WHITE PAPER:

OPTIONS FOR A TREATY ON BUSINESS AND HUMAN RIGHTS

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Executive Summary

I. Introduction

The United Nations Human Rights Council decided in June 2014 to establish an Intergovernmental Working Group to "elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises." The first meeting of the Working Group will take place in Geneva in July 2015.

The Council did not further specify what sort of instrument should be drafted. The Center for Human Rights of the American Bar Association and the Law Society of England and Wales invited the present authors to prepare a "White Paper" on possible options for a treaty on business and human rights.

The Paper takes no position for or against a treaty, or any particular form or content of a treaty. It is purely informational. It represents the views only of its authors, not necessarily those of the American Bar Association or its Center, or of the Law Society. Although other experts provided helpful comments on earlier drafts, the authors are solely responsible for the content.

The Paper begins by summarizing the context of the treaty process and current international law on business and human rights. It then addresses three main topics:

- **Treaty Options:** The wide variety of forms and content a treaty could take;
- **Templates:** Forms of treaties that enjoy broad support in international law, which could serve as templates for a treaty on business and human rights; and
- **Cross-cutting issues:** Issues of international law and policy that drafters may need to address, regardless of the form and content of a treaty (companies covered; applicable rights; law governing civil damages suits; geographic scope of State duties; parent company responsibilities; and whether to impose duties only on States or directly on business).

II. Background and Context

A broad consensus has emerged that business has a responsibility to respect human rights. A recent survey reports that senior executives of companies "overwhelmingly perceive a responsibility to protect human rights." In 2014 all member States of the UN Human Rights Council called upon "all business enterprises to meet their responsibility to respect human rights in accordance with the [UN] Guiding Principles [on Business and Human Rights]."

This consensus is reflected in the UN Framework on Business and Human Rights, endorsed by the Council in 2008, and the UN Guiding Principles on Business and Human Rights, endorsed by the Council in 2011. The Framework has three "Pillars":

- ***The State duty to protect*** against human rights abuses by business (Pillar One);

- ***The business responsibility to respect*** human rights (Pillar Two); and

- The responsibility of States and business to provide effective ***access to remedies*** (Pillar Three).

While the business responsibility to respect human rights arises partly from existing law, it rests more generally on the "basic expectation society has of business," which is part of a company's "social license to operate." The business responsibility is twofold. First, companies should not violate human rights. Second, they should exercise "due diligence" to anticipate and avoid or mitigate adverse impacts on human rights arising from their activities.

All three Pillars of the Framework were elaborated by the 2011 UN Guiding Principles, which provide more specific guidance for States and business. Implementation of the Guiding Principles is now being promoted by international bodies; States; many businesses and industry associations; bar associations; civil society; and a UN Working Group of five independent experts.

Nonetheless, doubts about the effectiveness of this "soft law" approach, especially with regard to remedies for victims, led Ecuador and South Africa in 2014 to ask the UN Human Rights Council to begin a process to draft a legally binding treaty. By a plurality vote of 20 States in favor, 14 opposed, and 13 abstaining, the Council agreed to establish an Intergovernmental Working Group to "elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises." The Group's first meeting will take place in Geneva in July 2015.

III. Existing International Legal Obligations of Business with Regard to Human Rights

Current international law imposes certain human rights obligations on business, but the coverage is incomplete, indirect and largely ineffective. International human rights law obligates States to protect human rights from infringement by business, but the obligations relating to business are vague and general. International labor law and international criminal law impose specific obligations on business, but their coverage is narrow. Most treaties in all three bodies of law are not universally ratified, and none grants victims effective remedies against companies.

IV. Treaty Options

There is a wide range of possibilities for the form and content of a treaty on business and human rights. They range from a comparatively weak treaty that would simply mandate public reporting by large companies, to a strong treaty with civil and criminal remedies in national and international courts.

The global coalition of NGO's calling for a treaty, as well as the lead governmental sponsors, advocate a treaty that comes closer to the "hard" end of the spectrum. However, it is not clear that any treaty that ultimately emerges from a drafting process will meet these objectives. Most options outlined in this Paper would not fully meet the goals of leading treaty proponents, such as Ecuador and the global NGO coalition, to provide broad accountability for companies and accessible remedies for victims.

This Paper does not attempt to catalogue all treaty options; there are simply too many. It outlines illustrative options, each modeled partly on existing international law binding States in regard to human rights, anti-corruption or environmental law. Each potential template is already either widely ratified or recently adopted. Thus there is reason to believe that its form, at least, may be generally acceptable to States.

The Paper presents the options in two broad categories: treaties mandating mainly national action; and treaties establishing international enforcement machinery. (A treaty could of course mandate both.) Within each category, the listing proceeds, roughly speaking, from relatively "weak" to relatively "hard" options. Each option could constitute either an entire treaty, or one component of a broader treaty. The Paper notes advantages and disadvantages of each treaty option.

A. <u>National Action:</u>

1. ***Business Reporting*:** A treaty might require corporations to report publicly on their human rights policies, risks, outcomes and indicators.

2. ***State Planning:*** A treaty might require States to adopt National Action Plans to implement the UN Guiding Principles and other norms.

3. ***Business Implementation of Guiding Principles**:* A treaty might commit States to require business to carry out its responsibilities under Pillars Two and Three of the UN Guiding Principles. In particular, States might require business to exercise human rights "due diligence."

4. ***Framework Treaty:*** A treaty might initially adopt a generally worded "framework," committing States only to broad principles, later to be supplemented by more specified duties, through additional protocols (*i.e.*, treaty supplements) or actions, based on review of experience over time.

5. ***Criminalization:*** A treaty might specify certain internationally recognized crimes against human rights, and require States to prosecute corporations and corporate executives and to cooperate with each other in doing so. The form of such a treaty could be modeled on the OECD *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.* Such a treaty might also provide a defense or mitigation for companies that could demonstrate they had robust due diligence programs in place.

6. ***Prevention:*** A treaty might require criminal prosecution and international cooperation, but add provisions requiring States to seek to prevent human rights violations by business through policies, practices, periodic review, independent prevention bodies, reporting and international collaboration. The form could be modelled on the widely ratified UN *Convention against Corruption*.

7. ***Civil Remedies:*** A treaty might require States to provide civil damages remedies for victims of human rights violations in which business is involved. Legal and practical barriers to access to justice would need to be addressed.

8. ***Comprehensive National Protection***: Existing human rights treaties impose wide-ranging duties on States to protect people from human rights violations, including violations committed by third parties. A treaty might make explicit and precise how States must implement those treaties with regard to business.

B. <u>International Supervision:</u>

1. ***State Reports:*** A treaty might require States periodically to report to committees of international experts on progress and obstacles in implementing their treaty obligations. As with current human rights treaties, the reporting process might allow civil society to submit "shadow reports," and authorize the committee to dialogue with States in public hearings and to publish concluding observations. This commitment would need to be harmonized with other UN treaty reporting procedures.

2. ***Individual Complaints:*** A treaty might follow existing UN human rights treaties, which allow individuals to file complaints against States before expert treaty bodies, once the complainants exhaust domestic remedies or show good cause for not doing so. A threshold question is whether to allow complaints against States, companies, or both. The answer might depend on the nature of the obligations imposed by the treaty, and on whether they mandate conduct by States, companies, or both. A complaint procedure might build on the existing procedure before "National Contact Points" under the OECD Guidelines for Multinational Enterprises.

3. ***International Civil Adjudication:*** A treaty might establish an international court to hear civil complaints, and to issue legally binding judgments granting reparations to victims, against States or companies or both. Regional human rights courts in Europe, Africa and the Americas currently order such reparations against States.

4. ***International Mediation and Arbitration:*** A treaty might create or make use of an international arbitral tribunal to hear complaints by victims against companies allegedly involved in human rights violations. A proposal to create such a tribunal has recently been circulated; if that tribunal is established beforehand, a treaty might then mandate States to require companies to submit to its jurisdiction, or the treaty itself might require business to submit to its jurisdiction.

5. ***International Criminal Prosecution:*** A treaty might authorize companies and business executives to be prosecuted before an international criminal court. The existing International Criminal Court can prosecute individuals, including business executives, for genocide, war crimes and crimes against humanity. A Protocol recently adopted by the African Union, but not yet entered into force, would both broaden the list of international crimes that could be prosecuted before the African Court of Justice and Human and Peoples' Rights, and permit corporations to be prosecuted.

6. ***Comprehensive treaty:*** The foregoing potential elements of a treaty are not mutually exclusive. A treaty could combine some or all, and others besides. Including more elements could make a treaty more effective. On the other hand, the more ambitious the treaty, the more difficult it may become to negotiate and to attract States to join it.

C. Policy Coherence Treaties:

1. ***National Laws:*** The UN Guiding Principles call on States to ensure that their laws and institutions affecting business are coherent with their duty to protect human rights. Examples include "corporate law and securities regulation, investment, export credit and insurance, trade and labour" as well as professional codes regulating the legal profession. A treaty might require States to review their laws, or to adopt particular measures (such as including human rights criteria in public procurement policies), to ensure policy coherence.

2. ***International Agreements:*** The Guiding Principles further provide that "States should maintain adequate domestic policy space to meet their human rights obligations when pursuing business-related policy objectives with other States or business enterprises." States might agree, for example, to include human rights protections in future investment and trade treaties. They could also agree to treat human rights conditions as terms of existing treaties.

D. Sectoral Treaties: It would also be possible to adopt a narrower treaty, focusing on a particular sector or on business involvement in certain kinds of human rights abuses.

V. Selected Key Issues

Whatever form or content of treaty is selected, a number of cross-cutting issues will need to be considered:

A. Companies to regulate: UN resolutions cover transnational corporations "and other business enterprises." The UN Guiding Principles apply to "all" business enterprises, although the extent of "due diligence" required may vary with the size of a business. Yet a preambular footnote in the Human Rights Council resolution initiating the treaty process

appears to limit "other business enterprises" to those with a "transnational character." Treaty drafters will need to consider this controversial limitation.

B. Human rights norms: The range of human rights covered by the treaty may depend on the duties it imposes. Reporting and planning might cover a broad range of rights. The UN Guiding Principles recognize the business responsibility to respect, at minimum, all rights in the Universal Declaration of Human Rights; the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights; and the ILO *Declaration of Fundamental Principles and Rights at Work*. Other rights may apply in specific circumstances. On the other hand, individual complaints or civil damages remedies might be limited to "justiciable" rights. And criminal prosecutions would apply only to crimes under existing law, or any new crimes recognized by the treaty.

C. Law governing civil damages claims: If the treaty authorizes a civil damages remedy in national courts, it might do so either for violations of international human rights law, or for violations of domestic tort law. Human rights claims would more appropriately recognize the gravity of violations, but domestic tort/delict standards might be more familiar to local judges and easier to apply. One solution might be to contemplate both kinds of remedies.

D. Extraterritorial jurisdiction: International law allows States to engage in reasonable exercises of jurisdiction over the conduct of their corporations in other States. A treaty might explicitly authorize, or even require, States to exercise jurisdiction over human rights violations committed by their companies outside their territories.

E. Parent company responsibility: In regard to reporting, planning and prevention, there is precedent to require parent companies to exercise due diligence to make sure that subsidiaries and other entities in the enterprise meet their responsibilities. In regard to civil or criminal liability, however, most States recognize the separate entity doctrine which treats parents and subsidiaries as different legal entities. Typically the parent cannot be held legally liable for wrongs committed by the subsidiary, except in very limited circumstances in which the corporate "veil" is pierced. On the other hand, recent developments in common law jurisdictions recognize that, in some circumstances, parent companies can be held liable for breaching a "duty of care" owed to persons injured by their subsidiaries. Drafters will need to consider such issues under the treaty.

F. Direct obligations on business: Eminent scholars disagree on whether corporations are subjects of international law. Pragmatists argue that the issue of whether or not corporations are "subjects" of international law is irrelevant to the question of what legal responsibilities can be imposed on them. Current investment and trade treaties grant corporations both substantive and remedial rights. Drafters might address whether a treaty should also impose duties on corporations.

G. Lawyers and business advisors: Bar Associations, lawyers and others advising companies need to take into account the responsibility of business to respect human rights. Treaty drafters might wish to ensure policy coherence of professional codes regulating the legal profession with State duties to protect human rights from infringement by business.

CONCLUSION

This Paper is presented in the belief that an informed negotiating process deserves, at the outset, a basic awareness of the main options, issues and choices that lie before the drafters.

I. INTRODUCTION

A plurality of the United Nations Human Rights Council member States decided in June 2014 to establish an Intergovernmental Working Group "to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises."[1]

Led by Ecuador and South Africa and supported by 20 Council member States (14 States opposed, including the US and the UK, while 13 abstained), and preceded by advocacy by hundreds of civil society organizations, the Council thus initiated a process to draft a treaty on business and human rights. The first meeting of the Working Group is to take place in Geneva in July 2015; the drafting process will likely take years.

There are many questions as to what will happen once the Working Group convenes. Will the negotiations succeed? If there is to be a treaty on business and human rights, what kind of treaty? Possibilities range from a treaty imposing minimal reporting requirements on corporations to one authorizing a special court where business entities may be sued or criminally prosecuted for human rights violations. What are the key issues the drafters will need to address under various treaty options? And if some form of treaty is adopted, what are its chances of being widely ratified by States? Or will it risk becoming, in effect, an international law orphan?

The American Bar Association Center for Human Rights, and the Law Society of England and Wales invited the present authors to prepare an informational "White Paper" on these questions. The Paper does not intend to advocate either for or against a treaty on business and human rights. Nor does it undertake to support or oppose any particular form or substance of a treaty. Its purpose is purely informational: to educate ABA and Law Society members and other interested persons about treaty issues and options. Views expressed in this Paper are strictly those of the authors, and not necessarily those of the ABA or its Center for Human Rights, or of the Law Society.

The remainder of this Paper is divided into four sections: background and context; existing international legal obligations of business in regard to human rights; options for the content of a treaty; and selected key issues.

II. BACKGROUND AND CONTEXT.

A generation ago it was often argued that only States had institutional responsibilities to safeguard human rights, and that only State actors could violate human rights. In recent years the predominant view has changed dramatically. By 2014 a reputable survey indicated that senior corporate executives "overwhelmingly perceive a responsibility to protect human rights,"[2]

[1] UN HRC Res. 26/9, 26 June 2014, *Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights*, par. 9.

[2] Economist Intelligence Unit, *Report Summary*, accessible at http://www.economistinsights.com/business-strategy/analysis/road-principles-practice. In a late 2014 survey of some 850 senior corporate executives, the Economist found that companies "overwhelmingly perceive a responsibility to protect human rights." Over 80% of execs surveyed agreed that business is "an important player in respecting human rights."

while all 47 member States of the UN Human Rights Council (including the US), acting by consensus, called upon "all business enterprises to meet their responsibility to respect human rights in accordance with the [UN] Guiding Principles [on Business and Human Rights]."[3]

How did we arrive at this new consensus?

This Paper is not the place to recount the long and tortuous history of debates in the UN over business and human rights, going back at least to the 1970s.[4] We focus here on only the latest chapter of that history, beginning a little more than a decade ago.

A. UN Mandate of John Ruggie on Business and Human Rights

In 2005 the UN Commission on Human Rights (later reconstituted as the Human Rights Council) asked UN Secretary-General Kofi Annan to appoint a special representative on the issue of "human rights and transnational corporations and other business enterprises."[5] Annan appointed Harvard University political scientist John Ruggie. The focus of Ruggie's mandate, and of business and human rights discourse, has paid special (but not exclusive) attention to the role of transnational businesses and their investments and operations in host States – addressing issues of the impact of such companies in operations outside of their home jurisdictions.

Ruggie's initial mandate was, among other things, to "identify and clarify standards of corporate responsibility and accountability for transnational corporations and other business enterprises with regard to human rights;" and to "elaborate on the role of States in effectively regulating and adjudicating the role of transnational corporations and other business enterprises with regard to human rights, including through international cooperation." [6]

Ruggie's appointment flowed from a decision of the UN Human Rights Council not to adopt an earlier instrument that attempted to define the legal responsibilities of corporations with respect to human rights. The draft "Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights" were approved in 2003 by the United Nations Sub-Commission on the Promotion and Protection of Human Rights. The Norms applied a long list of treaties and international instruments to transnational corporations.[7] Critics of the Norms, among other objections, viewed them as too prescriptive.[8]

While non-binding, the Draft Norms were crafted with the aspiration to extend human rights obligations to companies as well as states. The preamble recognized that even though

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[3] Resolution 26/22, *Human rights and transnational enterprises and other business enterprises,* UN Doc. A/HRC/26/22, 15 July 2014, par. 3.

[4] See the helpful summary in John Ruggie, *Quo Vadis? Unsolicited Advice to Business and Human Rights Treaty Sponsors*, Sept. 9, 2014, Institute for Human Rights and Business, accessible at http://www.ihrb.org/commentary/quo-vadis-unsolicited-advice-business.html.

[5] UN Commission on Human Rights, res. 2005/69, *Human rights and transnational corporations and other business enterprises*, 20 April 2005.

[6] *Id*.

[7] *Draft 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 (2003).

[8] For a summary critique, see John Ruggie, *Interim Report*, UN Doc. E/CN.4/2006/97, Feb. 2006, pars. 56-69.

States have the "primary responsibility" to protect human rights, "transnational corporations and other business enterprises, as organs of society, are also responsible for promoting and securing the human rights set forth in the Universal Declaration of Human Rights." The draft Norms also stated as an objective that every effort should be made that the norms be "generally known and respected."

The draft Norms were considered by the UN Commission on Human Rights in 2004. The Commission "express[ed] its appreciation to the Sub-Commission for the work it has undertaken in preparing the draft norms" and said they contained "useful elements and ideas for consideration." But it did not approve them and said they had "no legal standing."[9] Special Representative of the Secretary-General ("SRSG") Ruggie was then appointed so that the UN could undertake a more systematic study of the issue of human rights and transnational corporations and other business enterprises.

B. UN Framework on Business and Human Rights: "Protect, Respect, Remedy"

After extensive studies and consultations with diverse stakeholders worldwide, in 2008 Ruggie recommended a three-part "Framework" on business and human rights: "Protect, Respect and Remedy."[10] In summary, the Framework "comprises three core principles:"

- "the ***State duty*** to protect against human rights abuses by third parties, including business;"
- "the ***corporate responsibility*** to respect human rights; and"
- "the need for more effective ***access to remedies***."

"The three principles form a complementary whole in that each supports the others in achieving sustainable progress."[11]

Ruggie explained:

> "Business is the major source of investment and job creation, and markets can be highly efficient means for allocating scarce resources. They constitute powerful forces capable of generating economic growth, reducing poverty, and increasing demand for the rule of law, thereby contributing to the realization of a broad spectrum of human rights. But markets work optimally only if they are embedded within rules, customs and institutions. Markets themselves require these to survive and thrive, while society needs them to manage the adverse effects of market dynamics and produce the public goods that markets undersupply. …"[12]

[9] UN Commission on Human Rights, Decision 2004/116, 20 April 2004.
[10] John Ruggie, *Protect, Respect and Remedy: a Framework for Business and Human Rights*, UN Doc. A/HRC/8/5, 7 April 2008.
[11] *Id*. at 1 (emphasis added).
[12] *Id*., p. 3 par. 2.

Ruggie identified the "root cause" of contemporary problems involving business and human rights as "governance gaps":

> "governance gaps created by globalization - between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences. These governance gaps provide the permissive environment for wrongful acts by companies of all kinds without adequate sanctioning or reparation. How to narrow and ultimately bridge the gaps in relation to human rights is our fundamental challenge."[13]

The three-part Framework was Ruggie's response to those governance gaps. Under existing international human rights law, he noted, States have the legal duty to protect persons within their jurisdiction from human rights violations, including those committed by business[14] (or in which business is complicit[15]). This has come to be known as "Pillar One" of the three-part Framework.

What is now called "Pillar Two" of the Framework is the business responsibility to respect human rights. Ruggie articulated the general business "responsibility to respect," not as a new international legal obligation, but as a duty assumed "because it is the basic expectation society has of business."[16] It is "part of what is sometimes called a company's social license to operate."[17]

Ruggie noted that international organizations such as the International Labour Organization and the Organization for Economic Cooperation and Development, as well as major business organizations, and the thousands of individual companies that have joined the UN Global Compact, recognize that business has a responsibility to respect human rights.[18]

What does the business responsibility to respect human rights mean? In essence it has two components. The first is a negative obligation: "To respect rights essentially means not to infringe on the rights of others - put simply, to do no harm."[19]

The second is a positive responsibility: "What is required is due diligence - a process whereby companies not only ensure compliance with national laws but also manage the risk of human rights harm with a view to avoiding it, mitigating it and providing remediation in the event harm occurs. The scope of human rights-related due diligence is determined by the context in which a company is operating, its activities, and the relationships associated with those activities."[20]

These dual responsibilities apply to all human rights as enumerated in a core set of human rights treaties: "Because companies can affect virtually all internationally recognized rights, they

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[13] *Id*., p. 3 par. 3.
[14] *Id*., pp. 7-8, pars. 18-22.
[15] *Id*., pp. 20-21, pars. 73-81.
[16] *Id*., pp. 4-5, par. 9.
[17] *Id*., pp. 16-17, par. 54.
[18] *Id*., p. 8 par. 23.
[19] *Id*., p. 9 par. 24.
[20] *Id*., p. 9 par. 25.

should consider the responsibility to respect in relation to all such rights, although some may require greater attention in particular contexts."[21]

Finally, meeting these two responsibilities is not always enough: "There are situations in which companies may have additional responsibilities - for example, where they perform certain public functions, or because they have undertaken additional commitments voluntarily. But the responsibility to respect is the baseline expectation for all companies in all situations."[22]

The Third Pillar of the Framework requires a remedy for victims when human rights violations occur. States have a responsibility to provide both judicial and non-judicial remedies, while business has a responsibility to provide non-judicial remedies for violations in which it is involved.[23]

By consensus, the UN Human Rights Council formally "welcome[d]" Ruggie's three-part Framework and recognized the "need to operationalize" it. Extending his mandate for three years, the Council asked him to elaborate on the Framework, and encouraged governments, business and civil society to cooperate with him.[24]

C. UN Guiding Principles on Business and Human Rights

After further research and consultations, Ruggie in 2011 presented a set of some 31 "Guiding Principles on Business and Human Rights," together with commentaries on each Principle.[25] Principles 1-10 cover the State duty to protect; Principles 11-24 detail the business responsibility to respect; and Principles 25-31 address the need to provide victims access to effective remedies. Noting the "painfully slow" nature of treaty negotiations, Ruggie stated that he had considered and ruled out the treaty option "at this time" (in order to focus initially on what he viewed as a more timely means to close the governance gap and to provide victims access to a remedy sooner rather than later.[26] (Ruggie's position, as discussed below, has evolved since then.)

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[21] *Id*., p. 9, par. 24. The UN Guiding Principles on Business and Human Rights, later drafted by Ruggie and endorsed by the Human Rights Council in 2011, specifically identify, as a minimum set of human rights instruments to be respected by business in all contexts, the *Universal Declaration of Human Rights*; the *International Covenant on Civil and Political Rights*; the *International Covenant on Economic, Social and Cultural Rights*; and the International Labour Organization's *Declaration of Fundamental Principles and Rights at Work*. Guiding Principle 12, in *Guiding Principles*, note 25 below. *See generally* section V.B below.

[22] *Id*.

[23] *Id*., p. 24 et seq.

[24] UN Human Rights Council, res. 8/7, *Mandate of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises*, 18 June 2008.

[25] John Ruggie, *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.

[26] John Ruggie, *Treaty road not travelled*, ETHICAL CORPORATION, May 2008, pp. 42-43. Ruggie also argued that a treaty-making process "now" could undermine "effective shorter-term measures," and noted "serious questions" about how a treaty would be enforced. *Id*. at 42.

The UN Human Rights Council, again by consensus, formally "endorse[d]" the Guiding Principles,[27] now known as the "UN Guiding Principles." In addition to the ongoing mandate of the UN High Commissioner for Human Rights, the Council established a Working Group of five independent experts to monitor and promote effective implementation of the Guiding Principles.[28] It also established an annual Forum on Business and Human Rights, under the guidance of the Working Group, to facilitate dialogue and exchange on implementation of the Guiding Principles, as well as on issues of business and human rights generally.[29] The Council also made clear that its endorsement of the Guiding Principles by no means closed the door on further initiatives.[30]

Assisted by the Office of the UN High Commissioner for Human Rights, the expert Working Group has since 2011 conducted studies and consultations, and issued reports and recommendations.[31] The Working Group has particularly encouraged States to adopt National Action Plans to implement the Guiding Principles. It has published a set of guidelines, both for the content of plans and for the process by which plans are adopted.[32] Beginning in 2013, several States have adopted National Action Plans, and a dozen or so additional national plans are currently in preparation (including in the US).[33] The UN Guiding Principles emphasize that States have a critical role to play and can use a "smart mix" of measures – national and international, mandatory and voluntary – to foster business respect for human rights.[34] Companies, too, have made progress in adopting human rights policies, strengthening due diligence processes, and in other aspects of implementing the Guiding Principles.[35] The legal profession has also been active in promoting the Guiding Principles.[36]

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[27] UN Human Rights Council, res. 17/4, *Human Rights and transnational corporations and other business enterprises*, 16 June 2011, UN Doc. A/HRC/RES/17/4, 6 July 2011, par. 1.
[28] *Id*., par. 6.
[29] *Id*., par. 12.
[30] As aptly summarized by the International Commission of Jurists, the Resolution "notes that the *Guiding Principles* were adopted without prejudice to 'any future initiatives, such as a relevant, comprehensive international framework'. [The Resolution] also states that adoption of the *Guiding Principles* did 'not foreclose any other long-term development, including further enhancement of standards' …., and requested the new Working Group … to: 'continue to explore options and make recommendations at the national, regional and international levels for enhancing access to effective remedies ...'" International Commission of Jurists, *Needs and Options for a New International Instrument in the Field of Business and Human Rights*, June 2014 (hereafter "*ICJ Report*"), p. 5.
[31] *See generally* its web page at http://www.ohchr.org/EN/Issues/Business/Pages/WGHRandtransnationalcorporationsandotherbusiness.aspx.
[32] UN Working Group on Business and Human Rights, *Guidance on National Action Plans on Business and Human Rights*, Version 1.01, December 2014, accessible at http://www.ohchr.org/Documents/Issues/Business/UNWG_%20NAPGuidance.pdf.
[33] See listing at http://www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx.
[34] UN Guiding Principles, note 25 above at ¶3.
[35] *See generally, e.g., World Business Council on Social Development, Scaling Up Action on Human Rights: Operationalizing the UN Guiding Principles on Business and Human Rights* (2014), accessible at http://www.wbcsd.org/Pages/EDocument/EDocumentDetails.aspx?ID=16382&NoSearchContextKey=true. Thirty-four of the world's largest 50 companies now have a publicly available statement on human rights. Business and Human Rights Resource Centre, *LAUNCH: Corporate & Government Action on Human Rights Revealed*, Feb. 25, 2015, accessible at http://business-humanrights.org/en/launch-corporate-government-action-on-human-rights-revealed?utm_source=Business+%26+human+rights+-+Weekly+Update&utm_campaign=df1a8c93f3-Weekly_Update_25_February_20152_24_2015&utm_medium=email&utm_term=0_3a0b8cd0d0-df1a8c93f3-174128041. The first reporting framework specifically on the Guiding Principles has recently been introduced. Shift and Mazars, UN Guiding Principles Reporting Framework, *First Comprehensive Guidance for Companies on*

D. Debate Over a Treaty on Business and Human Rights

Frustration, however, remains. Many human rights groups report that, on the ground, not much has improved since the adoption of the Guiding Principles.[37] And there is widespread recognition that Pillar Three of the Guiding Principles – access to effective judicial and non-judicial remedies – does not seem to have made meaningful progress. Daunting legal and practical obstacles continue to thwart access to justice for parties adversely affected by corporate involvement in human rights abuses, especially in the transnational context.[38] Indeed, in some respects, notably in the United States and the United Kingdom, access to judicial remedies for human rights violations involving business has actually been limited since the adoption of the Guiding Principles.[39]

By 2013 a debate was well underway among governments and within the human rights community.[40] Some argued that the Guiding Principles were still quite new and growing in impact, and that all stakeholders needed more time to implement them more fully. Others contended that the Guiding Principles were in any event too weak to overcome what they perceived as business resistance to accountability, and that more time would only prolong their ineffectiveness. In their view, a more effective, "hard law" tool was needed.

In September 2013 Ecuador, claiming the support of some 85 countries, urged the UN Human Rights Council to take up the issue of a legally binding treaty on business and human rights.[41] In November 2013, civil society groups meeting in Bangkok, Thailand issued a Joint

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Human Rights Reporting Launches in London, Feb. 24, 2015, accessible at http://www.ungpreporting.org/wp-content/uploads/2015/02/UNGPRF_launchPR_20Feb20151.pdf.

[36] See section V.G below.

[37] See., *e.g.*, closing remarks of Audrey Gaughran of Amnesty International in the UN Forum on Business and Human Rights, Dec. 3, 2014, video accessible at http://webtv.un.org/meetings-events/human-rights-council/forum-on-business-and-human-rights/watch/closing-conversation-strategic-paths-forward-forum-on-business-and-human-rights-2014/3925402001001.

[38] *See generally, e.g.*, Jennifer Zerk, *Corporate Liability for Gross Human Rights Abuses: Towards a Fairer and More Effective System of Domestic Law Remedies* (2014) accessible at http://www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/StudyDomesticeLawRemedies.pdf; G. Skinner, R. McCorquodale and O. De Schutter, *The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business* (2013). The Office of the High Commissioner for Human Rights has commenced a large work plan focused on the access to remedy for gross human rights abuses – See http://www.ohchr.org/EN/Issues/Business/Pages/OHCHRstudyondomesticlawremedies.aspx.

[39] In the United States, the Supreme Court in 2013 ruled that overseas human rights violations may not be litigated in federal courts under the Alien Tort Statute except where they sufficiently "touch and concern" the US. *Kiobel v. Royal Dutch Petroleum*, 133 S. Ct. 1659 (2013). Cutbacks in UK legal aid funding likewise threaten the ability of British law firms to pursue overseas human rights violations. See Michael Goldhaber, *Corporate Human Rights Litigation in Non-U.S. Courts: A Comparative Scorecard*, 3 UC IRVINE L REV 127, 133-34 (2013).

[40] For a wide-ranging analysis of whether a treaty is needed, see *ICJ Report*, note 30 above, especially pp. 15-33.

[41] Business & Human Rights Resource Centre, *Calls for a binding treaty on business and human rights – perspectives*, 6 Dec. 2013, accessible at http://business-humanrights.org/en/calls-for-a-binding-treaty-on-business-human-rights-perspectives.

Statement echoing the call.[42] More than 600 civil society groups have now reportedly joined the call for a legally binding treaty.[43]

In June 2014, as noted above, the UN Human Rights Council decided to establish an Intergovernmental Working Group "to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises."[44]

Led by Ecuador and South Africa, the initiative was supported by a plurality of only 20 of the 47 member States of the Council. Fourteen States opposed and thirteen abstained. There was a notable geopolitical and geo-economic pattern in the vote. All States voting in favor were from Africa or Asia, except for Cuba, Ecuador, Russia and Venezuela. The opposing States included all European States on the Council (except Russia), plus the US, UK, Japan and the Republic of Korea. The abstentions included four major Latin American economies (Argentina, Brazil, Mexico and Peru), three African States, three Gulf States and one Asian State.

Opposition by the US, UK and European Union States was intense. Not only did they vote against the resolution, they stated that they would refuse to participate in the Intergovernmental Working Group. The US objected on multiple grounds, arguing that:

- A treaty negotiating process "will unduly polarize these issues."

- States have not had enough time to implement the Guiding Principles, which have already made a meaningful difference, but which will now be undermined by this "competing initiative."

- A one-size-fits-all instrument is not the right approach to the complexities of regulating business.

- In contrast to the global applicability of the Guiding Principles, a treaty would bind only states that become party to it.

- An "intergovernmental" working group will not benefit from participation by key stakeholders, including business.

- There are practical questions about how an international binding instrument would apply to corporations, which, the US contended, are not subjects of international law; yet one of the sponsors proposes to impose legal obligations directly on businesses.

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[42] People's Forum on Human Rights and Business, Bangkok, Nov.5-7, 2013, *Joint Statement: Call for an international legally binding instrument on human rights, transnational corporations and other business enterprises.*

[43] *FIDH and ESCR-Net New Joint "Treaty Initiative,"* Jan. 30, 2015, accessible at https://www.fidh.org/International-Federation-for-Human-Rights/globalisation-human-rights/business-and-human-rights/16868-fidh-and-escr-net-new-joint-treaty-initiative.

[44] UN HRC Res. 26/9, 26 June 2014, par. 9.

- The resolution seeks to regulate certain businesses and not others.[45]

This last objection – that the treaty might regulate some businesses and not others – refers to a footnote in the preamble to the resolution. The resolution proposes a treaty to regulate "transnational corporations and other business enterprises." Yet the preambular footnote explains that the phrase, "other business enterprises," denotes "all business enterprises that have a transnational character in their operational activities, and does not apply to local businesses registered in terms of relevant domestic law." This seems to exclude any business other than transnational corporations from the scope of any treaty. (This apparent narrowing of focus from the broader Guiding Principles will be further discussed in Part V below.)

That issue was among those addressed by John Ruggie in a September 2014 commentary. Cautioning against the legal and political difficulties inherent in negotiating a treaty on business and human rights, he urged the sponsors to pursue a treaty that would cover "other business enterprises" as well as transnational corporations; to appoint a prominent and consensus-seeking chair for the Intergovernmental Working Group; to ensure that the drafting process is broadly inclusive of outside voices, including business; to conduct basic legal research early in the process, including on corporate law and international investment law; and to step up efforts to implement the UN Guiding Principles during the predictably lengthy period of treaty negotiations.[46] A variety of commentators have begun to argue about the merits of a treaty, with experts lining up on both sides of the debate.

In subsequent remarks at the UN Forum on Business and Human Rights in Geneva in December 2014, Ruggie noted that the politics of imposing treaty obligations on transnational corporations are becoming ever more challenging. He pointed out that transnational companies from the global South – from countries like Brazil, China, India and South Africa – have become the world's largest in industries like oil, electronics and beer. He reiterated his earlier calls that any treaty should focus on corporate involvement in "gross" human rights abuses.[47]

In that same Forum, Ecuador's newly named Ambassador to the UN in Geneva, María Fernanda Espinosa, announced that the first meeting of the Intergovernmental Working Group will take place in Geneva in July 2015. She stated further that civil society would be welcome to attend, that a treaty should not be limited to transnational corporations, and that Ecuador and South Africa welcomed submissions beforehand from all interested parties.[48] In response to this and other statements, an EU representative seemed to leave open whether the EU might

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[45] Permanent Mission of the United States of America to the United Nations and Other International Organizations in Geneva, US Delegation to the UN HRC, Explanation of Vote, *Proposed Working Group Would Undermine Efforts to Implement Guiding Principles on Business and Human Rights*, June 26, 2014, accessible at https://geneva.usmission.gov/2014/06/26/proposed-working-group-would-undermine-efforts-to-implement-guiding-principles-on-business-and-human-rights/.

[46] John Ruggie, *Quo Vadis? Unsolicited Advice to Business and Human Rights Treaty Sponsors*, Sept. 9, 2014, Institute for Human Rights and Business, accessible at http://www.ihrb.org/commentary/quo-vadis-unsolicited-advice-business.html.

[47] John Ruggie, *Closing Plenary Remarks*, Dec. 3, 2014, Third UN Forum on Business and Human Rights, accessible at http://www.ohchr.org/Documents/Issues/Business/ForumSession3/Submissions/JohnRuggie_SR_SG_BHR.pdf.

[48] Personal notes of one of the present authors, who attended the presentation by Ambassador Espinosa.

participate after all in the Intergovernmental Working Group.[49] It is unclear at this writing how the business community will participate in the negotiation process. It appears that a joint set of comments will soon be submitted to the UN by a coalition of global business organizations.[50]

E. Continued Implementation of UN Guiding Principles

Meanwhile, the process of implementing the UN Guiding Principles continues. In June 2014, one day after voting on the controversial resolution on a treaty, the Council adopted a second resolution by consensus.[51] This resolution:

- Extends the mandate of the expert Working Group,
- Urges States to adopt National Action Plans or similar frameworks,
- Calls upon "all business enterprises to meet their responsibility to respect human rights in accordance with the Guiding Principles,"
- Asks the UN High Commissioner on Human Rights to continue "work to facilitate the sharing and exploration of the full range of legal options and practical measures to improve access to remedy for victims of business-related human rights abuses, in collaboration with the Working Group," and
- Continues the annual Forum on Business and Human Rights.[52]

In 2013 the United Kingdom became the first country to publish a National Action Plan.[53] One year later President Obama announced that the United States would launch a process to develop a National Action Plan for responsible business conduct, consistent with the UN Guiding Principles and other international instruments.[54] The US process is underway during

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[49] *Id.*

[50] On May 4, 2015, the International Organization of Employers ("IOE") circulated to other business groups for comment a draft set of observations on the treaty process, proposed to be submitted by the IOE, together with the Business & Industry Advisory Committee to the OECD, International Chamber of Commerce, International Petroleum Industry Environmental Conservation Association, and the World Business Council for Sustainable Development. Posted excerpts from their initial draft stated that "the UN treaty process must not undermine the ongoing implementation of the UN Guiding Principles...The UN treaty process should address all companies, not only multinationals...A potential UN treaty process should build on the UN "protect – respect - remedy" framework...The UN treaty process should be inclusive..." (Accessible at http://business-humanrights.org/en/business-organizations-call-for-comments-on-draft-observations-on-un-business-human-rights-treaty-process-22-may.)

[51] UN Human Rights Council, res. 26/L.1, *Human rights and transnational enterprises and other business enterprises*, 23 June 2014, UN Doc. A/HRC/26/L.1. A revised, final version of this text was adopted as Resolution 26/22, *Human rights and transnational enterprises and other business enterprises,* UN Doc. A/HRC/26/22, 15 July 2014. Quotations in the text above are from the final version.

[52] The annual Forum on Business and Human Rights is scheduled to take place in Geneva November 16-18, 2015.

[53] HM Government, *Good Business: Implementing the UN Guiding Principles on Business and Human Rights*, Cm 8695, Sept. 2013.

[54] White House, Office of the Press Secretary: *Factsheet announcing National Action Plan*, Sept. 24, 2014.

2015, with various stakeholder forums being held throughout the country.[55] The US initiative addresses not only human rights, but such other issues as anti-corruption and financial transparency.

This, then, is the state of play as we write this analysis of treaty issues and options in May 2015.

III. EXISTING INTERNATIONAL LEGAL OBLIGATIONS OF BUSINESS WITH RESPECT TO HUMAN RIGHTS

At present there is no comprehensive global treaty on business and human rights. Nor do the UN Guiding Principles impose new or additional obligations under international law.[56]

That does not mean that there are no current international laws imposing human rights obligations on business corporations or business executives. Such laws exist. But their coverage is scattered, often indirect, and incomplete.[57]

Before illustrating such laws, it bears mentioning that the modern human rights project, while State-centered, has never been exclusively so. The foundational document of international human rights law is the 1948 Universal Declaration of Human Rights. Its prefatory clause proclaims the Declaration as a "common standard of achievement for all peoples and all nations, to the end that every individual and *every organ of society*, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, …" (Emphasis added.)

Business corporations are, of course, among the "organs of society" thus exhorted, not only to respect human rights, but also to promote respect for human rights and by progressive measures to secure their effective observance.

But the prefatory clause of a General Assembly Declaration is not law. What international legal obligations do business corporations and their executives have to respect human rights?

Most of these obligations are indirect: international law obligates States to use their domestic laws and institutions to protect the human rights of persons within their jurisdiction,

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[55] *See generally* http://www.humanrights.gov/dyn/2015/usg-national-action-plan-on-responsible-business-conduct/.
[56] "The Guiding Principles' normative contribution lies not in the creation of new international law obligations but in elaborating the implications of existing standards and practices for States and businesses; …" *Introduction to the Guiding Principles*, UN Doc. A/HRC/17/31, par. 14. "Nothing in these Guiding Principles should be read as creating new international law obligations, or as limiting or undermining any legal obligations a State may have undertaken or be subject to under international law with regard to human rights." Guiding Principles, *General Principles* (preceding Guiding Principle 1).
[57] *See generally ICJ Report*, note 30 above, pp. 9-33.

including from violations by third parties.[58] States must require third parties, including business, to refrain from harming people. In some instances State obligations to safeguard human rights also obligate States to require business to take positive steps to protect rights, whether by properly training private security forces, providing safe factories and workplaces, or paying workers a minimum wage.

These State duties derive in part from general human rights treaties joined by States. In the words of Pillar One of the Guiding Principles, existing international law imposes on States a "duty to protect" persons within their jurisdiction from human rights violations committed by business. Wide-ranging global and regional human rights treaties require States Parties to "ensure,"[59] "secure,"[60] or "recognize" human rights,[61] and to take measures to give effect to the rights.[62] These commitments require States to take reasonable measures to prevent human rights violations, by granting State institutions the necessary powers and by using "all those means of a legal, political, administrative and cultural nature" necessary to prevent violations; to investigate, prosecute, punish, and provide reparations for violations; and, where possible, to restore rights that have been violated.[63]

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[58] *See generally, e.g.*, Jean-Francois Akandji-Combe, *Positive Obligations under the European Convention on Human Rights*, Human Rights Handbooks, No. 7, Council of Europe (2007), especially pp. 14-16; Eric Engle, *Third Party Effect of Fundamental Rights (*Drittwirkung), 5 HANSE LAW REV. 165 (2009).

[59] *International Covenant on Civil and Political Rights*, 16 Dec. 1966, entered into force, 23 March 1976, 999 U.N.T.S. 171, [hereafter "ICPR"], art. 2.2; *American Convention on Human Rights*, 22 Nov. 1969, entered into force, 18 July 1978, OAS Treaty B-32, art. 1.1.

[60] [European] *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 Nov. 1950, entered into force, 3 Sept. 1953, ETS No. 005, art. 1.

[61] *African Charter on Human and Peoples' Rights*, 27 June 1981, entered into effect, 21 Oct. 1986, art. 1.

[62] *ICPR*, art. 2.2 ("Where not already provided for by existing legislative or other measures, each State Party … undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights …."); *American Convention*, art. 2: ("Where the exercise of any of the rights or freedoms … is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms."); *African Charter*, art. 1 (States shall recognize rights "and shall undertake to adopt legislative or other measures to give effect to them.")

[63] Int.Am. Ct. H. Rts., *Velásquez Rodríguez v. Honduras*, Judgment of 29 July 1988, par. 166. To similar effect, see UN Human Rights Committee, General Comment 31, *Nature of the General Legal Obligation on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.13 (2004); and African Comm'n Human & Peoples' Rts., *Social and Economic Rts. Action Center v. Nigeria*, Communication No. 155/96, pars. 43-48 (2001).

As broadly explained by the Inter-American Court in *Velásquez Rodríguez*, the State duty to ensure rights "implies the duty of the States Parties to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights. … [T]he States must prevent, investigate and punish any violation of the rights recognized by the Convention and, moreover, if possible attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation."

Furthermore: "The State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation." (Par. 174.) "This duty to prevent includes all those means of a legal, political, administrative and cultural nature that promote the protection of human rights and ensure that any violations are considered and treated as illegal acts, which, as such, may lead to the punishment of those responsible and the obligation to indemnify the victims for damages." (Par. 175.)

In addition, International Labour Organisation ("ILO") treaties require States to legislate and enforce minimum wages, maximum hours, safe working conditions, freedom of association, and so on. While these laws are formally directed at States, the real objects of regulation, albeit indirectly, are business corporations.

For several reasons, these existing international laws are not adequate to ensure business respect for human rights. Not all general human rights or ILO treaties are universally ratified; these treaties simply do not bind some States. While general human rights treaties impose obligations on States, they lack specificity as to the scope of the duties States must impose on companies. In contrast, ILO treaties are specific, but limited in scope to particular labor rights and violations.

And in any case, States may lack the will or capacity to carry out even those specific commitments by which they have agreed to be bound. Many of these treaties lack any mechanism to require a State to live up to its commitments, outside of public reporting of State performance to a United Nations or relevant international body. For all these reasons, business may avoid accountability because States have not fully implemented their own duties with respect to human rights. Transnational businesses may also have different obligations depending on where they operate – at times working in States that do not have the will or ability to fulfill treaty commitments.

Another category of international laws bearing on business and human rights is international criminal law for heinous offenses such as genocide,[64] war crimes,[65] crimes against humanity,[66] slavery or forced labor,[67] human trafficking,[68] and sexual exploitation of children,[69] all of which in certain circumstances can be committed by non-State actors. Several international treaties explicitly require States to impose legal liability on "legal persons," such as business corporations, for involvement in international crimes.[70]

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[64] See section IV.B (5) below.
[65] *Id.*
[66] *Id.*
[67] *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery*, 7 Sept. 1956, *entered into force*, 30 April 1957, 266 U.N.T.S. 3.
[68] *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime*, 15 November 2000, 2237 U.N.T.S. 319, *entered into force*, 25 December 2003 (166 States Parties as of Feb. 15, 2015).
[69] *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*, 25 May 2000, *entered into force*, 18 Jan. 2002, 2171 U.N.T.S. 227.
[70] *International Convention for the Suppression of Financing of Terrorism*, 9 Dec. 1999, *entered into force*, 10 April 2002, 2178 U.N.T.S. 197, art. 5.1. To similar effect are the *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*, May 25, 2000, *entered into force*, Jan. 18, 2002, 2171 U.N.T.S. 227, art. 3.4; *Convention Against Transnational Organized Crime*, Nov. 15, 2000, *entered into force*, Sept. 29, 2003, 2225 U.N.T.S. 209, Art. 10; *Convention Against Corruption*, 31 Oct. 2003, *entered into force*, 14 Dec. 2005 , 2349 U.N.T.S. 41, art. 26; Organization for Economic Cooperation and Development, *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions,* Nov. 21, 1997, DAFFE/IME/BR(97)20, *entered into force*, Feb. 15, 1999, art. 2.

However, these "worst of the worst" human rights violations are limited to the most purposeful and gross violations of human rights. A gold mine or oil pipeline that poisons the local water supply, for example, may violate the human rights to life, health and clean water, but absent proof of malicious intent – a difficult element to prove in any case – would not likely rise to the level of one of these "gross" and criminal violations. Some states have domestic criminal legislation that theoretically permits the prosecution of legal persons for international crimes. This has arisen in part because States that are party to the Rome Statute of the International Criminal Court agreed to amend their own criminal laws to allow for prosecutions at the domestic level. A number of these jurisdictions allow for prosecution of corporations as well as natural persons.[71]

A new Protocol to the African Court of Justice and Human Rights broadens the list of international crimes which corporations might commit, and makes clear that corporations can be criminally liable for these crimes. (See section IV.B (5) below.) But this Protocol has not yet entered into force, its application is untested, and in any event it will apply only in Africa.

Existing international law, then, is uneven and extremely limited in practice in its application to business violations of human rights. Nonetheless, it demonstrates that there is no blanket jurisprudential impediment to using international treaty law to protect human rights from violations or complicity by business. This is true whether the international law is applied indirectly through States, or directly to business executives or, where national laws permit,[72] directly to business corporations.[73]

IV. TREATY OPTIONS

At this early stage there is a wide range of possibilities for the form and content of a possible treaty on business and human rights. The mandate of the Inter-Governmental Working Group is no more specific than "to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises."[74]

The negotiation process could lead to an instrument ranging from a comparatively weak or minimalist treaty, one that would simply mandate public reporting on human rights by large public companies (as recently required in Europe by the European Union as part of its non-

[71] Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, *Business and human rights: mapping international standards of responsibility and accountability for corporate acts*, UN Human Rights Council, UN Doc./HRC/4/35, 19 February 2007, ¶24-25; see also Anita Ramasastry and Robert C. Thompson, *Commerce, Crime and Conflict: Legal Remedies for Private Sector Liability for Grave Breaches of International Law: A Survey of Sixteen Countries* (Fafo 2006).

[72] See section IV.A (5) below.
[73] See section V.F below.
[74] UN HRC Res. 26/9, 26 June 2014, par. 9.

financial reporting rules),[75] to a strong treaty that provides for both civil and criminal remedies, in both national and international courts, for human rights violations committed by corporations.

The global coalition of NGO's calling for a treaty, as well as the lead governmental sponsor (Ecuador), advocate a treaty that comes closer to the "hard" end of the spectrum. The November 2013 NGO Joint Statement calls for a treaty that, among other things, requires States Parties to provide for:

> "c) … *legal liability* for business enterprises for acts or omissions that infringe human rights;" [and]
>
> "d) … access to an *effective remedy* by any State concerned, including access to justice for foreign victims that suffered harm from acts or omissions of a business enterprise in situations where there are bases for the States involved to exercise their territorial or extraterritorial protect- obligations."[76] (emphasis added)

In addition, the NGO's call for a treaty that "[p]rovides for an international monitoring and accountability mechanism."[77]

Similarly, Ecuador's Foreign Minister has written that the proposed treaty "would move the world to a legal framework that holds transnational corporations accountable for their human rights violations. It will provide legal protections and effective remedies, as well as create an important role for civil society actors in promoting corporate accountability …"[78]

On the other hand, it is by no means clear that any treaty that ultimately emerges from a UN drafting process will meet these objectives. In between the extremes of a strong treaty and no treaty, there is a wide range of possible outcomes of a drafting process. There is also the possibility that there might be more than one treaty, or that a treaty or treaties would address specific sectors.[79]

In this section we do not attempt to catalogue them all; there are simply too many options. Instead we merely outline illustrative options, each modeled partly on existing global or regional instruments binding States in regard to human rights or related fields, such as anti-

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[75] Council of the European Union, Press Release, *New transparency rules on social responsibility for big companies*, Sept. 29, 2014. The new rules will apply only to large public-interest companies with more than 500 employees and a balance sheet of $25.3 million and higher, or a net turnover of $50.7 million or more.

[76] People's Forum on Human Rights and Business, Bangkok, Nov.5-7, 2013, *Joint Statement: Call for an international legally binding instrument on human rights, transnational corporations and other business enterprises*, Par. 1 (c) and (d).

[77] *Id*., par. 1 (e).

[78] Ricardo Patiño, *Transnational Misconduct Must End*, HUFFINGTON POST, Oct. 24, 2014, accessible at http://www.huffingtonpost.co.uk/ricardo-patino/ecuador-ricardo-patino_b_6040920.html

[79] The Human Rights Council Resolution establishes the Intergovernmental Working Group on "a" legally binding instrument, for the purpose of elaborating "an" international legally binding instrument. UN HRC Res. 26/9, 26 June 2014, *Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights*, par. 1. Hence it appears that further HRC authority might be needed for the Working Group to elaborate more than one treaty.

corruption and environmental law.[80] Each of these potential templates is either widely ratified or recently adopted. Thus there is reason to believe that their form, at least, may be generally acceptable to States.

In all these examples, references to "corporations" or "companies" refer to "transnational corporations and other business enterprises," the phrase used in all the Human Rights Council resolutions of the last decade relating to business and human rights. Key conceptual issues that arise from the various treaty options, including from this very phrase, are addressed in section V, following the catalogue of illustrative treaty options in this Part IV.

A treaty specifying business responsibilities could either be a new, freestanding instrument, or might be crafted as an additional protocol to an existing treaty imposing human rights obligations on States.

For clarity, our listing is organized in two broad categories: treaties mandating mainly national action (Part A below); and treaties establishing international enforcement machinery (Part B below).[81] (A treaty could of course mandate both.) Within each category, the listing proceeds, roughly speaking, from relatively "weak" to relatively "hard" treaty options.

A third category involves "policy coherence" treaties, by which States would review and amend their laws and international agreements concerning business to ensure consistency with the State duty to protect human rights (Part C below). A final category refers to treaties for particular business sectors or for certain kinds of human rights violations (Part D below).

Finally, it should be noted that nothing in the UN treaty process precludes States or regional organizations from proceeding with national or regional laws, treaties and other initiatives on business and human rights.

A. National Action Treaties:

1. Business Reporting:

A treaty might simply require all or some corporations to report publicly on their human rights policies, risks, outcomes and indicators, perhaps using the "comply or explain" approach of some recent reporting regulations. For example, in October 2014 the European Union issued a Directive requiring some 6000 "public interest" companies in the EU, having more than 500 employees and a balance sheet of $25.3 million and higher, or a net turnover of $50.7 million or more annually, to disclose certain "non-financial and diversity information." Public interest companies are publicly listed companies of "significant public relevance" because of the nature of their business, size or corporate status.[82]

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[80] For further analysis, see *ICJ Report*, note 30 above, pp. 34-43.

[81] The NGO Joint Statement on a treaty specifically calls on States to "monitor and regulate" business enterprises and to provide for their "legal liability" and for an "effective remedy," but only generally calls for an undefined "international monitoring and accountability mechanism." Joint Statement, note 42 above.

[82] Council of the European Union, Press Release, *New transparency rules on social responsibility for big companies*, Sept. 29, 2014.

Under these new rules, large public companies will have to report certain non-financial information: "as a minimum, environmental, social and employee matters, respect for human rights, anti-corruption and bribery matters." Companies can avoid reporting on one or more of these issues if they do not pursue policies on those issues and provide a "clear and reasoned" explanation of this choice.

In addition to a brief description of their business models, companies will generally be required to report on:

- **Policies and Processes**: their policies regarding human rights (and related matters), including their due diligence processes;

- **Outcomes**: the outcomes of their policies;

- **Risks:** "the principal risks related to those matters linked to the group's operations including, where relevant and proportionate, its business relationships, products or services which are likely to cause adverse impacts in those areas, and how the group manages those risks;" and

- **Indicators:** key human rights (and related) "performance indicators" relevant to the company's business.[83]

EU member States will be allowed two years to incorporate the requirements of the Directive into their domestic laws. The methods of enforcement of the EU reporting obligations and independent verification of corporate reports are left to member State discretion. As is often true of EU directives, this may create inconsistencies in the application of these rules, and possibly a lack of "teeth" if companies fail to comply.

One approach to a UN treaty would be to adopt this existing EU reporting requirement, or a similar one, for States worldwide which choose to join the UN treaty, either as the entire UN treaty or as a component of a broader UN treaty.

One advantage of such an approach is that the 28 EU member States, already bound by the reporting requirement, and perhaps the current six EU candidate countries, might readily join a UN treaty obligating them to do what they are already bound to do. This might encourage wider ratification of the treaty by other States. A disadvantage, if the UN treaty were to go no further than a business-reporting requirement, is that it would not meet the stated objectives of the principal proponents of a treaty, in terms of access to effective remedy and corporate liability. It would still, however, facilitate a minimum baseline of information, providing potential transparency and access to information.

[83] Directive 2014/95 of the European Union Parliament and of the Council of 22 October 2014 amending Directive 2013/3/EU as regards *disclosure of non-financial and diversity information by certain large undertakings and groups*, par. 3, adding new article 29a, accessible at http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1424037657022&uri=CELEX:32014L0095.

2. National Planning:

The UN Human Rights Council has encouraged all States to adopt National Action Plans to implement the UN Guiding Principles on Human Rights.[84] To date only a handful of States have done so, including the United Kingdom, although another dozen or more are currently in the process of developing Plans,[85] including the United States.[86] In addition, the UN Working Group on Business and Human Rights has published detailed guidance on both the content of National Action Plans and the process by which they should be developed.[87]

In view of the limited number of States that have initiated planning processes to date, one form of treaty might require all States Parties to do so, and encourage international cooperation in developing plans and sharing best practices. The treaty might even require States to adopt, or at least encourage them to take into account, some or all elements of the Working Group's Guidance on plans.[88] The Working Group's Guidance focuses on Pillar I and the State Duty to Protect, and provides a non-exhaustive list of issues that States should evaluate and act on – focusing on how States can use a smart mix of voluntary and regulatory measures to ensure that companies within their jurisdiction respect human rights, and also that victims have better access to remedies. [89] This might constitute either the entirety of a treaty, or one component of a broader treaty.

One advantage of such an approach would be to make clear that the treaty will reinforce, rather than detract from, implementation of the UN Guiding Principles. A disadvantage is that, by itself, it would not meet the objectives of the principal proponents of a treaty, since a focus on National Action Plans emphasizes national activity without international oversight or enforcement, as well as the potential for divergent approaches to what governments see as a common baseline for State action on business and human rights.

3. Business Implementation of Guiding Principles:

A treaty might mandate:

- States to carry out their duties under the UN Guiding Principles to "protect" human rights from violations by business or in which business is involved ("Pillar One" of the Guiding Principles), including with respect to extraterritorial operations of their businesses, to the extent jurisdictional bases exist under international law;[90]

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[84] UN Human Rights Council, Res. 26/22, June 27, 2014, par. 2.
[85] See listing at http://www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx.
[86] See US Dept. of State, *USG National Action Plan on Responsible Business Conduct: Frequently Asked Questions,* Feb. 12, 2015, accessible at http://www.humanrights.gov/dyn/2015/usg-national-action-plan-on-responsible-business-conduct/.
[87] UN Working Group on Business and Human Rights, *Guidance on National Action Plans on Business and Human Rights,* Version 1.01, December 2014, accessible at http://www.ohchr.org/Documents/Issues/Business/UNWG_%20NAPGuidance.pdf.
[88] *Id*. at 17-36.
[89] *Id*. at 17-36.
[90] See section V.D below. The Commentary to Principle 2 of the UN Guiding Principles states: "At present States are not generally required under international human rights law to regulate the extraterritorial activities of businesses

- States to require all businesses, or all businesses above a certain size, to carry out their responsibility to "respect" human rights through adoption of human rights policies, due diligence processes, human rights conditions in their supply chain contracts, and remediation mechanisms ("Pillars One and Two" of the Guiding Principles); and

- States and business to address their judicial and non-judicial remediation responsibilities ("Pillar Three" of the Guiding Principles), either through taking certain specified measures, or through review processes designed to assure that victims have access to effective remedies.

An advantage of this approach is that it would encourage effective implementation of the UN Guiding Principles, whose basic content is already widely approved (albeit in "soft law" form). This approach is related to the National Action Plan option outlined above, but goes further in specifying the concrete actions that States must take to fulfill their treaty obligations. Implementation might be facilitated by templates for business reporting on implementation of the Guiding Principles, such as the *UN Guiding Principles Reporting Framework* recently developed by Shift and Mazars for the Human Rights Reporting and Assurance Frameworks Initiative (RAFI).[91]

Some of the same challenges exist, however, as with the prior National Action Plan option. A difficulty is that much of the language of the Guiding Principles, and of their accompanying commentary, is purposefully vague and flexible. On some points, then, the treaty language would need either to be made more precise, thereby triggering more extended negotiations and perhaps ultimate rejection, or to be "soft," requiring States and business, for example, to "take into account" certain of their obligations and responsibilities, or to demonstrate that they have given them "due consideration," even while other obligations (especially State obligations under existing human rights treaties) might be clearly stated and mandated.

One possible approach for such a treaty would be for States Parties to adopt mandatory "due diligence" requirements for their companies in regard to their global supply chains, similar to the bill recently approved by the French National Assembly,[92] and as encouraged by a recent resolution of the European Parliament.[93] The French bill, which many observers expect to be enacted into law in 2015, would make "French companies employing 5,000 employees or more domestically or 10,000 employees or more internationally ... responsible for

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domiciled in their territory and/or jurisdiction. Nor are they generally prohibited from doing so, provided there is a recognized jurisdictional basis."

[91] Accessible at http://www.shiftproject.org/project/human-rights-reporting-and-assurance-frameworks-initiative-rafi.

[92] National Assembly of France, Proposed Law, adopted text no. 501, 30 March 2015, accessible at http://www.assemblee-nationale.fr/14/ta/ta0501.asp.

[93] *European Parliament resolution on the second anniversary of the Rana Plaza building collapse and progress of the Bangladesh Sustainability Compact* (2015/2589(RSP)) 28 April 2015, accessible at http://www.europarl.europa.eu/sides/getDoc.do?type=MOTION&reference=P8-RC-2015-0363&language=EN.

developing and publishing due diligence plans for human rights, and environmental and social risks. Failure to do so could result in fines of up to 10 million euros." [94]

In a resolution adopted shortly after the French bill, the European Parliament "consider[ed] that new EU legislation is necessary to create a legal obligation of due diligence for EU companies outsourcing production to third countries, including measures to secure traceability and transparency, in line with the UN Guiding Principles on Business and Human Rights and the OECD MNE Guidelines."[95] Although this Resolution does not by itself mandate EU due diligence legislation, it may well lead to such legislation because the OECD Guidelines on Multinational Enterprises, discussed below, include a component on human rights due diligence.[96]

In Switzerland, a bill to mandate due diligence was narrowly defeated in Parliament, but an effort to mandate a binding public referendum is now underway.[97]

If a treaty were to commit States Parties to require human rights due diligence for businesses, or even compliance with all three pillars of the Guiding Principles more generally, consideration might also be given to whether good faith, demonstrated compliance with the Guiding Principles (or due diligence) might be deemed a defense to, or at least a proportional mitigation of, criminal or civil liability. Such a provision could give business a strong incentive to comply with the Guiding Principles or to exercise due diligence, without depriving victims of a remedy for serious violations of human rights.

The US Federal Sentencing Guidelines provide a relevant example in the area of anti-corruption. Courts and the US Department of Justice take certain factors into consideration when assessing criminal fines for companies prosecuted under the U.S. Foreign Corrupt Practices Act:[98]

- whether high-level personnel were involved in or condoned the conduct,
- whether the organization had a pre-existing compliance and ethics program,
- voluntary disclosure,

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[94] Roel Nieuwenkamp, *Legislation on responsible business conduct must reinforce the wheel, not reinvent it*, 15 April 2015, accessible at http://oecdinsights.org/2015/04/15/legislation-on-responsible-business-conduct-must-reinforce-the-wheel-not-reinvent-it/. Mr. Nieuwenkamp is Chair of the OED Working Party on Responsible Business Conduct. (The quoted language in text above is from his commentary, not from the original French text of the bill.)

[95] European Parliament Resolution, note 93 above, par. 23.

[96] Arnaud Poitevin, *The EU may move towards mandatory business & human rights regulation*, May 9, 2015, accessible at http://business-humanrights.org/en/eu-parliamentary-motion-calls-for-mandatory-human-rights-due-diligence-for-companies?utm_source=Business+%26+human+rights+-+Weekly+Update&utm_campaign=f16079aed2-Weekly_Update_13_May_20155_12_2015&utm_medium=email&utm_term=0_3a0b8cd0d0-f16079aed2-174128041.

[97] The Swiss motion, proposing mandatory human rights and environmental due diligence for Swiss corporations, was defeated by a vote of 95-86. Nieuwenkamp, note 94 above. In response, the Swiss Coalition for Corporate Justice has begun collecting signatures for a popular initiative on the same topic. If they gather 100,000 signatures in 18 months, the measure will be put to a binding public referendum. http://www.corporatejustice.ch/en/.

[98] US Sentencing Commission, US Sentencing Guidelines Chapter 8, Part B, e *Remedying Harm from Criminal Conduct, and Effective Compliance and Ethics Program* (1991).

- cooperation, and
- acceptance of responsibility.

United Kingdom anti-bribery law provides an example of due diligence as defense. The fact that companies took "adequate procedures" to prevent bribery in their operations is a defense to a charge of a company's failure to prevent bribery under the UK Bribery Act of 2010.[99]

Like the reporting and planning approaches outlined above, this approach to a treaty has the disadvantage that it does not meet all the objectives of the principal proponents of a treaty.[100] However, if suitable treaty language could be found, it might be acceptable to a broad range of States as a stand-alone treaty. Alternatively, it could be one component of a broader treaty.

4. Framework Treaty:

One way to implement the UN Guiding Principles (or other basic principles on business and human rights) could be a treaty designed to set in motion an ongoing process of review and elaboration of additional standards over time. That could be the result of initially adopting a generally worded, "framework" treaty, committing States Parties only to broad principles, later to be supplemented by more specified duties, through additional protocols or actions, based on review of state practice over time.

An example of such an approach is the universally ratified international legal regime on the ozone layer in the atmosphere.[101] The regime began with the 1985 Vienna Convention for the Protection of the Ozone Layer.[102] The initial commitments of States Parties were extremely general and flexible: "to take appropriate measures in accordance with the provisions of this Convention and of those protocols in force to which they are party," and to "[c]o-operate in the formulation of agreed measures, procedures and standards for the implementation of this Convention, with a view to the adoption of protocols and annexes …"[103]

As scientific analysis of ozone depletion progressed, the States Parties agreed to adopt more specific measures in the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer.[104] In addition, States included in the Montreal Protocol a "unique adjustment provision": Parties agreed to respond swiftly to new scientific information and to accelerate reductions of chemicals covered by the Convention as needed, by means of adjustments that would be "automatically applicable to all countries that ratified the Protocol." Since its initial adoption,

[99] See Transparency International UK Adequate Procedures Guidance http://www.transparency.org.uk/our-work/business-integrity/bribery-act/adequate-procedures.
[100] But it may meet some objectives of some proponents. The Secretary General of Amnesty International recently wrote, "A treaty should require each state to pass laws to make corporate human rights due diligence mandatory, …" Salil Shetty, *Corporations have rights. Now we need a global treaty on their responsibilities*, GUARDIAN (UK), 22 January 2015.
[101] Both the Vienna Convention and the Montreal Protocol enjoy universal ratification (by 197 States Parties). See table at http://ozone.unep.org/new_site/en/treaty_ratification_status.php.
[102] Adopted 22 March 1985, *entered into force*, 22 Sept. 1988, 1513 U.N.T.S. 293.
[103] Vienna Convention, arts. 1 and 2.c.
[104] Adopted 16 Sept. 1987, *entered into force*, 1 Jan. 1989, 1522 U.N.T.S. 3.

the Montreal Protocol has thus been modified six times, without the need to adopt a new treaty or protocol on each occasion.[105]

The main advantage of initially adopting a "framework" treaty like the Vienna Convention for business and human rights is that it might swiftly secure broad agreement by States. Its general principles could be taken from the already widely supported UN Guiding Principles. More difficult or specific issues could then be deferred to future protocols, without holding up the entire negotiating process (possibly for years), or limiting the number of Parties to an eventual treaty to only the most supportive States. The European Convention on Human Rights, for example, has been supplemented with 15 additional protocols (plus two more that are pending ratifications), giving rise to new State obligations as consensus emerged on different human rights.[106]

Future protocols to a framework business and human rights treaty might provide for supplemental commitments which States will then be asked to ratify. The treaty might even provide for automatic adjustments, based on review of experience in implementing the framework principles, whenever agreement is reached by States Parties, as in the Montreal Protocol. (However, automatic adjustments of business responsibilities might not be as easily crafted or agreed as additional restrictions on chemicals affecting the ozone layer.)

The main disadvantage of such a "framework" approach is that it would not initially be likely to achieve what treaty proponents principally seek: legally enforceable corporate accountability, and access of victims to effective remedies. Proponents might well doubt whether, after adoption of a framework convention, any future protocols or adjustments would likely be adopted. On the other hand, early agreement on a framework treaty might create positive momentum that could ease the way for further negotiations on more challenging issues.

5. National Criminalization and International Cooperation:

A treaty might specify certain internationally recognized crimes against human rights, and require States to prosecute corporations and corporate executives and to cooperate with each other in doing so.

The form of such a treaty could be modeled on the OECD *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*,[107] which has been joined by all 34 OECD member States (including the US and the UK), as well as seven other States.[108] The Convention requires States to criminalize bribery of foreign public officials, as well as complicity in such bribery.[109] Where State legal systems do not permit criminal prosecutions of legal persons such as corporations, the Convention requires States Parties to

[105] The foregoing information and quoted language are taken from the web site of the UN Environment Programme, Ozone Secretariat, http://ozone.unep.org/new_site/en/montreal_protocol.php (as of May 19, 2015).
[106] See table at http://conventions.coe.int/Treaty/Commun/ListeTraites.asp?CM=8&CL=ENG
[107] Signed 17 Sept. 1997, entered into force, 15 February 1999.
[108] See http://www.oecd.org/corruption/oecdantibriberyconvention.htm.
[109] Convention, arts. 1.1 and 1.2.

"ensure that legal persons shall be subject to effective, proportionate and dissuasive non-criminal sanctions, including monetary sanctions, for bribery of foreign public officials."[110]

International cooperation in enforcement is required through mutual legal assistance, extradition, and cooperation on monitoring through the OECD Working Group on Bribery in International Business Transactions ("the OECD Working Group"), composed of experts of States Parties to the Convention.[111]

The OECD uses two tools -- monitoring and peer pressure – to ensure implementation and enforcement of the Convention. The OECD Working Group examines and evaluates through a rigorous monitoring mechanism a Party's efforts to live up to its anti-bribery obligations. After the initial assessment of a State's legislation for conformity with the Convention, the second phase of the monitoring process examines the structures in place to enforce the laws.[112]

The systematic examination and assessment of a State's performance by peers result in recommendations for concrete anti-bribery actions by the examined country. In addition, the Working Group, at its regular meetings, conducts a "tour de table" exercise as a unique mechanism to report about latest developments, both in legislation and in enforcement actions and to hold States responsible for reporting on their actions to their peers.[113]

A treaty on business and human rights could similarly require States to criminalize and cooperate in prosecuting corporations and corporate executives who commit or are complicit in such crimes against human rights as genocide, crimes against humanity, war crimes, torture, forced labor, and other defined international crimes[114] (human trafficking is already the subject of a similar convention).[115]

An advantage of this approach is that, in the corruption context, its form has already been accepted, not only by OECD States, but also by most States through the UN Convention against Corruption (see below). Nor, in a sense, would the substance be new: many international crimes against human rights are already defined by international law and widely recognized as such by States. In those two senses, there would be "nothing new" conceptually about such a treaty – even though, in practice, domestic criminalization by States of international human rights crimes

[110] Convention, art. 3.2.
[111] Convention, arts. 9, 10 and 12.
[112] http://www.oecd.org/daf/anti-bribery/countrymonitoringoftheoecdanti-briberyconvention.htm
[113] OECD, "OECD Fights Foreign Bribery".
[114] John Ruggie recently suggested that "one obvious focus" for a treaty "would be the worst of the worst: business involvement in gross human rights abuses, such as genocide, extrajudicial killings, and slavery, as well as forced and bonded labor." J. Ruggie, *Quo Vadis? Unsolicited Advice to Business and Human Rights Treaty Sponsors*, Institute for Human Rights and Business, Sept. 9, 2014, note 17, accessible at http://www.ihrb.org/commentary/quo-vadis-unsolicited-advice-business.html.
[115] *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime*, 15 November 2000, 2237 U.N.T.S. 319, entered into force, 25 December 2003 (166 States Parties as of Feb. 15, 2015).

is currently uneven, while criminal punishment of business involvement in such crimes is rare, as is the imposition of proportional civil sanctions against corporations.[116]

There are also disadvantages to the OECD model as a stand-alone approach. It would focus on negative sanctions as deterrents, rather than on more positive and broader forms of preventing human rights abuses. It would also be limited to serious human rights crimes (referred to by some as "gross" human rights abuses), rather than to the far broader range of human rights violations that are often important in the business context (*e.g.*, routine labor rights violations such as wage theft or unpaid overtime, or failures by States to engage in processes to secure the free, prior, informed consent of indigenous communities about business projects affecting their lands).[117]

On the other hand, a treaty whose form is patterned on the OECD Convention need not be a stand-alone approach. It could be incorporated in a broader treaty. Indeed, in the corruption context, it already has been, as noted in the next section.

6. National Prevention, Sanctions and International Cooperation:

The UN Convention against Corruption ("UNCAC"), adopted in 2003 and entered into force in 2005, now has 175 States Parties (including the US and the UK).[118] It not only incorporates the OECD approach described in the previous section, it also has extensive provisions requiring States to seek to prevent corruption through policies, practices, periodic review, establishment of independent prevention bodies, reporting and international collaboration.[119]

The form of UNCAC has thus met nearly universal acceptance by States. More than the text of the OECD Convention, the UN Convention takes both a preventive and a punitive approach. UNCAC requires the criminalization of foreign bribery.[120] Like the OECD Convention, it covers complicity as well as direct commission of crimes,[121] and requires States to "establish the liability" of corporations for offenses under the Convention, whether that be criminal or, in States whose legal systems do not permit criminal prosecution of legal persons,

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[116] *See* Anita Ramasastry and Robert C. Thompson, *Commerce, Crime and Conflict: Legal Remedies for Private Sector Liability for Grave Breaches of International Law: A Survey of Sixteen Countries* (Fafo 2006) (uneven domestic incorporation); Int'l Corporate Accountability Roundtable, *Commerce, Crime, and Human Rights: Closing the Prosecution Gaps*, (businesses "rarely" held to account) accessible at http://icar.ngo/wp-content/uploads/2014/06/CCHR_Concept-Note-Commerce-Crime-and-Human-Rights.pdf

[117] *E.g., United Nations Declaration on the Rights of Indigenous Peoples* (2007), arts. 19, 29.2 and 32.2; International Labour Oganisation Convention No. 169, *Indigenous and Tribal Peoples Convention*, 27 June 1989, entered into force, 5 Sept. 1991, arts. 6, 7.1, 15.2, 16.2, 17.2, 25.2, 27.1, 27.2, and 28.1.

[118] Adopted 31 Oct. 2003, 2349 U.N.T.S. 41, entered into force, 14 Dec. 2005. See ratification table at http://www.unodc.org/unodc/en/treaties/CAC/signatories.html.

[119] Convention, arts. 5, 6, 10, 12 and 14.

[120] Convention, art. 16.

[121] Convention, art. 27.1.

then "effective, proportionate and dissuasive" civil or administrative sanctions.[122] UNCAC also requires States to provide victims of corruption access to civil damages.[123]

UNCAC calls for peer review and also for monitoring of treaty implementation by an Assembly of States Parties.[124] These are not as robust, however, as in the OECD Convention. The OECD Convention serves as a good example of the possible benefits of civil society participation, as reports and recommendations are made public, and private sector and civil society play an active role throughout each review phase of the convention's monitoring mechanism.[125] UNCAC provides for periodic review, but allows States Parties to choose whether to disclose the findings of any evaluation as well as their own self-assessment.[126] An optional clause permits disputes between States over implementation of the UN Convention to be referred to the International Court of Justice.[127]

Given the broad acceptance of the UNCAC, one might anticipate broad acceptance of its form as a model for a treaty on business and human rights. Preventive aspects of such a treaty might incorporate reporting requirements and references to the UN Guiding Principles (as discussed above). Controversy might arise over which international crimes against human rights should be included in the treaty. Because this form of treaty relies heavily on State implementation – where the political will or capacity to regulate business interests is often lacking – proponents of a treaty on business and human rights might object to the lack of binding international enforcement institutions and procedures.

7. National Civil Remedies:

In addition to national criminal enforcement as discussed in the preceding two sections, a treaty could require States to provide civil damages remedies for victims of human rights violations committed by business or in which business is complicit. National civil damages remedies are mandated, not only by UNCAC (as noted in the preceding section), but also, for example, by the UN Convention against Torture,[128] a treaty joined by 158 States Parties (including the US and the UK).[129] The Convention provides:

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[122] Convention, art. 26.

[123] Article 35 states: "Each State Party shall take such measures as may be necessary, in accordance with principles of its domestic law, to ensure that entities or persons who have suffered damage as a result of an act of corruption have the right to initiate legal proceedings against those responsible for that damage in order to obtain compensation."

[124] Convention, art. 63.

[125] See Marie Chêne and Gillian Dell, *U4 Expert Answer: Comparative Assessment of AntiCorruption Conventions' Review Mechanisms*, 2 (2008), available at http://www.u4.no/helpdesk/helpdesk/query.cfm?id=163.

[126] Most governments have not made public their self-assessments, which provide the basis for the review, nor have most governments agreed to publish the full review report online. Only the executive summary must be published. UNCAC Article 13.

[127] Convention, art. 66.

[128] *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 Dec. 1984, entered into force, 26 June 1987, 1465 U.N.T.S. 85.

[129] See table at https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&lang=en.

"Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. …" (Art. 14.1.)

There would be important advantages in requiring a national civil damages remedy in a treaty. In principle, mandating national judicial (or non-judicial) damages remedies would be consistent with State obligations under Pillar Three of the Guiding Principles, while responding to demands of the main treaty proponents for remedies and accountability.

A bare mandate of civil remedies, however, is no guarantee that they will be effective. Experience has shown that theoretical access to justice (civil or criminal) is often thwarted in practice by legal barriers such as corporate veils and separate legal personality for parents and subsidiaries, limits on jurisdiction, and statutes of limitations, as well as practical barriers such as the high costs of litigation, the lack of legal aid or litigation funding for victims, and intimidation (or worse) of victims and witnesses.[130] Some (but only some) of these issues are explored in section V below. If a treaty mandating national civil damages remedies is to be effective in practice, some way to address many of these thorny issues will have to be considered, either by addressing them in the treaty text, or by creating some institution or process to address them in future implementation of the treaty.

8. Comprehensive National Protection:

As set forth in section III above, general human rights treaties impose wide-ranging duties on States to protect persons subject to their jurisdiction from human rights violations, including violations committed by third parties. A treaty on business and human rights could make explicit what is already implicit: that States must carry out those wide-ranging obligations specifically to protect people from human rights violations in which business is involved.

An advantage of this approach would be breadth of coverage. A disadvantage, however, is the vagueness and ambiguity of the language of general State obligations to "ensure" respect for human rights. There is an argument, then, for coupling any such broad language with more specific State or business obligations, ranging from reporting and planning to civil and criminal liability, as outlined in the preceding sections.

[130] *See generally, e.g.*, Jennifer Zerk, *Corporate Liability for Gross Human Rights Abuses: Towards a Fairer and More Effective System of Domestic Law Remedies* (2014) accessible at http://www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/StudyDomesticeLawRemedies.pdf; G. Skinner, R. McCorquodale and O. De Schutter, *The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business* (2013).

B. International Supervision Treaties:

1. State Reports to an International Body:

Twelve UN human rights treaties, several of which are widely ratified, as well as many ILO labor treaties, require States periodically to report on the progress they have made and obstacles they encounter in implementing their treaty obligations.[131] States submit written reports to committees consisting of experts, elected in their individual capacities by States Parties, to oversee treaty implementation. Civil society submits "shadow reports" and otherwise engages in the review process. The expert committees then conduct "constructive dialogue" with States in public hearings, after which they issue "concluding observations" expressing concerns and making recommendations.

The reporting process has been plagued by multiple, overlapping and burdensome State reporting obligations; State delays or failures to report; and, even so, delays and overwhelming burdens on UN treaty committees in reviewing reports.[132] On the other hand, the reporting process provides an opportunity for periodic self-assessment by States, with participation by civil society in a relatively transparent process, and accountability in the form of publicized critiques and recommendations by expert, collectively independent bodies.

On balance, State reporting might be deemed a useful component of a treaty on business and human rights. It could be combined with some requirement that States create and then implement National Action Plans as outlined in section IV.A.2 above. Reporting could relate to a State's own progress with respect to its plans, for example. Any reporting commitment would likely need to be harmonized with other UN treaty reporting procedures.[133]

2. Individual Complaints to an International Treaty Body:

Optional clauses or protocols to at least eight core UN human rights treaties allow individuals to file complaints with the expert treaty bodies against States which agree to accept the procedure, once the complainants have exhausted domestic remedies or show good cause for failing to do so.[134] The number of States agreeing to individual complaint procedures, while often significant, is generally far fewer than the number of States Parties to the treaty. For example, whereas the International Covenant on Civil and Political Rights has 168 States

[131] *E.g.*, ICPR, art. 40.1 (States Parties "undertake to submit reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made in the enjoyment of those rights").
[132] *See generally*, Navanethem Pillay, *United Nations human rights treaty body system: A Report by the United Nations High Commissioner for Human Rights*, June 2012, accessible at http://www.ohchr.org/EN/HRBodies/HRTD/Pages/TBStrengthening.aspx.
[133] *See generally, e.g.*, UN G.A. Res. 68/268, *Strengthening and enhancing the effective functioning of the human rights treaty body system*, UN Doc. A/RES/68/268, 21 April 2014.
[134] *See generally* http://www.ohchr.org/EN/HRBodies/TBPetitions/Pages/HRTBPetitions.aspx.

Parties,[135] its First Optional Protocol, establishing its individual complaint procedure, has only 115 States Parties.[136]

The complaints are generally processed with little transparency, without independent investigations by the committees, and without public or evidentiary hearings. They result in "observations" from the treaty bodies which many States regard as not legally binding, and which often yield no or only partial compliance.

Nonetheless human rights NGOs have waged campaigns to establish individual complaint procedures for treaties that did not originally allow them. The written complaint procedure may be far less expensive than full-blown judicial litigation; it may result in published committee findings that place pressure on States to provide relief to the victim and not infrequently lead to a constructive response; it may develop jurisprudence; and it may be used to bring illustrative cases exemplifying broader patterns of abuse by States.

In negotiating situations where large numbers of States are willing to accept normative and reporting obligations, but only smaller numbers are willing to accept individual complaint procedures, the optional mechanism allows a way to maximize the number of States Parties to the main treaty, while also creating an individual complaints procedure for those States willing (now or in the future) to accept them.

Especially if States are resistant to a treaty requiring some form of complaints procedure resulting in legally binding rulings, as in adjudication, arbitration or administrative decision, a non-binding mechanism may be better than no individual complaint mechanism at all. It may also provide a way to overcome the barriers of expense and inequality of arms that may make adjudication or arbitration difficult for victims to pursue in practice.

A threshold question is whether such a procedure would allow individual complaints to be filed against States, companies, or both. The answer might depend on the nature of the underlying substantive obligations imposed by the treaty, and on whether they mandate conduct by States, companies, or both.[137]

OECD member States have already agreed to one form of complaint procedure, established as part of the OECD Guidelines for Multinational Enterprises.[138] The OECD Guidelines are recommendations from governments to multinational enterprises operating in or from countries that are signatory to the Declaration on International Investment and Multinational Enterprises including the Guidelines. The OECD Guidelines provide guidance for responsible business conduct in areas such as: labor rights, human rights, environment, combating bribery, consumer protection competition, taxation, and intellectual property rights.

[135] See table at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&id=IV~4&chapter=4&lang=en.
[136] See table at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-5&chapter=4&lang=en.
[137] In the context of individual complaints against States, human rights treaty bodies already address many human rights violations involving business. See ESCR-Net, *Global Economy, Global Rights: A Practitioner's Guide for Interpreting Human Rights Obligations in the Global Economy* (2014). However, any resulting remedies are formally only against States, which may or may not implement them with regard to any businesses involved.
[138] The Guidelines are accessible at http://mneguidelines.oecd.org/text/.

While the Guidelines are not legally binding on companies, OECD and signatory governments are required to ensure that they are implemented and observed. What distinguishes the OECD Guidelines from some other corporate responsibility instruments and mechanisms is their transnational nature, the fact that they are government-backed standards and that they have a dispute resolution mechanism for resolving conflicts regarding alleged corporate misconduct.

Governments that adhere to the Guidelines must establish a National Contact Point ("NCP") to handle complaints against companies that have allegedly failed to adhere to Guidelines' standards.[139] The 'specific instance' procedure – as the Guidelines' complaint process is officially called – is meant to resolve disputes, primarily through mediation and conciliation, but also through other means. The dispute resolution procedure can be used by anyone who can demonstrate an "interest" (broadly defined) in the alleged violation.

Non-governmental organizations and trade unions from around the world have used the specific instance process to address adverse human rights impacts caused by alleged corporate misconduct. The OECD NCP system is one model of dispute resolution that could be expanded or used as a model for further consideration. It should be noted, however, that the effectiveness of NCP procedures varies among countries, and that some civil society actors have been sharply critical of NCP procedures as uneven and often ineffective.[140]

3. International Civil Adjudication.

There are no UN or other global courts where victims of human rights violations can sue States for declaratory judgments and reparations. However, at the regional level, there are at least three such institutions: the European Court of Human Rights, which can issue legally binding judgments in human rights cases against all forty-seven member States of the Council of Europe;[141] the Inter-American Court of Human Rights, which can issue legally binding judgments against the twenty OAS member States that accept its contentious jurisdiction;[142] and the African Court of Human and Peoples' Rights, which can issue legally binding judgments against the twenty-seven African States Parties to the Protocol establishing the Court.[143] (Human rights complaints can also be brought against States before some courts at the sub-regional level.)[144]

The jurisdiction of such international courts is generally considered subsidiary to that of national courts; cases may not be brought before the international courts until after remedies

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[139] The NCP procedures are accessible at http://mneguidelines.oecd.org/ncps/.
[140] *E.g.*, OECD Watch, *Assessment of NCP Performance in the 2013-2014 Implementation Cycle*, June 2014, accessible at http://oecdwatch.org/publications-en/Publication_3962.
[141] See Table at http://conventions.coe.int/Treaty/Commun/ListeTableauCourt.asp?MA=3&CM=16&CL=ENG, for Council of Europe treaty CETS No. 5.
[142] Int.Am.Ct.H.Rts., ANNUAL REPORT 2013, p. 5, accessible at http://www.corteidh.or.cr/sitios/informes/docs/ENG/eng_2013.pdf.
[143] See Table at http://www.au.int/en/sites/default/files/achpr_1.pdf.
[144] *E.g.*, Court of Justice of the European Union; see generally http://europa.eu/about-eu/institutions-bodies/court-justice/index_en.htm; Community Court of Justice of the Economic Community of West African States (see note 145 below).

before national courts are exhausted or good reason is shown for not doing so.[145] The remedies they afford may vary. The Inter-American Court provides the widest range of reparations, including restitution where feasible; money damages for material and moral injuries; rehabilitation; satisfaction, including symbolic reparations such as naming of memorials and public apologies by high State officials; and guarantees of non-repetition, such as new laws and training programs for State officials and security forces.[146]

To the extent States fail to carry out their duty to protect people from business, they may already be sued before regional human rights courts. However, not all States are parties to regional or sub-regional courts with competence to hear human rights cases. An international court on business and human rights might not only fill that gap, but could also permit suits against companies.

Where justice in the form of civil remedies is not available before the relevant national courts – which might be the courts of either the home State or the host State in the case of transnational corporations – an international court on business and human rights could thus, in theory, ensure the legal liability and access to civil justice which are among the demands of the civil society Joint Statement.[147] On the other hand, a significant number of States, including major home States of transnational corporations such as the US, UK and China, are likely to resist a treaty exposing their companies to suit for money damages in an international court, even if a treaty included procedural safeguards which would likely be prerequisites to creation of such a court.

Predominantly host countries of transnational investment might well agree to join a treaty creating such an international tribunal, and could confer jurisdiction on the tribunal, at least with respect to subsidiaries or other activities of transnational corporations operating in their territories. Whether they could confer jurisdiction on the parent companies of such subsidiaries, however, is a separate question.

A bevy of practical questions would be important for accessibility and efficacy of such an international tribunal. For example: What resources would it have? How would it be funded? How many cases could it hear? Could claims be aggregated? What remedies could it order? How would victims' litigation costs – let alone a semblance of equality of arms with wealthy corporate defendants – be assured?

The answers will not come easily. Yet if such issues are not tackled (whether in a treaty or in the statute or rules of the court), and victims seeking civil damages are left to the vagaries of national courts, justice may remain elusive. And even if workable answers are found, they still might not reach companies domiciled in States which decline to join the treaty.

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[145] The ECOWAS Community Court of Justice is an exception. Exhaustion of domestic remedies is not required before filing cases in that Court. *Koraou v. Niger*, Judgment ECW/CCJ/APP/0808, 27 Oct. 2008, pars. 36-53.

[146] See generally D. Cassel, *The Expanding Scope and Impact of Reparations Awarded by the Inter-American Court of Human Rights*, in OUT OF THE ASHES: REPARATIONS FOR GROSS VIOLATIONS OF HUMAN RIGHTS, K. De Feyter, S. Parmentier, M. Bossuyt and P. Lemmens eds. (Intersentia 2005), pp. 191-223.

[147] See note 42 above.

4. International Mediation and Arbitration:

Thousands of bilateral and multilateral investment and trade treaties currently allow foreign corporations to sue host States, before international arbitral tribunals, for alleged breaches of stabilization clauses, regulatory takings, denials of justice, and other claims arising from State efforts to protect public health, the environment and worker rights in their territories.[148] Those same treaties do not, however, allow victims of any resulting human rights, consumer, worker or environmental violations to sue or countersue the foreign corporations before the arbitral tribunals for endangering their lives, health or livelihoods.

Recently a team of practitioners and scholars has circulated several drafts of a proposal to, in effect, redress this imbalance, by permitting victims of human rights violations in which companies are involved to bring the companies before an international arbitral tribunal on business and human rights.[149] Binding arbitration might be preceded by voluntary mediation. The arbitral tribunal might be created, and its use mandated or encouraged, by one or more of a variety of means, including voluntary agreements, incorporation into the Permanent Court of Arbitration,[150] conditions in supply chain contracts or in bank loans, and regulatory requirements.

One means of establishing or utilizing the tribunal would be to provide for or recognize it in a treaty on business and human rights. A treaty might, for example, mandate States Parties to require businesses in certain circumstances to accept its jurisdiction. As opposed to lawsuits for damages before an international court, an arbitral proceeding might have the advantage of speedier and more streamlined procedures, and potential enforceability of its arbitral awards before the courts of nearly all nations under the New York Arbitration Convention.[151] If no international court is agreed to in a treaty, an arbitral tribunal, unlike individual complaint procedures before a treaty body, would have the advantage of being empowered to issue a legally binding award with potentially broad enforceability throughout the world. To the extent national justice systems remain beset by barriers to access and to fair adjudication, an arbitral tribunal might provide a workable alternative.

Many issues remain. For example: How would the tribunal be funded? How would victims' litigation costs be funded? In view of the controversial track record of investor-State arbitration in matters affecting human rights, would victims and their advocates be willing to use even a tribunal where they would have standing? How would arbitrators be found with the necessary expertise, credibility and objectivity in matters of business and human rights,

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[148] *See generally* Public Citizen, *Case Studies: Investor-State Attacks on Public Interest Policies* (2014), accessible at http://www.citizen.org/documents/egregious-investor-state-attacks-case-studies.pdf.

[149] Claes Cronstedt and Robert Thompson et al., *An International Arbitration Tribunal on Business and Human Rights*, Version 5, April 13, 2015, accessible at http://www.l4bb.org/news/TribunalV5B.pdf. One of the authors of this White Paper has been a commentator on the drafts. *Id*., Appendix A at 21.

[150] *See generally* http://www.pca-cpa.org/showpage.asp?pag_id=363.

[151] *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 10 June 1958, entered into force, 7 June 1959, 330 U.N.T.S. 3. Some 152 States are parties to the Convention, including all major commercial States. See list at http://www.newyorkconvention.org/contracting-states/list-of-contracting-states, and update at http://www.newyorkconvention.org/.

particularly with respect to the specific concerns of communities and populations affected by corporate conduct? How public would be the arbitral proceedings and awards?[152]

Arbitration, as with transnational civil litigation, can also be lengthy and protracted. In some jurisdictions, citizens or claimants are never allowed to waive or relinquish their right to court in any type of contract signed before a dispute arises. Even if claimants may have a choice at the outset, a question remains of whether a consent to arbitrate will lead to a complete ban on future litigation.

The larger question is whether the model of investor-style international arbitration will be suitable to meet the needs of individual claimants or communities who seek redress for ongoing harms and need swift injunctive relief as opposed to damages and findings.

These and other questions are being addressed by the authors of the draft proposal through consultations with diverse stakeholders. While many of these questions might better be addressed in the rules of an arbitral tribunal, a drafting process for a treaty on business and human rights might take them into account.

5. International Criminal Prosecution:

Corporate executives have been prosecuted by international courts since Nuremberg.[153] For example, two executives of the German company that sold gas to the Nazi gas chambers were prosecuted by a British military occupation tribunal, convicted and sentenced to death.[154] Japanese mining officials were also prosecuted by a British military occupation tribunal in the Far East.[155] Although corporations were not formally prosecuted at Nuremberg, their assets were seized and they were put out of business for violating international law.[156]

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[152] One widely used set of rules for international arbitrations are the Rules of UNCITRAL, the United Nations Commission on International Trade Law. Effective in 2014, UNCITRAL adopted Rules on Transparency in Treaty-Based Investor-State Arbitration. These new rules could also potentially be used or adapted for arbitrations on business and human rights. They presumptively provide that most written aspects of the proceedings will be made public. These include the notice of arbitration and response; statements of claim and defense; any further written statements or submissions by either party; expert reports and witness statements; a list of exhibits (but not necessarily the exhibits themselves); written submissions by third parties; transcripts of hearings where available; and any orders, decisions or awards by the tribunal. The Rules permit tribunals to accept third party submissions, and presumptively provide that evidentiary hearings and oral arguments shall be public. The new Rules are accessible at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency.html. See also *United Nations Convention on Transparency in Treaty-Based Investor Arbitration*, *adopted* 10 Dec. 2014, UNGA Res. 69/116, Annex, art. 2, *not yet in force.*

[153] *See generally* Matthew Lippmann, *War Crimes Trials of German Industrialists* …, 9 TEMPLE INT'L & COMP. L.J. 173 (1995).

[154] *Id*., text at notes 79-86.

[155] Anita Ramasastry, *Corporate Complicity: From Nuremberg to Rangoon-An Examination of Forced Labor Cases and Their Impact on the Liability of Multinational Corporations* 91 *Berkeley J. Int'l L.* 20 (2002).

[156] *See generally Amicus Brief of Nuremberg Scholars*, in *Kiobel v. Royal Dutch Petroleum*, U.S. S. Ct. No. 10-1491, Dec. 21, 2011, accessible at http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs/10-1491_petitioner_amcu_nuremberg_bartov_etal.authcheckdam.pdf.

More recently the special international criminal tribunal for Lebanon has gone beyond merely prosecuting individuals, ruling that corporate defendants can be convicted for criminal contempt of court,[157] while a new Protocol to the African Court of Justice and Human and Peoples' Rights (discussed below), once it enters into force, authorizes criminal prosecutions of corporations for a range of international crimes.

Currently there are at least two models for international criminal prosecutions of gross violations of human rights involving business. One is the International Criminal Court ("ICC") in The Hague.[158] The ICC can prosecute only natural persons[159] – including business executives – for a limited range of crimes, namely genocide, war crimes and crimes against humanity.[160] In cases involving business and human rights, this model might be followed, either by adding a second chamber to the ICC, or by broadening the ICC's jurisdiction to include legal as well as natural persons,[161] or by creating a separate international criminal court specifically for crimes committed by business or in which business is complicit.

An alternative model has recently been provided by a 2014 Protocol, not yet in force, to the African Court of Justice and Human and Peoples' Rights.[162] The Protocol allows international criminal prosecution, not only of individuals, but also of corporations. A provision on "Corporate Criminal Liability" resolves several issues of attribution of crimes to corporations, as follows:

1. "… [T]he Court shall have jurisdiction over legal persons, with the exception of States."

2. "Corporate intention to commit an offence may be established by proof that it was the policy of the corporation to do the act which constituted the offence."

3. "A policy may be attributed to a corporation where it provides the most reasonable explanation of the conduct of that corporation."

[157] Special Tribunal for Lebanon, Appeals Panel, Case No. STL-14-05/PT/AP/AR126.1, *Case against New TV S.A.L. Karma Mohamed Tahsin al Khayat*, Decision on Interlocutory Appeal Concerning Personal Jurisdiction in Contempt Proceedings, 2 Oct. 2014, pars. 33-74.
[158] *See generally Rome Statute of the International Criminal Court*, 17 July 1998, entered into force, 1 July 2002, 2187 U.N.T.S. 3.
[159] *Id*., art. 25.1.
[160] *Id*., arts. 5, 6, 7 and 8.
[161] Article 25.1 of the ICC Statute currently provides, "The Court shall have jurisdiction over natural persons pursuant to this Statute." As a first step, Article 25.1 could be amended simply by adding the words "and legal" after the word "natural." The rest of the text would need to be reviewed to make any corresponding modifications. However, the process of amending the ICC Statute is difficult, requiring a high degree of consensus. See ICC Statute arts. 121-23.
[162] *Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights*, 27 June 2014, accessible at http://www.au.int/en/sites/default/files/PROTOCOL%20ON%20AMENDMENTS%20TO%20THE%20PROTOCOL%20ON%20THE%20AFRICAN%20COURT%20-%20EN_0.pdf.

4. "Corporate knowledge of the commission of an offence may be established by proof that the actual or constructive knowledge of the relevant information was possessed within the corporation."

5. "Knowledge may be possessed within a corporation even though the relevant information is divided between corporate personnel."

6. "The criminal responsibility of legal persons shall not exclude the criminal responsibility of natural persons who are perpetrators or accomplices in the same crimes."[163]

The Protocol grants the African Court jurisdiction over a broad range of crimes, including several which businesses might well commit. In addition to ICC crimes, the African Court will have jurisdiction over, among other crimes, mercenarism, corruption, money laundering, trafficking in persons, trafficking in drugs, trafficking in hazardous wastes, and illicit exploitation of natural resources.[164]

A significant disadvantage of the African Protocol is that, unlike the ICC Statute which disallows official immunity,[165] the African Protocol grants immunity from prosecution before the African Court to "any serving AU Head of State or Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office."[166] Especially in cases where corporations or corporate executives may be accused of acting in complicity with "senior state officials," objections might be raised to prosecuting the accomplices, but not the principal perpetrators.

A treaty, of course, need not copy either the ICC or the African Protocol model wholesale. For example, the African Protocol could be used as a model for an international criminal tribunal on business and human rights, but without its provision immunizing senior state officials.

6. Comprehensive treaty:

The foregoing potential elements of a treaty on business and human rights are not mutually exclusive. A treaty could combine some or all of these elements, and others besides. The more elements are included, the more effective a treaty might be in ensuring business respect for human rights, and in providing remedies for any violations. On the other hand, the more ambitious the treaty content, the more difficult it may become to negotiate and to attract a wide range and large number of States to join the treaty, especially home States of major transnational corporations, and to appeal to the businesses which often significantly influence State positions. Where the fault lines may be, and where the trade-off's might be found, are matters that may best emerge from a process of dialogue and consultations. In addition to the

[163] *Id*. art. 22, adding art. 46C.
[164] *Id*. art. 28A.1.
[165] ICC Statute, art. 27.
[166] African Protocol, art. 22, adding art. 46A bis.

inter-governmental process soon to begin at the UN, a global civil society process of consultation has also recently begun.[167]

C. Policy Coherence Treaties

1. National Laws:

UN Guiding Principle 8 calls on States to ensure that their institutions that "shape business practices are aware of and observe the State's human rights obligations when fulfilling their respective mandates, …" Examples of State institutions cited by the Commentary include those responsible for "corporate law and securities regulation, investment, export credit and insurance, trade and labour." Others might include professional codes regulating the legal profession.[168]

It would be a tall order for a global treaty to attempt a comprehensive review and reform of national legislation and regulation in all of these areas. But agreement might be pursued in particular areas. For example, in regard to corporate law, to what extent ought parent companies to be responsible for the human rights impacts of their subsidiaries, including their subsidiaries abroad?[169] In regard to public procurement, States might pursue agreement on common human rights standards and due diligence processes.[170]

2. International Agreements:

UN Guiding Principle 9 provides that "States should maintain adequate domestic policy space to meet their human rights obligations when pursuing business-related policy objectives with other States or business enterprises, for instance through investment treaties or contracts." The Commentary points out that the terms of "bilateral investment treaties, free-trade agreements or contracts for investment projects … may constrain States from fully implementing new human rights legislation, or put them at risk of binding international arbitration if they do so. … States should ensure that they retain adequate policy and regulatory ability to protect human rights under the terms of such agreements, while providing the necessary investor protection."

States might agree, for example, to include human rights protections in future investment and trade treaties.[171] They could also agree to treat them as terms of existing treaties, in cases

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[167] *FIDH and ESCR-Net New Joint "Treaty Initiative,"* Jan. 30, 2015, accessible at https://www.fidh.org/International-Federation-for-Human-Rights/globalisation-human-rights/business-and-human-rights/16868-fidh-and-escr-net-new-joint-treaty-initiative.

[168] See section V.G. below.

[169] See Part V.E below.

[170] *See, e.g., Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises*, UN Doc. A/HRC/29/28, 28 April 2015, pars. 40-42.

[171] *See generally Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises*, UN Doc. A/HRC/29/28, 28 April 2015, pars. 18-28 (investment), 29-31 (international investment agreements and dispute settlement), 32-35 (transparency in international arbitration) and 36-39 (trade agreements and trade-related issues).

where both States to a dispute are Parties to the new agreement, or otherwise agree to apply the new provisions in an existing treaty.[172]

D. Sectoral Treaties[173]

The foregoing sections catalogue, illustratively but not exhaustively, various ways that a treaty might address business with regard to human rights generally. It would also be possible to adopt a narrower treaty, focusing on a particular sector such as the extractives or information communications technology (ICT) sectors, or on the business role in regard to particular kinds of human rights abuses. Advantages of a narrower approach might include greater ease of adoption and ratification, because fewer technical legal issues might have to be resolved, and diplomatic consensus might be more readily reached. Disadvantages would include incompleteness of coverage, as well as potentially burdensome selectivity in regard to a particular industry. This, in turn, could adversely affect the interests of some States more than others.

V. SELECTED KEY ISSUES.

In deciding among and fleshing out treaty options, a number of cross-cutting issues will need to be considered. The following issues are not a comprehensive list, but are among the most prominent and contentious. They include:

- **What companies** are to be regulated – transnational corporations, large corporations, or all corporations? What will be the responsibility of State-owned enterprises?

- **What human rights norms** will the treaty enforce against business – *jus cogens*, customary international law, human rights treaties in States that are parties to those treaties, or the norms specified by the UN Guiding Principles (the International Bill of Human Rights, the ILO Declaration of Fundamental Labor Rights, plus others in context)?

- **What substantive norms** will the treaty impose for civil damages claims – international human rights law or domestic tort/delict standards? Will the treaty defer to international, regional or national legal standards for concepts such as complicity, or refer instead to general principles of law?

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[172] For examples of new treaties adding terms to existing treaties, see, *e.g., United Nations Convention on Transparency in Treaty-Based Investor Arbitration, adopted* 10 Dec. 2014, UNGA Res. 69/116, Annex, art. 2, *not yet in force*; *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 Dec. 1984, entered into force, 26 June 1987, 1465 U.N.T.S. 85, art. 8 (Torture offenses "shall be deemed to be included as extraditable offenses in any extradition treaty existing between States Parties.")

[173] The Human Rights Council Resolution establishes the Intergovernmental Working Group on "a" legally binding instrument, for the purpose of elaborating "an" international legally binding instrument. UN HRC Res. 26/9, 26 June 2014, *Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights,* par. 1. Hence it appears that further HRC authority might be needed for the Working Group to elaborate more than one treaty.

- **Extraterritorial jurisdiction:** Will States be expressly authorized or required to exercise jurisdiction over human rights violations committed outside their territories by companies domiciled in the State?

- **What is the scope of corporate responsibility:** In what circumstances will parent companies be liable for wrongs committed by subsidiaries, and vice versa?

- **Duty bearers:** Will the treaty impose direct obligations only on States, or will it impose direct obligations on business as well?

- **Lawyers and business advisors**: Will the treaty ensure policy coherence between their human rights responsibilities and their professional codes of conduct and ethics?

The following sections address these topics in sequence:

*A. **What companies** are to be regulated – transnational corporations, large corporations, or all corporations?*

The recurrent heading of UN Human Rights Council resolutions on business and human rights has been "transnational corporations *and other business enterprises*." (Emphasis added.) The Guiding Principles explicitly apply to "all" business enterprises:

> "The responsibility of business enterprises to respect human rights applies to all enterprises regardless of their size, sector, operational context, ownership and structure. Nevertheless, the scale and complexity of the means through which enterprises meet that responsibility may vary according to these factors and with the severity of the enterprise's adverse human rights impacts."[174]

Yet as noted above, even though the Council's June 2014 resolution initiating the treaty process repeats the phrase, "transnational corporations and other business enterprises," a footnote in the preamble defines "other business enterprises" to include only those which have a "transnational character in their operational activities." The footnote expressly excludes "local businesses registered in terms of relevant domestic law."[175]

This ambivalent narrowing of scope – from *all* business enterprises to only *transnational* corporations -- has been widely criticized, by both States and civil society, as disfiguring the business and human rights agenda. Ruggie's critique is illustrative:

> "A footnote defines 'other business enterprises' in a way that is intended to exclude national companies. Thus … the proposed treaty would have covered international brands

[174] UN Guiding Principle 14.
[175] UN HRC Res. 26/9, 26 June 2014, *Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights,* par. 9. UN HRC Res. 26/9, 26 June 2014, *Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights,* note one.

purchasing garments from the factories … in the collapsed Rana Plaza building in Bangladesh, but not the local factory owners … employing the more than 1,100 workers who died …."

"The core sponsors of the resolution may have found this formulation to be useful in putting together their voting coalition. But it poses two enormous impediments to future progress. First, an exclusive focus on transnational corporations has always triggered strong opposition from their home countries, … as well as from international business. … [I]t has also dampened the enthusiasm of civil society organizations for the initiative. … because for victims the corporate form of the abuser is irrelevant."

"Second, the definition of 'other business enterprises' … makes no sense either in logical or legal terms. … [T]here is no meaningful distinction between 'transnational corporations' and 'enterprises that have a transnational character.' … More importantly, transnational corporations' subsidiaries are typically required to incorporate under 'relevant domestic law,' often in joint ventures, including with state-owned enterprises or … local businesses. … How do all these structures and relationships get disentangled? …"[176]

Given the breadth of opposition to excluding national corporations from the treaty, this issue is likely to be raised during the negotiations. (This is a distinct issue from whether specific types of companies (*e.g.,* Small and Medium Enterprises ("SME's"), or State owned enterprises) would be exempt from specific treaty requirements, or might be given a different timeline or scope of compliance with obligations.)

***B. What human rights norms** will the treaty enforce against business – jus cogens, customary international law, human rights treaties in States Parties to those treaties, or the norms specified by the UN Guiding Principles (the International Bill of Human Rights, the ILO Declaration of Fundamental Labor Rights, plus others in context)?*

The range of human rights covered by the treaty may depend on the kinds of duties imposed by the treaty, or even by particular provisions of the treaty. To the extent the treaty focuses on reporting, planning, or implementing the Guiding Principles, it should cover a broad range of rights. As John Ruggie concluded after analyzing more than 300 reports of alleged corporate abuses, "there are few if any internationally recognized rights business cannot impact - or be perceived to impact - in some manner. Therefore, companies should consider all such rights."[177] Hence the Commentary to Guiding Principle 12 enjoins:

"Because business enterprises can have an impact on virtually the entire spectrum of internationally recognized human rights, their responsibility to respect applies to all such rights. In practice, some human rights may be at greater risk than others in particular

[176] John Ruggie, *Quo Vadis? Unsolicited Advice to Business and Human Rights Treaty Sponsors*, Sept. 9, 2014, Institute for Human Rights and Business, accessible at http://www.ihrb.org/commentary/quo-vadis-unsolicited-advice-business.html.

[177] John Ruggie, *Protect, Respect and Remedy: a Framework for Business and Human Rights*, UN Doc. A/HRC/8/5, 7 April 2008, par. 52.

industries or contexts, and therefore will be the focus of heightened attention. However, situations may change, so all human rights should be the subject of periodic review."

Guiding Principle 12 recognizes the business responsibility to respect, at minimum, all rights articulated in the International Bill of Human Rights and the ILO *Declaration of Fundamental Principles and Rights at Work*.[178] The International Bill of Human Rights includes the 1948 Universal Declaration of Human Rights,[179] the 1966 International Covenant on Civil and Political Rights,[180] and the 1966 International Covenant on Economic, Social and Cultural Rights.[181] Together these three instruments cover a broad range of rights. The ILO Declaration addresses specific workplace rights: freedom of association, prohibitions on child labor and forced labor, and non-discrimination.

These constitute the minimum catalogue of rights for purposes of human rights due diligence. In addition, the Commentary to Guiding Principle 12 explains:

> "Depending on circumstances, business enterprises may need to consider additional standards. For instance, … [UN] instruments have elaborated further on the rights of indigenous peoples; women; national or ethnic, religious and linguistic minorities; children; persons with disabilities; and migrant workers and their families. Moreover, in situations of armed conflict enterprises should respect the standards of international humanitarian law."

For treaties focused on reporting, planning, or implementation of the Guiding Principles, then, the coverage of rights should be very broad. On the other hand, to the extent a treaty establishes an individual complaint procedure, or provides for civil damages remedies, the list of human rights that can be invoked through such procedures might be narrowed to the kinds of rights – still a broad list – reasonably "justiciable" in similar proceedings against States.[182] Such an adjustment would have to be undertaken with care, because even rights that might appear less compelling in other contexts (*e.g.*, the right to leisure) can be serious in a business context where workers can be subjected to long hours with little or no rest.

Finally, to the extent a treaty imposes criminal sanctions, it would apply, not to all human rights violations, but only to violations caused by the commission of an existing international crime,[183] or conceivably by a new international crime recognized and defined by the treaty, or by a national crime that affects human rights.[184] If criminal prosecution were the only approach adopted, it would exclude most human rights infringements by business.

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[178] The Declaration, together with an explanatory report, is accessible at http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_176149.pdf.
[179] 10 December 1948, accessible at http://www.un.org/en/documents/udhr/.
[180] Adopted, 16 December 1966, *entered into force*, 23 March 1976, 993 U.N.T.S. 171.
[181] Adopted, 16 December 1966, *entered into force*, 3 Jan. 1976, 993 U.N.T.S. 3.
[182] See sections IV.A.7, IV.B.2, and IV.B.3 above.
[183] See section IV.B.5 above.
[184] The Statutes of some international criminal tribunals allow for the prosecution of certain national as well as international crimes. *E.g.*, the Statute of the Special Tribunal for Lebanon, art. 2.1 (a), grants the Tribunal jurisdiction over "[t]he provisions of the Lebanese Criminal Code relating to … terrorism, crimes and offences against life and personal integrity, illicit associations and failure to report crimes and offences, …" (Accessible at

A single treaty could of course employ different menus of rights: a full range for planning provisions, a somewhat narrower range for civil complaints, and a much narrower range for criminal prosecutions.

***C. What substantive norms** will the treaty impose for civil damages claims – international human rights law, or common law tort standards or, in civil law countries, the civil law equivalent? Will the treaty defer to national legal standards for concepts such as complicity or refer to general principles of international law?*

A number of suits for money damages have been brought in English courts against British companies for human rights violations committed in other countries based, not on international human rights law, but on common law tort theories such as trespass and negligence. Several settlements have resulted.[185] Following the decision of the US Supreme Court in 2013 in *Kiobel v. Royal Dutch Petroleum*,[186] which narrowed jurisdiction over human rights suits under the federal Alien Tort Statute, suggestions have been made to seek damages for overseas human rights violations by filing common law tort suits in US state courts.[187] Plaintiffs are now bringing common law tort claims in Canada with respect to the conduct of extractive companies overseas. [188]

It has been argued that, if a civil damages remedy in national courts is permitted or required by a treaty, it could be more effective in practice, at least in common law countries, if it were based on reasonably well-understood common law torts, with which common law judges are already familiar and comfortable, than on novel definitions of damages actions based directly on international human rights law.[189] In effect it is argued that, since common law tort actions have succeeded in practice, Why argue with success?

On the other hand, even where they result in payment of money damages, common law tort actions may not do justice to the gravity of the invasion of human dignity occasioned by gross violations of human rights. They may also be frustrated by procedural obstacles under national laws, such as short statutes of limitations, that should not apply to treaty-based actions

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http://www.stl-tsl.org/en/documents/un-documents/un-security-council-resolutions/security-council-resolution-1757.) Likewise Article 5 of the Statute of the Special Court for Sierra Leone granted the Court jurisdiction over "crimes under Sierra Leonean law," including abuse or abduction of girl children and arson. (Accessible at http://www.rscsl.org/Documents/scsl-statute.pdf.)

[185] *See generally* Richard Meeran, *Tort Litigation against Multinational Corporations for Violation of Human Rights: An Overview of the Position Outside the United States*, 3 CITY UNIV. HONG KONG L. REV. 1 (2011).

[186] 133 S. Ct. 1659 (2013).

[187] *E.g.*, Roger Alford, *The Future of Human Rights Litigation after* Kiobel, 89 NOTRE DAME L. REV. 1749 (2014).

[188] Susana C. Mijares Peña, *Human Rights Violations by Canadian Companies Abroad:* Choc v Hudbay Minerals Inc., 5 UWO J LEG STUD 3 (2014), accessible at <http://ir.lib.uwo.ca/uwojls/vol5/iss1/3>.

[189] *See* Meeran, note 185 above, at 24 ("This approach of invoking tort law involves allegations of negligence rather than human rights violations, which could be regarded as diminishing the significance of the harm, but on the other hand has the advantages of simplicity and being potentially applicable to fundamental human rights violations as well as violations of socio-economic rights … ")

for serious human rights violations.[190] In addition, civil remedies for violations of human rights may also be more congruent than common law torts with a comprehensive treaty enforcing international human rights law, and more uniform among potential States Parties with varying legal traditions (*e.g.*, common law, civil law, Islamic law). And even with tort law as a basis for redress, the legal standards for what gives rise to liability (*e.g.*, claims of negligence, intentional torts, standards for accomplice liability, etc., may vary somewhat from jurisdiction to jurisdiction.)

This is an issue treaty drafters may wish to consider. One potential solution might be for a treaty to contemplate both kinds of remedies – human rights suits and national tort suits (or other national damages remedies) – as vehicles to secure civil justice for victims of business violations of human rights.[191]

*D. **Extraterritorial jurisdiction:** Will States be expressly authorized or required to exercise jurisdiction over human rights violations committed outside their territories by companies domiciled in the State?*

Where a host State is unwilling or unable to provide victims access to effective remedies for human rights violations by a foreign company operating in its territory, should the treaty require the company's home State to exercise jurisdiction? If the answer is "no," then victims may continue to be deprived of effective remedies. Even if an international tribunal on business and human rights were to be established, history teaches that most international courts have limited resources and can hear only a relatively limited number of cases.[192] National justice cannot be abandoned altogether.

Guiding Principle 2 does not quite answer the question of a home State's extraterritorial jurisdiction: It provides that "States should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations." But must States embody this extraterritorial "expectation" in law and practice?

The Commentary is more specific, taking the view that extraterritorial jurisdiction is permissive, but not mandatory:

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[190] *E.g.*, Int.Am.Ct.H.Rts., *Barrios Altos v. Peru*, Judgment of March 14, 2001, Series C, No. 75, par. 41 ("provisions on prescription," i.e., statutes of limitations); *Basic Principles on the Right to a Remedy and Reparation …*, UNGA Res. 60/147. UN Doc. A/RES/60/147, 21 March 2006, Annex, pars. 6 and 7 (re statutes of limitations).

[191] For a discussion of the varying ways States have incorporated the right of victims to seek a remedy for human rights abuses committed by natural persons, see Beth Stephens, *Translating Filártiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations*, 27 YALE J. INT'L L. 1 (2002), Accessible at SSRN: http://ssrn.com/abstract=2125469

[192] An arguable exception is the European Court of Human Rights, which has 47 full-time judges and an annual budget of nearly $90 million. To the extent the UN, or the States Parties to a treaty, were willing to provide that level of human and financial resources, an international court on business and human rights could take on more of the burden of justice. (The European Court's 2013 budget of 66.8 million euros is accessible at http://www.echr.coe.int/Pages/home.aspx?p=court/howitworks&c=#newComponent_1346157778000_pointer. At the June 24, 2013 exchange rate of one euro = $1.31, that amounted to $86.7 million.)

> "At present States are not generally required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction. Nor are they generally prohibited from doing so, provided there is a recognized jurisdictional basis."

The Commentary to Guiding Principle 2 does recognize that "some human rights treaty bodies recommend that home States take steps to prevent abuse abroad by business enterprises within their jurisdiction." Increasingly, however, the International Court of Justice,[193] global and regional human rights treaty bodies, and UN thematic experts interpret human rights treaties not merely to permit, but to impose extraterritorial obligations, including with regard to regulation of business activities abroad.[194]

There is no doubt that States have the right to exercise extraterritorial jurisdiction over their own companies. In the United States Supreme Court litigation in the *Kiobel* case, the United Kingdom and Dutch governments—which as *amici curiae* opposed the exercise of US extraterritorial Alien Tort Statute ("ATS") jurisdiction over UK and Dutch companies[195]—nonetheless agreed that "active personality jurisdiction," by which the United States could apply the ATS extraterritorially to Americans, "is very clearly asserted (and accepted) in State practice, and is well established in international law."[196] Calling the same principle by a different name, the European Commission termed the "nationality principle" an "uncontroversial basis for jurisdiction under international law."[197]

Granted, any exercise of extraterritorial jurisdiction by a home State must be "reasonable" – paying due regard to the jurisdictional claims and sovereignty of the host State – but it is well-accepted under international law that, in principle, home States may adjudicate suits against their own companies (as opposed to foreign companies) for human rights violations committed outside their territories.[198]

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193 ICJ, *The Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep., p. 136, par. 109.

194 *See generally* ESCR-Net, *Global Economy, Global Rights: A Practitioner's Guide for Interpreting Human Rights Obligations in the Global Economy* (2014).

195 *See* Brief of the Governments of the Kingdom of the Netherlands and the United Kingdom of Great Britain and Northern Ireland as *Amici Curiae* in Support of Neither Party at 5–6, 18–23, *Kiobel v. Royal Dutch Petroleum Co*., 133 S. Ct. 1659 (2013) (No. 10-1491).

196 *Id.* at 14. For example, Canadian courts have presumptive jurisdiction over foreign torts where the defendant is "domiciled or resident" in Canada. *Club Resorts Ltd. v. Van Breda*, [2012] 1 S.C.R. 572, paras. 81–82, 85–86, 90(a) (Can.).

197 European Commission Amicus Brief in *Kiobel v. Royal Dutch Petroleum Co*., 133 S. Ct. 1659 (2013) (No. 10-1491), at 11. EU law, governing the twenty-eight EU member States, *Countries*, EUROPA, http://europa.eu/about-eu/countries/index_en.htm (last visited Feb. 12, 2014), and other European States who join the regulations voluntarily, makes jurisdiction turn mainly on domicile. The EU default rule is that "persons domiciled" in an EU State "shall, whatever their nationality, be sued in the courts of" the domiciliary State. Council Regulation 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, arts. 2.1, 3.1, 2001 O.J. (L 12) 1, 3–4 (EC); Council Decision 2007/712/EC of 15 October 2007 on the Signing, on Behalf of the Community, of the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, arts. 2, 3.1, 2007 O.J. (L 339) 3. In tort cases they may also be sued in the State where the "harmful event" takes place. Brussels I Regulation, art. 5.3; Lugano II Convention, art. 5.3.

198 *See generally* D. Cassel, *Suing Americans for Human Rights Torts Overseas: The Supreme Court Leaves the Door Open*, 89 NOTRE DAME L. REV. 1773, 1778-79 (2014).

International law, then, plainly allows States to engage in reasonable exercises of jurisdiction over the conduct of their corporations in other States. A treaty on business and human rights, or a protocol thereto, could either explicitly authorize or require States to exercise such extraterritorial jurisdiction. The treaty or protocol could undertake to articulate guidelines on the parameters of "reasonableness," or instead allow courts or legislatures to decide on the reasonableness of particular exercises of extraterritorial jurisdiction, in light of general principles of international law governing jurisdiction.[199]

*E. **What is the scope of corporate responsibility** – Will parent companies be liable for the wrongs of subsidiaries, and vice versa?*

In what circumstances should a treaty hold parent companies responsible for the actions of their subsidiaries or other corporate entities, and vice versa? The answer may depend on the kinds of duties the treaty imposes. To the extent a treaty mandates reporting, planning and prevention, including implementation of the Guiding Principles, it might not be controversial or impracticable to require parent companies to make sure that their subsidiaries (and other corporate entities, especially controlled entities) meet these responsibilities.

This seems to be the approach of the Guiding Principles. They generally refer to the responsibilities, not of a particular "corporation" or "company," but of a "business enterprise." The term "enterprise" is not defined. However, the language and logic of the Principles suggest that it embraces both a parent company and its subsidiaries. For example, the Commentary to Guiding Principle 2 cites, as an example of domestic measures with extraterritorial implications, "requirements on 'parent' companies to report on the global operations of the entire enterprise." This would make no sense unless the concept of "enterprise" included both parent companies and their subsidiaries.

The issue becomes more complicated to the extent a treaty mandates civil damages remedies against corporations. Most States have adopted, in one form or another, the separate entity doctrine. When one corporation invests in another – even when the first company owns 100% of the shares of the second, as in the case of parent companies with wholly owned subsidiaries – the two corporations are still treated as separate entities for purposes of legal liability. National laws typically provide, then, that the parent cannot be held legally liable for wrongs committed by the subsidiary (*i.e.*, the "corporate veil" cannot be pierced), unless the subsidiary is shown to be a mere façade or was created solely in order to defraud creditors.[200]

Recent developments in common law cases indicate that, in some limited circumstances, a parent company can be held to have a "duty of care" to the employees of a subsidiary, or to

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[199] See, *e.g.*, RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (1987). *Compare* § 402 (jurisdiction to prescribe) and § 421 (jurisdiction to adjudicate), *with* § 431(1) (jurisdiction to enforce judicially). All three categories authorize states to exercise jurisdiction over acts abroad by their own nationals, §§ 402(2), 421(2)(d)–(e), and 431(1), subject to the limit that the exercise be reasonable. *Id.* §§ 403, 421(1)–(2), and 431(1)–(2).

[200] See, *e.g., Presbyterian Church of Sudan et al. v. Talisman Energy Inc*., 453 F. Supp. 2d 633 (S.D.N.Y. 2006), affirmed, 582 F. 3d 244 (2d Cir. 1999); *see generally* G. Skinner, R. McCorquodale and O. De Schutter, *The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business* (2013), pp. 59-64.

persons injured by a subsidiary, the breach of which can result in legal liability.[201] In such cases the parent is held liable, not for the misconduct of its subsidiary, but rather for its own misconduct in breaching its duty of care. Negotiators might consider incorporating such a doctrine into a treaty.

Negotiators might also consider a broader parental company duty of care in regard to human rights. Without abrogating the general application of the doctrine of separate entity, negotiators might consider the following recommendation made by three distinguished scholars, in the particular context of a parent company's human rights due diligence:

> "[T]he duty of the parent company to exercise due diligence by controlling the subsidiary to ensure it does not engage in human rights violations, directly or indirectly, should be clearly affirmed. This should be seen as part of the due diligence necessary to meet the corporate responsibility to respect human rights, as set out in the UNGPs. The concept … amounts to imposing on the parent company a duty to monitor the activities of its subsidiaries, … This also includes the responsibility that all businesses seek to prevent and mitigate, through use of their leverage, all human rights violations by those with whom they have a business relationship. In contrast to the limited liability approach, this incentivizes the parent company to ensure that its subsidiaries and business partners comply with human rights."[202]

This scholarly recommendation is consistent, not only with the "enterprise" approach of the UN Guiding Principles to due diligence, but also with the even more explicit "enterprise" approach of the OECD Guidelines for Multinational Enterprises. In calling on business to respect human rights and to carry out due diligence,[203] the OECD Guidelines "extend to enterprise groups, although boards of subsidiary enterprises might have obligations under the law of their jurisdiction of incorporation. Compliance and control systems should extend where possible to these subsidiaries. Furthermore, the board's monitoring of governance includes continuous review of internal structures to ensure clear lines of management accountability throughout the group."[204]

*F. **Duty bearers:** Will the treaty impose direct obligations only on States, or will it impose direct obligations on business as well?*

During the drafting process of the UN Guiding Principles, reports John Ruggie, governments North and South "had deep seated doctrinal concerns about making corporations subjects of international human rights law."[205] The US statement of objections to the June 2014

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[201] *Compare* England and Wales Court of Appeal, *Chandler v. Cape PLC,* [2012] EWCA Civ 525 (25 April 2012), par. 80, and Superior Court of Justice of Ontario, *Choe v. HudBay Minerals, Inc.*, 2013 ONSC 1414, Decision of 22 July 2013, pars. 74-75, *with* District Court of The Hague, *Akpan v. Royal Dutch Shell PLC*, Case No. C/09/337050/HA ZA 09-1580, Judgment, 30 Jan. 2013 (2013), pars. 3.31, 3.32.

[202] G. Skinner, R. McCorquodale and O. De Schutter, *The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business* (2013), p. 68.

[203] OECD Guidelines (2011), pars. II.2, II.10, and Chapter IV.

[204] OECD Guidelines (2011), Commentary on General Policies, par. 9.

[205] John Ruggie, *Response to RAID "Executive Summary",* 23 March 2015, p. 1, accessible at http://business-humanrights.org/sites/default/files/documents/Ruggie%20response%20to%20RAID.pdf.

UN Human Rights Council treaty resolution included an assertion that business corporations are not "subjects" of international law.[206]

There are competing schools of thought among eminent scholars on whether corporations are subjects of international law.[207] Positivists insist that corporations are not subjects of international law, because no international instrument expressly recognizes them as such.[208] More flexible interpreters suggest that corporations may at least have "limited international legal personality."[209] Finally, pragmatists argue that the issue of whether corporations are "subjects" of international law is irrelevant to the question of what legal responsibilities can be imposed on corporations: "Skepticism about the 'personhood' of corporations should not be confused with doubts about whether international corporations have responsibilities (as well as rights) under international law. Clearly they now have both."[210]

At present, thousands of bilateral and multilateral investment and trade agreements grant corporations both substantive rights (*e.g.*, regulatory stability, compensation for property takings, and due process of law) and remedial rights to sue States before international arbitration panels.[211] Under the European Convention on Human Rights, corporations are also permitted to make claims against States for property takings and denials of due process of law before the European Court of Human Rights.[212] EU treaties also permit corporations to bring cases before the European Court of Justice, if their rights have been infringed by an EU institution.[213]

Whatever one's view on whether corporations are "subjects" or "legal persons" under international law, if international treaties can grant corporations rights and remedies, as in these instances, it is difficult to discern why a treaty cannot also impose human rights duties on corporations, enforceable before national or international courts. Whether a treaty on business and human rights should impose duties directly on companies would appear to be a policy choice to be made by the negotiators, one way or the other, and not a decision determined by current international law.

G. What is the Role of Lawyers and other Business Advisors?

The legal profession has been among civil society actors promoting implementation of the Guiding Principles. The American Bar Association ("ABA) has endorsed the Guiding

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[206] Note 45 above.
[207] *See generally* Jose Alvarez, *Are Corporations "Subjects" of International Law?,* 9 SANTA CLARA J. INT'L. LAW 1 (2011).
[208] *See* Decl. of James Crawford S.C., *Presbyterian Church of Sudan v. Talisman Energy Inc., Republic of Sudan*, 453 F. Supp. 2d 633 (S.D.N.Y. 2006).
[209] Andrew Clapham, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS 79 (2006).
[210] Alvarez, note 207 above, at 31 (footnote omitted).
[211] *See generally* Public Citizen, *Case Studies: Investor-State Attacks on Public Interest Policies* (2014), accessible at http://www.citizen.org/documents/egregious-investor-state-attacks-case-studies.pdf.
[212] *See generally, e.g.,* W. van den Muijsenbergh and S. Rezai, *Corporations and the European Convention on Human Rights* (2012), accessible at http://www.mcgeorge.edu/Documents/Conferences/GlobeJune2012_Corporationsandthe.pdf.
[213] http://europa.eu/about-eu/institutions-bodies/court-justice/index_en.htm

Principles.[214] The Business and Human Rights Advisory Group of the Law Society has recommended, among other measures, that the Law Society take the position that its law firm members have a responsibility to respect human rights, and that they should develop policies and procedures to implement that responsibility.[215] The International Bar Association has published pilot guidance for bar associations and business lawyers.[216]

Law firms and other business advisors, such as consulting and risk management firms, have at least a dual responsibility with regard to human rights: both as businesses themselves, and as advisors to their business clients.[217] While the ethical rules of the ABA, at least, "may well" affirmatively support these human rights responsibilities,[218] a treaty might commit States to ensure policy coherence between the human rights responsibilities of lawyers, law firms and other business advisors, and their duties under professional codes of conduct and ethics promulgated by bar associations and State entities.

CONCLUSION

This Paper seeks, not to advocate, but to inform. It takes no position on the advisability of a treaty on business and human rights, or on the form and content of any such treaty. It is offered in the belief that an informed negotiating process deserves, at the outset, a basic knowledge of the background that brought negotiators to the table, and an awareness of the main options, issues and choices that lie before them. It is in that spirit that this Paper has been prepared.

This Paper also provides analysis of the current policy landscape and context as the treaty process begins. This landscape, however, is constantly shifting, as States, civil society and businesses engage in further actions in relation to business and human rights.

[214] The ABA resolution and accompanying report are accessible at www.americanbar.org/content/dam/aba/administrative/house_of_delegates/resolutions/2014_hod_annual_meeting_109.authcheckdam.pdf.

[215] Law Society, *Business and Human Rights Advisory Group Recommendations*, Jan. 2014, p. 13, Recs. 1 and 6. See also the Council of Bars and Law Societies, *Corporate Responsibility and the Role of the Legal Profession*, accessible at www.ccbe.eu/fileadmin/user_upload/NTCdocument/EN_07022013_CSR_and_ 1_ 1361955115.pdf

[216] Int'l Bar Association ("IBA"), *Business and Human Rights Guidance for Bar Associations,* and its Annex, *Guidance for Business Lawyers on the UN Guiding Principles on Business and Human Rights* (2014).

[217] IBA, *Guidance for Business Lawyers*, note 216 above, pp. 16-18.

[218] "ABA Model Rule of Professional Conduct 2.1 may well apply in this context. It requires lawyers to exercise 'independent professional judgment and render candid advice' and permits them to 'refer not only to law but to other considerations such as moral, economic, social and political factors that may be relevant to the client's situation.' … This imperative logically would include applicable international standards in the conduct of a client's affairs, including the Framework and Guiding Principles where corporate clients are concerned."
". ABA report, note 214 above, at 5 n. 16 (citation omitted).