

Towards a Business and Human Rights Treaty

Master Thesis

at

Norwegian Centre for Human Rights

by

Si Chen

Oslo

June 2015



Abstract

A new wave of international discussion on an international binding instrument on business and human rights was triggered by the proposal for a business and human rights treaty by some states, originally represented by Ecuador and South Africa. Through its resolution A/HRC/RES/26/9 in June 2014, the Human Rights Council decided to establish “an open-ended intergovernmental working group” to elaborate “an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises”. Despite the Council mandate, the debate on a binding approach still continues and the necessity of a business human rights treaty remains controversial. This thesis addresses a three-fold research question on the proposal of a business and human rights treaty: 1) What is the state of play in the ongoing debate of a binding proposal? 2) Is it necessary to elaborate a business and human rights treaty? 3) If one is deemed necessary, how should a business and human rights treaty be formulated? The research question is answered by a combination of methods; including empirical research, literature review and legal analysis. The approach of this thesis is both empirical and legal.

In Chapter Two, this thesis takes a close observation of the ongoing debate on the proposal of a binding instrument on business and human rights. In Chapter Three, this thesis conducts a comprehensive examination on the necessity of a business and human rights treaty. It evaluates the necessity of a treaty from four significant issues of international legalization in the field of business and human rights. These issues are: the legal need of a business and human rights treaty in international legal framework, the political as well as legal achievability of a treaty on business and human rights, and the potential implications of elaborating a treaty on business and human rights. In Chapter Four, this thesis provides a constructive proposal on the specific legal formulation of a business and human rights treaty. The proposal discusses four general issues including: the duty-bearers, scope, extraterritoriality and function of a business and human rights treaty. The proposal suggests seven of the core provisions of a business and human rights treaty and provides commentaries for each provision.

Firstly, it is shown that while the necessity of a business and human rights treaty is still a core concern in the ongoing debate, potential issues have emerged. Further, it is deemed that it is necessary to elaborate a business and human rights treaty. Finally, it is suggested that a binding instrument on business and human rights should be a framework convention on strengthening the state obligation to protect human rights against abuses by businesses.

Acknowledgements

First of all, I would like to thank my thesis supervisor Malcolm Langford. I received encouraging support and professional supervision from you throughout my research. Your patience and expertise have eased my stress and helped me keep a positive attitude. Without your support and guidance, I would not have finished this long thesis journey.

I would also like to give my thankfulness to Asbjørn Eide. It was my great honor to have had the opportunity to attend the 3rd UN Annual Forum on Business and Human Rights together with you as well as other researchers from the Norwegian Centre for Human Rights. You kindly granted me the opportunities to discuss some of the key concerns of my research with you. Your kindness and expertise have inspired me significantly during my research.

I appreciate the China Programme at the Norwegian Centre for Human Rights for a scholarship which supported my attendance of the 3rd UN Annual Forum on Business and Human Rights in December 2014. In the Forum, I received insights and encouragement from key experts in the field of business and human rights.

I want to deliver my appreciation to the International Organization of Employers. Thank you, for granting me the unique opportunity to attend the High-level Conference on Business and Human Rights in Geneva in November 2014. I developed a much better understanding of my research topic with the insights from the Conference.

I want to thank all the other organizations and experts who supported me during the whole research process. During the desk research in Oslo and the field work in Geneva, I collected a lot of valuable data, and I also had the opportunity to approach some of the key stakeholders as well as professionals of my research topic, a business and human rights treaty.

I am deeply grateful to all of the above-mentioned organizations and experts, but the errors that remain are my responsibility alone.

Abbreviations

AIIB	Asian Infrastructure Investment Bank
ATS	Alien Tort Statute
BHR	Business and Human Rights
BHRRRC	Business and Human Rights Resources Centre
BRICs	Brazil, Russia, India, and China and South Africa
CCPR	Human Rights Committee
CESCR	Committee on Economic, Social and Cultural Rights
CRC	Committee on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
CSR	Corporate Social Responsibility
ECOSOC	Economic and Social Council
FCTC	Framework Convention on Tobacco Control
FIDH	International Federation for Human Rights
GC	General Comment
GPs	Guiding Principles
HRC	Human Rights Council
HRW	Human Rights Watch
ICC	International Chamber of Commerce
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Commission of Jurists
IGWG	Inter-governmental Working Group
IHRB	Institute for Human Rights and Business
IOE	International Organization of Employers
NAPs	National Action Plans
OHCHR	Office of High Commissioner for Human Rights
OPs	Optional Protocols
TNCs	Transnational Corporations
UDHR	Universal Declaration of Human Rights

Table of contents

ABSTRACT	II
ACKNOWLEDGEMENTS.....	III
ABBREVIATIONS	IV
CHAPTER 1 INTRODUCTION	1
1.1 Research Background.....	1
1.1.1 Business and Human Rights: An Overview of Law and Practice	1
1.1.2 A Binding Instrument on BHR: the Past, the Current and the Future	3
1.2 Research Question.....	5
1.3 Structure	9
1.4 Methodology	10
1.4.1 Methodological Design.....	10
1.4.2 Sources Evaluation.....	14
1.4.3 A Note of Terminology	15
CHAPTER 2 DEBATE ON A BINDING INSTRUMENT ON BHR.....	16
2.1 Ecuador Initiative.....	16
2.2 Does the World Need a Binding Instrument on BHR?	20
2.2.1 Public Debate.....	20
2.2.2 Research Report.....	23
2.2.3 Business and Human Rights Conference.....	23
2.2.4 3rd UN Annual Forum	24
2.2.5 Online Commentaries	24
2.2.6 Online Symposium	25
2.3 Conclusion.....	26

CHAPTER 3 NECESSITY OF A BINDING INSTRUMENT ON BHR.....	28
3.1 Legal Need of a Binding Instrument on BHR in International Legal Framework.....	28
3.1.1 Existing International Legal Framework on BHR	29
3.1.2 International Law Implementation on BHR issues	35
3.1.3 Preliminary Conclusion.....	41
3.2 Political Achievability of a Binding Instrument on BHR	43
3.2.1 Observed Consensuses on a Binding Instrument on BHR.....	44
3.2.2 Potential Consensuses on a Binding Instrument on BHR	52
3.2.3 Preliminary Conclusion	55
3.3 Legal Achievability of a Binding Instrument on BHR	57
3.3.1 Compatibility with International Law	57
3.3.2 Obstacles of Legal Formulation.....	59
3.3.3 Preliminary Conclusion	67
3.4 Potential Implications of a Binding Instrument on BHR	68
3.4.1 Identifying Values and Risks of a Binding Instrument on BHR	69
3.4.2 Potential Impact beyond a Binding Instrument on BHR.....	72
3.4.3 Preliminary Conclusion.....	75
3.5 Conclusion.....	76
CHAPTER 4 DESIGN OF A BINDING INSTRUMENT ON BHR	79
4.1 General Issues of a Binding Instrument on BHR.....	80
4.1.1 Duty-bearers	80
4.1.2 Scope.....	81
4.1.3 Extraterritoriality	83
4.1.4 Function	84
4.2 Suggested Core Provisions of a Framework Convention on BHR	85
4.2.1 Preamble	86

4.2.2 Part I Introduction	87
4.2.3 Part II Obligations of Prevention	92
4.2.4 Part III Obligations of Accountability	94
4.2.5 Part IV Obligations of Remedy	96
4.2.6 Part VI Monitoring	97
4.2.7 Part VII Miscellaneous Provisions	100
4.3 Conclusion.....	100
CHAPTER 5 CONCLUSION	102
5.1 Main Findings.....	102
5.2 Recommendations for Stakeholders	103
5.2.1 States	104
5.2.2 Business Enterprises	105
5.2.3 Civil Society	105
5.3 Issues for Further Research	105
BIBLIOGRAPHY	107

Chapter 1 Introduction

1.1 Research Background

1.1.1 Business and Human Rights: An Overview of Law and Practice

In the existing international legal framework, business enterprises are rights holders in international investment law, which entitles transnational corporations (TNCs)¹ to sue states in arbitral tribunals. Human beings are rights holders in international human rights law, which entitles individuals to file complaints against states in human rights treaty bodies. However, when it comes to business and human rights (BHR), individuals have no legal standing to sue business enterprises under the international legal framework when their rights have been abused by business operations. International law has not yet imposed human rights obligations directly on business enterprises, although it does indicate, on one hand, that states have the obligation to protect human rights against third parties, and on the other hand, that business enterprises have the responsibility to respect human rights as required by states through national legislations and domestic policies.

The increasing disclosure of business involvement in human rights abuses can be dated back to decades ago. It has been more than 30 years since the escape of deadly methyl gas from the Union Carbide Corporation plant in Bhopal, India in 1984. This tragedy took thousands of innocent human lives and left tens of thousands of citizens of Bhopal physically impaired or affected in various degrees. Since the 1960s, the Ogoni people in Nigeria have been suffering from the damage caused by the Royal Dutch Shell oil spills. Dated back to decades ago, people living in the rainforest area of Ecuador have been suffering from environmental damage and negative health effects caused by Chevron oil operations. These affected people have not obtained access to remedy after decades of appeals within existing legal framework in national courts as well as in international courts. Taking the case of Chevron oil operations as an example, the victims sued Chevron through domestic courts in Ecuador and in the United States of America (US) as well as

¹ There is no legal instrument giving a definition to TNCs. With the purpose of this thesis, TNCs are referred to as economic entities operating their assets and controlling their use across national borders, differing from domestic companies whose operations remain within national borders. A further distinction can be found in Amao (2011) at pp. 6-8.

through international courts such as International Criminal Court, but they have not been granted effective remedy.² While these decades-long issues have not been well addressed, newly alleged abuses have been revealed. According to a briefing paper issued by the International Federation for Human Rights (FIDH) in 2014, the situations are very discouraging in Cambodia, Brazil, Libya, the Democratic Republic of Congo and the Occupied Palestinian Territory.³ It is highlighted that “One of the world’s largest mining companies is designated a ‘CSR [corporate social responsibility] industry leader’ yet still fails to respect human rights”.⁴ The paper pointed out that Vale, one of the world’s largest mining companies, plays a key role in the production of pig iron, which has caused serious environmental pollution as well as serious health issues.⁵

Different actors have been making efforts in addressing the growing instances of human rights abuses by business enterprises; including international standards set by the United Nations (UN), internal voluntary initiatives launched by business leaders, advocating activities facilitated by NGOs as well as general legislations by national governments. Nonetheless, the situation of victims seems difficult. On one hand, the existing international standards on BHR are mostly legally nonbinding; on the other hand, national laws prove inadequate.⁶ Particularly, in the context of the global operation of businesses, it is assumed that the inadequacy of national laws in the governance of TNCs might have been resulted from the limitation of territorial jurisdiction.⁷ In the case of developing countries, it might also be influenced by the local authorities’ fear of losing the TNCs to less demanding sites for investment and the unwillingness of those authorities to adopt strict laws to regulate businesses in terms of human rights.

² Since 1993, some of the affected people filed lawsuits in the US Courts and then in the Ecuador Courts. These cases were either dismissed or ended by judgments without effective enforcement. See *Aguinda v. Texaco*, *Jota v. Texaco* and *Aguinda v. Chevron*. In 2014, Ecuadorian rainforest communities submitted a communication to the International Criminal Court in respect of Chevron chief executive’s acts to prevent the ordered clean-up of toxic waste in the Amazon.

³ FIDH (2014).

⁴ *Ibid*, p. 6.

⁵ *Ibid*, p. 6.

⁶ Amao (2011) p. 1.

⁷ *Ibid*, p. 1.

1.1.2 A Binding Instrument on BHR: the Past, the Current and the Future

Since the 1970s, there have been various attempts by the UN to improve the recognition of human rights by business enterprises.

Most of the existing international standards on BHR are voluntary in essence, among which the UN Global Compact (2000) and the UN Guiding Principles on Business and Human Rights (2011) make up the most significant ones. As the largest voluntary corporate responsibility initiative in the world, the Global Compact consists of ten universally accepted principles in the areas of human rights, labour, environment and anti-corruption. As the first authoritative guidance issued by the Human Rights Council (HRC)⁸ for states and business enterprises on their responsibilities on BHR, the Guiding Principles (GPs) encompass three pillars outlining how states and businesses should implement the “Protect, Respect and Remedy” Framework.⁹ Pillar one is the state duty to protect human rights, pillar two is the corporate responsibility to respect human rights, and pillar three is the access to remedy for victims of business-related abuses. The GPs are alleged to “apply to all states and to all business enterprises”.¹⁰ However, they are legally nonbinding, and it is up to the states and business enterprises’ own voluntary choice to abide by them or not. Despite the fact that there is currently no international legally binding instrument specifically addressing BHR related issues, discussions have been going back and forth at the UN level on whether to pursue binding norms on BHR. The debate has not yet been finalized.

The past two significant attempts to address human rights abuses by TNCs via a binding approach are unsuccessful. The first attempt was the draft of a code of conduct specifying the responsibilities of TNCs by the UN Commission on Transnational Corporations, and the second effort was the discussion on the UN Norms¹¹ in 2004. The negotiation of the Code of Conduct stalled in the 1990s because of the division between proponents of a legally binding code, on one hand, and a voluntary code, on the other. The draft Norms were prepared by the UN Sub-

⁸ In 2006, the Human Rights Council was created by the UN General Assembly by Resolution A/RES/60/251 and it replaced the former UN Commission on Human Rights. The Council consists of 47 UN Member States which are elected by the UN General Assembly. The Council is responsible for strengthening the promotion and protection of human rights around the globe and for addressing situations of human rights violations.

⁹ HRC (2011a).

¹⁰ Ibid.

¹¹ Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights. SCPPHR (2003).

Commission on the Promotion and Protection of Human Rights, but it ended with the affirmation by the then Commission of Human Rights, which is the predecessor of the HRC, that the proposed Norms “has no legal standing” and that the Sub-Commission “should not perform any monitoring function in this regard”.¹² In his book in 2006, Andrew Clapham commented that “There is currently little appetite among states to develop new international treaties focused on the issue of human rights abuses facilitated or committed by corporations”, and “nor does it appear that the human rights treaty bodies are ready to interpret the UN human rights treaties to directly impose obligations on non-state actors or individuals”.¹³

The current effort to reopen the discussion of a binding instrument on BHR, which is led by Ecuador and some other states, is controversial. Ecuador, the key sponsor of a binding approach, has called for “an international legally binding instrument” on BHR in the HRC sessions since 2013, and this proposal has stimulated a new wave of debate on the binding approach. Significantly, it seems that the long-lasting debate was facilitated into a further stage since the adoption of a ground-breaking resolution by the HRC in June 2014, A/HRC/RES/26/9 (Resolution 26/9). This resolution mandates the “Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights”.¹⁴ However, despite the resolution, it remains controversial among stakeholders on whether we need a binding instrument on BHR.¹⁵ In the political community, the resolution was not adopted by the HRC members unanimously, but rather with a pre-vote debate among nine of its member states and a divergent vote in which there were 20 votes in favor, 14 votes against and 13 votes abstaining.¹⁶ The European Union (EU) and the US, where many giant TNCs headquarter in, have been strongly against the proposal of a BHR treaty and both have expressly noted that they would not participate in the negotiation process. In civil society, while welcomed by many BHR-related NGOs, the resolution has also been criticized for its limitation in targeting only TNCs. In academia, comments from proponents and opponents are from a variety of perspectives. Notably,

¹² CHR (2004) and ECOSOC (2004).

¹³ Clapham (2006), p. 240.

¹⁴ HRC (2014a).

¹⁵ In my view, political representatives are stakeholders of international binding instruments. Businesses and civil representatives are also important in the context of a binding proposal on BHR.

¹⁶ HRC (2014a).

John Ruggie, the former Special Representative of the Secretary-General on BHR,¹⁷ with his experience of conducting nearly fifty international consultations in all regions and developing the GPs over the course of a six-year mandate, has been very cautious and skeptical about the idea of a binding instrument on BHR. Ruggie provided at least seven articles throughout January 2014-January 2015 specifically on the “UN Business and Human Rights Treaty”.¹⁸ In these articles, he stressed the importance of further implementation of the GPs and he cautioned about the danger of negotiating a BHR treaty.

Despite the failure of past attempts and the controversy of the current effort, the further development of the binding proposal seems promising. Indicative evidences can be identified from a variety of perspectives. The rapid expansion of transnational economic activity and corresponding growth in the power of TNCs has prompted renewed international discourses and actions over the past decade. In turn, these discourses influence how human rights abuses by business enterprises are addressed. Reflections by stakeholders during recent years have indicated an increasing amount of interest towards a binding instrument to further regulate businesses with respect to human rights. Some efforts have been made by human rights treaty bodies on further requiring states to regulate business enterprises with respect to human rights.¹⁹

1.2 Research Question

According to the preliminary literature review, it seems that with the negative impact on human rights by business enterprises increasingly being exposed to the public, the topics in the BHR area have been drawing more attention from different disciplines within the past decade. These disciplines include law, political science and so forth.²⁰ However, it appears that very little research have been conducted on international legally binding instruments on BHR since the “failure” of the Norms in 2004, with a few exceptions contributed by some of the drafters and sup-

¹⁷ Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises.

¹⁸ These articles were posted online in January, May, June, July, September, December of 2014 and January of 2015. See Ruggie (2014a), Ruggie (2014b), Ruggie (2014c), Ruggie (2014d), Ruggie (2014e), Ruggie (2014f) and Ruggie (2015).

¹⁹ For example, CESCR (2011) and CRC (2013).

²⁰ For example, Carasco (2010), Emedi (2011) and Martin-Ortega (2014).

porters of the Norms.²¹ Further, according to my preliminary observation conducted in October 2014, which might be regarded as an early stage of the recent discussion of a binding approach, I perceived that, while the mobilization by civil society organizations has been very active, scholarly response to the controversial discussion of a binding instrument on BHR has been quite reticent. Just to name a few, the International Commission of Jurists (ICJ) provided a thorough discussion of needs and options for a new international instrument in the field of BHR prior to the adoption of the Resolution 26/9;²² and non-governmental organizations (NGOs), such as the Human Rights Watch (HRW),²³ delivered comments on the resolution shortly after the adoption of the Resolution 26/9. Scholarly response to this topic might have been delayed in that the production of the research outcome often takes time. Only a few international professionals²⁴ can be identified in the discussion, including John Ruggie and Surya Deva, who have been dedicated to research on BHR issues for more than a decade.

Benefitting from my internship experience in the Human Rights Council Branch in the Office of High Commissioner for Human Rights (OHCHR) in spring 2014, I received a unique empirical impression of the UN human rights system, particularly the HRC, the Universal Periodical Review and the Human Rights Treaty Bodies.²⁵ As a preliminary view, I regarded the adoption of Resolution 26/9 as a positive sign for a potential BHR treaty in the future. Nonetheless, with the study experience in a multi-disciplinary programme on international human rights law, I understand that international legally binding instruments are not pure legal products, but products of the combination of international legalization, international relations and international politics.²⁶ Therefore, I have an open attitude towards a BHR treaty and I am very interested in the further development of the binding instrument proposal. For example, is this wave of discussion likely to

²¹ Weissbrodt (2014).

²² ICJ (2014).

²³ HRW (2014).

²⁴ Since the treaty proposal were largely commented by practitioners in the early stage of the debate and then increasingly discussed by scholars, I use the term “international professionals” to refer to both of them. Meanwhile, I also use the term “practitioners” and “scholars” to distinguish between them, when it is deemed necessary.

²⁵ During the 25th Session of the HRC in March 2014, I worked as an intern in the Secretariat of the HRC Session. I observed the function of the HRC through my work in the Meeting Room XX in the Palace of Nations, particularly through attending formal meetings, press conferences and side-events of the 25th Session. In May 2014, I followed up some of the meetings in the 52th Session of the Committee on Economic, Social and Cultural Rights.

²⁶ International Law and International Relations (2006), Interdisciplinary Perspectives on International Law and International Relations (2012) and Armstrong (2012).

be concluded with a BHR treaty or not? If there is any potential, what should a binding instrument on BHR look like?

Based on perceived research gaps and my preliminary concerns, I have developed my three-fold research question as follows:

Firstly, what is the state of play in the ongoing debate of a binding instrument on BHR?

Secondly, is it necessary to elaborate a binding instrument on BHR?

Thirdly, if one is deemed necessary, how should a binding instrument on BHR be formulated?

From my perspective, any further discussion on a binding instrument on BHR should be based on existing resources and the ongoing discussion. Hence, I recommend looking into the ongoing debate on the binding proposal to get an overview of the discussion and relevant resources for further analysis. Despite Resolution 26/9, the elaboration of a BHR treaty seems contentious with a variety of arguments from both proponents and opponents. Thus, I suggest evaluating the prospect of further international legalization in the BHR area in the contemporary context in order to get an evidence-based understanding of the necessity of a binding instrument on BHR. It could be premature to plan anything specific on the legal formulation of an international instrument before it is undertaken in the political agenda. It might be too ambitious for a master thesis to try to tackle the most controversial legal issues and to draft any legal provisions for a potential international instrument. However, taking into consideration the following context, I regard it meaningful to conduct this creative and challenging research on the legal formulation of a BHR treaty.

Firstly, any further international legalization in the BHR area will have to face the issue of legal formulation. It should be fully acknowledged the value of existing international instruments on BHR, particularly the GPs, in promoting the recognition of human rights by businesses. Nonetheless, international legalization in the BHR area seems an inevitable trend in the future. While pointing out the challenges for a BHR treaty, Ruggie stressed that “enumerating these challenges is not an argument against treaties”²⁷ and he noted that “some form of further international legali-

²⁷ Ruggie (2014a), Ruggie (2014b) and Ruggie (2014e).

zation in business and human rights is both necessary and desirable”²⁸. The legal formulation for international binding instruments on BHR will have to be addressed sooner or later in the future.

Secondly, if a BHR treaty is deemed necessary in the current international context, a thorough research about the legal formulation of the potential instrument will be of significant importance; even if one does not agree with the need for a BHR treaty, the negotiation process is starting in early July 2015 according to the mandate by Resolution 26/9. An open-ended intergovernmental working group (IGWG) is to be set up to elaborate an international legally binding instrument “to regulate, in international human rights law, the activities of transnational corporations and other business enterprises”.²⁹ It is required by the resolution that the first two sessions of the IGWG shall be dedicated to conducting “constructive deliberations on the content, scope, nature and form of the future international instrument”.³⁰ In addition, my research on the legal formulation will be employed as a tool to test the findings from the evaluation of the necessity of a BHR treaty. I suggest that a binding instrument on BHR should be formulated in the way that it might have the highest possibility to be accepted by politicians, and meanwhile, that it should make the most sense as a binding instrument. I will try to propose the legal formulation in this way to confirm whether there is any possibility to attain this aim.

Thirdly, any potential BHR treaties shall contain real values, aiming to better protect human rights. In my view, since the primary objective of elaborating a BHR treaty seems to further protect human rights against abuses by business enterprises, I argue that a BHR treaty should aim at greater protection of human rights and I will do so when I make specific proposals on the legal formulation of the potential instrument.

Therefore, the outcome of the thesis will contribute to narrowing down the identified research gaps; further, it will be valuable in the following ways: 1) it will act as a timely scholarly response to the most controversial issue in the international discussion of BHR issues, 2) it will serve as a resource for further research in international legalization of the BHR area, 3) it will provide inputs from international human rights law perspective for the negotiation process of a binding instrument on BHR.

²⁸ Ruggie (2014d).

²⁹ HRC (2014a), para 1.

³⁰ HRC (2014a), para 2.

1.3 Structure

Following the introduction, I will present three chapters to address the three dimensions of my research question respectively, and then I will draw a conclusion for the thesis.

In chapter 1, I will introduce the research background, develop the research question, provide thesis structure and then clarify the methodology.

In chapter 2, to understand “What is the state of play in the ongoing debate of a binding instrument on BHR”, I will track the ongoing debate, particularly during the most recent year, March 2014 – March 2015. I will provide an overview of the debate by responding to the following concerns. What efforts have been made by the main sponsors of the binding proposal? Where are the key venues for stakeholders to conduct the debate? Who are the core participants of the debate?

In chapter 3, I will address the main research concern “Is it necessary to elaborate a binding instrument on BHR”. I will conduct analysis on the necessity of a binding instrument on BHR through evaluation of four significant issues in further international legalization of the BHR area. According to these four issues, I developed the following sub-questions. Firstly, to what extent is a BHR treaty needed in international legal framework? Secondly, to what extent is a binding instrument on BHR likely to be politically achievable? Thirdly, to what extent is a treaty on BHR possible to be legally achievable? Fourthly, to what extent can a BHR treaty bring positive implications? During the evaluation of each issue, I will present views by both proponents and opponents, analyze the issue based on my observation of the debate, and then draw preliminary conclusions. During the discussion, I will analyze generally on the necessity of a binding instrument on BHR, and I will take the proposed binding instrument by Resolution 26/9 as a specific example, particularly in evaluation of the political achievability.

In Chapter 4, I will try to tackle the most difficult question “If one is deemed necessary, how should a binding instrument on BHR be formulated?” To provide a constructive proposal, I will propose on the specific legal formulation of a BHR treaty, addressing general issues and drafting core provisions. When addressing general issues, I will take into consideration insights from international law perspective and findings from previous chapters. When drafting core provisions, I

will follow the model by the GPs and the Commentary to the Maastricht Principles³¹, which have both presented provisions on BHR issues and then provided commentaries for each provision.

In chapter 5, I will conclude the thesis with a summary of main findings, a list of recommendations and a call for further research on relevant issues.

1.4 Methodology

Berg stated that, by combining several methods, researchers obtain “A better, more substantive picture of reality; a richer, more complete array of symbols and theoretical concepts; and a means of verifying many of these elements”.³² My three-fold research question is considerably related to the observation of the ongoing international debate, the use of multiple resources and the conduct of legal analysis. The question will be answered by a combination of methods; including empirical research, literature review and legal analysis. The strategy of methods triangulation, which encompasses the use of multiple methods and multiple data, will be used to ensure the validity of the sources and the quality of the research outcome.³³

1.4.1 Methodological Design

The approach of this thesis is both empirical and legal. It is empirical since the qualitative judgments are considerably based on empirical research. Firstly, it benefits from my internship experience in spring 2014 with the HRC Branch of the OHCHR. Secondly, it is supported by a three-week field work in Geneva; in particular, two key conferences on BHR in late 2014. Thirdly, it is based on an extended period of desk research on the international discussion of a BHR treaty, including the close observation of online videos and the track of scholarly online updates. It is legal because my main concern is the further development of the BHR treaty proposal, which encompasses different perspectives but significantly proceeds as part of further international legalization in the BHR area. Legal analysis is used as a significant method to address the two core dimensions of the research question: the necessity of a BHR treaty and the legal formulation of the treaty, if one is deemed necessary.

³¹ De Schutter et al. (2012) pp. 1084-1169.

³² Berg (2009) p. 5.

³³ Methods triangulation is the use of multiple research methods to study a phenomenon as well as combining different types of data collection. Johnston (1997).

1.4.1.1 Empirical Research

There are various strengths to use interviews as a method for qualitative research. Nonetheless, I understand that my research is challenging in the way that it is related to a controversial and ongoing international debate conducted by different types of stakeholders, such as politicians, businesses and civil representatives. Two main obstacles inspire me to rethink the idea of interviews. Theoretically, in-depth interviews may have the inherent limitation of reflecting opinions by a small group of stakeholders, and face difficulties such as restricted information disclosure. Practically, it is assumed that to approach core stakeholders for interviews would be difficult, particularly in the context of a contentious topic and a research project such as a master thesis. For instance, communications should be conducted with key stakeholders such as political representatives of great powers and business representatives of giant TNCs. Therefore, instead of interviews, I chose to observe key meetings and conduct informal discussions with key stakeholders. In particular, I identified two significant conferences in late 2014, which were highly relevant to my research topic. The first is the High-level Conference on Business and Human Rights organized by the International Organization of Employers (IoE) and the Employers' Federation of Western Switzerland on 19 November.³⁴ The other is the 3rd UN Annual Forum on Business and Human Rights organized by the OHCHR during 1-3 December.³⁵ The panelists as well as participants of these two conferences included a variety of stakeholders.

I carried out a three-week field work (November 18-December 11, 2014) in Geneva for this thesis. During the field work, I attended the above-mentioned conferences and I had informal discussions with some of the conference participants. In the conferences, I raised questions to the panelists in the relevant meetings.³⁶ Further, I tried to approach some of the core stakeholders,

³⁴ IOE (2014b) and IOE (2014c).

³⁵ OHCHR (2014a). I attended full day meetings during 1-3 December 2014. Most of the sessions I attended are not UN-led sessions. Therefore, no video record is available on the UN webcast. I took notes and I found summaries on the 3rd Forum webpage and the BHRRC webpage.

³⁶ For example, my questions to the panelists included: "what is your opinion on the treaty proposal on business and human rights", "what is your expectation of the treaty negotiation process", "what will you suggest on the potential contents of a business and human rights treaty" (to stakeholders); "do you think a new treaty could help further address business and human rights issues on the ground, and why do you think so?" (specifically to NGO representatives from the domestic level).

consulting them with my research concerns and exchanging views with them.³⁷ While my questions to panelists in key meetings were broad and open questions, my concerns in informal discussions were on more specific and closed questions. In these informal discussions, people spoke more openly and freely about their positions and opinions. For example, in the meetings, some of the representatives either refrained themselves from taking a clear position or avoided providing strong arguments for their positions on a BHR treaty. In informal discussions, some offered their positions with strong standing. Further, I have the impression that participants and organizers of the key meetings, regardless of their positions as for/against/neutral to the treaty proposal, appeared interested in my research topic, and some expressly stated that they would be interested in being notified about the research outcome.

1.4.1.2 Literature Review

While I used the data from empirical experience as a general background and a practical guidance for my qualitative research, I found evidential data from literature review of public resources. I identified the relevant sources from empirical experience, desk research as well as informal discussions with researchers in the BHR field.

I conducted literature review of multiple sources, which included both primary sources and secondary sources. The primary sources encompassed treaties, UN documents, online videos and statements. Core legal documents examined in this thesis are human rights treaties, particularly the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). Main UN documents used are from the HRC and the Human Rights Treaty System. I closely observed three online videos, which are on academic debate, political debate and business webinar respectively.³⁸ I also referred to statements by political and civil representatives. The secondary resources included books, articles, online scholarly commentaries and civil society research reports. As previously indicated, since

³⁷ To get closer to the inner positions and opinions of people with whom I discussed with, I approached them with the pure aim of academic research on my concerned topic. To respect their offer for help and to respect ethical rules, I will not cite any of them in the thesis. To ensure the value and validity of the discussions, I tried my best in the following perspectives. The informal discussions have a broad coverage of positions on the treaty proposal (for, against and neutral); continents (Asia, Europe, Oceania, Africa, North America and South America) as well as occupations (politicians, businesses, civil representatives). Meanwhile, I kept a balance of gender. I consulted nationalities from developed countries and developing countries.

³⁸ BHRRC-UND (2014). UN HRC (2014) and IOE-WBCSD (2015).

my research topic is on a newly developing debate, little existing academic research is available. Potential academic research outcome might be in production and some of them have appeared as online commentaries as well as research reports. Hence, a considerable amount of secondary sources used in this thesis are online scholarly posts and civil society research reports. These documents were contributed by scholars and civil organizations with internationally recognized reputation. In addition, I collected the data in an extended period and I followed updates on key websites, such as the sector of “Discover Big Issues-Binding treaty” on the website of Business and Human Rights Resources Centre (BHRRC)³⁹. All resources were carefully searched, summarized and analyzed for research findings for this thesis.

1.4.1.3 Legal Analysis

This thesis is on the most recent UN process towards a binding instrument on BHR. However, it does not take a pure legal reasoning on a BHR treaty. Instead it takes a legal approach with the awareness and recognition of other related perspectives. Therefore, this thesis draws perspectives from, among other important fields, political science and international relations when it is deemed necessary.

In chapter 3, given that most existing international standards on BHR are legally nonbinding, I examined both hard law and soft law sources in order to map out the international legal resources concerning BHR and to evaluate the sufficiency of law “on paper” and the adequacy of law “in practice”. In addition, I identified and analyzed the potential legal obstacles of formulating a BHR treaty. In chapter 4, legal analysis was conducted to address the general issues and draft the core provisions of a BHR treaty. The suggested design of the treaty was considerably based on primary resources of law such as treaties and international standards on BHR, taking into consideration the analyses in chapter 2 and chapter 3. This legal analysis was carried out as a response to the concerns brought forward concerning the legal formulation of a BHR treaty in chapter 3. It thus to some extent served as a tool to test the findings in chapter 3, particularly the political and legal achievability of a treaty on BHR. It should also be noted that this legal analysis is neither exclusive nor sufficient for elaborating a treaty, and it was conducted in order to facilitate further discussion of the legal formulation of a BHR treaty.

³⁹ BHRRC (2015).

1.4.2 Sources Evaluation

I will argue that sources used in this thesis are valid and reliable. On one hand, I collected data through both field work and desk research. On the other hand, I used multiple sources and I focused primarily on primary sources. In addition, by collecting and using multiple resources, I had the opportunity to crosscheck the validity of the sources.

When attending meetings and communicating with stakeholders, I always disclosed that I am a master's student writing a thesis on the topic of "An international legally binding instrument on business and human rights". I try my best to present my observations as clear as I can but I do respect all the ethical rules throughout my research. I do not cite the information from meetings and communications. The information and insights I received from the field work serve as a general background and a practical guidance throughout my research. All the evidential data I used in this thesis are public resources.

This thesis relies considerably on qualitative analysis based on the data from both empirical experience and desk research. I tried to keep myself neutral in the discussions of a potential BHR treaty and I kept an open attitude towards reflections by stakeholders. Nonetheless, I do not pretend that I approach the research topic as a "blank" researcher and I understand that my research may be biased to some extent. As far as I am concerned, there might be three main biases in this thesis. The first bias is personal predisposition. As an international human rights law learner, I tend to assume that international binding norms can make sense in a variety of approaches and thus would be helpful for further addressing BHR issues. The second bias is data collection bias. Due to limited time and resources, I conducted limited fieldwork. The third bias is language bias. As English is my second language, I had difficulties in understanding and analyzing some of the information. Still, within the limitations of a master thesis, I have tried my best to minimize these potential biases. I have kept an open mind to both arguments from proponents and opponents of the binding instrument proposal and I view the development of the proposal in different perspectives. I collected data through a variety of approaches and in an extended period. Further, I consulted experienced researchers as well as English native speakers when I had concerns about language issues. Therefore, I feel that my research has been satisfactorily secured by multiple perspectives, qualified data and meaningful consultations.

1.4.3 A Note of Terminology

Since this thesis contains a long text and some terminologies are used quite frequently in the discussion, it might be helpful to make a note of terminology before the main text. My clarification is based on the use of terminology in the international discussion of the binding proposal as well as in the context of this thesis.

As indicated by the title of this thesis, three terminologies are the most related to the discussion. The terminology “business enterprises” is taken from authoritative documents such as the GPs.⁴⁰ It has been replaced by some other expressions in this thesis. To illustrate, “business enterprises”, “businesses” and “companies” have all been referred to in the GPs.⁴¹ The use of “human rights” is a broad coverage of all internationally recognized human rights, particularly those recognized in the ICCPR and the ICESCR. The terminology “treaty” is referred to by a variety of documents commenting on the binding proposal, and it is a replacement for “international legally binding instrument”, which is employed by the HRC in its Resolution 26/9.⁴² In addition, “stakeholders” of a treaty on BHR in my thesis include three groups of people: political representatives, business representatives and civil society representatives.

Furthermore, while the abbreviations of “ICJ” and “ICC” have been frequently referred to as the International Court of Justice and the International Criminal Court, in the field of BHR as well as in the context of this thesis, “ICJ” is short for the International Commission of Jurists and “ICC” is short for the International Chamber of Commerce. The ICJ is an active NGO in the binding approach of the BHR area and the ICC is a global business organization.

⁴⁰ HRC (2011a).

⁴¹ Ibid.

⁴² HRC (2014a).

Chapter 2 Debate on a Binding Instrument on BHR

In this chapter, I will briefly present my observation of the ongoing international debate on the proposal for a BHR treaty, in particular during the time period of March 2014 – March 2015. I will address my research question “What is the state of play in the ongoing debate of a binding instrument on BHR”. I will concentrate on two concerns. The first is main efforts by key political sponsors of the treaty proposal. The second is critical venues and participants of the debate. This chapter will serve as a brief record of the ongoing debate, and it will provide resources for analysis in the next chapters.

2.1 Ecuador Initiative

Ecuador’s efforts on advocating binding international standards on the activities of TNCs can be dated to its statement at the 17th session of the HRC, which noted the conviction that the UN should continue to work on the issue of establishing binding international standards on the activities of TNCs. Ecuador’s statement underlined that “The Guiding Principles are not and do not aspire to be binding standards; they are just a guide, a starting point, as Mr. Ruggie defines them, and thus are not mandatory”.⁴³ It was concluded in the statement that “We must continue to seek binding international standards”.⁴⁴

Among others, the Ecuador Initiative⁴⁵ on a binding instrument for TNCs is based on the following four background elements. First, continuous efforts have been made to address BHR issues by the UN. Second, the possibility of future international instruments was confirmed by the HRC through its resolutions on BHR in producing the GPs. For instance, in the Preambles of Resolution A/HRC/RES/8/7 in 2008 as well as Resolution A/HRC/RES/17/4 in 2011, it is stated that “Efforts to bridge governance gaps at the national, regional and international levels are necessary”.⁴⁶ Third, victims by environmental damage caused by Chevron oil operations in Ecuador

⁴³ Ecuador (2011).

⁴⁴ Ibid.

⁴⁵ The wordings, such as “Ecuador Initiative” and “Treaty Initiative”, have been referred to by stakeholders and scholars when discussing the binding proposal by Ecuador and other states. See, for example, ICC (2014b), IOE (2014b) and Ruggie (2015). The use of “Ecuador Initiative” in this section aims to highlight the efforts made by Ecuador and other states for the binding proposal.

⁴⁶ HRC (2008) and HRC (2011b).

have not been granted sufficient access to remedy after decades of lawsuits and appeals; furthermore, the Ecuadorean government failed to hold Chevron accountable regarding their damage of the environment and the abuses of human rights in Ecuador. Fourth, civil society mobilization has long called for the legal accountability of human rights abuses by businesses, especially TNCs. For instance, the ICJ, together with other leading human rights NGOs, has called for the negotiation of global standards by states since 2007.⁴⁷

The proposal of a binding instrument on BHR was previously led by Ecuador, then co-sponsored by South Africa, and further supported by an increasing number of states and civil society groups as well as individual experts. Since 2013, Ecuador, together with some other states, has been making specific efforts on the binding instrument proposal.

Key events led by Ecuador can be summarized as follows:

Time	Organizer	Theme
September 2013	Ecuador	Joint statement in the 24 th HRC Session ⁴⁸
March 2014	Ecuador, South Africa	Two-day workshop in the 25 th HRC Session ⁴⁹
June 2014	Ecuador, South Africa	Co-sponsored Resolution in the 26 th HRC Session ⁵⁰
December 2014	Ecuador	Side-event on the treaty process in the 3 rd UN Forum ⁵¹
March 2015	Ecuador	Side-event on the treaty process in the 28 th HRC Session ⁵²

Throughout these meetings, the discussion on the binding proposal in the two-day workshop and the debate during the voting process of the co-sponsored HRC resolution were significantly contentious.

⁴⁷ ICJ (2014) p. 6.

⁴⁸ Ecuador delivered a joint statement on behalf of more than 85 countries, most notably the African Group, the Arab Group, Pakistan, Sri Lanka, Kyrgyzstan, Cuba, Nicaragua, Bolivia, Venezuela and Peru. Ecuador (2013).

⁴⁹ The workshop on “Human Rights and Transnational Corporations: Paving the Way for a Legally Binding Instrument”. See a report provided by the South Centre: South Centre (2014).

⁵⁰ This resolution was adopted by the HRC as A/HRC/RES/26/9. See HRC (2014a).

⁵¹ Side-event on “Resolution A/HRC/26/9, A Step forward towards the Elaboration of an International Legally Binding Instrument. See OHCHR (2014a).

⁵² Side-event on “Transnational Corporations, Human Rights and Environment”. Ecuador (2015).

In the 25th HRC session in March 2014, Ecuador and South Africa co-organized a two-day workshop on “Human Rights and Transnational Corporations: Paving the Way for a Legally Binding Instrument”. The eleven key speakers, consisting of representatives from academia, the UN human rights system, civil society organizations as well as business organizations, highlighted the following issues: the importance of the further implementation of the GPs; the gaps in international legal framework related to corporate legal accountability of human rights abuses, especially negative impacts by TNCs; and the significance of building on lessons learned from the history of addressing BHR issues.⁵³ Significantly, controversial issues such as business obligation under international law, proposed scope of a binding instrument on BHR and extraterritorial obligation of states to protect human rights were tackled during the discussion. For example, according to a report of the workshop, the concern on extraterritorial obligations of states was highlighted by at least six of the eleven speakers during the two-day workshop.⁵⁴ During the discussion, there was an overall recognition of the importance of addressing extraterritorial obligations of states while underscoring the challenges involved in the discussion of jurisdiction. While Brent Wilton doubted the possibility of adopting an instrument on extraterritorial obligations of states, five of the six speakers showed support for the idea of extraterritorial obligations of states from different perspectives, including Martin Khor, John Knox, Surya Deva, Marcos Orellana and Cephias Lumina.⁵⁵ Further, the implications of pursuing a legally binding instrument on existing progresses as well as developing initiatives were highlighted. To illustrate, some participants held that the binding instrument proposal would strengthen the GPs and others argued that it would hinder the further implementation of the GPs.⁵⁶ Practical suggestions for the way forward, besides elaborating a binding instrument and further implementing the GPs, were made by speakers such as: 1) developing a Declaration on the Human Rights Obligations of Business as an intermediate step towards the adoption of a binding instrument at a later stage, 2) setting up a monitoring mechanism for systemic abuses of human rights, 3) appointing a special rapporteur to facilitate fact-finding on allegations of human rights abuses by business activities, and 4) establishing a multi-

⁵³ South Centre (2014).

⁵⁴ Ibid.

⁵⁵ Ibid.

⁵⁶ Ibid, p. 15.

stakeholder committee at the domestic level to investigate human rights complaints against business enterprises.⁵⁷

In the 26th HRC session in June 2014, Ecuador and South Africa, later joined by Bolivia, Cuba and Venezuela, tabled draft resolution A/HRC/26/L.22/Rev.1. The draft resolution suggested the establishment of an open-ended Inter-governmental Working Group (IGWG) 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”.⁵⁸ It has been pointed out by a footnote in the draft resolution that the term “other business enterprises” denotes “all 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”.⁵⁹ When introducing the draft resolution to the HRC, Ecuador took a victim-oriented view and case-based approach, stressing the imbalance of individuals and TNCs in international law and impunity of mass case examples on the ground. For instance, Ecuador stated that “Transnational corporations enjoy protection by binding international norms ... Victims, however, of harmful effects by corporate activities have no legal protection, and they only have voluntary norms to protect them”.⁶⁰ It was highlighted by Ecuador that “We want a legally binding instrument which protect victims against such painful cases, just to name a few, such as Bhopal in India and Chevron in Ecuador. Most of these victims are still waiting for fair compensation”.⁶¹ Nonetheless, some states, for instance, the United Kingdom (UK) and the US, expressed their negative position against the draft resolution. To illustrate, the US stressed “We are extremely disappointed with the decision by Ecuador and South Africa to table this resolution ... we request a vote on this text and will vote no”.⁶² At the end of voting process, the draft resolution was adopted by the HRC as A/HRC/RES/26/9 with a recorded vote of 20 votes in favor, 13 votes abstaining and 14 votes against. Among the votes from 47 member states of the HRC, supportive and abstaining votes

⁵⁷ Ibid.

⁵⁸ See HRC (2014a), para. 1.

⁵⁹ Ibid, footnote 1.

⁶⁰ UN HRC (2014) at 00:00:57-00:07:28. The original speech is in Spanish.

⁶¹ Ibid.

⁶² UN HRC (2014) at 00:10:52-00:14:25.

came mainly from developing countries in Africa, Latin America and Asia, while negative votes came largely from the EU member states and the US.⁶³

2.2 Does the World Need a Binding Instrument on BHR?

An outline of the continued debate on the treaty proposal in different venues has been summarized as follows:

Time	Organizer	Theme
May 2014	BHRRC and UND	Public debate on “Does the World Need a Treaty on Business and Human Rights - Weighing the Pros and Cons” ⁶⁴
June 2014	ICJ	Research report on “Needs and Options for a New International Instrument in the Field of Business and Human Rights” ⁶⁵
November 2014	IOE-FER	High-level Conference on Business and Human Rights ⁶⁶
December 2014	OHCHR	3 rd UN Annual Forum on Business and Human Rights ⁶⁷
June 2014- February 2015	IHRB	Commentaries on “Business and Human Rights Treaty” by international practitioners ⁶⁸
February 2015	James G. Stewart	Online Symposium on “Business and Human Rights – Next Steps” contributed by scholars ⁶⁹

2.2.1 Public Debate

Prior to the adoption of Resolution 26/9, some representatives from academia, law firms, civil society organizations and business sectors participated in a public debate on the necessity of a treaty on BHR on 14 May 2014. Chip Pitts (Stanford University) argued for the need of a treaty on BHR and he further stressed that “It must be the right treaty, after the right process, and at the

⁶³ HRC (2014a), p. 3.

⁶⁴ BHRRC-UND (2014).

⁶⁵ ICJ (2014).

⁶⁶ IOE (2014b) and IOE (2014c).

⁶⁷ OHCHR (2014a).

⁶⁸ IHRB (2015). Ten articles by 30 March 2015.

⁶⁹ Stewart (2015).

right time”.⁷⁰ Pitts supported the treaty proposal based on the following five arguments: 1) legal gap in international law and lack of corporate accountability in case practice, 2) imbalance between business and individuals, 3) potential values of a treaty on BHR, 4) necessity and possibility of the GPs, which is soft law, to move toward a treaty, which is hard law, 5) support from a significant number of states and hundreds of NGOs.⁷¹ Further, Pitts highlighted that “It would be wrong and fruitless to try to shut down discussion. But rushing to just any ‘treaty’ would be similarly irresponsible”.⁷² In the end, Pitts highlighted that any treaty and accompanying process must firstly not retreat from the GPs, secondly be evidence-based but not an ideological anti-corporate political effort, and thirdly employ a transparent and inclusive process.⁷³

Supporting Pitts’ position, Sheldon Leader (Essex University) illustrated further that the imbalance of victims and businesses should be corrected through a “comprehensive treaty” on BHR.⁷⁴ Leader held that, compared to the GPs, a treaty might be more helpful for remedy. Arguing against Ruggie’s concern about the achievability of a treaty on complicated BHR issues, Leader stressed that a treaty on BHR, operating in a general way similar to other human rights treaties, should be sufficiently comprehensive but not be too detailed.⁷⁵

Chris Esdaile (Leigh Day), though supporting the need for legal accountability for human rights abuses by businesses, argued against a treaty on BHR. The main concerns by Esdaile are, firstly, whether a treaty is the best way forward at the moment, and secondly, whether it is achievable in the form we need it to be. Esdaile touched upon skeptical positions of business as well as states in the debate, predicted about the negative implications of negotiating a treaty on BHR, and then he provided suggestions on the alternative ways forward. Esdaile stressed his concern of the political and legal achievability of a treaty on BHR. Esdaile pointed out that a treaty on BHR is politically not achievable with the influence businesses have on states. He further argued that a treaty on BHR would not be legally achievable because of its wide coverage of rights. As predicted by Esdaile, a treaty negotiation process, if started regardless of potential issues, would “Face the

⁷⁰ BHRRC-UND (2014) at 00:12:04-00:24:44.

⁷¹ Ibid.

⁷² Ibid.

⁷³ Ibid.

⁷⁴ BHRRC-UND (2014) at 00:24:51-00:30:33.

⁷⁵ Ibid.

very real possibility of ending up with a watered-down set of rules, a treaty with few ratifications, and in the process create much hostility to the prospect of binding rules on business and human rights”.⁷⁶ Regarding alternatives for the way forward, Esdaile argued that “the GPs are not the sole answer” and he recommends creatively harnessing the existing patchwork of rights and remedies in both domestic and international level so as to further addressing BHR issues.⁷⁷

Supporting Esdaile’s position against the treaty proposal, Nadia Bernaz (Notre Dame University) regarded the GPs as “a formidable tool to induce change”.⁷⁸ Bernaz focused on two reasons for her position. She suggested that the incredibly wide ground of BHR issues and the subsequent complexity of a treaty on BHR might lead to conflicts with existing international legal framework. She pointed out that there would be a dilemma between the efficacy and the achievability of a treaty on BHR regarding some controversial legal issues; such as the duty-bearers, scope and extraterritorial dimension. Subsequently, Bernaz proposed other alternatives rather than a treaty on BHR; for instance, elaborating an amendment to the Rome Statute to enable the International Criminal Court to exercise jurisdiction over corporations and maneuvering within the existing international human rights legal framework.⁷⁹ Finally, Bernaz highlighted that, instead of negotiating a treaty on BHR, there is a lot more that states could do to regulate both the domestic and international operations of companies, through the adoption of measures with extraterritorial implications John Ruggie mentioned in his commentary of the GPs.⁸⁰

Questions from the floor were raised around a set of issues: 1) states’ noncompliance of international treaties, 2) the possibility of turning to investment treaties, 3) further development of existing mechanisms such as International Criminal Court or domestic mechanisms, 4) the negative impact of negotiating a treaty on BHR on existing progress, 5) protection of privacy in the internet area by corporations and states, 6) home state and host state obligations, and 7) political consensus on a treaty on BHR.⁸¹

⁷⁶ BHRRC-UND (2014) at 00:30:37-00:40:28.

⁷⁷ Ibid.

⁷⁸ BHRRC-UND (2014) at 00:40:30-00:47:17. See also Bernaz (2014b).

⁷⁹ Ibid.

⁸⁰ Ibid.

⁸¹ BHRRC-UND (2014) at 00:53:09-01:25:48.

2.2.2 Research Report

The ICJ conducted consultations and research with a view in assessing and drawing conclusions on the need for a binding instrument on BHR. In a research report published in June 2014, the ICJ identified five outstanding issues and the need for standard-setting in the international legal framework on BHR: 1) accountability and access to justice, 2) the application of the duty to protect - adoption of national legal frameworks of protection, 3) legal framework for protection against gross/serious corporate human rights abuses, 4) state obligations to protect against human rights abuse by third parties and its extraterritorial dimensions, 5) international cooperation for investigation and enforcement.⁸² The report also noted that existing treaties have been offered over time as models for a new treaty on human rights and business, or as examples of negotiation processes to follow.⁸³ It has been highlighted by the report that “The final decision on whether a binding instrument is appropriate and/or feasible will depend in part on its potential contents”.⁸⁴ Among others, the report analyzed specifically the duty-bearers, scope, and extraterritorial dimension for a treaty on BHR.

In conclusion, the report perceived that the proposal for a legally binding instrument enjoys wide support from a diversity of stakeholders, especially from civil society, and it could be “An effective instrument to address the existing gaps in regulation and the related lapses in protection”.⁸⁵ The report included an annex pointing out an indicative list of some elements of a possible treaty. The list encompassed prevention, accountability, remedies, international monitoring and supervision, international judicial cooperation and mutual legal assistance as well as miscellaneous provisions.

2.2.3 Business and Human Rights Conference

On 19 November 2014, the IOE organized a one-day “High-level Conference on Business and Human Rights” in Geneva, bringing business representatives, employers’ organisations, OHCHR representatives and political representatives together to discuss the trends and challenges in the area of business and human rights. Representatives for the CSR departments of seven leading

⁸² Ibid, pp. 15-53.

⁸³ Ibid, p. 39.

⁸⁴ Ibid, p. 35.

⁸⁵ Ibid, p. 46.

companies⁸⁶ participated in the following five panel discussions: 1) Status and trends of the integration of respect for human rights in business; 2) What governments have delivered so far on their duty to protect? 3) Challenges and success stories in integrating respect for human rights in business; 4) Improving access to remedy: what needs to be done? 5) New instruments, tools and standards – are they really needed?⁸⁷ The IOE Secretary-General Brent Wilton spoke at the beginning of the conference, highlighting that the purpose of the conference was “Not to talk policies or politics”, but “To provide a platform to share experiences, knowledge and information”.⁸⁸ In the fifth panel, emerging instruments, including the treaty proposal, were discussed. Questions were raised over the effectiveness of any treaty on BHR as well as the relationship between the treaty process and the implementation of the GPs.⁸⁹

2.2.4 3rd UN Annual Forum

In the 3rd Forum, at least four side-events could be identified in relation to a potential binding approach in the area of BHR. These four meetings are: 1) An international arbitration tribunal on business and human rights, organized by Lawyers for Better Business, 2) Resolution A/HRC/26/9, a step forward towards the Elaboration of an International Legally Binding Instrument, organized by Ecuador, 3) Does the world need a human rights based convention on healthy diets? Exploring the role of food corporations towards the rights to adequate food and health, organized by the Norwegian Centre for Human Rights, and 4) The treaty process – implications for business, organized by the IOE.⁹⁰

2.2.5 Online Commentaries

The Institute for Human Rights and Business (IHRB) has featured a series of personal perspectives from invited guests on the treaty proposal. By March 2015, there have already been 10 articles from international practitioners who are working in civil society organizations.⁹¹ Seven articles are from the IHRB Team and three articles are from invited external guests.

⁸⁶ These seven companies are: ABB, Telefónica, IBM, Repsol, The Coca-Cola Company, DHL and Royal Dutch Shell. See IOE (2014b).

⁸⁷ IOE (2014b).

⁸⁸ IOE (2014c).

⁸⁹ Ibid.

⁹⁰ OHCHR (2014a).

⁹¹ IHRB (2015).

From varying perspectives, the seven articles offered general support for the GPs and deep commitment to further address BHR issues; yet they noted the obstacles for elaborating a binding instrument on BHR. For example, the potential negative impacts by treaty negotiation on further implementing the GPs, and the overarching scope as well as unclear objectives of the proposed treaty. The other three articles, which came from Peter Frankental (Programme Director, Amnesty International UK), Josua Loots (Project Manager, University of Pretoria) and Amol Mehra (Director, International Corporate Accountability Roundtable), expressed an inclusive attitude for developing both binding and non-binding instruments to address BHR issues via a more coordinated and harmonized way towards greater protection of human rights.

2.2.6 Online Symposium

The symposium, “Business and Human Rights – Next Steps”, organized by James G. Stewart and with contributions from some key scholars around the world on BHR issues, is a collection of commentaries in reaction to John Ruggie’s closing plenary remarks to the 3rd UN Forum.⁹² The symposium started off with Ruggie’s remarks, then were commented on by a set of leading commentators from different disciplinary backgrounds and with varied political aspirations. The Symposium was finally concluded with Ruggie’s response to these commentators.

The major theme at the symposium concerned the scope of a BHR treaty. Further, controversial issues such as duty-bearers, extraterritorial dimension as well as enforcement of the proposed binding instrument were also touched upon. The commentaries reflected a variety of positions regarding proposals, such as the further implementation of the GPs, a binding instrument focusing on “gross abuses” of human rights and a binding instrument with a broad coverage of scope. John Ruggie, Erika George and Fr   ric M   ret stressed the importance of the further implementation of the GPs and thus are generally against the idea of elaborating a binding instrument. Ruggie’s proposal for a binding instrument focusing on “gross abuses” of human rights, though endorsed by Martinez, was contested by Surya Deva, John Tasioulas and James G. Stewart.

⁹² Stewart (2015).

More specific opinions can be summarized as follows:

Commentator	Opinions	Major concerns
John Ruggie	We shall redouble efforts to further implement the GPs. A treaty, if deemed necessary, should focus on gross abuses.	scope
Surya Deva	Any proposed international instrument should protect all internationally recognized human rights against abuses by all types of business enterprises.	scope
Erika George	The movement stands to advance human rights protection farther faster by insisting on more aggressive implementation of the GPs.	scope and enforcement
John Tasioulas	The “anti-legalism” of the GPs is problematic. Ruggie’s proposal on focusing on “gross human rights abuses” is limited.	scope
James G. Stewart	There are a series of countervailing dangers involved in codifying a new instrument on corporate responsibility for “gross” abuses of human rights.	scope
Jenny S. Martinez	A good start would be a treaty focused on the worst types of abuses.	scope and enforcement
Frédéric Mégret	A comprehensive treaty is problematic.	scope, enforcement and duty-bearers
John Ruggie	Any binding instrument shall build on what has already been achieved, not undermine it; and the effort shall be meaningful and actionable.	scope, extraterritorial dimension and enforcement

2.3 Conclusion

It can be concluded that a variety of stakeholders have been involved in the ongoing international debate about a binding instrument on BHR while an increasing amount of research interest has been undertaken by civil organizations and scholars. The observation shows that continued efforts have been made by the key sponsors of the treaty proposal, particularly Ecuador and South Africa. Meanwhile, the track of ongoing debate indicates that the discussions on a BHR treaty have been conducted in a variety of forms with the participation of multi-stakeholders. The forms encompass public debate, research activities, BHR conferences and online commentaries. The stakeholders in these dialogues include, but were not limited to, political representatives, business representatives and civil society representatives. It has been remarkably highlighted by the discussions that, despite having been put into the political agenda, the treaty proposal remains con-

troversial. Evidential indications can be found from the following perspectives. In political community the positions on a BHR treaty seem divided. In business community, the treaty proposal has been noticed by some business enterprises and business organizations. In the civil society, research activities were conducted and BHR dialogues were facilitated. In academia, while analytical articles have increasingly published, scholarly opinions appear diverse as well as fragmented.

Further, it can be noted that, while the debate has focused primarily on the necessity of a binding instrument on business and human rights, emerging issues can also be identified. As for the necessity of a BHR treaty, proponents have argued for the need of a binding instrument on BHR to fill the gap in international legal framework from time to time, however, opponents have raised the doubts of the political and legal achievability as well as potential implications of a binding instrument on BHR. Indeed, these concerns have been among the core issues argued by some key commentators, most prominently in the public debate in May 2014 and in the articles by John Ruggie and Surya Deva. In addition, new issues are emerging. One is the substantive content of a BHR treaty, concerning elements such as scope, duty-bearer as well as extraterritoriality. An additional one is the parallel efforts of negotiating a treaty on BHR, significantly concerning the further implementation of the GPs.

Chapter 3 Necessity of a Binding Instrument on BHR

As shown by the record of the multi-stakeholder discussions, despite Resolution 26/9, the elaboration of a binding instrument on BHR is still a controversial proposal. A comprehensive examination on the necessity of a BHR treaty is imperative for any further discussion on this topic as well as for further development of the binding approach on the BHR agenda. Therefore, I will conduct an evaluation of the necessity of a BHR treaty based on the empirical impression in the field and the evidential data through desk research.

In this chapter, I will address my main research concern “Is it necessary to elaborate a binding instrument on BHR”. I will follow four steps and then draw the conclusion:

- 1) Examine the legal need for a treaty on BHR in international legal framework.
- 2) Evaluate the political achievability of a BHR treaty.
- 3) Analyze the legal achievability of a BHR treaty.
- 4) Explore the potential implications of a binding instrument on BHR.

My evaluation of the necessity will be comprehensive from different angles. Firstly, I will focus on the above four significant issues of international legalization in the field of BHR. These issues are logical dimensions which should be considered before elaborating a BHR treaty, and they are key issues concerning stakeholders and international professionals. Secondly, I will analyze arguments by both proponents and opponents of the binding approach, taking into consideration the reflections by different types of stakeholders. Thirdly, I will make qualitative judgements through multiple methods.

3.1 Legal Need of a Binding Instrument on BHR in International Legal Framework

There will be no need for a new binding instrument on BHR, if 1) binding instruments already exist in international legal framework and function well to address BHR issues, or if 2) there are substitutive nonbinding instruments which can sufficiently address BHR concerns. Therefore, in this section, I will examine the most related existing international instruments on BHR to see whether there is any governance gap, then I will conduct research on international law implemen-

tation to evaluate whether existing international instruments have been implemented to sufficiently address BHR issues in practice. As a preliminary conclusion, I will comment to what extent a binding instrument on BHR is needed in international legal framework.

3.1.1 Existing International Legal Framework on BHR

As introduced in chapter 1, international law has not yet imposed human rights obligations directly on business enterprises; whereas it does indicate that states have the obligation to protect human rights against abuses by third parties, which includes business enterprises. Past attempts by the UN on binding instruments on BHR have not been successful. However, the UN has been continuously making efforts to improve the recognition of human rights by businesses. For instance, developing the state obligation to protect and issuing international standards on BHR. In this sub-section, I will conduct research on both international legally binding norms and international legally nonbinding standards to get an overview of the existing international legal framework on BHR.

3.1.1.1 International Legally Binding Norms on BHR

Very few legal resources can be found on direct obligation of business enterprises with respect to human rights under international law, excepting in a few possible situations such as human rights abuses amounting to international crimes and business obligations as non-state entities under international humanitarian law. Treaties, conventions and agreements are primary and persuasive sources of international law.⁹³ There are currently no specific provisions in international treaties on the obligation of businesses with respect to human rights. It seems to some extent possible to find legal support to address businesses involvement in extremely serious human rights abuses. For instance, under international criminal law, Article 25(2) of the Rome Statute of the International Criminal Court states that “A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute.” It is possible that a chief person of a company could be held responsible if the company commits human rights abuses amounting to crimes such as the crime of genocide and crimes against humanity. Another possible example might be found in international humanitarian law, where states

⁹³ International conventions are the first and primary sources for the International Court of Justice to decide disputes which are submitted to it. See Statute of the International Court of Justice Art 38 (1).

are not the only duty-bearers of the treaties. Common Article 3 to the four Geneva Conventions of 1949 contains the minimum protection obligations and it applies to “each Party to the conflict”, which includes non-state actors. Nonetheless, states are primary duty-bearers in international treaties.⁹⁴ The legal status of business enterprises as duty-bearers remains uncertain under international law, though it is increasingly controversial in academic discussions.⁹⁵

Under human rights treaties, states shoulder the obligation to protect human rights abuses against third parties, including businesses. States are required by human rights treaties to respect, protect and fulfil human rights. Human rights treaty provisions have firmly supported state obligation to protect individuals and groups against abuses, which applies to the field of BHR. For instance, Article 2 of the ICCPR has been regarded as one of the significant signs that states are required to protect human rights against abuses by business enterprises. It reads as Article 2 3. (a) that states undertake “To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity”. Guaranteed by this provision, victims of human rights abuses by states or third parties are entitled to an effective remedy before a national authority. To fulfill their commitment to human rights treaties, states shall ensure that besides themselves, third parties including business enterprises, refrain from abuses of human rights. Further, when abuses do occur, states shall, as the subsequent text of Article 2 reads, ensure the access to remedy for the victims via competent judicial, administrative or legislative approaches as well as enforcement of the granted remedies.

However, while state obligation to protect human rights has been firmly supported by core human rights treaties, it has not been clarified to what extent states shall protect human rights against abuses by businesses. A further process of clarification and elucidation is needed in order to shed light on state obligation in the field of BHR; in particular, the content, scope and practical implications of the relevant treaty provisions. The ICCPR and the ICESCR have both indicated their limitations and the need for clarification. To illustrate, as for the ICCPR, it should be noted that its Article 2 refers to “all individuals within its territory and subject to its jurisdiction”. The word-

⁹⁴ International Law (2014) p. 33.

⁹⁵ For example, Clapham (2006) and Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect? (2013).

ing “territory” limits the scope of application for state obligation to protect.⁹⁶ In the context of global operation of businesses, this could be regarded as an obstacle for extraterritorial protection of human rights. In the case of ICESCR, it should be complimented that its Article 2, which refers to the obligation on “international assistance and co-operation”, implies that states have the obligation to cooperate internationally in protection and promotion of human rights.⁹⁷ This type of provisions could help address human rights abuses in the context of global operations. Nonetheless, it should be noted that there is no specific provisions on remedies in the ICESCR.

The globalization of business operations has contributed to the further realization of human rights, such as economic, social and cultural rights. However, adverse impacts by business enterprises on the enjoyment of human rights have been observed more frequently; for example, unsafe working conditions, child labor, negative impacts on the environment and damage of health. In the context of ambiguity in human rights treaties and the increasing disclosure of alleged abuses by business activities, human rights treaty bodies have started to make efforts to further interpret human rights treaty provisions with regard to protecting human rights from abuses by businesses. Efforts by human rights treaty bodies to address BHR issues can be found in the form of Statements, General Comments as well as Concluding Observations. The most recent developments made by treaty bodies have shown a trend of further require states to protect human rights against abuses by business enterprises, both territorially and extra-territorially. Examples can be draw from the Statement by the Committee on Economic, Social and Cultural Rights (CESCR) in 2011 and the General Comment 16 by the Committee on the Rights of the Child (CRC) in 2013.

⁹⁶ The interpretation by the Human Rights Committee in the Uruguay case tried to overcome this deficiency. The Committee held that article 2 of the ICCPR “Does not imply that the State party concerned cannot be held accountable for violations of rights under the Covenant which its agents commit upon the territory of another State, whether with the acquiescence of the Government of that State or in opposition to it”. It was further stated that “It would be unconscionable to so interpret the responsibility under article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory”. CCPR (1981).

⁹⁷ The duty of states to cooperate internationally in the protection and promotion of human rights, has been clearly recognized by states in international law. Langford (2012) p. 112.

CESCR: The Statement on the Obligations of States Parties Regarding the Corporate Sector and Economic, Social and Cultural Rights

In the Statement⁹⁸, the Committee reiterates “the obligation of states to ensure that all economic, social and cultural rights laid down in the ICESCR are fully respected and rights holders are adequately protected in the context of corporate activities”.⁹⁹ The Committee illustrated that, derived from Article 2 (1) of the ICESCR, states have a primary obligation to respect, protect and fulfil the Covenant rights of all persons under their jurisdiction in the context of corporate activities undertaken by State-owned or private enterprises.¹⁰⁰ The Committee further clarified specific measures which states shall take to fulfill their obligations under the ICESCR, one of which is to regulate business enterprises with respect to human rights through legislations and policies. Particularly, the Committee stressed that, as part of state obligation to protect human rights, “states parties should also take steps to prevent human rights contraventions abroad by corporations which have their main offices under their jurisdiction, without infringing the sovereignty or diminishing the obligations of the host States under the Covenant”.¹⁰¹

CRC: The General Comment 16 on State Obligations Regarding the Impact of the Business Sector on Children’s Rights

The General Comment (GC) 16¹⁰² takes a similar approach to the Statement by ICESCR to strengthen state obligation under the Convention on the Rights of the Child and its Optional Protocols (OPs) to ensure that business enterprises respect human rights. More specifically, the GC recognizes that “Duties and responsibilities to respect the rights of children extend in practice beyond the State and State-controlled services and institutions and apply to private actors and business enterprises”.¹⁰³ Therefore, all businesses “must meet their responsibilities regarding children’s rights” and states “must ensure they do so”.¹⁰⁴ The GC established four general princi-

⁹⁸ CESCR (2011).

⁹⁹ Ibid, para. 1.

¹⁰⁰ Ibid, para. 2.

¹⁰¹ Ibid, para. 5.

¹⁰² CRC (2013).

¹⁰³ Ibid, p. 2.

¹⁰⁴ Ibid.

ples within the Convention as the basis for state action regarding business activities.¹⁰⁵ First it defines the general nature and scope of state obligations concerning children's rights and the business sector. Next it examines state obligations in specific contexts, and finally it concludes by outlining a framework for implementation and dissemination.¹⁰⁶

The GC addresses four key issues. These issues include: the scope of corporate objects of regulation, the framework for implementing the Convention, the extraterritorial dimension of state obligation and states' obligation in international organizations. In the GC, the business sector is defined very broadly. It includes all business enterprises, both national and transnational, regardless of their size, sector, location, ownership and structure.¹⁰⁷ Taking note of the broad range of children's rights that can be affected by business activities, the GC seeks to provide states with a framework for implementing the Convention as a whole with regard to the business sector; instead of examining in detail every pertinent article of the Convention and its protocols.¹⁰⁸ Illustrating extraterritorial obligations of states under the Convention as well as its OPs, the GC held that "Host states have the primary responsibility to respect, protect and fulfil children's rights in their jurisdiction" and that home states also have obligations to respect, protect and fulfil children's rights "in the context of businesses' extraterritorial activities and operations, provided that there is a reasonable link between the State and the conduct concerned".¹⁰⁹ The GC calls upon all states to cooperate directly in the realization of the rights of the Convention "through international cooperation and through their membership in international organizations".¹¹⁰

The ICESCR has 164 parties and the Convention on the Rights of the Child has 193 parties by April 2015. The former one is part of the International Bill of Human Rights, and the later one is almost universally ratified or acceded to. These two binding instruments encompass a very wide range of human rights; including economic, social and cultural rights as well as civil and political rights. It has been shown that these two significant human rights treaties have started to make

¹⁰⁵ CRC (2013). The four general principles are: the right to nondiscrimination (GC 16 paras 13-14), the best interests of the child (GC 16 paras 15-17); the right to life, survival and development (GC 16 paras 18-20) and the right of the child to be heard (GC 16 paras 21-23).

¹⁰⁶ Ibid, p. 3.

¹⁰⁷ Ibid, p. 2.

¹⁰⁸ Ibid, p. 2.

¹⁰⁹ Ibid, p. 6.

¹¹⁰ Ibid, p. 7.

specific efforts on BHR area, which is very promising for addressing negative human rights impacts by businesses. Further, there is also an emerging trend in the Human Rights Committee (CCPR) to pay more attention to BHR issues. The interpretation by the CCPR indicates that the scope of state obligation to protect human rights against abuses by businesses is not limited to “territory” but extended to “jurisdiction”, which means that a state is expected to be responsible for both territorial and extra-territorial activities of businesses domiciled in its territory. For example, in its Concluding Observations for Germany issued in November 2012, the Committee encouraged the state party not only to set out clear expectation on all business enterprises domiciled in its territory but also “to take appropriate measures to strengthen the remedies provided to protect people who have been victims of activities of such business enterprises operating abroad”.¹¹¹ Most recently, in its List of Issues for Ireland in October 2014, the Committee required the state party to “provide information on how the Government addresses concerns regarding the activities of private businesses based in the State party that may lead to violations of the Covenant outside the territory of the State party”.¹¹²

3.1.1.2 International legally nonbinding standards on BHR

Despite vague terms in international human rights treaties, international standards on BHR, though legally nonbinding, have confirmed that states have the obligation to protect human rights abuses by businesses, and that business enterprises have the responsibility to respect human rights. The Universal Declaration of Human Rights (UDHR) in 1948, the UN Global Compact in 2000 and the UN GPs in 2011 are among the most influential documents on international standards of BHR.

It is stated in the preamble of the UDHR that “Every individual and every organ of society... shall strive by teaching and education to promote respect for these rights and freedoms and ... to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction”.¹¹³ The UDHR has placed human rights responsibilities on individuals as well as on every organ of society, which presumably includes states and other third parties, such as business enterprises. The

¹¹¹ CCPR (2012), para. 16.

¹¹² CCPR (2013), para. 5.

¹¹³ UDHR Preamble.

Global Compact is a voluntary initiative through which business enterprises agree to implement the ten compact principles in their business operations. The Global Compact asks companies to embrace, support and enact, within their sphere of influence, a set of core values in the areas of human rights, labour standards, the environment and anti-corruption. It is notable that the Global Compact is a purely voluntary initiative without any monitoring or enforcement efforts, and it expects that its openness and transparency will encourage good practices by participants.

The GPs are grounded in states' existing obligations to respect, protect and fulfil human rights and fundamental freedoms.¹¹⁴ The GPs claimed that they “Apply to all states and to all business enterprises, both transnational and others, regardless of their size, sector, location, ownership and structure”.¹¹⁵ The GPs require that states “Must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises”, and “Should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations”.¹¹⁶ The GPs require that business ventures “should respect human rights”, which includes avoiding infringing on the human rights of others and addressing adverse human rights impacts with which they are involved.¹¹⁷ Concerning access to remedy, the GPs require that states “Must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction, those affected have access to effective remedy”. Furthermore, it requires that corporations “Should establish or participate in effective operational-level grievance mechanisms for individuals and communities who may be adversely impacted”.¹¹⁸

3.1.2 International Law Implementation on BHR issues

It can be concluded from the research on existing international legal framework that there are currently no international legally binding instruments specifically addressing BHR issues. The state obligation to protect human rights against abuses by businesses is implied in core human rights treaties. The further interpretation of this obligation has been declared a priority by human

¹¹⁴ HRC (2011a), General Principles at p. 6.

¹¹⁵ Ibid, General Principles at p. 6.

¹¹⁶ Ibid, Principle 1 at p. 6 and Principle 2 at p. 7.

¹¹⁷ Ibid, Principle 11 at p. 13.

¹¹⁸ Ibid, Principle 25 at p. 22.

rights treaty bodies. Further, international standards on BHR, though legally nonbinding, are set up to promote the recognition of human rights by businesses, with the requirement for both states and businesses.

Still, the legal status of documents by human rights treaty bodies has always been controversial.¹¹⁹ These documents can be binding to states if the treaty parties have consensuses to do so; thus the recent developments on BHR by human rights treaty bodies can be seen as emerging binding norms on BHR. The interpretation might have limited influence because of its specific scope such as on children's rights as well as its quasi-legal status as an outcome of human rights treaty bodies. Further influence of the interpretation regarding state obligation on BHR issues remains to be seen in the coming years. Meanwhile, the above-mentioned international standards relating to BHR, particularly the UDHR and the Global Compact, are not supported by enforcement mechanisms.

In this sub-section, I will concentrate on two instruments in order to evaluate to what extent international law resources on BHR have been implemented at the national level. The first one is the "state obligation to protect human rights", which is a binding norm for states guaranteed by core human rights treaties. The second one is the "Protect, Respect and Remedy" Framework, which is the first authoritative guidance issued by the HRC for states and businesses on BHR issues.

3.1.2.1 Implementation of International Legal Framework on BHR

State Obligation to Protect: Adoption of a National Legal Framework to Protect Human Rights against Abuses by Business Enterprises

Among other initiatives, a key element for the protection of rights is to establish a national legal framework. Regarding BHR issues, this means that national legislation should provide legal accountability for business enterprises with regard to abuses of human rights. The legal ambiguity of state obligation to protect in human rights treaties has resulted in the legal uncertainty of state obligation to protect human rights against abuses by businesses. Even if some of the human rights treaty bodies have started to further clarify through which approaches, within which scope and to

¹¹⁹ See Wheatley (2013) p. 84.

what extent states shall protect human rights via regulating business enterprises, very few states have fulfilled their obligation to protect in this domain.

According to the research by the ICJ based on 26 jurisdictions in all continents, legislation and practices that protect rights against abuses from business enterprises are generally insufficient and widely diverse.¹²⁰ As the ICJ stressed, the protection is insufficient mostly due to the absence of legal liability on BHR issues in national legal frameworks and the lack of implementation of existing frameworks. For example, very few states have provided legal liability for corporations regarding abuses of human rights in a broad national legal framework. Moreover, only a limited number of states, such as Australia, the US and South Africa, have declared legal liability for business enterprises on some gross human rights abuses. Further, a diversity of approaches and practices have been reflected in the following dimensions: 1) States implement their general obligations to protect human rights against abuses by third parties in different approaches; including legislative, administrative and other approaches; 2) In the legislation approach, states have different practices to establish direct legal liability on business enterprises and on corporate directors. 3) Regarding the legal liability of business enterprises, states have different practices in establishing criminal liability and civil liability for human rights abuses by corporations.

The generally insufficient and widely diverse national legal frameworks on BHR have not only resulted in the inadequate territorial protection of human rights, but also have negatively impacted the efficacy of extraterritorial protection; for instance, when a company headquarters in one country but then conducts human rights abuses in another country during its global operations.

“Protect, Respect and Remedy” Framework: Implementation of the GPs

Along with the endorsement of the GPs in 2011, the HRC established a Working Group on Business and Human Rights as well as an annual Forum on Business and Human Rights to facilitate the implementation of the GPs.¹²¹ In addition to the resolution on the binding instrument proposal, the HRC decided to extend the mandate of the Working Group for a period of three years in 2014.¹²² A comprehensive evaluation of the global progress in the implementation of the GPs has not been carried out. Though some evidences concerning the implementation of the GPs can be

¹²⁰ ICJ (2014) p. 20.

¹²¹ HRC (2011b).

¹²² HRC (2014b).

found in the annual reports by the Working Group to the HRC as well as in the key activities conducted by the Working Group in facilitating the implementation of the GPs.

In its first annual report to the HRC in April 2012, the Working Group mentioned that the GPs were endorsed and implemented by several international organizations, including the Organization for Economic Cooperation and Development and the Global Compact; as well as several states, including: the Netherlands, Colombia and the United Kingdom.¹²³ However, it has also been noted by the Working Group that, despite its efforts to disseminate the GPs, “A majority of state, business and civil society actors are unaware of the Guiding Principles, precluding even the possibility of implementation”.¹²⁴

Among other initiatives, the National Action Plan (NAP) on BHR is a prominent activity conducted by the Working Group according to its mandate. The Working Group decided to make NAPs a key strategic priority in February 2014.¹²⁵ In its most recent annual report to the HRC in May 2014, the Working Group further stressed the NAP as its primary objective in the coming years.¹²⁶ As illustrated by the Working Group, a NAP can provide greater coordination and coherence within government departments. Meanwhile, it can also serve as a process of the continuous monitoring of implementation and a platform for multi-stakeholder dialogues. In spite of this, according to the information from the OHCHR Website, as of May 2015, only seven states¹²⁷ have launched their NAPs on BHR, all of which are EU member states; and 27 states might have the potential to develop their NAPs in the coming years.

There has been an increasing awareness and implementation of the GPs at the international level. For example, giant TNCs such as Nestlé and Telefónica, have been invited to international BHR dialogues to share their best practice and key challenges in integrating human rights into their business agenda. However, there has been a differentiation in the dissemination and implementation of the GPs at the domestic level. A specific example can be drawn from China. As a key emerging market, it contains many giant state-owned companies and numerous private companies, and it has become both home and host state of many powerful TNCs. A most recent study

¹²³ HRC (2012), pp. 7-8.

¹²⁴ Ibid, p. 10.

¹²⁵ HRC (2014d), para. 5.

¹²⁶ HRC (2014c).

¹²⁷ These seven states are: the UK, The Netherlands, Italy, Denmark, Spain, Finland and Lithuania,

on China has shown that the subject of BHR is currently limited and only includes issues such as non-discrimination, child labour and forced labour.¹²⁸ As reflected by the study, a common view among respondents to an online survey is that most Chinese companies do not see how broader consideration of human rights is relevant to their business.¹²⁹ The dissemination of the GPs in China at the domestic level is very limited, and the vast majority of businesses in China are not aware of the BHR agenda or the GPs. China has not yet provided a systematic promotion plan for the GPs, and according to my empirical research during the 3rd Forum as well as desk research later on, it can hardly be expected when China will consider a NAP or a similar promotion plan for the GPs.

3.1.2.2 Case practice on BHR issues

In the absence of a court on human rights at the international level, the judicial protection of human rights abuses against business enterprises is mostly reflected by national court decisions. However, it seems that complaints presented to national courts as civil suits or criminal charges, have had very few successes compared to the increasing disclosure of large scale human rights abuses caused by business operations.

Firstly, the inadequacy of existing international legal framework and the insufficiency of national legal guidelines on BHR has resulted in a lack of legal foundation for victims to seek justice and remedy via court jurisdictions; further, nonbinding standards on BHR can hardly support victims as legal tools for litigations and they can rarely be cited by judges in international or domestic courts for BHR related cases.

Secondly, the alleged victims of human rights abuses by TNCs, such as in India, Nigeria and Ecuador, have long been struggling for access to justice and remedy. A specific example can be drawn from lawsuits against Chevron, formerly Texaco, which has been sued over massive alleged contamination of the Ecuadorian Amazon since the 1960s. Among other cases, two prominent ones are related to the alleged massive environmental damage caused by Texaco's oil operations beginning in 1964: one by Ecuadorian citizens in 1993 and the other by Peruvian citizens in

¹²⁸ Embassy of Sweden in Beijing and CSR Asia (2015).

¹²⁹ Ibid, p. 26.

1994 against Texaco under the US Alien Tort Statute (ATS)¹³⁰. Both of these lawsuits were dismissed by the US federal court in 2002.¹³¹ Following the dismissal of the US litigations, the plaintiffs re-filed their case against Chevron in Ecuador in 2003, and they were granted a judgment in 2011 which ordered Chevron to pay \$18 billion to remediate the environmental damage.¹³² However, Chevron has been refusing the ruling and blocking any enforcement of the judgment. In the recent ten years, Chevron sued against the plaintiffs' lawyers and representatives with alleged fraud via the US courts and put forth claims against the government of Ecuador for alleged violation of the international bilateral investment treaties via the Permanent Court of Arbitration at The Hague. In October 2014, Ecuadorian rainforest communities filed a communication at the International Criminal Court in respect of the Chevron chief executive's acts to prevent the ordered clean-up of toxic waste in the Amazon. After decades of efforts at the domestic and international level, Ecuadorian victims of environmental damage by business operations have not been granted access to remedy nor have the alleged abusers of human rights been held accountable.

Thirdly, recent court decisions from pioneer states in addressing BHR issues have seen significant setbacks in their attempts to hold businesses legally accountable. For example, The US ATS of 1789 grants jurisdiction to US federal courts over "Any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States". However, in April 2013 in the case of *Kiobel v. Royal Dutch Petroleum Co.*, the Supreme Court of the US held that the ATS could not be used for the adjudication of cases where the underlying conduct occurred abroad and did not have sufficient connection to the US jurisdiction so as to displace the application of a "presumption against the extraterritorial application" of laws.¹³³ The court held that conduct which occurred in the territory of other states was not actionable under the ATS. The subsequent jurisprudence of lower courts in the US has shown that the decision in the *Kiobel* case has

¹³⁰ The US Alien Tort Statute (ATS) have been widely used since the 1980s as the basis of legal suits against both individuals and companies for serious abuses committed abroad.

¹³¹ *Aguinda v. Texaco* and *Jota v. Texaco*.

¹³² *Aguinda v. Chevron*.

¹³³ See *Kiobel v. Royal Dutch Petroleum Co.* and ICJ (2014) at p. 12.

in fact significantly narrowed the options for this important avenue of redress for victims of corporate abuse.¹³⁴

3.1.3 Preliminary Conclusion

Indeed, the GPs have contributed to the promotion of human rights recognition by business enterprises; however, as a legally nonbinding document, the GPs have their own limitations. The GPs neither provide legal accountability for business enterprises nor guarantee enforceable remedy for victims of abuses by businesses; and its illustration of extraterritorial obligations does not match what has been put forward by human rights treaties and the subsequent interpretation by treaty bodies. As previously discussed, the GPs require states to protect human rights against abuses by businesses both territorially and extraterritorially; however, it sets a much lower standard for the extraterritorial obligation of states to protect human rights with the distinction of the wording “must” and “should”. According to its Commentary for Principle 1, “To regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction” has been taken by the GPs as permission, but not obligation under international human rights law. Further, the GPs require both states and business enterprises to take measures to facilitate the enjoyment of human rights; nonetheless, it set much lower standards for businesses with the distinction of the wording “must” and “should”.¹³⁵

On one hand, Ruggie stressed that the GPs express the potential of a “polycentric approach” to addressing business and human rights governance gaps, and constitute a normative platform and policy guidance for implementing them into the policies of states, corporations and other social actors.¹³⁶ On the other hand, based on his analysis of seven regulatory initiatives on BHR, Deva highlighted the three-fold inadequacy of the existing regulatory initiatives in holding companies accountable for human rights abuses: 1) insufficient or contestable rationales for compliance with human rights norms, 2) lack of precise, measurable human rights standards, and 3) deficient or undeveloped implementation and enforcement mechanisms.¹³⁷ Deva’s contribution has been fur-

¹³⁴ Further discussion can be found in ICJ (2014) at pp. 12-15.

¹³⁵ HRC (2011a), Principle 1 at p. 6 and Principle 2 at p. 7.

¹³⁶ Ruggie (2013) p. 202.

¹³⁷ Deva (2012) p. 65. Deva selected the seven regulatory initiatives based on criteria such as coverage of types of sources, degrees of content, targeting approaches, levels of operation and legal nature and the seven regulatory initia-

ther confirmed by my research on existing international legal framework on BHR and international law implementation on BHR issues.

The following deficiencies have been found in existing international legal framework:

First and foremost, the inadequacy of existing international legal framework on BHR. To begin with, there is a lack of an international legally binding instrument on BHR in the international legal framework. Then, the existing international binding norm of state obligation regarding human rights has not been legally clarified on the aspect of state obligation to protect human rights against abuses by businesses. Last but not least, international standards on BHR put emphasis on clarification of “state duty to protect” and “corporate responsibility to respect”; still, there are less strict standards in requiring corporations with respect to human rights as well as in the extraterritorial dimension of state obligation to protect.

Secondly, the insufficiency of international law implementation on BHR issues. As a result of the lack of binding instruments and the legal ambiguity of state obligation to protect, very few states have provided legal accountability for corporations regarding their adverse impacts on human rights. Further, though contributing to the recognition of human rights by business enterprises, the implementation of the GPs cannot be a sufficient substitute instrument for addressing BHR issues. The reasons are as follows. Though endorsed by the HRC member states unanimously, they have not been very well implemented at the national level. Though noted by a group of businesses, they are not widely known among the business industry. Though having generated a considerable amount of efforts from states as well as business enterprises, as an international legally nonbinding standard, they can hardly render legal support for BHR case practice in national courts.

Thirdly, the imbalance between individuals and businesses in international law. This imbalance results from the legal status of TNCs as only rights-holders, but not duty-bearers in international law, as well as the inadequacy and insufficiency of existing international legal framework in addressing BHR issues.

tives are: the ATCA, corporate codes of conduct, the OECD Guidelines, the ILO Declaration, the Global Compact, the UN Norms and the Guiding Principles.

Based on these three evidence-based deficiencies of existing international legal framework, I hold that there is a legal need of a binding instrument for further addressing BHR issues. From my perspective, the elaboration of a BHR treaty will offer a platform for states to discuss and to decide through which approaches, within which scope and to what extent they want to offer protection for human rights against abuses by businesses.

3.2 Political Achievability of a Binding Instrument on BHR

Even if a binding instrument would help to fill the gap in international legal framework and to further address BHR issues on the ground, a proposed instrument will face the following risks if enough political consensuses are not guaranteed. First, the negotiation process would be prolonged and accordingly the limited capacity of stakeholders for addressing BHR issues would be distracted. Second, the outcome of the negotiation might not be endorsed by states. The implementation of the instrument might be difficult because of the possible weak content of the instrument and the potential resistance by states. Therefore, it is crucial to get a clear overview of the political achievability of a proposed binding instrument before starting the negotiation process.

Politicians have been absolutely decisive in the international law making process. However, businesses can have an influence on political choices for the future of the BHR agenda. One reason is that businesses are one of the significant stakeholders in the BHR agenda. The other reason is that businesses, especially giant TNCs, have become increasingly powerful in contemporary economic and political dialogues. Further, though enjoying limited space in the international law-making process and having no right to vote for or against a proposed instrument, civil society today is more mobilized and empowered than it was decades ago; and thus can have a stronger voice during the evolution of international law. Therefore, to understand the political achievability of a binding instrument on BHR, I suggest sufficiently examining the consensuses among politicians; and meanwhile, making considerable effort to observe reflections by other stakeholders. I argue that reflections by business representatives and civil society representatives should be carefully considered so as to get a dynamic overview of the political achievability of a BHR treaty.

In this section, I will observe reflections by stakeholders for evaluating to what extent politicians might be willing to elaborate a BHR treaty. Then I will analyze the potential trend of political

consensuses on the binding proposal to see whether there is any possible change of political consensuses. As a preliminary conclusion, I will outline to what extent a BHR treaty is politically achievable.

3.2.1 Observed Consensuses on a Binding Instrument on BHR

3.2.1.1 Observation of Political Consensuses around Resolution 26/9

The adoption of Resolution 26/9¹³⁸ is deemed as a milestone achievement of Ecuador's proposal for a binding instrument on BHR. Still, it is criticized by the divided vote result. Thus, to get a specific view of consensuses among politicians, I recommend observing the reflections in the voting process.

Speaking as co-sponsors of the draft resolution, Ecuador and South Africa tried to convince the HRC members to adopt the resolution without a vote, and they stressed that the call for a binding instrument was supported by over 500 civil society organizations.¹³⁹ Among the 47 member states of the HRC, seven states took the floor before the voting to explain their positions on the draft resolution. These seven states have two opposite positions: while China and India expressed their support for the resolution, the US, Italy (on behalf of the EU), the UK, Japan and Ireland strongly opposed the resolution.¹⁴⁰

India declared both the values and the limitations of the GPs, and it firmly supported the treaty proposal. India stressed that "When states are unable to enforce national laws with respect to the gross violations committed by businesses ... the international community must come together to seek justice for the victims of the violations committed by the Transnational Corporations".¹⁴¹ India further highlighted that "We believe that we need to further the dialogue on these aspects and the resolution gives us an acceptable roadmap for the Council to move forward in this direction".¹⁴² Then it concluded with the sentence that "We will, therefore, vote in favor of the resolution".¹⁴³

¹³⁸ UN HRC (2014).

¹³⁹ UN HRC (2014) at 00:00:58-00:10:50.

¹⁴⁰ UN HRC (2014).

¹⁴¹ UN HRC (2014) at 00:25:58-00:28:06.

¹⁴² Ibid

¹⁴³ Ibid.

Contrastingly, though supporting the resolution, China seemingly refrained itself from providing strong statement for endorsing the binding approach. After affirming its general support for the GPs, China stated that “on this basis, we hold an open attitude for better promoting transnational corporations to respect and protect human rights”.¹⁴⁴ Then it was presented that “We regard the formulation of an international legally binding instrument on business and human rights as an important and complex issue”.¹⁴⁵ China further stressed that “During the negotiation process, it is necessary to carry out detailed and in-depth research and to be gradual, inclusive and open to get consensuses”.¹⁴⁶ The statement was concluded with the sentence that “Based on these above-mentioned understanding, we will vote ‘Yes’ for this draft resolution”.¹⁴⁷

The draft resolution gathered strong negative comments from the US, Italy (on behalf of the EU), the UK, Japan and Ireland. They voiced in alliance that they regarded the GPs as the proper way forward and that they were expressly against the proposed binding instrument. In particular, the US firmly stated that “The United States will not participate in this IGWG [Inter-governmental Working Group negotiation process] and we encourage others to do the same”.¹⁴⁸ Among other concerns, the US raised that “There are also a host of practical questions ... we heard one of the sponsors during informals [informal meetings] that it wishes to apply legal obligations directly to businesses, which are non-state actors. What precedent will this set?”¹⁴⁹ The US called a vote for the proposed resolution. While the EU member states and the US already firmly expressed their negative opinion towards the proposed binding instrument since the very beginning of the binding proposal, the proposed resolution, namely the then Resolution 26/9, was adopted by the HRC with 20 votes in favor, 14 votes against and 13 votes abstaining.¹⁵⁰

¹⁴⁴ UN HRC (2014) at 00:22:15-00:24:00. The original speech is in Chinese.

¹⁴⁵ Ibid.

¹⁴⁶ Ibid.

¹⁴⁷ Ibid.

¹⁴⁸ UN HRC (2014) at 00:10:52-00:14:25.

¹⁴⁹ Ibid.

¹⁵⁰ The 47 Member States of the HRC voted as follows. In favour (20): Algeria, Benin, Burkina Faso, China, Congo, Côte d’Ivoire, Cuba, Ethiopia, India, Indonesia, Kazakhstan, Kenya, Morocco, Namibia, Pakistan, Philippines, Russian Federation, South Africa, Venezuela and Viet Nam. Against (14): Austria, Czech Republic, Estonia, France, Germany, Ireland, Italy, Japan, Montenegro, Republic of Korea, Romania, The former Yugoslav Republic of Macedonia, United Kingdom, and United States of America. Abstentions (13): Argentina, Botswana, Brazil, Chile, Costa Rica, Gabon, Kuwait, Maldives, Mexico, Peru, Saudi Arabia, Sierra Leone, and United Arab Emirates. See HRC (2014a).

The 47 votes of Resolution 26/9 are allocated as follows:¹⁵¹

Regional Groups in the HRC	Number of States (47)	Number of Votes		
		In favour (20)	Abstentions (13)	Against (14)
African States	13	10	3	0
Latin American and Caribbean States	8	2	6	0
Asia-Pacific States	13	7	4	2
Western Europe and Other States	7	0	0	7
Eastern European States	6	1	0	5

A majority of African States (10 out of 13) voted in favor of the resolution, as did China, India, and Russia. Most of the European states, which are EU member states or EU candidate member states, voted against the proposed resolution, as did the US, Japan and Republic of Korea. Except for the co-sponsors of the resolution, Cuba and Venezuela who voted in favor, all Latin American states, notably Brazil, abstained.

There are two approaches to understanding the vote, and accordingly two kinds of opinions on the political consensuses of a BHR treaty. One opinion is typically held by Ruggie, which suggests that the proposed binding instrument is not politically achievable. Ruggie recalled past failures of binding attempts, for example, the Code of Conduct in the 1990s and the Norms in 2004; and he regarded the vote as “sharply” and “deeply” divided.¹⁵² Specifically, he pointed out that China’s explanation of its vote had no rousing endorsement for the binding instrument proposal, which signaled significant conditionality for its supporting vote. The other opinion is typically held by proponents of the binding instrument proposal, Deva and Bilchitz, who assume that the proposed binding instrument has a good chance of being politically achievable. As proposed by Deva, first, a Declaration on the Human Rights Obligations of Businesses along the lines of the UDHR, which can accumulate political consensuses for further international legalization on BHR, could be an intermediate step towards the adoption of legally binding instruments at a later stage. Second, if the first path does not collect enough political consensuses, the option of evolving international norms “bottom-up” should be pursued; as issues in the field of BHR would require

¹⁵¹ Ibid.

¹⁵² Ruggie (2014e).

international law's imaginative responses in the 21st century.¹⁵³ Bilchitz based his positive attitude towards the further development of the proposed instrument on three main arguments. First of all, Bilchitz argued that a new consensus can and needs to be found in the field of BHR, since many significant developments in international law which are widely recognized as binding today, commenced with significant disagreement amongst nations.¹⁵⁴ Further, Bilchitz stated that it is possible to develop a strong campaign and democratic support for the shifting of government policies, such as mobilization by civil society.¹⁵⁵ Finally, Bilchitz pointed out the changes in economic powers; for instance, the power of the BRICs¹⁵⁶ seems rivalling that of the traditional developed countries, which might have a positive influence on further development of international legal standards on BHR.¹⁵⁷

3.2.1.2 Observation of Reflections by Business

It has been summarized by a working paper in June 2014 that all the previous efforts at the UN to hold corporations accountable to the public have been met with vigorous opposition from TNCs and their business associations.¹⁵⁸ Most notably, the discussions about the Code of Conduct and the Norms, as well as a chain of initiatives ultimately failed.¹⁵⁹ It was noted in the report that the viewpoints and interests of business actors have become even more prominent through their privileged access to decision makers in the UN, and therefore the “political economy” of the BHR discourse should be taken into account when calling for a binding instrument on BHR.¹⁶⁰ Hence, to get a further understanding of the political achievability of a binding instrument on BHR, it is necessary and important to get a clear idea of reflections by business enterprises in different BHR dialogues on the binding instrument proposal. The opinions on the BHR agenda by businesses have mostly been delivered by CSR related departments of leading companies as well as key business organizations.

¹⁵³ Deva (2014) and Deva (2015).

¹⁵⁴ Bilchitz (2015). As noted by Bilchitz, these include the development of additional Protocol II to the Geneva Conventions and the progressing of the International Criminal Court.

¹⁵⁵ Bilchitz (2015).

¹⁵⁶ BRICs is the acronym for an association of five major emerging national economies: Russia, India, China and South Africa.

¹⁵⁷ Bilchitz (2015).

¹⁵⁸ Global Policy Forum (2014).

¹⁵⁹ Ibid, p. 5.

¹⁶⁰ Ibid, p. 27.

Criticisms by business representatives on the BHR treaty proposal have been observed; meanwhile, evidences have shown that companies do not necessarily oppose the binding proposal. According to the ICJ's research outcome, some business representatives have shared the view that the binding instrument proposal will have a negative influence on progress and the commitment to the implementation of the GPs by businesses.¹⁶¹ However, according to my desk research and empirical observation in multi-stakeholder meetings, it can be deemed that, on one hand, many business representatives tend to reserve their positions on the binding proposal; on the other hand, very few business representatives have expressly voiced against the idea of a treaty on BHR. In my view, the resistance from businesses might still exist, but it might have been eased considerably during the past decade. Though reserving their comments on the likelihood of a BHR treaty in the coming future, business representatives did stress the importance of further implementing the GPs as well as taking steps to respect human rights to face the challenges coming in the future. A more concrete reflection by businesses can be found in a report in early 2015, which is based on a global online survey of 853 senior corporate executives, extensive desk research and nine in-depth interviews with independent experts and senior executives of major companies.¹⁶² The report has shown that the support for a binding instrument is not limited to political and civil representatives, but also includes business representatives. In the global online survey, 57% of respondents have said that a new legally-binding international treaty on business and human rights would help their business respect human rights, 24% of respondents said that the instrument would not be useful and the remaining 19% of respondents either said they have not heard of the binding instrument proposal or they refrained from giving a clear answer. Further, their reflections for the binding instrument are very similar to their answers on the GPs, which are 58%, 23% and 19% respectively.¹⁶³ In an in-depth interview, Bob Collymore, CEO of Safaricom, expressed that he would be a big supporter of such a binding instrument. As Collymore explained,

¹⁶¹ ICJ (2014) p. 45.

¹⁶² The Economist Intelligence Unit (2015).

¹⁶³ Ibid, p. 29. The question for respondents is "How useful, if at all, would you say 'A new legally-binding international treaty on business and human rights' would be in helping your business respect human rights?" The detailed answer allocation is: 25% very useful, 32% slightly useful, 15% not very useful, 9% not at all useful, 6% have never heard of this, 13% don't know. Meanwhile, there is a comparison among different initiatives. These initiatives include: UN GPs, UN Global Compact, UN Working Group on Business and Human Rights, National action plans on business and human rights, a new legally-binding international treaty on business and human rights as well as a strong international self-regulatory mechanism led by business.

“We need to move from voluntary compliance to something harder. I have a lot of respect for the Guiding Principles. They were no easy task [to achieve], but it is all a bit too voluntary”.¹⁶⁴

Opposition by business organizations of the treaty proposal have been observed; meanwhile, evidences have indicated that key business organizations are actively responding to the binding initiative and taking part in the process. Not like the business representatives who keep public comments on BHR reserved, business organizations have been commenting directly on the binding approach in public. Among key organizations, the ICC and the IOE have strongly opposed the binding proposal with the main argument that the negotiation process would break the unanimous consensus on BHR achieved three years ago with the endorsement of the GPs.

The ICC has been firmly opposed to the binding approach. The ICC expressed its deep concerns on the binding proposal via online documents and BHR dialogues in the 3rd Forum.¹⁶⁵ Prior to Resolution 26/9, the ICC cautioned in its online comment that the treaty proposal risks “Shifting the state’s responsibility to protect human rights to the private sector, which may result in new forms of extraterritorial jurisdiction and may also result in companies incurring additional liabilities”.¹⁶⁶ Further, believing the implementation of the GPs to be the highest priority, the ICC stressed that there might be “More immediate risk of undermining the implementation of the GPs and of creating very significant uncertainty for businesses in the process”.¹⁶⁷ Therefore, the ICC encouraged its member companies “To engage with your respective government on this issue and highlight the potential risks associated with the Ecuadorian proposal”.¹⁶⁸ After the resolution, the ICC expressed its deep concern that the adoption of Resolution 26/9 would undermine progress already made by the widely supported GPs, and it stressed that “No initiative or standard with regard to business and human rights can replace the primary role of the state and national laws in this area”.¹⁶⁹

Differing slightly, the IOE has been opposing the binding instrument proposal with a more dynamic approach. In March 2014, the IOE expressed its skepticism over the idea of a binding in-

¹⁶⁴ Ibid, p. 23.

¹⁶⁵ ICC (2014a), ICC (2014b) and ICC (2014c).

¹⁶⁶ ICC (2014a).

¹⁶⁷ Ibid.

¹⁶⁸ Ibid.

¹⁶⁹ ICC (2014b).

strument on TNCs and its concern of the conflict between working with the GPs and working towards a binding proposal.¹⁷⁰ In June 2014, the IOE voiced its deep regret via a news release that the adoption of 26/9 had broken the unanimous consensus on BHR achieved with the endorsement of the GPs and it is “A genuine setback to the efforts underway to improve the human rights situation and access to remedy on the ground”.¹⁷¹ Nonetheless, the IOE has been very active in participating in the discussion of the treaty on BHR, and in facilitating dialogues between businesses and other stakeholders with a relatively open attitude. For instance, in its conference on BHR in November as well as its side-event in the 3rd Forum with regard to the treaty process, the IOE gathered multi-stakeholders to discuss BHR issues, including the treaty implications. Multiple voices have been delivered in these venues but not necessarily with the negative positions on the treaty proposal. Following the 3rd Forum, the IOE has been making continuous efforts to participate in dialogues and share businesses voices on different occasions; especially the first meeting of the IGWG on BHR in July 2015. For example, the IOE has been co-organizing monthly webinars with companies about the impacts of the treaty proposal to share the latest developments regarding the establishment of the IGWG. Furthermore it discusses its possible impacts on companies and develops a business response to the negotiation process.¹⁷²

3.2.1.3 Observation of Reflections by Civil Society

Voices by civil society on the BHR treaty proposal were mostly delivered by NGOs. Unlike the divided positions in political community and negative voices from business organizations, the BHR treaty has been welcomed by most of the concerned NGOs; with a few exceptions who have noted their negative position on the potential scope of the instrument.

On one hand, a number of NGOs have actively called for a binding instrument on BHR beginning decades ago¹⁷³ and then have firmly supported the treaty proposal via joint statements in the HRC Sessions and massive campaigns in BHR dialogues. An alliance of committed networks and campaign groups around the world, called the “Treaty Alliance”, have joined to collectively help organize advocacy activities in support of developing a binding international instrument to ad-

¹⁷⁰ South Centre (2014) p. 4.

¹⁷¹ IOE (2014a).

¹⁷² IOE-WBCSD (2015).

¹⁷³ ICJ (2014), p. 6.

dress corporate human rights abuses.¹⁷⁴ The numbers have been increasing according to the development of the binding instrument proposal. By April 2015, 14 BHR-related NGOs have joined the alliance and 610 organizations as well as 400 individuals in 95 countries have joined the call for a binding instrument on BHR.¹⁷⁵ Among the organizations, the Dismantle Corporate Power Campaign seeks to develop an “International Peoples Treaty” that would “Defend the rights of, and empower the peoples, especially those affected by the crimes and violations of transnational corporations”.¹⁷⁶ The Treaty Alliance has also started to make an effort on the substantive content of a BHR treaty, aiming to make their voice heard during the IGWG negotiation process. In late January 2015, the FIDH and ESCR-Net launched a two-year joint “Treaty Initiative”; in order to work on concrete propositions towards a binding treaty on BHR and to form workable content ideas for the IGWG to consider for the elaboration of a robust and feasible international treaty.¹⁷⁷ In April 2015, Friends of the Earth (Europe) called for researchers to work on inputs for the negotiation process regarding the need for further legal elaboration and the legal blocks.¹⁷⁸

On the other side, a sub-group of NGOs, while welcoming to the binding approach, have raised considerable concerns about the scope of the proposed instrument indicated by Resolution 26/9. It appears to me that none of the NGOs have expressly voiced against addressing human rights abuses by businesses via a binding approach. However, some NGOs have criticized the limitation of the proposed instrument in its focus only on TNCs and its exclusion of domestic business enterprises. They have stressed that legally binding measures should be applied against all business enterprises, including national corporate actors. These NGOs include, for instance, Human Rights Watch, Earth Rights International, Amnesty International, FIDH and ESCR-Net, which are highly esteemed NGOs at the international level.¹⁷⁹ To illustrate, Human Rights Watch criticized that the limited target of the binding proposal would lead to “a situation where an international apparel company was bound by human rights standards, but abusive local factories aren’t”.¹⁸⁰ Further,

¹⁷⁴ The 14 organizations are CETIM, CIDSE, Dismantle Corporate Power Campaign, ESCR-Net, FIAN, FIDH, Franciscans International, Friends of the Earth International, IBFAN-GIFA, International Commission of Jurists, Legal Resources Centre, PAN AP, Transnational Institute, TUCA. Treaty Alliance (2014).

¹⁷⁵ Treaty Alliance (2014).

¹⁷⁶ Dismantle Corporate Power (2014).

¹⁷⁷ FIDH-ESCR-net (2015).

¹⁷⁸ Friends of the Earth (2015).

¹⁷⁹ Among these NGOs, FIDH and ESCR-Net are the significant members of the Treaty Alliance.

¹⁸⁰ HRW (2014).

it argued that “A treaty with credibility should cover all businesses, whether they have ties to global brands or not”.¹⁸¹

3.2.2 Potential Consensuses on a Binding Instrument on BHR

I hold that political will is decisive in elaborating a BHR treaty; however, it should be taken into consideration that the potential trend of political consensuses will be shaped by the influential power of business enterprises and the important motivation by civil society.

3.2.2.1 Political Will: Decisive

Political will is decisive in elaborating any new binding instrument. Reflected by the vote for Resolution 26/9, it is obvious that the treaty negotiation will continue to face huge challenges from the EU and the US, and potentially from some other states. In his articles, Ruggie pointed out the strong opposition of the treaty proposal by the EU and the US as well as the unclear position of China. Nonetheless, in his article in early 2015, Ruggie admitted the possibility of the change of attitude by states on the treaty negotiation process. Ruggie stated that “The European Union and the United States indicated that they will not participate in the negotiations, although I suspect that eventually they will.”¹⁸² I argue that two notable indications of the political power structure around the binding proposal shall be paid attention to.

The first power structure is the potential change of the EU’s position from non-participation to participation in the negotiation process. In late March 2015, the EU issued three preconditions for reassessing its preliminary position of non-participation in the IGWG negotiation process: 1) A focus not only on TNCs, 2) commitment by all to continue implementing the GPs, 3) appointment of a third party as a chair to facilitate the process, involvement of relevant expertise and consultations with civil society as well as business.¹⁸³

The second structure is the potential power of BRICs in facilitation of the negotiation process. Among the BRICs, Russia, India, China and South Africa voted in favor of Resolution 26/9, and Brazil chose abstention. Within this situation, Brazil is very likely to participate in the treaty ne-

¹⁸¹ Ibid.

¹⁸² Ruggie (2015).

¹⁸³ EU (2015).

negotiation process and even to support the elaboration of a BHR treaty. If the BRICs strongly support the binding instrument proposal through the negotiation process and through domestic regulation of business activities, it can be expected that a binding instrument will come from the alliance of developing countries. Despite the resistance by the EU and the US, the improvement of domestic legislations in developing countries, which are host states of TNCs, will influence the local operation of TNCs with headquarters in the developed countries.

Additionally, from my perspective, China, which is an outstanding great power, plays a significant and critical role in the negotiation process of a treaty on BHR. First and foremost, in the circumstance of a weak treaty mandate by resolution adopted via a divided vote, it is clear that a BHR treaty will have a much better chance of political achievability if it receives strong support from China. There is no doubt that China is a key emerging market and it has become both home and host state of many powerful TNCs. Among others, evidences can also be found in the most recent development of the Asian Infrastructure Investment Bank (AIIB), which clearly indicates that Asia's balance of power is swinging to China's advantage. Notably, despite pressures by its close ally the US, the UK joined the AIIB in late March 2015, as did 13 other EU member states.¹⁸⁴ By 15 April 2015, the BRICs have all joined the AIIB. Further, even if it is difficult to predict to what extent China will support the elaboration of a BHR treaty, the supportive vote by China for Resolution 26/9 indicates China's friendly and open attitude towards the binding instrument proposal. It is of high potential that China will participate in the negotiation process, and it is possible that China will further extend its support for a BHR treaty.

3.2.2.2 Business Reaction: Influential

Business reaction to the political agenda of the elaboration of a new binding instrument is influential. On one side, there has been a very clear sign of potential influence by business enterprises on the political achievability of the binding proposal. With the awareness of business resistance to binding attempts in the past decade, it is not surprising to identify potential challenges contributed by business organizations in negotiating a BHR treaty. The ICC recommended that companies make an influence on their respective governments before the voting of the draft resolution.

¹⁸⁴ 14 EU Member States: Austria, Denmark, Finland, France, Germany, Hungary, Italy, Luxemburg, the Netherlands, Poland, Portugal, Spain, Sweden and the UK.

What the ICC was mostly concerned about was that a binding instrument on BHR would shift state obligation to protect human rights to business enterprises and put additional liabilities on businesses.¹⁸⁵ Prior to the 1st IGWG meeting in July 2015, the IOE had been proactively engaging businesses in the negotiation process by providing timely information for them and collecting their feedback on the proposal. The IOE will deliver the feedback as inputs to the negotiation process via its attendance of the IGWG meeting, and it will also organize a side-event at the 1st IGWG meeting.¹⁸⁶

On the other side, it seems positive to consider the difference made during the past decades' efforts in promoting the recognition of human rights by businesses. It can be concluded from the BHR dialogues that businesses have been increasingly involved in multi-stakeholder dialogues on the binding instrument proposal. Some of these businesses have expressly committed to making an effort to further implement the GPs and to further develop a binding instrument. Moreover, it has been observed that: 1) business representatives have a broader agreement on the importance of business enterprises to respect human rights, 2) businesses are more dedicated to the further implementation of the GPs, and 3) some corporations have regarded a binding instrument as helpful in order to facilitate their business to respect human rights. One of the reasons for those business reactions might be that they are well developed in addressing BHR issues and they can quickly adapt to a new regulatory regime and gain a competitive advantage. These strategic early adopters can be potential supporters for a binding instrument on BHR.

As argued by Campbell, corporations are likely to behave in socially responsible ways in conditions such as the monitoring by NGOs and the involvement in multi-stakeholder dialogues.¹⁸⁷ Thus the BHR dialogues might help businesses to integrate human rights into business agenda and to accept the further regulation by states. Therefore, a binding instrument might not necessarily be rejected by business enterprises if it consists of reasonable and justified content, rather than just shifting the state obligation to protect human rights to business enterprises. Further, it will be very interesting to observe to what extent business sectors will support or oppose the

¹⁸⁵ ICC (2014a).

¹⁸⁶ IOE-WBCSD (2015).

¹⁸⁷ Campbell (2007).

binding instrument proposal in the coming years. Most importantly, this will be significant for evaluating whether a binding instrument on BHR could be achieved or not on political agenda.

3.2.2.3 Civil Society Mobilization: Important

Civil society mobilization for binding instruments is important. The important and legitimate role of civil society was confirmed by the HRC when it endorsed the GPs through Resolution 17/4. I would argue that it is very wise for co-sponsors of the draft resolution to revise the then Resolution 26/9 before its adoption. The revision includes a new paragraph which emphasizes that “Civil society actors have an important and legitimate role in promoting corporate social responsibility, and in preventing, mitigating and seeking remedy for the adverse human rights impacts of transnational corporations and other business enterprises”.¹⁸⁸

I may expect that civil society will continue to contribute to the further legalization of the BHR area at the international level and to the alternative solutions for BHR issues at the domestic level. The BHR treaty proposal receives increasing support from civil society. Despite the uncertainty of political will and business positions on the BHR treaty proposal, one can still hope that the mobilization of civil society will make a difference in the international legalization of the BHR area.

3.2.3 Preliminary Conclusion

Stakeholders, including states, business enterprises and civil society, have different roles in international legalizations of BHR area. In elaborating a BHR treaty, the political will from states is decisive, the reaction by business enterprises is influential and the mobilization by civil society is important.

Resolution 26/9 is a meaningful test of the political consensus in the HRC towards a binding instrument on BHR. It is possible to understand the political will for a BHR treaty through the observation of political attitude to former binding approaches and political consensus around Resolution 26/9. Nonetheless, focusing on the political community is unilateral, since it is neither a single answer for the political achievability of a binding instrument on BHR nor a strong argument against any further development of the binding approach.

¹⁸⁸ HRC (2014a).

I would argue that claims, such as “Neither the international political or legal order is capable of achieving it [a binding instrument on business and human rights] in practice”¹⁸⁹ by Ruggie, are not sufficiently accurate since they might have not paid adequate attention to the significant changes in the international community. Firstly, the developed international economy structure and subsequent new international political power structure might have changed the traditional attitude towards businesses with respect to human rights. Secondly, the further integration of human rights into the business agenda might have eased the resistance from businesses on the BHR agenda. Thirdly, the increased power of international civil society might make a difference in facilitating international law making in BHR area. All of these three changes would have influence on the political achievability of a BHR treaty.

In my view, the adoption of Resolution 26/9 is a signal of a certain amount of political support for binding treaty proposal. It has undoubtedly put the elaboration of a binding instrument on BHR on the political agenda in the UN process. I would thus argue that the political consensuses are more promising than decades ago because of the increased political will and continuous civil mobilization; and they might be increasing since it may encounter less fundamental resistance from businesses. The acknowledgement of potential positive development is by no means a blind prediction of the political achievability of a BHR treaty. On the contrary, it is a more sufficient consideration of the complicated power structures and the diversity of stakeholders in the process of negotiating a treaty on BHR.

As a preliminary conclusion, I hold the opinion that, though current political consensuses seems neither stable nor strong enough, a binding instrument on BHR is politically achievable when considering the existing support from political community, the less extreme resistance from businesses and the strong support from civil society. It is hard to comment sufficiently and predict precisely the political achievability of a BHR treaty, despite the observation of political debate and analysis of reflections by stakeholders. It should be noted that the political consensuses of a BHR treaty may change according to the policies of key states, the influence of powerful businesses and the mobilization by unified civil society. The further development of a potential BHR

¹⁸⁹ Ruggie (2014d) and Ruggie (2014e).

treaty, such as the general framework issues and the substantive content of the instrument, may also attract different degree of interests and consensuses among stakeholders.

3.3 Legal Achievability of a Binding Instrument on BHR

Ruggie stressed in his articles that, even with the best of “political will”, it is legally not achievable to regulate the category of BHR with “a single set of detailed treaty obligations”.¹⁹⁰ Indeed, the area of BHR includes complex clusters of different bodies of international law. For instance, human rights law as well as investment and trade law, all of which are related to each other and embody extremely extensive diversity, institutional variations and conflicting interests across and within states. Further, potential legal obstacles might occur when drafting a binding instrument on the unique and complex area of BHR. Examples of this include the concerns that have been raised in different fora such as on the duty-bearer, scope and extraterritoriality of a binding instrument on BHR.

During the discussion, it has been debated whether a binding instrument on BHR would be feasible in existing international law and whether the substantive content of the instrument would be legally achievable. In this section, I will examine the compatibility of a binding instrument on BHR with existing international legal framework to see whether there is any potential contradiction of a BHR treaty with international law. Then, I will identify main legal obstacles of formulating a binding instrument on BHR based on my observation in meetings and research of online posts by key scholars; including those of proponents, such as Surya Deva and David Bilchitz; as well as opponents, such as John Ruggie and Nadia Bernaz. As a preliminary conclusion, I will evaluate to what extent a binding instrument on BHR is legally achievable.

3.3.1 Compatibility with International Law

On one hand, the necessity to fill the gap in international legal framework regarding human rights abuses by business enterprises has been the foundational argument by proponents for a BHR treaty. However, the feasibility within existing international legal framework has been regarded as a significant legal obstacle in elaborating a binding instrument on BHR.

¹⁹⁰ Ruggie (2014a).

3.3.1.1 Proponents: Legal Necessity

Based on the legal gap in international legal framework, proponents have argued that a binding instrument on BHR would be helpful in correcting the imbalance between individuals and TNCs and in providing legal accountability for business enterprises with regard to their abuses of human rights.

A group of international professionals, including Martin Khor, Surya Deva, Marcos Orellana and Chip Pitts, have voiced strong opinions about the asymmetry between rights and obligations of corporations in international law, and the imbalance between victims and corporations in the international legal system. Deva noted that an international instrument is desirable to perform the gap-filling role for deficiencies in existing regulatory initiatives in international law.¹⁹¹ He illustrated that this instrument should be underpinned by the normative hierarchy of human rights norms over business, trades as well as investment norms.¹⁹² He further suggested that this instrument should not be exclusively “state-centric” but should take it into consideration to harness the potential of non-state actors in enforcing international norms.¹⁹³ It was stressed by Pitts as one of his core arguments for a binding instrument on BHR, that corporations currently have legally enforceable rights globally; “including intellectual property rights under the TRIPS agreement and rights as investors to sue states directly in arbitral tribunals established by bilateral investment treaties”.¹⁹⁴ However, as Pitts highlighted, individuals have no legal standing to sue corporations when their rights violated by business operations.

3.3.1.2 Opponents: Potential Incompatibility

A potential BHR treaty will address a dual content on both business sectors and human rights issues, each of which relates to both investment and human rights law. In this circumstance, concerns have been raised about potential conflicts of a binding instrument on BHR with the over 3,000 bilateral investment treaties and the possible overlapping of contents with nine core human rights treaties. For instance, Ruggie and Bernaz have stressed their concerns about the potential incompatibility of a BHR treaty in international law. As Ruggie detailed throughout his articles, a

¹⁹¹ Deva (2014).

¹⁹² Ibid.

¹⁹³ Ibid.

¹⁹⁴ BHRRC-UND (2014).

general BHR treaty would have to be crafted at such a high level of abstraction that it is hard to imagine it providing a basis for meaningful legal action. Bernaz noted that BHR covers an incredibly wide ground relating to various and complex legal areas. She argued that a BHR treaty might fail to recognize the complexity, and thus set out principles which may create confusion and difficulties in implementation.¹⁹⁵ Further, in Bernaz's opinion, a treaty on BHR might be compatible with existing core human rights treaties if it follows the formulation of existing human rights treaties. For example, it can take states as duty-bearers, request states to regulate business enterprises in domestic law, contain a treaty body as the monitoring mechanism and possibly include a quasi-judicial mechanism for victims to complain against a given state. However, as Bernaz stressed, claims by victims can hardly be brought directly against corporations under this "classic model", and consequently, the goal of filling the gap in international law regarding corporate legal accountability would hardly be reached.¹⁹⁶

3.3.2 Obstacles of Legal Formulation

As indicated in chapter 2, there have been an increasing amount of concerns on the substantive content of a binding instrument on BHR by civil society representatives; including NGOs as well as international professionals. Comments have been concentrated on key legal issues, such as: the duty-bearers (states or business enterprises), the scope (a broad or limited coverage) as well as the extraterritoriality (including extraterritorial protection or not) of the potential instrument. However, while proponents have been making contributions to the blueprint of a binding instrument, opponents have been raising concerns about the legal achievability of the substantive content of the instrument. In this sub-section, I will analyse the three key legal issues among the concerns and explore the potential solutions for these legal obstacles, if there is any.

3.3.2.1 Three controversial legal issues

Duty-bearers of a Binding Instrument on BHR

As illustrated in the first section of this chapter, states are taken as the primary subject of international treaties. TNCs are the rights holders in international investment and trade law, and their

¹⁹⁵ Ibid.

¹⁹⁶ Ibid.

status as duty-bearers of international treaties remains an academic discussion. When calling for the legal accountability of business enterprises regarding their negative impacts on human rights, proponents have not expressly stated their positions on having states or business enterprises as the duty-bearers of the potential instrument. However, opponents have pointed out the dilemma in choosing duty-bearers for the instrument.

To begin with, taking businesses as duty-bearers is not compatible with international legal tradition and thus seems hardly achievable. Bernaz noted that one exception can be found in the situation of human rights abuses amounting to international crimes. However, she asserts that, if a binding instrument attempts to claim that business enterprises have human rights obligations under international law, which has already failed in 2004 with the abandoned Norms, the instrument will not be achieved.¹⁹⁷ Bernaz argued that taking corporations as duty-bearers remains an area of academic debate and that there is little agreement in international law regarding corporate human rights obligations under contemporary international law. Ruggie also noted the doctrinal debate about holding corporations as subjects of international law, and further stated that holding TNCs accountable for their adverse impacts on the full range of human rights directly under international law seems intuitive.¹⁹⁸

Next, holding states as duty-bearers is more compatible with international legal tradition and seems more easily achievable; however, a treaty on BHR following this pattern might have a lack of values. As stated by Ruggie and Bernaz, a binding instrument which simply lists state obligations to regulate business activities within their territories will have very little added value since this requirement for states already exists in human rights treaties.¹⁹⁹ On the other hand, as they pointed out, a binding proposal which intends to touch upon state obligations with regard to extraterritorial activities of companies domiciled on their territories would face both political and legal obstacles.²⁰⁰ For example, Bernaz illustrated that political resistance from home states of leading capital-exporting countries would block the binding instrument proposal and that legal

¹⁹⁷ Bernaz (2014a).

¹⁹⁸ Ibid.

¹⁹⁹ Ruggie (2014a) and Bernaz (2014a).

²⁰⁰ Ibid.

obstacles might occur in attempting to formulate a binding instrument, such as the ambiguity of terms and divided positions on extraterritorial jurisdiction in contemporary international law.²⁰¹

Scope of a Binding Instrument on BHR

According to my observation and research, the scope of a binding instrument on BHR is a very controversial issue among stakeholders, and it has been a main argument for opponents' negative opinions on the legal achievability of the instrument. In the discussion of legal issues in formulating a binding instrument, the term "scope" has been employed and illustrated in different ways. In my opinion, in a very broad sense, the "scope" of a binding instrument on BHR would include, but is not limited to, the following issues: 1) regulation scope: regulating all business enterprises or selected types of business enterprises, such as TNCs; 2) thematic scope: protecting all human rights or only selected human rights, such as right to life; 3) sectoral scope: covering all economic sectors or just selected sectors, such as mining industry, food industry and so forth.

Firstly, indicated by a footnote of Resolution 26/9, which limits the term of "other business enterprises", the regulation scope is planned to be on TNCs only.²⁰² If the regulation scope remains focused on TNCs, complex issues such as on legal definition would have to be addressed. For instance, how to define "transnational character" in their operational activities and to what extent supply chains and subcontractors shall be involved. As previously mentioned in the former section, the limitation of regulation scope has already received much criticism. If the regulation scope were to be extended to all business enterprises, emerging legal issues would be brought forth. For example, the decision should be made on whether to regulate all types of corporations with one standard, or to establish different standards for different types of businesses according to their characters and sizes.

Secondly, there is no clear political opinion about the thematic scope of rights and the sectoral scope of business types on the potential binding instrument. A BHR treaty with limited scope will have to deal with the selection of certain rights and economic sectors; whereas a binding instrument with a broad coverage will face the tension of legal ambiguity and political resistance, as

²⁰¹ Bernaz (2014a)

²⁰² HRC (2014a), footnote 1 states that "'Other business enterprises' denotes all 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".

well as subsequent issues with implementation. As previously indicated, the goal of civil society advocates is a binding instrument on BHR with a broad coverage of both rights and business enterprises. An example of this would be a treaty protecting all internationally recognized human rights against all types of businesses, which is very ideal but might be legally controversial.

Opponents of a BHR treaty have already pointed out several of the legal obstacles in addressing the scope of the instrument. In his first article, Ruggie doubted the possibility of a BHR treaty with a broad coverage and the legitimacy of a BHR treaty focusing only on limited rights. He questioned that “is it plausible that governments could agree on a single global corporate liability standard for every internationally recognized human right” and that “if only limited rights, which ones would they be, and on what basis would they be selected”.²⁰³ Along with the further development of the treaty proposal, Ruggie pointed out that the call for a binding instrument tends to be “an overarching international legal instrument” covering all relevant dimensions.²⁰⁴ Therefore, throughout his subsequent articles, Ruggie targeted his criticism mostly on the broad scope the proposed binding instrument is likely to cover. He stressed that the idea of “establishing an overarching international legal framework through a single treaty instrument governing all aspects of transnational corporations in relation to human rights” is neither politically nor legally achievable.²⁰⁵ In her contribution to the public debate in May 2014, Bernaz argued that one of the legal dilemmas of the scope would be that: a binding instrument focusing on civil and political rights would be extremely disappointing; however, a binding instrument endorsing economic, social and cultural rights would hardly get support from western states.²⁰⁶ Bernaz further argued that even if a binding instrument on BHR might be achieved in a vague formulation, focusing on relatively uncontroversial rights or on limited scope, such as violations committed that amounted to international crimes; the unfortunate outcome would be that the instrument fails to address the majority of core BHR issues.²⁰⁷

²⁰³ Ruggie (2014a).

²⁰⁴ Ruggie (2014a), Ruggie (2014c) and Ruggie (2014d).

²⁰⁵ Ruggie (2014d).

²⁰⁶ BHRRC-UND (2014) at 00:40:30-00:47:17.

²⁰⁷ Ibid.

Extraterritoriality of a Binding Instrument on BHR

Extraterritoriality is an extremely controversial issue in formulating a BHR treaty. When a TNC operates in a country other than that of its origin, both the state where it headquarters, referred to as the “home state”, and the state where it conducts its activities directly or through its subsidiaries, referred to as the “host state”, may potentially assert jurisdiction over the TNC’s activities.²⁰⁸ It happens frequently in the context of BHR that neither the home state, nor the host state effectively controls the activities of TNCs and properly addresses human rights abuses. This has resulted in a situation of impunity for human rights abuses, such as cases in India, Nigeria and Ecuador. In those situations, the territorially competent states (host states), where the abuses take place, may be unwilling or unable to effectively regulate the conduct of the corporations concerned. Further, the other potential competent states (home states), where the alleged abusers headquarter, may be restrained by international law as well as their national laws in exercising extraterritorial jurisdiction, even if they may be willing to take actions.

International law imposes limits to the exercise of extraterritorial jurisdiction that vary depending on the type of extraterritoriality concerned, among which the risk of the home states interfering with the sovereignty of host states is the most controversial and restricted issue. However, the precise restrictions that are imposed by international law to these various instances of extraterritorial jurisdiction remain contested.²⁰⁹ Extraterritoriality exists already, but not sufficiently clarified in the BHR context. As illustrated previously, there is ambiguity and inconsistency in human rights treaty provisions with regard to states’ extraterritorial obligation in protection of human rights. The interpretation of human rights treaties by treaty bodies, such as the Statement in 2011 by the ICESCR and the GC 16 by the CRC, and additionally the GPs have all touched upon the extraterritorial obligation of states to protect human rights against abuses by businesses. For example, the GC 16 requires home states to take measures to prevent the infringement of children’s rights by business enterprises when they are operating abroad and to enable access to effective remedy when extraterritorial abuses of children’s rights do occur. Further, the GC 16 requires states to establish legal frameworks that enable businesses to respect children’s rights across their global operations and to provide international assistance with investigations and enforcement of

²⁰⁸ De Schutter (2010) p. 245.

²⁰⁹ Ibid.

proceedings in other states. The GC 16 stresses that, when adopting measures to meet the obligation, home states “must not violate the Charter of the United Nations and general international law nor diminish the obligations of the host State under the Convention”.²¹⁰

In the context of global operation of business enterprises, there are an increasing number of requests to address human rights abuses by TNCs that headquarter in one country but operate in another. However, extraterritorial obligation of states in international law is ambiguous and controversial; and the above-mentioned interpretation or standards are not legally binding norms or internationally recognized among states. Therefore, when it comes to the extraterritorial dimension of a binding instrument on BHR, conflicts could arise because, on one hand, avoiding the controversial issue would limit the value of the instrument, and on the other hand, addressing this issue would raise both political resistance and legal obstacles. As far as I’m concerned, the legal issues around the extraterritorial dimension of a binding instrument on BHR might include but is not limited to the following concerns: 1) To what extent should states be expected to protect human rights from abuses extraterritorially. Should they take the approach of “permission”, as the GPs do, or the approach of “requirement”, as human rights treaty bodies do? 2) If home states should have the obligation, are home and host states equally obligated to protect human rights; or does one have primary obligation and the other secondary? 3) If home states are required to undertake obligation, how can conflicting issues with the principle of sovereign equality of states be avoid?

As previously mentioned in analyzing legal issues for determining duty-bearers, both Ruggie and Bernaz proclaimed that a binding instrument which touches upon extraterritorial obligation of states would face both political and legal obstacles and thus would not be achievable. Ruggie stated that extraterritorial jurisdiction would have to be involved in the enforcement provisions to add value to any proposed new binding instrument. Ruggie took the note that some states have started to provide greater extraterritorial protection against corporate-related human rights abuses in some policy domains according to the UN human rights treaty bodies’ requirement. However, Ruggie firmly claimed that, despite this, “State conduct generally makes it clear that they do not regard this to be an acceptable means to address violations of the entire array of internationally

²¹⁰ CRC (2013) p. 7.

recognized human rights”.²¹¹ Ruggie further pointed out that proponents of the binding instrument proposal are on “tricky terrain” when they seek “comprehensive forms of extraterritorial jurisdiction under international human rights law”.²¹²

3.3.2.2 Potential Solutions for Legal Obstacles

Supporting their positions as well as responding to the opposite side, solutions for legal issues have been brought up by both proponents and opponents of the binding instrument proposal.

Opponents of a binding instrument on BHR

Opponents suggest the further implementation of the GPs and the improvement of existing international legal framework. Doubtful about the proper timing for the further international legalization of the BHR filed and the legal achievability of a treaty on BHR, Ruggie has been making an effort to call for the further implementation of the GPs instead of rushing into a BHR treaty. Ruggie held that more focused legal and policy improvements, which have been developed on the GPs, are more readily achievable than a BHR treaty.²¹³ Ruggie argued that the proposed binding instrument, determined by its very scale, would be both politically and legally not achievable in practice.²¹⁴ He insisted that if there needs to be a binding instrument, the scope of the instrument should be narrowed down to gross human rights abuses by businesses.

Bernaz proposed other alternatives instead of a binding instrument. Bernaz deemed that it would be possible to re-open negotiations for a multilateral agreement on investment, which would include the GPs framework of “protect, respect and remedy”.²¹⁵ Bernaz suggested elaborating an amendment to the Rome Statute to enable the International Criminal Court to exercise jurisdiction over corporations.²¹⁶ Bernaz also stressed the importance of maneuvering within the existing international human rights legal framework.²¹⁷

²¹¹ Ruggie (2014c).

²¹² Ruggie (2015).

²¹³ Ibid.

²¹⁴ Ruggie (2014c) and Ruggie (2014e).

²¹⁵ Bernaz (2014a).

²¹⁶ Bernaz (2014b).

²¹⁷ Ibid.

Proponents of a binding instrument on BHR

Generally, most proponents hold a very positive outlook of the legal achievability of a binding instrument on BHR. Seen from the position of some key NGOs and academics, a treaty proposal on BHR has been proposed: 1) To further strengthen state obligation to protect human rights against abuses by business enterprises, including TNCs and domestic corporations; 2) To cover all internationally recognized rights; and 3) To address the extraterritorial obligation of states.²¹⁸ Besides arguing for their positions on the substantive content of a binding instrument on BHR, proponents have also offered further comments on the concerns raised by their opponents.

Without commenting directly on the choice of duty-bearers for a BHR treaty, Deva focused on concretizing the obligations of corporations already in existing human rights instruments. He stressed that “Irrespective of whether corporations are ‘subjects’ of international law or not, the arms of international law can reach them directly”.²¹⁹ Deva suggested that any international instrument on BHR should have a wide ambit as to whom it applies to and what types of rights it covers. Deva took a note of the foundational principle that human rights are indivisible, interdependent, interrelated and equally important, and the possibility that companies can violate all of them. Deva argued that the proposed instrument should apply to all types of business entities and cover all internationally recognized human rights. Deva indicated that touching upon the extraterritorial obligations of states might be a controversial legal obstacle for the proposed treaty on BHR; however, he insisted that it would still be practically favorable and legally achievable.²²⁰ Taking note of the difficulties in political divergences and legal obstacles, Deva proposed a Declaration on the Human Rights Obligations of Business, which asserts the normative hierarchy of human rights instruments in relation to relevant instruments in areas such as investment law. Deva suggested that this type of declaration could follow along the lines of the UDHR as an intermediate step towards the adoption of a legally binding instrument at a later stage.²²¹

Bilchitz responded to opponents’ doubts, such as Ruggie’s criticism on the limitation of targeting only TNCs and on the achievability of the proposed binding instrument. Bilchitz stressed the ne-

²¹⁸ Deva (2014), and ICJ (2014) p. 35.

²¹⁹ Deva (2014).

²²⁰ Deva (2014).

²²¹ Deva (2014) and Deva (2015).

cessity of international law to devote specific attention to human rights abuses by TNCs; and he argued that the treaty proposal is not meant to address “every single issue that arises in this complex arena”, but to create the legal “basic structure” in terms of which legal matters would be resolved.²²²

3.3.3 Preliminary Conclusion

Legal achievability of a BHR treaty is a significant issue. If not properly addressed, it will hinder the further development of the binding instrument proposal and even may, as Ruggie argued, have a “high potential for generating serious backlash against any form of further international legalization in this domain”.²²³ While opponents have raised considerable concerns about the legal achievability of a BHR treaty, proponents have made many efforts to argue the legal necessity of a binding instrument on BHR in international legal framework. Meanwhile, they have provided some solutions for the potential legal obstacles noted by their opponents.

Among others, the following two groups of issues are of the most concern to stakeholders: the compatibility of a BHR treaty with international law and the legal obstacles that have risen up around the controversial issues such a treaty may have to address. These issues include: the duty-bearers, the scope and the extraterritorial dimension. As stated by the ICJ report, “The final decision on whether a binding instrument [on business and human rights] is appropriate and/or feasible will depend in part on its potential contents”.²²⁴ According to my discussion of the issue of legal obstacles with key experts, some experts have also pointed out that the legal achievability of a binding instrument on BHR depends on how the instrument will be formulated. These experts point out that international treaties negotiated between states are directly binding only on the states that become parties to the treaty, and it would be against international legal tradition to adopt treaties that are directly binding on business enterprises. Any such effort would generate many further issues with negotiation, adoption and implementation.

I share the ICJ’s view and the opinion of other experts that a binding instrument on BHR seems legally achievable if it is carefully formulated. The emerging controversial legal issues might be

²²² Bilchitz (2015).

²²³ Ruggie (2014a).

²²⁴ ICJ (2014) p. 35.

obstacles towards a binding instrument on BHR; however, it might also be a motivation for clarifying these issues via a treaty on BHR. One way to improve the existing legal weaknesses would be to elaborate and clarify in the treaty the obligations of states to protect human rights against abuses by corporations. Another improvement would be to extend and clarify in the treaty the extraterritorial human rights obligations of those states where TNCs have their headquarters. As it has been put by the FIAN International, extraterritorial obligations are “a missing link in the universal human rights protection system”.²²⁵ According to my research on the international legal framework on BHR, extraterritoriality already exists in international law in general and explicitly in state obligation to protect human rights. The extraterritoriality has not been clarified sufficiently in the BHR context and has not been expressly supported by binding instruments. Therefore, it might be a motivation for a binding instrument on BHR to make contribution on this issue.

3.4 Potential Implications of a Binding Instrument on BHR

The potential implications of a binding instrument on BHR have been heavily debated by proponents and opponents. For example, the Ambassador of the Ecuadorean delegation stressed in its side-event in the 28th HRC session that stakeholders have very high expectations of the proposed binding instrument.²²⁶ However, Ruggie warned that the binding instrument proposal on BHR has a high potential for generating serious backlash for further international legalization in the field of BHR.²²⁷

In this section, I will present potential values and possible risks raised by proponents and opponents to predict what types of implications a binding instrument on BHR might bring. Then, I will argue from my perspective what kinds of positive impacts a BHR treaty might make. As a preliminary conclusion, I will evaluate to what extent a BHR treaty may make positive implications.

²²⁵ FIAN International (2013) p. 3.

²²⁶ Ecuador (2015).

²²⁷ Ruggie (2014c).

3.4.1 Identifying Values and Risks of a Binding Instrument on BHR

3.4.1.1 Potential Values

Some potential values of a binding instrument on BHR have been presented by proponents. Among the opinions, the function of a binding instrument as hard law has been the main argument for proponents, and the complementary relationship between the instrument and the GPs has been highlighted.

Deva has argued that a binding proposal on BHR will be a necessary logical extension of the GPs. Deva stated that a binding instrument would complement the GPs by “Providing a sounder normative basis for corporate human rights obligations, clarifying ambiguities inherent therein, and strengthening the enforcement of such obligations”.²²⁸ Further, Deva argued that, while complementing the GPs, such an instrument would also fill gaps inherent in them.²²⁹ Bilchitz commented that a BHR treaty “Will not fundamentally constrain the pursuit of business activity; rather, it will produce the necessary international regulatory framework to ensure that the pursuit of commercial activity does not conflict with and enhances fundamental human dignity and development”.²³⁰

Likewise, Errol Mendes, Carlos Lopez and Chip Pitts have expressed their opinions on different occasions. Mendes affirmed that a binding legislative framework could strengthen what has been suggested by the GPs and thus facilitate states to fulfill the obligation to protect human rights in practice. Mendes stressed that a binding instrument could urge powerful TNCs to respect human rights and guarantee access to remedy for victims.²³¹ Lopez noted the insufficiency of the protection of human rights against abuses by business enterprises in both international human rights treaties and domestic legislations. Lopez suggested that a binding instrument on BHR could be an effective instrument in the hands of states to improve their legal framework for better protection of human rights.²³² For Pitts, a BHR treaty would be in the interests of both businesses and states in combating mistrust and instability. Further, it would contribute to the integrity and coherence

²²⁸ Deva (2014).

²²⁹ Deva (2015).

²³⁰ Bilchitz (2015).

²³¹ South Centre (2014) p. 9.

²³² Ibid, p. 7.

of the global human rights and business system. As Pitts argued, a BHR treaty, which has a more compelling expressive function as hard law, could address significant issues such as legal clarity and extraterritorial jurisdiction. Pitts urged that any proposed binding instrument should “complement and build on and certainly not retreat from the GPs”.²³³

3.4.1.2 Possible Risks

While proponents have argued that a binding instrument on BHR would bring values and improvements, opponents, such as Ruggie, have noted the risks and backlashes of a treaty on BHR. Concerns have been raised around issues such as possible discouraging outcomes and negative impacts on the GPs.

Potential Outcome of the Negotiation Process

Ruggie asserted that, if not properly facilitated, the negotiation process would end up with a legally nonbinding document, or a legally binding document with few ratifications and subsequently little implementation. Ruggie argued that this would hinder any further international legalization in the BHR area. Prior to the adoption of Resolution 26/9, Ruggie stated that, even if the launch of a binding instrument would be successful, it would likely end “in largely symbolic gestures, of little practical use to real people in real places, and with high potential for generating serious backlash by undermining the credibility of further international legalization in any form”.²³⁴ After Resolution 26/9, Ruggie warned again about two possible outcomes of the negotiation process.²³⁵ The first is a legally nonbinding document, which drags on for a decade or more and follows the path of the 1970s Code of Conduct negotiations. The other is a legally binding document, which attracts few ratifications, covers few home countries of most TNCs and falls into the deadlock similar to the ICMW²³⁶. Ruggie stressed that the ICMW “Entered into force in 1990 but has not been ratified by a single migrant worker-receiving country”.²³⁷ Ruggie emphasized that whichever outcome prevails would represent another dead end, delivering nothing to individuals and communities that are adversely affected by corporate conduct.

²³³ BHRRC-UND (2014).

²³⁴ Ruggie (2014c).

²³⁵ Ruggie (2014d) and Ruggie (2015).

²³⁶ International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

²³⁷ Ruggie (2015).

Other international professionals have also raised concerns about the potential negative outcomes. For example, as predicted by Chris Esdaile, a treaty negotiation process, if started regardless of potential issues, would face the very real possibility of “Ending up with a watered-down set of rules, a treaty with few ratifications, and in the process create much hostility to the prospect of binding rules on business and human rights”.²³⁸

Impact on further Implementation of the GPs

Among others, the relationship of the binding instrument proposal and the GPs has attracted the most attention from stakeholders. It has been presented on different occasions that the negotiation of a binding instrument would undermine the consensus achieved by the GPs and hinder their further development.

As underlined by Ruggie prior to Resolution 26/9, an all-encompassing treaty negotiation would diminish the full range of related efforts; for example, discourage business support, polarize political consensus and distract civil society capacity.²³⁹ Throughout his articles, Ruggie highlighted the achievements of the GPs and the importance of their further implementation. Ruggie suggested following the path of the GPs but not employing a binding instrument negotiation. When outlining the key challenges, Ruggie noted that the final challenge facing the binding proposal sponsors concerns the relationship between their initiative and the GPs. At the commencement of the negotiation process in July 2015, Ruggie urged that the negotiations build upon the existing achievement of the GPs, not undermine them.²⁴⁰

Similarly, Mark Taylor pointed out the negative implications of the binding instrument proposal on civil society. Taylor proclaimed that the proposed binding process, with no consensus among stakeholders, no clear objective in content and a vague promise of development in international law in the far future, would not grant civil society any leverage and would probably hinder it.²⁴¹ Fr  ric M  gret perceived hidden motivations for proposing a binding instrument and the sort of substantive instrument that might result. M  gret pointed out that a BHR treaty might bring a risk

²³⁸ BHRRC-UND (2014).

²³⁹ Ruggie (2014c).

²⁴⁰ Ruggie (2015).

²⁴¹ Taylor (2014).

of an anti-business bias to draw attention away from the responsibilities of host states; moreover, there is a risk of disrupting the balance achieved in the GPs.²⁴²

3.4.2 Potential Impact beyond a Binding Instrument on BHR

It can be concluded that high expectations have gathered around the proposal for a binding instrument on BHR and that the possible risks have been voiced by opponents. It seems difficult to predict whether positive implications will prevail over negative ones before more evidences can be found in the proceeding of the negotiation process. However, I argue that a BHR treaty can bring positive implications from a variety of perspectives. I will illustrate three arguments as follows.

3.4.2.1 The Way towards Greater Protection of Human Rights

It is important to be aware of the possible risks of the negotiation of a BHR treaty. Meanwhile, it seems that opponents, particularly Ruggie, have only seen the treaty proposal from a limited perspective. Opponents have warned about the risks of negotiating a treaty on BHR. Conversely, they might have ignored other perspectives. The binding instrument proposal on BHR is a significant attempt of international legalization in the BHR area after the failure of the Code of Conduct and the Norms. Further, as a potential part of international human rights law, it is a part of international development towards the greater protection of human rights. Therefore, it would be an inestimable loss for the BHR agenda and international human rights development if the binding instrument proposal was frustrated again.

So which way shall we head to on the BHR agenda? Shall the dominant narrative be that we stand at a split in the road with the further implementation of the GPs on the right and the negotiation of a binding instrument on the left?

Despite the divergence of positions among scholars, a certain amount of consensuses have been gathered that neither the GPs nor the proposed binding instrument would be the sole answer for the future of the BHR agenda. As for the treaty opponents, when stressing that further implementation of the GPs shall be the priority, Ruggie indicated that “some form of further international

²⁴² Mégret (2015).

legalization in BHR is both necessary and desirable”.²⁴³ When arguing against the binding instrument proposal, Esdaile noted that “the GPs are not the sole answer” for further addressing BHR issues.²⁴⁴ On the side of the binding approach, Deva expressed that both sets of regulatory tools, “voluntary” regulations and “obligatory” regulations, are needed to further address BHR issues.²⁴⁵ Arguing for BHR treaty, Pitts reaffirmed that any proposed binding instrument should “complement and build on and certainly not retreat from the GPs”.²⁴⁶ Further, some international practitioners have expressed an inclusive attitude for developing both binding and non-binding instruments to address BHR issues via a more coordinated and harmonized approach to the greater protection of human rights. These professionals include Peter Frankental, Josua Loots and Amol Mehra.²⁴⁷

I thus share the call by Mehra that “We shall overcome potential divisiveness and see the journey as one long road towards greater protection of human rights”.²⁴⁸ Only by rejecting an either/or narrative and viewing the journey as a path to obtain better protection of human rights, can we be ready for a discussion on international legal principles.

3.4.2.2 The Power of the Negotiation Process

The negotiation process of an internationally legally binding instrument can be powerful. As argued by Heather Wipfli and Grace Huang, even when outcomes are unclear from the start, investments in international legal processes can be effective.²⁴⁹ As discovered by Wipfli and Huang on their study in the period just before, during and after the adoption of the Framework Convention on Tobacco Control (FCTC), the FCTC negotiation process coincided with a rise in domestic policy adoption in the direction advocated by the World Health Organization.²⁵⁰ The FCTC was adopted by World Health Assembly in May 2003 and it entered into force in February 2005. According to research by Wipfli and Huang, in 1998, when preparatory groundwork for the FCTC was initiated by the World Health Organization, a rise in the number of countries adopting an

²⁴³ Ruggie (2014d).

²⁴⁴ BHRRC-UND (2014).

²⁴⁵ Deva (2014).

²⁴⁶ BHRRC-UND (2014).

²⁴⁷ Frankental (2014), Loots (2014) and Mehra (2015).

²⁴⁸ Mehra (2015).

²⁴⁹ Wipfli (2011).

²⁵⁰ Ibid.

evidence-based tobacco control policy was observed.²⁵¹ During 2002-2003, the years in which the international debate regarding tobacco control and the FCTC was the most intense, the adoption rate intensified.²⁵²

In this regard, for the case of a binding instrument on BHR, I suggest that there might be a possibility for the negotiation process to stimulate a rise in domestic policies as well as national legislations to further address BHR issues. Further, I argue that the negotiation process for a BHR treaty can be powerful in another two ways. The first one is to foster BHR dialogues as well as to increase business understanding of human rights. The second one is to provide a platform for states to discuss to what extent they want to provide protection for human rights from abuses by businesses.

First, I suggest that the negotiation process should facilitate increasing involvement of business enterprises into BHR dialogues and further integration of human rights into the business agenda. With the dissemination of the GPs and the development of the treaty proposal, businesses have been increasingly aware of the human rights agenda. When different stakeholders are at the table, best practices by business enterprises can be shared and key challenges in practice can be identified.

Second, I hold that the negotiation process can offer opportunities for states to discuss and agree with each other to what extent they want to regulate business activities, and to what extent they want to provide protection for human rights. For instance, developing certain standards for the regulation of business enterprises and deciding a specific scope for the protection of human rights. Controversial issues do exist and there might be risks; including, polarizing politics at the international level, and losing investments when states put stronger restrictions on corporations at the domestic level. Nevertheless, many binding instruments have come out after intensive debates, such as the FCTC. The negotiation process might have a chance to provide solutions for the controversial issues in BHR. Further, the possible risks may be reduced if the negotiation process can be placed on the right track, and if business enterprises will be regulated by states in a reasonable, but not aggressive way.

²⁵¹ Ibid.

²⁵² Ibid.

3.4.2.3 The Function of International Human Rights Binding Norms

It is worth noting that international human rights treaties have received considerable criticism on their limited capacity and restricted coverage. However, it is very important to acknowledge the significant contribution by core human rights treaties and their treaty bodies. Additionally, it is of equal importance to be aware that international human rights binding norms are not only meaningful as a key part of UN human rights system, but also function in different ways; such as through international interaction as well as domestic mobilization.²⁵³ David P. Forsythe argued that international human rights norms have been injected into international relations through global, regional, national, and sub-national application.²⁵⁴ Beth Simmons argued that the ratification of human rights treaties has significant influence on domestic politics through the altering of national agendas, leveraging litigations and empowering political mobilization.²⁵⁵ As to Simmons, national states, NGOs and citizens have been empowered by human rights treaties, and subsequently these actors have been motivating and facilitating the promotion and implementation of human rights at the domestic level.

A binding instrument on BHR, classified by its complexity and uniqueness on both human rights issues and business operations, might be even more difficult to reach than other human rights treaties. However, I argue that the potential positive impacts of a binding instrument on BHR for both international and domestic levels shall be counted as an added value.

3.4.3 Preliminary Conclusion

Before negotiating an international legally binding instrument, the potential implications of the instrument shall be carefully evaluated and considered. Proponents argued that a BHR treaty could strengthen the protection of human rights against abuses by businesses. Opponents pointed out that negotiating a treaty on BHR may bring possible risks. Such risks might include ending up with a document without teeth, distracting the limited effort of stakeholders in addressing BHR issues and undermining the implementation of the GPs.

²⁵³ See Epp (1998), Baehr (2009), Simmons (2009) and Forsythe (2012).

²⁵⁴ Forsythe (2012) p. 30.

²⁵⁵ Simmons (2009) p. 154.

It is very important to be aware of the possible risks of a binding approach and to notice the difficulties in pursuing the potential values. However, I regard the negotiation of a binding instrument on BHR as a positive development. I have three arguments for my position. First, the binding proposal is one of the efforts towards the greater protection of human rights. Second, the negotiation process may be powerful and stimulate domestic policy changes, foster BHR dialogues and provide a platform for political negotiations to further address BHR issues. Finally, as drawn from further understanding of international human rights binding norms, a binding instrument on BHR may bring positive impacts for both international human rights development and domestic change.

With the negotiation process starting in July 2015, I thus recommend that stakeholders of the proposed binding instrument on BHR rethink about better collaborating to minimize the risks and maximize the values of the negotiation. Significant stakeholders, such as co-sponsors of the treaty proposal, civil society representatives and international scholars, are recommended to make an effort to shape the discussion and keep the negotiation on the right track.

3.5 Conclusion

In this chapter, I conducted a comprehensive evaluation of the necessity of a binding instrument via four significant issues on further international legalization in the field of BHR.

My findings are as follows:

Firstly, at the international level, there is a normative gap on the issue of BHR in international legal framework; meanwhile, at the national level, there is a lack of legal accountability in legislation as well as in case practice regarding human rights abuses by businesses. Based on the inadequacy of existing international legal framework on BHR, the insufficiency of international law implementation on BHR issues and the imbalance between individuals and businesses in international law, I argue that there is a legal need for a binding instrument to further address BHR issues.

Secondly, a certain amount of political consensuses for a binding instrument on BHR has been observed. The binding instrument proposal has been firmly supported by Ecuador, South Africa and some other developing countries. Later it was reinforced by rising powers such as the BRICs through the adoption of Resolution 26/9. The overall political consensuses have been criticized as divided. Evidences have shown that international legalization on BHR will inevitably be a pro-

duction of a mixed influence by politicians, businesses and civil society representatives; with further development of the political consensus on the proposed binding instrument to be seen. I argue that political consensus on the BHR treaty might be influenced by the following elements: 1) Positions of political powers, for example, the EU as a regional power and China as an increasingly rising great power; 2) Reactions by business enterprises, for example, giant TNCs and key business organizations; 3) mobilization by the civil society, for example, the Treaty Alliance. I suggest that a BHR treaty might be politically achievable, taking into consideration the current reflections by stakeholders and potential trend of political consensus.

Thirdly, determined by its uniqueness of covering the complex areas of both business and human rights, the legal formulation of a binding instrument on BHR is far more complicated than other human rights instruments. The ultimate decisive element on the legal achievability of a BHR treaty will depend in part on its potential contents. I hold the opinion that, despite potential legal issues concerning the duty-bearers, the scope and the extraterritorial dimension, if it is properly formulated, a binding instrument on BHR seems legally achievable.

Fourthly, the elaboration of a BHR treaty would potentially bring values as well as risks. A treaty may fill the gap in international legal framework on BHR and provide support for legal accountability for BHR issues. Despite this, the negotiation process of the proposed binding instrument may possibly end up with little value and even hinder the development on further addressing BHR issues. In my view, on one hand, the blueprint expected by proponents will not be realized if it is not sincerely pursued during the negotiation process; on the other hand, the risks cautioned by opponents might be reduced if properly addressed. Further, I recommend that we understand the potential BHR treaty beyond its nature as a binding instrument. For example, to view it as one of the helpful instruments towards the greater protection of human rights, to recognize the power of the negotiation process and to note the function of international human rights norms through a variety of approaches. Evidences have shown that the negotiation process, as well as the ultimate function of international binding norms will facilitate national legislation, domestic litigation as well as civil mobilization. Based on this understanding, I argue that the elaboration of a treaty on BHR may bring considerable positive outcomes.

Based on these four findings of comprehensive evaluation, I hold the position that it is necessary to elaborate an international legally binding instrument on BHR. Nonetheless, stressing the ne-

cessity of a BHR treaty is by no means a blind call for a random binding instrument, but rather a caution for stakeholders that a binding instrument on BHR is needed and can only be reached as expected under certain circumstances. The potential circumstances might include but are not limited to the following: 1) conducting sufficient legal research in international law perspective, 2) guaranteeing the legitimacy of the negotiation process, 3) justifying the legal formulation of the proposed binding instrument, 4) taking note of potential risks of treaty negotiation. Therefore, when stressing the necessity of a BHR treaty at the international level, I argue the necessity of efforts by stakeholders, both proponents and opponents, to shape the negotiation process so as to attain a binding instrument with real values.

Chapter 4 Design of a Binding Instrument on BHR

The research on the legal formulation of a potential BHR binding instrument is of significant importance in that: 1) any further international legalization in the BHR area will have to face the issue of legal formulation, 2) the negotiation process, which is starting in early July 2015, needs inputs from international law perspective, and 3) any potential BHR treaties shall contain real values, aiming to better protect human rights. Even if one does not agree with the need for a BHR treaty, the process has already begun according to the mandate by Resolution 26/9. The EU, the regional power who strongly opposed the binding proposal, has now indicated its intention to join the negotiation process.²⁵⁶ John Ruggie, the former Special Representative of the Secretary-General who expressed deep concerns about the treaty proposal, has admitted that, “Now that negotiations on an international legal instrument are about to commence”, his sole concerns are that the treaty negotiation will “Build on what has already been achieved, not undermine it; and that the effort be meaningful and actionable where it matters most”.²⁵⁷

The ongoing debate has touched upon some of the key legal issues of a potential BHR treaty; however, there has not yet been a thorough discussion on the substantive content and the specific legal formulation. Moreover, drafting a text may provide a more concrete idea as to what the treaty might be and thus help further inform the general debate over whether we need a treaty. In this chapter, I will propose the design of a binding instrument on BHR from an international human rights law perspective, taking into consideration the findings in previous chapters. I will make concrete suggestions with regard to general issues and core provisions in formulating the instrument. To begin with, I will settle a number of general issues which would guide the substantive drafting of a treaty on BHR. Next, I will draft some core provisions and provide commentary for each suggested provision, aiming to facilitate further discussion and deeper research on the legal formulation. Finally, I will provide comments on the proposed design and address any additional issues.

²⁵⁶ EU (2015).

²⁵⁷ Ruggie (2015).

4.1 General Issues of a Binding Instrument on BHR

In order to draft a BHR treaty, it is important to settle some general issues. The settlement of general issues will build upon the structure of the instrument and provide guidance for core provisions. Taking into consideration the analysis on legal achievability in chapter 3, the following key issues for formulating a treaty on BHR have been identified: duty-bearers (should states and/or business enterprises constitute the duty-bearers?); scope (should the treaty broadly cover all business enterprises and human rights or specifically focus on certain business enterprises and human rights?); extraterritoriality (should the treaty address only territorial jurisdiction or also extraterritorial jurisdiction?); function (should the treaty strengthen existing obligations in international human rights law or create new ones?).

According to different perspectives of these key issues, there could be various combinations and numerous choices for the content of a binding instrument on BHR. My opinion on the above-mentioned key issues is that a binding instrument on BHR should be a convention with a broad coverage of scope aiming to strengthen state obligation to protect human rights. My position is based on the observation of the ongoing debate, the research of the international legal framework on BHR and the reference of sample international instruments. I will illustrate my proposal as follows.

4.1.1 Duty-bearers

When discussing the duty-bearers of a binding instrument, two significant background contexts shall be noted. The first one is that, as discussed in chapter 3, states are the primary duty-bearers of international legally binding instruments. The second one, as illustrated in chapter 1, is that the historical development of international standards on BHR has witnessed considerable resistance from business enterprises when international law attempts to put direct obligations on them.

It would be desirable if business enterprises were to commit to a binding instrument on BHR and implement the instrument as required. However, we have to face the controversy of corporate legal status in international law and the difficulty of implementation without clear and strong commitment by states. More practically, it is important to carefully consider the approach to involve business enterprises into the human rights agenda and any potential risks. A direct binding approach may draw more resistance from businesses in negotiation process. The Norms in 2003

declared both states and businesses as duty-bearers²⁵⁸ with the intent to gain a higher consensus and more attention from each of them. However, it resulted in strong resistance by businesses and subsequently failed in the political agenda. A nonbinding approach may be more acceptable for businesses but it may face difficulties in implementation process. The GPs require business enterprises to respect human rights. Compared to the Norms, the GPs are more widely accepted by both politicians and businesses. Nonetheless, it should be noted that the GPs are not international legally binding norms and they take a very lax approach in requiring businesses to respect human rights. To illustrate, the GPs take the wording that “Business enterprises should respect human rights” and that “The responsibility to respect human rights is a global standard of expected conduct for all business enterprises”.²⁵⁹ Naming corporations as duty-bearers has many potential risks. For example, consensus seems difficult to achieve among the countless types and numbers of corporations and the negotiation process will likely be prolonged. Further, there may be a backlash of breaking the existing consensus achieved by the GPs.

Therefore, I share the voice of civil society, such as the ICJ, and the opinions of some leading experts, that the duty-bearer of a binding instrument on BHR should be states, not businesses. My four reasons are as follows. Firstly, it is more compatible to the tradition and principle of international law in general, and international human rights law in specific, to hold states as treaty parties and duty-bearers. Secondly, it is deemed more practical and efficient to reach consensus among states compared to reaching consensus among numerous companies. Thirdly, the implementation of the instrument needs the power and regulation authority held by states. Fourthly, businesses have the responsibility to respect and ensure human rights as required by states through national legislations and domestic policies.

4.1.2 Scope

As previously discussed in chapter 3, the consideration on the scope of a BHR treaty relates to a group of issues. According to my observation, there are two types of thoughts: one aims at a broad coverage of human rights as well as business enterprises, and the other one prefers a specific focus on certain targets. While the majority of civil society organizations and some interna-

²⁵⁸ SCPPHR (2003).

²⁵⁹ HRC (2011a), Principle 11 at p. 13.

tional professionals support the binding approach with a call for a broad coverage of scope, others have proposed differing opinions that focus specifically on certain targets. Examples can be found in the following proposals. Ecuador and South Africa have proposed a binding proposal on TNCs.²⁶⁰ Ruggie has proposed a binding instrument on gross abuses of human rights.²⁶¹ World Obesity Federation has proposed a human rights based global convention on healthy diets, which attempts to address a sectoral issue in BHR area.²⁶² While the proposal for a binding instrument on BHR with a broad coverage received quite many criticisms from treaty opponents during the ongoing debate, parallel proposals with specific targets have also been criticized. As illustrated in previous chapters, a group of civil society organizations expressed their regrets on the limitation of Resolution 26/9, which only focuses on TNCs. Scholars, such as Deva, Tasioulas and Stewart, have noted the deficiencies of only focusing on gross abuses of human rights. The side-event on the proposal for a convention on healthy diets²⁶³ attracted quite a bit of attention from participants in the 3rd UN Forum. However, the attention mostly came from academia and civil organizations working on food related issues; but rarely from states and businesses.

If a binding instrument focuses on specific topics, I agree that it might be easier for its legal formulation and be practically more useful for addressing certain issues in BHR area. Nonetheless, specific concentration might not be desirable to fill the gap in international legal framework on BHR. It might also be confronted by risks such as inadequate attention from stakeholders due to its limited scope. Even if a binding instrument covering a broad scope might face obstacles which have been pointed out by treaty opponents, I argue that a BHR treaty should cover a broad range of both human rights and business enterprises. My four reasons are as follows. Principles of universality, indivisibility and interdependence of all human rights suggest that all BHR related rights should be guaranteed properly.²⁶⁴ The Principle of non-discrimination requires that all business enterprises, regardless of their distinctions as domestic or global operations as well as sizes or sectors, shall all be responsible for respecting human rights throughout their operations. The GPs, as the first authoritative guidance issued by the HRC for states and businesses on their

²⁶⁰ HRC (2014a).

²⁶¹ Ruggie (2014a).

²⁶² World Obesity Federation (2014).

²⁶³ Does the world need a human rights based convention on healthy diets? See OHCHR (2014a).

²⁶⁴ VDPA Art. 5.

responsibilities of BHR, cover a broad range of human rights as well as business enterprises. The international legal framework needs a BHR treaty with a broad coverage of human rights and businesses to fill in the gap regarding BHR area.

4.1.3 Extraterritoriality

As previously analysed in chapter 3, extraterritoriality is an extremely controversial issue in international law and is regarded as a legal obstacle in formulating a binding instrument on BHR. Extraterritoriality has not yet been explicitly clarified by human rights treaties as to what extent states shall protect human rights against abuses by business enterprises. Conversely, an increasing number of requests to address human rights abuses by TNCs have been presented by victims via appeals and civil society mobilization. The requests include the call for home states of TNCs to hold the parent companies accountable for abuses of human rights abroad in their global operations.

It might make the formulation of a binding instrument on BHR much easier and simpler to just set aside the controversial issue of extraterritoriality. However, one of the main stimulations for global civil mobilization for a treaty proposal on BHR is the massive impunity of human rights abuses by business activities and the difficulty for victims to seek justice and reparations. The situation is particularly serious in the context of the global operations of TNCs. As indicated in the previously discussed cases, victims of abuses by TNCs have been struggling to seek justice due to the lack of a binding instrument on BHR at the international level. A parallel obstacle is the inadequate regulation of business activities with respect to human rights at the national level. Extraterritorial obligation for states to protect human rights is not a new obligation, but an obligation existing in human rights treaties which has not yet been sufficiently clarified. A binding instrument on BHR can offer a platform for states to discuss and decide how they will address global BHR issues. To address the extraterritorial obligations of states to protect human rights is both necessary and achievable in the context of business global operations.

Therefore, I suggest that a treaty on BHR should address the issue of extraterritorial obligations of states to protect human rights against abuses by global operations of business enterprises. By doing so, states can agree to what extent they would like to offer protection of human rights extraterritorially, and under which circumstances they should conduct extraterritorial protection of human rights against abuses by business enterprises.

4.1.4 Function

To summarize, I suggest that a binding instrument on BHR should target states as duty-bearers, cover a broad range of human rights and business enterprises, and address the extraterritorial obligations of states to protect human rights against abuses by business enterprises. In this regard, I argue that the objective of a new binding instrument on BHR is to further strengthen state obligation in international human rights law with regard to human rights abuses by business enterprises. Even if it is crafted into a specific objective, the complexity and diversity of the BHR area is still a practical issue for the formulation of a binding instrument on BHR. Ruggie has cautioned that a binding instrument on BHR “Would have to be pitched at such a high level of abstraction that it would be devoid of substance, of little practical use to real people in real places”.²⁶⁵ It is undoubtedly significant to take note of Ruggie’s opinion; however, I argue that a binding instrument on BHR could take the form of a framework convention which would provide basic legal structure and general guidance to further clarify state obligation to protect human rights against abuses by businesses.

A group of scholars have argued that a BHR treaty does not necessarily mean to solve every single issue at one time in the whole BHR area. Deva argued that a binding instrument on BHR would be a part of a coherent combination of regulatory strategies, and could be followed by more binding instruments.²⁶⁶ Bilchitz suggested that a binding proposal on BHR could be meant to establish a framework and a number of principles in terms of which some of the complex issues would be resolved.²⁶⁷ Darcy asserted that many human rights treaties have set general protections and enunciated broad principles, and a binding instrument might also do so and then be subjected to further jurisprudential developments.²⁶⁸

Moreover, the framework convention is not a new thing for international legal framework. For example, the World Health Organization set a precedent via the FCTC. Compared to the FCTC, which is equipped only with a reporting mechanism by its Article 21, the framework convention on BHR could be equipped with a treaty body on BHR; taking an example from existing human

²⁶⁵ Ruggie (2014d).

²⁶⁶ Deva (2014a).

²⁶⁷ Bilchitz (2015).

²⁶⁸ Darcy (2015).

rights treaty bodies. A treaty body on BHR could facilitate the state reporting procedure, the individual communication procedure and also possibly the inquiry procedure. In this way, the monitoring mechanism of the framework convention of BHR can be a part of the UN human rights treaty body system.

Therefore, I suggest that an eligible candidate of a binding instrument on BHR could be a framework convention. The framework convention might offer state parties guidance on fulfillment of the obligation to protect human rights against abuses by business enterprises, but not a detailed requirement for addressing BHR issues. It might be followed up by further international legalization on BHR. For example, the framework convention can be developed via future instruments such as treaties, OPs, GCs and Statements. Further, it is suggested to keep in mind that taking the International Bill of Human Rights as an example, the framework convention shall not be overloaded and should be formulated with the length around 30 articles.

4.2 Suggested Core Provisions of a Framework Convention on BHR

In this section, taking into account the settlement of general issues, I will try to draft some core provisions of a framework convention on BHR and then follow the model of the GPs²⁶⁹ and the Commentary to the Maastricht Principles²⁷⁰ to provide commentaries for each provision. In the commentaries, I will indicate which legal sources I reference from and explain my drafting choices. Prior to drafting core provisions of the convention, it is crucial to find some relevant international instruments for reference, and to draft an outline for further development. First, international treaties are absolutely relevant and significant for reference on both format and content. For instance, in the context of BHR, core human rights treaties and the FCTC are important sample documents. Second, recent developments in international standards on BHR should be taken into consideration. Documents by human rights treaty bodies, such as the GC 16 by the CRC, are helpful since they are authoritative interpretations of human rights treaties. The GPs, which are legally nonbinding but have been endorsed by the HRC, can provide considerable insights for formulating the convention on BHR. Third, the Norms, which have no legal standing

²⁶⁹ HRC (2011a).

²⁷⁰ Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights. De Schutter et al. (2012) pp. 1084-1169.

but present a specific draft on the binding approach towards BHR, can also provide guidance when it is appropriate.

Prevention, accountability and remedy of human rights abuses by business enterprises are the significant elements indicated in state obligation to protect human rights. These elements have been highlighted in the GPs, and further, they have been proposed as the main body of a binding instrument on BHR by the ICJ report.

Therefore, based on these considerations, I drafted the outline for the framework convention as follows:

Preamble:

Part I Introduction

Part II Obligations of Prevention

Part III Obligations of Accountability

Part IV Obligations of Remedy

Part V Monitoring and Enforcement

PART VI Miscellaneous Provisions

Framework Convention on Business and Human Rights

4.2.1 Preamble

The States Parties to the present Convention,

1) Recognizing that **states have the obligation** to protect human rights and that **business enterprises**, as organs of society, have the responsibility to respect human rights set forth in the **Universal Declaration of Human Rights and other international instruments**.

2) Recognizing that business enterprises in many instances **contribute** to the realization of human rights enshrined in international instruments through, inter alia, input to economic development, employment generation, and productive investment. However, it has also been frequently observed that business activities can **adversely affect** the enjoyment of human rights.

Commentary:

1) This recognition relates to core human rights treaties as well as the UDHR. It aims to clearly clarify state obligation to protect human rights and business responsibility to respect human rights. As illustrated in chapter 3, state obligation to protect human rights has been confirmed by core human rights treaties, and it requires states to protect human rights against abuses by third parties including business enterprises. Business responsibility to respect human rights has been supported by the preamble of UDHR, which notes that “every organ of society” is responsible for promoting human rights and for securing the “universal and effective recognition and observance” of human rights. Preamble of the Norms in 2003 and the Pillar 1 as well as Pillar 2 of the GPs have illustrated state obligation and business responsibility. Therefore, I suggest that it is important for the Preamble of the framework convention on BHR to reaffirm these two principles.

2) This presentation is referenced in paragraph 1 of the Statement by CESCR in 2011. Businesses are neither duty-bearers nor right-holders of the framework convention on BHR; however, they are key stakeholders. It is significant to confirm the contribution made by business enterprises, and meanwhile to raise the awareness of the potential harm caused by businesses regarding the realization and enjoyment of human rights.

4.2.2 Part I Introduction

Article 1: Use of Terms

For the purposes of this Convention:

The term ‘business enterprise’ includes any business entity, both transnational and others, regardless of their size, sector, location, ownership and structure.

The term ‘human rights’ includes all internationally recognized human rights, particularly the rights supported by the Universal Declaration of Human Rights, International Covenant on Civil and Political Rights as well as International Covenant on Economic, Social and Cultural Rights.

Commentary:

Clarification of the use of terms is very important for binding instruments since it will facilitate the proceeding of the substantive content and guide the interpretation of the instruments at a later

stage. For the convention on BHR, it is even more significant considering the complexity and controversy of BHR issues.

The FCTC, the GPs and the Norms, all have a specific clarification for the use of terms, such as “business enterprise” and “transnational corporation”. The Norms, the GPs and the GC 16 have all used the term “business enterprises” to clarify a broad coverage of business enterprises. This provision is a combination of reference from those clarifications.

As I suggested, there shall be a broad coverage of rights in a binding instrument on BHR. Nonetheless, it should be noted that the controversial issue of scope will be confronted by both political and legal obstacles. The diverging interests of different groups of rights by states may polarize politics and cause political resistance. Further, the fact that most states have only committed to some of the human rights treaties but not all, indicates that there is a potential for conflicts. This issue could be one of the most problematic issues in formulating the instrument. My preliminary opinions for this dilemma are as follows. Firstly, the framework convention should guarantee a broad recognition of all internationally recognized human rights. Secondly, with the acknowledgement of all human rights, states could undertake to fulfil their obligation to protect human rights against abuses by businesses within their existing commitment to human rights treaties. This consideration aims to minimize political resistance and avoid legal conflicts. Thirdly, states shall undertake to guarantee effective remedies in relation to abuses by businesses for all the rights recognized under the national laws.

More detailed definitions can be formulated based on the research of the existing legal framework on BHR and the consultation with stakeholders. Further, other terms shall also be clarified, such as “home states” and “host states”.

Article 2: Objective

The objective of this Convention is to protect present and future generations from the adverse impacts of business activities by providing a framework which further clarifies state obligation to protect human rights against abuses by business enterprises to be implemented by state parties at the national, regional and international levels in order to respect, protect and fulfill human rights.

Commentary:

The term object and purpose is used eight times in the Vienna Convention on the Law of Treaties, including in Articles: 18, 19, 20, 31, 33, 41, 58 and 60. These eight uses of the term object and purpose touch upon treaty interpretation, reservations, modifications, material breaches, and obligations prior to ratification.²⁷¹ The objective of a binding instrument could be decisive in resolving multiple current international law controversies, and would serve as the foundation of the instrument. Therefore, it is crucial to clarify the objective of the convention clearly in the introduction. This provision takes example from Article 3 of the FCTC on Objective and it is re-phrased according to the previously suggested objective of a binding instrument on BHR.

Article 3: General Obligations

- 1) State Parties undertake, as their **primary obligation**, to respect, protect and fulfill human rights by all appropriate means; including particularly the adoption of legislative measures. With regard to business and human rights, each State has the obligation to effectively safeguard all persons under their jurisdiction against infringements from business enterprises by all appropriate measures, including particularly a supervision mechanism to ensure business enterprises' compliance with respect to human rights.
- 2) State Parties undertake to contribute to the fulfillment of human rights **universally** by all appropriate means; including particularly through national legislation and international co-operation. Considering the influence of transnational corporations on the enjoyment of human rights, states undertake to **make sufficient efforts to** ensure legal accountability of **transnational corporations in relation to human rights abuses extraterritorially**.
- 3) States, which, at the time of becoming a Party of the Convention, have not published their **National Action Plans on Business and Human Rights**, undertake, within **two years**, to work out and adopt a detailed plan of action for the progressive legislation and implementation, within a reasonable number of years, to guarantee the prevention, accountability and remedy of human rights abuses by business enterprises.

²⁷¹ Jonas (2010) p. 577.

Commentary:

The clarification of general obligations will provide guidance for the further illustration of obligations in the following text of the convention. According to the previous discussion, the following two fundamental issues need further clarification; preferably in the part of general obligations: state obligation and business responsibility with regard to human rights, as well as territorial and extraterritorial obligation of states to protect human rights. In addition, it would be beneficial if a requirement on NAPs could be included in the convention as a general obligation.

1) This provision relates to core human rights treaties, such as Article. 2 (1) of the ICESCR. It aims to further stress that states have the primary obligation to safeguard human rights and that states shall take appropriate measures; particularly legislative measures; to fulfill that obligation. Some of the BHR related international documents stress that states have the primary obligation to safeguard human rights while businesses have the responsibility to respect human rights and to assist states; such as the part of ‘General Obligations’ in the Norms in 2003 as well as para. 3 and 6 of the Statement by CESCR in 2011. It reads in the Statement that states parties “Have the primary obligation to respect, protect and fulfill the Covenant rights of all persons under their jurisdiction’ and that home states shall encourage TNCs ‘to assist host states...in building the capacities needed to address the corporate responsibility for the observance of economic, social and cultural rights’”.²⁷²

As brought up in BHR dialogues, such as the IOE meeting and the 3rd Forum, the GPs have distinguished state duty and business responsibility with regard to human rights. However, states and corporations often blame each other on human rights abuses in practice. It is necessary to stress in the convention that states have the primary obligation to protect human rights and that business enterprises should respect human rights, with states taking measures to ensure they do so. Further, it is highly recommended that business enterprises’ compliance of human rights is monitored by a supervision mechanism.

2) The extraterritorial obligation of states to protect human rights is implied both in instruments which relate to the general recognition of rights and in instruments which relate to a particular recognition of some set of human rights. For example, it can be deduced from a combined under-

²⁷² CESCR (2011) para. 3 and 6.

standing of Article 55 and 56 of UN Charter that all member states “pledge themselves to take joint and separate action in cooperation with the Organization” to achieve “universal respect” for human rights. Extraterritorial obligation of states under international human rights law has been supported by interpretation of human rights treaty bodies, such as the CESCR and the CRC. It is more often reflected by international instruments in the form of “international cooperation”. For example, Article 22 of UDHR, Article 32 of CRPD²⁷³ and Article 2 of ICESCR have all implied that states have the extraterritorial obligation of international co-operation.

This provision derives particularly from Article 2 (1) of the ICESCR, which requires states to undertake steps “through international assistance and co-operation...to the maximum of its available resources...to achieving progressively the full realization of the rights”. This provision takes the wording of “undertake to contribute to the fulfillment of human rights extraterritorially” instead of “undertake to respect, protect and fulfill human rights extraterritorially”. The later phrase will cause ambiguity on whether states are obligated for the human rights of every individual around the world. It could also frighten states away due to its umbrella-like requirement for a large scale of overloaded obligations. The former wording seems less strict, which increases the risk of diminishing the value of the convention. However, it is stressed that states are responsible for fulfilling human rights extraterritorially, which provide a space for specific requirements on state obligation. With this set in the “General Obligation”, further requirement can be laid out in following texts of the convention.

All types of business enterprises must respect human rights according to domestic legislations; through which state parties use to fulfill their convention obligations. Nevertheless, TNCs deserve more attention due to the complexity of their global operations and their potential negative influence. Therefore, it shall be set as a general obligation that TNCs have legal accountability in their home states with regard to any abuses of human rights in their global operations. Potential legal issues, such as the allocation of obligations among home states and host states can be addressed in specific texts as well as in the OPs to the convention.

3) The requirement of action plans can find reference in core human rights treaties, such as Article 14 of ICESCR, which requires states to adopt a detailed plan of action for the progressive im-

²⁷³ Convention on the Rights of Persons with Disabilities.

plementation of free primary education. As previously indicated, state implementation, civil mobilization and business involvement on the BHR agenda can be accelerated via producing and implementing a NAP on BHR. While the majority of states have not expressed political will in developing NAPs, the interest in the development of NAPs on BHR has been indicated by an increasing number of states as well as other stakeholders in the past year. There is a high potential that states would accept the conduct of a NAP within a reasonable time as a treaty obligation. Further, it would be helpful for the implementation of the convention. For instance, the monitoring body of the convention can require states to include achievements and challenges in relation to NAPs in the state reports to the monitoring body. In addition, it might be more desirable if the provision on NAPs could include more specific requirements. For example, states should review the effectiveness of the NAPs at regular intervals.

4.2.3 Part II Obligations of Prevention

Article 4: State Obligation to Prevent Human Rights Abuses by Business Enterprises

- 1) States undertake to take all necessary, appropriate and reasonable measures to prevent business enterprises from causing or contributing to abuses of human rights. Such measures can encompass: **legislation, regulation, policy as well as judicial and non-judicial monitoring.**
- 2) States undertake to provide sufficient law, with appropriate **criminal, civil and administrative liability for business enterprises and persons working for them**, to prevent human rights violations by business enterprises. State shall provide an open ended list of corporate offences with appropriate liability.
- 3) States undertake to provide effective guidance to business enterprises on how to respect human rights throughout their operations. It shall be required by law that business enterprises adopt and implement policies and processes appropriate to their size and circumstances. The processes include human rights **due diligence** process, on preventing, mitigating and remedying abuses of human rights in their operations, or complicity therein.

Commentary:

The objective of this convention is to further strengthen and clarify state obligation to protect human rights against abuses by business enterprises. It is paramount for states to fulfill their obli-

gation via preventing businesses from causing or contributing to abuses of human rights. It has been suggested that the convention shall cover a broad scope. Among other types of abuses, gross abuses of human rights and abuses conducted by TNCs certainly deserve more attention; taking into consideration the large scale impairment as well tremendous negative impact they may cause for human rights.

To begin with, the complexity of BHR issues requires a set of domestic regulatory initiatives with legislations, regulations and policies for different types of potential negative impacts. Among these initiatives, legislation is a significant approach. As discussed in chapter 3, national legislations that protect rights against abuses by businesses are generally insufficient and widely diverse. Without domestic legal support, business enterprises will ignore or even avoid their responsibility of respecting human rights. Further, victims of human rights abuses will hardly be able to hold corporations accountable via court jurisdictions. It is thus required that appropriate legal liability be guaranteed by national laws to prevent human rights abuses by business enterprises.

Case law, such as *Public Prosecutor v. Van Anraat*²⁷⁴ in the Netherlands, has confirmed that business directors can be held accountable for gross abuses of human rights. The GPs have reaffirmed that “Corporate directors, officers and employees may be subject to individual liability for acts that amount to gross human rights abuses”.²⁷⁵ Therefore, I suggest that states shall provide sufficient legislation with appropriate criminal, civil and administrative liability for both business enterprises and persons working for them, particularly for gross abuses of human rights.

Secondly, it is highly desirable to include provisions concerning business enterprises’ human rights due diligence and impact assessments in the convention on BHR. Human rights due diligence can be an effective preventive approach and is stressed by existing international instruments on BHR, such as the Statement by the CESCR, the GC 16 by the CRC as well as the GPs by the HRC. The Statement affirms that the obligation to respect entails that states “Shall ensure that companies demonstrate due diligence to make certain that they do not impede the enjoyment

²⁷⁴ In the case of *Public Prosecutor v. Van Anraat*, with charges of being an accomplice in the genocide and war crimes committed by Saddam Hussein, businessman Frans van Anraat was sentenced to 17 years of imprisonment by Court of Appeal of The Hague in May 2007. The judgment is based on both Dutch Penal Code and international law, such as the Geneva Conventions and customary international law.

²⁷⁵ HRC (2011a), Principle 23 at p. 21.

of the Covenant rights by those who depend on or are negatively affected by their activities”.²⁷⁶ The GC 16 conducted specific analysis on “children’s rights and due diligence by business enterprises”, stressing that “states should require businesses to undertake child-rights due diligence”.²⁷⁷ The GPs have dedicated a specific section for human rights due diligence by business enterprises.²⁷⁸ The GPs are referred to by the CRC in its GC 16 and can serve as a very good reference for both the framework convention and domestic legislations.

Further, the conducting of due diligence by business enterprises shall include their supply chains and subsidiaries to some extent; taking into consideration that business ventures are nowadays increasingly operating on a global scale through complex networks of subsidiaries, contractors, suppliers and joint ventures.

4.2.4 Part III Obligations of Accountability

Article 5: State Obligation to Ensure Accountability of Business Enterprises with regard to Abuses of Human Rights

- 1) States must take appropriate steps to **investigate, adjudicate and redress** abuses of human rights within their territory and/or jurisdiction caused or contributed to by business enterprises.
- 2) Regarding conducts related to **transnational corporations, host states** undertake the primary obligation to address human rights abuses by transnational corporations under their jurisdiction; **home states** undertake to take steps to address human rights contraventions abroad by transnational corporations which have their main offices under their jurisdiction, without infringing the sovereignty or diminishing the obligations of the host states. When adopting measures to meet this obligation, States must not violate the Charter of the United Nations and general international law nor diminish the obligations of the host states under the Convention.

Commentary:

The lack of accountability is one of the core issues of the current BHR situation. Accountability, particularly in the context of BHR, is of critical importance with regard to state obligation to pro-

²⁷⁶ CESCR (2011) para. 4.

²⁷⁷ CRC (2013) p. 9.

²⁷⁸ HRC (2011a), Human Rights Due Diligence, Principle 17-21 at pp. 16-20.

protect human rights. Guiding provisions on the legal accountability of business enterprises are suggested to be a main part of the convention. This provision aims at the further clarification of state obligation in accountability.

1) The first point is to further stress that states “must” ensure the accountability of businesses with regard to any abuses of human rights. The first half of this provision takes example from the first principle of the GPs, which firmly holds that states shall take appropriate steps to “prevent, investigate, punish and redress” human rights abuses by business enterprises in order to fulfill their obligations to protect human rights. Insufficient implementation of legislation will do no good in protecting human rights. Following the requirement in the above-mentioned prevention provisions, national legislations shall further provide specific legal liability for both corporations and their staff to support the conduct of accountability. For example, a list of criminal liabilities as well as accordingly adequate penalties shall be included in domestic criminal law. More provisions should be included in this part of the convention to ensure the investigation, adjudication and redressing of abuses of human rights caused or contributed to by business enterprises. Such provisions can be concerning jurisdiction of national courts and definition of business offences.

2) The second point is to clarify that both host states and home states of TNCs shall be responsible for addressing human rights abuses by TNCs. The second half of this provision takes example from the GC 16. The GC 16 states that in the context of increasingly global business operations, host states have the primary responsibility to respect, protect and fulfill human rights. Further, it holds that home states also have these obligations provided that “there is a reasonable link between the state and the conduct concerned”.²⁷⁹ A reasonable link, as illustrated by the GC 16, exists when a business enterprise “has its centre of activity, is registered or domiciled or has its main place of business or substantial business activities in the state concerned”.²⁸⁰

Most of the provisions in the convention shall be applicable for all business enterprises based on the principle of nondiscrimination, but TNCs deserve particular attention. It is always a controversial issue on how to hold companies accountable when they headquarter in one country, but cause and/or contribute to human rights abuses in another country. It is very important to clarify

²⁷⁹ CRC (2013) p. 6.

²⁸⁰ Ibid.

and strengthen the legal accountability of TNCs in this regard. Elaboration of this provision is likely to be a very complex exercise. Nonetheless, it is suggested to give a guide regarding the obligation of both host states and home states on the accountability of human rights abuses by TNCs. Further illustration can be developed in the main text of the convention or as an OP to the convention, including the obligation allocation between home states and host states and the criterion for actions by home states. For example, under what circumstance shall home states take the responsibility and to what extent can home states take actions. In addition, with the confirmation of extraterritorial obligation in the convention, there might be a possibility to develop a standard or custom via international case practice. To illustrate, strategic litigations, as well as judgments on extraterritorial jurisdiction in domestic courts can be used as tools to illustrate specific standards for home states to take actions in addressing extraterritorial BHR issues.

4.2.5 Part IV Obligations of Remedy

Article 6: State Obligation to Guarantee Effective Remedy for Victims of Human Rights Abuses by Business Enterprises

Each State Party to the present Covenant undertakes:

- (a) To ensure that **any person or group of people** whose human rights have been violated by business enterprises shall have an effective remedy in the form of reparation, restitution, compensation or rehabilitation;
- (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent **judicial, administrative or legislative authorities**, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
- (c) To ensure that the competent authorities shall **enforce such remedies** when granted.

Commentary:

It is of significant importance for the convention to confirm and to develop further the right to remedy by the victims in the context of business activities. This provision takes example from Article 2 (3) of the ICCPR. The right of action should arise in relation to all rights recognized under national laws. States should undertake to provide effective remedies for the victims, includ-

ing a description of the scope of jurisdiction for national courts, access to both judicial and non-judicial remedies and effective measures to ensure the remedial mechanisms. Read together with the obligation of extraterritorial protection, the obligation of remedy requires states develop global remedies via international cooperation to ensure effective remedies for those affected.

4.2.6 Part VI Monitoring

Article 7: Monitoring and Enforcement

1) Treaty Body:

There shall be established a Committee on Business and Human Rights. It shall consist of eighteen members and shall carry out the functions hereinafter provided.

The States Parties to the present Covenant undertake to submit reports on the legislative, judicial, administrative or other measures which they have adopted and which give effect to the prevention, accountability and remedy of human rights violations by business enterprises and on the progress made in the improvement of the general human rights situations:

- (a) Within one year of the entry into force of the present Covenant for the States Parties concerned;
- (b) Thereafter every three years and whenever the Committee so requests.

The Committee may request further information from the States Parties.

2) International Enabling Environment:

States must take deliberate, concrete and targeted steps, separately, and jointly through international cooperation, to create an international enabling environment conducive to address human rights abuses by business enterprises, through, inter alia:

- a) encouraging the sharing of best practice among transnational corporations, state-owned corporations and domestic small and medium sized corporations;
- b) providing guidelines and requiring reports on the human rights due diligence process, grievance mechanism and code of conducts;
- c) providing measures and policies in respect of judicial cooperation and international assistance for the management of business and human rights challenges.

Commentary:

1) Each of the nine core human rights treaties is equipped with a committee, referred to as “treaty body”, as a monitoring mechanism. These treaty bodies are mandated by either human rights treaties, such as the CCPR, or their OPs, such as the CESCR. This provision takes examples from Article 28-40 of the ICCPR.

The choice of a treaty body as a monitoring mechanism:

When arguing for the establishment of a World Court of Human Rights, Manfred Nowak stressed that a world court of human rights could help hold non-state actors, including TNCs, accountable for human rights abuses.²⁸¹ It would be ideal if we could have an international court to work on BHR related cases. An international arbitration tribunal on BHR has been proposed by Lawyers for Better Business, and it was presented to the participants in the 3rd Forum.²⁸² However, the proposal attracted limited attention, compared to the treaty proposal; and it remains only as a call from civil society.

With the implementation of a convention on BHR and the development of international law, I would expect to have international human rights courts working on human rights issues, including BHR issues, in the long run. I suggest setting up a treaty body on BHR for the convention as a monitoring mechanism as well as a platform for cooperating with other human rights treaty bodies. A treaty body on BHR will be more compatible to international human rights law and will also be much easier receive acceptance by states.

The function of the treaty body on BHR:

This provision mandates the committee to monitor the implementation of the convention by state parties via reviewing state reports to the committee. More monitoring measures can be developed through other provisions or through OPs. One example could be complaint procedures, which include individual communications, inter-state complaints and inquiries. For example, an OP can be further negotiated by states to mandate the committee with these monitoring procedures, just as the OP to the ICESCR does.²⁸³ I suggest that an OP on the Individuals Communications

²⁸¹ Nowak (2012).

²⁸² Lawyers for Better Business (2014).

²⁸³ ICESCR OP Art. 2, 10 and 11.

should be the first OP of the convention. However, in the case of a convention on BHR, an Inter-State Complaint Procedure might not be a highly-recommended choice since it has never been used. Further, it has the high potential to trigger a prolonged discussion, particularly in the context of extraterritorial obligation of state to protect human rights.

The issue of extraterritorial obligation:

A treaty body in place will be helpful for monitoring the implementation as well as the further development of dialogues and consensuses on addressing BHR issues among states. The formulation of the first OP and the function of the treaty body on BHR will be more complicated than other human rights treaty bodies due to the complexity of BHR issues and the relevance with the extraterritorial obligation of states. Taking extraterritorial obligation and the individual communication procedure as an example, I suggest that victims of human rights abuses by TNCs should submit communications to the treaty body on BHR against both host states and home states of TNCs. One of the significant preconditions for a treaty body to consider a communication is that the applicant has exhausted all available domestic remedies.²⁸⁴ In the case of human rights abuses by TNCs, exhausting all available domestic remedies in both host states and home states can be a significant criterion for victims to submit communications against the home state of a TNC, if they choose to do so.

2) This provision takes example from both the GPs²⁸⁵ and the Maastricht Principles²⁸⁶, both of which are not binding instruments, but have been produced based on states' existing obligations in international law.²⁸⁷ There are three reasons to include this provision into the convention. First, the creation of an international enabling environment for addressing BHR issues is a specific requirement deduced from state obligation of international cooperation in the context of increasing global business operations. Second, reflections by business enterprises in BHR dialogues have shown the differentiation among big companies and small and medium-sized enterprises on awareness and practice of respecting human rights. In the BHR dialogues, some of the giant

²⁸⁴ For example, ICCPR OP 1 Art. 2 and Ar. 5.

²⁸⁵ HRC (2011a), Principle 25 at p. 22.

²⁸⁶ FIAN International (2013). Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, Art. 29.

²⁸⁷ HRC (2011a), General Principles at p. 6.

companies, such as Nestlé were highly profiled.²⁸⁸ However, small and medium-sized enterprises have rarely been heard. In some of the dialogues, it was stressed by representatives from these types of companies that they had very few resources on BHR and that they would like to understand best practices and receive guidance from the leading companies. It was also recognized by the IOE that “More awareness raising and capacity building, particularly in SMEs [small and medium-sized enterprises], needs to be achieved”.²⁸⁹ Third, along with the dissemination of best practice, the management of challenges shall also be addressed with international cooperation and assistance.

4.2.7 Part VII Miscellaneous Provisions

In this part, further issues concerning the implementation of the convention should be included. This may include proposals for amendment as well as provisions on ratification, entry into force, reservations and denunciation.

4.3 Conclusion

To begin with, the elaboration of a BHR treaty will be much more than a task on legal analysis. My draft proposal on the legal formulation of a BHR treaty is based mostly on the theoretical requirement by international legal framework as well as the ongoing international debate on a treaty proposal. My draft proposal also takes into consideration the evaluation of the political and legal achievability of a BHR treaty discussed in chapter 3. It has been shown that a BHR treaty might be achievable considering the following two reasons. First, the recognition of existing human rights treaties by states may be helpful for states to accept a BHR treaty with similar formulation and monitoring mechanism. Second, resource documents, both on state obligation to protect and on BHR standards, are in place in international law. Based on these understanding, I presented my opinions on four general issues a BHR treaty may have to address: the duty-bearers, the scope, the extraterritoriality and the function of the treaty; then I proposed seven of the core provisions for a BHR treaty. From my perspective, a proper candidate for a binding instrument on

²⁸⁸ For example, see OHCHR (2014a).

²⁸⁹ IOE (2014c).

BHR could be a framework convention, and this convention should cover a broad scope and aim to strengthen state obligation to protect human rights.

Next, there are numerous issues which deserve specific attention when elaborating a binding instrument on BHR. Just to name a few: 1) paying specific attention to gross violations and selective sectoral issues, such as those in the food industry and mining industry; 2) ensuring the protection of BHR human right defenders; 3) illustrating supply chain, due diligence as well as extraterritorial jurisdiction; 4) stressing the human rights obligation of states when they act as a member of international organizations, especially as a member of international financial institutions, to ensure their operations respect human rights; and 5) affirming the importance of international judicial cooperation and mutual legal assistance in monitoring and implementation. However, a framework convention is needed to fill the legal gap in current international law and to further clarify the state obligation to protect human rights against abuses by business enterprises. Thus, the inclusion of detailed provisions concerning such issues may not be ideal or desirable, due to the possibility of overloading the convention and prolonging the negotiation process. I recommend that the further clarification of those issues be developed through Optional Protocols of the convention, or be interpreted by its treaty body via General Comments, Concluding Observations and Statements. When it is necessary and appropriate, those issues could also be addressed by other human rights instruments, similar to the GC16 by the CRC.

Lastly, as I illustrated in chapter 3, the elaboration of a BHR treaty is decided by political negotiations, on which stakeholders such as businesses and civil society representatives can have considerable influence. Therefore, my draft proposal aims to stimulate further discussion and I retain the opinion that the negotiation process for a binding instrument can offer venues for dialogues among stakeholders. It can also provide a platform for states to discuss as well as to decide the scope of protection for human rights they want to offer in the context of increasing global business operations.

Chapter 5 Conclusion

5.1 Main Findings

My research has been guided by my three-fold research question as follows:

What is the state of play in the ongoing debate of a binding instrument on BHR?

Is it necessary to elaborate a binding instrument on BHR?

If one is deemed necessary, how should a binding instrument on BHR be formulated?

To answer my research question, I briefly presented my observation of the ongoing debate of a binding instrument on BHR among stakeholders, particularly during the period of March 2014-March 2015. Next, I comprehensively evaluated the necessity of a BHR treaty from four perspectives; namely, the legal need of a BHR treaty in existing international legal framework, the political as well as legal achievability of a BHR treaty, and the potential implications of a binding instrument on BHR. Finally, I constructively proposed the design of a binding instrument on BHR with regard to four general issues and seven core provisions through reference to the preliminary findings and conduct of legal analysis.

It is outlined in chapter 2 that stakeholders have been increasingly involved in the discussion of a binding instrument on BHR. Notably, despite having been put into the political agenda, the BHR treaty proposal remains controversial. Further, while the debate has focused primarily on the necessity of a BHR treaty, emerging issues could also be identified; for instance, the substantive content of a BHR treaty and parallel efforts of negotiating a treaty.

It is shown in chapter 3 that it is deemed necessary to elaborate an international legally binding instrument on BHR. Four main arguments are as follows:

- 1) There is a legal need for a treaty on BHR because of the inadequacy of existing international legal framework on BHR, the insufficiency of international law implementation on BHR issues and the imbalance between individuals and businesses in international law.
- 2) A BHR treaty seems politically achievable since a certain amount of political consensuses among the HRC member states are reflected through the adoption of Resolution 26/9 and the potential trend of political consensuses is perceived increasing. Additionally, compared to the situa-

tion in previous binding approaches, oppositions by businesses are deemed relatively eased; and meanwhile, the support from civil society is increasing.

3) A treaty on BHR seems legally achievable since some of the human rights treaty provisions, as well as BHR standards, have already been in place in existing international legal framework. The emerging legal obstacles might be addressed if a binding instrument is properly formulated.

4) A BHR treaty appears positive for both international legalization and domestic change with regard to the greater protection of human rights, including national legislation, domestic litigation as well as civil mobilization.

It is deduced from the reasoning in chapter 4 that a binding instrument on BHR could be a framework convention with a broad coverage of scope aiming to strengthen the state obligation to protect human rights against abuses by businesses. Taking note of the findings in the ongoing debate as well as the achievements in international legal framework, I proposed on both the settlement of general issues and the drafting of core provisions of a BHR treaty. While the convention should be brief, it would still be valuable if it is well-structured with the emphasis on providing general guidance for states to make efforts on prevention, accountability and remedy of human rights abuses by corporations, including extraterritorial efforts. It is suggested that the convention be equipped with a monitoring mechanism, preferably a treaty body on BHR with competences on considering state reports, addressing communications and conducting inquiries.

5.2 Recommendations for Stakeholders

As I argued in the thesis, although politicians are decisive in international law making, businesses and civil society can have influence on the elaboration of a BHR treaty. By the adoption of Resolution 26/9, the elaboration of a BHR treaty has been put on the political agenda, and accordingly the debate on the necessity of a treaty has been gradually facilitated to further concerns such as the substantive content of the potential instrument as well as the legitimacy of the negotiation process. Particularly, the choice of a third party as the chair for the IGWG has been stressed by Ruggie two months after Resolution 26/9 and by the EU nine months after Resolution 26/9.²⁹⁰ Both of them, as representatives of international professionals and politicians respectively, ex-

²⁹⁰ Ruggie (2014e) and EU (2015).

tremely opposed to the treaty proposal at the early stage of the debate. They have now indicated the intention of being engaged in the process and they have started to make efforts to shape the negotiation process. As noted during the debate, the negotiation process should be a consultative and open approach, involving states, businesses as well as civil society. I further argue that, at this point, it is better for stakeholders to shape the discussion onto a legitimate track via participation of the negotiation process, rather than to undermine the negotiation process because of the divergence between proponents and opponents.

My further recommendations for key stakeholders are as follows:

5.2.1 States

Firstly, I suggest all states participate in the IGWG negotiation of a binding instrument on BHR. On one hand, their opinions, either positive or negative for the treaty proposal, will not be sufficiently considered without participation in the negotiation process. On the other hand, the elaboration of a new binding instrument matters to the international community as a whole and it influences every single state in one way or another. Thus the binding instrument needs sufficient discussion and contribution by a wide range of states.

Further, I recommend all states make further efforts in the dissemination and implementation of the GPs. I recommend this because the GPs should be the foundation for the way forward in further addressing BHR issues, including any international legalization in this domain.

Thirdly, I suggest that key sponsors of the binding instrument proposal, for example, Ecuador and South Africa, make more effort in the facilitation of the negotiation process. The following approaches might be taken as a starting point: 1) taking into consideration both the positive and negative reflections by stakeholders, including the concerns on achievability and implications of a BHR treaty; 2) guaranteeing the legitimacy of the negotiation process, for instance, disclosure of information, consultation with stakeholders as well as conduct of legal research; 3) taking full recognition of the values of the GPs but not undermining them for the purpose of advocating for a treaty; 4) taking measures now to further address human rights abuses by business activities at the domestic level, such as through both judicial and non-judicial mechanisms to guarantee access to remedy for victims.

5.2.2 Business Enterprises

As observed from the concerns by business organizations such as the ICC, the major risk of a binding instrument on BHR might be in creating additional human rights obligations for business enterprises. One example is the shifting of states' obligation to protect human rights to the private sectors. In this regard, firstly, it will be crucial for businesses to equip themselves with the knowledge of their responsibility to respect human rights as well as the distinction between state obligation and corporate responsibility with regard to human rights. Secondly, it will be significant to deliver their opinions in the negotiation process on the treaty proposal as well as on their practice in addressing BHR issues. For instance, one approach can be via inputs by accredited business organizations in the IGWG negotiation sessions.

Apart from that, it will be better for the business enterprises' own benefits to increase awareness of the BHR agenda and to take action now via implementation of the GPs. Through the GPs they can fulfill their responsibility to respect human rights and they can be better prepared for any further requirements with respect to human rights at the international and national level.

5.2.3 Civil Society

An increasing number of civil organizations have been supporting the binding instrument proposal. However, there currently have not been sufficient and concrete proposals for addressing the legal obstacles in formulating a BHR treaty. In this context, I recommend civil society organizations collaborate with each other to facilitate the proceeding of the negotiation process. Possible steps could include: 1) contributing to the further integration of human rights into the business agenda, 2) facilitating the legitimacy of the negotiation process, and 3) delivering their voice on the substantive content of a BHR treaty based on legal research and practical experience.

5.3 Issues for Further Research

Scholars play a significant role in any further international legalization in the BHR area. In particular, legal scholars can contribute in ways such as providing legal expertise in formulating a BHR treaty. Legal issues, such as the duty-bearers, scope and extraterritoriality of a potential BHR treaty remain controversial. Additionally, many issues may occur in the future; such as the implementation, enforcement and interpretation of the treaty, if it is produced. Further research on identified and potential key legal issues will contribute a great deal, specifically for the legal

formulation of BHR treaty as well as for further developments of international human rights instruments.

At the opening of the 3rd Forum in late 2014, United Nations High Commissioner for Human Rights pointed out that the Human Rights Council has decided to begin work on a new legally binding treaty on human rights and transnational corporations. In his statement, the High Commissioner said that “Although this decision gave rise to some discussion, we must now ensure that political controversy does not become an obstacle to action”.²⁹¹ Meanwhile, the High Commissioner noted that “While treaty negotiations will start next year, and may take time, we must advance in the implementation of the Guiding Principles”.²⁹²

I would thus expect a future treaty be produced to further address business and human rights issues; and I hope that, before a treaty is in place, the protection of human rights be strengthened via available approaches.

²⁹¹ OHCHR (2014b).

²⁹² Ibid.

Bibliography

Primary Resources:

Treaties/Declarations

CRC	Convention on the Rights of the Child (Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989 entry into force 2 September 1990)
FCTC	Framework Convention on Tobacco Control (Adopted by the World Health Assembly on 21 May 2003, entry into force on 27 February 2005)
ICCPR	International Covenant on Civil and Political Rights (Adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of 16 December 1966, entry into force on 23 March 1976)
ICESCR	International Covenant on Economic, Social and Cultural Rights (Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 3 January 1976)
VCLT	Vienna Convention on the Law of Treaties (Signed at Vienna on 23 May 1969, entry into force on 27 January 1980)
VDPA	Vienna Declaration and Programme of Action (Adopted by the World Conference on Human Rights in Vienna on 25 June 1993)
UN Charter	The Charter of the United Nations (Signed on 26 June 1945, in San Francisco, at the conclusion of the United Nations Conference on International Organization, and came into force on 24 October 1945. The Statute of the International Court of Justice is an integral part of the Charter)
UDHR	Universal Declaration of Human Rights (Adopted by the General Assembly of the United Nations, on 10 December 1948)

UN Documents

Commission on Human Rights

CHR (2004)	Responsibilities of transnational corporations and related business enterprises with regard to human rights (At its 56th meeting, on 20 April 2004, the Commission on Human Rights) Decision 2004/116
------------	---

Committee on Economic, Social and Cultural Rights

CESCR (2011)	Statement on the obligations of States parties regarding the corporate sector and economic, social and cultural rights E/C.12/2011/1
--------------	--

Committee on the Rights of the Child

CRC (2013) General comment No. 16 (2013) on State obligations regarding the impact of the business sector on children's rights CRC/C/GC/16

Economic and Social Council

ECOSOC (2004) Responsibilities of transnational corporations and related business enterprises with regard to human rights (At its 49th plenary meeting, on 22 July 2004, the Economic and Social Council took note of Commission on Human Rights decision 2004/116 of 20 April 2004) Decision 2004/279

Human Rights Council

HRC (2008) Mandate of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises A/HRC/RES/8/7

HRC (2011a) Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework A/HRC/17/31

HRC (2011b) Human rights and transnational corporations and other business enterprises A/HRC/RES/17/4

HRC (2012) Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises A/HRC/20/29

HRC (2014a) Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights A/HRC/RES/26/9

HRC (2014b) Human rights and transnational corporations and other business enterprises A/HRC/RES/26/22

HRC (2014c) Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises A/HRC/26/25

HRC (2014d) Outcome of the seventh session of the Working Group on the issue of human rights and transnational corporations and other business enterprises A/HRC/WG.12/7/1

Human Rights Committee

CCPR (1984) Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, Thirteenth session, Delia Saldias de Lopez v. Uruguay, 29 July 1981. (Communication No. 52/1979) CCPR/C/13/D/52/1979

CCPR (2012) Concluding observations on the sixth periodic report of Germany CCPR/C/DEU/CO/6

CCPR (2013) List of issues in relation to the fourth periodic report of Ireland CCPR/C/IRL/Q/4

Sub-Commission on the Promotion and Protection of Human Rights

SCPPHR (2003) Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights E/CN.4/Sub.2/2003/12/Rev.2

Cases

Aguinda v. Texaco US Court of Appeals for the Second Circuit, Manhattan, 16 August 2002

Aguinda v. Chevron Ecuadorian Superior Court of Nueva Loja, Nueva Loja, 14 February 2011

Jota v. Texaco US Court of Appeals for the Second Circuit, Manhattan, 16 August 2002

Kiobel v. Royal Dutch Petroleum Co. US Supreme Court, Washington, DC, 17 April 2013

Public Prosecutor v. Van Anraat Court of Appeal of The Hague, The Hague, 9 May 2007

Online Videos

BHRR-UND (2014) Public Debate on “Does the World Need a Treaty on Business and Human Rights? Weighing the Pros and Cons” (Business and Human Rights Resource Centre and University of Notre Dame, London, 14 May 2014)

<http://business-humanrights.org/en/binding-treaty/event-by-business-human-rights-resource-centre-univ-of-notre-dame-may-2014> [Last accessed on 10 June 2015]

UN HRC (2014) A/HRC/26/L.22/Rev.1 Vote Item: 3 - 37th Meeting 26th Regular Session Human Rights Council (Adopted as A/HRC/RES/26/9) (United Nations Human Rights Council, Geneva, 26 June 2014)

<http://webtv.un.org/meetings-events/human-rights-council/regular-sessions/26th-session/watch/ahrc26l.22rev.1-vote-item3-37th-meeting-26th-regular-session-human-rights-council/3643474571001> [Last accessed on 10 June 2015]

IOE-WBCSD (2015) Webinar on “International treaty on business and human rights: A status report” (International Organization of Employers and World Business Council for Sustainable Development, Geneva, 30 March 2015)

<https://www.youtube.com/watch?v=H0Hf2lQsHtE&feature=youtu.be> [Last accessed on 10 June 2015]

Secondary Resources:

Books and Articles

- Amao, Olufemi. *Corporate Social Responsibility, Human Rights and the Law: Multinational Corporations in Developing Countries*. London: Routledge, 2011
- Baehr, Peter R.. *Non-Governmental Human Rights Organizations in International Relations*. London: Palgrave Macmillan, 2009
- Berg, Bruce L. *Qualitative Research Methods for the Social Sciences*. 7th edition. Boston: Allyn & Bacon Publisher, 2009
- Carasco, Emily F. and Jang B. Singh. *Towards holding transnational corporations responsible for human rights*. In: *European Business Review*. Vol. 22 (2010), pp. 432–445
- Campbell, John. *Why Would Corporations Behave in Socially Responsible Ways? An Institutional Theory of Corporate Social Responsibility*. In: *The Academy of Management Review*. Vol. 32 (3) (2007), pp. 946-967
- Clapham, Andrew. *Human Rights Obligations of Non-State Actors*. Oxford: Oxford University Press, 2006
- De Schutter, Olivier. *Sovereignty-plus in the Era of Interdependence: Toward an International Convention on Combating Human Rights Violations by Transnational Corporations*. In: P. Bekker, R. Dolzer and M. Waibel (eds). *Making Transnational Law Work in the Global Economy: Essays in Honour of Detlev Vagts*. Cambridge: Cambridge University Press, 2010, pp. 245-284
- De Schutter, Olivier. *Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights*. In: *Human Rights Quarterly*. Vol.34 (2012), pp. 1084-1169
- Deva, Surya. *Regulating Corporate Human Rights Violations: Humanizing Business*. London: Routledge, 2012
- Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* Edited by Surya Deva and David Bilchitz. Cambridge: Cambridge University Press, 2013
- Emedi, Stephen J.. *Utilizing Existing Mechanisms of International Law to Implement Human Rights Standards: States and Multinational Corporations*. In: *Arizona Journal of International and Comparative Law*. Vol. 28 (3) (2011), pp.629-658
- Epp, Charles R.. *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective*. Chicago: The University of Chicago Press, 1998
- Forsythe, David P.. *Human Rights in International Relations*. 3rd edition. Cambridge: Cambridge University Press, 2012
- Interdisciplinary Perspectives on International Law and International Relations*. Edited by Jeffrey L. Dunoff and Mark A. Pollack. Cambridge: Cambridge University Press, 2012
- International Law and International Relations*. Edited by Beth A. Simmons and Richard H. Steinberg. Cambridge: Cambridge University Press, 2006
- International Law*. Edited by Malcolm D. Evans (4th edition). Oxford: Oxford University Press, 2014
- Johnston, R. Burke. *Examining the Validity Structure of Qualitative Research*. In: *Education*. Vol.118 (1997), pp. 282-293
- Jonas, David S. *The Object and Purpose of a Treaty: Three Interpretive Methods*. In: *Vanderbilt Journal of Transnational Law*. Vol. 43 (3) (2010), pp. 565-609
- Langford, Malcolm. *Extraterritorial Duties in International Law*. In: Malcolm Langford, Martin Scheinin, Wouter Vandenhole and Willem van Genugten (eds.). *Global Justice, State Duties: The*

Extra-Territorial Scope of Economic, Social and Cultural Rights in International Law. Cambridge: Cambridge University Press, 2012, pp. 51-113

Martin-Ortega, Olga. *Human rights due diligence for corporations from voluntary standards to hard law at last?*. In: Netherlands Quarterly of Human Rights. vol. 32 (1) (2014), pp. 44-74

Ruggie, John Gerard. *Just Business: Multinational Corporations and Human Rights*. New York: W. W. Norton & Company, 2013

Simmons, Beth A.. *Mobilizing for Human Rights: International Law in Domestic Politics*. Cambridge: Cambridge University Press, 2009

Wheatley, Steven. *On the Legitimate Authority of International Human Rights Bodies*. In: Andreas Føllesdal, Johan Karlsson Schaffer and Geir Ulfstein (eds.). *The Legitimacy of International Human Rights Regimes: Legal, Political and Philosophical Perspectives*. Edited by Cambridge: Cambridge University Press, 2013, pp. 84-116

Weissbrodt, David. *Human Rights Standards Concerning Transnational Corporations and Other Business Entities*. In: Minnesota Journal of International Law. Vol. 23 (2) (2014), pp.135-171

Wipfli, Heather. *Power of the process: Evaluating the impact of the Framework Convention on Tobacco Control negotiations*. In: Health Policy. Vol.100 (2-3) (2011), pp.107-115

Online Sources

Bernaz, Nadia. *Multilateral Agreement on Investment: Time to Awaken the Beast? – A contribution to the “Business and Human Rights Treaty” Debate*. 2014a.

<http://rightsasusual.com/?p=756> [Last accessed on 10 June 2015]

Bernaz, Nadia. *Does the world need a business and human rights treaty?* 2014b.

<http://rightsasusual.com/?p=850> [Last accessed on 10 June 2015]

BHRRC. *Discover Big Issues: Binding Treaty*. 2015.

<http://business-humanrights.org/en/binding-treaty> [Last accessed on 10 June 2015]

Bilchitz, David. *The Moral and Legal Necessity for a Business and Human Rights Treaty*. 2015.

<http://business-humanrights.org/sites/default/files/documents/The%20Moral%20and%20Legal%20Necessity%20for%20a%20Business%20and%20Human%20Rights%20Treaty%20February%202015%20FINAL%20FINAL.pdf>

[Last accessed on 10 June 2015]

Darcy, Shane. *Key Issues in the Debate on a Binding Business and Human Rights Instrument*. 2015.

<https://businesshumanrightsireland.wordpress.com/2015/04/13/key-issues-in-the-debate-on-a-binding-business-and-human-rights-instrument/> [Last accessed on 10 June 2015]

Deva, Surya. *The Human Rights Obligations of Business: Reimagining the Treaty Business* 2014

http://business-humanrights.org/sites/default/files/media/documents/reimagine_int_law_for_bhr.pdf

[Last accessed on 10 June, 2015]

Deva, Surya. *Corporate Human Rights Abuses and International Law: Brief Comments*. 2015.

<http://jamesgstewart.com/corporate-human-rights-abuses-and-international-law-brief-comments/> [Last accessed on 10 June, 2015]

Dismantle Corporate Power. *Dismantle Corporate Power Campaign*. 2014.

http://www.stopcorporateimpunity.org/?page_id=5530 [Last accessed on 10 June 2015]

Ecuador. *Statement on the Resolution on “Human Rights and Transnational Corporations” at the 17th Session of the Human Rights Council*. 2011.
<http://business-humanrights.org/sites/default/files/media/documents/ruggie/declaration-ecuador-human-rights-business-16-jun-2011.pdf> [Last accessed on 10 June 2015]

Ecuador. *Statement on behalf of a Group of Countries at the 24rd Session of the Human Rights Council*. 2013.
<http://business-humanrights.org/sites/default/files/media/documents/statement-unhrc-legally-binding.pdf> [Last accessed on 10 June 2015]

Ecuador. *Ecuador Promotes the Protection of Human Rights and the Environment from Damages Caused by Transnational Corporations*. 2015.
<http://www.cancilleria.gob.ec/ecuador-promotes-the-protection-of-human-rights-and-the-environment-from-damages-caused-by-transnational-corporations/> [Last accessed on 10 June 2015]

EU, *European perspectives on Business and Human Rights (19/03/2015)*. 2015.
http://www.eeas.europa.eu/delegations/un_geneva/press_corner/all_news/news/2015/20150323_bus_and_hr_en.htm [Last accessed on 10 June 2015]

Embassy of Sweden in Beijing and CSR Asia. *A Study on Corporate Social Responsibility Development and Trends in China*. 2015.
http://www.swedenabroad.com/ImageVaultFiles/id_29016/cf_347/CSR-development-and-trends-in-China_WEBB.PDF [Last accessed on 10 June 2015]

FIAN International. *Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights*. 2013.
http://www.etoconsortium.org/nc/en/library/maastricht-principles/?tx_drblob_pi1%5BdownloadUid%5D=23 [Last accessed on 10 June 2015]

FIDH. *Business and Human Rights: Enhancing Standards and Ensuring Redress*. 2014.
https://www.fidh.org/IMG/pdf/201403_briefing_paper_enhance_standards_ensure_redress_web_version.pdf [Last accessed on 10 June 2015]

FIDH-ESCR-net. *FIDH and ESCR-Net New Joint “Treaty Initiative”*. 2015
<https://www.fidh.org/International-Federation-for-Human-Rights/globalisation-human-rights/business-and-human-rights/16868-fidh-and-escr-net-new-joint-treaty-initiative> [Last accessed on 10 June 2015]

Friends of the Earth. *Call for tender for legal research on UN HRC Proposal for Business & Human Rights Treaty*. 2015.
<http://business-humanrights.org/en/call-for-tender-for-legal-research-on-un-hrc-proposal-for-business-human-rights-treaty> [Last accessed on 10 June 2015]

Frankental, Peter. *A Business and Human Rights Treaty? We shouldn't be afraid to frighten the horses*. 2014.
<http://www.ihrb.org/commentary/business-and-human-rights-treaty-we-shouldnt-be-afraid.html> [Last accessed on 10 June 2015]

Global Policy Forum. *Corporate Influence on the Business and Human Rights Agenda of the United Nations*. 2014.
https://www.globalpolicy.org/images/pdfs/GPFEurope/Corporate_Influence_on_the_Business_and_Human_Rights_Agenda.pdf [Last accessed on 10 June 2015]

HRW. *Dispatches: A Treaty to End Corporate Abuses?* 2014.
<http://www.hrw.org/news/2014/07/01/dispatches-treaty-end-corporate-abuses> [Last accessed on 10 June 2015]

ICC. *Comments on the Proposal for a Binding UN Treaty on Business and Human Rights*. 2014a. <http://www.google.no/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=4&ved=0CDAQFjAD&url=http%3A%2F%2Fwww.rijksoverheid.nl%2Fbestanden%2Fdocumenten-en-publicaties%2Fwob-verzoeken%2F2015%2F01%2F12%2Fbesluit-wob-verzoek-internationaal-bindend-instrument-mbt-bedrijven-en-mensenrechten%2Fwob-verzoek-bindend-instrument-doc-4.pdf&ei=ZfBeVcfHJYGXsAH1w4DABw&usg=AFQjCNEElSzzIpScSXwnTn4Q5CIT1-A0fw&bvm=bv.93990622,d.bGg> [Last accessed on 10 June 2015]

ICC. *ICC disappointed by Ecuador Initiative adoption*. 2014b. <http://www.iccwbo.org/News/Articles/2014/ICC-disappointed-by-Ecuador-Initiative-adoption/> [Last accessed on 10 June 2015]

ICC. *ICC represents international business at 3rd UN Forum on Business and Human Rights*. 2014c. <http://www.iccwbo.org/advocacy-codes-and-rules/areas-of-work/corporate-responsibility-and-anti-corruption/international-business-and-human-rights/> [Last accessed on 10 June 2015]

ICJ. *Needs and Options for a new International Instrument in the field of Business and Human Rights*. 2014. http://icj.wputengine.netdna-cdn.com/wp-content/uploads/2014/06/NeedsandOptionsinternationalinst_ICJReportFinalelecvers.compressed.pdf [Last accessed on 10 June 2015]

IHRB. *Business and Human Rights Treaty*. 2015. <http://www.ihrb.org/tags.html?tag=business+and+human+rights+treaty> [Last accessed on 10 June 2015]

IOE. *Consensus on BHR is broken with the adoption of the Ecuador Initiative*. 2014a. http://www.ioe-emp.org/fileadmin/ioe_documents/publications/Policy%20Areas/csr/EN/2014-06-26_G-566_Consensus_on_Business_and_Human_Rights_is_broken_with_the_Adoption_of_the_Ecuador_Initiative.pdf [Last accessed on 10 June 2015]

IOE. *IoE Conference Provisional Agenda*. 2014b. http://www.ioe-emp.org/fileadmin/ioe_documents/publications/Policy%20Areas/business_and_human_rights/EN/2014-10-03_Agenda_International_Conference_on_BHR_agenda.pdf [Last accessed on 10 June 2015]

IOE. *IoE and Federation of Western Switzerland (FER) Host High-level Conference on Business and Human Rights in Geneva*. 2014c. http://www.ioe-emp.org/fileadmin/ioe_documents/publications/Policy%20Areas/business_and_human_rights/EN/2014-11-20_G-680_News_Release_-_IOE_and_FER_host_high-level_Business_Human_Rights_Conference_in_Geneva.pdf [Last accessed on 10 June 2015]

Lawyers for Better Business. *An International Arbitration Tribunal on Business and Human Rights*. 2014. <http://www.l4bb.org/news/TribunalV5B.pdf> [Last accessed on 10 June 2015]

Loots, Josua. *Of Aims and Means: More Coordination and Harmonization of Efforts are Critical to Further Progress on Bbusiness and Human Rights*. 2014. <http://www.ihrb.org/commentary/of-aims-and-means.html> [Last accessed on 10 June 2015]

Mégret, Frédéric. *Would a Treaty Be All It Is Made Up to Be?* 2015.
<http://jamesgstewart.com/would-a-treaty-be-all-it-is-made-up-to-be/> [Last accessed on 10 June 2015]

Mehra, Amol *The Caravan toward Business Respect for Human Rights*. 2015.
<http://www.ihrb.org/commentary/caravan-toward-business-respect-for-human-rights.html> [Last accessed on 10 June 2015]

Nowak, Manfred. *On the Creation of World Court of Human Rights*. 2012.
http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2118352 [Last accessed on 10 June 2015]

OHCHR. *2014 UN Forum on Business and Human Rights “Advancing business and human rights globally: alignment, adherence and accountability”*. 2014a.
<http://www.ohchr.org/EN/Issues/Business/Forum/Pages/2014ForumonBusinessandHumanRights.aspx> [Last accessed on 10 June 2015]

OHCHR. *Opening Remarks by Mr. Zeid Ra’ad Al Hussein, United Nations High Commissioner for Human Rights at Annual Forum on Business and Human Rights*. 2014b.
<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15367&LangID=E> [Last accessed on 10 June 2015]

Ruggie, John. *A UN Business and Human Rights Treaty? An Issues Brief by John G. Ruggie*. 2014a.
<http://www.hks.harvard.edu/m-rcbg/CSRI/UNBusinessandHumanRightsTreaty.pdf> [Last accessed on 10 June 2015]

Ruggie, John. *A UN Business and Human Rights Treaty Update*. 2014b.
http://business-humanrights.org/sites/default/files/media/un_business_and_human_rights_treaty_update.pdf [Last accessed on 10 June 2015]

Ruggie, John. *A Business and Human Rights Treaty? International legalisation as precision tools*. 2014c.
<http://www.ihrb.org/commentary/business-and-human-rights-treaty-international-legislation-as-precision-tools.html> [Last accessed on 10 June 2015]

Ruggie, John. *Quo Vadis? Unsolicited Advice to Business and Human Rights Treaty Sponsors*. 2014d.
<http://www.ihrb.org/commentary/quo-vadis-unsolicited-advice-business.html> [Last accessed on 10 June 2015]

Ruggie, John. *The Past as Prologue? A Moment of Truth for UN Business and Human Rights Treaty*. 2014e.
<http://www.ihrb.org/commentary/past-as-prologue.html> [Last accessed on 10 June 2015]

Ruggie, John. *Closing Plenary Remarks, UN Forum on Business & Human Rights*. 2014f.
<http://jamesgstewart.com/closing-plenary-remarks-un-forum-on-business-and-human-rights/> [Last accessed on 10 June 2015]

Ruggie, John. *Life in the Global Public Domain: Response to Commentaries*. 2015.
<http://jamesgstewart.com/life-in-the-global-public-domain-response-to-commentaries/> [Last accessed on 10 June 2015]

Stewart, James G. *Symposium: Business and Human Rights – Next Steps*. 2015.
<http://jamesgstewart.com/symposium-business-and-human-rights-next-steps/> [Last accessed on 10 June 2015]

South Centre. *Report on the “Workshop of Human Rights and TNCs: Paving the Way for a Legally Binding Instrument”*. 2014.

http://www.southcentre.int/wp-content/uploads/2014/05/Ev_140311_Final-Report.pdf [Last accessed on 10 June 2015]

Taylor, Mark. *A Business and Human Rights Treaty? Why Activists Should be Worried*. 2014.

<http://www.ihrb.org/commentary/business-and-human-rights-treaty-why-activists-should-be-worried.html> [Last accessed on 10 June 2015]

Treaty Alliance. *Global movement for a Binding Treaty*. 2014.

<http://www.treatymovement.com/> [Last accessed on 10 June 2015]

The Economist Intelligence Unit. *The Road from Principles to Practice: Today’s Challenges for Business in Respecting Human Rights*. 2015.

http://www.economistinsights.com/sites/default/files/EIU-URG%20-%20Challenges%20for%20business%20in%20respecting%20human%20rights%20WEB_corrected%20logos%20and%20UNWG%20thx.pdf [Last accessed on 10 June 2015]

World Obesity Federation. *Global Convention on Healthy Diets*. 2014.

<http://www.worldobesity.org/what-we-do/policy-prevention/advocacy/global-convention/> [Last accessed on 10 June 2015]