The Environmental Law Dimensions of an International Binding Treaty on Business and Human Rights

**Introduction**

Globalization has contributed to the proliferation of manifold markets around the world, giving rise to numerous Multinational Corporations (MNCs),¹ whose operations transcend regulatory frameworks and jurisdictions of any given state,² concurrently moulding the values to which our society adheres.³ MNCs accrued larger revenues than the figures shown in the top economies’ GDPs,⁴ suggesting an important extent of influence in the design and implementation of international norms.⁵

Moreover, while it is unmistakable that MNCs have stimulated global economic growth, the negative impacts on human rights and the environment generated directly or indirectly by them should not be overlooked, especially in a context where their operations are being outsourced to developing countries, giving rise to a ‘disproportionate impact of lawful pollution’ linked to their ‘operational policies, decisions, practices and production activities’,⁶ being carried out in practically de-regularized jurisdictions. A quotidian dramatic reality particularly for local communities highly dependent upon natural resources.⁷

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¹ Commentary on the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights 2003 (UN Doc E/CN4/Sub2/2003/38/Rev2) para 20. For the purposes of this document, the term MNC corresponds to that of Transnational Corporations (TNCs), generically defined in the Norms as ‘an economic entity operating in more than one country or a cluster of economic entities operating in two or more countries - whatever their legal form’.


⁵ Wettstein (n 3) 168.


Corporate Social Responsibility (CSR), a concept coined in the 50s, intends to contribute to the ‘well-being and progress of individuals and society’. However, it has not fully embraced a human rights perspective. This has led human rights victims to find ways to hold MNCs liable in host countries’ jurisdictions; disentangling sophisticated contracts between parent companies with multiple suppliers in de-localized jurisdictions, and lifting corporate veils to prevent impunity of MNCs domiciled in their home countries.

These legal challenges are the consequence of a vacuum in international law, mainly due to few evidence of ‘direct liability of corporations when [breaching] obligations with regard to human rights’ or international environmental law (IEL), ratifying that said duties are consigned exclusively upon states.

In view of this, the first attempt to regulate MNCs through international legislation in a universal and more stringent fashion was first initiated in the 70s by the United Nations Economic and Social Council, which created a UN Commission on Transnational Corporations in order to draft a Code of Conduct for Transnational Corporations (UNCCTC); an attempt that was stalled by a negotiations collapse in 1992, partially due to a new paradigm that encumbered businesses’ regulations. Subsequently,

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9 ibid.
10 All along this text, ‘home country’ will be defined as the territory or jurisdiction where the parent company is registered or incorporated, whereas ‘host country’ is where the company, or a subsidiary, operates outside the jurisdiction or territory of its home country.
‘partnership approaches’ and soft-law guidelines\(^{17}\) gave rise to some voluntary initiatives endorsed by intergovernmental organizations, such as the UN Global Compact (GC) in 2000, an initiative still in progress aiming to implement ten universal sustainability principles that derive from main international human rights instruments, with more than 10,000 companies as participants.\(^{18}\)

In 1997, the UN Sub-Commission on the Promotion and Protection of Human Rights prepared the ‘Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights’ (the Norms),\(^{19}\) an initiative focused in human rights and environmental direct responsibilities for companies, differing in that aspect with the GC.\(^{20}\) However, its anti-hortatory content subtracted political recognition,\(^{21}\) leading to a decline of endorsement by the former UN Commission on Human Rights (UNCHR) in 2003.\(^ {22}\)

In order to overcome past political stalemates, in 2005 the UNCHR requested the Secretary-General to appoint a special representative on the issue of human rights and transnational corporations and other business enterprises (SRSG) to submit recommendations and clarifications on the issue.\(^{23}\) Professor John Ruggie assumed this position, who later developed the UN Framework on Business and Human Rights (UNFBHR) in 2008\(^ {24}\) and operationalized it through a set of ‘Guiding Principles’ on

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\(^{20}\) Weissbrodt (n 18) 138.

\(^{21}\) Morgera, ‘Multinational Corporations and International Environmental Law’ (n 11) 201.

\(^{22}\) López (n 19) 62.


business and human rights (UNGP) in 2011.25 Both initiatives were endorsed unanimously by the Human Rights Council (HRC)26 and rest upon three pillars: ‘Protect, Respect and Remedy’.27

Despite a diverse range of opinions, it could be said that today, the UNGP and the OECD Guidelines for Multinational Enterprises,28 are the most prominent soft-law instruments that bring corporations and governments together to respect human rights,29 however, since their adoption and further implementation, several governments and NGOs have been pushing the HRC’s agenda30 in order to resit discussions on a legally binding business and human rights treaty (BHRT).

This led to a resolution on 26 June 2014 to establish an open-ended intergovernmental working group (OEIGWG) to elaborate a BHRT,31 which had its first round of negotiations in 2015, providing a new forum where countries could raise concerns about the inclusion of environmental issues therein.32

This process could entail multiple outcomes, such as contributing at ‘redressing gaps and imbalances in the international legal order that undermine […] victims of corporate human right abuses’,33 or on the contrary, it could be an attempt to repeat history by emulating the unsuccessful destiny of the Norms or the UNCCTC.

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29 Ruggie, Just Business (n 27) 84.
Moreover, in nearly a third of cases involving corporations around the world, alleged environmental harms had corresponding impacts on human rights,\(^ {34}\) a phenomenon that has not yet been fully comprehended, since in ‘general academic treatments of human rights law, […] there is almost no debate on the relationship between human rights and the environment’,\(^ {35}\) nor an important exploration of ‘the usefulness of [IEL] in addressing human rights-related concerns about corporate conduct’.\(^ {36}\) This spurs a problematic scenario, given that ‘unlike the field of human rights, where most violations are committed by state agents, environmental harm largely stems from actions of the private sector’\(^ {37}\) in general, and MNCs in particular.\(^ {38}\)

Having said that, the objective of this document is to examine the environmental dimensions subtly entrenched within the prospective BHRT, currently being developed under the auspices of the HRC. Firstly, a brief contextual introduction on the practical and theoretical inter linkages between international human rights law (IHRL) and IEL in the context of corporate accountability will be explored. Secondly, the shortcomings and opportunities of past initiatives aimed at rendering MNCs accountable – emphasizing on UN initiatives, will be examined. Thirdly, some light will be shed on different issues involving the protection of the environment embedded in the negotiations of the BHRT. By comparing the evolution of the discussions around corporate accountability undertaken in the past and simultaneously relying on IEL instruments, possible pathways for environmental protection linked to human rights will be spelled out. Furthermore, special importance will be given to discussions with

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\(^ {37}\) Anton and Shelton (n 7) 131.

respect to duties directly assumed by corporations and its implications for the protection of the environment.

I. Human rights, the environment and international law in the context of corporate accountability

Principle 1 of the Rio Declaration placed human species at the centre of concerns for sustainable development, giving rise to the concept of having a healthy life in harmony with nature, as a result, a convergence of three dimensions emerged: human rights, environmental protection and sustainable development. This conjunction is reflected in several international instruments designed by the interplay of socio-economic dynamics and diplomatic efforts, under the overarching paradigm of globalization, where tensions between economic interests – predominantly identified with MNCs – and environmental protection are prevalent.

With that said, this chapter will attempt to briefly explore the interactions of corporations with international law related to both: human rights and the environment.

1.1 MNCs under international law: an overview

A ‘corporation’ may be defined as a legal fictional abstraction, separated from the personality of its constituents and shareholders, of ‘limited liability and licensed by the state for the purpose of conducting profit-seeking business activity’. Contrariwise, behind the definition of a MNC lies an intrinsic elusive character, indicating its highly mutable nature. Although, irrespective of this fact, MNCs do share several common

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44 Mgera, *Corporate Accountability in International Environmental Law* (n 12) 59.
features, like their presence in more than one country through coordinated subsidiaries motivated by profit earning.\textsuperscript{45} Part of their diversity lies on their size and ‘multinational spread’,\textsuperscript{46} paving their way through unrestricted markets, and sometimes attracted by new frontiers with less regulated jurisdictions.\textsuperscript{47}

Considering that MNCs are fundamental global actors, capable of prominently influencing international law due to their transnational powers – subduing even the role of several nations, discussions on whether MNCs are subjects or objects, or have rights and duties under international law, have not been exhausted; mainly because the state, as the exclusive duty-bearer, is a paradigm posited as inadequate under current socio-economic contexts.\textsuperscript{48}

MNCs outsource their operations onto developing countries – where most of the times standards are less stringent, yielding profit not only from the low costs that those operations involve, but also from the guarantees provided by Bilateral Investment Treaties (BITs), which in some cases consider human rights and the environmental domestic law as a risk for foreign investments.\textsuperscript{49}

International law has not been able to provide homogenous definitions and categories linked to corporations’ nature, a lacuna cautiously addressed by the ICJ in the \textit{Barcelona Traction} case, stating that municipal law should supplement any absence of definition in international law\textsuperscript{50}.

\textsuperscript{45} ibid.
\textsuperscript{50} \textit{Barcelona Traction, Light and Power Company, Limited, Judgment Belgium v Spain} [1970] International Court of Justice Reports 1970, p.3, Reports of Judgments, Advisory Opinions and Orders [38].
However, municipal law cannot decide if MNCs have personhood or not under international law. For instance, if corporations become new subjects of international law, they would freely amend bilateral treaties, a task classically restricted to interstate relations,\textsuperscript{51} but also home states would no longer ‘retain the right to waive the right of their investors to file a claim’.\textsuperscript{52}

Hence, giving personhood to corporations – an scenario not yet crystallized under international law,\textsuperscript{53} would ‘threaten to remove the element of state control from such important questions and may threaten the credibility of international law itself’,\textsuperscript{54} thus potentially broadening historic power imbalances.

For the time being, corporations’ identity under international law is not carved in stone; and while they can be referred as key ‘participants’ in the continuous international law-making process, or defined as subjects in the sense of its \textit{locus standi} before specific international tribunals,\textsuperscript{55} the need for improving the design of corporate accountability measures should not be restrained by this on-going debate.

Unquestionably, corporations are subjects of law under domestic law, and some treaties ratified by their home states may confer them human rights,\textsuperscript{56} or other category of rights embedded in thousands of BITs,\textsuperscript{57} conferring them a ‘fair treatment, contract enforcement, protection against expropriation, and compensation for violations of their rights’.\textsuperscript{58}

\textsuperscript{52}ibid.
\textsuperscript{53}Shaw (n 46) 250.
\textsuperscript{54}Alvarez (n 51) 25.
\textsuperscript{55}Peter Muchlinski, ‘Corporations in International Law’ in Rudiger Wolfrum (ed), \textit{Max Planck Encyclopaedia of Public International Law} (Oxford University Press 2014) para 7.
\textsuperscript{56}Meinhard Schröder, ‘Precautionary Approach/Principle’ in Rudiger Wolfrum (ed), \textit{Max Planck Encyclopaedia of Public International Law} (Oxford University Press 2014).
\textsuperscript{57}UNCTAD (ed), \textit{Global Value Chains: Investment and Trade for Development} (United Nations 2013) 101. In 2013, around 339 International Investment Agreements and 2857 BITs were concluded.
Moreover, the idea of corporate duties or obligations under IHRL which would allow to render MNCs directly liable, contradicts the classic doctrine where states are the legitimate bearers of said obligation, and not private entities.\(^5\) This notion is currently widely supported by the international human rights legal corpus,\(^6\) and partly by literature.\(^6\)

A similar phenomenon is reflected in IEL, where private actors do not have direct duties,\(^6\) and while some liability regimes regarding pollution do take note of direct liability on private actors,\(^6\) its application is only effective via the will of contracting states,\(^6\) resorting the matter in national jurisdictions. Therefore, currently there are not international environmental norms\(^6\) nor customary international law\(^6\) directly binding upon private companies in general and MNCs in particular.

Overall, international law is currently not well-equipped to hold MNCs liable in a direct manner, and even if these entities could be deemed as subjects of international law under certain circumstances, its fluid personality allows them to circumvent obligations under international law. However, given that the legal architecture of the corporation is similar to that of recognized subjects of international law, such as states, in the sense that they both share the status of juristic person, establishing international legal


\(^{6}\) Schröder (n 56) 30.

\(^{6}\) Sandrine Maljean-Dubois and Vanessa Richard, ‘The Applicability of International Environmental Law to Private Enterprises’ in Pierre-Marie Dupuy and Jorge E Vinuales (eds), Harnessing Foreign Investment to Promote Environmental Protection (Cambridge University Press 2013) 94.


\(^{6}\) Morgera, Corporate Accountability in International Environmental Law (n 12) 72.

\(^{6}\) Birnie, Boyle and Redgwell (n 14) 326.
obligations upon them should not be considered as an impossible conceptual legal challenge.\textsuperscript{67}

Thus, it could be said that the state-centred paradigm of international law has widened a legal chasm that a new binding treaty might be looking to sew up in tandem with soft-law initiatives, where direct obligations for companies could be outlined.

1.2 Human rights violations in relation to environmental degradation: Corporations under the spotlight

In 2010, global Foreign Direct Investment (FDI) exceeded $21,288.5 billion, and the number of MNCs was estimated at over 100,000.\textsuperscript{68} Furthermore, the share of global FDI from MNCs registered in emerging markets has grown from 10 per cent in 2000 to 40 per cent in 2013,\textsuperscript{69} denoting a likely impact in new frontiers where the pressure on the extraction of natural resources has not yet been consolidated, hence, not only increasing the chances of FDI opportunities, but most importantly, heightening the risks of human rights violations.\textsuperscript{70}

Thus, the traditional narrative of western MNCs involved in breaches of human rights and environmental regulations in developing host states is now shifting so as to include local companies registered in those same un-regulated developing countries – like MNCs originated from BRICS.\textsuperscript{71}

\textsuperscript{67} Karavias (n 43) 7.
Either way, regardless of jurisdiction, a breach of law by a private actor, amounting to human rights and environmental malfeasance, is usually generated by the tension between the right to pursue an economic endeavour on the one hand, and the rights of the people affected by those endeavours on the other.\footnote{Natasha Affolder, ‘Square Pegs and Round Holes?’ in Ben Boer (ed), Environmental Law Dimensions of Human Rights (First Edition, Oxford University Press 2015) 35.} This conflict of values can theoretically explain the intersection of human rights and the environment,\footnote{See Birnie, Boyle and Redgwell (n 14) 271. Three perspectives on environmental rights are developed: first procedural human rights can serve environmental related purposes; the self-standing right to a healthy environment as an economic, social and cultural right; and a collective right to the environment.} and demonstrated in several renowned cases around the world.

The harm on human rights and the environment caused by MNCs is often determined by the negligence of the parent company’s supplier or a franchise thereof at some stage of the supply chain, normally operating in a developing country that seeks to attract FDI through lax environmental regulations, weak labour conditions, an ineffective judiciary system and an unstructured rule of law.\footnote{Dorothée Baumann-Pauly and Michael Posner, ‘Making the Business Case for Human Rights: An Assessment’ in Dorothée Baumann-Pauly and Justine Nolan (eds), Business and human rights: from principles to practice (Routledge 2016) 12.}

Bhopal disaster in India, generated by the MNC Union Carbide, resulted in a death toll of 2.100 people and 200.000 people injured, let alone livestock and agricultural loss.\footnote{In Re Union Carbide Corp Gas Plant Disaster at Bhopal [1986] SDNY 634 F. Supp. 842 2.} In this case, even if plaintiffs sought recourse in the US – the jurisdiction of the parent company, the case was dismissed.\footnote{ibid.} Moreover, cases like Bhopal are just a symptom of a pervasive phenomenon, underlining that the vast majority of victims are poor communities, highly vulnerable to the practices of MNCs and their suppliers.\footnote{Ruggie, ‘Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises. Addendum: Corporations and Human Rights: A Survey of the Scope and Patterns of Alleged Corporate-Related Human Rights Abuse’ (n 34) 67.}

In addition, emblematic cases around the world, which share analogous factual features as Bhopal,\footnote{Bowoto v Chevron Corp [2007] ND Cal 481 F. Supp. 2d 1010; Doe v Unocal Corp [1997] United States District Court, CD California 963 F. Supp. 880; Flores v Southern Peru Copper [2002] US District} may entail additional intricacies that reveal the complexity of the
problem: from the violation of environmental defenders’ right in the context of MNCs’ operations in collusion with state actors,\textsuperscript{79} to the potential transboundary human rights violations\textsuperscript{80} linked to CO2 emissions from MNCs of fossil fuel industries.\textsuperscript{81}

Clearly, finding a coherent convergence between IHRL and IEL to tackle corporations’ misconducts is not a facile task, especially considering that the connections between human rights and the environment via IHRL instruments has been surprisingly recent. The evidence is that seminal human rights treaties, such as the UDHR and the two core human rights covenants\textsuperscript{82} do not mention a self-standing right to a healthy environment, narrowing the environmental protection as a ‘green’ extension of the rights already recognized therein.\textsuperscript{83}

While ‘greening’ human rights has been successful in connecting environmental degradation and impairments of substantive (right to life, health, housing, access to water and private family life), and procedural rights (access to justice, public participation, transparency and access to information),\textsuperscript{84} and also benefiting the


\textsuperscript{81} RK Pachauri, Leo Mayer and Intergovernmental Panel on Climate Change (eds), \textit{Climate Change 2014: Synthesis Report} (Intergovernmental Panel on Climate Change 2015) 5. Fossil fuel industry contributed with nearly 78% of the total level of emissions between 1970 and 2010.


protection of the rights of indigenous peoples such as their collective right to a free, prior and informed consent (FPIC), still the state-centred paradigm has not been formally contested. Likewise, the self-standing human right to a healthy or satisfactory environment, recognized in several international treaties around the world, and in more than 100 countries’ constitutions, does not entirely dispute the state-centred paradigm.

Similarly, UN human rights treaty bodies, the HRC, and even regional human rights courts, have established the prominence of environmental considerations as essential conditions to the full realization of human rights. But again, despite their important contributions in providing authority in establishing that link, the fundamental role of corporations therein has not yet been fully resolved.

The dialogue between IEL and IHRL has had both its drawbacks and opportunities. However, despite their differences, both conceive non-state actors in general and

85 Morgera, Corporate Accountability in International Environmental Law (n 12) 142.
90 Kawas-Fernández v Honduras (Merits, Reparations and Costs) [2009] IACtHR Series C No. 196; Kichwa Indigenous People of Sarayaku v Ecuador (Merits and Reparations) [2012] IACtHR Series C No. 245.
91 Marcos Orellana, Miloon Kothari and Shivani Chaudhry, ‘Climate Change in the Work of the Committee on Economic, Social and Cultural Rights’ 20.
92 See Kate Donald, ‘Human Rights Practice: A Means to Environmental Ends?’ (2013) 3 Oñati Journal of Emergent Socio-Legal Studies 908. It is argued that human rights fall short in contributing to the extensive development of environmental law compliance mechanisms; in addition, human rights focus more on the remedy rather than preventive measures, as environmental law does.
business enterprises in particular, as fundamental pieces for understanding the reasons behind environmental degradation and human rights violations.

Perhaps, acknowledging this common trait may be the first step to overcome the so-called ‘fragmentation of international law’, namely the ‘loss of an overall perspective on the law’. After all, both regimes appeal to alleged universal values or ‘global concerns’, upon which humanity is besought to respond, and their ‘hegemonic structure’ could be utilized to explore ways to establish international law obligations upon MNCs; an opportunity to solve a legal impasse through interaction and integration, which may be crystallized in a new BHRT.

II. Some strategies for corporate accountability

2.1 Civil, criminal and human rights law versus MNCs: effective tools for environmental protection?

Whenever a human right abuse linked to an environmental harm occurs between a private actor (a MNC) against another private actor (a victim or group of victims) the forum on which the case will be resolved depends on the jurisdictional rules of a specific legal system. Though generally, proceedings may be filed in a host or a home country.

This apparent simplicity is superseded by the convoluted issue of ‘fragmentation of jurisdiction’, which is inextricably linked to the nature of holding accountable a MNC. For instance, the headquarters, the legal incorporation, the shareholders, the

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95 Martti Koskenniemi, ‘Hegemonic Regimes’ in Margaret A Young (ed), Regime Interaction in International Law (Cambridge University Press 2011) 324.
97 Binnie, Boyle and Redgwell (n 14) 312.
operations, the workers and those affected by the operations, can all come from a different jurisdiction.\textsuperscript{98}

This diversity obliges victims to be meticulous about selecting the type of recourse they should engage with. The options range from administrative, tort or criminal litigation against MNCs or their subsidiaries. However, finding proper redress in host states may entail several legal and procedural shortcomings; for instance domestic legislation may not enshrine criminal or civil liability for legal persons; or the domestic judiciary may not be well-equipped and prone to hamper an independent trial;\textsuperscript{99} or even if victims were favoured with a positive domestic judgement, the defendant may not have assets or personnel in the host country to actually materialize the redress, as exemplified by \textit{Aguinda v. Chevron} in Ecuador.\textsuperscript{100} These types of shortcomings are constantly capitalized by big private companies, who are in a position to pay top law firms to effective use of substantive and procedural rules on their favour, sidestepping liability.\textsuperscript{101}

The aforementioned obstacles lead victims to pursue justice in MNCs’ home states, like in the US, home of thousands of MNCs.\textsuperscript{102} There, victims are able to sue US companies under several statutes, including the most renowned, the Alien Tort Claim Statute (ATCA), an 18th century statute that confers upon the Federal District Courts original jurisdiction over ‘any civil action by an alien for a tort only committed in violation of the law of nations’.\textsuperscript{103}


\textsuperscript{99} Lagoutte (n 31) 172.


\textsuperscript{102} Iain M Cockburn and Matthew J Slaughter, ‘The Global Location of Biopharmaceutical Knowledge Activity: New Findings, New Questions’ (2010) 10 Innovation Policy and the Economy 129, 150. In 2006 there were more that 2000 MNCs registered in the US.

\textsuperscript{103} Clapham (n 98) 252.
US jurisdiction provides victims a sense of due process, while giving them the chance of publicizing their case, which explains the urge of Burmese victims to use the ATCA against the oil giant Unocal, allegedly involved in human rights violations in the context of the construction of an oil pipeline. However, the Federal Court ruled that the corporations could not be held liable under international law, although the Ninth District Court of Appeals subsequently overturned that previous view. In the aftermath, this case along with others, like Wiwa v. Royal Dutch Petroleum, agreed to settle the lawsuit out of court.

A similar case, Kiobel v. Royal Dutch Petroleum, have set precedents regarding dismissals based on the impossibility of extra-jurisdictional reach of US courts regarding alleged unlawful acts. Likewise, US Courts have repeatedly used the doctrine of forum non conveniens, which gives a court discretion to dismiss the case on the basis of having a better court to vent the action. According to several studies, dismissal on the grounds of this doctrine ‘is typically outcome determinative – if the victims are unable to sue in U.S. courts, they are unable to recover for the violations of their rights’.

Conversely, if the weapon of choice were to be international criminal law, the Rome Statute of the International Criminal Court excludes legal persons from its scope, on

104 Katuoka and Dailidaite (n 60) 1309.
106 ibid 137.
107 Clapham (n 98) 256.
112 ibid 165.
the basis that corporations do not have ‘a body to kick and soul to damn’,\textsuperscript{113} and that there is no global consensus on the standard for corporate liability.\textsuperscript{114} Even though this forum does not have jurisdiction, it can prosecute individuals associated to negligent businesses.

Another option of remedy has been recurring to regional human rights bodies. Even if these bodies are deemed as one of the few alternatives to litigate human rights violations linked to environmental damages – once domestic remedies are exhausted, ‘they are not generally enforcing [IEL]’.\textsuperscript{115} The European (ECHR) and Inter-American (IACtHR) Court of Human Rights for instance, have been less willing to ‘hear cases where environmental issues go beyond immediate human well-being’.\textsuperscript{116}

In that sense, procedural rights related to the environment have been safeguarded before the IACtHR in cases related to indigenous peoples\textsuperscript{117} and not-indigenous peoples,\textsuperscript{118} stressing an ‘undeniable link between the protection of the environment and the enjoyment of other human rights’.\textsuperscript{119} This inter-linkage has also been pointed out in the jurisprudence of the ECHR, by underscoring the environmental dimension of the right to respect for private and family.\textsuperscript{120} The IACtHR has a ‘collective/public interest-oriented approach to the adjudication of environmental complaints’,\textsuperscript{121} a feature not very developed in the ECHR.

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  \item \textsuperscript{113} H van der Wilt, ‘Corporate Criminal Responsibility for International Crimes: Exploring the Possibilities’ (2013) 12 Chinese Journal of International Law 43, 44.
  \item \textsuperscript{114} M Kremnitzer, ‘A Possible Case for Imposing Criminal Liability on Corporations in International Criminal Law’ (2010) 8 Journal of International Criminal Justice 909, 917.
  \item \textsuperscript{116} ibid 150.
  \item \textsuperscript{117} Saramaka People v Suriname (Preliminary Objections, Merits, Reparations, and Costs) [2007] IACtHR Series C No. 172 [147]; Kichwa Indigenous People of Sarayaku v. Ecuador (Merits and Reparations) (n 90) [183].
  \item \textsuperscript{118} Claude-Reyes et al v Chile (Merits, Reparations and Costs) [2006] IACtHR Series C No. 151 [73].
  \item \textsuperscript{119} Kawas-Fernández v. Honduras (Merits, Reparations and Costs) (n 90) [148].
  \item \textsuperscript{120} López Ostra v Spain (Merits and just satisfaction) [1994] ECHR App no 16798/90; Fadeyeva v Russian Federation (Judgment, Merits and Just Satisfaction) [2005] ECHR App No 55723/00; Guerra and ors v Italy (Judgment, Merits and Just Satisfaction) [1998] ECHR App No 14967/89.
  \item \textsuperscript{121} Riccardo Pavoni, ‘Environmental Jurisprudence of the European and Inter-American Courts of Human Rights’ in Ben Boer (ed), \textit{Environmental Law Dimensions of Human Rights} (Oxford University Press 2015) 106.
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Despite this increasingly progressive stance on connecting the environment and human rights, the state-centred paradigm is still grained in the aforementioned bodies. Jurisprudence of said bodies stresses that the state bears the obligation to prevent, investigate and punish human rights violations as due diligence, and failing to do this may lead to states’ international responsibility, even if the wrongful act was committed by a private actor. This deferral on the basis of lack of jurisdiction is the main obstacle to render MNCs liable before human rights bodies.

2.2 UN initiatives

In 1977, an Intergovernmental Working Group on a Code of Conduct was appointed by the UN Commission on Transnational Corporations to elaborate the UNCCTC. This work started with several disagreements, chiefly whether the treaty had to be binding or not. However, they did agree on environmental protections in its first round of negotiations, although the content of the instrument is rather broad and exhortatory.

Overall, the UNCCTC ensured that MNCs provide a ‘stable, predictable, and transparent framework to [strength] international investments; and to help minimize [their] negative effects’.

By the beginning of the 1990s, it was clear that none of the participants were interested in continuing with the negotiations, probably due to the shift of priorities towards the encouragement of FDI, or because its all-encompassing approach arose suspicion

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122 Velásquez-Rodríguez v Honduras (Merits) [1988] IACtHR Series C No. 04 [72]; International Responsibility for the Promulgation of Laws in Violation of the Convention (Advisory Opinion) [1994] Inter-American Court of Human Rights OC-14/94 [56].


125 Morgera, Corporate Accountability in International Environmental Law (n 12) 84.

126 ibid 80.

127 Sauvant (n 124) 55.
around MNCs who refused to be bound by international standards, heralding the failure of the UNCCTC in 1992.\(^{128}\)

In August 2003, the UN Sub-Commission for the Promotion and Protection of Human Rights adopted the Norms, a novel and comprehensive list of human rights standards for MNCs.\(^{129}\) The Norms comprise a reference to numerous international legal instruments, namely human rights and environmental treaties, such as the Convention on Biological Diversity (CBD) and the Rio Declaration.\(^{130}\)

Such standards, however, were criticized due to the impracticality behind uniformly applying them across different countries with diverse legal traditions and realities; and, for including rights that were not still recognized by all states.\(^{131}\) For instance, the Norms envisage that MNCs shall conduct their operations in accordance to national and international environmental and human rights regulations.\(^{132}\)

In spite of its ambitious and stringent language, the Norms were not accepted by the Commission on Human Rights,\(^ {133}\) and only reached ‘a level of expert legitimacy, but no political endorsement’.\(^ {134}\) However, its merit rests on its potential to convey its positive conceptual array onto other regimes of corporate environmental and human rights standard-setting,\(^ {135}\) like the UNGP and the BHRT.

As a strategy to fill the void left by hard-law approaches rehearsed in the past, the UN decided to give the ‘partnership approach’ a chance, launching the GC as a soft-law strategy for ‘leveraging the platform’ of large corporations and encouraging socially


\(^{131}\) Gelfand (n 129) 316–318.

\(^{132}\) *Norms on the Responsibilities of TNCs* (n 130).

\(^{133}\) Weissbrodt (n 18) 165.

\(^{134}\) Morgera, ‘Benefit-Sharing as a Bridge between the Environmental and Human Rights Accountability of Multinational Corporations’ (n 36) 46.

\(^{135}\) ibid; Weissbrodt (n 18) 167.
responsible corporate behaviour. The GC, just like the Norms, covers broad and flexible principles that hinge upon existing UN documents, namely the UDHR and the Rio Declaration.

However, the GC was not without its critics, who attributed its voluntary nature to a lack of responsiveness from some MNCs to civil society’s claims regarding corporate’s human rights abuses; and also questioned those MNCs’ continuance in the initiative. Overall, critics perceive the GC as ‘long on promises, short on performance, and mostly silent on transparency and objective reporting’, however, it does require from companies the implementation of measures based on the precautionary approach and also have a procedure to handle egregious abuse of its principles, including severe environmental damage. Thus, it could be said that the climate of divisiveness around this instrument may indicate that further and concrete results are yet to be seen.

2.3 The UNGP

John Ruggie, the SRSG, made it very clear from the beginning of his mandate, that he was going to leave behind the approach taken in the Norms – who deemed them as a ‘distraction’, and adopted a ‘principled pragmatism’ instead, whose legitimacy was reached by ‘consulting with a wide range of stakeholders [while] keeping businesses and government “on side”.

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137 Morgera, ‘The UN and Corporate Environmental Responsibility’ (n 17) 99.
140 ibid 201.
142 Elisa Morgera, ‘From Corporate Social Responsibility to Accountability Mechanisms’ in Pierre-Marie Dupuy and Jorge E Vinuales (eds), Harnessing Foreign Investment to Promote Environmental Protection (Cambridge University Press 2013) 338.
The result of the SRSG’s acclaimed mandate was the design of the UNFBHR and the UNGP to implement it. Comprising 31 principles and corresponding commentaries, the UNGP clarify legal and policy implications.\textsuperscript{144} They apply to all states and all business enterprises,\textsuperscript{145} and encompass all internationally recognized rights, being the floor the International Bill of Human Rights and the principles set out in the ILO’s Declaration on Fundamental Principles and Rights at Work.\textsuperscript{146} Moreover, they rest upon three pillars designed for states and businesses who are called to flesh-out mechanisms to protect individuals from human rights abuses across the world. The first one is the duty of states to integrally protect human rights, the second entails the corporate’s application of due diligence aimed at respecting human rights, and the third pillar underpins the necessity of effective remedies for human rights victims.\textsuperscript{147}

It is worth noticing that the second pillar within the UNGP relies on corporate due diligence – a widely applied concept in environmental protection contexts – which involves ‘(i) impact assessment; (ii) stakeholder involvement in decision-making; and (iii) life-cycle management’.\textsuperscript{148} Nonetheless, there is no evidence of synergies between the UNGP and principles or instruments of IEL.\textsuperscript{149}

The ubiquitous presence of the UNGP is undeniable; they are being used by governments, intergovernmental organizations, human rights advocate groups, and foremost, business themselves.\textsuperscript{150} For instance, the HRC enacted two\textsuperscript{151} resolutions on human rights and the environment, explicitly pointing out the importance of the UNGP. Furthermore, in the \textit{Kaliña and Lokono Peoples v. Suriname} case, the IACtHR took note of the UNGP, reiterating the obligation of states to ‘protect against human

\textsuperscript{146} Ruggie, ‘Report of the SRSG John Ruggie’ (n 144) 13.
\textsuperscript{147} Ruggie, \textit{Just Business} (n 27) 7.
\textsuperscript{148} Morgera, ‘Benefit-Sharing as a Bridge between the Environmental and Human Rights Accountability of Multinational Corporations’ (n 36) 44.
\textsuperscript{149} Morgera, ‘Multinational Corporations and International Environmental Law’ (n 11) 204.
\textsuperscript{150} Ruggie, ‘A UN Business and Human Rights Treaty?’ (n 145) 2.
rights abuses within their territory and/or jurisdiction by third parties, including business enterprises’.  

The UNGP have been received with enthusiasm by some, arguing a global consensus and momentum as its major strength, and with scepticism by others, underlining an ontological flaw entrenched to their voluntary nature. Overall, it seems that the common agreement is that a follow-up of the implementation of the UNGPs shall be undertaken. In this vein, the HRC established a Working Group on Business and Human Rights (WGBHR), who stressed that information regarding state protection of human rights from companies is lacking due to the novelty of integrating the UNGP onto domestic legislation, therefore the need of a future complete assessment. This reaffirms Ruggie’s description of the essence of the UNGP as ‘the end of the beginning’.

II. Drafting the BHRT

The proposal to elaborate a BHRT under the auspices of the HRC, led by Ecuador and South Africa, was passed with 20 votes in favour, 14 against and 13 abstentions, a different result to that of the unanimously endorsed UNGP just four

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152 Kaliña and Lokono Peoples v Suriname (Merits, Reparations and Costs) [2015] IACtHR Series C No. 309 [224].
157 Ruggie, Just Business (n 27) 204.
years before, indicating a contentious future, specially around sensitive issues – like direct obligations on MNCs. The main risk is a ‘diluted standards’ type of instrument.\footnote{Justine Nolan, ‘A Business and Human Rights Treaty’ in Dorothée Baumann-Pauly and Justine Nolan (eds), \textit{Business and human rights: from principles to practice} (Routledge 2016) 72.}

Except for China, states that voted against the proposition are the ones with the largest and most influential MNCs in the world. This is of particular interest since the resolution is circumscribed to the regulation of MNCs exclusively, leaving national corporations out of its scope.\footnote{Arvid Ganesan, ‘Towards a Business and Human Rights Treaty?’ in Dorothée Baumann-Pauly and Justine Nolan (eds), \textit{Business and human rights: from principles to practice} (Routledge 2016) 74.} Another sign of early contention is that countries who did not support the BHRT, did sponsor a resolution on the extension for three more years of the mandate of the WGBHR, whose main task is the study of the implementation of the UNGP\footnote{United Nations Human Rights Council, \textit{Human rights and transnational corporations and other business enterprises 2014} [A/HRC/RES/26/22] para 10.}.

Bearing in mind that the idea of a BHRT is not a new one, this revised hard-law approach, advocated by an important number of NGOs, scholars and states alike,\footnote{Lagoutte (n 31) 178.} might be seen as a political sentiment of restlessness, probably stirred by the modest results of past initiatives – a sentiment that seeks to level the playing field through a diplomatic process. However, what is already obvious is that this open-ended process will take several years of negotiations until a treaty is finally adopted, which is a fair point from the UNGP’s advocates, who strive for its implementation as an interim pragmatic measure.\footnote{Ruggie, ‘The Past as Prologue? A Moment of Truth for UN Business and Human Rights Treaty’ (n 30) 6.}

The HRC in its Resolution 26/9, decided that the first two sessions of the OEIGWG ought to be dedicated to conduct ‘constructive deliberations on the content, scope, nature and form of the future international instrument’\footnote{United Nations Human Rights Council Resolution 26/9 (n 158) para 2.} and recommended that relevant stake-holders should submit inputs on this regard.\footnote{ibid 5.} In this vein, the OEIGWG, chaired by the representative of Ecuador, had its first and hitherto session
in July 2015, welcoming the presence of states, intergovernmental organizations and NGOs that supported the creation of the group.\footnote{United Nations Human Rights Council (n 33) 6–10.} However, the complete absence of the United States and the intermittent presence of the European Union did not go unnoticed.\footnote{ibid 39.}

Discussions were introduced by general statements from some state’s delegates, which highlighted the inter-linkage between the environment and human rights, such as the delegation of Algeria, who stated that ‘environmental degradation [and] dumping of toxic wastes […] by [MNCs], affect, marginalise and impoverish groups disproportionately and exacerbate human rights concerns’,\footnote{Mohamadieh and Uribe (n 32) 6.} a statement echoed by Indonesia\footnote{Mohamadieh and Uribe (n 32) 7.} and China,\footnote{Indonesian Delegation, ‘Statement by Indonesian Delegation At the 1st Session of the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights’ (United Nations Human Rights Council 2015) 2 <http://www.ohchr.org/Documents/HRBodies/HCouncil/WGTransCorp/Session1/GeneralComments/States/Indonesia1.pdf> accessed 1 June 2016.} who noted that despite the leading role of MNCs in global economic development, they also could injure human rights and the environment, which is why the inclusion of these issues in tandem with development are important.

NGOs’ representatives also made numerous and relevant remarks about the importance of the environment, asserting that depletion of natural resources, had an impact on the right to self-determination and an adequate standard of living.\footnote{United Nations Human Rights Council (n 33) 32.} In these lines, some delegations encouraged the inclusion of environmental principles, like the use of the best technology, polluter-pay principles (PPP) and FPIC; while at the same time highlighted the interdependence and indivisibility of human rights.\footnote{ibid 24.} South Africa for instance, encouraged the inclusion of effective remedies for environmental damage.\footnote{South African Delegation, ‘Opening Statement Delivered by South Africa’ (United Nations Human Rights Council 2015) 3 <http://www.ohchr.org/Documents/HRBodies/HCouncil/WGTransCorp/Session1/SOUTHAFRICAS_Opening_StatementbyAmbMinty_Panel1.pdf> accessed 1 June 2016.}
Following the introductory general statements, the session was divided in eight panels of discussion, each of which addressed core elements of the treaty. Having said that, the analysis of the negotiations will be narrowed to include only the topics related to direct obligations of MNCs in the context of environmental damage linked to human rights violations. The analysis will be based on the travaux préparatoires of the treaty’s drafting process, including the official report of the first session, participants’ submissions and non official bulletins.

3.1 Principles of the new Treaty

The first panel, which in essence discussed issues related to the principles that should be rooted in the treaty, comprised oral addresses from some state delegations, legal experts and NGOs. However, most contributions touched upon a myriad of issues that do not fit neatly into the definition of principles as such, like the type of corporations that should be regulated, or the range of human rights that should be protected.

Additionally, the anchoring of the principles within the treaty, which would allow to understand the interpretation of the context of the treaty, and the potential crystallization of currently recognized principles of IEL and their inter-play with general principles of international law, was largely obviated in the official report. However, records of written submissions of some state delegates and experts, did consider it. Bolivia for instance, recommends that the principles should be included as an

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174 United Nations Human Rights Council (n 33) 2. Panels were as follows: I. Implementation of the Guiding Principles on Business and Human Rights: a renewed commitment by all States. II. Principles for an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights. III. Coverage of the instrument: transnational corporations and other business enterprises — concepts and legal nature in international law. IV. Human rights to be covered under the instrument with respect to activities of transnational corporations and other business enterprises. V. Obligations of States to guarantee the respect of human rights. VI. Enhancing the responsibility of transnational corporations and other business enterprises to respect human rights, including prevention, mitigation and remediation. VII. Legal liability of transnational corporations and other business enterprises: what standard for corporate legal liability and for what conduct? VIII. Building national and international mechanisms for access to remedy, including international judicial cooperation, with respect to human rights violations by transnational corporations and other business enterprises.

175 Shaw (n 46) 935.

176 United Nations Human Rights Council (n 33) 44.

177 ibid 46.
operative part of the instrument in order to facilitate its implementation, a perspective shared by Ecuador, who in addition stated that hierarchies among principles should be averted. Cuba also made reference to the importance of expressly mentioning the principles within the future treaty in order to avoid erroneous interpretations or unnecessary legal voids. Contrariwise, one panellist stressed that the principles should be placed in the preamble of the treaty but reflected in the treaty provisions.

Principles, on this regard, may have three entwined purposes: the first one is to interpret the treaty as a whole during its implementation; secondly, to interpret it in the context of legal recourse before a compliance mechanism set in the treaty or by any other international adjudicative body; and thirdly, to guide and determine the scope and the wording of specific provisions.

Principles steering a treaty towards a coherent body of law have been already rehearsed in international environmental treaties, namely the United Nations Framework Climate Change Convention (UNFCCC), where principles like the ‘common but differentiated responsibilities and respective capabilities’, precaution-prevention and sustainable development have been drawn in an explicit article therein

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and have been accommodated all through the Convention’s provisions. A shared feature with the CBD, where the principle of prevention of transboundary environmental harm is stressed.

Principles of IEL have been developed by vast, diverse and even fragmented types of national and international instruments, which demonstrates the importance of soft-law initiatives that embed principles therein, such as the Rio Declaration, greatly endorsed by states and further included in several treaties. Thus, it is clear that if environmental principles are discussed, they will serve as an authoritative way to resolve ambiguities, fill in gaps, codify and progressively develop the law that is being resolved by the treaty.

Outlining general principles as an avenue to provide evidence of opinio juris and legitimacy, is not only confined to the realms of environmental law, but it is also reflected in the process of law making of the international human rights regime.

Thus, placing different types of principles within the new treaty is likely to be the approach opted by some states and NGOs. However, at this stage of the process, written and oral contributions during the panels have been characterised of being too imprecise and almost figurative, thus rendering it difficult to predict how exactly those invoked principles would be introduced into the text or how they would shape its content. Still, the fact that some participants are willing to address the challenges that the treaty presupposes by means of IEL principles, is a step forward towards a clarification of the extent of those principles in the context of corporate accountability.

186 Birnie, Boyle and Redgwell (n 14) 27.
188 Birnie, Boyle and Redgwell (n 14) 30.
189 Boyle and Chinkin (n 41) 224.
For instance, the precautionary principle was specifically invoked – although in an indeterminate manner, by the delegation of Ecuador\textsuperscript{191} and several international NGOs,\textsuperscript{192} suggesting that states should refrain from authorizing, promoting or facilitating the operations of MNCs when the likelihood of an impairment of human rights and the environment is extant.

Said formulation poses a number of questions regarding the implications of how the precautionary principle will be developed, essentially because the scope of the definition of the principle under international law is still unclear,\textsuperscript{193} and secondly because the proposals, as were submitted, tend to overlap the principle of prevention and precaution, a conceptual slip that might or might not be seen as a bottleneck for future discussions.

Though, what it is clear is that the stakeholders’ proposals do suggest a ‘strong’ interpretation of the principle, analogous to that of the World Charter for Nature, which envisages stymieing the activities which are likely to cause irreversible damage to nature or to recede the activities if a probable adverse effect to the environment is not fully understood.\textsuperscript{194}

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\textsuperscript{191}Ecuadorian Delegation, ‘Panel II: Ámbito de aplicación de un instrumento prospectivo: alcance del instrumento; empresas transnacionales y otras empresas comerciales, conceptos y naturaleza jurídica en el derecho internacional’ (n 179) 4.
\textsuperscript{193}Malgosia Fitzmaurice, \textit{Contemporary Issues in International Environmental Law} (Edward Elgar 2009) 27.
\end{flushright}
Moreover, it opens the question on who exactly is providing the evidence to determine whether the operations are innocuous to human rights and the environment: will it be the enterprise (thus implying a reverse of the burden of proof), or the state? The former implies that the treaty might offer the mechanisms whereby MNCs should comply in accordance to the spirit of the principle, including the performance of an environmental impact assessment. This has already been explored not only in the GC, where ‘companies are expected to carry out assessments of their environmental impacts and environmental risks’, but also in the Norms, where it is stressed that enterprises should respect the precautionary principle when risk assessments are implemented.

On the contrary, if the states are the ones that should shoulder the onus of proof, then the treaty might define the risks involved in MNCs’ operations, and explicitly mention the effective or proportional measures to be taken in order to mitigate them. This specific formulation could inhibit cases like Tătar v. Romania, where despite the fact that the ECtHR did signal the importance of the precautionary principle as binding European law, it relied on assorted domestic and international sources. Therefore, the BHRT may be a possible way to codify and clarify the precautionary principle on this regard.

It is noteworthy that if the precautionary principle is inserted as an open-to-interpretation provision, then the margin of appreciation of international courts – like the ECtHR, widens; precluding the development of a subsidiarity role, a useful

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195 Schröder (n 56) 10.
197 Morgera, ‘The UN and Corporate Environmental Responsibility’ (n 17) 105.
198 Commentary on the Norms (n 1).
201 ibid 251.
feature specially in environmental related cases. Therefore, flexible rules for states, may confer them an ample range of options to justify the breach of an obligation.

The precautionary principle could be designed to be an obligation of conduct, result, or a mix of the two. The first one will provide broad guidelines, as evinced in the context of social, economic and cultural rights, while the second one will set specific, measurable and objective processes, emulating unambiguous provisions found in some international environmental instruments, like the Protocol of Environmental Protection to the Antarctic Treaty, prohibiting the extraction of minerals. The third one could be inspired by the Cartagena Protocol on Biosafety to the CBD, which broadly invokes the precautionary principle to justify the rationale of the instrument, and contemplates a scientifically sound risk assessment whose costs shall be borne by the exporting country, just like the Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, where the operator bears the costs of prevention and the state of origin undertakes the necessary expenditure to put in place administrative, financial and monitoring mechanisms.

If a hybrid logic were to be transposed onto the context of the precautionary principle within the BHRT, perhaps requiring a risk assessment of MNCs’ operations in host countries could be an obligation of conduct; but at the same time, offsetting its costs onto the home state, an obligation of result. Concomitantly, domestic legislation could

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205 Rüdiger Wolfrum, ‘Obligation Of Result Versus Obligation Of Conduct: Some Thoughts About The Implementation Of International Obligations’ in Mahnoush H Arsanjani and others (eds), Looking to the Future (Brill 2010) 367.
206 ibid 369.
208 ibid.
oblige locally registered MNCs to fund those risk assessments, placing the obligation of this matter on corporations as an extension of states’ obligation of conduct.

Additionally, delegates may find it useful to rely on previous efforts in order to flesh out standards that might not only protect biodiversity, but also the rights of local communities that may be affected by extractive MNCs. For this, the Akwé: Kon Voluntary Guidelines provide good insights on environmental and social impact assessments.\(^\text{210}\)

Furthermore, other principles related to the environment were also pointed out during discussions, expressly by Ecuador; for example the ‘reversal of the burden of proof’ and the PPP.\(^\text{211}\) However, given the lack of a depth and thorough debate about the implications of those proposals, it is still too precipitous to extrapolate their outcome, although from a first glimpse, it may be inaccurate to define as a self-standing principle the ‘shift of the burden of proof’, since it could already be implied depending on the interpretation given to the precautionary principle. As for the PPP, perhaps its scope might be better developed under the discussions on corporate liability.

To conclude, the environmental principles that were mentioned, even if invoked in an undefined manner, shows the will to accept the conceptual and practical challenges of adapting their scope into the context of a human rights treaty, an area of international law where such principles may be deemed as ‘alien’.\(^\text{212}\) However, for future sessions, it may be relevant to additionally discuss the scope of other principles instilled in treaties such as the UNFCCC, like the principle of ‘common but differentiated responsibilities’, mostly because it could be helpful to understand that the costs linked to social and environmental risk assessments, either borne by states


\(^{211}\) United Nations Human Rights Council (n 33) 51.

\(^{212}\) Morgera, ‘Benefit-Sharing as a Bridge between the Environmental and Human Rights Accountability of Multinational Corporations’ (n 36) 49.
or MNCs, should consider each country’s special circumstances, a measure that could level the playing field for developing countries and their MNCs.\(^{213}\)

### 3.2 Ratione Personae: what enterprises should be included?

According to HRC Resolution 26/9, the scope of regulation had initially been constrained to MNCs and ‘other business enterprises’. The latter is a category explained in a footnote within the same resolution indicating only ‘business enterprises that have a transnational character in their operational activities, and does not apply to local businesses registered in terms of relevant domestic law’.\(^{214}\)

Firstly, it is still unclear whether a footnote has equivalent normative authority as the core of the resolution, or is just a flexible reference, subject to further interpretation or modification.\(^{215}\) The former compartmentalizes only enterprises with a transnational character, clashing with those who pursued a broader interpretation encompassing all business enterprises, even local companies,\(^{216}\) which is underpinned by the UNGP\(^{217}\) and echoed by countries like Namibia.\(^{218}\) Contrariwise, some states asserted, in a generic fashion, that MNCs should be the only ones to be regulated, claiming that the impacts of human rights are directly linked to the size and structure of MNCs, and that the spirit of the treaty should address the current gap created by undefined MNCs.\(^{219}\)

One commentator emphasized that legally binding all businesses to comply with all forms of human rights standards would alter the objective of the BHRT.\(^{220}\) Whereas


\(^{216}\) Mohamadieh and Uribe (n 32) 12.


\(^{219}\) United Nations Human Rights Council (n 33) 58.

\(^{220}\) Mohamadieh and Uribe (n 32) 14.
regulating only MNCs would imply establishing their definitions either within the same treaty or in domestic legislation.\textsuperscript{221}

The quandary regarding the definition of MNCs in a treaty is redolent of the times when the Norms were drafted,\textsuperscript{222} whose final outcome did envisage a vague definition of MNCs,\textsuperscript{223} including ‘all business entities, regardless of their stated corporate form or the international or domestic scope of their business’.\textsuperscript{224} A ‘broad and inclusive’ formula is also present in the GC\textsuperscript{225} and the ILO Tripartite Declaration on Multinational Enterprises and Social Policy,\textsuperscript{226} indicating that the OEIGWG has a range of multifaceted and revamped options to choose from.

Moreover, some NGOs’ delegates proposed a ‘hybrid option’, upon which no type of businesses should be excluded from regulation, while simultaneously drawing provisions addressing specific challenges for MNCs only.\textsuperscript{227} They argued that the footnote in Resolution 26/9 is not entirely clear, assuming that a clear-cut definition of MNCs in the treaty will not only be problematic with respect to overlooking variables that define their ‘transnational’ character, but also may contribute to the creation of loopholes.\textsuperscript{228} In a similar vein, other NGOs decried the ‘one-size-fits-all’ approach by underscoring the irrelevance of the structure of the enterprise in the milieu of human rights encroachments, recommending the establishment of flexible rules that take into account the size, context and type of business enterprises.\textsuperscript{229}

\textsuperscript{221} ibid.
\textsuperscript{223} Norms on the Responsibilities of TNCs (n 130).
\textsuperscript{224} Weissbrodt and Kruger (n 222) 909.
\textsuperscript{225} Weissbrodt (n 18) 140.
\textsuperscript{228} ibid 2.
Finally, it might sound tempting, from an environmental protection perspective, to regulate more thoroughly MNCs that profit from the most pollutant activities deployed specially in developing countries. However, the reality is that human rights violations alleged in the context of environmental hazards, have been correlated with all business sectors.\textsuperscript{230} Thus, regulating a segment of MNCs would contradict the universality and non-hierarchical definition of human rights, an aspirational tenet in the treaty. Notwithstanding, if all types of business enterprises were to be included in the treaty, it could be an opportunity to expand environmental protection standards in all supply chains, which may lead to take into consideration climate change related policies or biodiversity protection mechanisms, as already stressed in the OECD Guidelines.\textsuperscript{231}

### 3.3 Ratione Materiae: what rights should be included?

The ‘subject matter’ of the BHRT should bridge the historical chasm between civil and political rights on the one hand, and economic, social and cultural rights on the other, according to a commentator,\textsuperscript{232} while drawing three potential options that should be analysed with regards to the breadth of human rights that should be protected: the first one should only address ‘gross’ human rights abuses; the second should only refer to the ‘core’ human rights treaties; and the third one is to embrace all human rights instruments while establishing specific provisions with more severe sanctions for ‘gross’ abuses.\textsuperscript{233}

The first option was largely discredited by virtually all stakeholders, while the second was considered too narrow, even if it resonates with the minimum set of rights in

\textsuperscript{230} Morgera, ‘Benefit-Sharing as a Bridge between the Environmental and Human Rights Accountability of Multinational Corporations’ (n 36) 41.

\textsuperscript{231} Organisation for Economic Co-operation and Development (n 28) 43.


\textsuperscript{233} ibid 2.
Principle 12 of the UNGP.\textsuperscript{234} The third option reconciles with the stance of countries like Bolivia,\textsuperscript{235} Cuba,\textsuperscript{236} Ecuador\textsuperscript{237} and South Africa,\textsuperscript{238} whose views underscore the importance of not omitting environmental rights, the rights of indigenous peoples and even the right to development, invoking the universality of rights enshrined in the Vienna Declaration and Programme of Action.\textsuperscript{239} Nearly all NGOs followed said stance, while adding the right to food and nutrition,\textsuperscript{240} the rights of environmental defenders,\textsuperscript{241} the eradication of poverty and a gender-based perspective.\textsuperscript{242}

If the afore mentioned stance finds consensus, the obvious question is what will happen to those rights underpinned in international instruments that have no universal recognition, such as regional human rights instruments.

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\textsuperscript{234} Ruggie, ‘Report of the SRSG John Ruggie’ (n 144) 13.
\textsuperscript{235} Bolivian Delegation, ‘Panel IV – Derechos Humanos a ser cubiertos bajo el Instrumento con respecto a las actividades de las Empresas Transnacionales y otras empresas’ (United Nations Human Rights Council 2015) 1
\textsuperscript{236} Cuban Delegation, ‘Panel IV: Qué violaciones a los derechos humanos deben estar cubiertas bajo el Instrumento sobre las empresas transnacionales y otras empresas comerciales?’ (2015) 1
\textsuperscript{237} Ecuadorian Delegation, ‘Panel IV: Qué derechos humanos a ser cubiertos bajo el Instrumento sobre las empresas transnacionales y otras empresas de negocios?’ (2015) 2
\textsuperscript{238} South African Delegation, ‘Panel IV: Human Rights to Be Covered under the Instrument with Respect to Activities of TNCs and Other Business Enterprises?’ (United Nations Human Rights Council 2015) 1
\textsuperscript{241} FIDH, ‘Panel IV: Scope / Human rights to be covered under the Instrument with respect to activities of TNCs and other business enterprises?’ (2015) 1
\textsuperscript{242} Centre for Applied Legal Studies, ‘Panel IV: Human Rights to Be Included’ (2015) 1
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Accordingly, should all types of human rights be included, then both, a self-standing right to a healthy environment as well as procedural and substantive rights related to environmental protection, would automatically be annexed into the BHRT. This includes regional instruments that protect an autonomous right to a healthy or decent environment; but also the Aarhus Convention, deemed ‘an important extension of environmental rights and of the corpus of human rights law,’ which acknowledges the importance of the environment to the enjoyment of basic human rights and mentions private actors when contravening national environmental law, and the 169 ILO Convention on Indigenous and Tribal Peoples, which protects the right to obtain the FPIC of indigenous peoples in projects that may directly affect them, and sets the obligation of carrying out social and environmental impact assessments, a legal tool in several cases before regional human rights bodies.

With that said, including rights related to the environment into the BHRT, might be a good opportunity to convey environmental protection in human rights rhetoric, coalescing in a harmonious manner with current IEL. However, due to a lack of universal state support of said rights in international law – due to technical and political components better resolved in domestic fora, it will be interesting to witness how these discussions evolve within this drafting process.

3.4 Responsibility of corporations: revisiting pillar two of the UNGP

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243 Boyle (n 35) 624.
246 `Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters’ (n 244) 524.
249 Boyle (n 35) 633.
Pillar two of the UNGP and its role in the BHRT’s drafting process was pivotal in this discussion. According to some delegates, ‘responsibility’, in the context of corporations, should be differentiated from connotations found in the UNGP on the one hand, and in CSR contexts on the other.\textsuperscript{251}

Cuba proposed that companies shall disclose all the information regarding preventive plans of human rights protection and other due diligence procedures.\textsuperscript{252} The Ecuadorian delegation stressed that direct obligations for corporations can be found already in several instruments of international law, namely the Convention on Civil Liability for Oil Pollution Damage, which might inspire the design of direct obligations upon companies in the treaty.\textsuperscript{253} The South African delegation deemed that the UNGP should set the ground for liability and accountability for corporations in international human rights.\textsuperscript{254}

NGOs proposed the collective responsibility of MNCs with respect to their subsidiaries.\textsuperscript{255} Moreover, it was advised that states should pass national legislation aiming to define obligations for MNCs to abstain from any activity that could cause ecological harm; to conduct independent ex ante and ex post human rights and environmental impact assessments; to put in place access to information mechanisms for individuals and communities potentially affected by MNCs’ operations; to

\textsuperscript{251} Mohamadieh and Uribe (n 32) 25.
implement on-going human rights and environmental monitoring systems; and to comply with judiciary and administrative decisions.256

According to some participants, the standard whereby business enterprises would certainly be bound to, is human rights due diligence, which would include several elements – like FPIC of indigenous peoples,257 and whose definition and implementation should be left to states looking to regulate companies operating at home or abroad, while taking due consideration of their supply chains.258

It is worth clarifying that during the discussions, stakeholders were mostly using the definition of ‘responsibility’ as an obligation rather than as a breach thereto.259 With this in mind, two conflicting postures arose: direct obligations for MNCs on the one hand, and indirect obligations through states on the other. However, in-depth debate about the implications of either of those positions was notoriously absent.

The ‘direct-obligation’ approach is based on the need that corporations – as power-holders, shall also protect human rights, striking a balance under international law between the rights of corporations enshrined in BITs, and human rights embedded in the BHRT, provided that both are anchored in international agreements, thus granting them equal value.260 Its main shortcoming, however, is that it overlooks ontological distinctions between the private and the public realms, misconceiving or overlapping each dimensions’ fundamental roles,261 and giving free rein to private entities to

258 Nollkaemper (n 38) 182.
260 Bilchitz (n 190) 216.
‘capture’ an international regime designed to protect individuals, as was underscored by some NGOs. 

Furthermore, it is still unclear how exactly those ‘direct obligations’ will be executed, or how they are going to abate the inconsistency that stems from the imposition of obligations for ‘private subjects of international law’ who will likely refrain to be bound by a norm that opposes their interests. The options to deal with this is that either MNCs become also part of the treaty or – as in the international humanitarian law regime with respect to rebel groups – they are bound by default to the treaty.

Contrariwise, the ‘indirect obligations’ approach is already an existent paradigm, where states are the means for MNCs’ compliance of human rights obligations, therefore, adding an environmental dimension therein should be less complex. Then again, since it entrusts human rights protection exclusively upon the state, it falls short in recognizing a universal duty of protection.

A good example of the ‘direct obligation’ approach is Section 1502 of the Dodd-Frank Act, a US domestic law that seeks to raise investors and consumers’ awareness through transparency ‘on potential corporate complicity in human rights abuses, primarily in the Democratic Republic of the Congo’. Domestic and foreign companies, as a form of due diligence, must report the origin of certain minerals in their products in order to avoid the funding of local groups linked to human rights violations.

Although the cited example is confined to national jurisdiction and does not incorporate a direct environmental component, it nonetheless evinces the positive impact behind drawing obligations for companies as a mandatory due diligence requirement to

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263 Nolkaemper (n 38) 195.
264 Bilchitz (n 261) 166.
266 Narine (n 265).
operate. In that vein, states under the treaty could flesh out due diligence obligations that not only touches upon human rights, but also environmental protection.

Principle 17 of the UNGP contemplates corporate due diligence as a way to identify, prevent, mitigate and account for adverse human rights impacts, including current and potential ones. \(^{267}\) In that regard, the Norms,\(^{268}\) as a way to materialize the concept of due diligence, enshrined the need to carry out social and environmental assessments before and during the life cycle of the operation, ensuring ‘that the burden of the negative environmental consequences does not fall on vulnerable racial, ethnic and socioeconomic groups’\(^{269}\). Therefore, corporate due diligence could be delineated taking into account existent standards of environmental and social impact assessments intertwined with nascent standards on human rights impact assessments.\(^{270}\)

Regardless of the approach taken by the OEIWG with respect to direct or indirect obligations for MNCs, fixing binding standards of corporate due diligence is arguably a step forward towards filling international law lacuna; additionally, it is a good opportunity to merge standards from two different law regimes, a challenge that may find insights in current national and international law, as was demonstrated. Said examples could also be transposed onto state-run companies, a category barely mentioned during the discussions and whose grey areas could ignite further contention, even if Principle 4 of the UNGP takes due notice of their importance.\(^{271}\)

### 3.5 Liability for businesses

Delegates highlighted that the treaty should address frequent litigation obstacles to render MNCs accountable, like complex corporate structures or the doctrine of *forum


\(^{268}\) Weissbrodt (n 18) 153.

\(^{269}\) Morgera, *Corporate Accountability in International Environmental Law* (n 12) 180.


non conveniens. Moreover, it was claimed that standards should adapt to different civil and criminal liability contexts or diverse legal systems and traditions, while also allowing inter-state cooperation for legal enforcement and liability for all stages in the supply chain. In addition, the level of liability could be proportional to the level of due diligence measures taken from a parent company vis-à-vis its subsidiaries, implying that rules should be adjusted on a case-by-case basis.

Conversely, a delegate from an employers’ organization proposed that instead of focusing on standards, the treaty should have an approach where specific conducts should be penalized and a pragmatic victim-oriented approach should be embraced. Moreover, defining the jurisdiction where the harmful conduct took place and sanctioning them based on the level of damage inflicted should be the focus.

Bolivia and Cuba stressed that impairments of human rights perpetrated by parent companies and/or their subsidiaries should amount to the executives’ liability. To this, Venezuela proposed a list of harmful conducts and their corresponding sanctions therein. Ecuador recommended setting a nationality test in order to lift the corporate veil, which may include, inter alia, the country where the company is domiciled, the jurisdiction where its operations take place and the nationality of their shareholders.


273 ibid 2.


275 Mohamadieh and Uribe (n 32) 31.


277 Mohamadieh and Uribe (n 32) 33.

278 Ecuadorian Delegation, ‘Panel VII: Responsabilidad legal de las empresas transnacionales y de otras empresas: Qué estándares para la responsabilidad legal corporativa y para qué tipo de conducta?’ (2015) 1
An NGO cited the Australian criminal code regarding ‘fault elements other than negligence’, whereby it is stated, *inter alia*, that either the body corporate’s board of directors or a high managerial agent could be held liable if expressly, tacitly or impliedly authorised or permitted the commission of an offence. Furthermore, shared liability of MNCs for the ‘activities of their subsidiaries, suppliers, licensees and subcontractors’, was also stressed.

Moreover, the need of drawing legal liability provisions to shift the burden of proof from the claimant to the defendant was proposed by an NGO, since ‘those affected by corporate injustice, the complex organisational processes within a company and its business relationships are extremely difficult to determine and prove’.

All this begs the question of whether due diligence could be considered a measure that attenuates or exempts liability of MNCs and their subsidiaries, or not. The outcome of this question will depend on whether the PPP, if included in the treaty, will be extensive to the parent company and its subsidiaries or restrictive to each supplier in the value chain. In this sense, international liability regimes are mostly designed around the concept of strict limited liability for private operators in specific high risk activities, like the movement of ultra hazardous substances, where private due


diligence is unknown, and paradoxically an integral implementation of the PPP is yet to be consolidated.\footnote{283 Morgera, \textit{Corporate Accountability in International Environmental Law} (n 12) 40–41; Birnie, Boyle and Redgwell (n 14) 325.}

If the BHRT includes the PPP, there should be a balance between the strict liability standard and the implications of implementing MNCs due diligence, which may be used as a potential defence argument should they commit wrongful acts. It is noteworthy that the the SRSG indicated that human rights due diligence, by itself, should not absolve a company from liability,\footnote{284 John Ruggie, \textit{Business and Human Rights: Further Steps toward the Operationalization of the “protect, Respect and Remedy” Framework - Report of the Special Representative of the SecretaryGeneral on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie} (United Nations Human Rights Council 2010) U.N. Doc. A/HRC/14/27 para 86.} a caveat that resonates with the formula in the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, whereby an operator is exempted from liability, \textit{inter alia}, if the act was caused by a third party intending to cause damage, and having implemented safety measures first.\footnote{285 Council of Europe (n 63) 1234.}

Perhaps the first step to implement the PPP under this new treaty is to identify the polluter or the human rights transgressor, to whom a nationality test could be applied, and depending on the size of the company, determine whether home states should assume part of the burden as ‘residual sources of redress’.\footnote{286 Boyle (n 96) 8.} This could be seen as a progressive implementation of principles 13 and 16 of the Rio Declaration, with respect to liability and compensation for adverse effects of environmental damage, and the internalization of environmental costs.\footnote{287 United Nations, \textit{‘Conventions and Agreements International Developments’} (n 40).}

\textbf{IV. Conclusions}

It is clear that since 2006, the prolific role of the HRC in bolstering the human rights regime is undeniable,\footnote{288 BG Ramcharan, \textit{The Law, Policy and Politics of the UN Human Rights Council} (Brill Nijhoff 2015) 164.} a contribution that certainly extends to the current endeavour
of crafting a BHRT, which indubitably is a new opportunity to keep developing a vital service for humanity. In that sense, a new BHRT is feasible, although it entails colossal challenges that will have to be dealt with caution, without repeating mistakes from the past; and a way to do it, is by understanding that law making processes are frequently diplomatic facades, veiling each country’s political agendas. That is why, the drafters of the BHRT should consider the risks of assigning direct duties to private actors; namely the erosion of the human rights regime due to offsetting states’ obligations onto non-state actors. This risk may increase taking into consideration that the main proponents and supporters of the treaty are countries not particularly deemed as democratic, demonstrating the importance of legislative rigour and a vibrant diversity of voices in the HRC.

To illustrate the previous point, all stakeholders that were present in the session had similar views on almost all the basic structure of the BHRT, except for the contended point of scope of regulation. States were keen on regulating only MNCs, while NGOs and experts suggested to extend it to all types of businesses. Therefore, an initial global consensus may start to crumble in subsequent sessions if these salient points are not resolved effectively. This goes without mentioning the absence of key actors, like Europe and the US, which without them, thwarting the adoption of a final outcome is a foreseeable scenario, analogous to the unsuccessful experience of the UNCCTC and the Norms.

Evidently, it is difficult to assess, at least at this early stage of drafting, what the substantive content, operative procedures, or practical shortcomings the BHRT will entail, specially for environmental considerations; however, the chances for environmental protection are multiple if drafters start discussing them in subsequent drafting stages. What may spark further debate on environmental dimensions are the

290 Boyle and Chinkin (n 41) 103.
broad assertions regarding environmental principles that stakeholders made during the first session. But again, vaguely worded declarations might be interpreted as an attempt to internationalize domestic standards, an ambitious endeavour that should be meticulously examined.

Notwithstanding, apart from the Convention on Liability for Oil Spills, no IEL instrument nor source was mentioned during the first session, not even submissions of environmental experts were considered; signalling an absence of cross-fertilization between distinct areas of law during this stage of the drafting, and to that end, it should be pointed out that the multiple array of IEL tools could be useful. Needles to say, the HRC is a human rights body, not a conference of the parties of an environmental agreement; and from what was perceived at this early stage, the chasm that divides both regimes, has not yet been bridged.

Ostensibly, the UNGP and other voluntary initiatives designed to provide guidance on corporate human rights responsibility, will keep developing and be progressively inserted onto global law and policy, concomitantly with the negotiations of the BHRT, however, if an honest and useful addition of environmental dimensions within these initiatives are intended to be included, it is ‘still necessary to identify the relationship between human rights obligations and environmental protection in order to determine what environmental responsibilities we expect corporations to respect’.293

Considering that this document has mainly addressed the question of corporations’ responsibility to respect human rights and the environment – or the second pillar in UNGP’s vernacular, the plethora of ramifications around these discussions are still ill-explored; and it hints the need to keep examining the way in which the rest of the pillars interweave with other phenomena that might be slightly out of the scope of the HRC. That path must be followed in order to clinch this heated and elongated debate. Of course, the focus of this unresolved matter should always be the global victims, and in that category, it might be wise to make room for the environment.

293 Boyle (n 35) 621.
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