Goettingen Journal of International Law 9 (2019) 3, 501-536

Evaluating the Zero Draft on a UN Treaty on Business and Human Rights: What Does it Regulate and how Likely is its Adoption by States?

Julia Bialek*

Table of Contents

* The author is a student assistant at the Chair of European and Public International Law (Professor Dr. Markus Kotzur) of the University of Hamburg (Germany). She has attended courses in Public International Law at the University of Hamburg and la Universidad Autónoma de Madrid (Spain), with a special focus on the topic of Business and Human Rights.

doi: 10.3249/1868-1581-9-3-bialek

Abstract

Infringements of human rights through the actions of transnational corporations are common in our globalizing world. While the international community has undertaken numerous attempts to hold private corporations responsible for their actions, only soft law instruments govern this area of public international law. Only recently, a first draft was released for a Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises, also known as the Zero Draft.

This article argues that the Zero Draft, while based on contemporary international law, represents a positive first step in the treaty-making process, but it still needs specification and clarification in order to close the gap in human rights protection effectively. First outlining the need for a closure of the gap in human rights protection, this article then closely examines the content of the Zero Draft. To that end, an in-depth analysis of the core provisions of the Draft is offered, especially focusing on the rights of victims, the prevention of human rights infringements, and corporate liability. Furthermore, this article analyzes current State practice and the expectations of the international community towards a legally binding instrument on the topic of business and human rights. Significantly, this article also compares the Zero Draft to existing soft law and previous recommendations on how to close the gap in a binding manner. Finally, the article concludes that, by indirectly holding companies accountable without depriving States of their sovereign power over their companies, the Zero Draft has the potential to be implemented as a future Treaty on Business and Human Rights.

A. Introduction: Business and Human Rights in a Globalized Economy

The increasing economic power, as well as the far-reaching rights, of corporate actors are still not linked to any obligations arising from international human rights law.[1] Despite this, corporations are able to fundamentally obstruct the enjoyment of human rights.[2] Recurring infringements mainly affect equality and labor rights, the rights of indigenous peoples, and rights of self-determination over natural resources.[3]

The focus of our globalized economy lies on transnational corporations. These business units are the principal driving force of global trade and thus the protagonists of most economic activities.[4] Numerous agreements and effective enforcement mechanisms regulate the protection of the interests of economic actors – whether it be international trade law or international patent and investment protection law – but so far there has been a lack of binding norms obliging corporations to protect human rights.

Merely non-binding and political demands,[5] which are not enforceable under international law, have been accumulating in this area.[6] The consequence of this has been a legal asymmetry that provides transnational corporations with strong rights and imposes no human rights obligations upon them.[7]

1 J. G. Ruggie, *Just Business: Multinational Corporations and Human Rights* (2013), xii [Ruggie, Just Business].

2 A. McBeth, *International Economic Actors and Human Rights* (2009), 6; J. von Bernstorff, *Die völkerrechtliche Verantwortung für menschenrechtswidriges Handeln transnationaler Unternehmen: Unternehmensbezogene menschenrechtliche Schutzpflichten in der völkerrechtlichen Spruchpraxis* (2010), 6; T. Koenen, *Wirtschaft und Menschenrechte: Staatliche Schutzpflichten auf der Basis regionaler und internationaler Menschenrechtsverträge* (2012), 25.

3 Koenen, *supra* note 2, 25.

4 McBeth, *supra* note 2, 6.

5 Cf. *Guiding Principles on Business and Human Rights: Implementing the United Nations „Protect, Respect and Remedy" Framework*, UN Doc A/HRC/17/31, 21 March 2011 [UN Guiding Principles]; UN Global Compact, available at https://www.unglobalcompact.org (last visited 16 December 2019).

6 W. Kaleck & M. Saage-Maaß, *Unternehmen vor Gericht: Globale Kämpfe für Menschenrechte* (2016), 56.

7 J. Martens & K. Seitz, *Auf dem Weg zu globalen Unternehmensregeln: Der „Treaty-Prozess" bei den Vereinten Nationen über ein internationales Menschenrechtsabkommen zu Transnationalen Konzernen und anderen Unternehmen*, Global Policy Forum (2016), 1, 26.

In the absence of effective regulation at both the national and international level, the actions of transnational corporations fall into a protection gap – a vacuum outside the law,[8] bearing grave risks of un-remedied human rights violations.

The Zero Draft, which was developed by an intergovernmental working group, now carries the potential to close the existing protection gap. The preamble enshrines the goal of expanding the existing human rights regime, embodied by traditional human rights treaties. Legal mechanisms need to be created or adapted so that the existing human rights regime can be applied to all aspects of human coexistence, including the reality of a global economy, an interconnected world and its non-state actors.[9]

In light of the *de facto* human rights violations by transnational corporations, this article, after a brief description of the necessity to close the gap [B.], examines the content [C.] and chances of adoption [D.] of the Zero Draft of the UN working group for a legally binding instrument on business and human rights.

B. On Course to the Zero Draft: Bridging the Gap Between Business and Human Rights

The origin of the growing legal asymmetry lies in the traditional understanding of the human rights regime and the unsuccessful efforts to oblige corporations. An overview of both what the regime of human rights encompasses [I.] and the failed past attempts to oblige corporations [II.] shall illustrate the necessity as well as the potential of the Zero Draft to close the protection gap.

8 S. Massoud, *Menschenrechtsverletzungen im Zusammenhang mit wirtschaftlichen Aktivitäten von transnationalen Unternehmen* (2018), 3; D. Kinley & J. Tadaki, 'From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law', 44 *Virginia Journal of International Law* (2004) 4, 931, 935; J. Woodroffe, 'Regulating Multinational Corporations in a World of Nation States', in M. K. Addo (ed.), *Human Rights Standards and the Responsibility of Transnational Corporations* (1999), 131, 133; S. Deva 'Scope of the Proposed Business and Human Rights Treaty, Navigating through Normativity, Law and Politics', in S. Deva & D. Bilchitz (eds), *Building a Treaty on Business and Human Rights – Context and Contours* (2017), 154, 156 [Deva, Scope of Business and Human Rights Treaty].

9 McBeth, *supra* note 2, 8.

I. Traditional Understanding of Human Rights and a Gap in Protection

First and foremost, human rights are constructed as defensive rights of individuals against the State.[10] For this reason, States traditionally bear sole responsibility for the protection and realization of human rights.[11] States' obligations in this regard are twofold: the negative obligation to respect human rights, insofar as to not interfere with the realization of human rights, as well as the positive obligation to ensure the realization of human rights.[12] Corporations, on the other hand, are not bound by human rights; rather, as private entities, they qualify as recipients of human rights protection. Traditionally, their actions are regulated by national law and are largely ignored by international law.

This is where the loophole for private corporations and their actions is located. That becomes evident when looking at the general rule that the conduct of private entities is not attributable to the State under international law.[13] The actions of States and private corporations therefore need to be differentiated from one another.

Consequently, even though States are bound by human rights obligations, responsibility for human rights infringements that result from actions of private corporations and are not attributable to any State are determined to fall within the loophole. Even though States do have a human rights obligation to prevent individuals from harmful conduct, it is disputed how far-reaching this obligation is and whether, as an obligation of conduct to take reasonable measures,[14] it has the same value as the obligations (of result) specifically laid down in the

10 A. von Arnauld, *Völkerrecht*, 3rd ed. (2016), 274; W. Kälin & J. Künzli, *Universeller Menschenrechtsschutz, Der Schutz des Individuums auf globaler und regionaler Ebene*, 3rd ed. (2013), para. 211.

11 *Universal Declaration of Human Rights*, GA Res. 217A (III), UN Doc A/810 at 71, 10 December 1948 [UDHR]; *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171 [ICCPR]; *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 3. [ICESCR]; von Arnauld, *supra* note 10, 274; McBeth, *International Economic Actors and Human Rights*, *supra* note 2, 1.

12 Human Rights Committee, *General Comment 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add.13, 26 May 2004, para. 6 [HRC, GC 31].

13 ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries, 2 *Yearbook of the International Law Commission* (2001) 2, 47.

14 Committee on Economic, Social and Cultural Rights, *General Comment 24: On State Obligations Under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities*, UN Doc E/C.12/GC/24, 10 August 2017, para. 32 [CESCR, GC 24].

respective human rights treaties. Further, that obligation only applies in the respective State's jurisdiction or when the State has control over a corporation that causes a foreseeable harm to others and does not infringe upon another State's sovereignty.[15] Sovereignty grants each State the right to govern its jurisdiction without any foreign interference.[16] Depending on corporate structures, which can include the division of parent and daughter corporations, sub-contractors, and lengthy supply chains, transnational corporations are subject to various jurisdictions. In light of the principle of sovereignty, the host State of a parent company is prevented from applying their national laws to a daughter company in another State's jurisdiction. Different national laws therefore govern the same corporation – the duty to prevent of one State only reaches to the point where the duty (and complementary right) of the next State begins.

The unknown scope of States' obligations to prevent infringements and the ensuing gap in human rights protection is illustrated by the *Kiobel* case. It shows that national laws protecting and enforcing human rights usually do not apply to extraterritorial situations. In that case, a group of Nigerian nationals residing in the United States filed a suit against certain Dutch, British, and Nigerian corporations on the basis of the Alien Tort Statute (ATS). The United States Supreme Court found that there was an insufficient link between the United States, the plaintiffs, and the companies, and therefore the ATS did not apply.[17] Further, the ATS was considered inapplicable, since it does not explicitly grant extraterritorial applicability and the violations claimed took place in another State's jurisdiction.[18] Even though that case concerned the direct actions of non-US corporations and would in this form probably not fall within the scope of the Zero Draft, it marks one of the essential problems that allow the gap of protection: States will not apply national laws to companies located in other States.

Regardless of urges from the Committee on Economic, Social and Cultural Rights on States to apply due diligence mechanisms,[19] States cannot apply due diligence in a field that falls without their jurisdiction. The complex and oftentimes obscure set-up of transnational corporations makes it difficult to determine which activity is attributable to which State and what due diligence standards apply.

15 CESCR, GC 24, *supra* note 14, para. 26, 30.
16 von Arnauld, *supra* note 10, 317.
17 Kiobel *et. al* v. Royal Dutch Petroleum Co. *et. al*, 569 U.S. 108 (2013), 14.
18 *Ibid.*
19 CESCR, GC 24, *supra* note 14, para. 15, 30, 31.

The ambiguity of the duty to prevent and the fact that human rights law does not bind corporations is pivotal, as States have long ceased to be the only actors to jeopardize the realization of human rights. On the contrary, some of the largest transnational corporations regularly have a turnover that is greater than that of some State budgets[20] and are frequently integrated into the markets in such a way that they are equally able to jeopardize the realization of human rights. Nevertheless, according to the traditional understanding of the human rights regime, private corporations are far from being obligated directly. The prevention of human rights violations through corporations still seems to lie outside the scope of the traditional application of the traditional human rights system and the mechanisms that have developed accordingly.[21]

II. Past Attempts to Impose Human Rights Obligations on Private Corporations

Since the 1970's, several attempts at various levels have been made to expand the fragmentary human rights system.[22] Within the framework of the United Nations (UN), the International Labor Organization (ILO), and the Organization for Economic Cooperation and Development (OECD), numerous initiatives have aimed to regulate the link between business and human rights.[23] The UN Global Compact, a multi-stakeholder initiative, also requires corporations to implement universal sustainability principles and to commit to the so-called "Ten Principles" that are also directed towards the protection of human rights.[24] However, these instruments only constitute *soft law* and are not legally binding on corporations or States.[25] They are, therefore, incapable of sufficiently counteracting the abuses of human rights committed by corporations.[26]

20 Martens & Seitz, *supra* note 7, 22.

21 S. Deva, *Regulating Corporate Human Rights Violations, Humanizing Business* (2012), 499 [Deva, Regulating Corporate HR Violations]; McBeth, *supra* note 2, 7.

22 Cf. M. N. Shaw, *International Law*, 8th ed. (2017), 197; D. Baumann-Pauly & J. Nolan (eds), *Business and Human Rights, From Principles to Practice* (2016), 70.

23 P. Miretski & S. Bachmann, 'The UN "Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights": A Requiem', 17 *Deakin Law Review* (2012) 1, 1, 14.

24 UN Global Compact, available at https://www.unglobalcompact.org (last visited 16 December 2019).

25 von Arnauld, *supra* note 10, 277.

26 Miretski & Bachmann, *supra* note 23, 14.

1. Draft Norms of 2003

After the development of a code of conduct by an intergovernmental body failed,[27] a working group was established in 1998 at the request of a sub-commission of the UN Commission on Human Rights. This working group was tasked with drawing up recommendations and proposals concerning the working methods and activities of transnational corporations.[28]

In 2003, the final document "Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights" ("2003 Draft Norms") was adopted by the sub-commission.[29] These norms provided for a direct obligation ofprivate corporations, placing special emphasis on employee rights and prohibitions of discrimination.[30] Nevertheless, the States did not accept the 2003 Draft Norms. In 2004, the Human Rights Commission announced that the Draft would have "no legal standing".[31]

2. Alternative Solution: John G. Ruggie

Despite the fact that States rejected the 2003 Draft Norms, several governments agreed that the issue of "business and human rights" continued to require attention.[32] In 2005, John G. Ruggie was appointed as Special Representative of the UN Secretary-General for Business and Human Rights. He was to be the antithesis to the rejected 2003 Norms; States requested an approach that would be founded in international law and therefore would not

27 A. Hennings, *Über das Verhältnis von Multinationalen Unternehmen und Menschenrechten, Eine Bestandsaufnahme aus juristischer Perspektive* (2009), 144; Massoud, *supra* note 8, 10.

28 UN Sub-Commission on the Promotion and Protection of Human Rights, T*he Relationship Between the Enjoyment of Economic, Social and Cultural Rights and the Right to Development, and the Working Methods and Activities of Transnational Corporations*, UN Doc E/CN.4/Sub.2./Res/1998/8, 20 August 1998.

29 UN Sub-Commission on the Promotion and Protection of Human Rights, *Draft Report of the Sub-Commission on the Promotion and Protection of Human Rights*, UN Doc E/CN.4/Sub.2/2003/L.11, 13 August 2003.

30 UN Sub-Commission on the Promotion and Protection of Human Rights, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, UN Doc. E/CN.4/Sub.2/2003/12/Rev.2, Art. 1, 4.

31 *Responsibilities of Transnational Corporations and Related Business Enterprises with Regard to Human Rights*, UN Doc E/CN.4/2004/116, para. (c).

32 Ruggie, *Just Business*, *supra* note 1, xvii.

grant international subjectivity to and obligate corporations directly.[33] After years of consultation, various studies and reports, Ruggie presented the framework "Protect, Respect and Remedy" in 2008.[34] The framework is based on three pillars: the State's duty to protect human rights, the corporate responsibility to respect human rights, and appropriate remedial and legal protection mechanisms.[35]

In State practice, the framework was widely acknowledged and accepted. It also forms the basis for the so-called UN Guiding Principles, which were unanimously adopted by the Human Rights Council[36] in 2011 and are viewed as the most important basis in the debate on business and human rights today.[37] However, these are regarded as soft law and therefore do not contain binding rules, neither on States nor on corporations.[38]

3. The German National Action Plan and the French "Loi de Vigilance"

Even though the UN Guiding Principles do not impose hard legal obligations, 21 States have so far followed UN Guiding Principle 1 and implemented National Action Plans (NAPs).[39] In this field, a NAP is defined as "evolving policy strategy developed by a State to protect against adverse human rights impacts by business enterprises in conformity with the UN Guiding

33 J. G. Ruggie, 'Business and Human Rights: The Evolving International Agenda', 101 *The American Journal of International Law* (2007) 4, 819, 824-825; Massoud, *supra* note 8, 13.

34 Ruggie, *Just Business*, *supra* note 1, xx.

35 UN Commission on Human Rights, *Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, UN Doc E/CN.4/2006/97, 22 February 2006 [Interim Report of Ruggie].

36 Human Rights Council, *Human Rights and Transnational Corporations and Other Business Enterprises*, UN Doc A/HRC/RES/17/4Res. 17/4, 6 July 2011.

37 D. Bilchitz, 'The Ruggie Framework: An Adequate Rubric for Corporate Human Rights Obligations?', 7 *SUR – International Journal on Human Rights* (2010) 12, 198, 199-200; Massoud, *supra* note 8, 15.

38 Cf. *Kaliña and Lokono Peoples v. Suriname*, Judgment of 25 November 2015, IACtHR Series C, No. 309, para. 166.

39 UN Guiding Principles, 'Implementation- Tools & Examples, National Action Plans, Business and Human Resource Centre', available at https://www.business-humanrights.org/en/un-guiding-principles/implementation-tools-examples/implementation-by-governments/by-type-of-initiative/national-action-plans (last visited 16 December 2019).

Principles on Business and Human Rights".[40] NAPs are designed to assess the actual as well as the potential adverse human rights impacts with which a business entity may be involved.[41] States ascertain what they are already doing to implement the UN Guiding Principles and identify gaps, which require further policy action.[42]

Especially noteworthy are the national legislations of France and Germany, which have both used the UN Guiding Principles as a basis. Germany implemented its comprehensive NAP in 2016, which is to be realized in 2020.[43] Its core provisions are of civil liability for corporations regarding violations in and outside of Germany, the possibility of class actions, and international cooperation.[44] A pivotal role is assigned to due diligence obligations for corporations, which consist of human rights impact assessments, reports, complaint mechanisms, and policy statements to respect human rights.[45]

France also leaned on the UN Guiding Principles when it introduced the new law "loi n°2017-399" (*loi de vigilance*) in March 2017. This law is considered to be the most advanced national instrument, which holds corporations responsible for human rights violations, due to its relatively high standard for due diligence, that can be penalized quite strongly.[46] At the heart of the *loi de vigilance* is the human rights due diligence of corporations and thus the correlated liability of companies for non-compliance with this duty.

As shown, past attempts have so far not been able to develop a binding solution. However, the need as well as the willingness for more regulation is shown, when 21 States have implemented NAPs and leading European nations are starting to implement strict regulatory frameworks to deal with the actions of corporations.

40 *Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, UN Doc A/69/263, 5 August 2014, para. 6.

41 *Ibid*., para. 2; *UN Guiding Principles*, *supra* note 5, Principle 18 and Commentary.

42 *Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, *supra* note 40, para. 2.

43 German Federal Government, 'Nationaler Aktionsplan: Umsetzung der VN-Leitprinzipien für Wirtschaft und Menschenrechte, 2016-2020' (2017), 10, available at https://www.auswaertiges-amt.de/blob/297434/8d6ab29982767d5a31d2e85464461565/nap-wirtschaft-menschenrechte-data.pdf (last visited 16 December 2019).

44 *Ibid*., 25.

45 *Ibid*., 8.

46 S. Brabant & E. Savourey, 'French Law on the Corporate Duty of Vigilance: A Practical and Multidimensional Perspective', 50 *Revue Internationale de la compliance et de l'éthique des affaires, Supplément a la Semaine Juridique entreprise et affaires* (2017), Articles 91-94, Art. 91, 7.

C. The Zero Draft: A Binding Regulatory Framework at Last?

On 16 July 2018, the Open-Ended Intergovernmental Working Group on Transnational Corporations and other Business Enterprises with respect to Human Rights (OEIGWG) published the first draft for a potentially binding treaty: The Zero Draft.[47] The OEIGWG was established in 2014 as a new intergovernmental forum, based on Human Rights Council Resolution 26/9. It is mandated with developing an internationally binding instrument to regulate the activities of transnational corporations under international law.[48] Issues such as the civil and criminal liability of corporations, effective victim protection, extraterritorial State obligations, and the relationship of a possible future treaty to international investment protection law are addressed.[49]

Before looking at how the content is perceived within the international community, it is crucial to analyze what the Zero Draft is aiming to regulate and accomplish. As such, this section looks at the relationship between the aims of the Zero Draft [I.] and their implementation [II.] to determine whether the Zero Draft can close the human rights protection gap effectively [III.].

I. The Aims of the Zero Draft

By expanding and specifying the human rights obligations of States in the context of transnational business activities, the Zero Draft is designed to close the existing protection gap in a binding manner. Transnational corporations should no longer be able to impair human rights unhindered and without legal consequences.[50] In order to achieve this goal as effectively as possible, the Zero Draft pursues several sub-goals, namely those of international cooperation, the

47 'Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises', Zero Draft, 16 July 2018, available at https://www.ohchr.org/documents/hrbodies/hrcouncil/wgtranscorp/session3/draftlbi.pdf (last visited 16 December 2019) [Zero Draft].

48 Human Rights Council, *Elaboration of an International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises With Respect to Human Rights*, UN Doc A/HRC/RES/26/9, 14 July 2014; Massoud, *supra* note 8, 16.

49 *Report on the Second Session of the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises With Respect to Human Rights*, UN Doc A/HRC/34/47, 4 January 2017; Martens & Seitz, *supra* note 8, 17.

50 Cf. *Zero Draft*, *supra* note 47, Art. 2(1)(a).

mutual legal assistance of States, obligations to protect, and effective remedies. The central element lies within the protection of victims.[51] This is based on the idea that it is generally of no relevance to the victims whether a human rights violation is caused by a State or by a private actor. Therefore, effective remedial mechanisms are to be introduced.[52] In order to guarantee the effective protection of victims, the Zero Draft further aims to introduce comprehensive corporate liability.[53] The nexus of victim protection and corporate liability is the corporate duty of due diligence, for which the draft provides uniform international standards.

II. Implementation of the Aims: The Framework of the Zero Draft

The following section examines how the Zero Draft attempts to realize the desired aims. The core provisions of the document include Art. 8 (rights of victims), Art. 9 (prevention), and Art. 10 (corporate liability), which link the protection of victims to the corporate duty of due diligence and the associated corporate liability for the first time.

1. Scope of Application of the Zero Draft

In order to assess the range and extent of the provisions of the Zero Draft, the scope of application needs to be determined. It is argued that, due to unclear wording, the scope of application poses a threefold problem: there is no clear definition of which corporations are to be addressed [a.], the extent of extraterritorial obligations is questionable [b.], and there is no specific indication of which human rights are specially protected [c.].

a. Transnational Corporations, Art. 3(1)

The question as to which kinds of corporations should be addressed arose during the sessions of the OEIGWG.[54] While some States wanted to include all kinds of corporations, regardless of their national or transnational character,[55]

51 Cf. *ibid*., Art. 2(1)(b).
52 Cf. *ibid*., Art. 2 (1)(b) in conjunction with Art. 8.
53 Cf. *ibid*., Art. 9.
54 *Report on the Third Session of the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business enterprises With Respect to Human Rights*, UN Doc A/HRC/37/67, 24 January 2018, para. 51.
55 *Ibid*., para. 52.

other delegations wanted to specifically exclude national corporations from the scope.[56] As a result, the draft currently applies to all business activities with a transnational character.[57] Art. 4(2) defines a business activity as having a transnational character when "[...] actions, persons or impact of the action take place in two or more national jurisdictions". Upon first glance, the Zero Draft seems to provide an alternative solution that focuses on the activity itself and not the characteristics of an enterprise. The document also assumes that a definition of the companies concerned is not necessary, as the only decisive factor is the transnational activity.[58]

However, as it is, the scope of application is formulated very vaguely and leaves great room for interpretation. Comparing the Zero Draft to other international instruments that concern transnational activities, one could have recourse to the UN Convention against Transnational Organized Crime. There, Art. 34(2) states that the implementation of the Convention must take place regardless of the transnational character of a corporation. The Convention thus includes all corporations, irrespective of their character. The UN Guiding Principles also apply to all corporations, regardless of their transnational character.

Nonetheless, the drafting States have deliberately decided against a definition that clearly includes corporations irrespective of their transnational character. By doing so, the draft overlooks the fact that violations of human rights by national corporations can occur just as frequently and as severely as those of transnational corporations.[59] Thus, it was noted by several delegations and organizations during the 4th session of the OEIGWG that the structure or nature of a corporation is irrelevant to victims, and so they should be entitled to access to remedy regardless of the corporation committing the abuse.[60] With the

56 *Ibid*., para. 60.

57 Cf. *Zero Draft*, *supra* note 47, Art. 3(1).

58 Cf. 'Elements for the Draft Legal Binding Instrument on Transnational Corporations and Other Business Enterprises With Respect to Human Rights' (2017), 4, available at https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/LegallyBindingInstrumentTNCs_OBEs.pdf (last visited 16 December 2019).

59 D. Weissbrodt & M. Kruger, 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights', 97 *The American Journal of International Law* (2003) 4, 901, 909; Hennings, *supra* note 27, 17.

60 *Report on the Fourth Session of the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises With Respect to Human Rights*, UN Doc A/HRC/40/48, 2 January 2019, para. 14.

victim-centered approach that the Zero Draft takes, a definition that included all corporations would be desirable.

b. (Extra-) territorial Scope of Application

Strongly intertwined with the definition of actions of transnational character is the territorial scope of application of the prospective treaty. Art. 9(1) imposes obligations on States "[…] within such State Parties' territory or otherwise under their jurisdiction or control [...]". It is argued that the term control is not used as an alternative criterion to the criterion of jurisdiction, but rather to specify what the term jurisdiction entails. It is typical for human rights treaties to connote the term jurisdiction with a factual power that States exercise over territory or individuals.[61] With the explicit mention of the word *control*, the Zero Draft clarifies that it is indeed this factual link between the State and the respective corporation that is decisive to determine jurisdiction. The question remains as to how jurisdiction is to be interpreted.

The wording suggests that States' obligations may go further than the range of their territory, i.e. extraterritorially. This is in accordance with the current trend of expanding States' extraterritorial obligations. For example, the Inter-American Court of Human Rights, in its Advisory Opinion 23/17, declares that, when a State has effective control over specific conduct that then causes direct and foreseeable harm in another State's territory, the former State has jurisdiction over the injury itself and is considered to have human rights obligations towards all who were affected by the injury.[62] The Committee on Economic, Social and Cultural Rights also considers States to have extraterritorial obligations when they have control over a corporation and harm is foreseeable.[63] However, the Committee stresses, the obligations of one State cannot interfere with the sovereignty or diminish the obligations of the host States under the Covenant.[64] Presumably, it is for this reason that the Advisory Opinion 23/17 relies on the established criterion of *effective control*.

61 M. Milanović, 'From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties', 8 *Human Rights Law Review* (2008) 3, 411, 418, 430.

62 *Medio Ambiente y Derechos Humanos*, Advisory Opinion 23/17 of 15 November 2017, IACtHR, para. 102.

63 CESCR, GC 24, *supra* note 14, para. 27.

64 *Ibid*., para. 26; Committee on Economic, Social and Cultural Rights, *Statement on the Obligations of States Parties Regarding the Corporate Sector and Economic, Social and Cultural Rrights*, UN Doc E/C.12/2011/1, 12 July 2011, para. 5, 6.

Usually, as set out by the case law of the International Court of Justice (ICJ)[65] and the European Court of Human Rights (ECHR)[66], *effective control* relates to, or over, territory or individuals. Accordingly, States only have extraterritorial jurisdiction in exceptional cases where they exercise effective control through the occupation or physical control over individuals.[67] The Inter-American Court uses the idea of effective control to establish the factual link between a State and a corporation's conduct. If that conduct leads to foreseeable damage on another State's territory, the Court attributes jurisdiction to the former State.[68] However, this new approach has so far not been reiterated or confirmed by any other Court decisions and it is also not manifested in State practice.

In the event that the Zero Draft relied on this new approach of establishing jurisdiction, determining direct and foreseeable links along supply chains of transnational corporations would still present a challenge. It is questionable what the term *foreseeable* entails and how far extraterritorial jurisdiction of States would be extended.

To provide an example of a scenario in which this becomes evident, consider the following: State A is the home State to a parent company that exploits inhumane working conditions in State B. If it was foreseeable to State A that their corporation causes harm in the jurisdiction of State B, State A would have (extraterritorial) jurisdiction over the harm. At the same time, State B also has jurisdiction over its territory and has the sovereign right to govern its own affairs without interference from other States. It follows that A could not exercise its extraterritorial jurisdiction without interfering with State B's jurisdiction. It is therefore argued that, if read extensively, States could hardly put this rule into practice without violating the sovereignty of other States.

The explicit mentioning of the term *control* with *territory or otherwise jurisdiction* suggests that the draft incorporates and confirms current practice, i.e. that the term *control* must be interpreted restrictively. This is also supported by the fears expressed by States at the 3rd session of the OEIGWG about the

65 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, 136, para. 113.

66 *Al-Skeini and Others v. United Kingdom*, ECtHR Application No. 55721/07, Judgment of 7 July 2011, para. 109; cf. also *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda)*, Judgment, ICJ Reports 2005, 201, para. 175.

67 *Al-Skeini and Others v. United Kingdom*, *supra* note 66, para. 109; cf. also *Democratic Republic of Congo v. Uganda*, *supra* note 66, para. 175.

68 *Medio Ambiente y Derechos Humanos*, *supra* note 62, para. 102.

possibility of inappropriate and far-reaching extraterritorial application,[69] as well as by the fundamental principle of State sovereignty under international law, which prevents States from exercising extraterritorial jurisdiction when another State has territorial jurisdiction. It is argued that, while this clause is to be read rather restrictively, the Zero Draft foresees mutual legal assistance and international cooperation, through which – even if applied only territorially – the protection gap would still be closed effectively.

c. "All International Human Rights", Art. 3(2)

The Zero Draft is set out to not only apply to specific human rights, but to all.[70] Nevertheless, the wording is so unclear that the *ratione materiae* cannot be unequivocally established. As stated in Art. 31(1) of the *Vienna Convention on the Law of Treaties*, a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose. Whenever the wording is unclear, one may turn to the object and purpose of a treaty in order to interpret a term.[71]

With regards to the Zero Draft, one could come to the conclusion that, as labor and equality rights are the most affected rights, they are essentially the ones that the Draft intends to protect first and foremost. Nevertheless, looking to the reports of the working sessions and the preamble of the Zero Draft, that conclusion is not mandatory. No reference is made to the International Bill of Human Rights,[72] nor is any reference made to any restrictions imposed by customary international law or *ius cogens*, especially ensuring the right not to be subject to torture, cruel, inhumane, or degrading treatment, as provided by Art. 7 of the International Covenant on Civil and Political Rights (ICCPR). Principle 12 of the UN Guiding Principles, which is based on the International Bill of Human Rights and the ILO Rights on Fundamental Principles and Rights at Work, could serve as a clarifying interpretation. However, the draft does not refer to the UN Guiding Principles, for which this interpretation is not mandatory. On the other hand, an interpretation that is too narrow and focused on specific rights would only run counter to protecting any potentially affected human right. As there is no mandatory interpretation in either direction at this stage in

69 *Report on the Third Session of the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights*, *supra* note 54, para. 78.

70 Cf. *Zero Draft*, *supra* note 47, Art. 3(2).

71 O. Dörr & K. Schmalenbach, *Vienna Convention on the Law of Treaties* (2012), 546.

72 Consisting of: UDHR, ICCPR, ICESCR.

the development of the Treaty on Business and Human Rights (the Treaty), it would be desirable for the Treaty to gain in specificity. It is recommended that heavily affected labor and equality rights be included with particular emphasis, without excluding other possibly affected rights.

2. State Obligations

Of particular note, the draft does not directly oblige corporations but leaves the (primary) responsibility for preventing and penalizing human rights infringements with States.[73] Above all, the protection of victims remains the responsibility of States.[74]

a. The Obligation to Protect

The perambulatory text already emphasizes that the primary responsibility for the positive implementation of human rights is to remain with the State. Specifically, States must protect individuals within their jurisdiction from any interference that can infringe upon their human rights, including the conduct of corporations.[75] To this end, Art. 9(1) imposes an obligation on States to ensure through national legislation that corporations observe human rights due diligence obligations. This is to apply to all corporations that are located in the territory of the States or otherwise under their jurisdiction or control. The Draft thus expands human rights to include a mandatory dimension of protection. The State's duty to protect is supposed to apply wherever the State has factual power over an enterprise: on State territory, and in exceptional cases also extraterritorially for corporations that are under the State's effective control.

b. Effective Remedies and Judicial Recourse

The establishment of effective remedial mechanisms, and thus the protection of victims, is of central importance.[76] Art. 8 not only establishes that there must be remedial mechanisms to compensate and indemnify victims

73 Cf. *Zero Draft*, *supra* note 47, Preamble para. 4; Art. 9(1), Art. 10.

74 Cf. *Zero Draft*, *supra* note 47, Art. 8.

75 *Zero Draft*, *supra* note 47, Preamble, para. 4; HRC, GC 31, *supra* note 12, para. 8; C. Köster, *Die völkerrechtliche Verantwortlichkeit privater (multinationaler) Unternehmen für Menschenrechtsverletzungen* (2010), 70; cf. *Velásquez Rodríguez v. Honduras*, Judgment of 29 July 1988, IACtHR Series C, No. 4, para. 166.

76 *Zero Draft*, *supra* note 47, Art. 2(1)(b).

or their surviving dependents, but it also regulates procedural costs and the treatment of victims. It follows from the systematic connection to Art. 5(1), as well as Art. 10-11, that both the home and host States are obliged to provide appropriate remedies and to cooperate with other States to guarantee their implementation.

First, Art. 8(1) and Art. 8(2) provide that the right of access to legal protection is guaranteed by providing for general remedies and by including the right to bring individual action, as well as collective actions. Also concerning judicial access, Art. 8(4) emphasizes that victims must be provided with all necessary information. A similar regulation can be found in the German NAP, which emphasizes that collective actions are possible and also introduces a multilingual information brochure. The UN Guiding Principles also focus on access to effective remedies in their Principle 25. Additionally, States are required through their domestic law to provide their courts and other competent authorities with appropriate jurisdiction.[77]

The common law principle of *forum non-conveniens* allows courts to deny jurisdiction when they consider another forum to be more appropriate.[78] Therefore, claims are dismissed as inadmissible when a Court in a different jurisdiction is more appropriate.[79] In the *Chevron* case, where indigenous peoples from Ecuador tried to bring claims for oil spills caused by Texaco before US courts, these declined jurisdiction.[80] In order to ensure adequate, timely, and effective legal protection, Art. 8(2) sets out that States provide their courts with the necessary jurisdiction under the Treaty. The report on the 4th session of the OEIGWG further indicates that the *forum non-conveniens* principle shall be prohibited when the Zero Draft finds application.[81]

Art. 5 is closely connected to this, when it determines jurisdiction both for the State where the human rights violations took place (host State) and for the corporation's home State. It bases this, similarly to the Rome Statute, on general

77 Cf. *ibid*., Art. 8(2).

78 Cf. Deva, *Regulating Corporate HR Violations*, *supra* note 21, 48.

79 M. Koebele, *Corporate Responsibility under the Alien Tort Statute, Enforcement of International Law Through US Torts Law* (2009), 325.

80 G. Skinner, R. McCorquodale & O. De Schutter, *The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business, Bericht des International Corporate Accountability Roundtable, CORE und der European Coalition for Corporate Justice* (2013), 15; Kaleck & Saage-Maaß, *supra* note 6, 75.

81 *Report on the Fourth Session of the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights*, *supra* note 60, para. 104.

principles of international law.[82] Essentially, this serves in the interest of victims as the Draft aims to make seeking legal redress as easily accessible as possible. Moreover, according to Art. 8(3), States have the duty to "[...] investigate all human rights violations effectively, promptly, thoroughly and impartially and, where appropriate, take action against those natural or legal persons allegedly responsible, in accordance with domestic and international law". Therefore Art. 8(3) further stresses the importance of victim protection by ensuring that human rights infringements are prosecuted.

The reference to "other competent authorities" in Art. 8(2) could mean extrajudicial remedy mechanisms. However, unlike the UN Guiding Principles,[83] the Draft does not further deal with extrajudicial or non-governmental remedy mechanisms. Instead, Art. 8(5) of the Draft focuses on the judicial remedy mechanisms and provides above all for financial support from the State. According to Art. 8(6), procedural fees shall be waived. Art. 8(7) draws the link from international cooperation to victim relief, by providing for the establishment of an *International Fund for Victims*. Art. 8(8) ensures the provision of "[...] effective mechanisms for the enforcement of remedies, including national or foreign judgments […]", and so stresses the necessity of the effective enforcement of legal remedies, but the Draft does not further deal with detailed procedural questions that would give an indication of how an implementation by States would look like. Finally, Art. 8 guarantees that victims be "[...] treated with humanity and respect for […] their human rights [...]". Accordingly, the Draft also addresses the protection of victims after the human rights infringement by a corporate entity has taken place and ensures a safe harbor in the search for legal remedy.[84]

c. Duties of Cooperation

Of particular importance are those measures in the Draft which provide for strong international cooperation, mutual recognition, and support. These can be found in Art. 11 and Art. 12. The significance of these measures can be summarized concisely by the fact that other provisions of the Draft find their basis in them,[85] essentially devoted to filling jurisdictional gaps.[86]

82 von Arnauld, *supra* note 10, 149.
83 Cf. *UN Guiding Principles*, *supra* note 5, Principle 27-29.
84 Cf. *Zero Draft*, *supra* note 47, Art. 8(9)-(13).
85 Cf. above B. II. 3; C. II. 1. b).
86 *Report on the Fourth Session of the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights*,

Art. 12 stresses the importance of international cooperation, and that above all States must recognize the importance of such cooperation. States are to "[...] undertake appropriate and effective measures in this regard, between and among States [...]". There exists, therefore, a due diligence obligation for States to ensure international cooperation. Art. 12(I)(a)-(c) contains a non-exhaustive list of how to comply with this obligation. States, for example, are to "promote effective technical cooperation and capacity-building", "share experiences, good practices, challenges, information and training programs," and "facilitate cooperation in research and studies".

Art. 11 specifically deals with the mutual legal assistance of States. States are called upon to exchange information, as well as to aid each other in the investigation of human rights violations. They are further to support each other in criminal and civil proceedings. To this end, central authorities in each State are to be established and empowered, on the one hand, to receive inquiries from other States, and on the other hand, to be able to send inquiries to other States themselves.[87] When having recourse to Court proceedings that concern transnational companies and human rights, it becomes evident that, without mutual legal assistance, the remaining obligations can easily be rendered meaningless.

Here, Art. 11(9) stands out, in that it states "[a]ny judgment […] which is enforceable in the State of origin of the judgment and is no longer subject to ordinary forms of review shall be recognized and enforced in any Party […]". Accordingly, this guarantees the legal effect of incontestable national judgments in other contracting States. This also seems to go beyond current practice, as national judgments usually only produce legal effect in the jurisdiction where they were ordered. The enforcement of a judgment from one State in another would hardly be obtained without prior mutual legal assistance. According to Art. 11(10), an exception to this general notion can only be made if there is "[...] proof, that (a) the defendant was not given reasonable notice and a fair opportunity to present his or her case, (b) where the judgment is irreconcilable with an earlier judgment validly pronounced in another Party with regard to the same cause of action and the same parties or (c) where the judgment is contrary to the public policy of the Party in which its recognition is sought."

supra note 60, para. 75.

87 Cf. *Zero Draft*, *supra* note 47, Art. 11(7).

3. Obligations of Private Corporations

Although companies currently inflict the most severe infringements of labor and equality rights as well as the right to self-determination of natural resources, they are not meant to be directly bound by the Treaty. The Draft, however, does not completely disregard the risks of corporate actions: corporations are indirectly bound to human rights, with the State as the intermediary.

a. Due Diligence Obligations

In order to indirectly bind corporations, the Draft employs an already recognized approach of human rights due diligence.[88] Art. 9(2) lit. a-h contains a concrete, non-exhaustive list of the content of the due diligence obligations. In addition to the common (environmental- related) obligations of reporting publicly and periodically,[89] corporations are also obliged to carry out human rights impact assessments and even prevent human rights violations along their entire supply chain. While obligations of due diligence normally represent obligations of conduct,[90] the Zero Draft sets the requirements and threshold remarkably high, in that the obligations *de facto* represent obligations of result.[91] That is not only atypical in international law,[92] but it can also not be found in any national legislation. Even the progressive French *loi de vigilance* does not contain such high requirements. The UN Guiding Principles also do not presuppose such a high standard: instead, they provide for a declaration of principle by corporations,[93] even though they assume that the due diligence obligations apply to corporations even if the State fails to comply with its own obligations.[94]

88 *UN Guiding Principles*, *supra* note 5, Principle 15; R. McCorquodale & L. Smit, 'Human Rights, Responsibilities and Due Diligence, Key Issues for a Treaty', in Deva & Bilchitz, *supra* note 8, 216, 216.

89 *Pulp Mills on the River of Uruguay (Argentina v. Uruguay)*, Judgment, ICJ Reports 2010, 14, 20, para. 91.

90 *Ibid*.; McCorquodale & Smit, *supra* note 88, 218.

91 J. G. Ruggie & D. Cassel. 'Comments on the Zero Draft', available at https://www.business-humanrights.org/en/comments-on-the-"zero-draft"-treaty-on-business-human-rights (last visited 16 December 2019).

92 Cf. U*nited States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, Judgment, ICJ Reports 1980, 3, 31, para. 62.

93 *UN Guiding Principles*, *supra* note 5, Principle 17.

94 Cf. *Ibid*., Principle 11.

b. Liability of Private Corporations

Art. 10 provides for both civil and criminal liability for companies as a consequence of the due diligence obligations. Both cases of liability are to be applied independently of each other.[95]

Civil liability is regulated in Art. 10(5) to Art. 10(7). In Art. 10(6), the Draft focuses on the factors "control", "a strong and direct link", or "foreseeable risk" in the civil liability of corporations in connection with the actions of their subsidiaries and business partners. It is not clear from the wording whose actions are decisive.[96] The *loi de vigilance* uses a similar starting point, but uses the criterion of "effective control"[97] and thus further restricts the scope of application. Also vaguely formulated is Art. 10(4), which provides for the possibility of reversing the burden of proof "where needed".

Meanwhile, criminal liability is defined in Art. 10(8) to Art. 10(12). The imprecise definition of transnational corporations is particularly problematic in this respect, as the criminal law principle of certainty also applies in international law.[98] If the Treaty does not specifically define which transnational activities are covered nor which corporations are addressed, the Treaty does not appropriately reflect the principle of certainty.[99] Here again the difference between corporations, which qualify as human rights recipients, and States, which are human rights guarantors, becomes evident. This fact can and must not be overlooked when determining the international obligations of private corporations.

4. Conflict with Trade and Investment Treaties

There has long been speculation about the relationship between the Treaty on Business and Human Rights and existing investment treaties. Generally, human rights are largely disregarded in such treaties.[100] While human rights

95 Cf. *Zero Draft*, *supra* note 47, Art. 10(3), Art. 10(7).

96 Ruggie & Cassel, *Comments on the Zero Draft*, *supra* note 91.

97 Art. L. 225-102-4, L.225-102-5 *loi relative audevoir de vigilance des sociétés mères et des entreprises donneuses d'ordre* (law on the duty of care of parent companies and ordering companies).

98 von Arnauld, *supra* note 10, 573.

99 Cf. *Report on the Third Session of the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights*, *supra* note 54, para. 56.

100 Deutsches Institut für Menschenrechte, *Stellungnahme: Die UN- Leitprinzipien als Grundlage für ein verbindliches UN-Abkommen zu Wirtschaft und Menschenrechten, Stellungnahme zu den „Entwurfselementen für ein verbindliches Menschenrechtsabkommen"*

organizations wish for the Treaty to take precedence over investment treaties, corporations naturally advocate for the opposite.[101] Contrary to what was originally envisaged in the 2017 Elements,[102] the Draft does not provide for an overarching position on investment protection treaties.

According to Art. 13(3), it applies "[...] without prejudice to any obligation incurred by States under relevant treaties[...]". Art. 13(6) stipulates that future investment treaties must not conflict with the Treaty. Art. 13(7) regulates that both existing and future investment treaties shall be interpreted in such a way as to limit the Treaty as little as possible. When applying the rules set out in the *Vienna Convention on the Law of the Treaties*, one would thus have to regard investment treaties as part of the context of the Treaty on Business and Human Rights. The potential Treaty would be regarded on the same level as trade and investment treaties, which would have to be interpreted in the light of one another. A fixed superimposition of human rights obligations is thus avoided; the result depends on the situation and the individual case.

5. Institutional Regulations

While the 2017 Elements,[103] as well as some delegations of the OEIGWG, were in favor of an international court, Art. 14 of the Draft merely provides for the establishment of a Committee. Similar to the Human Rights Committee and the Committee on Economic, Social and Cultural Rights, this Committee is entrusted with the task of monitoring the observance and development of treaties.[104] Within this framework, it is to generate, among other things, General Comments on the basis of State reports and make recommendations.[105] There is no provision for a right of appeal before the Committee. The Committee's position will thus most probably be comparable to those of the Committees for the conventional human rights treaties, although their Optional Protocols provide for the possibility of individual complaints.[106] In addition to the

der Offenen Zwischenstaatlichen UN-Arbeitsgruppe zu Transnationalen Konzernen und Sonstigen Unternehmen (2018), 6.

101 Massoud, *supra* note 8, 196.

102 'Elements for the Draft Legal Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights', *supra* note 58, 3.

103 *Ibid*., 14.

104 *Zero Draft*, *supra* note 47, Art. 14(4); cf. ICCPR, *supra* note 11, Art. 40; cf. ECOSOC Res. 17, 28 May 1985.

105 Cf. *Zero Draft*, *supra* note 47, Art. 14(4).

106 Cf. *Optional Protocol to the ICCPR*, 19 December 1966, 999 UNTS 171; *Optional Protocol to the ICESCR*, UN Doc A/RES/63/117, 10 December 2008.

Committee, there is to be a conference of States, which will also regularly deal with the implementation and further development of the Treaty.[107] Here, too, the Draft focuses especially on international cooperation.

III. Evaluation of the Zero Draft: Can the Zero Draft Realize Its Aims with the Established Provisions?

The overall structure of the Zero Draft is convincing at first glance. It prioritizes the concerns of victims of human rights abuses, providing detailed remedial mechanisms while also ensuring mutual legal assistance and international cooperation. In view of the current situation, in which it is virtually impossible for victims to obtain legal redress,[108] this presents a positive development.

In particular, access to justice[109] and the obligation of all States to provide their courts with the necessary jurisdiction[110] is essential to ensure effective remedial mechanisms in the contracting States. Alongside the provision of jurisdiction of home as well as host States, as guaranteed by Art. 5, victims will be given the opportunity to seek legal assistance at the place most convenient to them, thereby intensifying protection. In this context, the planned financial support from the State is also of great significance, since protracted procedures usually turn out to be cost-intensive.

While this much needed level of protection for victims is desirable, the Draft lacks clear and precise wording at focal points. This could potentially prevent the enforcement of effective victim protection. A fundamental problem constitutes the lacking definition of transnational corporations. While the Draft, presumably based on the tense discussions,[111] merely focuses on the transnational activities of corporations, it deliberately avoids a wording that specifies which corporations will be affected in concrete terms. It thus seems to tie in with the fact that human rights are particularly affected by the transnational

107 Cf. *Zero Draft*, *supra* note 47, Art. 14(5).

108 Skinner, McCorquodale & De Schutter, *supra* note 80, 9; Deva, 'Scope of Business and Human Rights Treaty', *supra* note 8, 156.

109 Cf. *Zero Draft*, *supra* note 47, Art. 8(1).

110 Cf. *Ibid*., Art. 8(2).

111 'Elements for the Draft Legal Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights', *supra* note 58, 4; *Report on the Second Session of the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights*, *supra* note 49, para. 14.

activities of corporations and addresses the core of the problem of human rights infringements by corporations.

Nonetheless, the regulation in its present form is too vague to effectively address and eliminate human rights infringements by private actors. It is also unclear whether State enterprises or so-called joint ventures, consisting of State and private shares, fall within the scope of application. The role of States in economic action and their legal responsibility is thus fundamentally ignored by the Draft. In view of the footnote in Res. 26/9 and the discussions based on it,[112] it is also obvious that local companies do not fall within the scope of application, even though they may affect human rights in the same manner. The criterion of locality does not exclude these companies from also carrying out (some) transnational activities. Without a precise analysis of the subsequent State practice, the scope of the definition cannot be precisely determined; the current wording opens the door to abuse and circumvention in order to protect corporations' as well as States' economic interests.

It is important to note here that, while States would still be under a due diligence obligation to prevent local companies from committing human rights abuses, it is questionable whether the standard set out by the Committee on Economic, Social and Cultural Rights is the same as the standard that is foreseen in the Zero Draft. Further, the universal standard that the Zero Draft aims to create, not only in terms of protection and prevention obligations but also in terms of remedy, could be undermined if local corporations were excluded. Therefore, it would be more effective to include both local and transnational corporations or to interpret the term transnational activity in such a manner that all businesses would be affected whenever carrying out transnational activities.[113]

That the Draft addresses *all international human rights* is a worth while approach. As corporations are in a position to infringe upon all manner of human rights, from labor rights to the right to life, it is necessary for corporations to be bound to respect all human rights.[114] In this way, the comprehensive and effective

112 *Report on the Third Session of the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights*, *supra* note 54, para. 27.

113 The latter was suggested by delegations in: *Report on the Fourth Session of the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights*, *supra* note 60, para. 38.

114 UN Human Rights Council, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie*, UN Doc A/HRC/8/5, 7 April 2008, para. 23; Deva, 'Scope of Business and Human Rights Treaty', *supra* note 8, 163.

protection of human rights is ensured. Yet the current wording, without any kind of restriction and emphasis on labor and equality rights that are especially affected, harbors a certain risk of abuse and could perpetuate legal uncertainty.

Furthermore, leaving the primary obligation to protect with the State and using it as an intermediary to indirectly bind corporations to human rights could cost the potential Treaty some effectiveness. In theory, even under current international obligations, States are obliged to prevent human rights violations by third parties.[115] Even though that triggers the international responsibility of States, these violations can only be claimed by other States and only if they are injured or specially affected.[116] A claim by individuals on the grounds of a State's treaty violation is not provided in international law. It is only under narrow circumstances that individuals can bring forward claims in front of the respective human rights courts,[117] and the Zero Draft does not change that. Although the Draft also prescribes explicit liability measures for the fulfillment of these obligations of protection, it is uncertain what will happen if a State continues to refrain from its obligation to protect. Explicit consequences only follow from non-compliance of the corporate responsibilities.[118]

Additionally, human rights infringements are most severe in "weak government zones" and conflict areas.[119] Therefore, it is surprising that, unlike the UN Guiding Principles, the Draft does not address these zones specifically at all. However, it is precisely these States that are expected to fulfill their obligations to protect to the full extent. It is a utopian assumption to expect an improvement of the current situation in this regard.[120] It is recommended that international cooperation and recognition be expanded and adapted in the Draft in order to guarantee the effective implementation of obligations in every State. This could be developed accordingly in further treaty negotiations.

115 Human Rights Committee, *General Comment 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.13, 29 March 2004, para. 8.

116 ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries, *supra* note 13, 31-143, 117.

117 Cf. *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, Art. 35, 213 UNTS 222 (amended by the provisions of Protocol No. 14 (CETS No. 194))[ECHR]; *American Convention on Human Rights*, 22 November 1969, Art. 46, 1144 UNTS 123, 150 [ACHR].

118 Cf. *Zero Draft*, *supra* note 47, Art. 10.

119 *Report of the Special Representative of the Secretary-Generalon the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, *supra* note 114, paras. 46-49.

120 Deva, 'Scope of Business and Human Rights Treaty', *supra* note 8, 161.

The corporate obligations of due diligence are generally set very high in the Draft, possibly to account for the fact that corporations are not directly held responsible. *De facto*, the obligation in Art. 9(2) to prevent human rights impairments requests more from corporations than to apply a certain due diligence. While due diligence obligations are not completely alien to transnational corporations, these are normally based on the voluntary actions of the corporations.[121] Compliance with the obligatory corporate due diligence obligations could be achieved through effectively implementing the liability provisions. By holding a corporation liable under civil and criminal law as soon as it fails to comply with its duty, not only is political pressure exerted but non-compliance would also be costly for the company. In short, the company would have to bear at least part of the costs that were saved by infringing upon human rights. A corporation that reduces production costs because of inhumane working conditions would at least have to carry part of those saved costs when being penalized for exploiting those conditions. From an economic perspective, exploitation would be less worthwhile for companies than might currently be. If these standards are introduced in all States, it will also make it increasingly difficult for corporations to exploit working conditions that are detrimental to human rights.

However, Art. 10 could present problems in the context of the so-called *piercing of the corporate veil*. As a general principle of international law, the legal personality of a company must be separated from that of its shareholders and business partners.[122] If the Draft bases provisions on the fact that the company is responsible for the actions of its business partners, then it neglects this principle. Courts are generally reluctant to take action against shareholders.[123] Some exceptions to this principle have been made, especially in recent human rights procedures.[124] The Western Cape High Court in Cape Town, South Africa explicitly stated that juristic personality is a legal fiction and that, when the circumstances of a particular case require disregarding this legal fiction, then courts should disregard it.[125] While the UK Supreme Court left open the question of whether the courts in that jurisdiction truly possess the power to

121 McCorquodale & Smit, *supra* note 88.
122 *Ibid.*, 229.
123 Cf. *Salomon v. Salomon & Co Ltd.* [1897] AC 22; *Faiza Ben Hashem v. Shayif* [2008] EWHC 2380 (Fam).
124 Cf. Gore NO and 37 Others NNO, Case No: 18127/2012, 2013, SA, 382 (WCC).
125 *Ibid.*

pierce the corporate veil, courts have acted in such a manner over the years that it is to assume they do possess the power.[126]

The Draft therefore does not appear to be heading for new territory here. However, the regulation requires further clarification in order to make clear whose actions are the decisive ones, in order to avoid the potential for abuse and to apply the regulation effectively. The relationship between trade and investment treaties seems to represent a compromise. Considering that the origin of the protection gap lies in the fact that companies are granted many rights yet are imposed with no human rights obligations, this is a rather disenchanting finding. In order to effectively prevent human rights infringements, the treaty should take precedence over trade and investment treaties. In conclusion, there has been some progress towards at least respecting human rights within these treaties.

The existing gap between business and human rights can only be closed effectively if the roots of the problem are addressed. The Draft employs many important and effective approaches. On the points indicated, however, re-writing and specification is urgently needed in order to give the Draft much-needed effectiveness.

D. Challenges of a Global Convention From a Policy Perspective

Regardless of assessments on the content of the Zero Draft, the potential for an international treaty on business and human rights and its adoption by the international community can be evaluated. Ultimately, the chances of its acceptance ultimately depend on the various interests of different States and corporate entities. Therefore, a comparison is drawn with previous attempts to close the protection gap [I.], before assessing what positions are represented by States [II.] in order to evaluate the chances of a successful treaty adoption [III.].

I. Historical Background: Comparison to the 2003 Norms

The need for a binding solution to bridge the protection gap is not a completely new idea. For example, the Draft Norms of the working group of the "UN Sub-Commission for the Promotion and Protection of Human Rights"

[126] Cf. the conclusion by Rose LJ in Re H and others (restraint order: realizable property): [1996] 2 All ER 391, para. 401F.

were completed in 2003 and proposed to the Human Rights Commission.[127] Although the 2003 Draft Norms were highly appreciated and found approval in literature,[128] States vehemently rejected them as the Norms foresaw direct obligations on private corporations. That would indeed burden the steadily growing economic players with more responsibility and obligations, which in terms of victim protection is favorable. However, it would provide corporations with a partial subjectivity of international law, ultimately granting them the capacity to maintain their rights by bringing international claims.[129] This constitutes a situation that most sovereign States would rather prevent, even if NGOs and some delegations spoke in favor of this notion in October 2018.[130]

At the time, Ruggie assumed that the 2003 Draft Norms would fail, because there was no basis for the direct human rights obligations of transnational corporations in international law.[131] The UN Guiding Principles therefore laid all responsibility on States, a concept that the Zero Draft picks up on. Like the Zero Draft, the 2003 Draft Norms recognized that the primary responsibility for ensuring human rights rested with States.[132] Meanwhile, the 2003 Draft Norms went one step further and directly obligated corporations alongside States.[133] The human rights selected in the 2003 Draft Norms were intended to oblige transnational corporations not only to respect human rights, but also to

127 *UN Sub-Commission on the Promotion and Protection of Human Rights Res. 2003/16*, UN Doc E/CN.4/Sub.2/2003/L.11, 13 August 2003.

128 Miretski & Bachmann, *supra* note 23, 8.

129 *Reparation for Injuries Suffered in Service of the United Nations*, Advisory Opinion, ICJ Reports 1949, 174, 9; J. Crawford, *Brownlie's Principles of Public International Law*, 8th ed. (2012), 57.

130 *Report on the Fourth Session of the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights*, *supra* note 60, para. 38.

131 *Interim Report of Ruggie*, *supra* note 35, para. 60; cf. also McBeth, *supra* note 2, 254.

132 Cf. UN Sub-Commission on the Promotion and Protection of Human Rights, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, *supra* note 30, Preamble, Art. 1; K. Nowrot, 'Die UN-Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights – Gelungener Beitrag zur transnationalen Rechtsverwirklichung oder das Ende des Global Compact?', 21 *Beiträge zum Transnationalen Wirtschaftsrecht* (2003), 5, 13.

133 Cf. UN Sub-Commission on the Promotion and Protection of Human Rights, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, *supra* note 30, Art. 1, Art. 2; Miretski & Bachmann, *supra* note 23, 10.

promote and guarantee them.[134] The 2003 Draft Norms also provided for certain due diligence obligations of companies,[135] but these were of secondary nature. Rather, the focus was on the direct, far-reaching human rights obligations of private entities. The focus of the 2003 Draft Norms was solely on holding companies accountable and – unlike the Zero Draft– did not mention State obligations, international cooperation, corporate liability, or the protection of victims.

II. Positions of States and State Practice with Regards to the Main Content

As the third and fourth sessions of the OEIGWG show, States largely agree that a legally binding instrument is required in order to close the existing protection gap.[136] Nonetheless, there is disagreement on how this is to be achieved. Res. 26/9 was far from being adopted unanimously in 2014. Only 20 of the 47 voting States voted in favor of the adoption of the resolution.[137] The clear difference in opinion of States of the global North and the global South become evidently clear when only looking at the willingness of negotiations on business and human rights. States of the global South, including Pakistan, Namibia, South Africa, and Venezuela, voted in favor of adopting the resolution. The global North, on the other hand, including Germany, France, Austria, the United Kingdom, and the United States, initially voted against negotiations on a legally binding instrument. Germany, in particular, did not participate in the first negotiations.[138] Striking however, are the positive responses from China and the Russian Federation.

Germany was represented at the third session, but ensured lengthy discussions with the European Union (EU) on the scope of application of the

134 Cf. UN Sub-Commission on the Promotion and Protection of Human Rights, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, *supra* note 30, Art. 1, Art. 5, Art. 12.

135 Cf. *Ibid*., Art. 15.

136 *Report on the Third Session of the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights*, *supra* note 54, para. 15.

137 Human Rights Council, *Elaboration of an International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights*, UN Doc A/HRC/RES/26/9, 14 July 2014, 3.

138 Martens & Seitz, *supra* note 7, 5.

binding treaty.[139] The main concern, especially of the EU, seems to be the potential competitive advantages for local businesses. If the EU had to introduce high standards for its (predominantly) transnational corporations but, for example, South Africa would not have to fulfill this obligation, as its corporations are classified as local, the local South African company would have a competitive advantage over the EU-based transnational corporation. Despite this concern, many developed States have introduced NAPs.[140] Negatively noted is the fact that even the States that have introduced NAPs do not sufficiently address the access to judicial remedies.[141]

As the fourth session of the OEIGWG especially shows, different jurisdictions allow for different discussions and possibilities.[142] Having to apply different laws, depending on where the abuse took place, makes the situation even more difficult. As the fourth report also provides, the vague terms of the Zero Draft are far from serving as a concrete legal basis on which national courts could base decisions.[143] The German NAP provides for extensive State obligations to protect by increasing the level of protection of human rights,[144] especially for corporations linked to the State and imposes due diligence obligations on its corporations.[145] The French *loi de vigilance* also relies on high corporate due diligence obligations. However, even these progressive national regulatory systems let the effective access to remedies slide.

139 *Report on the Third Session of the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights, supra* note 54, para. 27.

140 Business and Human Resource Centre, 'Implementation- Tools & Examples, National Action Plans', available at https://www.business-humanrights.org/en/un-guiding-principles/implementation-tools-examples/implementation-by-governments/by-type-of-initiative/national-action-plans (last visited 16 December 2019).

141 International Corporate Accountability Roundtable, 'Assessments of existing National Action Plans (NAPS) on Business and Human Rights', August 2017 Update, 5, available at https://static1.squarespace.com/static/583f3fca725e25fcd45aa446/t/599c543ae9bfdf40b5b6f055/1503417406364/NAP+Assessment+Aug+2017+FINAL.pdf (last visited 16 December 2019).

142 *Report on the Fourth Session of the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights*, *supra* note 60, para. 18.

143 *Ibid*., para. 39.

144 *Nationaler Aktionsplan: Umsetzung der VN-Leitprinzipien für Wirtschaft und Menschenrechte, 2016-2020*, 11, available at https://www.auswaertiges-amt.de/blob/297434/8d6ab29982767d5a31d2e85464461565/nap-wirtschaft-menschenrechte-data.pdf (last visited 16 December 2019).

145 *Ibid*., 20.

There is broad agreement in State practice when it comes to the extraterritorial application of obligations to protect. At the second session of the OEIGWG, some delegations proposed to refer to the "Maastricht Principles on Extraterritorial State Obligations", which are regarded as *soft law*.[146] However, an extraterritorial obligation to protect cannot be discerned from customary international law *de lege lata*.[147] This is further confirmed by States' opinions in the different reports of the OEIGWG, especially in the most recent one, where States again have raised their concern over the extraterritoriality aspect in the jurisdiction clause of Art. 9(5) of the Zero Draft.[148]

III. Evaluating the Chances of Treaty Adoption – Does the Draft Meet the Needs of the International Community?

The better the Draft strikes a balance between international economic interests on the one hand and human rights on the other, the greater the chances of it developing into a binding UN Treaty on Business and Human Rights. In contrast to the 2003 Draft Norms, the Zero Draft only directly obligates States and only these bear the responsibility. To underline this, the Draft also does not refer to the 2003 Draft Norms, so that there is a clear demarcation and differentiation from the originally rejected proposal.

The fact that the Draft does not directly oblige corporations corresponds to the applicable international law and is therefore likely to meet with the approval of State practice. *De lege lata* (transnational) corporations do not have an international legal personality[149] and it is not in the interest of the States to change this.[150] States remain in a higher position of power if they are able to regulate corporations through domestic law without providing them with the capacity of international subjects. Moreover, no international court is established

146 *Report on the Second Session of the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights*, *supra* note 49, para. 39.

147 Koenen, *supra* note 2, 206.

148 *Report on the Fourth Session of the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights*, *supra* note 60, para. 16.

149 von Arnauld, *supra* note 10, 275; Crawford, *supra* note 129, 66.

150 Cf. that no international legal personality of corporations can be deducted from current international law: Hennings, *supra* note 27, 37, 184.

through the Draft that would control the verification of States' implementation. This, too, should be in accordance with the interests of States.

The largest issue, also in terms of feasibility, centers on the circumvention of the definition of transnational corporations. Industrial States, which are the home countries of most transnational corporations, especially request that all enterprises fall within the scope of application. The regulatory gap can only be closed effectively if all corporations are addressed but, above all, industrial States do not want to miss out on potential economic profits. Although States may agree that the Draft does not address corporations that are state-owned or at least state-linked, it can be assumed that the existing vague and potentially abusive definition will not be approved by industrial States. Without further clarification of the interpretation of the current definition, industrial States are likely to oppose a Treaty.[151]

Protection of victims goes beyond all current national legislation. This will not necessarily lead to a rejection among States, but the requirements for international cooperation and support could constitute a major challenge. The fundamental principle of State sovereignty under international law includes the right of every State to regulate its internal affairs without the influence of other States.[152] Accordingly, a State is also not obliged to recognize the national jurisprudence of another State to be legally binding on itself or to ensure that it is enforceable. Art. 11(9), however, requires precisely that. While the mutual recognition of jurisprudence in this particular area would be more than desirable, it is not far-fetched that States will interpret the exceptions in Art. 11(10)(11) broadly in order to reduce the possibility of interference from foreign States to the highest extent possible.

Another point of conflict is likely to be the issue of civil liability. Especially those States, which particularly protect the so-called *corporate veil*, are likely to reject the far-reaching, civil law, corporate liability. While it is regrettable from a human rights perspective that the UN Treaty is not supposed to prevail over trade and investment treaties, this fact should contribute to approval among States. Corporations will continue to receive the protection they enjoy under the *status quo* – human rights considerations must only be taken into account additionally, without them having a predominant effect.

151 See also: Deva, 'Scope of Business and Human Rights Treaty', *supra* note 8, 169.

152 *Award in the Arbitration Regarding the Island of Palmas Case (or Miangas) between the United States v. Netherlands*, Award, 4 April 1928, II Reports of International Arbitral Awards (1928), 829, 838; Shaw, *supra* note 22, 166.

If, above all, the definition of the corporations to be addressed is revised and the details of international cooperation and civil liability are specified, the chances of adopting the Zero Draft are high. The scope of application of State obligations to protect should also be clearly emphasized. The Zero Draft pursues the realization of its goals with approaches that find their basis in international law and correspond to the general interest of States. It should also not be forgotten that the Zero Draft is the very first draft of the UN Treaty. A long process of negotiation with further drafts is likely to await the final Treaty. With the Zero Draft as the first basis, however, the negotiation process is off to a good start.

E. Conclusion

The steadily growing economic power of non-state actors is accompanied by an increasing danger of human rights infringements. It is therefore important to safeguard human rights without restrictions and without excessively hindering economic growth and the effectiveness of corporations. While transnational corporations have the potential to positively promote and advance human rights,[153] they can also do the exact opposite. The consequences are countless victims of human rights violations – without them being *de iure* violations, because as long as corporations are not bound by human rights, they cannot technically violate them.

The Zero Draft can now change this. Focusing on the protection of victims and access to legal remedies, it indirectly holds corporations accountable without depriving States of their sovereign power over their corporations. As a result, the State is responsible for compliance with due diligence obligations of companies. Only time will tell whether the legally binding UN Treaty on Business and Human Rights can sufficiently and adequately close the protection gap. The primary task of States is to exert sufficient political and legal pressure on business actors, although this can and will also have economic effects on the States themselves. The most recent development can be seen in a revised Draft, which was published on 16 July 2019. It was discussed at the 5th conference of the OEIGWG in October 2019 and found appreciation among States.[154] Even though it contains advanced and more precise wording, States pointed out that

153 Koenen, *supra* note 2, 25.

154 Draft *Report on the Second Session of the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises With Respect to Human Rights*, UN Doc A/HRC/43/XX, January 2020, para. 8.

it still lacked clear and precise language in crucial parts.[155] The Chair-Rapporteur invites States and other relevant stakeholders to provide their concrete textual suggestions on the revised draft no later than 30 November 2019 as well as to submit their additional textual suggestions no later than the end of February 2020. States suggestions – as well as the Second Revised Draft Legally Binding Instrument – are eagerly anticipated.

[155] *Ibid.* para 14, 22, 33.