



**The "Elements for the draft legally binding instrument on
transnational corporations and other business enterprises with
respect to human rights" :
A Comment**

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The "Elements for the draft legally binding instrument on transnational corporations and other business enterprises with respect to human rights" : A Comment

Introduction

1. Following up on Resolution 26/9 of the Human Rights Council (A/HRC/RES/26/9), "Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights", and building on the discussions that took place during the first two sessions of the open-ended intergovernmental working group (OEIGWG) established by that resolution, Ecuador presented on 29 September 2017 a document titled "Elements for the draft legally binding instrument on transnational corporations and other business enterprises with respect to human rights".

2. The following are comments on sections 1-8 of the document that shall be discussed between 23 and 27 October, at the third session of the OEIGWG. For ease of reference, the comments follow the structure of the document presented :

1. General Framework

1.1. Preamble

3. The "Elements" list a number of instruments or documents that are considered directly relevant to the topic under discussion to warrant inclusion in the future instrument (hereafter referred to as the "Treaty on Business and Human Rights" or "TBHR"). The list as it is proposed may be controversial. The reference to the "Norms on the responsibilities of transnational corporations and other business enterprises with regards to human rights" (E/CN.4/Sub.2/2003/12/Rev.2 (2003)), in particular, will be challenged, since these "Norms" were neither requested nor endorsed by the Commission on Human Rights, and were strongly opposed by a number of States who at the time were members of the Commission. Referring in such a list to documents other than treaties or documents that have been endorsed in intergovernmental settings may prove unnecessarily divisive.

4. If however it is considered that the Preamble should include such a list, it may be suggested to include the General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities adopted by the Committee on Economic, Social and Cultural Rights (E/C.12/GC/24) and the General Comment No. 16 (2013) on State obligations regarding the impact of the business sector on children's rights, of the Committee on the Rights of the Child, which are the most relevant contributions of the human rights treaty bodies to the topic under consideration.

5. Moreover, since the "Elements" refer to the duties of the member States of international organisations, it might be relevant to refer to the Draft Articles on the responsibility of international organizations (adopted by the International Law Commission at its sixty-third session, in 2011 (A/66/10, para. 87), welcomed by the UN General Assembly in Res. 66/100 of 9 December 2011), which codify the key principles that apply to this area of international responsibility.

6. Finally, the "Elements" anticipate that the Preamble may include a paragraph referring to the duty of State Parties to "carry out their obligations under this Convention in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States, and that nothing in this Convention shall entitle a State Party to undertake in the territory of another State the exercise of jurisdiction and performance of functions that are reserved exclusively for the authorities of that other State by its domestic law". This should refer to Res. 2525 (XXV) adopted on 24 October 1970 by the General Assembly, Declaration on

Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (A/RES/2625 (XXV)).

7. The Preamble would include a paragraph recalling that "International Organizations shall not adopt or promote any international norm or decision that could limit the achievement of the purpose and objectives of this legally binding instrument, as well as the capacity of the Parties to fulfill their obligations adopted herein. Such organizations include *inter alia*, the UN and their specialized agencies, funds and programs and other international and regional economic, finance and trade organizations". It may be recalled in this regard that, as any other subjects of international law, international financial institutions and other international organisations are "bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties".¹ They are therefore bound to comply with human rights, as listed in particular in the Universal Declaration of Human Rights, that are part of customary international law or of the general principles of law, both of which are sources of international law. This has been repeatedly stated, *inter alia*, by the Committee on Economic, Social and Cultural Rights.²

1.2. Principles

The "primary responsibility" of the State to protect against human rights violations or abuses

8. The 'Principles' section of the "Elements" refer to the "primary responsibility of the State to protect against human rights violations or abuses within their territory and/or jurisdiction by third parties, including TNCs and OBEs". This is language that has its origin in the "Norms on the responsibilities of transnational corporations and other business enterprises with regards to human rights" (E/CN.4/Sub.2/2003/12/Rev.2 (2003)).³ It suggests the idea that the imposition of human rights obligations on companies should not be invoked by a State as an excuse for not complying with its own human rights obligations; and that States may not shift on companies the burden of providing certain services (in areas such as education, housing, or health care provision), which it is the responsibility of the State itself to provide.⁴

9. There is general agreement on the idea. However, the idea of a "primary responsibility", expressed thus, may be misinterpreted if its content is not further clarified. In particular, it may be invoked by companies to avoid certain liabilities linked to human rights abuses they may have committed or contributed to, by arguing that the State, not the companies themselves, should be held liable for the consequences. Yet, a failure of the State to comply with its human rights duties should never be considered as authorizing a company to ignore its own, distinct obligations towards human rights. The Commentary to Principle 11 of the Guiding Principles on Business and Human Rights states in this regard: "The responsibility to respect human rights is a global standard of expected

¹ International Court of Justice, Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion (20 December 1980), I.C.J. Reports 1980, 73 at 89–90 (para. 37).

² See in particular the Statement "Public debt, austerity measures and the International Covenant on Economic, Social and Cultural Rights", adopted on 24 June 2016 (E/C.12/2016/1), para. 7.

³ Principle 1 of the said Norms stated: "States have the primary responsibility to promote, secure the fulfillment of, respect, ensure respect of and protect human rights recognized in international as well as national law, including ensuring that transnational corporations and other business enterprises respect human rights. Within their respective spheres of activity and influence, transnational corporations and other business enterprises have the obligation to promote, secure the fulfillment of, respect, ensure respect of and protect human rights recognized in international as well as national law, including the rights and interests of indigenous peoples and other vulnerable groups".

⁴ In the course of the consultations that the United Nations Office of the High Commissioner for Human Rights conducted as a follow-up to the debate launched by the presentation of the Norms, a number of critics expressed the view that the imposition of legal responsibilities on business could "shift the obligations to protect human rights from Governments to the private sector and provide a diversion for States to avoid their own responsibilities" and that, by seeking to impose on businesses to "promote, secure the fulfillment of, respect, ensure respect of and protect human rights", the Norms would be misstating international law, as "only States have legal obligations under the international human rights law" (*Report of the United Nations High Commissioner on Human Rights on the responsibilities of transnational corporations and related business enterprises with regard to human rights*, 15 February 2005 (E/CN.4/2005/91)).

conduct for all business enterprises wherever they operate. *It exists independently of States' abilities and/or willingness to fulfil their own human rights obligations, and does not diminish those obligations.* And it exists over and above compliance with national laws and regulations protecting human rights." (emphasis added).

10. Indeed, this idea is also present in the OECD Guidelines for Multinational Enterprises, which state (in chapter IV, Human Rights), that: "States have the duty to protect human rights. Enterprises should, *within the framework of internationally recognised human rights*, the international human rights obligations of the countries in which they operate as well as relevant domestic laws and regulations" (emphasis added). This language (particularly the words highlighted) is to be understood as recognizing that "A State's failure either to enforce relevant domestic laws, or to implement international human rights obligations or the fact that it may act contrary to such laws or international obligations does not diminish the expectation that enterprises respect human rights. In countries where domestic laws and regulations conflict with internationally recognised human rights, enterprises should seek ways to honour them to the fullest extent which does not place them in violation of domestic law".⁵

11. The duties towards human rights of States and corporations are distinct and exist independently of one another. Neither should be seen as a substitute for the other. This language may be preferred to that of "primary responsibility" of the State.

The primacy of human rights obligations

12. The "Elements" suggest that the Preamble could affirm "the primacy of human rights obligations over trade and investment agreements". This is a welcome suggestion. Trade agreements and investment treaties routinely impose on States certain obligations towards investors, that occasionally have restricted the ability for States to adopt measures to ensure full protection of, or full realization of, human rights. In its General Comment No. 24 on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, the Committee on Economic, Social and Cultural Rights noted in this regard that:

The interpretation of trade and investment treaties currently in force should take into account the human rights obligations of the State, consistent with Article 103 of the Charter of the United Nations and with the specific nature of human rights obligations. (Inter-American Court of Human Rights, *Sawhoyamaxa Indigenous Community v. Paraguay* (judgment of 29 March 2006, Series C No. 146), para. 140). States parties cannot derogate from the obligations under the Covenant in trade and investment treaties that they may conclude. They are encouraged to insert, in future treaties, a provision explicitly referring to their human rights obligations, and to ensure that mechanisms for the settlement of investor-State disputes take human rights into account in the interpretation of investment treaties or of investment chapters in trade agreements.⁶

Indeed, it is welcome that this very language is also included in the proposals for the Preamble of the TBHR.

1.3. Purpose

Civil, administrative and criminal liability of TNCs and OBEs

13. The "Elements" suggest that among the purposes of the TBHR should be to "ensure civil, administrative and criminal liability of TNCs and OBEs regarding human rights violations or abuses". Reference is made here to the comments below, under section 5 of the "Elements" (see paras. 42-49

⁵ OECD Guidelines on Multinational Enterprises, para. 38 of the Commentary.

⁶ At para. 13.

below).

Extraterritorial obligations

14. The "Elements" anticipate that the TBHR shall "reaffirm that State Parties' obligations regarding the protection of human rights do not stop at their territorial borders". This would provide an important and welcome clarification to the duties of States under international human rights law. The extraterritorial dimensions of the duties of States under international human rights law have become increasingly prominent and widely accepted. The Members of the United Nations have pledged "to take joint and separate action in cooperation with the Organization..." to achieve purposes set out in Article 55 of the Charter, including: "... universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."⁷ This duty is expressed without any territorial limitation, and should be taken into account when addressing the scope of States' obligations under human rights treaties. Also in line with the Charter, the International Court of Justice has acknowledged the extraterritorial scope of core human rights treaties, focusing on their object and purpose, legislative history and the lack of territorial limitation provisions in the text.⁸ Customary international law also prohibits a State from allowing its territory to be used to cause damage on the territory of another State, a requirement that has gained particular relevance in international environmental law.⁹ The Human Rights Council has confirmed that such prohibition extends to human rights law, when it endorsed the Guiding Principles on Extreme Poverty and Human Rights in resolution 21/11.¹⁰

15. Human rights treaty bodies have long recognized the extraterritorial implications of the instruments that they are tasked to supervise. Thus for instance, in its 2011 Statement on the obligations of States Parties regarding the corporate sector and economic, social and cultural rights, the Committee on Economic, Social and Cultural Rights reiterated that States Parties' obligations under the Covenant do not stop at their territorial borders, and that States Parties are required to take necessary steps to prevent human rights violations abroad by corporations which they can control, without infringing the sovereignty or diminishing the obligations of the host States under the Covenant.¹¹ The Committee has also addressed specific extraterritorial obligations of States Parties concerning business activities in General Comments relating to the right to water,¹² the right to work,¹³ the right to social security¹⁴ or the right to just and favourable conditions of work.¹⁵ Similar positions

⁷ Charter of the United Nations (June 26, 1945), 59 Stat. 1031, *entered into force* Oct. 24, 1945 (Article 56).

⁸ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136 (9 July), paras. 109-112.

⁹ See *Trail Smelter Case* (United States v. Canada), 3 R.I.A.A. 1905 (1941), pg. 1965; *Corfu Channel Case (United Kingdom v. Albania) (Merits)* 1949 I.C.J. 4 (9 Apr.), para. 22; and *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226 (8 July), para. 29. See also International Law Commission, *Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising out of Hazardous Activities*, adopted at the fifty-eighth session of the International Law Commission (A/61/10) (2006) (in particular Principle 4, stipulating that "Each State should take all necessary measures to ensure that prompt and adequate compensation is available for victims of transboundary damage caused by hazardous activities located within its territory or otherwise under its jurisdiction or control"). The Maastricht Principles on the Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, adopted by a range of academics, research institutes and human rights non-governmental organizations in 2011, provide a restatement of the current state of international human rights law on this topic, contributing to its progressive development.

¹⁰ The *Guiding Principles on Extreme Poverty and Human Rights submitted by the Special Rapporteur on extreme poverty and human rights* (A/HRC/21/39) provide that "as part of international cooperation and assistance, States have an obligation to respect and protect the enjoyment of human rights, which involves avoiding conduct that would create a foreseeable risk of impairing the enjoyment of human rights by persons living in poverty beyond their borders, and conducting assessments of the extraterritorial impacts of laws, policies and practices" (para. 92).

¹¹ E/C.12/2011/1 (Statement on the obligations of States parties regarding the corporate sector and economic, social and cultural rights), paras. 5-6.

¹² E/C.12/2002/11 (General Comment No. 15 (2002): The right to water (arts. 11 and 12)), paras. 31, 33.

¹³ E/C.12/GC/18 (General Comment No. 18 (2006): The right to work (art. 6)), para. 52.

¹⁴ E/C.12/GC/19 (General Comment No. 19 (2008): The right to social security (art. 9)), para. 54.

¹⁵ General Comment No. 23 (2016) on the right to just and favourable conditions of work (E/C.12/GC/23), para. 70,

have been adopted by the Committee on the Rights of the Child,¹⁶ as well as by other human rights treaty bodies.¹⁷

16. The scope of the extraterritorial obligations of States to control corporations should be clarified further in the TBHR. This could be based on the position adopted by the Committee on Economic, Social and Cultural Rights in its General Comment No. 24, where it stated that States parties' duty to protect the rights of the Covenant :

... extends to any business entities over which States parties may exercise control, in accordance with the Charter of the United Nations and applicable international law. Consistent with the admissible scope of jurisdiction under general international law, States may seek to regulate corporations that are domiciled in their territory and/or jurisdiction: this includes corporations incorporated under their laws, or which have their statutory seat, central administration or principal place of business on their national territory.¹⁸

The same position has been adopted by the Committee of Ministers of the Council of Europe in the 2016 Recommendation it adopted on human rights and business.¹⁹

1.4. Objectives

17. The "Elements" include as part of the objectives of a future TBHR that this instrument should "strengthen international cooperation, including mutual legal assistance to tackle business enterprises human rights related violations or abuses". This is an important and welcome contribution, since the lack of inter-State cooperation is a major source of impunity for corporations operating across different jurisdictions. A number of multilateral instruments seeking to address transnational crimes include provisions of international cooperation, in the form of mutual legal assistance. The best model that can be invoked here is probably chapter IV of the 2003 United Nations Convention against Corruption.

2. Scope of application

18. The "Elements" suggest that "the objective scope of the future legally binding instrument should cover all human rights violations or abuses resulting from the activities of TNCs and OBEs that have a transnational character, regardless of the mode of creation, control, ownership, size or structure."

19. This is a constructive approach, which in fact acknowledges that, from the legal point of view, the distinction between transnational corporations and other business enterprises does not pass scrutiny: TNCs are simple networks of distinct companies (each of which is domiciled in a national jurisdiction), more or less tightly connected to one another by investment or contractual links, and that follow a global strategy under a more or less integrated leadership structure. Thus, the scope of the future TBHR is rightly more based on the *transnational nature of the activity* than on the *nature of the corporation* itself: in other terms, it is to the extent that the corporation develops its economic activities across different national jurisdictions (by one company buying shares in other companies, domiciled in other countries, by licensing of franchisee agreements, or by contracting with suppliers or sub-contractors located in other jurisdictions) that the future TBHR shall be of relevance to those activities.

¹⁶ CRC/C/GC/16 (General Comment No. 16 (2013) on State obligations regarding the impact of the business sector on children's rights), paras. 43-44.

¹⁷ For example, Committee on the Elimination of Racial Discrimination, Concluding Observations: Norway (2011) (CERD/C/NOR/CO/19-90), para. 17; Human Rights Committee, Concluding Observations: Germany (2012) (CCPR/C/DEU/CO/6), para. 16.

¹⁸ At para. 31.

¹⁹ See recommendation CM/Rec(2016)3 of the Committee of Ministers of the Council of Europe, on human rights and business, adopted on 2 March 2016 at the 1249th meeting of the Ministers' Deputies, Annex, para. 13.

20. Thus, the TBHR would potentially apply to all corporations, whatever their nature, their size, their mode of creation or ownership structure, etc. However, the TBHR would only target activities that are transnational. The "Elements" define as such the "acts subject to its application":

Violations or abuses of human rights resulting from any business activity that has a transnational character, including by firms, partnerships, corporations, companies, other associations, natural or juridical persons, or any combination thereof, irrespective of the mode of creation or control or ownership, and includes their branches, subsidiaries, affiliates, or other entities directly or indirectly controlled by them.

21. This general limitation to the scope of application of the future TBHR uses a slightly confusing wording, however, because it conflates in a single sentence what concerns the scope of application as such, with an attempt to define the scope of the responsibility of corporations (more precisely, the extent to which corporations should be imposed a duty of care). The wording could also be improved by including a reference to global supply chains (and therefore to the human rights duties of companies in their relationships with suppliers or sub-contractors). This could be consistent with the paragraphs which appear under the "General Obligations" section of the "Elements", which state *inter alia* that "States should adopt measures to ensure that TNCs and OBEs under their jurisdiction adopt adequate mechanisms to prevent and avoid human rights violations or abuses throughout their supply chains" (see 3.1.).

22. The general scope of application clause could therefore be reworded as follows:

This treaty applies to the activities of all corporations, irrespective of their size, mode of creation or control or ownership. Its scope of application is limited to business activities that have a transnational character. This includes the relationship of corporations to their branches, subsidiaries, affiliates, or business partners with which they have a continuous business relationship.

3. General Obligations

3.1. Obligations of States

23. States have duties to respect, protect and fulfil human rights. The duty to protect is central to the objectives of the TBHR. This duty has both a preventative and a remedial dimension, although of course the provision of effective remedies allowing victims to seek compensation, and the imposition of administrative and/or criminal sanctions (on the criminal liability of corporations, see the comments below, paras. 42-49), while remedial in nature, also have an obvious preventative function to fulfil.

24. The "Elements" usefully list some of the implications that follow from the general duty of the State to protect human rights by adequately regulating corporations and by ensuring that victims have access to effective remedies. A review of the duties of States to ensure that corporations practice due diligence with regard to human rights is provided in the 2012 report *Human Rights Due Diligence: The Role of States* report prepared for the International Corporate Accountability Roundtable, European Coalition for Corporate Justice and Canadian Network on Corporate Accountability.²⁰ A review of the obstacles victims face in seeking to exercise remedies in the context of transnational human rights abuses resulting from corporate activity is provided by the 2013 report *The Third Pillar. Access to Judicial Remedies for Human Rights Violations by Transnational Business* prepared for the International Corporate Accountability Roundtable, CORE and European Coalition for Corporate

²⁰ *Human Rights Due Diligence: The Role of States* (O. De Schutter, A. Ramasastry, M.B. Taylor and R.C. Thompson), International Corporate Accountability Roundtable, European Coalition for Corporate Justice and Canadian Network on Corporate Accountability, December 2012.

Justice (ECCJ).²¹

25. Beyond the implications of the duty of States to protect listed in the "Elements", the Committee on Economic, Social and Cultural Rights noted, in its General Comment No. 24, that States parties to the International Covenant on Economic, Social and Cultural Rights could be expected to adopt a number of measures to ensure that corporations comply with human rights:

States parties should consider imposing criminal or administrative sanctions and penalties, as appropriate, where business activities result in abuses of Covenant rights or where a failure to act with due diligence to mitigate risks allows such infringements to occur; enable civil suits and other effective means of claiming reparations by victims of rights violations against corporate perpetrators, in particular by lowering the costs to victims and by allowing forms of collective redress; revoke business licences and subsidies, if and to the extent necessary, from offenders; and revise relevant tax codes, public procurement contracts (see the conclusions attached to the resolution concerning decent work in global supply chains, adopted by the General Conference of the International Labour Organization at its 105th session, para. 16 (c)), export credits and other forms of State support, privileges and advantages in case of human rights violations, thus aligning business incentives with human rights responsibilities.²²

26. The "Elements" refer to a number of duties that States could be imposed to ensure that the TNCs and OBEs under their jurisdiction adopt certain measures that should ensure that they neither engage in, nor are linked to, activities that could result in human rights violations. Such measures include duties to prepare human rights and environmental impact assessments; reporting obligations; the adoption of "adequate mechanisms to prevent and avoid human rights violations or abuses throughout their supply chains"; and designing, adopting and implementing "effective due diligence policies and processes, including codes of conduct, ... to identify and address human rights impacts resulting from their activities" (though this last obligation appears in section 4 of the "Elements", under the heading "Preventive measures").

27. One difficulty however is that, consistent with the scope of application of the future TBHR as discussed above (2.), such positive obligations that States are expected to impose on corporations presupposes that such corporations be identified as corporations that conduct activities of a transnational character. Indeed, it is the companies as such that are targeted, not merely certain activities. It is noteworthy that existing instruments that impose such positive obligations define which companies owe such duties, for instance:

- The UK Modern Slavery Act of 2015 requires corporate entities carrying on any part of their business in the UK that supply goods or services and have a minimum turnover of £36 million to produce a 'slavery and human trafficking statement' each year, thus imposing on such businesses to ensure transparency in their supply chains with respect to slavery and human trafficking (see section 54 of the MSA);
- The California Transparency in Supply Chains Act 2010, which requires companies to disclose their efforts to keep supply chains free from slavery and human trafficking by reporting about risks and about how suppliers are expected to comply to ensure compliance, as well as about the auditing of suppliers and the training of personnel, applies to corporations doing business in California with annual receipts over 100 million US dollars.
- Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups imposes certain reporting requirements (including "a description of the policies pursued by the undertaking in relation to [environmental, social and employee matters, respect for human rights, anti-corruption and bribery matters], including due diligence processes implemented" and " the outcome of those

²¹ *The Third Pillar. Access to Judicial Remedies for Human Rights Violations by Transnational Business* (by G. Skinner, R. McCorquodale and O. De Schutter), International Corporate Accountability Roundtable, CORE and European Coalition for Corporate Justice (ECCJ), December 2013.

²² General Comment No. 24, at para. 15.

policies") on "large undertakings which are public-interest entities exceeding on their balance sheet dates the criterion of the average number of 500 employees during the financial year" (article 1);

- The French Law of 27 March 2017 on due diligence (Loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre) imposes the adoption of a due diligence plan on companies incorporated in France with at least 5,000 employees (including the employees of its subsidiaries), or companies with at least 10,000 employees whether or not they are incorporated in France ("Toute société qui emploie, à la clôture de deux exercices consécutifs, au moins cinq mille salariés en son sein et dans ses filiales directes ou indirectes dont le siège social est fixé sur le territoire français, ou au moins dix mille salariés en son sein et dans ses filiales directes ou indirectes dont le siège social est fixé sur le territoire français ou à l'étranger").

28. It would be both unreasonable and impractical to impose reporting requirements and duties to adopt due diligence action plans on to all companies, regardless of their size and potential impacts on the enjoyment of human rights. The future TBHR may find it unavoidable either to set a criterion such as in the examples above (for instance, imposing such requirements only on companies with a minimum turnover or beyond a certain number of employees employed directly or through subsidiaries), or to provide that reporting requirements and requirements to adopt due diligence plans should be imposed "as appropriate, taking into account the size of the companies concerned and their potential impacts on human rights", leaving it to each State to opt for the level which is most suitable in accordance with national conditions.

3.2. Obligations of Transnational Corporations and Other Business Enterprises

29. The "Elements" propose that "TNCs and OBEs, regardless of their size, sector, operational context, ownership and structure, shall comply with all applicable laws and respect internationally recognized human rights, wherever they operate, and throughout their supply chains".

30. This is welcome, and it is far from constituting the break with traditional international law that some suggest it might. In fact, this closely replicates what is stated in Chapter IV of the OECD Guidelines on Multinational Enterprises, which were cited above. Moreover, investment treaties (or investment chapter in free trade agreements) grant extensive rights to foreign investors, which such investors are allowed to claim protection of before international arbitral tribunals (often established in accordance with the International Convention on the Settlement of Investment Disputes), so that it may be said that corporations already enjoy to a large degree an international legal personality -- although naturally, since they have neither a territory nor a population over which they exercise jurisdiction, they should not be presumed to have to comply with all the rules of international law that apply to States.

31. How this can be relevant is illustrated in the recent case of *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. Argentina* presented for resolution to an arbitral tribunal established under the International Centre for Settlement of Investment Disputes. In this case, the claimant companies had established a subsidiary in Argentina (Aguas Del Gran Buenos Aires S.A. (AGBA)) which was awarded a concession for water and sewage services to be provided in the Province of Greater Buenos Aires. However, AGBA faced a number of obstacles, which allegedly "rendered the efficient and profitable operation of the Concession extremely difficult", culminating in the devaluation of the peso in January 2002: although the peso had lost two thirds of its value, AGBA failed to obtain a renegotiation of the tariffs it was allowed to impose under the concession contract.²³ The concession contract was finally terminated in 2006. Before the ICSID tribunal, the claimants sought compensation for a total amount of 316 million USD under the Argentina-Spain BIT.²⁴

²³ ICSID Case No. ARB/07/26, *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. Argentina*, Award of 8 December 2016, para. 34.

²⁴ Agreement on the Reciprocal Promotion and Protection of Investments between the Argentine Republic and the Kingdom of Spain signed on October 3, 1991

32. Before the tribunal, the Argentinian government argued *inter alia* that it could not set aside its duties towards its population, to provide water at an affordable price. It stated that "under the Concession Contract and the applicable Regulatory Framework, Claimants assumed investment obligations. Furthermore, these obligations gave rise to bona fide expectations that those investments would indeed be made and would make it possible to guarantee, in the area in question, the basic human right to water and sanitation. By failing to make the investments they had undertaken to make, Claimants violated the principles of good faith and *pacta sunt servanda* that are recognized both by Argentine law and by international law. Such failure did not only affect mere contractual provisions, but basic human rights, as well as the health and the environment of thousands of persons, most of which lived in extreme poverty".²⁵ Argentina argued that the Universal Declaration of Human Rights imposes obligations not exclusively on States, but also on private parties.²⁶ Underlining that it had committed to guaranteeing the right to water and sanitation under the International Covenant on Economic, Social and Cultural Rights,²⁷ it presented this right as "a fundamental right that the leading companies of the world have adopted in the Global Compact as being part of their corporate social responsibility",²⁸ and that would impose direct obligations on companies.

33. In response, the claimants stated that "the Argentine Republic would be the "true guarantor" of human rights and that such rules, as they are part of international law, are directly binding on States but not on private parties. ... guaranteeing the human right to water is a duty of the State, not of private companies like the Claimants".²⁹ The Spain-Argentina BIT, it argued, "adopts the classical asymmetric model that exclusively regulates State obligations [and] does not impose obligations upon the investor".³⁰

34. The arbitral tribunal rejects this latter view. It finds instead that investor-State dispute settlement procedures are established precisely because States have certain rights that may prevail over those of the investor, requiring that the tribunal arbitrate between these conflicting rights.³¹ The tribunal also agrees with Argentina that general international law is relevant to the adjudication of the dispute between the parties: the Spain-Argentina BIT, in other terms, cannot be read in isolation from international law.³² Finally, it considers outdated the view according to which "corporations are by nature not able to be subjects of international law and therefore not capable of holding obligations as if they would be participants in the State-to-State relations governed by international law"³³: citing the Guiding Principles on Business and Human Rights, it notes that:

international law accepts corporate social responsibility as a standard of crucial importance for companies operating in the field of international commerce. This standard includes commitments to comply with human rights in the framework of those entities' operations conducted in countries other than the country of their seat or incorporation.³⁴

The tribunal concludes that the classic view according to which, since they are not subjects of international law, corporations cannot be imposed obligations under international human rights law, is untenable as a general statement³⁵; quite to the contrary, "the human right for everyone's dignity and its right for adequate housing and living conditions are complemented by an obligation on all parts, public and private parties, not to engage in activity aimed at destroying such rights".³⁶

²⁵ *Urbaser S.A. et al.*, cited above, para. 1156.

²⁶ *Id.*, para. 1159.

²⁷ *Id.*, para. 1160.

²⁸ *Id.*, para. 1161.

²⁹ *Id.*, para. 1157.

³⁰ *Id.*, para. 1167.

³¹ *Id.*, paras. 1186-1187.

³² *Id.*, paras. 1188-1192.

³³ *Id.*, para. 1194.

³⁴ *Id.*, para. 1195.

³⁵ *Id.*, para. 1196.

³⁶ *Id.*, para. 1199.

35. Yet, according to the arbitral tribunal, although the Spain-Argentina BIT must be interpreted in the light of this requirement (the treaty "cannot be interpreted and applied in a vacuum"³⁷), international human rights law does not result in imposing direct obligations on corporations ; nor does the Concession contract result in shifting from the State to the company the burden of ensuring the right to water and sanitation: "The human right to water entails an obligation of compliance on the part of the State, but it does not contain an obligation for performance on part of any company providing the contractually required service. Such obligation would have to be distinct from the State's responsibility to serve its population with drinking water and sewage services".³⁸ Citing General Comment No. 15 (2002) on the right to water and sanitation adopted by the Committee on Economic, Social and Cultural Rights, the arbitral tribunal notes that it is the State's duty, *inter alia*, to create accountability mechanisms ensuring that this right is fully guaranteed, but that in the absence of any specific performance requirement imposed by the State, corporate actors do not have the same duties to provide. In sum, the right to water and sanitation "is imposed upon States. It cannot be imposed on any company knowledgeable in the field of provision of water and sanitation services. In order to have such an obligation to perform applicable to a particular investor, a contract or similar legal relationship of civil and commercial law is required. In such a case, the investor's obligation to perform has as its source domestic law; it does not find its legal ground in general international law".³⁹ Only negative duties (to abstain from infringing the right to water and sanitation) could be of "immediate application" to private parties.

36. This arbitral award illustrates that international investment law may in the future increasingly acknowledge the fact that investors should not be allowed to claim the benefit of certain rights (in particular, not to be subject to indirect forms of expropriation), unless they comply with certain human rights duties. The future TBHR might serve to rebalance rights and duties in this regard. It might also ensure that corporations will not be allowed to act in violation of human rights, for the mere reason that the State under the jurisdiction of which they operate has not ratified certain human rights treaties or is not effectively ensuring the protection of human rights (see above, paras. 10-11).

3.3. Obligations of International Organisations

37. The "Elements" anticipate that the future TBHR may include provisions according to which "State Parties shall strive to ensure that international organizations, including international and regional economic, financial and trade institutions, in which they are Members, do not adopt or promote any international norm or decision that could harm the objectives of this legally binding instrument, or affect the capacity of the Parties to fulfill their obligations adopted herein".

38. This too is not new. The International Law Commission has now made it clear that "A State member of an international organization incurs international responsibility if, by taking advantage of the fact that the organization has competence in relation to the subject-matter of one of the State's international obligations, it circumvents that obligation by causing the organization to commit an act that, if committed by the State, would have constituted a breach of the obligation".⁴⁰ In other terms, where a States seeks to avoid compliance with an international obligation by transferring powers to an international organisation and allowing it to take measures that run counter to such international obligations, it engages its responsibility under international law.

39. The provision that it is proposed to include in the TBHR would helpfully clarify the scope of States' duties as members of international organisations. It would impose on States that, prior to transferring powers to an international organization, they act with due diligence to ensure that such

³⁷ Id., para. 1200.

³⁸ Id., para. 1208.

³⁹ Id., para. 1210.

⁴⁰ Art. 61 of the Draft Articles on the responsibility of international organizations, adopted by the International Law Commission at its sixty-third session, in 2011 (A/66/10, para. 87), welcomed by the UN General Assembly in Res. 66/100 of 9 December 2011.

powers shall only be exercised in conformity with their pre-existing human rights obligations.⁴¹ More generally, the Draft Articles on the responsibility of international organizations adopted by the International Law Commission prohibit the use by its member States of the channel of an international organisation in order to commit acts that would be a violation of those States' obligations if they were to be committed by those States acting alone.⁴²

40. This is similar to the view long adopted by human rights treaty bodies, which consider that States "cannot ignore their human rights obligations when acting in their capacity as members of these organisations".⁴³ In the framework of the International Covenant on Economic, Social and Cultural Rights in particular, the Committee on Economic, Social and Cultural Rights has expressed its view on a number of occasions that States parties to the Covenant would be acting in violation of their obligations if they were to delegate powers to international agencies and to allow such powers to be exercised without ensuring that they do not infringe on human rights, or if they were to exercise their voting rights within such agencies without taking such rights into account.⁴⁴

4. Preventive Measures

41. Reference is made to the comments provided above on the due diligence obligation to be imposed on TNC and OBEs (see above, paras. 26-28).

5. Legal liability

42. The "Elements" anticipate that the future TBHR may not only "strengthen administrative and civil penalties in cases of human rights violations or abuses carried out by TNCs and OBEs", but also impose criminal liability on TNCs and OBEs. It states in this regard:

States which do not yet have regulations on criminal legal liability on legal persons are invited to adopt them in order to fight impunity and protect the rights of victims of violations of human rights perpetrated by TNCs and OBEs. Criminal legal liability must cover the acts of those responsible for the management and control of TNCs and OBEs.

Additionally, legal liability must also cover those natural persons who are or were in charge of the decision-making process in the business enterprise at the moment of the violation or abuse of human rights by such entity.

⁴¹ The International Law Commission remarked that: "the existence of an intention to avoid compliance is implied in the use of the term 'circumvention'. International responsibility will not arise when the act of the international organization, which would constitute a breach of an international obligation if done by the State, has to be regarded as the unintended result of the member State's conduct. On the other hand, the present article does not refer only to cases in which the member State may be said to be abusing its rights". However, a result cannot be said to be 'unintended' if it is the consequence of the deliberate choice by a State not to ensure that its pre-existing international obligations shall be taken into account in the activities of the organisation, where the State knew or should have known that such would be the result of transferring powers to the organisation in the field concerned. Bearing witness, perhaps, to the difficulty of defining with sufficient clarity the scope of the due diligence obligation that States must accept when they transfer powers to an international organisation, the commentary to article 25 in an earlier draft, the equivalent of article 61 in the final text of the Articles, tended to impose on the State a slightly higher burden if it wished to avoid responsibility: it was explained then that "the existence of a specific intention of circumvention is not required and responsibility cannot be avoided by showing the absence of an intention to circumvent the international obligation" (Report of the International Law Commission on the work of its fifty-eighth session, 1 May-9 June and 3 July-11 August 2006, I.L.C. Report, A/61/10 (2006), chap. VI, paras. 77-91.)

⁴² For instance, a State would be engaging its international responsibility if it were providing aid or assistance to an international organisation for the commission of an act that would be internationally wrongful if committed by that State (Article 58. Aid or assistance by a State in the commission of an internationally wrongful act by an international organization).

⁴³ Committee on Economic, Social and Cultural Rights, Public Debt, Austerity Measures and the International Covenant on Economic, Social and Cultural Rights (24 June 2016) (E/C.12/2016/1), para. 9.

⁴⁴ General Comment No. 14 (2000), The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights), E/C.12/2000/4, para. 39; General Comment No. 14 (2000), The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights), E/C.12/2000/4, para. 39.

43. It has become common for international and regional conventions to include obligations upon States parties to implement or to consider implementing provisions in domestic legislation providing for the criminal liability of legal persons. These conventions include the United Nations Convention against Transnational Organized Crime (Article 10); the United Nations Convention against Corruption (Article 26); the Organization for Economic Cooperation and Development's Convention on Combating Bribery of Foreign Public Officials (Article 2); the Council of Europe Criminal Law Convention on Corruption (Article 18); and the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of Proceeds from Crime and on the Financing of Terrorism (Article 10).

44. The reasons for this trend are not hard to list. First, the risk of being found criminally liable may have a strong deterrent effect on a corporation of the risk of being prosecuted or being found criminally liable, which may seriously damage its reputation and thus its "brand", a consideration that is also of concern to investors.⁴⁵ Second, corporate entities have complex decision-making structures, and it is therefore difficult, where human rights abuses occur that may warrant to be treated as criminal offences, to identify a natural person who is the perpetrator of the criminal offense. By introducing legal provisions in domestic law that provide for liability of legal persons, this difficulty may be circumvented, and it shall be more difficult for individual perpetrators to shield their criminal conduct through the use of corporations.

45. If a reference to criminal liability of corporations is deemed essential, the "Elements" anticipate that States shall establish for a criminal liability of corporations "for criminal offences recognized as violations or abuses of human rights in their domestic legislation and in international applicable human rights instruments". Except for international criminal law (acts of genocide, crimes against humanity, war crimes, torture or enforced disappearances), an admittedly very limited group of offences, it would therefore be left to each State to determine under which conditions, and for which offences, the criminal liability of corporations could be engaged.

46. This is probably a realistic proposal. Of course, an alternative approach would be to provide that such criminal liability should be established only for a limited set of human rights violations, such as "serious violations of international human rights", in addition to violations of international humanitarian law. However, whereas violations of international humanitarian law are well circumscribed in particular as their definitions are provided in the Rome Statute of the International Criminal Court (with the exception of the crime of aggression), the notion of "serious violation of international human rights law" is much more elusive. The African Charter on Human and Peoples' Rights provides that: 'When it appears after deliberations of the [African Commission on Human and Peoples' Rights] that one or more communications apparently relate to special cases which reveal the existence of a *series of serious or massive violations of human and peoples' rights*, the Commission shall draw the attention of the Assembly of Heads of State and Government to these special cases.'⁴⁶ Various human rights treaties define the scope of the powers of the expert bodies they establish by referring to the existence of "grave or systematic violations".⁴⁷ Despite these references however, the notion remains largely undefined. Similarly, the 2005 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law refer to "gross" and "serious" violations, but they do not define these notions, although the Preamble states that such violations "by their very grave nature, constitute an affront to human dignity".⁴⁸

⁴⁵ Indeed, the *Legislative Guide to the United Nations Convention against Transnational Organized Crime and the Protocols Thereto* notes (page 116, paragraph 240): "Criminal liability of a legal entity may also have a deterrent effect, partly because reputational damage can be very costly and partly because it may act as a catalyst for more effective management and supervisory structures to ensure compliance."

⁴⁶ Article 58(1), African [Banjul] Charter on Human and Peoples' Rights, adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986.

⁴⁷ Article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); Article 13 of the Optional Protocol to the Convention on the Rights of Child; Article 6 of the Optional Protocol to the Convention on the Rights of Persons with Disabilities; Article 11 of the Optional Protocol to the Convention on the Economic, Social and Cultural Rights (ICESCR).

⁴⁸ UN GA Res. 60/147, 16 December 2005.

47. The "Elements" proposes that the future TBHR should also clarify under which circumstances acts adopted by natural persons can engage the criminal liability of the corporation concerned. It suggests in this regard that:

Criminal legal liability must cover the acts of those responsible for the management and control of TNCs and OBEs.

and that :

State Parties shall adopt legislative and other measures to establish that criminal and civil liability of TNCs and OBEs for human rights violations or abuses from their activities and throughout their operations do not exclude criminal and civil liability of company members, regardless of their position, and shall be independent from the finding of individual or collective civil and criminal liability.

48. This is a perfectly reasonable approach, and it is the one that has most chances of succeeding. Various theories have been advanced as regards the relationship between the acts of natural persons adopted on behalf of a corporation, and the criminal liability of that corporation itself. Under a theory of liability that is occasionally referred to as "holistic" or "systems-based", a corporation and the "corporate culture" it promotes, as well as its procedures, can create a dangerous environment in which offenses can occur, and therefore the company is held directly responsible for the criminal act because it has done nothing to change that culture. Under a second theory, of vicarious liability, the corporation shall be held responsible for all the acts of its employees provided such acts are committed in the name of, on behalf or of for the benefit of, the company concerned. Under a third theory, referred to as the "directing minds" principle, a limited number of officers having decision-making powers within a legal person act with a requisite degree of authority and control in the legal person so as to make it appropriate to attribute their actions to that of the company. It is this latter theory, the more generally relied on, that the "Elements" suggest to retain.

49. It must be acknowledged however that not all States have provided for the possibility of legal persons being criminally liable under their domestic law. Therefore, a reference to "dissuasive and effective sanctions and an effective right to reparation for victims, through civil, administrative and/or criminal means, or a combination thereof", may constitute an alternative departure point.

6. Access to justice, effective remedy and guarantees of non-repetition

50. Reference can be made in this regard to paragraphs 42-48 of General Comment No. 24 on State parties obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, where the Committee on Economic, Social and Cultural Rights provided the following comments :

42. Because of how corporate groups are organized, business entities routinely escape liability by hiding behind the so-called corporate veil, as the parent company seeks to avoid liability for the acts of the subsidiary even when it would have been in a position to influence its conduct. Other barriers to effective access to remedies for victims of human rights violations by business entities include the difficulty of accessing information and evidence to substantiate claims, much of which is often in the hands of the corporate defendant; the unavailability of collective redress mechanisms where violations are widespread and diffuse; and the lack of legal aid and other funding arrangements to make claims financially viable.

43. Victims of transnational corporate abuses face specific obstacles in accessing effective remedies. In addition to the difficulty of proving the damage or establishing the causal link between the conduct of the defendant corporation located in one jurisdiction and the resulting violation in another, transnational litigation is often prohibitively expensive and time-consuming, and in the absence of strong mechanisms for mutual legal assistance, the collection

of evidence and the execution in one State of judgments delivered in another State present specific challenges. In some jurisdictions, the *forum non conveniens* doctrine, according to which a court may decline to exercise jurisdiction if another forum is available to victims, may in effect constitute a barrier to the ability of victims residing in one State to seek redress before the courts of the State where the defendant business is domiciled. Practice shows that claims are often dismissed under this doctrine in favour of another jurisdiction without necessarily ensuring that victims have access to effective remedies in the alternative jurisdiction.

44. States parties have the duty to take necessary steps to address these challenges in order to prevent a denial of justice and ensure the right to effective remedy and reparation. This requires States parties to remove substantive, procedural and practical barriers to remedies, including by establishing parent company or group liability regimes, providing legal aid and other funding schemes to claimants, enabling human rights-related class actions and public interest litigation, facilitating access to relevant information and the collection of evidence abroad, including witness testimony, and allowing such evidence to be presented in judicial proceedings. The extent to which an effective remedy is available and realistic in the alternative jurisdiction should be an overriding consideration in judicial decisions relying on *forum non conveniens* considerations. The introduction by corporations of actions to discourage individuals or groups from exercising remedies, for instance by alleging damage to a corporation's reputation, should not be abused to create a chilling effect on the legitimate exercise of such remedies.

45. States parties should facilitate access to relevant information through mandatory disclosure laws and by introducing procedural rules allowing victims to obtain the disclosure of evidence held by the defendant. Shifting the burden of proof may be justified where the facts and events relevant for resolving a claim lie wholly or in part within the exclusive knowledge of the corporate defendant. The conditions under which the protection of trade secrets and other grounds for refusing disclosure may be invoked should be defined restrictively, without jeopardizing the right of all parties to a fair trial. Furthermore, States parties and their judicial and enforcement agencies have a duty to cooperate with one another in order to promote information-sharing and transparency and prevent the denial of justice.

51. The problem of the corporate veil, referred to in paragraph 42 of General Comment No. 24, is of particular relevance in transnational human rights cases. The most effective way to address this potential obstacle that victims face in seeking access to remedies, is to ensure that each State imposes on the companies under its jurisdiction (domestic parent companies), who have an investment nexus with companies outside its jurisdiction (foreign subsidiaries), a duty of care, obliging the parent company to take measures to ensure that its subsidiaries shall not commit, or be involved in, human rights abuses. This is the approach recommended by the Committee on Economic, Social and Cultural Rights:

33. In discharging their duty to protect, States parties should also require corporations to deploy their best efforts to ensure that entities whose conduct those corporations may influence, such as subsidiaries (including all business entities in which they have invested, whether registered under the State party's laws or under the laws of another State) or business partners (including suppliers, franchisees and subcontractors), respect Covenant rights. Corporations domiciled in the territory and/or jurisdiction of States parties should be required to act with due diligence to identify, prevent and address abuses to Covenant rights by such subsidiaries and business partners, wherever they may be located. The Committee underlines that, although the imposition of such due diligence obligations does have impacts on situations located outside these States' national territories since potential violations of Covenant rights in global supply chains or in multinational groups of companies should be prevented or addressed, this does not imply the exercise of extraterritorial jurisdiction by the States concerned.

7. Jurisdiction

52. The "Elements" anticipate that any TNC or OBE could be considered to be "“under the jurisdiction” of the State Party" where it "has its center of activity, is registered or domiciled, or is headquartered or

has substantial activities in the State concerned, or whose parent or controlling company presents such a connection to the State concerned". This is entirely consistent with the scope of extraterritorial obligations of States in international human rights law, as exposed above (see paras 14-16), and with the earlier comment on the need to allow victims of transnational human rights abuses to overcome the barrier that the corporate structure might represent (see para. 51 above).

8. International Cooperation

53. As already mentioned, one of the most promising contributions of the "Elements" is that they introduce this key element of international cooperation (see above, para. 17). Again, General Comment No. 24 of the Committee on Economic, Social and Cultural Rights referred in the following terms to the need for such international cooperation:

34. In transnational cases, effective accountability and access to remedy requires international cooperation. The Committee refers in this regard to the recommendation included in the report on accountability and access to remedy for victims of business-related human rights abuse (A/HRC/32/19), prepared by the Office of the United Nations High Commissioner for Human Rights at the request of the Human Rights Council (HRC Res. 26/22), that States should "take steps, using the guidance" (annexed to that report) "to improve the effectiveness of cross-border cooperation between State agencies and judicial bodies, with respect to both public and private law enforcement of domestic legal regimes". The use of direct communication between law enforcement agencies for mutual assistance should be encouraged in order to provide for swifter action, particularly in the prosecution of criminal offences.

35. Improved international cooperation should reduce the risks of positive and negative conflicts of jurisdiction, which may result in legal uncertainty and in forum-shopping by litigants, or in an inability for victims to obtain redress. The Committee welcomes, in this regard, any efforts at the adoption of international instruments that could strengthen the duty of States to cooperate in order to improve accountability and access to remedies for victims of violations of Covenant rights in transnational cases. Inspiration can be found in instruments such as the International Labour Organization (ILO) Maritime Labour Convention, 2006, in force since 2013, which establishes a system of harmonized national legislation and inspections both by flag States and by port States upon complaints of seafarers on board ship when the ship comes into a foreign port; or in the ILO Domestic Workers Convention, 2011 (No. 189) and the ILO Domestic Workers Recommendation, 2011 (No. 201).

Conclusion

54. The "Elements" presented for consideration by the third session of the OEIGWG (23-27 October 2017) provide an excellent basis for discussion. They are informed by recent developments in international human rights law, and on a sound diagnosis about the obstacles victims face in transnational human rights cases, as well as, more generally, about the sources of the impunity of corporate entities that operate across different national jurisdictions. The "Elements" should be clarified, however, in a number of areas. The most difficult issue concerns the scope of application they define for the future instrument to be adopted, and how the definition of the scope of application shall allow to identify the corporations on which States parties to that instrument shall impose certain reporting requirements, or requirements to adopt human rights due diligence plans.

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