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KEEPING THE HEAD UP: LESSONS LEARNED FROM THE INTERNATIONAL DEBATE ON BUSINESS AND HUMAN RIGHTS[1]

MANTENDO A CABEÇA ERGUIDA: LIÇÕES APRENDIDAS COM O DEBATE INTERNACIONAL SOBRE EMPRESAS E DIREITOS HUMANOS

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Abstract
The present paper analyses the negotiating history of different initiatives related to the issue of business and human rights in the United Nations. It particularly focusses on the different lessons learned in such negotiations with the view of identifying and clarifying the challenges developing countries face in the negotiation of an international instrument on business and human rights which is currently discussed in the United Nations Human Rights Council.

Keywords
Business and human rights. Human Rights Council. Binding instrument.

Resumo
O presente artigo analisa a história das negociações de diferentes iniciativas relacionadas com a questão das empresas e dos direitos humanos nas Nações Unidas. Ele focaliza particularmente as diferentes lições aprendidas em tais negociações com o objetivo de identificar e esclarecer os desafios que os países em desenvolvimento enfrentam na negociação de um instrumento internacional sobre empresas e direitos humanos que é atualmente discutido no Conselho de Direitos Humanos das Nações Unidas.

Palavras-chave
Empresas e Direitos humanos. Conselho de Direitos Humanos. Instrumento vinculante.

1. INTRODUCTION

The international debate on business and human rights is not new. The dichotomy between the role that private individuals and other private entities in the international arena human rights play, and the efforts of States to cope with such role, has been a long existing concern in international affairs. Even in the early 1800s, several States laid down initiatives to counter the harmful effects of the conduct of private entities on human dignity[2]. Similarly, the contribution of corporations and other business enterprises in the commission of egregious violations of human rights during the Second World War led to insightful discussions on the need to adjudicate on corporate responsibility of those companies involved in crimes ranging from profiting from slave work force to supplying Zyclon B gas to concentration camps (GALLEGOS and URIBE, 2016). Nonetheless, it was not until the

[1] The views expressed in this paper are do not represent views of the South Centre or its Member States and are only the responsibility of the author.
[2] Various treaties signed by Great Britain with the Netherlands, Portugal and Spain in the early 1800s established international tribunals with the jurisdiction to adjudicate cases of captured slave ships with the aim to suppress the slave trade (Bethell, 1966 and Martinez, 2008)

1970s that the United Nations decided to set in motion a global agenda on the debate of business and human rights.

This global agenda was triggered by the denunciation of Chile of the involvement of transnational corporations (TNCs) in the political, economic and military decisions of States, particularly in developing States. Former President of Chile, Salvador Allende, strongly noted, in his well-remembered speech to the General Assembly in December 1972, that:

> The corporations are interfering in the fundamental political, economic and military decisions of the states. The corporations are global organizations that do not depend on any state and whose activities are not controlled by, nor they are accountable to nay parliament or any other institution representative of the collective interest. In short, all the world political structure is being undermined. The dealer's don't have a country. The place where thy may be does not constitute any kind of link; the only thing they are interested in is where they make profits (ALLENDE, 1972).

In the same year, the United Nations Under-Secretary-General drafted a resolution in the UN Economic and Social Council (UN ECOSOC) calling for the formation of a Group of Eminent Persons to "study the role of multinational corporations (MNEs) and their impact on the process of development, especially that of the developing countries, and also their implication for international relations" (UN ECOSOC Resolution 1721 LIII), which ultimately led to the establishment of the United Nations Commission on Transnational Corporations (CTC) and the United Nations Centre on Transnational Corporations (UNCTC) in ECOSOC Resolution 1913 LVIII with the mandate to discuss the possible elaboration of a Code of Conduct for TNCs.

The decision taken by the UN ECOSOC Resolution 1913 LVII is the starting point of this paper, which will analyse the negotiating history of different initiatives related to the issue of business and human rights in the United Nations.

First it will examine the draft UN Code of Conduct on Transnational Corporations (United Nations Centre on Transnational Corporations, 1986), and some of the possible reasons for not being adopted. Secondly, it will focus on the "Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights" (U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2) and the political and technical reasons that led to its "failure". Thirdly, it will address some of the concerns raised during the adoption of the Guiding Principles on Business and Human Rights (UN Doc. A/HRC/17/31) (hereinafter 'the Guiding Principles') which although represented a step forward in the discussion on business and human rights, for some States and other interested stake-holders it did not match the expected outcomes.

Finally, and as concluding remarks, it will draw on some lessons that these process have outlined for future discussions on the issue of business and human rights, particularly on the current negotiations of an international legally binding instrument on on Transnational Corporations and other Business Enterprises with respect to Human Rights mandated by the United Nations Human Rights Council Resolution A/HRC/26/9, which provides the establishment of an open-ended intergovernmental working group (OEIWG) with the mandate of elaborating an international legally binding instrument to regulate, in accordance with international human rights law, the activities of transnational corporations and other business enterprises (UN Doc A/HRC/26/9).

2. THE CODE OF CONDUCT ON TRANSNATIONAL CORPORATIONS

UN ECOSOC Resolution 1721 LIII called for the formation of a Group of Eminent Persons to "study the role of multinational corporations and their impact on the process of development, especially that of the developing countries, and also their implication for international relations" (UN ECOSOC Resolution 1721 LIII). Resolution 1721 LIII mandated the group to submit a report to the ECOSOC at its fifty-seventh session. The report submitted by this group "led to the establishment of the United Nations Commission on TNCs and the UNCTC in New York in 1974" (MORAN, 2008, p.92).

In its fifty-seventh session the ECOSOC decided to establish the Commission for Transnational Corporations, an intergovernmental Commission composed by forty-eight-member States which, among other responsibilities, served as the "forum within the United Nations system for the comprehensive and in-depth consideration of issues relating to transnational corporations" (UN ECOSOC Resolution 1913 LVII). In the same resolution, the ECOSOC decided to provide the terms of reference for the United Nations Centre on Transnational Corporations (UNCTC) which included:

> (d) To conduct research on various political, legal, economic and social aspects relation to transnational corporations, including work which might be useful for the elaboration of a code of conduct and specific arrangements and agreements as directed by the Economic and Social Council and the Commission (UN ECOSOC Resolution 1913 LVII).

The UNCTC became operational in 1975, and served as the technical and advisory body of the Commission on TNCs, particularly on its mandate to produce a Code of Conduct (the Code) to "establish a multilateral framework to define, in a balanced manner, the rights and responsibilities of transnational corporations and host country governments in their relations with each other" (SAUVANT, 2015, p.11). From the beginning of the Commission's work, it was clear that at least two diverse approaches where present at the discussions. On the one hand, developing States envisaged the Code as an opportunity to safeguard their policy space and as a mechanism to consolidate their independence and ascending bargaining power in the international arena (SAUVANT, 2015, p.14), while on the other hand developed States sought to solidify the international minimum standards of treatment of foreigners trough its codification in an international instrument. The dichotomy was clear from the beginning of the Commission's work:

> However, even in the commission's report of its first session, areas of disagreement or concern among its member began to emerge (…) Among the most contentious of these was over the legal status of the code of conduct for TNCs that the GEP had earlier proposed. While most developing countries insisted on an international instrument that would be binding on TNCs, developed countries were not prepared to go beyond a voluntary set of guidelines and wanted explicit assurances from host countries about their obligations to protect FDI (SAGAFI-NEJAD and DUNNING, 2008, p.85).

The Commission on Transnational Corporations and the UNCTC were developed as twin-institutions with the objective of analysing the extent of influence and impact of transnational corporations in the policy making of States and in the nascent world economic order. The idea of covering the role of TNCs in one umbrella instrument was an ambitious one, and the drafting process

included cross-referencing several new and related agreements and multilateral instruments[3] with regards to the issue of TNCs and MNEs (SAUVANT, 2015, p.18). Similarly, the program of work which set the agenda for the upcoming years established the impressive task of discussing an international framework that could address the operation of TNCs and their role in the promotion of national development goals and global economic growth, while eliminating any negative effects (CTC, E/5782, 1976: 2).

The CTC identified a list of areas of concern raging from the preferential treatment demanded by TNCs in hosts countries, to the lack of respect of the socio-cultural identity of host countries by TNCs. Other areas of concern included the lack of adjustment by TNCs to the legislation of the host counties in the matters of FDI, credits exchange, fiscal matters, industrial property and labour policies, the non-conformation of TNCs to national policies, objectives and priorities for development of developing States and the failure of TNCs to promote research and development in the host countries (CTC, E/5782, 1976: Annex I). These are still areas of concern in the relationship between TNCs and States nowadays, and they have been strongly brought to different discussions on issues related to the reform of the current International Investment Agreements (IIAs) Regime, the current international tax regime and on the adoption of a legally binding instrument on business and human rights.

The structure of the Draft United Nations Code of Conduct on Transnational Corporations was discussed during the CTC's special session in 1983, and it incorporated some of the concerns shared during the early sessions of the Working Group in charged of drafting the Code and the CTC. It incorporated a broad set of concerns divided in three subsets of issues, covering the activities of TNCs, the treatment of TNCs and the international cooperation and implementation of the Code. Particularly, the first part dealing with the activities of TNCs considered, *inter alia,* discussion on the respect for human rights and fundamental freedoms, the non-interference of TNCs in internal political affairs, issues related to control and ownership of corporations, taxation, restrictive business practices, consumer protection and disclosure of information. The second part touching the issue of treatment of transnational corporations was rather more "concise" than the previous one, and consisted in the general treatment of TNCs in the countries in which they operate, the issue of expropriation framed in the concept of "nationalization and compensation", and jurisdiction, which included amicable settlement of disputes arising between States and investors, and the possible use of international arbitration as mechanism to settle such disputes (CTC, E/1983/17/Rev.1, 1983: Annex II).

While developing countries were strongly pushing for the establishment of clear rules on the activities of TNCs in their territories, developed countries were only open to discusses broad guidelines for corporations, and only focus on the sue of more precise legal language on those provisions related to treatment of foreign investors (SAUVANT, 2015, p.43). These long-term dichotomy between the interest of developing and developed countries led to the formal end of the negotiations of a code of conduct and the subsequent termination of the work of the CTC and the UNCTC.

[3] This document included the Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy of the International Labour Organization, the Declaration on International Investment and Multinational Enterprises of the Organization for Economic Co-operation and Development, among others.

2.1 The Dichotomy of the UN Code of Conduct

Certainly, the adoption of a Code of Conduct which incorporated *soft* guidelines for corporations and *binding* legal language on the treatment of TNCs was not well received by developing countries which considered the use of such language as threating their regulatory and policy space. On the contrary, developed countries view the possibility of establishing *binding* guide lines for their corporations coupled with an implementing mechanism as a "[*slippery slope*] and, eventually, could lead to the Commission on Transnational Corporations acquiring quasi-judicial powers" (SAUVANT, 2015, p.48). Ultimately, the dichotomy between *soft* rules for regulating corporate behaviour and *hard* rules for protecting foreign investors that led the Code's negotiations to *fizzled out* (SAUVANT, 2015, p.51), is still the one of the major issues embracing the current discussions on business and human rights as their complex structures allows them to:

> (…) benefit from various legal frameworks, including the treatment of a subsidiary under national law as a 'domestic enterprise' and the possibility of relying on different BITs to enforce their 'investors rights' (CORREA, 2016, p.4).

While developing countries where engaged in the discussion for *binding* guidelines for corporate behaviour; developed countries lead, by the United States, were seeking new avenues to stop the negotiation of the Code of Conduct and stressed the importance of new agreements on foreign investment, particularly by lobbying with officials responsible for investment and not with those responsible of UN Affairs (SAUVANT, 2015, p.54).

The economic growth of Asian markets and the debt crisis affecting developing States, particularly from Latin America, which required foreign investment to capitalize their economies in the 1980s (WOUTERS, DUQUET and HACHETZ, 2013, p.35), led to the ratification of international investment agreements between developed and developing countries. Likewise, the bargaining power of the United States and European States in international economic affairs gradually raised in the 1990s due to the collapse of the Soviet Union and the establishment of the Washington consensus (PAUWELLYN, 2014, p.25). It is worth noticing that this BIT's boom happened to coincide with the weakening of negotiations in the Commission of Transnational Corporations on the adoption of a Code of Conduct and could be one of the major factors that limited the participation of the developed countries in this process, as it was:

> (…) at that time, the single most important objective of the developed countries: to protect the investment of their investors abroad by establishing mandatory standards of treatment of foreign investors by the governments of host countries, subject to binding dispute settlement trough international arbitration (SAUVANT, 2015, p.57).

The fact is that by the end of the 1980s, 385 BITs were in existence, and by the end of the 1990s this number raised to 1,857 (UNCTAD, 2000). Currently, according to UNCTAD, the number of BITs has triplicate to 2950 BITs in force by the end of 2017.

The end of the negotiation of a Code of Conduct for Transnational Corporations become a symbol of a strong dichotomy between the establishment of an international framework that recognises a strong level of protection for investors, including international jurisdiction, and a continuing debate on the need of *soft* or *binding* guidelines to regulate the activities of transnational corporations in international human rights law. This debate is still in place, and future discussions on

the need for *binding* rules on the issue of business and human rights have proven to be challenging as explained below.

3. THE UN NORMS ON THE RESPONSIBILITIES OF TRANSNATIONAL CORPORATIONS AND OTHER BUSINESS ENTERPRISES WITH REGARD TO HUMAN RIGHTS

The formal end of the negotiation of the Code of Conduct was a turning point in the discussions on business and human rights. While the net of BITs was growing in milliards without addressing the obligation and responsibilities of foreign investors, the discussions on the need for *binding* rules for transnational corporations was kept off the radar.

The dichotomy that characterized the discussions on the Code of Conduct allowed corporations and other business enterprises to take advantage of the gap emerging from the outcome -or rather the lack of outcome- of such negotiating process and led to "a proliferation of codes, networks and standards" (KINLEY, NOLAN and ZERIAL, 2007, p.30) in the form of a new developed corporate social responsibility aiming at improving corporate reputation and limited any discussion of effective international regulatory measures in the international agenda (KINLEY, NOLAN and ZERIAL, 2007, p.30) in the form .

Nonetheless, the awakening of a new millennium and the continuing discussions on the right to development lead the UN to quickly kept the pace of the 'privatization of human rights' and, with the impulse of civil society organizations, the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities (Sub-Commission) decided to prepare a background document on the question of the relationship between the enjoyment of human rights and the working methods and activities of TNCs (SUB-COMMISSION, Res. 1997/11. 1997), such decision was taken considering that:

> (…) the Working Group on the Right to Development recommended the adoption of new international legislation and the creation of effective international institutions to regulate the activities of transnational corporations and banks, and in particular to resume the multilateral negotiations on a code of conduct for transnational corporations (SUB-COMMISSION, Res. 1997/11).

As result of such working paper, the Sub-Commission decided to establish a sessional Working Group (WG) for a three-year period with the mandate, among others, to "consider the scope of the obligation of States to regulate the activities of transnational corporations," (SUB-COMISSION, Res. 1998/8). The sessional Working Group, pursuant to its mandate, considered "developing a code of conduct for TNCs based on the human rights standards" (WG, E/CN.4/Sub.2/1999/9).

The different drafts and public consultations of the WG led to the adoption of the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights by the Sub-Commission (SUB-COMISSION, E/CN.4/Sub.2/2003/12/Rev.2). Nonetheless, the UN Commission on Human Rights (HR Commission) only took note of the Draft Norms and explicitly affirmed "that document E/CN.4/Sub.2/2003/12/Rev.2 has not been requested by the Commission and, as a draft proposal, has no legal standing, and that the Sub Commission should not perform any monitoring function in this regard" (HR COMISSION, E/CN.4/DEC/2004/116). This decision marked the end of discussions on the draft Norms and the return to the practice of voluntary guidelines to cope with the activities of corporations in the realm of human rights.

3.1 Private Lobbying and the Norms drafting process

The Norms adopted by the Sub-Commission were intended as a draft for initiating negotiations at the level of the HR Commission, and not as a "taking or leave" document.

> The Norms are explicitly in draft form, and were brought before the international community with the intention that they would be subject of amendment, debate and reform (KINLEY, NOLAN and ZERIAL, 2007, p.34).

According to certain corporate actors and some States, the method used by the Sub-Commission for drafting the Norms was not participative, and there were not sufficient consultations in the work conducted by the working group. This established certain polarization between those detractors and supporters of the Norms. The fact is that the Working Group established by the Sub-Commission conducted open seminars with the auspices of the Office of the High Commissioner for Human Rights (OHCHR) during the drafting of the Norms (WEISSBRODT and KRUGER, 2003, p.904).

This "lack" of consultation was added to the already polarized debate on the Code of Conduct which translated into a limited possibility of negotiating the Norms. Instead the draft Norms became an "static and immutable" document (KINLEY, NOLAN and ZERIAL, 2007, p.34) to the eyes of certain States and other stakeholders, and some States even raised their voice against any negotiation involving a code of conduct or norms on the matter (MARTENS and SEITZ, 2016, p.11).

Private lobbying steaming from big corporations and corporate conglomerates also favoured the collapse of negotiations. Despite the establishment of corporate groupings contributing to the discussions and even promoting the adoption the Norms[4], some other stakeholders from the private sector drop out of the negotiations as they became aware that issues at hand were dealing more with corporate responsibility and implementation mechanisms, including a possible tribunal to hear claims against corporations involved in human rights violations (KINLEY, NOLAN and ZERIAL, 2007, p.35), than issues of corporate social responsibility and other voluntary initiatives. Indeed, a representative of the ICC was quoted explaining that:

> We don't have a problem at all with efforts that seek to encourage companies to do what they can to protect human rights. We have a problem with the premise and the principle that the norms are based on. *These Norms clearly seek to move away from the realm of voluntary initiatives...* and *we see them as conflicting with the approach taken by other parts of the UN that seek to promote voluntary initiatives* (CORPORATE EUROPE, 2004: 1).

Similarly, it has been pointed out that the complaints of the private sector with regards to the lack of consultations on the drafting of the Norms are exclusively responsibility of themselves as they chose "back-channel lobbying against the Norms" (CORPORATE EUROPE, 2004, p.3) rather than communicating their views directly.

Finally, the consolidation of the views shared by some organizations from the private sector against the Norms was based on the argument that the imposition of international obligations on

[4] Business Leaders Initiative on Human Rights was a corporate grouping composed by 10 companies which participated actively and constructively throughout the drafting of the Norms, by submitting and publishing a number of briefing intended to contribute to the establishment of a common framework of business and human rights. See: https://www.business-humanrights.org/company-policysteps/other/business-leaders-initiative-on-human-rights-blihr

corporations will privatize human rights (KINLEY, NOLAN and ZERIAL, 2007, p.36). According to one of the representatives of the private sector, the Norms were drafted in a very problematic process, driving conflict between companies and human rights organizations and undermining voluntary initiatives at the UN (CORPORATE EUROPE, 2004, p.2). At the end, these corporate lobby reach "powerful government ministries in key countries, such as the US Department of Commerce and the UK Department of Trade and Industry" (CORPORATE EUROPE, 2004, p.4), both States were the most sceptical about the Norms. During the adoption of Human Rights Council Resolution 2005/9, requesting the appointment by the UN Secretary General of a special representative on the issue of human rights and transnational corporations and other business enterprises, the United States delegation stated that the country will reject any resolution intended to further the cause of norms or a code of conduct for TNCs (MARTENS and SEITZ, 2016, p.11). Such affirmation set the tone for future negotiations in the United Nations.

4. THE UN GUIDING PRINCIPLES NN BUSINESS AND HUMAN RIGHTS

The UN Commission on Human Rights required the UN Secretary General to appoint a special representative on the issue of human rights and transnational corporations and other business enterprises (HR COMMISSION, E/CN.4/RES/2005/69). The UN Secretary General appointed John Ruggie as the Special Representative (SR) and from the beginning he had the difficult task of joining to polarized sides in the arena of business and human rights.

After he was appointed as Special Representative, the initial views of the International Organization of Employers and the International Chamber of Commerce on the mandate given to the SR stated that the success of the SR work will defined by the way n which it is able to, among others, "explicitly recognized that there is no need for a new international framework" (IOE-ICC, 2005) on the issue of business and human rights[5].

The work of the SR consisted in a number of consultations with different stakeholders, including business organizations as well as CSOs. According to Prof. Ruggie he "intended to conduct an evidence-based mandate, and that [I] would subject the alternatives to as rigorous an assessment as time and circumstances permitted" (RUGGIE, 2013). Prof. Ruggie ended up struggling with the same politics and views that characterized former initiatives, his response was that the way forward should be to better recognize the interconnection between the "multiple spheres of governance that shape the conduct of multinational corporations" (RUGGIE, 2013).

According to such objective, Prof. Ruggie submitted to the UN Human Rights Council (UN HRC) in 2008 the Protect, Respect and Remedy Framework for Business and Human Rights (UN HRC, UN Doc A/HRC/8/5), and in 2011 Prof. Ruggie presented the UN Guiding Principles on Business and Human Rights (Guiding Principles) in his last report to the UN HRC (UN HRC, UN Doc A/HRC/17/31), which was endorsed by UN HRC in its Resolution A/HRC/RES/17/4. According to Prof. Ruggie:

> The Protect, Respect and Remedy Framework (Framework) and Guiding Principles (GPs) for its implementation aim to establish a common global normative platform and authoritative policy guidance as a basis for making cumulative step-by-step, progress without foreclosing

[5] For more details see (Martens and Seitz, 2016: 11).

> any other promising longer-term developments. The Framework addresses what should be done; the Guiding Principles how to do it (RUGGIE, 2013).

For Prof. John Ruggie, the endorsement of the Guiding Principles did not close any long-term development in the issue of Business and Human Rights in the United Nations, rather such endorsement should be regarded as the "end of the beginning" (UN HRC, UN Doc A/HRC/17/31). While some business representatives considered that the Guiding Principles were not to be changed for a number of years in order to allow sufficient time for a period of reflection and implementation (MARTENS and SEITZ, 2016, p.14), some States considered that the endorsement was "(…) a first step, but without a legally binding instrument, it will remain only as such: a "first step" without further consequence" (ECUADOR, 2013).

The statement by Ecuador, representing a group of States, was the beginning of new negotiations for a binding instrument on business and human rights. After such statement, Ecuador and South Africa were proponents of Resolution A/HRC/26/9 which established the OEIWG with the mandate of elaborating an international legally binding instrument to regulate, in accordance with international human rights law, the activities of transnational corporations and other business enterprises.

4.1 Shortcomings of the UN Guiding Principles

Some of the criticisms of the implementation of Guiding Principles relate to the lack of effectiveness and binding language on the way it addresses the responsibilities of corporate actors. Some commentators have suggested that the endorsement of the Guiding Principles only promotes the *status quo* of a world "where companies are encouraged, but not obliged, to respect human rights" (HUMAN RIGTS WATCH, 2011). This was in part the reasoning behind the adoption of Resolution A/HRC/26/9, as soft law instruments, such as the Guiding Principles, are only "a partial answer to the pressing issues relation to human rights abuses by transnational corporations" (ECUADOR, 2013). According to the proponents of resolution 26/9, these principles fell short when addressing the problem of lack of accountability regarding TNCs and accentuates the absence of adequate legal remedies for victims (ECUADOR, 2013).

The concerns shared by Ecuador and South Africa are reinforced by a report prepared for the Office of the UN High Commissioner for Human Rights (OHCHR) with regards to corporate liability for human rights abuses (ZERK, 2013), in which it has been highlighted that:

> (…) the present system of domestic law remedies is patchy, unpredictable, often ineffective and fragile. It is failing victims who are unable in many cases to access effective remedies for the abuses they have suffered (ZERK, 2013).

Finally, although criticisms have been voiced against the Guiding Principles, the Chairperson of the OEIWG has properly asserted that both procedures, the implementation of the UN Guiding Principles and the negotiation of the binding treaty, are of mutual reinforcement, and that:

> Even though the Guiding Principles are not binding, they are the tools some countries are using in accordance with their reality and interests for the moment. They also constitute a reference that we have at our disposal. Without doubt, the Guiding Principles will be one of the sources frequently used in our debates (ESPINOSA, 2015).

5. CONCLUSION

The present document is not intended to be a complete account of the facts and circumstances surrounding the negotiations on business and human rights carried out in the United Nations, rather it tries to examine and identify certain elements that require more attention by all stake-holders in order to find a common approach to the issue of business and human rights that would benefit those who are more affected by the lack of accountability in cases of corporate human rights violations.

Under this perspective, there are inherited lessons streaming from the negotiations of the Code of Conduct, the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights, and the UN Guiding Principles on Business and Human Rights that could guide the work of all stakeholders in the negotiations currently held in the OEIWG on business and human rights.

Firstly, it would be important to recognised that, even if certain transitional corporations do not respect minimum international human rights standards, several them do respect them and have recognised the need to address gaps on the implementation of the current framework dealing with the issue of business and human rights. Many initiatives have been put forward by business enterprises with the intention of guiding their conduct in specific settings[6]. Such initiatives, that should be carefully assessed under a benefit of inventory, could be the basis to set up implementing mechanisms under a binding instrument of business and human rights. Similarly, the outcomes of former initiatives such as the Business Leaders Initiative on Human Rights, should be examined and be brought back to life in the discussion leading to a binding treaty, this could also serve as strategy to bring *other* business representatives to the negotiating table.

This takes us to a second lesson. As demonstrated by some of the several statements made by the traditional *business representatives*; they are historically reluctant to the idea of establishing a binding framework on the issue of corporate conduct. One of the most used arguments is the idea that establishing certain obligations under international law for corporate actors would lead to the privatization of human rights by transferring State obligations to corporations. This article does not seek to have a deeper understanding on this issue, but it is vital to clarify that currently international law does not limit the possibility of imposing obligations on private actors, and that even if such argument were valid, several existing international human rights instruments have taken the approach of regulating the conduct of private entities indirectly through national legislation (MOHAMADIEH and URIBE, 2017). Further, it could also be argued, that limiting the issue of human rights in the corporate realm only to corporate social responsibility or voluntary initiatives will imply depending on the good will of corporations, which in practice is *privatizing human rights compliance*. Therefore, although it is essential to count with the participation of all stakeholders, this does not mean that only *certain voices* should represent the business sector, and that strategic partnerships should be built with other business representatives. Again, rethinking on the Business Leaders Initiative on Human Rights would be a good start.

[6] For example the Bangladesh Accord on Fire and Building Safety, which a legally binding agreement between brands and trade unions designed to work towards a safe and healthy Bangladeshi Ready-Made Garment Industry, or the Montreux Document and the International Code of Conduct with respect to private military and security industry.

A third lesson of major weight is to relive history and learn from past mistakes and achievements. On the issue of mistakes, it is important to consider that one of the shortcomings of the Code of Conduct was the political polarization of different parties to the negotiation process. In part, such polarization was due to the broad extent of issues covered under an umbrella Code of Conduct that attempted to encompass the concerns in almost every branch of international law. Similarly, the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises where misinterpreted as a static proposal emerging from a process lacking from the involvement of different stakeholders and the support of States.

With regards to the first issue, it will be crucial for the OEIWG to stay focused on the issue at hand, which is establishing an international framework that would complement domestic legislative efforts and mechanisms to allow effective redress for victims of human rights abuses perpetrated by corporate actors. This does not imply that the relationship with other areas of international law should be unnoticed, but rather that the elements that ties it all together is the protection of victims of human rights violations.

Concerning the second issue, it is of must importance to clarify that the process towards the adoption of a legally binding instrument on business and human rights has been characterized by a broad participation of all stakeholders. Although certain cries of lack of participation of the business sector have been raised by some States and business representatives, it is necessary to recall that the sessions of the OEIWG are not only webcasted, but that also the International Chamber of Commerce and the International Organization of Employers have actively participated not only with statements from the floor, but as panellist in several occasions[7] through the submission of many contributions of the matter[8].

Finally, the most important lesson built from past experiences is that every effort is important. The negotiations of a Code of Conduct brought to light the tense relationship between investment protection and sovereign right of States to regulate in the sake of public interest. The discussions on the Norms cast a spotlight on the issue of corporate social responsibility and human rights, particularly emphasising in the power of corporate lobby. The UN Guiding Principles have built a first step to establish a strong international framework that will not only strengthen the efforts of States to provide effective redress for victims of human rights abuses perpetrated by corporate actors, but that could clarify procedural elements with respect to jurisdiction of the courts, international rules for cooperation in investigations of case, sharing of information among courts, and mutual recognition and enforcement of judgments (MOHAMADIEH and URIBE, 2017).

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[7] See the list of panellist of each of the three sessions of the OEIWG, where the IOE or a representative of such organization participated in at least two different panels. http://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Pages/IGWGOnTNC.aspx

[8] All of the statements and contributions of the IOE and ICC have been published in the website of the OEIWG. Here: http://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Pages/IGWGOnTNC.aspx

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