

# DOING BUSINESS RIGHT: THE CASE FOR A BUSINESS AND HUMAN RIGHTS TREATY

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*In recent years, there has been significant debate around the need for a Business and Human Rights Treaty under international law. However in 2018, a 'zero draft' of the treaty was issued by the Working Group on Business and Human Rights, which suggests that the arguments in favour of a treaty are gaining support. Arguments for such a treaty have centered around the non-binding status of the instruments that currently form the international framework in this area, and the need for a treaty to address the gaps that this framework contains. While arguments against have focused on the difficulty of enacting a treaty in this area, and the perceived inappropriateness of doing so. After considering both sides of the debate, this article argues that the case for a business and human rights treaty is stronger than the case against it, and that a treaty would make an important contribution in the effort to address corporate human rights abuses.*

## I INTRODUCTION

The roles and responsibilities of business in relation to protecting and promoting human rights have been subject to significant discussion over the past few decades.<sup>1</sup> While the need for regulation and accountability in business practices has been agreed upon, the form that such regulation should take has been subject to debate; many advocate that voluntary initiatives are sufficient,<sup>2</sup> others argue that a binding instrument is needed to effectively address the issue of corporate human rights abuses.<sup>3</sup> The culmination of this debate was the adoption of a resolution by the Human Rights Council in 2013 to explore the possibility of a treaty on business and human rights,<sup>4</sup> and the issuance of a 'zero draft' treaty by the Working Group on Business and Human

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<sup>1</sup> Aurora Voiculescu and Helen Yanacopulos, 'Human Rights in business contexts: An Overview' in Aurora Voiculescu and Helen Yanacopulos (eds), *The Business of Human Rights: An Evolving Agenda for Corporate Responsibility* (Zed Books, 2011) 1.

<sup>2</sup> Graham Markiewicz, 'The Logical Next Step: Motivations on the Formation of a Business and Human Rights Treaty' (2017) 26 *Minnesota Journal of International Law* 63, 72; Ruggie, John, *A UN Business and Human Rights Treaty?* (Issue Brief, Harvard Kennedy School, 2014) 3.

<sup>3</sup> Olivier De Schutter, 'Towards a New Treaty on Business and Human Rights,' (2016) 1 *Business and Human Rights Journal* 41, 43; David Bilchitz, 'The Necessity for a Business and Human Rights Treaty,' (2016) 1 *Business and Human Rights Journal* 203, 212.

<sup>4</sup> *Elaboration of an International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights*, 26<sup>th</sup> sess, A/HRC Res. 26/9 (26 June 2014), para 9.

Rights in August 2018.<sup>5</sup> In the meantime, the *United Nations Guiding Principles on Business and Human Rights*<sup>6</sup> form the predominant framework for action by States and corporations in connection with business and human rights related impacts, and this has garnered support from businesses and States alike.<sup>7</sup> Further initiatives at the international level include the *OECD Guidelines on Multinational Enterprises* and sector specific guidance such as those for mining businesses in conflict and high risk zones.<sup>8</sup> Parts of these international guidelines have been translated into domestic legislation in several jurisdictions, including the United Kingdom's *Modern Slavery Act 2015*, the *California Transparency in Supply Chains Act*,<sup>9</sup> and the recently enacted *Modern Slavery Act 2018* in Australia. However, a majority of States continue to lack any legislation regulating corporate behaviour in relation to human rights.<sup>10</sup>

While the draft treaty will be used as the basis for negotiations between States in the future, this essay aims to summarise the case for a treaty moving forward and highlight that a treaty would make an important contribution in the effort to address corporate human rights abuses. It argues that the current business and human rights framework is inadequate for the strong protection of human rights. The current international framework consists only of non-binding standards and the existing guidelines, the Guiding Principles, contain gaps.<sup>11</sup> The adoption of a treaty could address these issues, and would assist in clarifying and strengthening the current standards so that corporate human rights violations can be prevented or remedied effectively.<sup>12</sup> The appropriateness of an international treaty is even more apparent when the current status of Transnational Corporations in the international arena, and the increased capacity in recent years for business to impact upon fundamental human rights, is considered.<sup>13</sup> Furthermore the need for a treaty is strengthened by the fact that the main arguments against the adoption of a

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<sup>5</sup> Working Group on Business and Human Rights, *Legally Binding Instrument To Regulate, In International Human Rights Law, The Activities Of Transnational Corporations And Other Business Enterprises*, Zero Draft 16.07.18.

<sup>6</sup> Hereafter referred to as 'The Guiding Principles'.

<sup>7</sup> Connie De la Vega, 'International Standards on Business and Human Rights: Is Drafting a New Treaty Worth It?' (2017) 51 *University of San Francisco Law Review* 431, 431.

<sup>8</sup> Carlos Lopez, 'Struggling to Take Off?: The Second Session of Intergovernmental Negotiations on a Treaty on Business and Human Rights' (2017) 2 *Business and Human Rights Journal* 365, 367.

<sup>9</sup> Justine Nolan, 'Business and human rights: The challenge of putting principles into practice and regulating global supply chains,' (2017) 42 *Alternative Law Journal* 42, 42.

<sup>10</sup> Justine Nolan, 'Refining the Rules of the Game: The Corporate Responsibility to Respect Human Rights,' (2014) 30 *Utrecht Journal of International and European Law* 7, 10.

<sup>11</sup> Surya Deva, *Regulating Corporate Human Rights Violations: Humanizing Business* (Routledge, 2012) 116.

<sup>12</sup> Bilchitz, above n 3, 210.

<sup>13</sup> Bilchitz, above n 3, 206.

treaty, namely that consensus on a treaty will not be reached, and that States are already under a duty to protect, are not persuasive. Further arguments against the adoption of a treaty, such as that the scope of the treaty will be too broad to be meaningful, and that Transnational Corporations should not have direct obligations under international law, can also be rebutted. Finally, this article comments briefly on the text of the draft treaty itself, concluding that while it is a step in the right direction, it has a long way to go if it is to amount to a robust and meaningful treaty on business and human rights.

## II ARGUMENTS IN FAVOUR

### A *The Need For Binding International Law*

A key argument in favour of the creation of a treaty on business and human rights is that the current framework only consists of voluntary standards that do not create legal obligations for States or corporations.<sup>14</sup> As has been demonstrated by the poor uptake of, and lack of commitment to the Guiding Principles,<sup>15</sup> without legal compulsion, corporate compliance with human rights tend to be inconsistent and sporadic.<sup>16</sup> Purely voluntary initiatives are dependent upon the good will of businesses in accepting any and giving effect to standards that emerge.<sup>17</sup> They rely on a corporation's willingness to consider long-term social impact of their actions in a system where the motivations behind their decision-making are often based upon shorter term profit maximisation.<sup>18</sup> A global binding instrument would help to avoid the illegitimate corporate competition that can be achieved through exploiting differences across jurisdictions.<sup>19</sup> It would assist in creating a 'level playing field' between those corporations that already comply with human right standards and those that do not,<sup>20</sup> ensuring that businesses who respect human rights are not disadvantaged by doing so.<sup>21</sup>

The need for binding international law becomes further evident when one considers

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<sup>14</sup> Ibid 203; Deva, above n 11, 116.

<sup>15</sup> Steven Bittle and Lauren Snider, 'Examining the Ruggie Report: Can Voluntary Guidelines Tame Global Capitalism?' (2013) 21 *Critical Criminology* 177, 189.

<sup>16</sup> Justine Nolan, 'Mapping the Movement: the Business and Human Rights Regulatory Framework,' in Baumann-Pauly, Dorothee and Justine Nolan (eds), *Business and Human Rights: From Principles to Practice* (Taylor and Francis, 2016) 96.

<sup>17</sup> Bilchitz, above n 3, 212.

<sup>18</sup> Ibid.

<sup>19</sup> Daniel Uribe and Kinda Mohamadieh, *Building a Binding Instrument on Business and Human Rights*, Business and Human Rights Resource Centre < <https://www.business-humanrights.org/en/building-a-binding-instrument-on-business-and-human-rights>>.

<sup>20</sup> Nina Seppala, 'Business and the International Human Rights Regime: A Comparison of UN Initiatives' (2009) 87 *Journal of Business Ethics* 401, 411.

<sup>21</sup> Uribe and Mohamadieh, above n 19.

that soft law has been ineffective as a method of ensuring that States adopt the principles into their domestic law.<sup>22</sup> Only a small number of States have developed national action plans in line with the Guiding Principles, and current commitments fall short of what is required to address the full extent of the issues in the business and human rights context.<sup>23</sup> Treaties generally demonstrate a greater sense of commitment than soft law instruments,<sup>24</sup> with the voluntary nature of the Guiding Principles making them primarily an educational tool, rather than a practical way of enforcing corporate and State accountability commitments.<sup>25</sup> In comparison, a treaty would have the effect of imposing legally binding obligations on States that sign and ratify it.<sup>26</sup> Furthermore, international conventions are much more effective at prompting domestic legal reform, and creating a framework for the development of domestic remedies, than soft law instruments.<sup>27</sup> Evidence shows that the few judicial cases of corporate human rights abuses that were successfully addressed by public authorities, or ended in a positive result for victims, would not have been possible without the existence of legal frameworks that were enacted in response to obligations set out in international Conventions.<sup>28</sup> Therefore, due to a treaty's binding nature, it has the potential to be more effective than soft law initiatives at strengthening accountability and access to remedies in the field of business and human rights.<sup>29</sup>

Moreover it could be argued that the fundamental nature of human rights requires that they be contained in a binding instrument,<sup>30</sup> so as to be recognised as being on at least the same level of importance as other corporate obligations such as those relating to trade and investment.<sup>31</sup> The normative importance and universality of fundamental human rights renders it appropriate that they should be contained in the most authoritative mechanism possible under international law,<sup>32</sup> and that legally binding obligations are

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<sup>22</sup> Bilchitz, above n 3, 212.

<sup>23</sup> Nolan, above n 10, 10.

<sup>24</sup> Alan Boyle, 'Some Reflections on the Relationship of Treaties and Soft Law' (1999) 48 *International Law Quarterly* 901, 903.

<sup>25</sup> Justine Nolan, 'The United Nations' Compact with Business: Hindering or Helping the Protection of Human Rights?' (2005) 24 *University of Queensland Law Journal* 445, 464.

<sup>26</sup> Bilchitz, above n 3, 203.

<sup>27</sup> International Commission of Jurists, *Needs and Options for a New International Instrument In the Field of Business and Human Rights: Executive Summary* (2014) 5; Aurora Voiculescu, 'Human Rights and the Normative Ordering of Global Capitalism' in Aurora Voiculescu and Helen Yanacopoulos (eds), *The Business of Human Rights: An Evolving Agenda for Corporate Responsibility* (Zed Books, 2011) 24.

<sup>28</sup> International Commission of Jurists, above n 27.

<sup>29</sup> *Ibid.*

<sup>30</sup> Bilchitz, above n 3, 212.

<sup>31</sup> Nolan, above n 16, 96.

<sup>32</sup> Bilchitz, above n 3, 212.

imposed on all agents who have the capacity to impact upon them, including business.<sup>33</sup>

## B Gaps In The Current Framework

Another key argument for the creation of an international treaty on business and human rights is that the current framework of rights and responsibilities of corporations, in relation to human rights, has serious deficiencies.<sup>34</sup> The Guiding Principles suffer from ambiguities and legal lacunae that prevent individuals whose rights are affected by corporate activities from seeking protection or redress.<sup>35</sup> For example, the Guiding Principles do not adequately address the barriers that exist in holding corporations to account which arise from the separate legal personality doctrine, which insulates a corporation from legal liability for human rights violations.<sup>36</sup> The Guiding Principles acknowledge the doctrine as a legal barrier,<sup>37</sup> but do not propose any solutions to overcome it.<sup>38</sup> This represents a key conceptual and procedural hurdle that victims face in holding companies to account for human rights violations under the existing framework.<sup>39</sup> A further example is that instead of setting robust global standards for business, the Guiding Principles leave it to companies to ascertain their human rights responsibilities on a case by case basis with reference to other international law.<sup>40</sup> This approach is unsatisfactory because it neither offers concrete guidance to companies, nor allows one to easily conclude if a company is in breach of its obligations.<sup>41</sup> A treaty can address these gaps in the Guiding Principles.<sup>42</sup>

The Guiding Principles also contain substantive gaps on the subject of securing accountability and ensuring access to reparations.<sup>43</sup> For example, under the Guiding Principles, corporations have a ‘responsibility’ to respect human rights,<sup>44</sup> rather than a ‘duty’ to do so, meaning that a breach of these Principles does not entail legal

<sup>33</sup> Ibid 206.

<sup>34</sup> Bilchitz, above n 3, 203.

<sup>35</sup> Ibid 203; Arvind Ganesan, *Dispatches: A Treaty to End Corporate Abuses?* (1 July 2014) Human Rights Watch <<https://www.hrw.org/news/2014/07/01/dispatches-treaty-end-corporate-abuses>>.

<sup>36</sup> Deva, above n 11, 113.

<sup>37</sup> United Nations Human Rights: Office of the High Commissioner, *Guiding Principles on Business and Human Rights* (2011) Commentary to Principle 16 <[http://www.ohchr.org/Documents/Publications/Guiding-PrinciplesBusinessHR\\_EN.pdf](http://www.ohchr.org/Documents/Publications/Guiding-PrinciplesBusinessHR_EN.pdf)>.

<sup>38</sup> Deva, above n 11, 113.

<sup>39</sup> Ibid 117.

<sup>40</sup> Ibid 239.

<sup>41</sup> Ibid 239.

<sup>42</sup> Ibid 215.

<sup>43</sup> International Commission of Jurists, above n 27, 8.

<sup>44</sup> United Nations Human Rights: Office of the High Commissioner, above n 37, Principle 13.

consequences.<sup>45</sup> Due to this, the Guiding Principles lack an enforcement or monitoring mechanism,<sup>46</sup> leaving victims of human rights abuses unable to seek redress of a breach human rights at the international level.<sup>47</sup> While this may have assisted in earning corporate support for the framework, the practical effect of an absence of ‘legal accountability’ or ‘legal duty,’<sup>48</sup> is that corporations have narrow responsibilities that do not guarantee prevention of or redress from human rights abuses.<sup>49</sup> This accountability deficit is illustrated by the fact that there are only a few examples of businesses being held to account for violations of human rights.<sup>50</sup> The absence of firm requirements and a monitoring process makes the Guiding Principles woefully inadequate to provide a strong system of rights protection for victims of corporate abuse.<sup>51</sup> The text of the draft treaty demonstrates how this issue can be addressed, with Article 10 making provision for civil and criminal liability for those who commit human rights violations.<sup>52</sup> Thus the role of a treaty in expressly recognising the legal obligations of corporations becomes important for providing remedies to individuals and addressing these gaps.<sup>53</sup>

### C To Provide Clarity For Victims Of Corporate Abuse

A further argument in favour of a business and human rights treaty is that the standards outlined in the Guiding Principles are vague and lack robust guidance for the protection of human rights.<sup>54</sup> They do not provide detailed guidance for companies to adopt.<sup>55</sup> Rather they set out the general roles and responsibilities of states and businesses, and not specifics that can easily be adopted into domestic legislation for the creation of a consistent framework.<sup>56</sup> For example they do not make explicit reference to the full body of international human rights law that are relevant for the assessment of corporate respect for human rights.<sup>57</sup> While the Principles do state that business can

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<sup>45</sup> Deva, above n 11, 106.

<sup>46</sup> Arvind Ganesan, ‘Towards a Business and Human Rights Treaty?’ in Baumann-Pauly, Dorothee and Justine Nolan, *Business and Human Rights: From Principles to Practice* (Taylor and Francis, 2016) 99.

<sup>47</sup> Deva, above n 11, 114.

<sup>48</sup> De la Vega, above n 6, 452.

<sup>49</sup> Deva, above n 11, 106.

<sup>50</sup> International Commission of Jurists, above n 27, 4.

<sup>51</sup> Ganesan, above n 35.

<sup>52</sup> Working Group on Business and Human Rights *Legally Binding Instrument To Regulate, In International Human Rights Law, The Activities Of Transnational Corporations And Other Business Enterprises*, Zero Draft 16.07.18, Art 10.

<sup>53</sup> Bilchitz, above n 3, 209.

<sup>54</sup> *Ibid* 210.

<sup>55</sup> Ganesan, above n 46, 99.

<sup>56</sup> *Ibid*; Bilchitz, above n 3, 212.

<sup>57</sup> United Nations Human Rights: Office of the High Commissioner, above n 37, 12.

impact on virtually all human rights, and business may need to consider additional rights depending on the circumstances, these are not explicitly referenced.<sup>58</sup> In this way, the Guiding Principles lack precise and measurable human rights standards, which limits their ability to adequately protect human rights.<sup>59</sup>

In addition, there are several issues that the Guiding Principles leave ambiguous. For example, the Guiding Principles are weakly formulated with regards to the extraterritorial application of a State's duty to protect.<sup>60</sup> A treaty could assist in clarifying whether that duty should be extended to an extraterritorial responsibility.<sup>61</sup> Further it could assist with addressing the technical difficulties that arise when extra-territorial jurisdiction is exercised.<sup>62</sup> Provisions could be included that deal with the interplay of extraterritoriality and state sovereignty, and provide for co-operation surrounding matters such as gathering evidence, certifying statements and assisting victims with legal representation.<sup>63</sup> A treaty could also help to clarify issues regarding when and how 'host,' 'home' or 'other connected' States should act to ensure accountability when corporate human rights abuse occurs.<sup>64</sup> Addressing these issues would provide more clarity and certainty for States, businesses and potential victims of human rights breaches.<sup>65</sup> The strong normative force of a treaty, and the institutions it creates, renders it preferable to the development of further soft law instruments for the purpose of clarifying the obligations and responsibilities of business with respect to human rights.<sup>66</sup>

#### D *Transnational Business Should Be Subject To International Law*

A final key argument that has been proposed in favour of a binding treaty is the need for corporate actors to be regulated under international law.<sup>67</sup> This position has been strengthened through the rise of the concept of 'Corporate Social Responsibility,' which is driving the creation of standards and initiatives in relation to the interaction between

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<sup>58</sup> Mariette van Huijstee, Victor Rocco and Laura Ceresna-Chaturvedi, *How to use the UN Guiding Principles on Business and Human Rights in Company Research and Advocacy: A guide for civil society organisations* (SOMO, 2012) 12.

<sup>59</sup> Deva, above n 11, 116.

<sup>60</sup> De Schutter, above n 3, 46;

<sup>61</sup> Ibid.

<sup>62</sup> Bilchitz, above n 3, 219.

<sup>63</sup> Ibid.

<sup>64</sup> John Morrison, *A Business and Human Rights Treaty? Strategies are needed to close accountability gaps* (3 June 2014) Institute for Human Rights and Business <<https://www.ihrb.org/other/treaty-on-business-human-rights/a-business-and-human-rights-treaty-smart-strategies-are-needed-to-close-acc>>.

<sup>65</sup> International Commission of Jurists, above n 27, 5.

<sup>66</sup> Bilchitz, above n 3, 212.

<sup>67</sup> Uribe and Mohamadieh, above n 19.

business and society.<sup>68</sup> Corporate Social Responsibility is focused on constraining corporate behaviour, internalizing systematic responses and stigmatizing outliers.<sup>69</sup> In line with this theory, the proposed treaty would hold corporations directly liable under international law for violating human rights.<sup>70</sup> This is appropriate given that over the past three decades, there has been a marked increase in the economic and political power of Transnational Corporations.<sup>71</sup> Today the economic capacities of some corporations go far beyond the economic capacities of the State in which they operate, and their political influence is often significant.<sup>72</sup> This can affect the ability of some States to regulate large Transnational Corporations effectively.<sup>73</sup> Moreover, many Transnational Corporations are able to exert greater power than some States in affecting the realization of a wide array of rights,<sup>74</sup> such as labour rights, rights to welfare and health, and freedom from discrimination.<sup>75</sup> They are able to commit severe human and environmental damage when they are left unregulated.<sup>76</sup>

This is particularly the case since the removal of trade barriers and advances in communications and transport has allowed corporations to move operations to jurisdictions where labour is cheap and there are fewer and weaker human rights laws.<sup>77</sup> Examples include the continued and well-known presence of forced and child labour in the supply chains of jewellery companies with operations in Africa,<sup>78</sup> and the poor working conditions of employees in the garment and footwear industry.<sup>79</sup> Additionally, given that the nature of Transnational Corporations is to operate across borders, developing a

<sup>68</sup> Mikhail Reider-Gordon, Markus Funk, Uche Eweluwka and Ira Feldman, 'Corporate Social Responsibility,' (2013) 47 *International Lawyer* 183, 183.

<sup>69</sup> Peter Rosenblum, 'Two Cheers for CSR' in Charlotte Walker-Said, John Kelly and John D Kelly (eds), *Corporate Social Responsibility?: Human Rights in the New Global Economy* (University of Chicago Press, 2015) 33.

<sup>70</sup> *Elaboration of an International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights*, 26<sup>th</sup> sess, A/HRC Res. 26/9 (26 June 2014), para 9.

<sup>71</sup> Lee McConnel, 'Assessing the feasibility of a business and human rights treaty' (2017) 66 *The International and Comparative Law Quarterly* 143, 146.

<sup>72</sup> Nolan, above n 25, 448.

<sup>73</sup> *Ibid.*

<sup>74</sup> John Ruggie, 'Business and Human Rights: The Evolving International Agenda,' (2007) 101 *American Journal of International Law* 819, 824.

<sup>75</sup> Justine Nolan and David Kinley 'Trading and Aiding Human Rights: Corporations in the Global Economy,' (2007) 25 *Nordic Journal of Human Rights* 353, 358.

<sup>76</sup> Bittle and Snider, above n 15, 179.

<sup>77</sup> Chris Jochnick and Nina Rabaeus, 'Business and Human Rights Revitalized: A New UN Framework Meets Texaco in the Amazon' (2010) 33 *Suffolk Transnational Law Review* 413, 413; *Ibid* 186.

<sup>78</sup> Human Rights Watch, *The Hidden Cost of Jewellery: Human Rights in Supply Chains and the Responsibility of Jewellery Companies* (2018) 5.

<sup>79</sup> Human Rights Watch, *Follow the Thread: The Need for Supply Chain Transparency in the Garment and Footwear Industry* (2017) 4.



framework for the cooperation among States, and a set of common standards that have the potential to be binding for all States, is necessary to avoid or mitigate the risk of conflicting requirements in different jurisdictions.<sup>80</sup> Thus to be effective, attempts to regulate Transnational Corporations must include mandatory and enforceable rules and responsibilities in relation to human rights that are applicable across borders.<sup>81</sup>

### III ARGUMENTS IN OPPOSITION

#### A *A Treaty Will Not Be Successful Without Consensus*

A key argument against creating an instrument that places binding obligations on businesses in relation to human rights is that a treaty does not currently command the same level of consensus amongst States as the Guiding Principles.<sup>82</sup> This has led many to argue that a treaty is not worth pursuing because it will either create more divisive and controversial debate that will continue for a long period, or garner few ratifications.<sup>83</sup> It is further contended that the only States that will ratify it are those that lack the power to adequately address corporate abuses,<sup>84</sup> as the home States of the largest Transnational Corporations are currently not in support of the treaty.<sup>85</sup> In this way, critics compare it to the *International Convention for the Protection of the Rights of All Migrant Workers and Their Families*,<sup>86</sup> which to date has not been ratified by any of the largest migrant worker receiving countries.<sup>87</sup> Ruggie describes this approach as “principled pragmatism,” arguing that before launching into any treaty process, we must be confident that it will be effective at addressing the issue.<sup>88</sup>

However neither the length of the treaty drafting process, nor the lack of consensus, is a sufficient reason to argue against the development of a treaty.<sup>89</sup> As Bilchitz argues, the fact that no consensus exists now is not a strong reason to prevent a process that

<sup>80</sup> International Commission of Jurists, above n 27, 4.

<sup>81</sup> Bittle and Snider, above n 15, 189.

<sup>82</sup> John Ruggie, *Quo Vadis? Unsolicited Advice to Business and Human Rights Treaty Sponsors* (9 September 2014) Institute for Business and Human Rights < <https://www.ihrb.org/other/treaty-on-business-human-rights/quo-vadis-unsolicited-advice-to-business-and-human-rights-treaty-sponsors>>; International Commission of Jurists, above n 28, 5.

<sup>83</sup> De la Vega, above n 6, 431.

<sup>84</sup> John Ruggie, *Life in the Global Public Domain: Response to Commentaries on the UN Guiding Principles and the Proposed Treaty on Business and Human Rights* (Harvard Kennedy School, 2015) 4.

<sup>85</sup> Ruggie, *A UN Business and Human Rights Treaty*, above n 2, 4.

<sup>86</sup> Hereafter referred to as the ‘Migrant Workers Convention’.

<sup>87</sup> Ruggie, *Quo Vadis? Unsolicited Advice to Business and Human Rights Treaty Sponsors*, above n 81, 5.

<sup>88</sup> John Ruggie, ‘International Legalization in Business and Human Rights,’ (Speech delivered at Harvard Kennedy School of Government, 11 June 2014) 3.

<sup>89</sup> Nolan, above n 16, 96.

could address significant problems in international law.<sup>90</sup> If fears of a lack of consensus were allowed to prevail over desires for improvement, then some of the most important developments in international law would never have taken place.<sup>91</sup> Bilchitz cites the birth of the World Trade Organisation, the development of the International Criminal Court and the Marrakesh Agreement as examples of initiatives which were all rooted in significant disagreement between States but have, over time, garnered greater consensus.<sup>92</sup> Additionally, the length of time that it may take to reach a treaty that is acceptable to States should not be seen as an argument against commencing treaty negotiations.<sup>93</sup> Rather it should provide more of an impetus to start those negotiations soon. The fact that no consensus exists currently on a binding business and human rights treaty is no reason to suggest that it never will.<sup>94</sup> Thus this is not a persuasive reason to reject the development of a treaty in this area.

Furthermore, the concern that the lack of consensus is among the States that are currently home to the largest Transnational Corporations, should not be a reason to dismiss the treaty process, considering future trends. The distribution of world economic powers is shifting, with the economic powers of non-Western States and corporations growing significantly.<sup>95</sup> Research undertaken by the McKinsey Global Institute indicates that by 2025, almost half of the world's largest corporations will be based in emerging markets.<sup>96</sup> It is also highly significant that, apart from Brazil, each of the 'BRICS' countries, who represent the major emerging national economies, supported the Human Rights Council Resolution in favour of establishing the Open-Ended Intergovernmental Working Group to elaborate on a treaty.<sup>97</sup> If these States ratify the treaty and require corporations to adhere to its provisions, then it could make a significant contribution to human rights protection and it would be at least 'distinctly embarrassing' for developed countries that currently oppose it, such as the US and European Union, to continue to do so.<sup>98</sup> Moreover the nature of this treaty means that corporations which are strongly connected to States who refuse to ratify it can still be held to account if they operate

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<sup>90</sup> Bilchitz, above n 3, 224.

<sup>91</sup> Ibid.

<sup>92</sup> Ibid.

<sup>93</sup> Ibid.

<sup>94</sup> Ibid 225.

<sup>95</sup> Ibid.

<sup>96</sup> McKinsey Global Institute, *Urban World The Shifting Global Business Landscape* (2013) 55.

<sup>97</sup> *Elaboration of an International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights*, 26<sup>th</sup> sess, A/HRC Res. 26/9 (26 June 2014).

<sup>98</sup> Bilchitz, above n 3, 225.

in States which do embrace the treaty.<sup>99</sup> Over time, the treaty's provisions are likely to become the de facto international standard applicable to corporations, making the opposition of developed States less relevant.<sup>100</sup> Therefore support for the treaty from developing countries should not be seen as insignificant.

In addition, it could be argued that consensus itself is neither always good, nor a sign of progress.<sup>101</sup> It can come at the dilution of standards,<sup>102</sup> and the consensus built around the Guiding Principles appears to have come at the cost of a weak effect and lack of State action.<sup>103</sup> Much of the support for the Guiding Principles has been purely rhetorical rather than physical action.<sup>104</sup> Bittle and Snider highlight that it is not uncommon for corporate claims of adherence to voluntary, non-binding principles to be 'long on praise but short on evidence and/or action.'<sup>105</sup> This would not be desirable for the realisation of human rights in the long run.<sup>106</sup> Therefore setting the goal of ensuring that human rights are respected and promoted by business is arguably more important than aspiring for a consensus at the cost of undermining human rights.<sup>107</sup>

Finally in response to the argument regarding the treaty suffering the same fate as the Migrant Workers Convention, Connie highlights that there are still benefits from the treaty existing at all.<sup>108</sup> The process of discussing and reaching an agreement on the numerous topics involved in the Migrant Workers Convention consolidated current norms of international law,<sup>109</sup> and coalesced the various standards that existed on migrant worker's rights into one document.<sup>110</sup> The treaty has been transformed into domestic law in a number of jurisdictions,<sup>111</sup> and even though these may be States with a smaller proportion of migrant workers, it should not be seen as insignificant that the treaty has assisted in protecting the rights of those workers.<sup>112</sup> A treaty on business and human rights could have a similar effect, and while it might not achieve the ultimate goal of

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<sup>99</sup> Ibid.

<sup>100</sup> Ibid.

<sup>101</sup> Deva, above n 11, 239.

<sup>102</sup> Ibid 105.

<sup>103</sup> Bittle and Snider, above n 15, 190.

<sup>104</sup> Ibid 182.

<sup>105</sup> Ibid.

<sup>106</sup> Deva, above n 11, 215.

<sup>107</sup> Ibid 240.

<sup>108</sup> De la Vega, above n 6, 434.

<sup>109</sup> Ibid 453.

<sup>110</sup> Ibid 467.

<sup>111</sup> Ibid 467.

<sup>112</sup> Ibid 467.

creating a uniform legislative framework initially, it is still a worthwhile first step.<sup>113</sup>

### E *A Treaty Will Diminish the Work of Guiding Principles*

There are fears that a treaty will jeopardise the impact of the Guiding Principles and the accomplishments it has made as a result of its adoption by consensus.<sup>114</sup> It is argued that a treaty will distract from the implementation of the Guiding Principles, and will be used by some states as an excuse to not implement them while a treaty is under construction.<sup>115</sup> However this argument is not persuasive. Many commentators note that soft law often works best when it is accompanied by hard law contained in treaties.<sup>116</sup> As Shelton highlights, soft law is rarely used in isolation.<sup>117</sup> Rather it is used most frequently either as a precursor or supplement to hard law instruments.<sup>118</sup> Existence of a treaty in an area often acts to bolster soft law instruments, which take on added significance through being connected to a field with authoritative standing in international law and by helping to elaborate upon aspects of that law.<sup>119</sup> Voluntary and mandatory standards thus do not need to be mutually exclusive as some commentators suggest.<sup>120</sup> It is not necessarily the case, therefore, that the Guiding Principles will be ignored or forgotten, but will most likely work in tandem with a treaty to create and advance a stronger human rights framework.<sup>121</sup> Additionally, just as some argue that a treaty is being used to distract from the implementation of the Guiding Principles, it could be argued that the Guiding Principles are being used as a technique to avoid the introduction of stronger corporate accountability measures at a national or international level.<sup>122</sup> This makes this objection to a treaty even less persuasive.

### F *States Are Already Under A Duty To Protect*

Another key argument made by those opposed to a business and human rights treaty is that a treaty is unnecessary because States are already under a duty to protect against non-State human rights abuse within their jurisdiction.<sup>123</sup> This duty exists under the core

<sup>113</sup> Ibid 467.

<sup>114</sup> International Commission of Jurists, above n 27, 8.

<sup>115</sup> Markiewicz, above n 2, 79.

<sup>116</sup> Boyle, above n 24, 904; Bilchitz, above n 3, 212.

<sup>117</sup> Dinah Shelton, 'Normative Hierarchy in International Law' (2006) 100 *The American Journal of International Law* 291, 320.

<sup>118</sup> Ibid 320.

<sup>119</sup> Bilchitz, above n 3, 224.

<sup>120</sup> Ganesan, above n 46, 98.

<sup>121</sup> Bilchitz, above n 3, 224.

<sup>122</sup> Nolan, above n 25, 464.

<sup>123</sup> *Velásquez Rodríguez v Honduras*, Inter-Am.Ct.H.R. (Ser C) No. 4 (1988), note 13, para 172

UN human rights treaties such as the *International Covenant on Civil and Political Rights*,<sup>124</sup> and the *Convention on the Elimination of All Forms of Discrimination Against Women*,<sup>125</sup> is elaborated by the treaty bodies established under these treaties,<sup>126</sup> and exists under customary international law.<sup>127</sup> To fulfil this duty to protect, States must regulate and adjudicate the acts of business enterprises and thus ensure corporate human rights abuses are protected and remedied.<sup>128</sup> This is argued to therefore prevent the need for a treaty.<sup>129</sup>

However, the existing framework of the duty to protect is inadequate because it does not relate to the imposition of obligations on corporations. The existing international human rights treaties do not create legally binding obligations for corporations in the same way that they do for States.<sup>130</sup> This does not ensure that corporations will be liable for human rights abuses that they inflict.<sup>131</sup> For example, in *Social and Economic Rights Action Centre v Nigeria*,<sup>132</sup> the African Commission on Human and People's Rights held that the State had breached its duty to protect its citizens against violations of their rights by oil companies that operated in the region, but did not focus on the responsibility of the oil companies at all.<sup>133</sup> Bilchitz argues that this is inappropriate given that the oil companies, in acting in a certain way to cause the harm that they did, could be said to bear the primary responsibility for the harms caused.<sup>134</sup> It seems inherently unfair that the agent who directly, and in many cases knowingly, caused the harm, is not capable of being held to account internationally.<sup>135</sup>

Additionally without legal obligations being imposed on corporations as well as States, if the State is not found liable, the victim of a corporate human rights violation

<sup>124</sup> *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) arts 2 & 3.

<sup>125</sup> *Convention on the Elimination of All Forms of Discrimination Against Women* opened for signature 18 December 1979, 1249 UNTS 1 (entered into force 3 September 1981) arts 2(e), 11 & 15.

<sup>126</sup> Committee on Economic, Social and Cultural Rights, *Statement on the importance and Relevance of the Right to Development, adopted on the occasion of the twenty-fifth anniversary of the Declaration on the Right to Development*, 46<sup>th</sup> sess, UN Doc E/C. 12/2011/2 (12 July 2011) para 5.; Human Rights Committee, *General Comment No. 31[80]: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 18<sup>th</sup> sess, UN Doc. CCPR/C/21/Rev. 1/Add. 13, (26 May 2004) para 10.

<sup>127</sup> Human Rights Committee, above n 126, para 8.

<sup>128</sup> Ruggie, *Business and Human Rights: The Evolving International Agenda*, above n 73, 828.

<sup>129</sup> *Ibid.*

<sup>130</sup> Nolan, above n 10, 13.

<sup>131</sup> Bilchitz, above n 3, 208.

<sup>132</sup> African Commission on Human and People's Rights: *Social and Economic Rights Action Centre v Nigeria*, (2001): *Communication 155/96*, 30<sup>th</sup> sess, (27 October 2001).

<sup>133</sup> Bilchitz, above n 3, 208.

<sup>134</sup> *Ibid* 209.

<sup>135</sup> *Ibid.*

will not be able to seek redress in another jurisdiction or before an international mechanism.<sup>136</sup> Furthermore it would be useful to have the State's duties and corporate obligations in relation to business and human rights in one document, rather than relying on the extensive patchwork of laws that currently make up the piecemeal approach to protection from corporate abuse.<sup>137</sup> A treaty would be able to address these issues and ensure that corporations are bound by international human rights law.<sup>138</sup>

### G *The Scope of a Treaty Would Be Too Broad*

Objections have been raised to the development of a business and human rights treaty on the basis that any treaty would be too broad in scope so as to be helpful.<sup>139</sup> Ruggie argues that the area of business and human rights encompasses too wide a diversity of issues, rights and international law for a single detailed treaty to address.<sup>140</sup> He further adds that any attempt to do so would be pitched at such a high level of abstraction that it would be 'devoid of substance, of little practical use to real people in real places.'<sup>141</sup> Furthermore it is argued that the need to satisfy the many competing interests of States in order to develop a treaty that can be agreed upon, would result in a treaty that is narrow in scope and weak in its ability to protect human rights and to hold corporations accountable.<sup>142</sup>

This argument is not persuasive enough to establish that a treaty should not be formulated. Firstly, the same objection could be lodged against the Guiding Principles, which also attempt to cover the whole domain of business and human rights.<sup>143</sup> This would render those arguments for the Guiding Principles over a treaty on this basis as unfounded. Secondly, a treaty would not necessarily need to address every single issue that arises in this complex area, but would be able to create the basic legal structure in terms of which matters, such as the adjudication of disputes, could be resolved.<sup>144</sup> This is the structure through which human rights treaties generally operate – they outline the broad rights and principles which are then developed through general comments, country

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<sup>136</sup> Ibid.

<sup>137</sup> De la Vega, above n 6, 435.

<sup>138</sup> Bilchitz, above n 3, 209.

<sup>139</sup> Ruggie, Quo Vadis? Unsolicited Advice to Business and Human Rights Treaty Sponsors, above n 82.

<sup>140</sup> Ibid; Ruggie, A UN Business and Human Rights Treaty?, above n 2, 3.

<sup>141</sup> John Ruggie, 'Incorporating Human Rights: Lessons Learned and Next Steps,' in Baumann-Pauly, Dorothee and Justine Nolan, *Business and Human Rights: From Principles to Practice* (Taylor and Francis, 2016) 94.

<sup>142</sup> Markiewicz, above n 2, 74.

<sup>143</sup> Bilchitz, above n 3, 222.

<sup>144</sup> Ibid.

reports and other structures that the treaties create.<sup>145</sup> Thus the treaty would have room for the flexibility that is commonly associated with international instruments.<sup>146</sup> This has been demonstrated by the draft zero treaty, which is phrased in broad terms but still contains particular obligations. For example, there is a specific obligation in Article 9.1 that requires State Parties to ensure that businesses undertake due diligence throughout their business and operations.

Additionally, as the International Council on Human Rights Policy notes, the process of developing international human rights standards has in the past, often proceeded from the general to the particular.<sup>147</sup> States have tended to first agree on broad, comprehensive declarations and treaties, such as the *UN Declaration on Human Rights*, which have subsequently inspired more specific standards such as the specific human rights treaties such as *International Covenant on Civil and Political Rights* or the *International Covenant on Economic, Social and Cultural Rights*.<sup>148</sup> It seems reasonable that a comprehensive and broad treaty would then be able to give greater coherence to the creation of more specific treaties in the future due to the development of a solid legal foundation.<sup>149</sup>

#### H *International Law Should Not Apply Directly To Corporations*

Lastly, many argue that the direct enforcement of human rights norms against corporations, rather than States, represents a fundamental theoretical departure from traditional international practice and thus makes a treaty in this area inappropriate.<sup>150</sup> Although this may not be an issue, since the zero draft in its current form does not purport to directly bind corporations, this argument is addressed in light of the concerns that continue over the reach of the treaty. Historically, international law has been perceived as a system governing inter-State relations only,<sup>151</sup> meaning that States are the ones held accountable under international law for their own human rights violations, and for the violations committed by corporations within their borders.<sup>152</sup> This means that

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<sup>145</sup> Ibid.

<sup>146</sup> Deva, above n 11, 116.

<sup>147</sup> International Council on Human Rights Policy, *Beyond Voluntarism: Human Rights and the Developing International Legal Obligations of Companies* (Report, ICHRP, 2002) 156.

<sup>148</sup> Ibid.

<sup>149</sup> Ibid.

<sup>150</sup> Sara McBrearty, 'The Proposed Business and Human Rights Treaty: Four Challenges and an Opportunity,' (2016) 57 *Harvard International Law Journal* 11, 12.

<sup>151</sup> Lee McConnell, 'Assessing the feasibility of a business and human rights treaty' (2017) 66 *The International and Comparative Law Quarterly* 143, 146.

<sup>152</sup> McBrearty, above n 150.

corporations, like private citizens, are accountable to international law only to the extent that it is incorporated into the domestic legal system.<sup>153</sup> The framework of the Guiding Principles adopts this conception of international law.<sup>154</sup> Further, some commentators argue that any framework imposing direct obligations and corresponding accountability mechanisms on corporations will be unsuccessful because of the sheer number of the actors involved.<sup>155</sup> There are also concerns that States may use the treaty to shift the human rights onus on to corporations and away from themselves.<sup>156</sup> Markiewicz fears that if a treaty has the effect of shifting the blame from States to corporations, it will allow States to avoid responsibility to protect human rights.<sup>157</sup>

However these arguments are not persuasive for a number of reasons. Firstly, international law does not contain a conceptual barrier for developing a binding agreement among States that imposes direct obligations on corporations.<sup>158</sup> While it might be unprecedented for non-State actors to play such a central role in the protection and promotion of human rights by having direct responsibilities under international law,<sup>159</sup> it does not mean that it is inappropriate or highly unusual, since they have participated in international law for some time.<sup>160</sup> It is now accepted that Transnational Corporations are ‘subjects’ of international law, acquiring significant rights under various types of bilateral investment treaties,<sup>161</sup> and in the context of arbitration procedures.<sup>162</sup> Obligations have also been placed upon corporations by maritime treaties.<sup>163</sup> Additionally, certain corporate acts are directly prohibited in several civil liability Conventions that deal with environmental pollution.<sup>164</sup> Thus holding Transnational Corporations accountable for

<sup>153</sup> Jochnick and Rabaeus, above n 77, 414.

<sup>154</sup> McBrearty, above n 150.

<sup>155</sup> Human Rights Council, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie: Guiding Principles on Business and Human Rights; Implementing the United Nations “Protect, Respect and Remedy” Framework*, 17<sup>th</sup> sess, UN Doc A/HRC/17/31, (21 March 2011) para 17.

<sup>156</sup> Markiewicz, above n 2, 70.

<sup>157</sup> *Ibid.*

<sup>158</sup> Uribe and Mohamadieh, above n 19.

<sup>159</sup> Seppala, above n 20, 403.

<sup>160</sup> International Council on Human Rights Policy, above n 147, 12.

<sup>161</sup> Ruggie, *Business and Human Rights: The Evolving International Agenda*, above n 73, 824.

<sup>162</sup> *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, opened for signature 10 June 1958, 330 UNTS 3 (entered into force 7 June 1959) art I; International Council on Human Rights Policy, *Beyond Voluntarism: Human Rights and the Developing International Legal Obligations of Companies* (Report, ICHRP, 2002) 12.

<sup>163</sup> *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal*, opened for signature 22 March 1989, 1673 UNTS 57 (entry into force 5 May 1992); International Council on Human Rights Policy, *Beyond Voluntarism: Human Rights and the Developing International Legal Obligations of Companies* (Report, ICHRP, 2002) 12.

<sup>164</sup> Ruggie, *Business and Human Rights: The Evolving International Agenda*, above n 73, 824.



their adverse impact on human rights directly under international law seems consistent with the rights and duties they already have in other areas.<sup>165</sup>

Furthermore, it would be possible for a treaty to clearly delineate corporate and State responsibilities, and corporate duties would be complementary to, not a substitute for, the State's duties to fulfil their human rights obligations.<sup>166</sup> This is consistent with the structure of the Guiding Principles which allow both States and corporations to have duties and responsibilities.<sup>167</sup> States would in addition still be subject to the duty to protect.<sup>168</sup> Deva also argues that in the context of human rights violations, less focus should be placed on who the violator is, as for the people whose human rights have been violated, it makes little difference if the violator is a State or corporation.<sup>169</sup> As highlighted above, the increased economic and social power of Transnational Corporations also makes it appropriate to challenge the traditional notion that only States can be held accountable for violations of human rights at an international level.<sup>170</sup> Finally the argument that there are too many Transnational Corporations to regulate effectively is not convincing either. As Olivier suggests, if this mentality were applied to the application of domestic law, which is addressed to a large range of individuals, then domestic law would also be seen as doomed to fail.<sup>171</sup> Thus the argument that corporations should not be subject to international law is also unsuccessful in establishing a case against a business and human rights treaty.

#### IV THE 'ZERO-DRAFT' TREATY

Since the theoretical case for a treaty on Business and Human Rights is strong, the drafters need to ensure that the text of the finalised document lives up to these expectations. While the draft treaty released in August 2018 is promising, with its requirement that companies undertake human rights due diligence to human rights abuses within their business, and its creation of liability for parent companies with regards to what their subsidiaries and suppliers do, it has a number of shortcomings in its current form. For example, it focuses exclusively on "business activities of a

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<sup>165</sup> Ruggie, A UN Business and Human Rights Treaty, above n 2, 4.

<sup>166</sup> McBrearty, above n 150, 12.

<sup>167</sup> Nolan, above n 10, 14.

<sup>168</sup> Ibid.

<sup>169</sup> Deva, above n 11, 240.

<sup>170</sup> Peter Muchlinski, 'Human Rights and Multinationals: Is there a problem?' (2001) 77 *International Affairs* 31, 31.

<sup>171</sup> De Schutter, above n 3, 58

transnational character,”<sup>172</sup> rather than applying to all businesses, which is a narrower application than the scope of the Guiding Principles. To exclude national companies from the treaty would deny remedies for victims of human rights abuses perpetrated by these entities. The draft treaty also fails to remedy many of the gaps in the Guiding Principles. For example, it fails to prescribe direct obligations for businesses, and does not attempt to define exactly which human rights corporations must respect. Therefore, while the draft treaty represents an important step towards the realisation of a binding treaty on Business and Human Rights, there is still large room for improvement, and it will need to be revised if it is to provide the robust and meaningful protection for victims of corporate human rights abuses that it has the potential to do.

## V CONCLUSION

It has been almost five years since the Rana Plaza factory collapse in Bangladesh killed more than 1,100 factory workers who were supplying garments for global brands.<sup>173</sup> While justice may have been served against those operating the factory, the global corporations supporting the extremely poor working conditions have escaped accountability.<sup>174</sup> The need to regulate the supply chains of these companies is becoming increasingly urgent in order to protect the human rights of such workers, and to ensure that people do not continue to die for reasons like fashion. The treaty process represents an opportunity to achieve this and to better safeguard communities and individuals from human rights abuses involving corporations. Voluntary initiatives such as the Guiding Principles have proven to lack the power to influence change in domestic legislation. Corporate human rights abuses continue to occur, and the current framework has serious gaps in regards to the enforceability and accountability of corporations for these abuses. The creation of binding international law in the field of business and human rights is necessary in order to ensure the comprehensive enforcement of the rights in this area. The creation of a zero draft is a promising step. However, it currently falls short in a number of areas, and will need to be significantly revised if it is to make the meaningful contribution that a treaty on Business and Human Rights has the potential to have.

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<sup>172</sup> Working Group on Business and Human Rights, *Legally Binding Instrument To Regulate, In International Human Rights Law, The Activities Of Transnational Corporations And Other Business Enterprises*, Zero Draft 16.07.18, Art. 1(a).

<sup>173</sup> Rina Chandran, ‘Three Years After Rana Plaza Disaster: Has Anything Changed?’ *Reuters* (online) 22 April 2016 <<https://www.reuters.com/article/us-bangladesh-garments-lessons-analysis/three-years-after-rana-plaza-disaster-has-anything-changed-idUSKCN0XJ02G>>.

<sup>174</sup> *Ibid.*