



# The Path Towards Accountability for Human Rights Abuses by Transnational Corporations



Geneva International Centre for Justice

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but it also encompasses environmental protection policies for a sustainable ecosystem. In this regard, UNCTAD’s reports have noted that TNCs are prone to move the location of their pollution-intensive production plants to countries where environmental policies are laxer,<sup>4</sup> which certainly does not contribute to neither the environment nor global sustainable development in the long-run.

## 2. TNCs and their Relation to Human Rights

The UN Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes, in its report on the “Impact of Toxics and Pollution on Children's Rights”, sheds light on the intoxication and poisoning of children due to exposure of toxic chemicals and wastes; the inadequacy of States’ measures to protect the human right to the highest attainable standard of health; and he addresses the responsibilities of the business sector in preventing exposure by children to such substances. In his report, it is revealed that children are born with numerous hazardous substances in their bodies leading to deaths, cancer, or silent pandemics of disease and disability that can be irreversible and passed down from one generation to the next, without access to effective remedy. Furthermore, it is unveiled that children in low-income, indigenous and marginalized communities are at more risk, given that their level of exposure tends to be higher, leading to environmental injustice and inequality.

With that said, many factors are said to contribute to this exposure, inter alia, policies that prioritize businesses’ operations instead of the human rights of children, legislation gaps, and the high disengagement of ministries of health. Lastly, the report uncovers how business activities are the cause of most childhood exposures to hazardous substances, given that roughly every business sector is involved, directly or indirectly, in the production, use, release and/or disposal of hazardous substances.

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Image Source: [www.ohchr.org](http://www.ohchr.org) “Rights of workers and exposure to toxic and otherwise hazardous substances”

The widespread exposure of children to toxic substances and pollution is just one example of human rights abuses perpetrated by TNCs. Additionally, many abuses of TNCs in relation to indigenous peoples have been reported by several human rights organisations and scholars.<sup>6</sup>

<sup>4</sup> United Nations Conference on Trade and Development, “Foreign direct investment by transnational corporations can produce major benefits, if the right government policies are in place”. 03 September 1999. (February 2019)

<sup>5</sup> “Report of the Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes, A/HRC/33/41”, 2016.

<sup>6</sup> Johnsen, Siri, “Liability of transnational corporations for indigenous peoples human rights violations”, 2011.

### 3. International Soft Law and Guidelines for Corporate Social Responsibility

Under those circumstances, and considering the increasing dismay at the international level about the assurance that TNCs and other business enterprises operate in accordance with international human rights standards, international law has progressively embraced the concept of business’ respect for human rights through the establishment of soft law, voluntary, and self-regulatory instruments related to corporate social responsibility. The main such instruments include:

- the OECD Guidelines for Multinational Enterprises, adopted in 1976;
- the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (MNE Declaration), adopted in 1977;
- the UN Global Compact launched in 2000;
- The UN Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, which were presented to the UN Commission on Human Rights in 2004 but were never approved for not having “legal standing”, however, they served as a preceding guide for the subsequent instruments on business and human rights.<sup>7</sup>
- Self-regulatory and certification approaches to corporate social responsibility exercised by civil society groups including ISO 1400 (developed in 1996), Social Accountability 8000 (developed in 1989), and the Global Reporting Initiative (launched in 2000).

These soft law instruments and self-regulatory mechanisms have many similarities in terms of what they intent to promote: the considerations of all stakeholders involved (*the stakeholders approach*), a relevant contribution to sustainable development, and respect for human rights and labour rights.

### 4. The Non-Binding UN Guiding Principles on Business and Human Rights (UNGPs)



Image Source: business-ethics.com  
“Business and Human Rights:  
Interview with John Ruggie”

For his part, John Ruggie, UN Special Representative of the Secretary-General, stated in 2007 that corporate accountability for human rights infringements should be the responsibility of States through the regulation of private actors.<sup>8</sup> Against this backdrop, in 2008 Ruggie proposed the “Protect, Respect and Remedy” framework,<sup>9</sup> which acknowledged that the international system consigns the “duty to protect” human rights to States, while the “responsibility to respect” human rights corresponds to business. Based on this notion, in June 2011 the Human Rights Council endorsed the Guiding Principles on

<sup>7</sup> United Nations Sub-Commission Norms on business & human rights: Explanatory materials. [www.business-humanrights.org](http://www.business-humanrights.org)

<sup>8</sup> Ruggie, John, “*Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises - Addendum corporate responsibility under international law and issues in extraterritorial regulation: summary of legal workshops*, A/HRC/4/35/Add.2.”, 2007. p. 7.

<sup>9</sup> Ruggie, John, “*Protect, respect and remedy: a framework for business and human rights- A/HRC/8/5*”, 2008.

Business and Human Rights (UNGPs).<sup>10</sup> The latter instrument places the concept of *human rights-due diligence* at the core of the business’ responsibility to respect human rights. In this respect, the UNGPs declares that “States should take appropriate steps to ensure the effectiveness of domestic judicial mechanisms when addressing business-related human rights abuses, including considering ways to reduce legal, practical and other relevant barriers that could lead to denial of access to remedy.”

#### 5. Subjects of International Law in Business-Related Dynamics

As can be seen, the hitherto mentioned international instruments predominantly leave the responsibility and accountability on States, on a voluntary basis, while TNCs and other business enterprises are essentially moral (not legal) duty-bearers that are regulated by the State.<sup>11</sup> In other words, legal liability for business’ violations of international human rights standards is defined essentially in domestic law.<sup>12</sup> Given this situation, some scholars have already pointed out to the regrettable assertion that corporations are not subjects to international law, since international law only exists in relation to States. However, foreign investments norms for protecting corporations under international law conveniently contradict the latter assertion. In line with this, in her book *Corporate human rights obligations: in search of accountability*, Nicola Jägers has remarked how international law tends to emphasize on the rights of TNCs by protecting their investments, but not on regulating their duties and obligations. Furthermore, she also analyses that the argument TNCs are not subject to international law is no longer solid since corporations actually gather all the constitutive elements to have international legal personality (international legal subjectivity, international legal capacity, and international *jus standi*) and therefore, human rights duties.<sup>13</sup> With that said, the legal personality precept and the fact that there yet remain procedural hindrances, do not mean that there are no obligations for corporations. In fact, it is argued that international human rights law has a horizontal effect applicable to non-state entities, meaning that international law provisions apply to private parties through a horizontal effect. Hence, the fact that States are the primary subject of international human rights law does not rule out the existence of this horizontal effect. Moreover, taking into account the growing influence and important role TNCs play on the well-being of society, Jägers describes as deficient that current



Image Source: [www.business-humanrights.org](http://www.business-humanrights.org) “How to hold TNC's accountable for human rights violations?”

<sup>10</sup> Human Rights Council resolution 17/6

<sup>11</sup> Banerjee, Subhabrata Bobby, *Corporate social responsibility the good the bad and the ugly*, Cheltenham: Edward Elgar, 2007. p.99.

<sup>12</sup> Office of the High Commissioner for Human Rights, “*The Corporate Responsibility to respect human rights*”. pp.10-11.

<sup>13</sup> Jägers Nicola, *Corporate human rights obligations: in search of accountability*. pp.27-35.

human rights system in which only the State bears obligations because it lacks binding regulations for corporations.<sup>14</sup>

## 6. The Proposal of a Legally Binding Treaty for TNCs



Image Source: [www.cetim.ch](http://www.cetim.ch) “The negotiations for the drafting of a legally binding treaty on transnational corporations into the heart of the matter”-2017.

Under those circumstances, an antagonistic and polemical debate has surged about the possibility to institute an enhanced normative regime under international law by granting business and TNCs a legal personality.<sup>15</sup> Nevertheless, some States have historically shown reluctance to the attempts of recognising corporations as subjects of international law and extending human rights obligations to private actors, mainly from the fear that it would empower corporations to interfere in a State’s affairs.<sup>16</sup>

However, despite resistances, the need to advance towards a “legally binding” instrument for regulating the operations of TNCs resulting in human rights abuses was addressed during the 24<sup>th</sup> session of the United Nations Human Rights Council, in September 2013. This topic was brought up mainly on the basis that victims of human rights abuses by TNCs still lacked access to effective remedies under the UNGPs and other existing mechanisms of international human rights law, and that the new binding instrument could fill remaining gaps.

On the other hand, the UN Special Rapporteur on the right to food recalls that a State’s duty to protect human rights extends outside its national territory, in the so-called *extraterritorial human rights obligations*. He reminisces that the International Court of Justice referred to this principle in previous cases, by asserting that the duty of a State to ensure that activities within their jurisdiction respect the environment of other States, is part of international law with respect to the environment.<sup>17</sup> In addition, United Nations human rights treaty bodies have also addressed the duty of a State to control the activities of non-State actors outside its territory. For instance, the Committee on Economic, Social and Cultural Rights asserts that States parties should prevent human rights infringements abroad by corporations that have their main seat

<sup>14</sup> Jägers Nicola, *Corporate human rights obligations: in search of accountability*. p. 40; p. 256.

<sup>15</sup> Baagø –Rasmussen, Line, “Business in development: diminishing human rights? making the case for human rights-based approach to corporate social responsibility”, *Anuario De Acción Humanitaria Y Derechos Humanos*,(2010): p.229.

<sup>16</sup> -Muchlinks, Peter, ‘International corporate social responsibility and international law’, p.238.

-Jägers Nicola, *Corporate human rights obligations: in search of accountability*. p. 34.

<sup>17</sup> Office of the High Commissioner for Human Rights, “Regulating Transnational Corporations: A Duty under International Human Rights Law - Contribution of the Special Rapporteur on the right to food, Mr. Olivier De Schutter, to the workshop “Human Rights and Transnational Corporations: Paving the way for a legally binding instrument” convened by Ecuador, 11-12 March 2014, during the 25th session of the Human Rights Council. P. 4.

under their jurisdiction, without affecting the sovereignty or diminishing the obligations of host states.<sup>18</sup> The Special Rapporteur further analyses that the recognition and strengthening of extraterritorial duties of States in human rights matters represents a growing development of international law, in which the UNGPs lag behind.<sup>19</sup>

#### 7. The work of the Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with respect to human rights

As a result of these developments, international human rights law has embarked on a path towards regulating the activities of TNCs and extending State-duties to extraterritorial situations. In effect, in June 2014, despite resistance from some countries who voted against the proposal, the Human Rights Council established an intergovernmental working group to negotiate a legally binding treaty to extend human rights accountability to private actors and to regulate their activities:<sup>20</sup> (not to be confused with the UN Working Group on Business and Human Rights, whose main mandate is to implement to UNGPs). This working group has held four rounds of negotiations in Geneva since 2014. After several years of negotiations and informal consultations, in October 2018, the fourth session of negotiations has introduced for the first time the *zero draft legally binding instrument to regulate the activities of transnational corporations*, as well as a zero draft optional protocol on access to remedy.

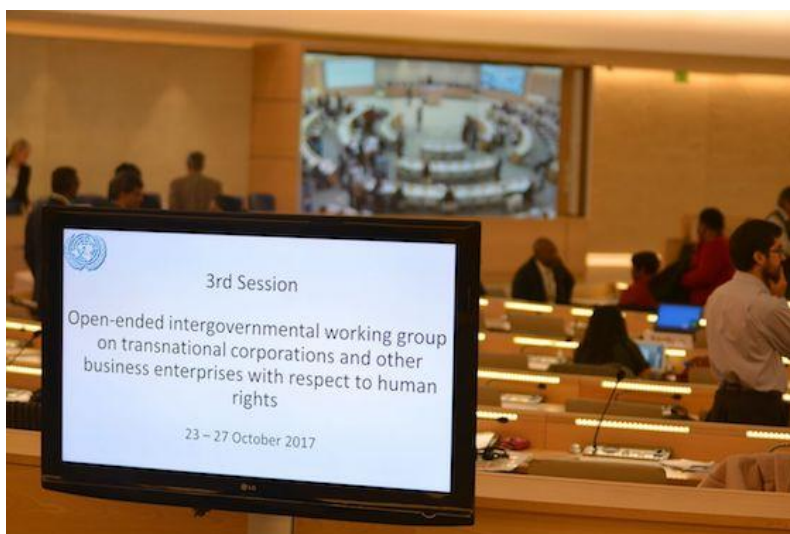


Image Source: [www.escr-net.org](http://www.escr-net.org) “Human Rights and Business Treaty”

At the start of its 4<sup>th</sup> session, the Deputy High Commissioner for Human Rights, Kate Gilmore, reminded all delegations that the UNGPs and the future legally binding treaty should be mutually reinforcing rather than competing instrument against each other and that the UNGPs should underpin and serve as the basis for the new legal instrument. Additionally, she warned that the negotiations of the new treaty should be rooted in the experiences of those who

suffer most at the hands of TNCs’ activities. Moreover, “*the perverse impact of the relatively powerful on the relatively weak*” was addressed by one promoting delegation of the legally

<sup>18</sup> Committee on Economic, Social and Cultural Rights, ‘Statement on the obligations of States Parties regarding the corporate sector and economic, social and cultural rights’, UN Doc. E/C.12/2011/1 (20 May 2011), para. 5.

<sup>19</sup> Office of the High Commissioner for Human Rights, “Regulating Transnational Corporations: A Duty under International Human Rights Law - Contribution of the Special Rapporteur on the right to food, Mr. Olivier De Schutter, to the workshop “Human Rights and Transnational Corporations: Paving the way for a legally binding instrument” P. 5.

<sup>20</sup> Human Rights Council Resolution 26/9



binding instrument, adding that there was no reason why the general rules of international law should not apply to all actors.

Regarding the doctrine of granting a legal personality to TNCs, and despite positive expectations from civil society groups and scholars in this matter, the new legally binding treaty on TNCs is seemingly going the traditional path in which the State bears all responsibility as the primary subject of international law. Some delegations even made the effort to clarify this notion by reiterating this structure under international law. On the other hand, some countries aligned to the request of not restricting the scope of the treaty to TNCs but also to include companies operating at the domestic level. While the argument seems plausible since it is based on the principle of non-discrimination, it is imperative to differentiate the nature of TNCs with that of enterprises operating at domestic level, and the realisation that the former beyond doubt requires a specific legal instrument focused on an extraterritoriality dynamic.

When introducing the draft legally binding instrument, it was stated that the draft was based on four main pillars: 1) Prevention, incorporating elements of the UNGPs; 2) Victims’ rights and access to justice. 3) International cooperation and the need for States to work together; 4) Monitoring mechanisms. Another important aspect addressed at the 4th round of negotiations was the need to close the legal vacuums of international law existing in those cases where perpetrators evade national legislation by using their transnational structures and legal and political discrepancies between States, in order to hide behind while operating at the expense of the environment and the wellbeing of vulnerable populations around the world.

Moreover, it was clarified that the drafting of this legal instrument does not intend to affect Foreign Direct Investment in developing countries and that there is no contradiction between the promotion of foreign investment and the promotion of clear rules for the respect for human right. The legal instrument rather seeks to ensure that this investment takes place in an equal plainfield, focusing on the responsibility of TNCs considering their entire value chain, the provision of redress for damaged victims (or alleged victims), as well as the obligations of the States of origin of TNCs in providing remedy through the principle of international cooperation. In this matter, some civil society groups, in line with previous concerns about the primacy of foreign investment over human rights, requested an explicit reference in the new treaty to the prevalence of human rights over trade and investment agreements. However, some delegations expressed concern that this type of provision could generate a hierarchy in international law, possibly violating customary international law. Among many other observations and proposals, the establishment of an international fund for victims was also addressed.



Image Source: [www.imagenesmi.com](http://www.imagenesmi.com)

The revised draft legally binding instrument based on the 4<sup>th</sup> session’s discussions was presented to civil society and Member States, followed by a series of informal consultations before the 5<sup>th</sup> session of negotiations to be held on October 2019 in Geneva by the Intergovernmental Working Group. Nonetheless, until such treaty is fully negotiated, the UNGPs continue to be the most authoritative instrument and a fundamental norm for business and human rights.<sup>21</sup> However, like one delegation has stated at the 4<sup>th</sup> session: current negotiations should not set an excuse for not providing remedy to victims waiting for redress and justice now.

#### 8. GICJ’s Conclusions and Recommendations.

Considering the current state of international law, uncertainty remains as to how making TNCs directly accountable; whether the new legally binding instrument for TNCs, which follows the traditional doctrine of international law, will in practice be effective; and how the corporate responsibility of TNCs to respect human rights in local communities can be regulated globally. While the self-regulatory mechanisms and soft law guidelines mentioned previously offer a relevant path for reaching progress in the corporate respect for human rights, the regulation of TNCs require more substantial measures to ensure that human rights are protected, respected and fulfilled in all communities, including the most vulnerable. That the international community has embarked on a path towards creating a legally binding treaty to ensure accountability for human rights abuses by TNCs and access to remedy for victims, is the first step of many additional needed including the harmonization of legal procedures within domestic legislations with a view to ensuring accountability for TNCs, the ratification and implementation of the treaty at domestic level, and the establishment of domestic enforcement mechanisms for the treaty to be effective.

With that said, Geneva International Centre for Justice exposes the following recommendations:

- Until the legally binding treaty for TNCs is completely negotiated, States have the obligation to ensure that the business sector respects the fulfilment of human rights at the communities where these business operate, as well as remedy for victims. In this sense, States (Host States and Sending States of TNCs) should encourage the application and commitment to the UNGPs as the fundamental norm of business and human rights.
- States should seek to expand commitments of companies by creating financial incentives in order to promote greater compliance with the UNGPs and the future legally binding treaty.

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<sup>21</sup> Hoag Foley and UNEP FI 2015, *Banks and Human Rights, a legal analysis*, UNEP Finance Initiative.p.6.

- In addition to the aforementioned incentives, States and the multilateral trading system should detect measures to prevent the trade in goods that are connected to human rights abuses in the global value chains of TNCs.
- States should ensure that their trade and investment agreements include sufficient safeguards to protect human rights and labour standards for possibly affected populations and respect the principle of prior consultation for indigenous peoples.
- Civil society is encouraged to continue to raise awareness, as well as document cases of human rights abuses, related to TNCs and business' operations.
- It is imperative that civil society, the media and academia follow the negotiations of the legally binding treaty taking place in Geneva, in order to exert pressure on States to present a worthwhile outcome that is truly focused on the interests of the most affected communities, while considering the suggestions that the respect for human rights should prevail over trade and investment agreements.
- Business and TNCs are encouraged to implement the UNGPs and the new legally binding treaty provisions, as part of their corporate social responsibility, independently of the States' stance or attitude towards these instruments.

Lastly, GICJ reiterates that besides the future legally binding treaty, there are already human rights instruments that are binding upon States, which should act also as a crucial guidance for TNCs and other business enterprises, such as: The International Covenant on Civil and Political Rights, the International Covenant on Economic, Social, and Cultural Rights, and the eight ILO core conventions.

