CRDH | PARIS HUMAN RIGHTS CENTER
UNIVERSITÉ PARIS II PANTHÉON-ASSAS

DROITS FONDAMENTAUX
Revue électronique du CRDH

The Objectives of a Convention on Business and Human Rights: Some Remarks on Prevention and Access to Remedy

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à l'occasion de la conférence

LES OPPORTUNITÉS ET LES DÉFIS POUR UNE CONVENTION INTERNATIONALE SUR LES ENTREPRISES ET LES DROITS DE L'HOMME

Évènement co-organisé par l'UDEM et le CRDH, 18 novembre 2021

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Pour citer cet article :

Marco Fasciglione, « The Objectives of a Convention on Business and Human Rights: Some Remarks on Prevention and Access to Remedy », *Droits fondamentaux*, n° 20, 2022, 11 p.

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The Objectives of a Convention on Business and Human Rights: Some Remarks on Prevention and Access to Remedy

Introduction

In June 2014, the Human Rights Council established, in its Resolution 26/9, an open-ended intergovernmental working group (OEIGWG) with the mandate to elaborate an "international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises"[1]. Seven sessions have been held so far. The latest revised draft of the legally binding instrument (hereinafter "draft treaty") released in August 2021, the third one, formed the basis for intergovernmental negotiations during the session of November 2021[2].

This paper should not be seen as an exhaustive review to the various revisions made in the third draft treaty and on the several complex issues raised by the draft and by the very same treaty process, as well. Rather, the following pages are meant to focus on three general questions laying at the heart of treaty process and deserve scholars' attention: *Why* a treaty? *What* does the treaty do? *How* to achieve its objectives?

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[1] Human Rights Council, "Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights", Resolution 26/9, 26 June 2014, U.N. doc. A/HRC/RES/26/9, § 1. The Resolution was opposed by 14 members of the Human Rights Council, including the United States and the Member States of the European Union.

[2] See at www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/LBI3rdDRAFT.pdf. As far as the literature on the draft treaty process see *inter alia* C. Methven O'Brien, "BHR Symposium: The 2020 Draft UN Business and Human Rights Treaty–Steady Progress Towards Historic Failure", in *OpinioJuris*, 2020, www.opiniojuris.org/2020/ 09/11/bhr-symposium-the-2020-draft-unbusiness-and-human-rights-treaty-steady-progress-towards-historic-failure/; M. Fasciglione, "A Binding Instrument on Business and Human Rights as a Source of International Obligations for Private Companies: Utopia or Reality?", in M. Buscemi, N. Lazzerini, L. Magi, D. Russo (eds), *Legal Sources in Business and Human Rights*, Leyden, Brill, 2020, pp. 31-51; J. Letnar Cernic, N. Carrillo-Santarelli (eds), *The Future of Business and Human Rights Theoretical and Practical Considerations for a UN Treaty*, Mortsel, Intersentia, 2018; M. Fasciglione, "Another Step on the Road? Remarks on the Zero Draft Treaty on Business and Human Rights", *Diritti umani e diritto internazionale*, 2018, pp. 629-661; S. Deva, D. Bilchitz (eds), *Building a Treaty on Business and Human Rights: Context and Contours*, Cambridge, Cambridge University Press, 2017; H. Cantú Rivera, "Negotiating a treaty on business and human rights: The early stages", *University of New South Wales Law Journal*, 2017, vol. 40, n°3, pp. 1200-1222; O. de Schutter, "Towards a New Treaty on Business and Human Rights", *Business and Human Rights Journal*, 2016, vol. 1, pp. 41-67.

* *Les opinions exprimées ici n'engagent leur autrice qu'à titre personnel.*

The treaty process has attracted a lot of criticism. The adoption of a legally binding instrument, indeed, has been criticized for being, in turn: *unnecessary*, once compared to the progress made in the implementation of the UNGPs; *dangerous*, due to the risks that it may jeopardize such progress; abstract and excessively *demanding*, once considered the content of the States' obligations and their extraterritorial reach; or, on the contrary, too *restrictive*, as to its scope of application; or *too State-centric*, given the absence of obligations directly binding on corporations; *ineffective*, given the weakness of its international monitoring mechanism; and *even bearer of legal uncertainty*, in respect to the criteria concerning the attribution of jurisdiction and the identification of the applicable law to business-related human rights disputes[3]. Such reproaches, some of which of course may be shared, are based much more on political or ideological – rather than legal – concerns, while the main boundaries of the treaty are relatively drawn.

Despite these criticisms, the treaty process represents the most ambitious attempt so far towards the setting forth of a general international legal regime regulating the impact of business activities on human rights. The third draft represents, in this respect, a step forward in the treaty path as it improves the text, by eliminating some redundancies and inconsistencies, by reordering the subject matter, as well as by clarifying some ambiguities of former drafts. Particularly commendable are the efforts made, in response to comments made by some States and stakeholders, in order to better align the draft to the UNGPs language. This having said, the structure of the revised draft, resembling more of an international private law convention than a human rights treaty, remains substantially the same as the previous one, and a lot remains to be done included the very same alignment to the UNGPS, which is still incomplete.

I. Why a treaty? Some remarks on the objectives of a Treaty on business and human rights

The treaty is meant to introduce obligations on States to protect human rights from the negative impact stemming from corporate activities. Generally speaking, the ultimate goal of the treaty is to deliver broad-spectrum obligations, so that States be duty-bound to "effectively regulate business" (art. 6, para. 1), in order to ensure corporate respect for human rights, and to reinforce remediation for victims. A wide range of specific purposes may be detected by peeking into the text of the draft treaty and in turn: *a*) assuring effective reparations for victims; *b*)

[3] These criticisms are underlined by A. Bonfanti, M. Pertile, "How can a treaty on business and human rights fit with international law? Assessing the development of international rules on corporate accountability and their relationship with other international legal regimes",*QIL, Zoom-in 83*, 2021, pp. 1-4, at 2.

expanding the concept of jurisdiction for enlarging the avenues for actual remedies for the victims; *c*) advance international cooperation among States; *d*) advancing corporate liability avoiding the 'corporate veil'; *e*) affording priority to human rights law over economic law since trade and investments agreements accelerate the global "race to the bottom". The formulation of Article 2 attempts to encompass such a broad range of purposes.

In this respect the approach enshrined in the draft treaty is welcomed. Effective regulation of business from human rights perspective is necessary since the traditional approach focusing on voluntarism and on corporate self-restraint (with the CSR movement best illustrating it) has failed to ensure effective protection of human rights of the victims and will continue to do so. On the same token, transnational regulation of corporate conduct is necessary once considered that the human rights regime as it stands now is unapt to fully address corporate violations of human rights. The relying idea of the draft treaty process is that by directly regulating States, and the businesses *via* the States, and by rendering international human rights law obligations transnational in scope, the future treaty might play a fundamental role precisely in relation to situations in which States are not in position to enforce human rights against harm caused by third parties such as corporations due to them being either *unable* or *unwilling* to enforce human rights. Here the draft treaty aspires exactly to close those governance gaps between the scope and the impact on human rights of economic forces and actors, and the capacity of corporations to manage their adverse consequences, which are created by globalization forces, and which render States unable to protect human rights adequately due to a lack of effective control over companies.[4]

This having said, Article 2 of the third draft treaty is not without criticism. The list attached to this provision adds one purpose, "[t]o clarify and ensure respect and fulfilment of the human rights obligations of business enterprises", which seems to re-insert again in the scope of application of the draft treaty the direct corporate human rights obligations and responsibility. Well-known is the circumstance that this is a highly divisive issue among negotiating parties, which is potentially apt to prevent a positive outcome of the negotiation path. Actually, a clear and generalized consensus of States on placing direct human rights obligations for corporations does not yet exist and insisting on this point might lead to derail the adoption of a treaty on business and human rights[5] This is one of the reasons that led negotiating Parties to expunge from the text of the draft treaty any references to direct corporate human rights obligations, although these were included in the

[4] See J. Ruggie, *Statement on Swiss Citizens Initiative*, 10 June 2018, available at https://media.business-humanrights.org/media/documents/files/documents/Statement_on_Swiss_Citizens.pdf.
[5] See M. Fasciglione, "A Binding Instrument on Business and Human Rights as a Source of International Obligations for Private Companies: Utopia or Reality?", *op. cit.*, pp. 43-46.

text of the 'Elements'.[6] Also, there is no apparent corresponding operative part in the current version of the draft treaty in furtherance of this specific purpose, with the draft treaty remaining strictly confined to fixing obligations for States. The current version of the draft treaty, indeed, set forth corporate liability exclusively under the domestic law of States Parties and compel them to strengthen domestic mechanisms for such liability.

Furthermore, the very same use of the formula "to clarify" applied to the effective implementation of the obligation of States to respect, protect, fulfil and promote human rights in the context of business activities, is obscure and misleading, at the very least. State obligations in this area, indeed, have already been clarified by the large amount of case-law stemming from UN monitoring bodies, and regional courts of human rights,[7] as well. It is well-established, indeed, that while States have not to abridge the enjoyment of human rights through their actions or those of their organs or agents, they also have the (positive) obligation to take all reasonable and appropriate steps in protecting individuals against violations of human rights committed by third parties, included in the private corporate sector. It suffices here to make reference, *inter alia*, in respect to the economic, social and cultural rights area, to the General Comment No. 24 *on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities*, adopted in 2017.[8]

[6] See, in particular Article 3 ("General Obligations") and Article 3.2 ("Obligations of Transnational Corporations and Other Business Enterprises") of the Elements (OEIGWG, *Elements for the Draft Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights*, September 2017).

[7] As far as regional human rights mechanisms, with specific regard to the European regional system, see D. Augenstein, L. Dziedzic, *State obligations to regulate and adjudicate corporate activities under the European Convention on Human Rights*, *EUI LAW*, 2017/15 at http://hdl.handle.net/1814/48326; M. Fasciglione, "Enforcing the State Duty to Protect under the UN Guiding Principles on Business and Human Rights: Strasbourg views", in A. Bonfanti (ed.), *Business and Human Rights in Europe: International Law Challenges*, New York and London, Routledge, 2019, pp. 37-47; E. Fura-Sandstrom, "Business and Human Rights – who cares?", in L. Caflish et al. (eds.), *Liber amicorum Luzius Wildhaber: Human rights- Strasbourg views*, Kehl, Engel, 2007, pp. 159-176.

[8] See CESCR, "General comment n°24 on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities", 10 August 2017, U.N. doc. E/C.12/GC/24 (for a comment: M. Ferri, "The General Comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities", *Federalismi, Focus Human Rights*, 2017, vol. 3 pp. 1-36) ; The ESCRs Committee has also addressed obligations of States Parties concerning business activities in other General Comments, such as those relating to the right to water (General Comment n°15, "The right to water (arts. 11 and 12)", 20 January 2003, U.N. doc. E/C.12/2002/11, §§ 31 and 33), the right to work (General Comment n°18, "The right to work (art. 6)", 6 February 2006, U.N. doc. E/C.12/GC/18, § 52), or the right to just and favourable conditions of work (General Comment n°23, "The right to just and favourable conditions of work (art. 7)", 27 April 2016, U.N. doc. E/C.1/GC/23, § 70).

II. What does the treaty do? The Content of the Draft Treaty: Prevention and Access to Remedies

The objective of regulating corporations in respect to human rights violations connected to their activities, is also the core of provisions concerning **"**Prevention" and "Access to remedies", which are enshrined in Arts. 6 and 7. These provisions shall represent the heart of the treaty and its main contribution to the development of international legal framework on human rights. Some important points deserve to be highlighted in this respect.

As far as *prevention* is concerned, the draft treaty identifies as the main instrument to prevent harm carrying out effective human rights due diligence. Accordingly, the draft treaty under its Article 6, paragraph 3, obliges States to establish mandatory human rights due diligence. Since at international level human rights due diligence is currently included exclusively in non-binding standards (UNGPs, OECD Guidelines, etc.), it follows in this respect that a future treaty would mark a clear step forward. It might reinforce, indeed, the current regulatory path in the business and human rights area with the proliferation of national human rights due diligence legislations (adopted or under adoption), and the process for the adoption of an EU directive on human rights due diligence, as well.

However, while the text incorporates some UNGPs language in its outlining of the due diligence obligations expected of business enterprises, the formulation used by the draft treaty also proceeds to an anomalous *reconfiguring* of the object of human rights due diligence. Indeed, corporate human rights due diligence, as enshrined in Article 6, paragraph 3, letters *a*) and *b*), strongly diverges from the phases of the human rights due diligence process described both in the UNGPs and in the OECD Guidelines under several profiles. Just to mention some of them: the absence in the 3rd revised draft of the "integrating and acting upon the finding" phase; the omitted incorporation of the "cause", "contribute to", and "directly linked to" causal element for attribution of conducts, which are disconcertingly melted in the 3rd revised draft; the focus on communicating to stakeholders, while the international standards on human rights due diligence rely on "external communication" and "formal reporting" in specific situations, providing for, therefore, a much wider target audience of the communication.

Well, such a reconfiguring of the content of human rights due diligence is simply pointless as it implies losing clarity and coherence on a feature which is at the core of the treaty and which will lead to confuse practitioners (NGOs, lawyers, corporate staff, judges) who are already operating under a UNGPs-informed conception of human rights due diligence. Ultimately, from the point of view of

consensus-based process, which is crucial for the positive outcome of the treaty negotiations, it is of concern that the draft treaty seeks to establish a new consensus over a new human rights due diligence process, when a standard, widely recognised and accepted, not only already exists, but has inspired important developments in national legal systems. Again, departing during the negotiation path from this already existing area of consensus among States involves the risk that the process of negotiations on a binding treaty on business and human rights might get bogged down again. We will come back on the centrality of State consensus in the treaty path in the next section.

As far as access to remedies is concerned, the draft treaty includes interesting and important compulsory measures for States with the goal to facilitate and assure the access to remedies for victims. The "road to remedies" in the draft treaty is marked by the provisions concerning the rights of the victims (Art. 4), and those involving the obligations of States with regard to access to remedies, legal liability, and adjudicative jurisdiction (Art. 7, Art. 8 and Art. 9). Article 4 recognises the right to access to justice, individual or collective reparation and effective remedy on a fair, adequate, effective, prompt, non-discriminatory, appropriate and gender-sensitive basis; it includes: restitution, compensation, rehabilitation, reparation, satisfaction, guarantees of non-repetition, injunction, environmental remediation, and ecological restoration (Art. 4, para. 2, let. c). Provisions concerning States' obligations focus primarily on access to remedy for individuals and consist in establishing the duty for States to reduce the barriers to access to remedies (Art. 7)[9], in fixing new grounds according to which States may exercise adjudicative jurisdiction (Art. 9) and in establishing some remedial avenues in connection to corporate legal liability (Art. 8). Article 8 encompasses two types of remedies: "sanctions" and "reparations". Sanctions are applied in "cause" and in "contribute to" corporate human rights negative impact but not in "directly linked to" corporate human rights negative impact (Art. 8, para. 3). The draft treaty provides for a tautological description of reparation: where "a legal or natural person conducting business is found liable for reparation" then such person should provide reparation to the victim, or compensate the State" (Art. 8, para. 4). Combined with the absence of any connection between corporate conduct and remedy in Article 6, which is the only article stipulating what obligations should be placed on corporations, there is no precision as to when a corporation should be required to provide reparations.

Noteworthy is also the provision in Article 8, paragraph 8, concerning the obligation of States to ensure that their domestic law provides for criminal, or functionally equivalent, liability of legal persons for human rights violations that

[9] Among obstacles to eliminate there is also the *forum non conveniens* principle, which may pose substantial barriers to bringing cases in the post-Brexit UK.

amount to criminal offences under international human rights law, or under customary international law, or under domestic law. The reference in the text to customary international law deserves to be highlighted since it goes in the direction of crystallizing those interesting developments, that have recently occurred in the high courts' national case-law. Two landmark decisions have to be mentioned, in this respect. The first one is the 2020 *Nevsun* decision, in which the Supreme Court of Canada declined to dismiss a series of customary international law claims brought by Eritrean refugees against a Canadian mining corporation for grave human rights abuses committed in Eritrea. The Supreme Court held that in principle, the Canadian mining company could be found in breach of customary international law[10]. In doing so, the Supreme Court opened the possibility of a novel front for transnational human rights litigation: common law tort claims based on customary international law. The second one, and turning to the criminal law realm, is the decision handed down in 2021 by the French Court of Cassation in the *Lafarge* case, holding that the French cement company Lafarge's indictment for complicity in crimes against humanity was wrongly cancelled by the Paris Appeals Court. According to the Court of Cassation, indeed, the company could be held legally responsible for complicity in committing crimes against humanity in connection to payments made to armed groups, such as ISIS, during the civil war in Syria[11].

On the contrary, a cautionary approach should be used in respect to the likewise important provision enshrined in Article 7, paragraph 5, in respect to the reversion of the burden of proof. The rationale of this provision is of course commendable: the reversal of the burden of proof is one of the techniques that may be used in order to overcome obstacles to the award of effective remedies for victims of business-related human rights abuses. It, in particular, may allow victims to obtain the disclosure of evidence held by the defendant. This technique, however, should be… "handled with care". Indeed, the indiscriminate application of such principle may result contrary to the principle of presumption of innocence and the right to a fair trial as recognized in several international and regional human rights instruments. The very same European Court of Human Rights has emphasized the exceptionality of reversing the burden of proof.[12] This having been said,

[10] See, Supreme Court of Canada, *Nevsun Resources Ltd. v. Araya*, 2020 SCC 5, 28 February 2020, (www.canlii.ca/t/j5k5j).

[11] Accordingly, the Supreme Court ordered for the case to be sent back to the Appeals Court on this charge. See *Cour de cassation – Chambre criminelle*, judgements n° 865, 866 and 868 of 7 September 2021, available at www.dalloz-actualite.fr/flash/cour-de-cassation-ouvre-voie-une-mise-en-examen-de-lafarge-pour-complicite-de-crime-contre-l-h.

[12] According to the Court's case-law under Articles 2 and 3 of the Convention, where the events in issue lie wholly, or in large part, within the exclusive *knowledge* of the authorities the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation. In the absence of such an explanation, the Court can draw inferences which may be unfavourable to the respondent Government (see, *inter alia*, CtEDH, 27 August 1992, *Tomasi v. France*, req. n° 12850/87; CtEDH, 24 July 2014, *Husayn (Abu Zubaydah) v. Poland*, req. n° 7511/13).

shifting the burden of proof may be justified *prima facie* in cases where "the facts and events relevant for resolving a claim lie wholly or in part within the exclusive knowledge of the corporate defendant".[13] The current formulation of Article 7, paragraph 5, is excessively vague in this respect as it generically establishes that States should foresee the reversal of the burden of proof "in appropriate cases" and "where consistent with international law and its domestic constitutional law".

III. How to achieve the objectives of the treaty path? The unavoidable role of State consensus

The objective of elaborating an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises point to another issue deserving attention: The necessity for catalysing the largest possible consensus amongst States in support of the negotiated text, in order to avoid that another UN led treaty process on a LBI might be bogged down again[14]. Even if a treaty was successfully adopted, something that to me is far from certain, a future treaty on business and human rights with low level of signatures and ratifications, or, even worse, ratified only by States in the Global South with the absence of the world's industrialised States, and replicating the polarization of the '70s New International Economic Order, risks to be meaningless. A treaty with these characteristics would suffer from scanty effectiveness in respect to the main objective of the treaty path: to protect human rights of victims of corporate-related abuses. Such a treaty would be destined to replicate well-known previous failures of the international community in addressing transnational challenges. The regulation of migration flows, with its 1990 *UN Migrant workers convention*, being a perfect example illustrating such risks.

The *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, was adopted in New York on 18 December 1990, and entered into force in 2003, hence 13 years later. The convention is one of the most comprehensive international treaties in the field of migration and human rights, and is meant to protect one of the most vulnerable groups of people: migrant

[13] See CESCR, "General comment n°24 on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities", *op. cit.*, § 45.

[14] There is a risk that the negotiation process might recast the failures concerning the Draft Code of Conduct on Transnational Corporations (Commission on Transnational Corporations, *Proposed Text of the Draft Code of Conduct on Transnational Corporations*, in *International Legal Materials*, 1984, p. 626 ff.) which was abandoned in the 1990s, and the later Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises (Commission on Human Rights, "Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights", 26 August 2003, U.N. doc. E/CN.4/Sub.2/2003/12/Rev.2) which the Commission on Human Rights declared devoid of any legal standing (Commission on Human Rights, "Responsibilities of transnational corporations and related business enterprises with regard to human rights", 20 April 2004, U.N. doc. E/CN.4/DEC/2004/116).

workers, whether in a regular or in an irregular situation. The Convention sets a worldwide standard in terms of migrants' access to fundamental human rights, whether on the labour market, in the education and health systems or in the courts. Despite its vanguard content, the Convention suffers from marked indifference. It has polarized sending and receiving States. Only fifty-six States have ratified it: all of them are sending States, no major immigration country has done so! Even the ratifying States appear unwilling to implement effectively the Convention and to provide remedies to victims through the individual complaint procedure: only 4 out of the 56 ratifying States have accepted the jurisdiction of the Migrant Workers' Committee to receive individual complaints.

It goes without saying that a similar outcome for the current negotiating path would undermine the effectiveness of a future treaty on business and human rights. Of course, a large consensus is difficult to attain. The treaty process has polarized opinions from the very beginning. Concerns about the political feasibility of the initiative came along with the debate on the scope of the treaty and any positive outcome will require striking balance between two competing standings in a highly divisive subject-matter. In the first place, idealist positions putting forward ambitious treaty designs aimed at fixing one of the most blatant inadequacies of the contemporary international human rights regime by taming corporate powers. In the second place, realism-inspired positions addressing economic, foreign policy and other similar interests, which still play a decisive role in guiding States' attitudes at the international level and opting for a gradual approach. The point is that States still play a quintessential role in the making of contemporary international law and their consensus and support are still fundamental. Well, not all the States, for different – and in some case not-commendable – reasons, seem to agree on the current negotiation path, and eventually advocate for alternative approaches. This position has emerged again during the 7th session of the IGWG, with the statement of the US delegation, for the first time participating to a session after having for long boycotted the negotiating process. If the US participating is a positive aspect, the US delegation has expressed concerns as to the current approach of the draft treaty and has called for exploring "alternative approaches", mentioning by way of example a "framework treaty" path[15].

While the issue is extremely complex due to the existing stark divide among pros and cons delegations, grounded on ideological reasons rather than on points of international law, some observations are necessary. If calls for "alternative approaches" are meant as an incitement to fine-tuning provisions of the current

[15] See USA, *Statement by the United States of America, as delivered by Catherine Peters at the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises*, 25 October 2021, available in the *Oral statements* section at www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session7/Pages/Session7.aspx.

text, which are still deemed too much vague or opaque, or which are seen as putting excessive burden on States or companies by committing them to "unrealizable" duties[16], or to address new threats to labour rights in the gig economy, or along the supply chains, then they may be agreed upon.

If, on the contrary, calls for "alternative approaches" are meant as implying an alternative to the legally binding form of the future instrument, for softer and diluted regulatory solutions, then they have to be … "returned to the sender". Reasons for the necessity of a binding instrument are well explored and any solution pointing to a non-binding instrument has to be rejected[17].

Nevertheless, what is important to highlight is that "alternative approaches" do not imply *per se* to lean towards non-binding solution, but simply suggesting *other binding-treaty forms capable to convey a larger consensus from States*. If understood in this way, a framework convention, a legally binding international agreement enjoying the same legal status of any other international treaty, subject to the law of treaties and relevant practice and not being *per se* more flexible than other agreements, might serve the purpose. Characteristics of framework conventions include the formulation of key objectives of the agreement, a set of broad commitments by contracting States to implement the objectives specified, and a governance regime to promote and to facilitate the implementation of the treaty commitments. Also, framework conventions establish a mechanism (or mechanisms) by which more detailed rules on specific topics can be developed and adopted by States Parties over time. This regulatory technique has certain benefits compared to single "piecemeal" treaties in international law[18] and, despite some disadvantages[19], it may

[16] See D. Cassel, "The New Draft Treaty on Business and Human Rights: How Best to Optimize the Incentives?", available at www.media.business-humanrights.org/media/documents/Treaty_draft_8.21_dwc_ incentives_draft.pdf", at p. 2, noting how "unrealistic due diligence requirements are all the more objectionable, because States must penalize companies that fail to meet them".

[17] In a bulk of literature in this respect, see D. Bilchitz, "The Necessity for a Business and Human Rights Treaty", *Business and Human Rights Journal*, 2016, vol. 1, pp. 203-227; P. Simmons, "The Value-Added of a Treaty to Regulate Transnational Corporations and Other Business Enterprises", in S. Deva, and D. Bilchitz (eds), *Building a Treaty on Business and Human Rights*, *op. cit.*

[18] The advantages of a framework convention approach to the business and human rights treaty path have been illustrated by Claire Methven O'Brien in some recent pieces: C. Methven O'Brien, *A business and human rights framework treaty: Information note*, 25 October 2021, available at www.researchgate.net/publication/355585594_2-page_Information_ Note_on_Business_and_Human_Rights_Framework_Treaty_261021; C. Methven O'Brien, "BHR Symposium: The 2020 Draft UN Business and Human Rights Treaty–Steady Progress Towards Historic Failure", *op. cit.*.; C. Methven O'Brien, "Experimentalist Global Governance and the Case for a Framework Convention Based on the UN Guiding Principles on Business and Human Rights", in M. Mullen et al. (eds), *Navigating a New Era of Business and Human Rights: Challenges and Opportunities under the UNGPs*, Bangkok, Article 30, 2019, pp. 204-210.

[19] See R. Mares, "The United Nations Draft Treaty on Business and Human Rights", in A. Marx, G. Van Calster, J. Wouters (eds), *Research Handbook on Global Governance, Business and Human Rights*, Cheltenham, Edward Elgar Publishing, 2022.

solve the underlying cooperation and consensus-building problems in human rights treaty negotiations[20].

To sum up, I do not pretend necessarily to advocate in favour of such alternate approaches. I deem, however, that strong legitimacy on the negotiation path is highly desirable and this requires a wide participation of States and hence for them to further compromise. If a framework convention may help to reach these objectives, then it is worth discussing it, without preconceptions and without indulging in ideological struggles. Obstacles towards wide-ranging consensus-based solutions turn again to the UNGPs alignment. UNGPs have already developed a broad consensus on a series of principles, with the human rights due diligence being one of the most important: it would be wise to build the treaty path around such principles that have already been agreed upon in order to facilitate compromise over their content and in order to reach that ambitious objective of fixing one of the inadequacies of the contemporary international human rights regime.

[20] For an assessment of the framework conventions' law-making effectiveness see N. Matz-Lück, "Framework Conventions as Regulatory Tools", *Goettingen Journal of International Law*, 2009, vol. 1, n° 3, 439-458; N. Matz-Lück, "Framework Agreements", in *Max Planck Encyclopedia of Public International Law* (online), 2011.