

# THE NECESSITY FOR A BUSINESS AND HUMAN RIGHTS TREATY

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## I. Introduction

The path to advances in the realm of fundamental rights is never an easy one. From the abolition of slavery to the demise of apartheid, the obstacles initially seem overwhelming. Yet, those who advocated for these changes recognized the deep flaws in the status quo and doggedly pursued principled change which eventually led to the desired results. As Abraham Lincoln famously said, ‘determine that the thing can and shall be done, and then we shall find the way’.<sup>1</sup>

These reflections apply importantly to the current debate as to whether states should pursue a treaty that addresses the obligations business has with respect to fundamental rights. This issue was firmly placed on the agenda of international law-making when, on 25 June 2014, the Human Rights Council passed a resolution that establishes ‘an intergovernmental working group on a legally binding instrument on transnational corporations and other business enterprises with respect to human rights’.<sup>2</sup> The resolution is clearly designed to create a process leading to the eventual adoption of a treaty in this area. It was sponsored by Ecuador and South Africa – both of whom have historical experiences with business violating rights within their states – and garnered 20 votes in favour, 13 abstentions, and 14 votes against it.<sup>3</sup> The voting patterns reflect a split between developed countries and developing countries as

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<sup>1</sup> A. Lincoln, ‘Speech in the House of Representatives’ (20 June 1848) at para 153, available at [http://en.wikisource.org/wiki/Life\\_and\\_Works\\_of\\_Abraham\\_Lincoln/Volume\\_3/In\\_Favor\\_of\\_Internal\\_Improvements#153](http://en.wikisource.org/wiki/Life_and_Works_of_Abraham_Lincoln/Volume_3/In_Favor_of_Internal_Improvements#153).

<sup>2</sup> Human Rights Council, ‘Elaboration of an internationally legally binding instrument on transnational corporations and other business enterprises with respect to human rights’ A/HRC/26/L.22/Rev.1 (25 June 2014).

<sup>3</sup> In the case of Ecuador, this relates to a long-standing dispute with Chevron/Texaco around serious environmental harms caused by Texaco: see Tineke Lambooy, Aikaterini Argyrou and Mary Varner ‘An analysis and practical application of the Guiding Principles on providing remedies with special reference to case studies related to oil companies’ in Surya Deva and David Bilchitz (eds) *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge University Press, 2013) 329, at 336-341. In South Africa, the issue has arisen around corporations that were implicated in propping up the system of apartheid: see, for instance, the litigation in *In re: South African Apartheid Litigation*, U.S. District Court, Southern District of New York, No. 02-md-01499.

well as between more established economic powers such as the United States and European Union (which voted against) and emerging economic powers such as China and India (which voted in favour).

In the face of this global split, John Ruggie – the former Special Representative of the Secretary General (SRSG) on the issue of human rights and transnational corporations and other business enterprises – has been perhaps the most prominent public voice opposing a comprehensive treaty on business and human rights treaty.<sup>4</sup> Much of the debate around the treaty has focused around engaging with and responding to Ruggie’s arguments.<sup>5</sup> Yet, whilst critical engagement with this proposed international instrument is no doubt important, the current discussion in a sense commences from the wrong starting point. The first step should be to consider the reasons for a treaty on business and human rights, not the difficulties associated with achieving it. Identifying the purpose and goal of such a treaty is crucial in outlining a vision of what it should seek to achieve and in determining the very content of any such instrument.<sup>6</sup> In approaching this task, it is necessary to investigate some of the reasons why the most recent development in this field at the United Nations level - the Guiding Principles on Business and Human Rights – does not adequately address the problems of international law that are experienced in this area. Understanding the lacunae that exist can help identify the key role that a treaty can play. With such a clear vision in mind, it then becomes possible to address the difficulties involved in implementing it and the contours of its content.

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<sup>4</sup> He already made the choice not to follow this route many years back when he outlined his ‘Protect, Respect and Remedy’ Framework on Business and Human Rights: see, for instance, his reasoning in John Ruggie, *Business and Human Rights – Treaty Road Not Travelled* (May 1, 2008), available at <http://business-humanrights.org/en/pdf-treaty-road-not-travelled>. \_With the advent of the current debate after his mandate ended, he has taken a number of public positions which question the wisdom of pursuing a treaty: see, for instance, John Ruggie, *A UN Business and Human Rights Treaty?*, available at <http://business-humanrights.org/sites/default/files/media/documents/ruggie-on-un-business-human-rights-treaty-jan-2014.pdf>; J. Ruggie, ‘Quo Vadis? Unsolicited Advice to Business and Human Rights Treaty Sponsors’ (9 September 2014), available at <http://www.ihrb.org/commentary/quo-vadis-unsolicited-advice-business.html>; and J. Ruggie ‘Life in the Global Public Domain: Response to Commentaries on the UN Guiding Principles and the Proposed Treaty on Business and Human Rights’, available at <http://jamesgstewart.com/life-in-the-global-public-domain-response-to-commentaries/>

<sup>5</sup> See, for instance, the symposium on ‘Business and Human Rights – Next steps’ at <http://jamesgstewart.com/list-of-previous-symposia/>.

<sup>6</sup> The range of options for such an instrument is canvassed in Douglass Cassel and Anita Ramasastry ‘White Paper: Options for a Treaty on Business and Human Rights’ (2015) 6 *Notre Dame Journal of International and Comparative Law* 1, 12-13.

In this paper, I will outline four arguments for why a treaty on business and human rights is necessary. The arguments are all rooted in a common normative understanding of fundamental rights and seek to ensure that they are accorded the importance they deserve in this increasingly globalized world. Each argument on its own has strength and remains independent of the others, and can be regarded as providing a particular strand of argumentation that together build up a powerful affirmative case for a treaty. These arguments relate to a range of gaps that exist at international law surrounding the relationship between business and fundamental rights that have often been recognised: the article seeks to draw out the manner in which these lacunae provide an important case for a binding treaty in this area. The emphasis throughout is also upon why a general binding international legal instrument is particularly important, as opposed to softer forms of regulation.<sup>7</sup> Whilst the paper does not pretend to exhaust the arguments that can be made for a treaty, it does seek to systematize and extend some of the rather unstructured discussion surrounding such an instrument into a core affirmative set of justifications that can be the basis for future debate and development as the negotiations unfold. After having outlined the case for the treaty, I turn to several objections raised against it, many of which are those made by Ruggie himself. I attempt to show how the arguments presented in favour of the treaty contain the resources necessary to respond to these objections and to reject an alternative, more restrictive proposal for a treaty that only addresses ‘gross’ human rights violations.

## II. Arguments in Favour of a Treaty

### A. The Argument from Bindingness

The starting point for any discussion surrounding a treaty in this area must be a concern for the protection of fundamental rights. This notion involves an important set of moral entitlements which have legal force<sup>8</sup> and have become enshrined in the basic legal

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<sup>7</sup> A treaty between states is the main method of creating law at the international level: I thus focus on this option rather than suggesting a change in customary international law where the process of doing so is much more nebulous and uncertain.

<sup>8</sup> For an exploration of the relationship between morality and law in the idea of fundamental rights, see Amartya Sen ‘Elements of a Theory of Human Rights (2004) 32 *Philosophy And Public Affairs* 315, 320.

architecture of international law. The International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) both contain the central idea that the rights contained therein ‘derive from the inherent dignity of the human person’.<sup>9</sup> This essentially moral idea has been given a legal imprimatur in the covenants and has a number of key implications. The fact that individuals have an intrinsic worth leads to the idea that they must be treated in accordance with that worth which in turn requires that they be afforded protection for a range of fundamental interests – protected by specific legal rights - that are broadly captured by the notions of freedom, well-being, and political participation.<sup>10</sup> Moreover, further important principles are derived from this foundation. First, if rights flow from the inherent dignity of individuals, then they must apply equally to all individuals and are thus universal in nature.<sup>11</sup> Secondly, the derivation of fundamental rights from intrinsic dignity also means that they cannot be ‘renounced, lost or forfeited, human rights are inalienable’.<sup>12,13</sup>

Fundamental rights importantly are articulated from the perspective of the beneficiaries of those rights.<sup>14</sup> These rights are not specific about the agents that are required to realise them: what they entail are obligations on others both to desist from behaviour that would imperil these entitlements and to assist in the realisation thereof.<sup>15</sup> The early historical contexts in which fundamental rights claims arose – such as the French revolution where the oppressive exercise of state power needed to be addressed – meant that the focus was upon the obligations of the state in relation to the civil and political rights of citizens. However, those early origins do not mean that states are the only agents upon whom obligations fall to realise these entitlements. Indeed, the fact that rights are concerned with protecting the fundamental interests of individuals implies logically that they must have binding

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<sup>9</sup> See, for instance, the Preamble to the International Covenant on Civil and Political Rights (1966) 999 UNTS 171 and 1057 UNTS 407 available at <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>.

<sup>10</sup> See David Bilchitz, *Poverty and Fundamental Rights* (Oxford: Oxford University Press, 2007), 47-74.

<sup>11</sup> Jack Donnelly, *International Human Rights*, 4<sup>th</sup> edn. (Westview Press, 2007), 18 and Klaus Dicke, ‘The Founding Function of Human Dignity in the Universal Declaration of Human Rights’ in David Kretzmer and Eckart Klein (eds.), *The Concept of Human Dignity in Human Rights Discourse* (Kluwer Law International, 2002) 118.

<sup>12</sup> Donnelly, *ibid*, 18.

<sup>13</sup> See further *Velásquez Rodríguez v Honduras*, Inter-Am.Ct.H.R. (Ser C) No. 4 (1988) para. 144.

<sup>14</sup> See Bilchitz, note 7, 74 in response to an objection by Onora O’Neill, *Towards Justice and Virtue* (Cambridge: Cambridge University Press, 1996), 134.

<sup>15</sup> Andrew Kuper, ‘Introduction: The Responsibilities Approach to Human Rights’ in Andrew Kuper (ed.), *Global Responsibilities. Who Must Deliver on Human Rights?* (New York: Routledge, 2005), at x.

consequences for all agents who have the capacity to impact upon them.<sup>16</sup> The exact nature and distribution of these obligations amongst agents may of course vary: nevertheless, a necessary corollary of the institutionalisation of fundamental rights in international law was that multiple agents – including businesses – would be bound by their requirements. The first argument for a treaty is therefore that such an instrument would provide a clear recognition and articulation of the important normative position that fundamental rights under international law impose legally binding obligations upon businesses. The increased capacity of businesses in recent years to impact upon fundamental rights provides added impetus for this development.

Yet, it could be objected, why is it in fact necessary to negotiate a binding instrument explicitly to draw out logical implications that already flow from the recognition of fundamental rights in international law? The problem lies in the fact that, strangely, the recognition of the logical corollary of recognizing fundamental rights has been controversial in the international sphere since the attempt to draw up a code of conduct outlining the obligation of multinationals in relation to fundamental rights in the 1970s.<sup>17</sup> When that initiative failed, the focus was placed on voluntary mechanisms for ensuring businesses recognized that they have some responsibility for fundamental rights: these included codes of conduct of individual companies, and the United Nations Global Compact.<sup>18</sup> Dissatisfaction with a purely voluntary approach led the Sub-Commission on Human Rights to develop the Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises which purported to recognize certain legally binding obligations upon corporations for the realization of fundamental rights that ‘reflected’ existing international law.<sup>19</sup> The Draft Norms were, however, not adopted by the Commission on Human Rights

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<sup>16</sup> ‘If human rights are aimed at the protection of human dignity, the law needs to respond to abuses that do not implicate the state directly.’ Steven R Ratner, ‘Corporations and Human Rights: A Theory of Legal Responsibility’ (2001) 111 *Yale Law Journal* 443, 472; see also Florian Wettstein *Multi-National Corporations and Global Justice: Human Rights Obligations of a Quasi-Governmental Organisation* (Stanford, Stanford University Press, 2009) 285 and David Bilchitz ‘Corporations and the Limits of State-based Models for Protecting Human Rights in International Law’ (2016) *Indiana Journal of Global Studies* (forthcoming).

<sup>17</sup> See Khalil Hamdani and Loraine Ruffing *United Nations Centre on Transnational Corporations: Corporate Conduct and the Public Interest* (London: Routledge, 2015)

<sup>18</sup> For an overview of problems with the voluntary approaches, see Surya Deva, *Regulating Corporate Human Rights Violations: Humanizing Business* (Oxford: Routledge, 2012) 74-100.

<sup>19</sup> See David Weissbrodt and Muria Kruger ‘Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights’, (2003) 97 *American Journal of International Law* 901, at 915.

given a large division between developed and developing countries and, in their wake, the mandate of the SRSG was set up.<sup>20</sup>

One of the SRSG's first acts was to distance himself from the Norms and to commit one of the central flaws in his entire work, namely, to assert that international human rights law did not directly bind corporations legally (other than in relation to international crimes).<sup>21</sup> Corporations, the SRSG contended, should rather take account of fundamental rights as they represented the social expectations of communities without which such bodies would lack a social license to operate.<sup>22</sup> The mandate thus took the retrogressive step of declaring the edifice of legally binding human rights in international law to be mere moral claims against corporations which could only ground social (rather than legal) censure.

The SRSG's approach in this regard is at odds with what we saw were the necessary logical implications that flow from the recognition of fundamental rights in international law.<sup>23</sup> His mistaken assertions (together with those of some influential scholars)<sup>24</sup> have led to a situation in which confusion reigns supreme as to the exact nature and status of corporate obligations in this regard. These circumstances demonstrate the need for an international treaty expressly to recognize and clarify that businesses have legal obligations flowing from international human rights treaties. No other vehicle exists which would suffice to establish this principle

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<sup>20</sup> For an overview of these developments, see David Bilchitz and Surya Deva, 'The Human Rights Obligations of Business: A Critical Framework for the Future' in Deva and Bilchitz, note 3, 1, 5-10.

<sup>21</sup> Commission on Human Rights 'Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises', E/CN.4/2006/97 (22 February 2006) (SRSG '2006 Interim Report') paras 64-5. For a more detailed critique from which I draw some of the argument in this section, see David Bilchitz, 'A Chasm Between "Is" and "Ought"? A Critique of the Normative Foundations of the SRSG's Framework and the Guiding Principles' in Deva and Bilchitz, note 3, 107-137.

<sup>22</sup> Human Rights Council, 'Protect, Respect and Remedy: A Framework for Business and Human Rights', A/HRC/8/5 (7 April 2008), at para 54 (2008 Framework).

<sup>23</sup> Since these implications necessarily follow from the law that already exists, they have legal rather than simply moral force. The argument I make is logical: however, it has been bolstered by a number of other arguments concerning why businesses already have obligations under international law rooted in what is necessary to render human rights effective, and the fact that businesses already have obligations in relation to a number of soft and hard law instruments: see Andrew Clapham *Human Rights Obligations of Non-State Actors* (2006) 80 and 195-270.

<sup>24</sup> SRSG, 2006 Interim Report, note 21, para 60. See, for instance, also Antonio Cassese *International Law in a Divided World* (Oxford: Clarendon Press, 1986), 103. Whilst Ramasastry and Cassel, note 6, 12-13 recognise the human rights project has never been confined to states, they conclude that corporations are generally only bound indirectly through the state's duty to protect.

with the clarity and authority an express recognition thereof would have in an international treaty.<sup>25</sup>

It may, however, be responded that there is no need for a treaty at international law to bind corporations as states currently are already under an obligation to enact a regulatory framework which establishes obligations of third parties – including businesses – in relation to fundamental rights. These state responsibilities are part of its clear ‘duty to protect’ that is well-established in international law.<sup>26</sup> Consider, for instance, the right to fair wages in the ICESCR (article 7(a)(i)): it is hard to provide a viable interpretation of this right as being applicable only to state employees: the right was clearly meant to apply to all workers irrespective of their employer. Yet, it could be argued, that, instead of recognizing direct obligations upon employers at international law, the right is meant simply to place an obligation upon the state to establish a legal framework that guarantees fair remuneration for all employees and enforcement procedures to ensure this is complied with.

This argument is flawed both theoretically and for the problematic practical consequences that it gives rise to. First, at a conceptual level, it is important to recognize that if states are required by international law to ensure that third parties (including corporations) comply with binding human rights requirements, then this entails that the third parties are themselves obligated to comply with such requirements. Indeed, if the third parties were not bound by international law to comply with such requirements, then there would be no reason for the state to ensure that they do so. The state can only be required to enforce an obligation that is already recognized – expressly or implicitly – by the international treaties themselves.<sup>27</sup> The logic of the state ‘duty to protect’ at international law thus necessarily entails the notion that non-state actors, including corporations, have binding legal obligations with respect to the human rights contained in these treaties.<sup>28</sup> Recognising corporate obligations in relation to fundamental rights thus helps clear up confusion and align existing law with the correct normative position. That, in turn, has the benefit of coherence and, indeed, could have

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<sup>25</sup> Alan E Boyle ‘Some Reflections on the Relationship of Treaties and Soft Law’ (1999) 48 *International and Comparative Law Quarterly* 901 at 903-4 recognises that a treaty generally demonstrates a ‘greater sense of commitment than a soft law instrument’ and is particularly appropriate for the elaboration of human rights law.

<sup>26</sup> *Velásquez Rodríguez v Honduras*, note 13, para 172.

<sup>27</sup> Wettstein, note 16, 285 writes in a similar vein: ‘[i]f corporations did not have prior moral obligations to individuals, the state’s derivative responsibility to hold them accountable would be empty and meaningless’.

<sup>28</sup> I draw this argument from Bilchitz, note 21, 111-114 and have elaborated on some the assumptions contained in the state duty to protect in Bilchitz, note 14.

significant expressive value<sup>29</sup> in preventing businesses from claiming any impunity under international law.

Theoretical purity aside, there are significant practical reasons why it is particularly important for binding legal obligations to be recognized under international law. Consider the case of *Socio-Economic Rights Action Centre v Nigeria*.<sup>30</sup> A complaint was brought to the African Commission on Human and People's Rights concerning the severe environmental degradation caused by irresponsible practices of oil companies in Ogoniland, Nigeria. The Commission found that the Nigerian state had a duty to protect its citizens against violations of their rights by private parties. In this case, 'the Nigerian government has given the green light to private actors, and the oil companies in particular, to devastatingly affect the well-being of the Ogonis'.<sup>31</sup>

There is no doubt that the government of Nigeria bore a strong responsibility for the situation that unfolded in Ogoniland. Yet, the fact that the Commission focused its attention only on the actions of the government is puzzling: the oil companies could arguably have been said to have primary responsibility for the harms caused. The failure to recognize that businesses themselves are bound by international and regional human rights instruments leads to this lacuna. It seems fundamentally unfair that the primary agent which is responsible for a harm is not capable of being held to account: only a treaty has the authority to address this situation that arises within international fora by recognizing expressly the fact that corporations are bound by international law in this regard.

That is also particularly important when considering the significant connection between the recognition of binding obligations and the right to have access to a remedy.<sup>32</sup> Without an understanding of the legal obligations corporations bear with respect to fundamental rights, it will not be possible for victims of rights violations to claim access to a legal remedy against such a private corporation. This is perhaps one of the strange features of the Guiding Principles on Business and Human Rights: whilst recognizing in the third central pillar that victims of rights violations should have access to a *legal* remedy, they do not expressly recognize binding *legal* obligations of corporations for violations of fundamental rights in the

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<sup>29</sup> See Cass Sunstein, 'On the Expressive Function of Law' (1996) 144 *University of Pennsylvania Law Review* 2021, 2021ff.

<sup>30</sup> Communication 155/96, African Commission on Human and Peoples' Rights (2001) AHRLR 60.

<sup>31</sup> *Ibid*, para. 58.

<sup>32</sup> I am indebted to Meghan Finn for highlighting this point to me.



second pillar. Access to a remedy is itself a fundamental right in international law<sup>33</sup> but how can a remedy be provided without a recognition of a prior legal obligation? The role of a treaty in expressly recognizing that businesses have legally binding human rights obligations thus becomes the crucial precondition for providing legal remedies to individuals against such entities.

These arguments become particularly significant in contexts where the state cannot be held to account. For instance, in cases where the state cannot be shown to be culpable or complicit in the harm caused, there will be no-one who will be legally responsible despite the fact that a violation of rights has occurred. The state 'duty to protect' is not an absolute obligation and is formulated in such a way so as to require it to exercise reasonable due diligence to ensure that it establishes the relevant legal frameworks and mechanisms to prevent third parties from harming fundamental rights.<sup>34</sup> It is possible, for instance, that a corporation will violate a right in a manner that could not previously have been reasonably foreseen and, thus, the state will not meet the requirements for liability. Without a recognition of direct obligations upon corporations, there will be no possibility of corporate liability in such a scenario and no access to a remedy for the victims of those violations.

As will be elaborated upon further in the fourth argument below, there are also circumstances where it is not possible to pursue remedies against a corporation within a particular state due to the breakdown of governance and a weak legal system. Some states also fail to comply with their 'duty to protect' obligations: the possibility of achieving reparations for this failure where rights are violated remains remote as regional and international mechanisms often lack the ability to provide such concrete relief. In the *SERAC* case, for instance, despite strong findings against Nigeria, the African Commission could not directly provide compensation to the victims and was reliant upon the co-operation of a recalcitrant state to comply with its decision. In such circumstances, there are very few options to acquire relief within the state or against it. There will also be no possibility of holding corporations to account in another jurisdiction or before an international mechanism without a recognition that there are legal obligations that they have violated. Only an international treaty has the authoritative nature to establish that corporations are bound by international human rights irrespective of whether states comply with their 'duty to protect' obligations.

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<sup>33</sup> Article 2 of the International Covenant on Civil and Political Rights, *supra* note 6.

<sup>34</sup> *Velasquez Rodriguez v Honduras* note 13 paras 172 and 174.

## B. The Argument from Norm Development

Even if international law clearly recognizes that corporations have binding human rights obligations, many questions remain concerning the exact nature and extent of these obligations. This problem flows from the fact that the primary focus of fundamental rights is upon their realization: who exactly must be involved with this project and what they are required to do requires further specification. In determining the exact obligations of business in relation to fundamental rights, there is a need for much development both at the international and national levels.

The Guiding Principles on Business and Human Rights do not adequately address this difficult question. Corporations generally have a responsibility to respect human rights – ‘[t]his means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved’.<sup>35</sup> The position has an immediate intuitive appeal: corporations must avoid doing harm. It would seem to proscribe such egregious cases as the Bhopal disaster where 15000 people died as a result of a gas leak in a plant run by the Union Carbide Corporation with many others being injured.<sup>36</sup> However, as is recognized today in domestic, regional and international fora, the mere infringement of a fundamental right is not sufficient to determine that an actionable wrong has been done.<sup>37</sup> A further step is necessary, namely, determining the justification for the infringement and whether the benefits achieved can be said to be proportional to the harms caused to the fundamental right in question.<sup>38</sup> Moreover, in relation to corporations, there is also a prior question, namely, whether the infringement of rights flows from an obligation that falls upon or applies to a corporation.<sup>39</sup> Both questions are elided by a simple focus on a ‘responsibility to respect fundamental rights’.

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<sup>35</sup> Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework (A/HRC/17/31), principle 11, available, with commentary, at [http://www.ohchr.org/documents/publications/GuidingprinciplesBusinesshr\\_en.pdf](http://www.ohchr.org/documents/publications/GuidingprinciplesBusinesshr_en.pdf).

<sup>36</sup> See Deva, note 18, 24-45.

<sup>37</sup> See Kai Moller *The Global Model of Constitutional Rights* (Oxford: Oxford University Press, 2012) 2-17.

<sup>38</sup> See, for example, the Canadian position in *R. v. Oakes* [1986] 1 S.C.R. 103 and, the South African position, *S v Makwanyane and Another* [1995] ZACC 3; 1995 (3) SA 391, paras 100 ff.

<sup>39</sup> See Ratner, note 16, who provides a sophisticated approach to this question.

Consider a company policy that provides that it has a right to gain access to all information that flows through the laptops it provides to employees or its computer network. The company reasons that the laptops and network are its property and, hence, it may behave in this manner. Employees are unhappy with the policy claiming that it violates their right to privacy. Two sets of issues arise in this context. The first concerns whether corporations are bound by the right to privacy and, if so, what their obligations are in this regard.<sup>40</sup> It is not clear whether a company has any obligation to avoid such a policy until it is determined that such a policy restricts the right in a manner that infringes upon the company's obligations.

Even if it is determined that there is a prima facie violation of the right to privacy of employees in this instance, that does not end the matter. The question then arises as to whether there is any legitimate justification for the infringement. A company, for instance, may be concerned that their networks will be used for illegal purposes such as downloading child pornography. It may also have a legitimate expectation that it may monitor the work performed by employees. If there is a justifiable reason for the infringement, it would then have to be determined whether the benefits of the infringing measure are proportional to the harms caused to fundamental rights.<sup>41</sup> That would involve, for instance, evaluating the necessity of the particular intervention and, thus, whether the purpose could be achieved in a way that would have a lesser impact on the privacy rights of employees (by, for instance, requiring prior notification of surveillance and taking clear measures to limit company access to work-related folders of employees).<sup>42</sup>

This example illustrates that the application of existing rights to companies is a complex matter and will require the development of a jurisprudence which considers a number of issues: (i) the application of particular rights to corporations; (ii) the interpretation and meaning of the obligations imposed by particular rights upon corporations; and (iii) the determination of when corporations may justifiably limit fundamental rights.

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<sup>40</sup> See, for instance, *Khumalo and Others v Holomisa* [2002] ZACC 12; 2002 (5) SA 401.

<sup>41</sup> See, for instance, the approach in *R. v. Big M Drug Mart Ltd* [1985] 1 S.C.R.295; and *De Lange v Smuts NO and Others* [1998] ZACC 6; 1998 (3) SA 785, paras 86-88.

<sup>42</sup> For an examination of the necessity enquiry in proportionality, see David Bilchitz 'Exploring the Necessity Enquiry in the Limitation of Fundamental Rights', in L Lazarus, C McCrudden and N Bowles (eds.) *Reasoning Rights* (Oxford: Hart, 2014) 41-62. The obligations of corporations in the context of privacy rights are considered in David Bilchitz 'Privacy, Surveillance and the Duties of Corporations' (2016) *Journal of South African Law* 45.

The example though has focused upon a situation where corporations may have negative obligation not to harm fundamental rights. The UN Guiding Principles focus, as we saw, on such negative obligations with a very limited role for positive obligations.<sup>43</sup> This approach is based upon the idea that the corporate role in relation to fundamental rights is itself a very limited one and needs to be distinguished clearly from that of the state.<sup>44</sup> Yet, that view has been strongly contested by several prominent scholars in the fields of philosophy, business ethics and law, who contend that there are good reasons why corporations should indeed be recognized as having more positive obligations in relation to fundamental rights.<sup>45</sup> These arguments often involve a more expansive conception of the nature and function of corporations which, it is claimed should be seen to be ‘quasi-government’ institutions<sup>46</sup> or, at least, have an important public dimension to them.<sup>47</sup> The power and capacity of corporations is also cited as a strong reason for recognizing their obligations to assist in the realization of fundamental rights.<sup>48</sup> This issue of the contributions corporations can make positively to realizing rights is particularly important for developing countries and it is significant that the recent Human Rights Council resolution, in commencing negotiations around a treaty, specifically references the right to development.<sup>49</sup> Even on this more expansive view of corporate obligations, however, it is unlikely that the positive obligations of business will be equivalent to that of the state and care needs to be taken not to elide the distinctive nature of business entities for which profit must remain a significant motivation.<sup>50</sup> Thus, whilst corporations clearly can be powerful change agents in the quest for improving the global

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<sup>43</sup> See, for example, instances in the 2008 Framework, note 22 in relation to anti-discrimination, para 55 and, in relation to due diligence, para 56; and the 2009 Report of the SRSG A/HRC/11/13, at paras 61-65

<sup>44</sup> SRSG ‘2006 Interim Report’, note 21, para 66 and Ratner, note 16, 518.

<sup>45</sup> See, for instance, Nien-he Hsieh, ‘The Obligations of Transnational Corporations: Rawlsian Justice and the Duty of Assistance’ (2004) *Business Ethics Quarterly* 14; Florian Wettstein, note 17, 311-333; Stepan Wood ‘The Case for Leverage-based Corporate Human Rights Responsibility’ (2012) *Business Ethics Quarterly* 63, 76-92; Michael Santoro ‘Post-Westphalia and its Discontents: Business, Globalisation and Human Rights in Political and Moral Perspective’ (2010) *Business Ethics Quarterly* 281, 291-2; Iris Marion Young ‘Responsibility and Global Justice: a Social Connection Model’ (2006) *Social Philosophy and Policy* 127-130; David Bilchitz, ‘Do Corporations Have Positive Fundamental Rights Obligations?’ (2010) *Theoria* 11-26; and Bilchitz, note 21, 126-136.

<sup>46</sup> Wettstein, note 16, 324-325.

<sup>47</sup> Bilchitz, note 46, 21-22.

<sup>48</sup> Wettstein, note 16, 324-25; Young, note 46, 127.

<sup>49</sup> Human Rights Council, note 2.

<sup>50</sup> See Bilchitz, note 46, 24-26.

realization of fundamental rights, significant questions arise in determining the nature and scope of their legal obligations in this regard.

The above discussion has underlined the need for greater clarity in relation to both the negative and positive obligations that corporations have in relation to fundamental rights. The answer to this problem is to develop a mechanism that can elaborate upon the international standards surrounding business and human rights. An international legally binding instrument would be the best vehicle through which to do so: it could set up a mechanism which would be able to provide guidance across the world as to the implications of fundamental rights for corporations. That would help determine a common, consistent and objective base standard that could be applied to the entire global business environment today. If we look to other international human rights treaties, we see that they establish committees which perform similar tasks. The International Covenant on Civil and Political Rights, for instance, establishes a Human Rights Committee which is required, amongst other tasks, to issue 'such general comments as it may consider appropriate'.<sup>51</sup> These various bodies have employed these General Comments to provide clarification, development and persuasive interpretations of the obligations imposed in the covenants. There is thus a need for a similar mechanism for the release of authoritative guidance on the application of international human rights to companies.

The strong normative force of a treaty on business and human rights and the institutions it creates render it preferable for this purpose than alternatives that can be conceived. Voluntary and soft law instruments can of course play an important role in outlining perspectives on what the implications of human rights are for corporations. Yet, purely voluntary instruments will be dependent upon corporations accepting any standards that emerge; they will also depend on corporate goodwill to give effect to them. Such voluntary approaches have been widely recognized as being flawed in practice.<sup>52</sup> Inevitably, there is also an inherent tension which renders them inadequate: they rely on an ability of corporations to think in a manner that considers their wider social impact where the incentives for their decision-makers are often focused on shorter-term profit maximisation.

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<sup>52</sup> See Deva, note 18.

Multi-stakeholder initiatives have also emerged as an attempt at establishing non-binding, voluntary rules to address governance gaps.<sup>53</sup> They no doubt can contribute towards the elaboration of norms; yet, there are several critiques which have emerged about the legitimacy of the principles that emerge and the capacity of the mechanisms formed for monitoring and implementation.<sup>54</sup> Such initiatives, in general, do not comprehensively cover the human rights field and focus on particular issues and sectors; moreover, even if they establish certain standards, it remains unclear on what basis they could claim any authority over ‘rogue’ corporations, for instance, which simply choose to ignore them. They also fundamentally involve the problem that the very targets of regulation (corporations) are involved in developing the regulations themselves.<sup>55</sup> A mechanism for standard-setting could also potentially be developed in terms of a soft-law instrument such as the Guiding Principles which currently lacks any such institution. The problem would remain, however, that any elaboration on norms in terms of such a weak instrument would lack the authority and persuasiveness that a treaty mechanism would possess.<sup>56</sup> Soft law also often works best when it is conjoined with the hard law contained in treaties.<sup>57</sup> Moreover, the normative importance, universality and binding force of fundamental rights (as explicated in the first argument above) renders it appropriate that their content be explicated by the most authoritative mechanism possible under international law which could only be established by a treaty.<sup>58</sup>

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<sup>53</sup> Multi-stakeholder initiatives are defined as ‘private governance mechanisms involving corporations, civil society organisations, and sometimes other actors, such as governments, academia or unions, to cope with social and environmental challenges across industries and on a global scale’: see Sebastien Mena and Guido Palazzo ‘Input and Output Legitimacy of Multi-Stakeholder Initiatives’ (2012) 22 *Business Ethics Quarterly* 527, at 528.

<sup>54</sup> Ibid. and also see Luc Fransen and Ans Kolk ‘Global Rule-setting for Business: a Critical Analysis of Multi-Stakeholder Standards’ (2007) 14 *Organisation* 667.

<sup>55</sup> That can of course be a strength too as they buy into the process; yet, there is a fundamental problem with having the industry, at least partially, set the rules for themselves.

<sup>56</sup> Peter Muchlinski ‘Beyond the Guiding Principles: Examining New Calls for a Legally Binding Instrument on Business and Human Rights’ available at <http://www.ihrb.org/commentary/guest/beyond-the-guiding-principles.html> clearly states that ‘an international instrument that sets down corporate responsibilities and liabilities in a more authoritative manner would be a genuine advance’.

<sup>57</sup> See Boyle, note 25, 904-906.

<sup>58</sup> I recognize that the status of general comments is generally not taken to be as binding as the particular contents of a treaty: at the same time, they have a status and persuasiveness that is affected by the origins of the committee that issues them in a binding treaty. This is what I mean by ‘strongly authoritative’ (which is not equivalent to binding law): see, for example, International Law Association ‘Final Report on the Impact of Findings of the United Nations Human Rights Treaty Bodies’ (2004) at 5.

Such a strongly authoritative international mechanism for norm development would not only be of importance to the development of international human rights law but could also help influence the development of these norms at a national level too.<sup>59</sup> Indeed, many constitutions allow for the direct application of international law<sup>60</sup> whilst others require that it be used as an interpretive aid in national systems.<sup>61</sup> As such, the clarification and progressive development of international law in this area through a strongly authoritative treaty mechanism could help develop the law in domestic jurisdictions and, at least, be considered persuasive authority at a national level.

### C. The Argument from Competing Obligations

The need for a recognition of binding obligations on corporations in respect of human rights and an understanding of the nature and extent of these obligations becomes all the more important when considering the rapid pace at which international law has developed in the twentieth century in relation to commerce and trade across sovereign borders. International trade regimes – most notably the treaties relating to the World Trade Organisation – have developed to govern free trade across the world. States have entered into bilateral and multilateral investment treaties ostensibly to promote development in their countries but which confer strong rights upon corporate investors. Importantly, all these changes in relation to international commerce occur through binding legal frameworks and provide adjudicatory mechanisms to address disputes.

These fields of law, however, have the potential to raise concerns relating to fundamental rights. In relation to WTO law, a major dispute arose concerning the patent protections provided to pharmaceutical companies. These patents essentially allow for the formation of monopolies which enable corporations to charge exorbitant prices for life-saving medication:

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<sup>59</sup> Developments at national and regional levels could of course also influence the standards expressed by the international mechanism so there would be a virtuous two-way effect on norm development in this field.

<sup>60</sup> See, for example, Magnus Killander and Horace Adjlohoun, ‘International Law and Domestic Human Rights Litigation in Africa: An Introduction’ in Magnus Killander (ed.), *International Law and Domestic Human Rights Litigation in Africa* (Pretoria: Pretoria University Law Press, 2010); and Christian Courtis, ‘Notes on the Implementation by Latin American Courts of the ILO Convention 169 on Indigenous Peoples’ (2009) 10 *International Journal on Human Rights* 53, 53ff.

<sup>61</sup> See section 39(1)(b) of the South African Constitution which requires that courts must consider international law when in interpreting the Bill of Rights.

that in turn can severely hamper the ability of individuals to access these medications or for governments to provide them through a public health service to their people.<sup>62</sup> In international investment law, a dispute arose, for instance, between a foreign corporation and the South African government concerning new mining legislation that was passed in the post-apartheid era. The company lodged a dispute that the legislation in effect expropriated its property; the legislation though was designed as a positive measure to address the legacy of past discrimination under the apartheid system and thus sought to realise the right to equality and property of individuals. Whilst the exact effect of the legislation was in dispute, the matter (which was eventually settled) demonstrated how a bilateral investment treaty could effectively place obstacles in the face of governments seeking to address a legacy of rights violations.<sup>63</sup>

The relationship between these legal regimes and human rights law is a large subject matter which cannot be addressed in detail here.<sup>64</sup> Nevertheless, it is necessary to address in international law the problem of conflicts that may arise between commercial legal regimes and the demands of human rights law. At present, with no clarity as to the legal obligations of corporations in international law with respect to fundamental rights, and with most statements of responsibility existing in instruments that are at best soft-law (such as the Guiding Principles)<sup>65</sup>, international commercial obligations will be likely to trump those flowing from fundamental rights in most cases.

The Guiding Principles themselves recognized the potential of both bilateral and multi-lateral commercial obligations to impact negatively upon fundamental rights. Their approach is to urge states, when concluding any such agreements and in addressing commercial matters, to

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<sup>62</sup> See for instance Barnali Choudhury et al, 'A Call for a WTO Ministerial Decision on Trade and Human Rights' in Thomas Cottier and Panagiotis Delimatsis (eds.), *The Prospects of International Trade Regulation* (Cambridge: Cambridge University Press, 2011) 323ff. Rights violations which have flowed from the WTO are detailed by Choudhury et al from 330 and include public services, including the rights to education and water. See also Philippe Cullet, 'Patents and Medicines: The Relationship between TRIPS and the Human Right to Health' (2003) 79 *International Affairs* 139 and, generally, Holger P. Hestermeyer, *Human Rights and the WTO* (Oxford: Oxford University Press, 2008).

<sup>63</sup> *Piero Foresti, Laura de Carli v Republic of South Africa* (ICSID) Case No. ARB (AF)/07/1.

<sup>64</sup> See, for example, Hestermeyer, note 64; Sarah Joseph, *Blame It On the WTO?: A Human Rights Critique* (Oxford: Oxford University Press, 2013); Janet Dine and Andrew Fagan (eds.), *Human Rights and Capitalism: A Multidisciplinary Perspective on Globalisation* (Edward Elgar, 2006); Frederick Abbott et al, *International Trade and Human Rights: Foundations and Conceptual Issues* (Michigan: University of Michigan Press, 2006); and Marc Jacob, 'International Investment Agreements and Human Rights' (2010) 3 *INEF Research Paper Series on Human Rights, Corporate Responsibility and Sustainable Development*.

<sup>65</sup> Justine Nolan, 'The Corporate Responsibility to Respect Rights: Soft Law or Not Law?' in Deva and Bilchitz, note 3, 138.



be mindful of their duty to protect fundamental rights.<sup>66</sup> Yet, the Guiding Principles by their very nature lack the capacity to address the fundamental imbalance between commercial and human rights obligations as they have a very weak normative force in international law.

The problem of contrasting hard legal commercial obligations against soft human rights responsibilities has concrete consequences:

‘If arbitrators apply something outside the clear jurisdiction/mandate of the treaty because they sympathize, they’ll exceed their jurisdiction, risk annulment/setting-aside and their reputation. It is law they have to apply not airy-fairy wishy-washy concept of desirability with a vague soft-law claim’.<sup>67</sup>

A key important role for a treaty on business and human rights would be the express recognition by states that businesses have hard legal obligations in relation to fundamental rights with a similar (or greater) level of bindingness as commercial regimes have.<sup>68</sup> This would enable the recognition that the human rights obligations could well conflict with commercial treaty obligations in international law but the latter would not automatically trump the former.

The above quote also points to a jurisdictional problem in that the adjudicatory mechanisms set up in terms of international trade and investment regimes often only have powers that fall within the four corners of the treaties in terms of which they are constituted. It is thus necessary to utilize mechanisms through which human rights arguments can be made in terms of these treaties.

The Preamble to the Marrakesh Agreement Establishing the WTO, for instance, asserts that free trade is not an end in itself, but rather a means to promote basic human rights.<sup>69</sup>

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<sup>66</sup> See Guiding Principles 8 to 10, note 35.

<sup>67</sup> John Ruggie, *Just Business: Multinational Corporations and Human Rights* (W. W. Norton & Company, 2013) 184.

<sup>68</sup> There is an interesting and controversial question about the extent to which there is a hierarchy of norms in international law: see, for example, Dinah Shelton, ‘Normative Hierarchy in International Law’ (2006) 100 *The American Journal of International Law* 291; Martti Koskeniemi, ‘Hierarchy in International Law: A Sketch’ (1997) 8 *European Journal of International Law* 566 and Erika de Wet and Jure Vidmar, *Hierarchy in International Law: The Place of Human Rights* (Oxford: Oxford University Press, 2012). Fundamental rights would be key candidates for norms that have a superior status given their rootedness in the dignity of individuals: as a matter of normative philosophy, they *should* have this status. Yet, as international law develops, there is no clarity as to whether fundamental rights are recognized to have this prior status and how they intersect with other bodies of international law.

<sup>69</sup> (1999), 1867 UNTS 154, 33 ILM 1144 (1994).

Moreover, Article XX of the General Agreement on Trade and Tariffs provides for “exceptions” enabling countries to adopt measures that would be necessary to protect human, animal or plant life or health, and to protect public morals.<sup>70</sup> These provisions together with a recognition of binding obligations on businesses in a new treaty could clearly provide the basis for state action that violated the rules of the WTO for purposes of ensuring compliance by business with its human rights obligations.

In terms of international investment law, much will depend on the specific provisions of the treaties in question. Sadly, until recently, very few agreements have expressly contained references to human rights. Despite this, there are, however, mechanisms for recognizing human rights and related obligations in terms of international investment treaties.<sup>71</sup> There is of course the possibility of doing so if it relates closely to the investment and particular dispute in question. In *Maffezini v Kingdom of Spain*, the tribunal took into account provisions of European and Spanish environmental law in determining whether the claimant’s rights had been infringed. Furthermore, when determining the applicable law to a dispute, several agreements include the possibility of engaging with applicable rules of international law. A business and human rights treaty would provide a compelling case that the obligations of business in relation to fundamental rights constitute binding elements of international law. Finally, norms relating to fundamental rights can be utilized to interpret investment treaties. A treaty on business and human rights would provide a strong basis for arguing that a corporation’s commercial rights and obligations need to be harmonized with their obligations arising from fundamental rights. The Vienna Convention on the Law of Treaties also provides that ‘any relevant rules of international law applicable between the parties’ and the relevant context should be utilized when interpreting a treaty.<sup>72</sup> Recognizing human rights obligations of corporations in a treaty would thus bolster the case for considering them alongside the rules contained in the international investment treaties themselves.

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<sup>70</sup> (1999), 1867 UNTS. 187, 33 I.L.M. 1153 (1994).

<sup>71</sup> See Jacob, note 66, for instance, for a more detailed discussion in this regard.

<sup>72</sup> (1969) UNTS 1155, 331 at Article 31(3)(c).

#### D. The Argument from Access to Remedies

A key concern in the field of business and human rights is the ability to gain access to remedies for victims of human rights violations by companies. One of the most important arguments for a treaty involves attempting to address the confluence of three particular legal doctrines that render it difficult for multi-national corporations (MNCs) to be held to account for their violation of fundamental rights. First, we have what we might term the *jurisdictional* challenge: in international law, each state is generally regarded as sovereign with jurisdiction over its own internal affairs.<sup>73</sup> An MNC in fact consists of multiple corporations formed in different jurisdictions yet often there is a complex web of interconnections and profit-sharing. This structure raises the problem as to where an MNC can be held to account for violations of rights: if access to a remedy can only be claimed where the harm is caused, the actual centre of control, power and financial profiteering in the corporate group which is based in another country may escape any accountability. The territorial nature of the state-based system thus does not appear well-suited to regulating a global entity such as an MNC.

Secondly, there is the problem of weak governance zones: there are parts of the world in which laws are not properly enforced, human rights standards are weak and courts lack independence. How can one ensure that individuals can gain access to a remedy against corporations that violate fundamental rights in these contexts? Corporations could exploit the weaknesses in these countries to maximize their profits without any fear of legal consequences.

Finally, there are several legal problems created by the very corporate structure itself: where businesses operate as corporations, they are generally treated as separate legal persons with limited liability.<sup>74</sup> As has been mentioned, an MNC consists of multiple separate entities each constituted in different countries. In such a structure, how does one hold one entity in one country responsible for the activities of another related but distinct entity in a different country? The problem goes even further than this. MNCs operate today often not only through setting up subsidiaries in different countries but also through sub-contracting many activities to completely distinct corporations: major clothing brands, for instance, outsource the manufacture of clothing to a range of different entities in South-east Asia which often

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<sup>73</sup> Article 2, United Nations Charter (1945) 1 UNTS XVI.

<sup>74</sup> Peter Muchlinski, 'Limited Liability and Multinational Enterprises: A Case for Reform?' (2010) 34 *Cambridge Journal of Economics* 915.

then sub-contract further. There is great difficulty in holding an MNC legally to account for violations of rights perpetrated by sub-contractors far removed from it, particularly where the centre of control of the MNC exists in a different state.<sup>75</sup> MNCs may also use devices of corporate law such as changing their name to avoid accountability.<sup>76</sup>

These three sets of legal issues come together to create a major problem of accountability for victims of corporate rights violations (which I term the accountability gap). To address this gap, several interventions are necessary which could best be accomplished by a treaty.<sup>77</sup> As we have seen in the first argument, the starting point is to recognize that corporations themselves have binding legal obligations in relation to fundamental rights for which they can be held to account. Once this is established, it is necessary to ensure there are institutional fora where their obligations can be enforced whose procedural rules and jurisdiction can circumvent the problems identified above. A treaty is essential in doing so and two primary options seem available in this regard.<sup>78</sup>

The first would be to try to hold a company liable for the damage caused in a particular state (the ‘host’ state) in a forum that exists in a different jurisdiction where either the parent or contracting company is based (often referred to as the ‘home state’) and where there is a stronger, more independent court system.<sup>79</sup> This approach has been of great importance until recently where an old United States statute – the Alien Tort Claims Act (ATCA) – was used as a basis to found jurisdiction against corporations with a presence in the United States for tortious claims where the harm was committed in other countries. Several of these cases settled, providing some compensation for the victims.<sup>80</sup> Unfortunately, in the judgment of

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<sup>75</sup> For an approach to addressing these problems, see Olivier De Schutter ‘Towards a New Treaty on Business and Human Rights’ (2016) 1 *Business and Human Rights Journal* 47-54.

<sup>76</sup> This is precisely one of the problems with holding Texaco responsible for the environmental damage it caused in Ecuador as it merged with Chevron: see Lambooy, note 3, 337.

<sup>77</sup> The reform of a number of doctrines of corporate law are amongst these, a matter I cannot consider here in any detail.

<sup>78</sup> See also International Commission of Jurists, *Needs and Options for a New International Instrument in the Field of Business and Human Rights* (2014), at 9, available at [http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2014/06/NeedsandOptionsinternationalinst\\_ICJReportFinalelecvers.compressed.pdf](http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2014/06/NeedsandOptionsinternationalinst_ICJReportFinalelecvers.compressed.pdf).

<sup>79</sup> Surya Deva, ‘Acting Extraterritorially to tame multinational corporations for human rights violations: Who should ‘Bell the Cat’?’ (2004) 5 *Melbourne Journal of International Law* 37; and De Schutter, note 77, at 55.

<sup>80</sup> See, for example, the case of *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir.) 2000; *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699 (9th Cir. 1992).

*Kiobel v Royal Dutch Petroleum*<sup>81</sup>, the United States Supreme Court fundamentally narrowed the scope of any potential actions under the ATCA and thus severely curtailed the possibility of home-state liability.<sup>82</sup> Very few countries, however, have laws similar to the ATCA and, where they do, few actions have been successful.<sup>83</sup>

To address this problem, one possibility would be for states across the world to agree in a treaty to provide that they would enact ATCA-type laws (together with relevant modifications to their corporate law). Such an approach could be modelled on the provisions of the United Nations Convention against Corruption (UNCAC).<sup>84</sup> This convention is based upon an approach whereby states commit themselves to enacting the relevant laws to ensure successful prosecution for corrupt offences even outside their territories.<sup>85</sup> They also commit to working together in investigations and technical matters to ensure successful prosecutions.<sup>86</sup>

Why though could states not just enact these ATCA-type laws themselves without a treaty framework? Two particular problems arise in this context which make a treaty necessary. First, there is a collective action problem: any state that passes these laws individually will be a less desirable destination for investment for some multi-national corporations. The Supreme Court in *Kiobel* seemed worried about US courts becoming the human rights enforcers of the world which could also have had a negative effect on US interests.<sup>87</sup> Thus, individual states alone will have little incentive to pass such a law unless there is some collective agreement to do so.

Secondly, there remain difficulties in ensuring that transnational claims are successful: clearly, there is greater complexity in ensuring adequate evidence is provided in a different jurisdiction.<sup>88</sup> Victims of rights violations may struggle to navigate the particularities of a

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<sup>81</sup> *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659 (2013).

<sup>82</sup> See David Bilchitz, 'Human rights accountability in domestic courts: Does the *Kiobel* case increase the global governance gap?' (2013) 120 *South African Law Journal* 794.

<sup>83</sup> *Akpan and Milieudefensie v Royal Dutch Shell and Shell Petroleum Development Company of Nigeria* [2013] District Court of the Hague C/09/337050/HaZA 09-1580 available at [http://www.menschenrechte.uzh.ch/entscheide-1/Friday\\_Alfred.pdf](http://www.menschenrechte.uzh.ch/entscheide-1/Friday_Alfred.pdf).

<sup>84</sup> (2003) A/58/422. See Anita Ramasatary, 'Closing the Governance Gap in the Business and Human Rights Arena: Lessons from the Anti-Corruption Movement' in Deva and Bilchitz, note 3, 162.

<sup>85</sup> *Ibid*, at articles 5, 27, 38 and 42.

<sup>86</sup> *Ibid*, at article 43. De Schutter, note 77, at 67 advocates for this type of model as being preferable and the most politically feasible.

<sup>87</sup> *Kiobel*, note 82, 12. Similarly, see Deva, note 81 on the Australian context.

<sup>88</sup> See Sarah Joseph, *Corporations and Transnational Human Rights Litigation* (Oxford: Hart Publishing, 2004).

different legal tradition and to obtain adequate representation. Different legal systems may adopt different approaches to questions surrounding complicity liability and the responsibility of parent companies for the activities of their subsidiaries and sub-contractors. A treaty could also assist with the technical difficulties that arise when extra-territorial jurisdiction is exercised: provisions could encourage co-operation surrounding such matters as gathering evidence, certifying statements, securing the attendance of witnesses in courts of a foreign jurisdiction and assisting victims with legal representation;<sup>89</sup> at the same time, such a binding international instrument could enunciate, for instance, common legal principles that can aid accountability such as that the corporate structure which is in effective control of the global operations can be sued for harms to fundamental rights by subsidiaries across territorial borders. Indeed, the International Law Association has released the Sofia Guidelines on International Civil Litigation and the Interests of the Public which attempts to suggest rules to assist in closing the accountability gap.<sup>90</sup> An international treaty on business and human rights could help codify and develop such rules further and thus provide a baseline legal framework for corporate accountability across the world.

The main alternative possibility to close the accountability gap would be to create an international mechanism or court which could adjudicate on civil and/or criminal claims against corporations where they have violated fundamental rights.<sup>91</sup> Such a mechanism would hold jurisdiction over corporations that operate in multiple jurisdictions and/or where the judicial system is not operating effectively. Developing such a mechanism would be a less unwieldy solution to the accountability gap than the home state liability solution which would require laws to be passed in every country that would inevitably vary in their content and effect. Such a mechanism would not, however, need to be considered the exclusive forum in which such matters could be resolved and only come into play when domestic avenues are exhausted. Moreover, it would assist in the process of norm development discussed in relation to the second argument outlined above as particular cases brought before it would

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<sup>89</sup> See De Schutter, note 77, at 65.

<sup>90</sup> Sofia Guidelines on Best Practices for International Civil Litigation for Human Rights Violations, adopted at the 75th Conference of the Association held in Sofia, Bulgaria in August 2012, available at <http://www.ila-hq.org/en/committees/index.cfm/cid/1021>.

<sup>91</sup> Ramasastry and Cassel, note 6, at 33-34 also canvass the possibility of an international arbitration tribunal that could be developed to perform this task.

help develop our understanding of the application of fundamental rights to corporations.<sup>92</sup> Such a mechanism would be an ambitious international solution for an international problem: it would still though need state support to ensure judgments are enforced and would have to avoid many of the pitfalls faced by international adjudicatory fora in other spheres.

### III. Response to Objections

Each of the four arguments outlined thus far provide an affirmative case for the treaty and represents particular strands of argumentation that, when added together, add weight to the case for such instrument. The four arguments thus are connected in seeking to address the existing gaps, ambiguities and inflexible doctrines which cause serious legal problems and thus require an international legal solution. These problems cannot be addressed in any other way than through a treaty on the subject that would establish a common legal base-line against which corporate activity must take place.<sup>93</sup> The voting record on the recent resolution passed in the Human Rights Council in favour of commencing discussions surrounding such a treaty, however, indicates that there is much disagreement on this topic, particularly between traditional Global North countries and Global South countries. It thus becomes important to consider and respond to some of the objections that have been raised against such a treaty.<sup>94</sup> I shall attempt to evaluate whether they negate or call into questions any of the arguments provided thus far in its favour.

#### A. The Scope of the Proposed Treaty: All Business Enterprises?

The Human Rights Council resolution that has initiated discussions around the proposed treaty focuses on regulating in ‘international human rights law, the activities of transnational corporations and other business enterprises’.<sup>95</sup> In a footnote to the preamble of the resolution, ‘other business enterprises’ are defined as ‘all business enterprises that have a transnational character in their operational activities and does not apply to local businesses registered in

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<sup>92</sup>For more details, see the proposal for an international tribunal put forward by Lawyers for Better Business, available at <http://www.l4bb.org/news/tribunal.pdf>.

<sup>93</sup> See also Wettstein, note 16, 342-347.

<sup>94</sup> Whilst Ruggie has been the most prominent critic, I also consider the views of academic commentators which has ensued largely on web-sites and blogs at present.

<sup>95</sup> Note 2, at 1.

terms of relevant domestic law'.<sup>96</sup> This footnote has generated much controversy and raised the question as to which business enterprises should be covered by a treaty: the approach to answering that question, however, requires a consideration of the very rationales for such an instrument.

John Ruggie, for instance, claims that the definition in the footnote renders the term 'other business enterprises' redundant and 'purely rhetorical'.<sup>97</sup> The claim is that this is deeply problematic from a substantive point of view for several reasons: it would cover 'international brands and retailers that sourced apparel products from local suppliers in Rana Plaza...but not the factories in which some 1200 workers died'.<sup>98</sup> A related point is that it creates an artificial division between transnational and national firms which fails to capture the complex contractual and other relationships that exist in the global business world today.<sup>99</sup> That in turn will 'inevitably result in lawyers advising enterprises how to bypass the given definitional contours',<sup>100</sup> which focus only on a particular sub-set of corporate entities.

As I have argued throughout this paper, the logic of fundamental rights requires us to recognise obligations on all agents who can affect those entitlements: it thus does not distinguish between transnational corporations and local corporations. All corporations must therefore – from a principled point of view – potentially be included within the scope of the binding obligations flowing from fundamental rights.

At the same time, the arguments in favour of the treaty demonstrate that a number of the most pressing reasons for international law-making in this arena arise from lacunae that exist in relation to the activities of transnational corporations specifically. It is transnational corporations that are best able to exploit the weaknesses of the current international legal system to avoid accountability for violations of fundamental rights in weak governance zones; and it is these entities which employ arbitration procedures against particular governments where bilateral or multi-lateral investment treaties are signed that fail adequately to take account of fundamental rights. The international system creates the very

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<sup>96</sup> *Ibid*, at fn 1.

<sup>97</sup> Ruggie, *Quo Vadis*, note 4.

<sup>98</sup> John Ruggie *Closing Plenary Remarks, UN Forum Business and Human Rights* available at <http://jamesgstewart.com/closing-plenary-remarks-un-forum-on-business-and-human-rights/>

<sup>99</sup> *Ibid*.

<sup>100</sup> Surya Deva *Corporate Human Rights Abuses and International Law: Brief Comments* available at <http://jamesgstewart.com/corporate-human-rights-abuses-and-international-law-brief-comments/>



conditions in which such entities become viable and hence it must ensure that there is effective regulation of them. As such, there is a principled case for why states should seek to find a treaty-based solution to the problems caused by the very structure of international law itself for the regulation of corporations whose activities cross territorial boundaries.

The passing of a treaty in relation to transnational corporations may well also not be as restrictive as some of the criticism suggests. After all, Ruggie himself recognises that ‘a growing number of local companies conduct business across borders, and thus may be said to have a transnational character’.<sup>101</sup> He also states that the current web of contracts formed by transnational corporations may render it difficult to draw legal boundaries around such an entity.<sup>102</sup> These points suggest that a wide range of local businesses could be included within a treaty focusing on corporations with a transnational character and much will depend upon how this transnational character is defined and other legal elements of such a treaty dealing with supply chains and subsidiaries. Another key benefit of a treaty would be the influence international law could have on the domestic realm: it does not strain credulity to suggest that once corporate entities are being held to account at the international level, domestic jurisdictions that are failing to do so currently may be persuaded to follow suit in relation to corporations operating on a more localised level.

## B. The Scale of Proposed Treaty: Too Ambitious?

Objections have also been made to the fact that the proposed treaty attempts to ‘establish an overarching international legal framework – a global constitution of sorts – governing transnational corporate conduct under international human rights law’.<sup>103</sup> The problem, as Ruggie argues, is that there is a wide diversity of concerns that need to be addressed which cannot be captured by one comprehensive treaty. He writes that business and human rights ‘encompasses too many complex areas of national and international law for a single treaty instrument to resolve across the full range of internationally recognised human rights’.<sup>104</sup> Moreover, ‘[a]ny attempt to do so would have to be pitched at such a high level of abstraction that it would be largely devoid of substance, of little practical use to real people in real

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<sup>101</sup> Ruggie *Quo Vadis*, note 4.

<sup>102</sup> Ruggie, note 103.

<sup>103</sup> Ruggie, *Quo Vadis*, note 4.

<sup>104</sup> *Ibid.*

places, and with high potential for generating serious backlash against any form of further international legalization in this domain'.<sup>105</sup>

It is no doubt true that the relationship between business and human rights covers a wide range of issues. This is, however, precisely why a treaty is a good idea.<sup>106</sup> Any proposed treaty, in my view, will be designed to establish a legal framework and a number of general principles in terms of which some of these complex issues would be resolved. As has been suggested in the arguments for a treaty, it would also need to establish a mechanism for norm development and, possibly, adjudication of particular disputes. It would not be meant to address every single issue that arises in this complex arena but to create the legal 'basic structure'<sup>107</sup> in terms of which such legal matters would be resolved. In turn, this could have an impact on the domestic laws of states concerning the relationship between corporations and fundamental rights. Indeed, this is precisely the structure through which international human rights treaties in general operate: they outline broad rights and principles which are then developed by the structures that the treaties create in various general comments and country reports. Such a process would indeed have important consequences for 'real people in real places'. There would also be no need to re-invent the wheel in particular areas: the treaty need not replace the excellent work done by a body such as the International Labour Organisation and could simply incorporate many of the standards already developed by such groupings.

### C. The Treaty Process: what happens in the short term?

Concern has also been expressed about the fact that a treaty would be a long-term project. Ruggie contends that people whose rights are affected by businesses need some form of relief in the present and cannot wait for the vague hope that such a convention will be passed.<sup>108</sup> Moreover, such a treaty, he claims could distract from implementing the Guiding Principles

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<sup>105</sup> *Ibid.*

<sup>106</sup> Indeed, it has been pointed out that the same objection could be lodged against the Guiding Principles which attempt to cover the domain of business and human rights as a whole: see Deva, note 105 and John Tasioulas *Human Rights, No Dogmas: The UN Guiding Principles on Business and Human Rights*, <http://jamesgstewart.com/human-rights-no-dogmas-the-un-guiding-principles-on-business-and-human-rights/>. Ruggie's response in *Life in the Global Public Domain*, note 4 is unconvincing, conflating principle with pragmatic considerations.

<sup>107</sup> See John Rawls, *The Law of Peoples* (Cambridge: Harvard University Press, 2001), 3-10.

<sup>108</sup> Ruggie, *Quo Vadis*, note 4.

which have already been accepted by consensus in the Human Rights Council.<sup>109</sup> Erika George also expresses concern about what will happen in the interim and that the advancements of human rights protections against business should not be conditional upon the negotiation of a successful treaty.<sup>110</sup>

It is indeed true that a business and human rights treaty will take time to negotiate and develop. This is not a reason to avoid such a process: indeed, the development of all international law norms takes time and this objection would counsel against embarking on any ambitious process to advance international law. Two significant legal developments in recent years – the Rome Statute establishing an International Criminal Court and the edifice of international environmental law – did not appear overnight and have taken years of negotiation and deliberation. It is also important to recognise that the very process of negotiating a treaty can be designed to embody a range of virtues which would apply irrespective of the nature of the final legal text: these could include increased discussion across the world of the issues around business and human rights; engaging with victims of corporate human rights abuses to understand the problems they face in more detail; and the stimulation of focused and creative legal thinking by experts to solve the problems faced in this area, recognising that a range of measures are necessary at the international, regional and domestic levels to address corporate obligations in relation to fundamental rights.<sup>111</sup>

Having said that, clearly, for any human rights advocate, it is critical to have an eye not only on the long-term but the short-term too. As such, it would be important to push for the development in the shorter term of approaches that advance the human rights obligations of business as far as possible and encourage the establishment of fora where victims of rights violations can gain access to remedies. One of the instruments which can assist in this process

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<sup>109</sup> *Ibid.* The United States government explained its vote against the establishment of the inter-governmental working group partially in this way : see US Mission to the UN ‘Proposed Working Group would undermine efforts to implement Guiding Principles’ (June 26, 2014) available at <https://geneva.usmission.gov/2014/06/26/proposed-working-group-would-undermine-efforts-to-implement-guiding-principles-on-business-and-human-rights/>

<sup>110</sup> See Erika George *Incorporate Rights: Making the Most of the Meantime* available at <http://jamesgstewart.com/incorporating-rights-making-the-most-of-the-meantime/>. A similar worry is expressed by Mark Taylor ‘A Business and Human Rights Treaty: Why Activists Should Be Worried’ available at <http://www.ihrb.org/commentary/board/business-and-human-rights-treaty-why-activists-should-be-worried.html>

<sup>111</sup> Ruggie’s advocacy of polycentric governance (see *Life in the Global Public Domain*, note 4) and Deva’s integrated theory of regulation (developed in *Humanizing Business*, note 18) need not be at odds with the formation of a treaty.

is the Guiding Principles on Business and Human Rights. As a recent report produced by the International Commission of Jurists remarks that there is no need to consider a treaty process and the Guiding Principles as mutually exclusive: indeed, they can complement one another.<sup>112</sup> The Human Rights Council has created a Working Group of experts to help advance the Guiding Principles and there is, consequently, an institutional mechanism in place to advance the business and human rights agenda in the interim period. Organisations supportive of a treaty can make it clear that they expect states driving the treaty process to show their good faith in complying with the Guiding Principles and establish National Action Plans, for instance. In this way, the expansion of the Guiding Principles can themselves help to create the very environment in which a treaty becomes possible and also perhaps address some matters that cannot be included in a treaty. As Shelton also points out, 'soft law rarely stands in isolation; instead, it is used most frequently either as a precursor to hard law or as a supplement to a hard-law instrument'.<sup>113</sup> Indeed, she points out that in the human rights field, non-binding declarations preceded almost all the multilateral conventions that developed. Thus, a soft instrument such as the Guiding Principles can indeed be a precursor to stronger, more binding international law in this field and this, in itself – apart from its other virtues – would represent a substantial contribution to the advancement of fundamental rights.<sup>114</sup> The existence of hard treaty law in an area often also helps bolster soft-law instruments which take on added significance by helping to elaborate upon aspects of a treaty and by being connected to a field with authoritative standing in international law.<sup>115</sup>

#### D. International Politics: Is there sufficient consensus for a treaty?

A major concern that has arisen relating to a treaty is its ability to command consensus amongst a wide variety of nations given the divisions that have already opened up over the resolution to commence negotiations.<sup>116</sup> Ruggie suggests two scenarios are likely: either negotiations will continue for a long period and eventually be abandoned or an eventual

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<sup>112</sup> International Commission of Jurists, note 80, at 9; Ruggie too seems to accept this point in *Closing Plenary Remarks*, note 4.

<sup>113</sup> Shelton, note 70, at 320-321.

<sup>114</sup> See Boyle, note 25, 904.

<sup>115</sup> *Ibid.* 905-6.

<sup>116</sup> Ruggie, *Quo Vadis* note 4.

treaty will only garner few ratifications amongst small nations who lack the power adequately to address corporate abuses.<sup>117</sup>

This is a fundamentally conservative challenge: the fact that no consensus exists now is held out to be a reason to stop a process that addresses significant problems in international law. The reality is that, if such an approach were to have been followed, some of the most important developments in international law would never have taken place which command large amounts of consensus today. The concept of *jus cogens* (a peremptory norm of international law), divided the Vienna Conference on the Law of Treaties yet is widely accepted today.<sup>118</sup> Huge division characterised the development of international environmental law measures: a good example is the Montreal Protocol on Substances that Deplete the Ozone Layer (a protocol to the Vienna Convention for the Protection of the Ozone Layer) which began with significant division between participating countries but is today regarded as a success.<sup>119</sup> Additional Protocol II to the Geneva Conventions,<sup>120</sup> the birth of the World Trade Organization and the Marrakesh Agreement<sup>121</sup>, and the development of the International Criminal Court<sup>122</sup> were all rooted in significant disagreement between countries which have, over time, garnered greater consensus.

In a similar vein, the fact that no consensus exists currently on a binding business and human rights treaty (where negotiations have not even commenced) is no reason to suggest it never will exist. Already, shifts have occurred in the approach of several countries with the large-scale acceptance of the Guiding Principles. Moreover, incentives can be created whereby states acting in their own self-interest would increasingly be encouraged to adhere to such a document. Strong campaigns by NGOs and other mechanisms of garnering popular support could be utilised to shift the government policies of the large economic powers currently opposing the treaty.

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<sup>117</sup> See Ruggie, *Life in the Global Public Domain*, note 4 where he raises the spectre of the Migrant Workers Convention which came into force in 1990 but has not thus far been ratified by any migrant worker-receiving country.

<sup>118</sup> Shelton, note 70, 300.

<sup>119</sup> See Elizabeth DeSombre, 'The Experience of the Montreal Protocol: Particularly Remarkable, and Remarkably Particular' (2000) 19 *Journal of Environmental Law* 49.

<sup>120</sup> See Sylvie Junod, 'Additional Protocol II: History and Scope' (1983) 33 *The American University Law Review* 29.

<sup>121</sup> Surendra Bhandari, 'Doha Round Negotiations: Problems, Potential Outcomes and Possible Implications' (2012) 4 *Trade, Law and Development* 356.

<sup>122</sup> Fanny Benedetti and John Washburn, 'Drafting the International Criminal Court Treaty: Two Years to Rome and an Afterword on the Rome Diplomatic Conference' (1999) 5(1) *Global Governance* 1.

As Ruggie also recognises, the world is changing with the economic power of non-Western states and corporations growing.<sup>123</sup> It is highly significant that, apart from Brazil, each of the BRICS countries (Brazil, Russia, India, China and South Africa) supported the Human Rights Council resolution in favour of the formation of the inter-governmental working group tasked with elaborating upon a treaty. Should BRICS countries come out strongly in favour of such a treaty, and eventually ratify it, it will at least be distinctly embarrassing for developed countries such as the United States and those in the European Union to oppose it. Moreover, if such countries actively embrace such a treaty and require corporations with operations therein to adhere to its provisions, this will no doubt de facto become the standard that companies utilise when evaluating their own conduct. Importantly, the nature of this treaty will mean that corporations with strong links to states who refuse to sign or ratify it can still be held to account if they operate in states which do embrace the treaty. That is a good reason for those developed states to change their attitude towards the treaty and engage in the process. If they fail to do so, in time, their opposition will be less relevant as the treaty's provisions become the de facto international standard applicable to corporations (and thus potentially enter into customary international law).

#### E. A Treaty on Gross Human Rights Violations: a Better Proposal?

An alternative to a general framework treaty on business and human rights has been proposed by John Ruggie that he claims has a narrower scope and is likely to achieve consensus at the international level.<sup>124</sup> The idea he proposes is to negotiate a treaty to address 'business involvement in gross human rights abuses, such as genocide, extrajudicial killings, and slavery as well as forced and bonded labour'.<sup>125</sup> He contends such a focus is apposite due to the severity of the abuses involved; the consensus amongst states about these prohibitions but the existence of 'considerable confusion about how they should be implemented in practice

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<sup>123</sup> Ruggie, *Closing Plenary Remarks*, note 4.

<sup>124</sup> This approach is supported by De Schutter, note 77, at 60-62.

<sup>125</sup> Ruggie, *Quo Vadis*, note 4, fn 17.

when it comes to legal persons’,<sup>126</sup> and that this could heighten corporate awareness of business and human rights issues more generally and have positive knock-on effects.<sup>127</sup>

The argument for such a limited treaty is based on a gradualist approach again founded in what is regarded as politically feasible and particularly egregious.<sup>128</sup> No doubt, such a treaty would have some merit and clarify the obligations of corporations in relation to gross human rights violations. There are several problems, however, with focusing the efforts of states and civil society on such a limited treaty. The first concerns its highly restricted scope: the notion of ‘gross’ human rights abuses is designed to focus upon a very narrow sub-set of extreme violations of rights that are usually taken to constitute international crimes. As Deva points out, such a treaty would ‘mostly serve a symbolic purpose for its ambit will exclude most of the human rights abuses’ committed by business.<sup>129</sup> The narrow definition of these crimes would likely exclude very egregious violations of human rights such as the Rana Plaza building collapse and the Bhopal gas disaster.<sup>130</sup> It would also – in all likelihood – exclude most violations of economic, social and cultural rights where much of the abuse suffered by those in the Global South occurs and where much potential for the contribution of business lies.<sup>131</sup> Is it worth creating a treaty for such a narrow band of crimes alone that fails to address large areas where business has an impact on fundamental rights?

Moreover, much of what such a narrow treaty would cover could be addressed by amending the Rome Statute of the International Criminal Court to allow prosecutions against corporations for international crimes. A debate on such a possibility has occurred since the inception of the Rome Statute: whilst it has not been resolved in favour of allowing such

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<sup>126</sup> Ruggie, *Closing Plenary Remarks*, note 4

<sup>127</sup> See also James Stewart *A New Instrument on “Gross” Violations? Enthusiasm and Apprehension* available at <http://jamesgstewart.com/a-new-instrument-on-corporate-responsibility-for-gross-human-rights-violations-enthusiasm-and-apprehension/>

<sup>128</sup> See Jenny Martinez *A First Step Is Better Than No Step at All* available at <http://jamesgstewart.com/a-first-step-is-better-than-no-step-at-all/>

<sup>129</sup> Deva, note 105.

<sup>130</sup> *Ibid.*

<sup>131</sup> *Ibid* and Stewart, note 132.

prosecutions, it is unclear that a new treaty with the scope proposed by Ruggie would accomplish much more than this and not be an unnecessary duplication.<sup>132</sup>

Additionally, and perhaps this is key, such a limited treaty would fail to address some of the key arguments for establishing an international instrument on business and human rights which have been canvassed in section II of this article. First, in terms of norm development, such a treaty would have very a limited use and not affect, in any general manner, the way in which the obligations of business are understood on a day-to-day level.<sup>133</sup> Developing a broad framework treaty that enables various mechanisms to issue general comments and/or adjudicate particular cases would allow for a much wider impact on developing our understanding of the specific obligations of business in this area. Secondly, such a narrow treaty would fail in any general way to create express binding obligations upon corporations relating to fundamental rights with the same status as commercial legal obligations that could be applied in various fora. Finally, such a treaty would fail to close the accountability gap affecting transnational corporations (and thus fail to enhance the right of victims to gain access to remedies) other than in the narrow band of cases that effectively constitute international crimes. This was always the problem with the narrowing of the ATCA jurisdiction in the *Sosa* case by the US Supreme court to such egregious cases<sup>134</sup> – the international community should not make a similar mistake.

#### IV. Conclusion

I have argued in this paper that there are powerful reasons as to why the international community should take forward the resolution of the Human Rights Council in June 2014 and develop a treaty on business and human rights. Understanding the case for such an instrument makes it clear that it will not be designed to solve all the problems that arise in the business and human rights sphere and expectations of all actors engaged in the process need

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<sup>132</sup> Andrew Clapham, 'Extending International Criminal Law Beyond the Individual to Corporations and Armed Opposition Groups' (2008) 6 *Journal of International Criminal Justice* 899; and Doug Cassel, 'Corporate Aiding and Abetting of Human Rights Violations: Confusion on the Courts' (2007-2008) 6 *Northwestern University School of Law* 304.

<sup>133</sup> See George, note 115.

<sup>134</sup> *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).



to be calibrated accordingly. Its importance lies in providing legal solutions to a number of troubling lacunae, ambiguities and inflexible doctrines within the current framework of international law which have a serious negative impact upon the rights of individuals affected by corporate activities. The process of debating and negotiating such a treaty can also have a number of virtuous knock-on effects in creating awareness of the problems and stimulating creative legal thinking and interventions.

Understanding the rationales for the treaty also helps to provide a basis for determining its eventual contours. The arguments I have provided suggest the need to establish a framework treaty<sup>135</sup> with, at least the following content: corporations are recognised as having binding legal obligations in relation to a range of, at least, core internationally recognised human rights; mechanisms are established such as a General Comment procedure for the development of our understanding of the application of human rights norms to corporations; mechanisms are created for holding corporations to account where they violate their obligations; and key legal principles are outlined which modify existing doctrines of corporate and international law that contribute to impunity for those corporations violating fundamental rights. Clearly, as the process unfolds, each of these points will need to be elaborated upon in more detail. Having clarity on the key rationales for a treaty, however, provides the basis for these discussions and enables those in the process to keep their eyes on the ball: to establish an international framework that articulates the binding legal obligations of business with respect to fundamental rights and develops effective enforcement mechanisms.

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<sup>135</sup> They also suggest that the proposal of Deva, note 105 for a Declaration on the Human Rights Obligations of Business – whose exact normative force is unclear - would not be optimal except as an interim step if a more binding and expansive instrument cannot be agreed upon.