

THE EMERGING UN BUSINESS AND HUMAN RIGHTS TREATY AND ITS CODIFICATION OF INTERNATIONAL NORMS

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I. INTRODUCTION

The 2019 and 2020 versions of the draft Business and Human Rights Treaty (BHR Treaty) signal a move away from soft law and self-regulation for multinational corporations (MNCs) and entities engaged in transnational business activities. There is some resistance to the treaty from industrialized states, although they have failed to tackle root causes of extra-territorial human rights abuses by MNCs under their control. While the BHR treaty does not absolve states of their primary responsibility as human rights duty bearers, it does however establish a triangular relationship requiring that MNCs observe strict due diligence requirements, as well as provide remedies to victims of human rights violations and abuses caused directly or indirectly by them. The state is compelled to facilitate and enforce corporate due diligence as well as extensive access to justice for victims, including through the provision of legal aid, physical security, effective jurisdiction, corporate and personal sanctions, and even mutual legal assistance.

By way of background, in 2011, the UN Human Rights Council established an inter-governmental working group (Working Group) to address the human rights roles and responsibilities of transnational corporations and other business enterprises.¹ This Working Group was tasked with regulating the activities of transnational corporations and other business enterprises.² The UN Guiding Principles on Business and Human Rights, endorsed by the UN Human Right Council in 2011,³ had run its course, necessitating a move away from self-regulation and corporate social responsibility.⁴ Despite some opposition by industrialized states, a proposal was tabled by Norway and forty-four co-sponsors seeking operationalization

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¹ See *Statement on Behalf of a Grp. of Countries at the 24rd [sic] Session of the Human Rights Council*, BUS. & HUMAN RIGHTS RES. CTR. (Sept. 2013), <http://business-humanrights.org/sites/default/files/media/documents/statement-unhrc-legally-binding.pdf>.

² Human Rights Council Res. 26/9, U.N. Doc. A/HRC/26/L.22/Rev.1, at 2, ¶ 1 (June 25, 2014).

³ See *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, OHCHR, U.N. Doc. HR/Pub/11/04 (2011), http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf [hereinafter *Guiding Principles*].

⁴ See Larry Catá Backer, *Shaping a Global Law for Business Enterprises: Framing Principles and the Process of a Comprehensive Treaty on Business and Human Rights*, 42 N.C. J. INT'L L. 418, 419-20 (2017).

of the UN Guiding Principles.⁵ Some states backtracked and there was significant opposition by the US and the EU.⁶

The first two sessions⁷ of the Working Group focused largely on deliberating the content, scope, nature, and structure of a BHR treaty and how this would fit within the existing international human rights architecture. During the third session, the Working Group began a holistic discussion on the possible elements of a draft treaty, prepared by the Chairperson of the Working Group.⁸ Many of these issues had already been discussed in the first two sessions. Ecuador, on behalf of the Chairperson of the Working Group, prepared a Zero Draft legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises, as well as a Zero Draft optional protocol.⁹ The Zero Draft was effectively the basis for further negotiations and exchange of ideas during the fourth session of the Working Group.¹⁰

⁵ See Human Rights Council Res. 26/22, U.N. Doc. A/HRC/26/L.1 (June 23, 2014).

⁶ See *EU Contribution to First Session*, OHCHR, at 3-4.

<https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session1/EuropeanUnion.doc> (last visited Jan. 28, 2021) (The Contribution notes that the EU does not see the additional benefit to the UN Guiding Principles (UNGPs) by the adoption of a binding treaty, stressing that: “pushing for a legally binding document at this stage unnecessarily polarizes the debate.” The EU further stressed the role of self-regulation through its Corporate Social Responsibility (CSR) Strategy with a view to implementing the UNGPs.); Treaty Alliance, *Resolution on Binding Human Rights Standards Passes in Human Rights Council*, GLOB. POL’Y F. (June 27, 2014), <https://www.globalpolicy.org/component/content/article/221-transnational-corporations/52651-treaty-alliance-press-release-on-resolution-on-binding-human-rights-standards.html>; see also Stephen Townley, *Proposed Working Group Would Undermine Efforts to Implement Guiding Principles on Business and Human Rights*, U.S. MISSION TO INT’L ORG. GENEVA (June 26, 2014), <https://geneva.usmission.gov/2014/06/26/proposed-working-group-would-undermine-efforts-to-implement-guiding-principles-on-business-and-human-rights/>.

⁷ See Working Group, Rep. on the First Session, U.N. Doc. A/HRC/31/50, at 1 (Feb. 5, 2016); see also Working Group, Rep. on the Second Session, U.N. Doc. A/HRC/34/47, at 3 (Jan. 4, 2017).

⁸ See Working Group, Rep. on the Third Session, U.N. Doc. A/HRC/37/67, at 3 (Jan. 24, 2018).

⁹ The so-called Zero Draft was the first ever draft BHR treaty adopted by the Working Group. While it was clear that this would not be the definitive text, the expectation was that to a very large degree it reflected a minimum consensus as to the duties of both states and MNCs. See generally *Legally Binding Instruments to Regulate, In International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises*, OHCHR (July 16, 2018), <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/DraftLBI.pdf> [hereinafter Zero Draft], (the full Zero Draft). See *Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights*, U.N. HUMAN RIGHTS COUNCIL, <https://www.ohchr.org/en/hrbodies/hrc/wgtranscorp/pages/igwgonc.aspx> (last visited Jan. 28, 2021).

¹⁰ See Working Group, Rep. on the Fourth Session, U.N. Doc. A/HRC/40/48, at 3 (Jan. 2, 2019).

The Zero Draft was subsequently amended, and a second draft was produced by the Working Group Chairperson on July 16, 2019,¹¹ along with a revised Optional Protocol.¹² The 2019 draft treaty was the subject of significant debate, both within the UN and academia.¹³ However, unlike in the past, this debate was largely hosted on electronic platforms, such as expert blogs,¹⁴ where ideas were exchanged rapidly and in many cases in real time. This accelerated the debate considerably, compared to the significant amount of time such debates are accustomed to in print media or legal periodicals.¹⁵ This helps to explain, to some degree, why a new draft was produced in August 2020¹⁶ with the aim of addressing concerns related to the 2019 Zero Draft. This article focuses on the Zero Draft to the degree it has not been amended by the 2020 draft and will employ the 2020 draft where it introduces new or revised terms. This analysis is based on the assumption that the 2019 Zero Draft generally codifies existing customary and treaty law, and that it would be wrong to see subsequent amendments to the Zero Draft as rendering the Zero Draft obsolete, or that most of its provisions do not reflect a much broader consensus.¹⁷ This assumption further helps preserve

¹¹ See *OEIGWG Chairmanship Revised Draft, Legally Binding Instruments to Regulate, In International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises*, OHCHR (July 16, 2019), https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/OEIGWG_RevisedDraft_LBI.pdf [hereinafter 2019 BHR Draft].

¹² The Protocol establishes a committee for the enforcement of member states' obligations, as well as a supplementary national implementation mechanism. See *Draft Optional Protocol to the Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises*, OHCHR, at 1; 3-4, <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session4/ZeroDraftOPLegally.pdf> (last visited Jan. 28, 2021) [hereinafter Draft Optional Protocol].

¹³ See *Briefing Paper on the Zero Draft: Unpacking Arguments Against the Treaty*, BUS. & HUMAN RIGHTS RES. CTR.,

<https://www.business-humanrights.org/en/latest-news/experts-reflect-on-the-zero-draft-of-the-legally-binding-treaty-on-business-and-human-rights/> (last visited Jan. 28, 2021) (offering examples of various debate about the 2019 Zero Draft treaty).

¹⁴ See generally THE CORP. SOC. RESP. AND BUS. ETHICS BLOG, <https://corporatesocialresponsibilityblog.com/category/business-and-human-rights/> (last visited Jan. 28, 2021); see also BUS. & HUMAN RIGHTS RES. CTR., <https://www.business-humanrights.org/en/latest-news/new-blog-business-human-rights-the-limits-of-law/> (last visited Jan. 22, 2021) (offering examples of expert blogs where debates mostly took place).

¹⁵ See *Blog: Reflections on the Zero Draft Treaty*, BUS. & HUMAN RIGHTS RES. CTR., https://www.business-humanrights.org/en/blog/?opinion_series=8&backdate_after=&backdate_before=&query= (last visited Jan. 28, 2021) (a blog dedicated entirely to debate the Zero Draft treaty).

¹⁶ See Surya Deva, *BHR Symposium: The Business and Human Rights Treaty in 2020—The Draft Is “Negotiation-Ready” but are States Ready?*, OPINIOJURIS (Sept. 8, 2020), <http://opiniojuris.org/2020/09/08/bhr-symposium-the-business-and-human-rights-treaty-in-2020-the-draft-is-negotiation-ready-but-are-states-ready/>.

¹⁷ *Id.*

the topicality of this article, even if subsequent drafts are ultimately produced.¹⁸

Any BHR treaty will have to be undertaken in a global treaty landscape that is already rather complex. It will need to deal with, or traverse through, issues precipitated by bilateral investment treaties (BITs), human rights treaties, treaties dealing with international trade, international criminal law agreements (including extradition and mutual legal assistance treaties), bilateral tax treaties, private international law (both choice of law and choice of courts), as well as general international law and customary international law. The proposed BHR treaty also engages fundamental regulatory spheres of states, such as the law of corporations, extra-territorial jurisdiction, and the law of obligations (i.e., contracts). This extensive shopping list is meant to illustrate the myriad hurdles that the drafters of the BHR treaty have had to consider. No new treaty in the twenty-first century can possibly claim to be an 'island' and hence must be consistent with existing international law, whether treaties, custom, or general principles.¹⁹ The problem, of course, is that many of these other treaties are either narrow in scope, express the politics of a different era, or are downright antithetical to the very notion that corporations possess, or should possess, some human rights obligations. This necessarily means that any new cross-cutting treaty will be subject to severe limitations.

As a result of these considerations, it is not self-evident that a new treaty always advances the aims and objectives of its driving stakeholders. A treaty severely limited from the outset may not only have little to offer, but worse, if put to a vote even its limited focus may be shot down by a large number of states. The danger with the latter outcome is that in its pre-treaty manifestation its substantive provisions may have been considered customary in nature, or already adequately reflected in transnational legal practice or self-regulation.²⁰ These qualities are lost to a draft treaty that is subsequently dismissed.²¹ The paradigm of the International Law Commission's (ILC's) Articles on State Responsibility and the wisdom of then ILC Rapporteur James Crawford to reject the draft treaty option resulted

¹⁸ To justify this assertion, it is instructive that key provisions of the Zero Draft have either remained unchanged or slightly altered. *See id.*

¹⁹ In fact, the 2019 draft treaty contains a provision aiming to achieve "consistency with international law" (Article 12), which in its majority concerns non-intervention and state responsibility. *See* 2019 BHR Draft, *supra* note 11, at art. 12. One has to reach the penultimate paragraph (6) to find a discussion on compatibility with bilateral and multilateral treaties "on issues relevant to the [treaty and protocol]." *Id.* Article 12(6) of the BHR treaty stipulates that such bilateral and multilateral treaties "shall be compatible and interpreted in accordance with [states' obligations under the BHR treaty and its protocol]." *Id.* In reality, the likelihood of conflict is high and there is no principle of international law that obliges states to renege on existing treaties on the basis of subsequent treaty obligations. *See* below section 3 of this article for a more thorough discussion and the additions made in this respect by the 2020 draft.

²⁰ *See generally* G.A., *Report of the International Law Commission*, U.N. Doc A/73/10 (2018).

²¹ *Id.*

in their unequivocal recognition as principles of customary international law;²² an outcome far better than a watered-down treaty, or an instrument ultimately shelved and rejected. This is not the case with the proposed BHR treaty, whose articulation in treaty form, as will be shown below, is welcomed because it fills gaps in domestic laws and practice that are absent from the current transnational corporate architecture.

So, what are the 'forces' that the proposed BHR treaty has to contend with? First and foremost is the notion that human rights are owed only by states and it is only states that are responsible for their protection and fulfillment. Any other result, despite the subject matter of the proposed treaty, would be absurd. If MNCs²³ became the duty bearers of international human rights, even within their sphere of operation, states would be justified to decrease their positive and negative human rights obligations in all those areas of regulation where MNCs have even the faintest of presence. Moreover, if MNCs were conferred the same obligations as states, demarcation would become an impossible exercise and by implication MNCs would request, and rightly so, that they be endowed with powers typically exercised by states.

Another contentious issue concerns aligning the proposed BHR treaty with the existing international regulatory architecture. Much of the work of the BHR treaty could be undertaken through BITs, whether by amending existing BITs and/or inserting pertinent provisions in new BITs. BITs can strengthen the regulatory weaknesses of host states and expand the extra-territorial reach of home states, such as by ensuring that all suppliers are conforming to strict standards that are to be monitored and supervised by the parent company.²⁴ Moreover, just as they confer rights directly to investors, like access to arbitration, they could equally confer specific duties on investors/MNCs.²⁵

This change is not in the interests of powerful home states and most developing host states are reluctant to tighten their regulatory grip out of fear

²² See James Crawford, *The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect*, 96 AM. J. INT'L L. 874, 886, 889 (Oct. 2002).

²³ The terms MNCs, corporations and business entities, whether domestic or transnational in nature, will be used interchangeably throughout this article. The meaning ascribed to both coincides with the subject matter of the BHR draft treaty. In fact, several delegations during the Working Group sessions queried which term was more appropriate. The consensus position was in favor of a broad approach, not only because all types of legal entities, domestic and multinational as well as state-owned, can commit violations, but also because a narrow definition could induce an entity to choose a particular type of incorporation to avoid being encompassed under the BHR treaty. See Working Grp., Rep. of the Fifth Session, U.N. Doc. A/HRC/43/55, at 8, ¶ 41 (Jan. 9, 2020).

²⁴ See Ilias Bantekas, *The Human Rights and Development Dimension of Investment Laws: From Investment Laws with Human Rights to Development-Oriented Investment Laws*, 31 FLA. J. INT'L L. 339, 340-42 (2020).

²⁵ See Rep. of the Fifth Session, *supra* note 23 at 8, ¶ 41.

of losing out on inward investments.²⁶ BITs generally create a cocktail of rights for investors that override constitutional norms and even general international human rights law; the latter on the ground that international foreign investment law is fragmented from other spheres of international law, and hence there is no real need to reconcile possible conflicts.²⁷ This issue is examined in more detail in Section 3 below. What this means is that the proposed BHR draft treaty cannot be in conflict with the global BIT architecture,²⁸ as well as other treaties, such as WTO agreements, which directly or indirectly grant rights to investors/MNCs/traders/suppliers above the human rights of persons in states where such entities operate.

Finally, a BHR treaty that obliges states to strengthen their regulation of corporate activities, stretching to each and every supplier, necessitates the active participation of the bulk of the international community. If not, certain states may rightly perceive their self-exclusion as a competitive advantage against other signatory states.²⁹ Hence, it is important not only that the treaty is compatible with existing limitations, but that enough political leverage is exercised against potential opt-out states so that universal participation is guaranteed.

Despite such restrictions, there is still significant scope for a proposed BHR treaty to make a difference, so long as one delineates from the outset what it is that it should seek to achieve. Clearly, the problem seems to lie in the fact that: a) very little, if any, international human rights and environmental law applies to MNCs, despite the fact that it is otherwise binding on states; and b) poor, developing states, have little incentive to impose strict regulation on foreign MNCs because of the potential negative impact on their economies. It is exactly these important issues that the proposed BHR treaty seeks to address, without upsetting, at least intentionally and vocally, the existing international treaty architecture to which it is bound.

This article discusses seven main concepts related the 2020 BHR draft treaty's codification of international human right norms: (1) Territorial scope of the treaty; (2) Material Scope of the treaty; (3) Preventative due

²⁶ See, e.g., Kenneth J. Vandeveld, *The Economics of Bilateral Investment Treaties*, 41 HARV. INT'L L.J. 469, 499 (2000) ("BITs seriously restrict the ability of host states to regulate foreign investment...").

²⁷ See Anne van Aacken, *Fragmentation of International Law: The Case of International Investment Protection*, 17 FIN. Y.B. INT'L L. 91, 92-93 (2008). It should be admitted, however, that there is a growing body of practice and scholarly opinion advocating in favor of the principle of systemic integration between human rights and foreign investment obligations in accordance with Article 31(3)(c) of the 1969 Vienna Convention on the Law of Treaties (VCLT). See Silvia Steininger, *What's Human Rights Got to Do with It? An Empirical Analysis of Human Rights References in Investment Arbitration*, 31 LEIDEN J. INT'L L. 33 (2017).

²⁸ Concerns about such a clash have arisen in the discussions of the Working Group. See Rep. of the Fourth Session, *supra* note 10, at ¶ 51.

²⁹ See MICHAEL E. PORTER, *THE COMPETITIVE ADVANTAGE OF NATIONS* (The Free Press 1990).

diligence obligations; (4) Liability of MNC as legal persons; (5) Jurisdiction for victim's rights; (6) Characterization of victimhood under the treaty; and (7) Institutional arrangements created by the treaty.

II. TERRITORIAL SCOPE OF THE PROPOSED TREATY

The territorial scope of the draft BHR treaty is wholly different from other universal and regional human rights treaties, all of which generally prescribe territorial application regardless of the nationality or other status of the victims or perpetrators.³⁰ In fact, the draft BHR's territorial scope concerns chiefly, but not exclusively, extra-territorial acts. This is because the draft treaty is intended to encompass "all business activities, including particularly but not limited to those of a transnational character."³¹ The term *transnational* is not readily susceptible to a neat definition or quantification,³² but for the purposes of the 2019 draft treaty a business activity is considered transnational in nature if:

- a. It is undertaken in more than one national jurisdiction or State; or
- b. It is undertaken in one State through any contractual relationship but a substantial part of its preparation, planning, direction, control, designing, processing or manufacturing takes place in another State; or
- c. It is undertaken in one State but has substantial effect in another State.³³

This provision is provocative because it allows member states to assume jurisdiction over business activities that are extra-territorial in nature. If this were not so, however, the draft BHR would simply replicate the formalism

³⁰ See International Covenant on Civil and Political Rights, art. 2(1), *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171, 173 (entered into force Mar. 23, 1976, adopted by the United States Sept. 8, 1992) [hereinafter ICCPR]. Of course, there is a long list of domestic and international case law clearly stipulating that effective control over foreign territory is tantamount to a state's own territory for the purposes of the coverage of human rights treaties. See MARKO MILANOVIĆ, *EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES: LAW, PRINCIPLES, AND POLICY* (Oxford Univ. Press 2013). A long list is beyond the scope of this article.

³¹ See 2019 BHR Draft, *supra* note 11, at art. 3(1).

³² The consistent practice of MNCs, as well as state enterprises acting as *fiscus* in particular cross-border industries gives rise to rules (and forms of self-regulation) recognized by courts and domestic laws, whether expressly or tacitly, as private custom or acceptable conduct. See Roger Cotterrell, *What is Transnational Law?* 37 L. & SOC. INQUIRY 500, 502 (2012) (book reviews). This 'rule-making capacity' of corporate entities and MNCs is known as *lex mercatoria* and is part of a much larger process known as transnational law. See *id.* Moreover, States are increasingly using private contracts and private law as their governing law, rather than treaties. See Ilias Bantekas, *The Globalization of English Contract Law: Three Salient Illustrations*, 137 L.Q. REV. 330, 334 (2021) (explaining how private law is used by State entities to bypass the formalities of transactions that would otherwise be subject to public law).

³³ See 2019 BHR Draft, *supra* note 11, at art. 3(2).

of territorial incorporation of MNCs and allow parent companies to relinquish due diligence obligations over their affiliates and supply chains. Such a narrow view of MNCs is inconsistent with general international human rights law and the control of the parent company over its affiliates and suppliers arising from MNC intra-shareholding or equity-based ownership. Even so, Article 13(1) and (2) of the 2019 draft BHR treaty is at pains to emphasize that there is nothing in the proposed treaty authorizing intervention in the domestic affairs or jurisdiction of other states. Article 1(3) of the 2020 version expands the notion of “business activities” to also include state-owned enterprises.³⁴ A new Article 1(4) has been added in the 2020 version, with the aim of defining “business activities of a transnational character.” It is defined as any business activity that: a) is undertaken in more than one jurisdiction; b) is just in one state through any business relationship, “albeit a substantive part of its preparation, planning, direction, control, design, processing or manufacturing, storage or distribution takes place in another state,” or; c) is undertaken in one state but produces a substantial impact in another.³⁵ Article 3(1) of the 2020 version makes it clear that the scope of the draft BHR treaty encompasses “business enterprises” whereas its predecessor only referred to “business activities.”³⁶

One of the myths as to why extra-territorial regulation is disfavored is because of its interventionist effect in other legal systems. While this is prima facie true, there is no doubt that: a) the ability to regulate an entity under one’s control, such as a company incorporated in the home state, makes the home state complicit in the illegal conduct of that entity abroad; and b) where the conduct of the entity abroad produces effects on the territory of the home state, as well as elsewhere, measures against such effects are justified under international law on the basis of territoriality. Even so, the obligation of states to respect, protect and fulfill human rights (especially socio-economic rights) extraterritorially stems from general international law and particularly the law on state responsibility.³⁷ Paragraph 9 of the 2011 Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural (ESC) Rights, states that such an obligation arises in situations over which:

³⁴ See *OEIGWG Chairmanship Second Revised Draft, Legally Binding Instruments to Regulate, In International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises*, OHCHR at art. 1(3) (June 8, 2020) [hereinafter 2020 BHR Draft].

³⁵ *Id.* at art. 1(4).

³⁶ *Id.* at art. 3(1).

³⁷ In *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Georgia v. Russian Federation), Provisional Measures, 2008 I.C.J. Rep. 353, ¶ 109 (Oct. 15), a question posed to the Court was whether the CERD, which like the ICESCR does not contain a jurisdictional provision may nonetheless apply extraterritorially. Despite the absence of such a provision, the International Court of Justice (ICJ) held that the CERD generally applies “to the actions of a state party when it acts beyond its borders.” *Id.*

- a. [A state] exercises authority or effective control, whether or not such control is exercised in accordance with international law;
- b. State acts or omissions bring about foreseeable effects on the enjoyment of economic, social and cultural rights, whether within or outside its territory;
- c. The State, acting separately or jointly, whether through its executive, legislative or judicial branches, is in a position to exercise decisive influence or to take measures to realize ESC rights extraterritorially, in accordance with international law.³⁸

The Maastricht Principles iterate nothing more than general international law. In a globalized world, powerful states are able to exert a significant amount of financial, fiscal, trade, or other similar control over their weaker counterparts. Hence, international law clearly considers that states effectively controlling the fate of ESC rights in third nations have an obligation to reverse the effects of their actions. Such a gap in the law would render ESC rights meaningless in the era of globalization.

Given that corporations can only be incorporated in the territorial state, the only way that affiliates established abroad may be owned and controlled by the parent company is through intra-shareholding.³⁹ Intra-shareholding allows affiliates in the group to control not only the overall profits within the group, but also the directorship of each affiliate. If affiliates were open to unlimited publicly available purchase of shares (so-called initial public offering), then the parent company, as well as other affiliates, would lose all control over the other affiliates.⁴⁰ This is nothing short of catastrophic for MNCs, because each affiliate trades in, or produces, patented products and sought-after brands. If each affiliate were able to profit from such patents or brands without profits going to the parent company, and without the parent company controlling the use of trade secrets, then the creation of MNCs in this manner would be detrimental to the parent company and the group as a whole.⁴¹ While intra-shareholding allows for development-oriented investments, as well as growth across the globe, the weak transnational corporate architecture, with its emphasis on the race to the bottom as far as

³⁸ Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, ¶ 9 (2011), https://www.etoconsortium.org/nc/en/main-navigation/library/maastricht-principles/?tx_drblob_pi1%5BdownloadUid%5D=23.

³⁹ For an excellent analysis, see Katharina Lewellen & Leslie Robinson, *Internal Ownership Structures of Multinational Firms* (2013), https://www.law.nyu.edu/sites/default/files/ECM_PRO_075236.pdf.

⁴⁰ See Rafael La Porta et al., *Corporate Ownership Around the World*, 54 J. OF FIN. 471 (1999).

⁴¹ Press Release, UNCTAD, Increasingly Complex Ownership Structures of Multinational Enterprises Poses New Challenges of Investment Policy-Makers, U.N. Press Release UNCTAD/PRESS/PR/2016/016 (June 21, 2016), <https://unctad.org/en/pages/PressRelease.aspx?OriginalVersionID=303>.

developing states are concerned, gives rise to serious human rights and environmental concerns.⁴² The first and most obvious is the likelihood of forum/investment shopping through the MNC model for the weakest regulatory regime.⁴³ Such a choice may be predicated on regulatory compliance costs considerations (e.g., low or no pension contributions; insufficient environmental compliance; light health and safety requirements), tax avoidance, or avoidance of public scrutiny by civil society organizations, especially in autocratic states.⁴⁴ No doubt, MNCs typically set up affiliates chiefly in order to create new consumer bases and expand the range of their operations.

When MNCs are allowed to operate in weak regulatory environments, it is clear that little or no meaningful development can ever take place in the sense of the human development index⁴⁵ and that human rights generally deteriorate.⁴⁶ Under such circumstances, inward investment becomes injurious to the host state, because it culminates in the depletion of natural resources, assists corrupt regimes to consolidate their power, while exacerbating poverty and under-development. This is absurd, because investment is meant to augment growth and emulate solid democratic governance practices.⁴⁷ Poor regulation further breeds poor corporate conduct, driven by the desire of corporate directors to please shareholders

⁴² From a budgetary and tax perspective, see Rosanne Altshuler & Harry Grubert, *The Three Parties in the Race to the Bottom: Host Governments, Home Governments and Multinational Corporations*, 7 FLA. TAX REV. 153 (2005).

⁴³ See UNCTAD, *supra* note 41.

⁴⁴ See generally BJÖRN P. EBERT, FORUM SHOPPING IN INTERNATIONAL INVESTMENT LAW: FORUM PLANNING, FORUM ENHANCEMENT, AND FACILITATION OF PROCEDURE (Mohr Siebeck 2017).

⁴⁵ The three indicators of HDI are: longevity, knowledge, and decent living standards. See UNDP, HUMAN DEVELOPMENT REPORT 1990: CONCEPT AND MEASUREMENT OF HUMAN DEVELOPMENT, 11-12 (Oxford Univ. Press 1990). See also Amartya Sen, *Capability and Well-Being*, in Martha Nussbaum & Amartya Sen, THE QUALITY OF LIFE, 30 (Oxford Univ. Press 1993), who distinguishes between capabilities and wellbeing. Sen's capabilities approach demonstrates that wellbeing differs from welfare in that the latter concerns prosperity in terms of material needs. See *id.* He measures the developmental progress of states by reference to the capabilities of their citizens (capabilities approach) and distinguishes between positive and negative freedoms. See *id.* Sen, whose influence was significant in the formulation of the HDI, has argued that only bottom-up development is sustainable, whereas development driven exclusively by governments is unsustainable because of the violation of rights and the lack of empowerment involved in the process. See *id.*

⁴⁶ According to a 2017 survey by the Chartered Institute of Procurement and Supply (CIPS), 34% of business entities required by the UK Modern Slavery Act to complete the report/audit stipulated under the Act failed to do so, with a significantly large number found to have adopted no pertinent policies. See *One in Three Businesses are Flouting Modern Slavery Legislation – And Getting Away with It*, CIPS NEWS (Sept. 6, 2017), <https://www.cips.org/en-gb/who-we-are/news/one-in-three-businesses-are-flouting-modern-slavery-legislation--and-getting-away-with-it/>. The survey was bleak in its conclusion that despite the disappointing findings, the industry was adamant that self-regulation was sufficient. See *id.*

⁴⁷ See Zeng Huaqun, *Balance, Sustainable Development, and Integration: Innovative Path for BIT Practice*, 17 J. INT'L ECON. L. 299, 323 (2014) (arguing that the concepts of 'balance' and 'sustainable development' be inserted in BITs).

and of elite service providers to find loopholes in the system. Transfer pricing is emblematic as to why the business conduct of MNCs should be subject to extra-territorial control. Transfer pricing allows *all* the affiliates of an MNC to declare the *same* losses and expenses incurred in one jurisdiction in their own annual tax returns, as long as they possess shares or some form of equity in that other affiliate. Hence, the same losses and expenses are declared in several national tax declarations around the world, even though they have only been incurred once and in only one jurisdiction. This mechanism allows all affiliates to decrease their tax burden and in doing so decrease the amount of tax owed to the country of incorporation, which in turn impacts social services and the enjoyment of fundamental rights.⁴⁸ Fortunately, the Organization for Economic Co-operation and Development (OECD) is in the process of taking measures against transfer pricing through its Base Erosion and Profit Shifting (BEPS) mechanism,⁴⁹ but such measures will not have global application absent a multilateral treaty.⁵⁰

As a matter of unilateral state practice—as opposed to the BEPS that is an exercise of collective state practice—extra-territorial laws regulating particular aspects of corporate conduct are on the rise, chief among these being the United Kingdom’s Modern Slavery Act of 2015⁵¹ and the Australian Modern Slavery Act of 2018.⁵² Section 54 of the United Kingdom’s Act requires commercial entities with a turnover of £36 million, irrespective of their place of incorporation, but which undertake even a part of their business in the United Kingdom, to prepare annual slavery and trafficking audits.⁵³ In equal measure, the French Corporate Duty of Vigilance Law 2017 (Vigilance Law)⁵⁴ imposes a duty of care on large

⁴⁸ This has led to a scholarly literature arguing in favor of a unitary taxation of MNCs. See Alexander Ezenagu, *Unitary Taxation of Multinationals: Implications for Sustainable Development*, CTR. FOR INT’L GOVERNANCE INNOVATION (Nov. 2019), https://www.cigionline.org/sites/default/files/documents/SDG%20PB%20no.4_0.pdf.

⁴⁹ *International Collaboration to End Tax Avoidance*, ORG. FOR ECON. CO-OPERATION & DEV., <https://www.oecd.org/tax/beps/> (last visited Jan. 30, 2021). See Ilias Bantekas, *Inter-State Tax Arbitration in International Law*, 8 J. INT’L DISP. SETTLEMENT 507, 522 (2017) (explaining that while BEPS is the most progressive tax mechanism by which to deter transfer pricing, its application is limited).

⁵⁰ See generally RICHARD S. COLLIER & JOSEPH L. ANDRUS, *TRANSFER PRICING AND THE ARM’S LENGTH PRINCIPLE AFTER BEPS* (2017) (analyzing the effectiveness of ALP and BEPS).

⁵¹ Modern Slavery Act 2015 (c. 30) (U.K.).

⁵² Modern Slavery Act 2018 (No. 153/2018) (Austl.); see also MODERN SLAVERY BUS. ENGAGEMENT UNIT, *COMMONWEALTH MODERN SLAVERY ACT 2018: GUIDANCE FOR REPORTING ENTITIES* (2019), <https://www.homeaffairs.gov.au/criminal-justice/files/modern-slavery-reporting-entities.pdf>.

⁵³ Modern Slavery Act 2015 (c. 30) (U.K.).

⁵⁴ Loi no. 2017-399 du 27 Mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d’ordre [Law 2017-399 of Mar. 27, 2017 on the Duty of Vigilance of Parent Companies and Ordering Companies], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.], Mar. 28, 2017, p. 1 (Fr.). For a useful English summary, see *French Corporate Duty of Vigilance Law – Frequently Asked Questions*, EECJ (Feb. 23, 2017), <https://corporatejustice.org/documents/publications/french-corporate-duty-of-vigilance-law->

French companies (on the basis of number of employees) and their subsidiaries or entities under their control for a wide range of environmental and human rights obligations.⁵⁵ A similar initiative was undertaken by India through the adoption of its National Guidelines on Responsible Business Conduct in 2018.⁵⁶ This trend is increasingly witnessed in the case law of industrialized states. In *Nevsun Resources Ltd. v. Araya*, the Canadian Supreme Court held that Canadian corporations are liable for the breach of customary and *jus cogens* obligations.⁵⁷ Significantly, such liability is not limited to tort, particularly given the public nature and importance of the violated rights involved, the gravity of their breach, the impact on the domestic and global rights objectives, and the need to deter subsequent breaches.⁵⁸

Finally, there is a significant practice by industrialized states in exercising broad extra-territorial jurisdiction in respect of foreign corporate acts that produce harm upon their territory or economic interests. The application of several varieties of the “effects doctrine” is of particular relevance in this context.⁵⁹ Transnational corruption by MNCs abroad impacts the ability of the home state to collect taxes (e.g., because full extent of profits are not revealed), the level of financial aid due to the host state, the ability of its other corporations to freely compete in international bids, as well as any additional offences related to the repatriation of profits, such as money laundering. It is simply fictitious to assume that other illegal or injurious actions of an MNC affiliate abroad will produce no financial, social, criminal, or other effect in the territory or the global interests of the home state of the MNC. It is precisely because of the effects of such actions that home states not only have a direct interest, but an obligation, to take appropriate measures.

The draft treaty clearly exhibits a consensus concerning the need for a multilateral regulatory framework for MNCs that encompasses not only the

faq-pdf. See also *France’s Law on the Corporate Duty of Vigilance: A Practical and Multidimensional Analysis in English*, BUS. & HUMAN RIGHTS RES. CTR. (Mar. 28, 2018), <https://www.business-humanrights.org/en/frances-law-on-the-corporate-duty-of-vigilance-a-practical-and-multidimensional-analysis-in-english>.

⁵⁵ In *Sherpa v. Lafarge*, the Paris Appeals Court held that Lafarge had paid several million USD to ISIS in Syria to maintain operations at its cement factory. *Sherpa and ECCHR to Appeal Decision in Lafarge/Syria Case at French Supreme Court*, ECCHR (Nov. 7, 2019), <https://www.ecchr.eu/en/press-release/sherpa-and-ecchr-to-appeal-decision-in-lafargesyria-case-at-french-supreme-court/>. The Court held that the company, among others, endangered the lives and fundamental rights of its employees and was further liable for terrorist financing. *Id.*

⁵⁶ MINISTRY OF CORP. AFFAIRS, NATIONAL GUIDELINES ON RESPONSIBLE BUSINESS CONDUCT (2018), https://www.mca.gov.in/Ministry/pdf/NationalGuideline_15032019.pdf.

⁵⁷ *Nevsun Res. Ltd. v. Araya*, [2020] S.C.J. No. 5 (Can.).

⁵⁸ *Id.*

⁵⁹ Its application, in fact, lies in several areas of regulation, including anti-competition. See, e.g., C-413/14, *Intel Corp. v. Commission*, 2017 E.C.R. I-0000; *United States v. Aluminum Co. of America*, 148 F.2d 416, 444 (2d Cir. 1945) (confirmed in *Hartford Fire Ins. v. California*, 509 U.S. 764, 796 (1993)).

home state, but also extra-territorial jurisdiction. As explained, this consensus draws on recent state practice that holds MNCs accountable in home states for acts and omissions committed abroad.

III. MATERIAL SCOPE OF TREATY

Article 3(3) of the 2019 Zero Draft encompasses business activities that impact or affect “all human rights treaties.”⁶⁰ The problem with such a broad scope is that, in theory, states which are parties to the BHR treaty may not necessarily be parties to all UN human rights treaties; as a result, non-ratified treaties cannot form part of the material scope of those states’ obligations.⁶¹ Article 9 of the 2019 draft treaty serves to remedy this inconsistency. Paragraph 1 thereof provides that all procedural and substantive issues regarding claims shall be governed by the *lex fori*, including the forum’s conflict of laws rules.⁶² Where substantive human rights law-related claims are not covered by the *lex fori*, the competent court of the forum may apply the laws of another state, if its domestic law so allows.⁶³ Paragraph 2 of Article 9 of the Zero Draft thus effectively allows the use of conflict of laws rules—which typically concern the civil law of obligations—to import substantive human rights rules. This is a unique tool that should not go unnoticed. Paragraph 2 of the Zero Draft placed some limitations on such importation where:

- a. the acts or omissions that result in violations of human rights covered under this [treaty] have occurred; or
- b. the victim is domiciled; or
- c. the natural or legal person alleged to have committed the acts or omissions that result in violations of human rights covered under this [treaty] is domiciled.⁶⁴

This provision fills some of the most significant hurdles in transnational tort suits against corporate business conduct. Suits brought before the courts of states with minimal links to the conduct or its impact have generally been disinclined to entertain such disputes and invoke the *forum non conveniens* doctrine to decline jurisdiction.⁶⁵ Moreover, the courts of countries whose

⁶⁰ See 2019 BHR Draft, *supra* note 11.

⁶¹ In the First Session, the issue of human rights reference in a preamble was raised by one delegation but was not discussed. See First Session, *supra* note 7, at ¶ 97. In the Fifth Session, a similar reference in the preamble was found to be inflexible, with some delegates asking that the language found in Principle 12 of the UNGPs be used instead. See Fifth Session, *supra* note 23, at ¶¶ 24, 43. Furthermore, some delegations argued that “all human rights” might not comply with the principle of legality, while also permitting the infusion of different standards among states. See *id.*

⁶² See 2019 BHR Draft, *supra* note 11, at art. 9(1).

⁶³ *Id.* at art. 9(2).

⁶⁴ *Id.*

⁶⁵ See, e.g., AAA v. Unilever PLC [2018] EWCA Civ 1532 (QB) (holding no duty of care by a U.K. parent company in respect of third parties harmed by the business conduct of a foreign

human rights armory is weak can assert jurisdiction and apply a more extensive gamut of rights that are in force in a country with a link to the claim under consideration.

States limited by BITs that constrain the regulatory authority of host states can make use of the laws of the home state, or other connected states. The human rights discrepancy in the foreign investment architecture is glaring and not necessarily the fault of corporations. On the one hand, there are few, if any, human rights obligations on investors/corporations in BITs and multilateral investment treaties.⁶⁶ In fact, an underlying aim of BITs, at least from the perspective of industrialized home states, is to permit their corporations to expand their operations abroad with as few regulatory restrictions as possible, including environmental and human rights. On the other hand, host states are bound to observe human rights obligations arising from treaties and domestic laws, but these may turn out to conflict with obligations under BITs and multilateral investment treaties. In such events, treaty and constitutional-based human rights obligations are overridden by investment guarantees under BITs and multilateral investment treaties.⁶⁷ At the same time, the home state is under no real obligation to supervise the human rights conduct of its corporations/investors in the host state. There exists no such obligation in any BIT, which in any event would have amounted to interference in the domestic affairs of the host state. The lifting of the limitations in BITs under Article 3 of the BHR treaty should, in theory at least, apply also to so-called umbrella clauses in BITs,⁶⁸ the existence of which was a surprise to most developing states when arbitral disputes began to be filed before ICISD. Umbrella clauses, in short, serve to extend BIT protection to privileges and guarantees included in investment contracts,

subsidiary); *see also* Kalma v. African Minerals Ltd., [2020] EWCA Civ 144 (QB) (deciding that there was no liability for a UK company's operations in Sierra Leone mired by police abuse).

⁶⁶ A study was conducted by UNCTAD in 2001, which demonstrated that BITs contain a very tiny amount of investor obligations. *See* U.N. CONFERENCE ON TRADE & DEV., SOCIAL RESPONSIBILITY, at 17, U.N. Sales No. E.01.II.D.4 (2001).

⁶⁷ The *Tecmed* case serves as a good illustration. It involved an investment agreement between Tecmed and Mexico with the purpose of constructing a landfill. *See* *Tecnicas Medioambientales Tecmed S.A. v. Mexico*, ICSID Case No. ARB(AF)/00/2, Award, ¶ 116 (May 29, 2003). Following the expiry of the first license period the Mexican government refused to renew the license, arguing correctly that the project caused adverse environmental and health effects on the local population. *See id.* As a result, the investment was effectively terminated, and the investor stood to suffer a financial loss. The investment tribunal to which the dispute was referred held that the "government's intention [was] less important than the effects of the measures on the owner of the assets or on the benefits arising from such assets affected by the measure." *See id.*; *see also* *Compañía del Desarrollo de Santa Elena S.A. v. Costa Rica*, ICSID Case No. ARB/96/1, Final Award, ¶ 71 (Feb. 17, 2000). *See also* Ilias Bantekas, *The Linkages between Business and Human Rights and their Underlying Causes*, 43 HUM. RTS. Q. 118, 130 (2021) (arguing that the underlying cause of business violations are weak host State laws and as well as the absence of human rights obligations in BITs).

⁶⁸ *See* Jarrod Wong, *Umbrella Clauses in Bilateral Investment Treaties: Of Breaches of Contract, Treaty Violations and the Divide between Developed and Developing Countries in Foreign Investment Disputes* 14 GEO. MASON L. REV. 137, 137 (2006).

even if these are not stipulated in the BIT itself.⁶⁹ This effectively means that contracts between investors and host states ultimately end up having the same effect as BITs and hence override constitutional law and other laws that would ordinarily apply, including the human rights law and the obligations of the host state.

The material scope of the treaty is important, apart from what has already been said, in at least two practical respects: a) in order to ascertain whether a human rights violation is attributable to a business entity, which by extension gives rise to the jurisdiction of one or more national courts; b) because the existence of a human rights abuse or violation constitutes the *duty* element of the pertinent tort,⁷⁰ whose breach in turn gives rise to a claim by the victim(s). Hence, the exact number of human rights encompassed under the 2019 draft BHR treaty was deemed crucial for ascertaining the rights of victims to appropriate remedies under Articles 4(5) and 6(4) of the treaty.⁷¹ As will be shown below, such as extensive recitation of rights was considered redundant in the 2020 draft because it may easily be codified through a more generic clause.

Liability arising from a business activity and the claims this liability entails are meaningless without understanding its precise legal basis. Articles 1(2) and 6(1) of the 2019 draft BHR treaty leave no doubt that liability of corporations/MNCs arises from "human rights violations or abuses," which includes any harm committed by a state-owned enterprise⁷² or a private business/enterprise through acts and omissions in the course of business activities.⁷³ As has already been explained, only states are duty bearers of human rights obligations and accordingly human rights violations are attributable to them alone. While some human rights language increasingly finds itself in the newer generation of BITs,⁷⁴ this does not necessarily give rise to corporate human rights obligations. In equal measure, although some

⁶⁹ *Id.*

⁷⁰ See *Vedanta Resources PLC and Another v. Lungowe and Others* [2019] UKSC 20, [45]-[46], [92] (appeal taken from EWCA Civ 1528) (Eng.) (which unlike other cases (¶ 45) did find a duty of care arising from a company's overseas business operations or in the Cape case (¶ 92)).

⁷¹ See 2019 BHR Draft, *supra* note 11, at art. 4(5), 6(4).

⁷² The regulation of state-owned enterprises in the 2019 draft BHR treaty is hardly straightforward. In fact, there is an emerging scholarship on so-called state capitalism, which several scholars assume is wholly antithetical to free market economy and that ultimately MNCs are hurt by state capitalism. See Alvaro Cuervo-Cazurra et al., *Governments as Owners: State Owned Multinational Companies*, 45 J. OF INTL. BUS. STUD. 919, 919 (2014). At the most basic level, states incur liability from unlawful acts and omissions of state-owned enterprises, hence their inclusion in the BHR treaty dilutes the liability of MNCs. See *id.* Of course, this is not necessarily the case with state-owned enterprises open to private shareholding. See *id.* Moreover, while state-owned enterprises acting as *fiscus* would not enjoy immunity from process or enforcement, it is doubtful that many states of origin would make them susceptible to BHR claims before their national courts. See *id.*

⁷³ See 2019 BHR Draft, *supra* note 11, at art. 1(2), 6(1).

⁷⁴ See, e.g., U.S. Model BIT, Art. 8(3)(c)(i), 12, 13 (2012); Canadian FIPA, Art. 10(1), 11 (with its Norwegian counterpart); Indian Model BIT, Art. 5.5; Brazilian CFIA, Art. 16 (which is effectively a Model BIT/MIT).

investment tribunals accept human rights defenses,⁷⁵ these are not translated into obligations on investors.⁷⁶ The language of “human rights violations and abuses” is therefore unfortunate, but perhaps also unavoidable.⁷⁷ Although technically incorrect, in practice a wrongful act or omission committed by a legal entity is no less a human rights violation simply because it is not committed by a state entity. This is what the BHR aims to illustrate, without at the same time diminishing the primary human rights responsibility of the state.

Article 14 of the 2020 version clarified one of the most contentious provisions found in its predecessor, which referred to the consistency of the BHR with states’ existing international obligations. It was perhaps felt that the 2019 version retained the much-maligned status quo, which provided sufficient discretion to fragment and prioritize between treaties. Article 14(5) of the 2020 draft, although still rather weak and less intrusive than would otherwise be desired requires that states shall ensure that:

- a. Any existing bilateral or multilateral agreements, including regional or sub-regional agreements, on issues relevant to this (Legally Binding Instrument) and its protocols, including trade and investment agreements, shall be interpreted and implemented in a manner that will not undermine or limit their capacity to fulfill their obligations under this (Legally Binding Instrument) and its protocols, as well as other relevant human rights conventions and instruments.
- b. Any new bilateral or multilateral trade and investment agreements shall be compatible with the State Parties’

⁷⁵ See Johannes Hendrik Fahner & Matthew Happold, *The Human Rights Defense in International Investment Arbitration: Exploring the Limits of Systemic Integration* 68 INT’L & COMPAR. L. Q. 741, 741 (2019).

⁷⁶ In the event of conflicts between national constitutions and BIT obligations, several countries have been forced to take a stand. South Africa, e.g., adopted the Promotion and Protection of Investment Act in 2013, after a commissioned report concluded that BITs were incompatible with section 25 of the South African Constitution, which concerns expropriation and compensation. See Constitution of the Republic of South Africa 1996, § 25 (S. Afr.); Promotion and Protection of Investment Act § 5(1)-(4) (2013). Countries in South America have also gone ahead to denounce BITs through the so-called Bolivarian Alternative for the Americas. See *What is the Alba?*, Alba Info: Information of The Bolivarian Alliance (Blog), (Mar. 20, 2019), <https://albainfo.org/what-is-the-alba/>.

⁷⁷ Not surprisingly, this has been the subject of heated debates. Some delegations felt it was unclear what level of harm had to be present to constitute a human rights abuse or violation. See Emilio Rafael Izquierdo Miño, *Draft report on the Fifth Session of the Open Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights*, at ¶ 35, U.N. Doc. A/HCR/XX (2020), https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session5/IGWG_5th_DraftReport.pdf. There were multiple calls for greater consideration of the distinction between “violation” and “abuse,” with a few delegations suggesting that the revised draft refer only to “abuses” throughout the document. See *id.* Another delegation and a non-governmental organization suggested defining “abuse” and “violation” separately. See *id.*

human rights obligations under this (Legally Binding Instrument) and its protocols, as well as other relevant human rights conventions and instruments.⁷⁸

The material scope of the BHR encompasses aspects that largely divide states. Non-state actors, such as MNCs do not generally have human rights obligations under international law. The draft treaty respects this status of affairs yet obliges states to impose tort-based liability on MNCs violating human rights norms. In this manner the draft treaty, while not departing from general international law on the rights and obligations of non-state actors, demands that states hold them accountable at the domestic level. Such an outcome does not depart from customary international law.

IV. PREVENTIVE DUE DILIGENCE OBLIGATIONS

The purpose of the BHR treaty is twofold. On the one hand, it sets out to create a uniform set of largely host state obligations, while on the other hand, it extends enforceable rights to victims of corporate human rights abuses and violations directly against the perpetrators themselves. States are required to take certain measures by which to ensure that corporations are prevented from abusing human rights, while at the same time rendering the corresponding obligations justiciable and subject to dissuasive penalties and fines. Article 5(2) of the 2019 draft stipulates that such preventive measures are to be enforced through domestic law, principally by means of human rights due diligence assessments encompassing not only potential human rights impact arising from a corporation's direct conduct, but also potential human rights impact arising, or likely to arise, from a corporation's other contractual relationships,⁷⁹ typically its supply chain, or sub-contractors.⁸⁰ Article 1(4) of the 2019 version, which dealt with the meaning of contractual relationships, has been deleted and replaced with a new Article 1(5) in the 2020 version, which refers to these as "business relationships." Accordingly, they are defined as:

any relationship between natural or legal persons to conduct business activities, including those activities conducted through affiliates, subsidiaries, agents, suppliers, partnerships, joint venture, beneficial proprietorship, or any other structure or contractual relationship as provided under the domestic law of the

⁷⁸ See 2020 BHR Draft, *supra* note 34, at art. 14(5).

⁷⁹ See Miño, *supra* note 77, at ¶ 37 (where certain delegations felt there was a danger that the term could be interpreted narrowly, excluding certain relevant relationships (e.g., equity-based relationships)). It was queried whether it might be wise replacing the phrase with "business relationship," as contained in the UNGP. *See id.* Other delegations proposed the term "economic relationship." Björn Fasterling, *Human Rights Due Diligence as Risk Management: Social Risk Versus Human Rights Risk*, 2 BUS. & HUM. RTS. J. 225, 225 (2017).

⁸⁰ See 2019 BHR Draft, *supra* note 11, at art. 5(2)(a)-(d).

State, including activities undertaken by electronic means.⁸¹

Human rights impact assessments (HRIAs) are now common practice in the work of international financial institutions (IFIs),⁸² UN bodies,⁸³ the EU,⁸⁴ private sector banks, and elsewhere.⁸⁵ Hence, there is access to an excellent body of best practices, and there exists a global industry that advises on and undertakes HRIAs on behalf of states and corporate actors.⁸⁶ Paragraph 3 of Article 5 of the 2019 draft BHR treaty specifies further where HRIAs are appropriate and what they should focus on. The results of HRIAs and environmental impact assessments should be integrated in the relevant “internal functions and processes [of MNCs] ... [and further be used to] take appropriate action.”⁸⁷ Domestic laws should further mandate meaningful consultations with pertinent stakeholders “through appropriate procedures with representative institutions,” with

⁸¹ See 2020 BHR Draft, *supra* note 34, at art. 1(5).

⁸² Comm. on Econ., Soc., and Cultural Rts., *Public Debt, Austerity Measures in the International Covenant on Economic, Social and Cultural Rights*, at ¶ 4, 11, U.N. Doc. E/C.12/2016/1, (July 22, 2016); see, e.g., H.R.C., *Report of the Independent Expert on the Effects of Foreign Debt and Other Related International Financial Obligations of States on The Full Enjoyment of All Human Rights, Particularly Economic, Social and Cultural Rights on His Mission to Greece*, ¶ 81(a)-83(b), U.N. Doc. A/HRC/31/60/Add.2 (Jan. 12, 2016). The World Bank Group has set up quasi-judicial mechanisms, such as the Bank’s Inspection Panel and the Multilateral Investment Guarantee Agency (MIGA) Ombudsman, which are competent to hear complaints concerning violations of the Bank’s internal rules, not violations of human rights law, albeit as these arise from violations of assessments incumbent on corporate borrowers. See The Inspection Panel, *Mandate and Procedures*, <https://www.inspectionpanel.org/about-us/panel-mandate-and-procedures> (last visited Feb. 1, 2021).

⁸³ See H.R.C., *Guiding Principles on Human Rights Impact Assessment for Trade and Investment Agreements*, U.N. Doc. A/HRC/19/59/Add.5 (Dec. 19, 2011); H.C.R., *Guiding Principles on Extreme Poverty and Human Rights*, U.N. Doc A/HRC/21/39 (July 18, 2012); CESCR, *General Comment No. 24*, ¶ 17, 21-22, 24 (Aug. 17, 2017); CRC Comm., *General Comment 19*, ¶ 47, 19, U.N. Doc. CRC/CG/19 (July 10, 2016).

⁸⁴ Eur. Comm’n, *Working Paper Operational Guidance on Taking Account of Fundamental Rights in Commission Impact Assessments*, SEC (2011) 567 Final, (May 6, 2011). The CJEU has, in fact, emphasized the importance of such HRIAs in the adoption of primary and secondary EU legislation. See *Schecke and Eifert v. Land Hessen*, ECLI:EU:C:2010:662, Case No. C-92/09, C-93/09, (Nov. 10, 2010). HRIAs are also required through two EU instruments, namely: The Directive on Public Procurement and the Directive on Non-Financial Information Disclosure. See Eur. Comm’n, *Public Procurement*, https://ec.europa.eu/growth/single-market/public-procurement_en (last visited Feb. 14, 2021); Eur. Comm’n, *Non-Financial Reporting*, https://ec.europa.eu/info/business-economy-euro/company-reporting-and-auditing/company-reporting/non-financial-reporting_en (last visited Feb. 14, 2021). Under the latter, companies with over 500 employees are required to disclose information on policies, risks and results as regards their respect for human rights. See *Non-Financial Reporting*, *supra* note 84.

⁸⁵ See also UNTAD, *supra* note 41; EBERT, *supra* note 44; UNDP, *supra* note 45.

⁸⁶ See GRI, *GRI’s Contribution to Sustainable Development 2016-2020*, (2016), [www.globalreporting.org/resource/library/GRI%27s%20Contribution%20to%20Sustainable%20Development%202016-2020%20\(2\).pdf](http://www.globalreporting.org/resource/library/GRI%27s%20Contribution%20to%20Sustainable%20Development%202016-2020%20(2).pdf); OECD, *OECD Due Diligence Guidance for Responsible Business Conduct*, <https://www.oecd.org/investment/due-diligence-guidance-for-responsible-business-conduct.htm> (last visited Feb. 1, 2021).

⁸⁷ See 2019 BHR Draft, *supra* note 11, at art. 5(3)(a).

particular emphasis on those most vulnerable, including women, children, persons with disabilities, those in flight, indigenous persons, and others.⁸⁸ While the principle of free, prior, and informed consent (FPIC) is specifically reserved to indigenous persons in Paragraph 3(b) of Article 5 of the 2019 draft treaty,⁸⁹ consultations encompassing similar principles are required for all urban populations as is generally mandated under domestic planning, zoning, and other laws.⁹⁰ Paragraph 3(c) of Article 5 of the 2019 draft treaty further imposes on states an obligation to require financial and non-financial reporting from MNCs with a view to highlighting how they assess and mitigate pertinent human rights and environmental risks.⁹¹ In every case, all due diligence and HRIAs should integrate the impact of the MNC's contractual relationships on human rights and the environment.⁹²

It should be noted that HRIAs and environmental impact assessments are commonplace in some domestic laws, as a species of contractual obligation imposed by IFIs or private banks, or as a matter of self-regulation. Article 5(4) of the 2019 draft BHR treaty went further than the express stipulation in Article 5 by requiring that due diligence be mandated by law. It stipulates that in requiring national procedures to assess whether MNCs have complied with their due diligence obligations, these be made: "available to all natural and legal persons having a legitimate interest, in accordance with domestic law."⁹³ This is crucial because not only is due diligence elevated to a statutory requirement, it is subject to broad *locus standi* by anyone directly or indirectly affected. Hence, the obligations contained in Article 5 of the 2019 draft BHR treaty are rendered justiciable in character.⁹⁴ Article 4 of the 2019 draft treaty is, in fact, at pains to set out the concept of corporate victimhood, to be explored in a subsequent section of this article, with the aim of securing sufficient jurisdiction to claim remedies for human rights abuses and violations.

Unless due diligence obligations move beyond their current self-regulated character where content, procedure, and ethics are optional and subject to the contractual relationship between auditor and audited company, human rights audits will suffer from significant ethical pitfalls and culminate

⁸⁸ *Id.* at art. 5(3)(b).

⁸⁹ *Id.*; see G.A. Res. 61/295, at 9 (2007), https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf.

⁹⁰ See The Town and Country Planning (Development Management Procedure), SI 2015/595, pt. 3, art. 15 (Eng.), <https://www.legislation.gov.uk/uksi/2015/595/article/15> (describing that in the U.K., for example, local planning authorities are required to undertake a formal period of public consultation, prior to deciding a planning application).

⁹¹ See 2019 BHR Draft, *supra* note 11, at art. 5(3)(c).

⁹² *Id.* at art. 5(3)(d)-(e).

⁹³ *Id.* at art. 5(4).

⁹⁴ See generally FONS COOMANS, JUSTICIABILITY OF ECONOMIC AND SOCIAL RIGHTS: EXPERIENCES FROM DOMESTIC SYSTEMS (Intersentia 2006).

in box-ticking exercises.⁹⁵ Despite the existence of several recognized frameworks for sustainability/human rights corporate due diligence, such as the GRI Sustainability Reporting Standards,⁹⁶ the OECD Due Diligence Guidance for Responsible Business Conduct (2018) the UNGC's Communication on Progress,⁹⁷ the International Organization for Standardization ("ISO") 26000⁹⁸ and the UN Guiding Principles Reporting Framework,⁹⁹ no framework hints at ethical rules or regulation of auditors and audit firms. The pertinent ethical issues in due diligence make the difference between human rights-based reporting and potentially tarnished outcomes. Chief among these is respect for participants, informed consent, specific permission required for audio or video recording, voluntary participation, participants right to withdraw, full disclosure of funding sources, no harm to participants, avoidance of undue intrusion, deception techniques, issues with anonymity, participants' right to check and modify a transcript, confidentiality in respect of personal matters, data protection, enabling participation, ethical governance, provision of grievance procedures, appropriateness of research methodology, full reporting of methods, conflicts of interest, moral hazard, and duty of care.¹⁰⁰ Finally, empirical studies have aptly shown that non-financial disclosures of particular industries (e.g., mining) are not susceptible to neat comparisons and benchmark against other corporations in diverse industries.¹⁰¹

A new Article 3(2) was added in the 2020 draft treaty, which provides some clarity between the conduct expected of corporations of vastly varying size. It says that:

⁹⁵ See Jonathan Bonnitcha & Robert McCorquodale, *The Concept of "Due Diligence" in the UN Guiding Principles on Business and Human Rights*, 28 EUR. J. INT'L L. 899, 901 (2017); see also John Gerard Ruggie & John F. Sherman III, *The Concept of "Due Diligence" in the UN Guiding Principles on Business and Human Rights: A Reply to Jonathan Bonnitcha and Robert McCorquodale*, 28 EUR. J. INT'L L. 921, 925 (2017); see also Ilias Bantekas & Alexander Ezenagu, *Ethical Considerations in Financial (Tax) and Non-Financial Corporate Human Rights Reporting*, 28 U. MIAMI INT'L & COMP. L. REV. (forthcoming 2021) (explaining that the HRIA industry is subject to no ethical rules whatsoever and there is little visible willingness to change this state of affairs).

⁹⁶ See *New Standards into Effect for Reporting in 2021*, GRI (2021), <https://www.globalreporting.org/standards/>.

⁹⁷ *Transparency Builds Trust*, U.N. GLOB. COMPACT (2021), <https://www.unglobalcompact.org/participation/report>.

⁹⁸ *ISO 26000 Social Responsibility*, ISO, <https://www.iso.org/iso-26000-social-responsibility.html> (last visited Feb. 13, 2021).

⁹⁹ See *U.N. Guiding Principles Reporting Framework*, SHIFT & MAZARS, <https://www.ungpreporting.org> (last visited Feb. 13, 2021).

¹⁰⁰ Frank Vanclay et al., *Principles for Ethical Research Involving Humans: Ethical Professional Practice in Impact Assessment Part 1*, 31 IMPACT ASSESSMENT & PROJECT APPRAISAL 243, 251 (2013), <https://www.tandfonline.com/doi/pdf/10.1080/14615517.2013.850307?needAccess=true>.

¹⁰¹ See Alberto Fonseca et al., *Sustainability Reporting Among Mining Corporations: A Constructive Critique of the GRI Approach*, 84 J. OF CLEANER PROD., 70, 75 (2012).

when imposing prevention obligations on business enterprises under this (Legally Binding Instrument), State Parties may establish in their law, a non-discriminatory basis to differentiate how business enterprises discharge these obligations commensurate with their size, sector, operational context, and the severity of impacts on human rights.¹⁰²

This is a welcomed addition to the text of the final draft. It is absurd to impose HRIA or other unnecessarily stringent burdens on small corporations in the exact same manner as MNCs. A distinction of what is expected based on size and capacity is important and allows corporations to assess how best to mitigate the negative impact of their operations. It is equally likely that smaller corporations have little to no human rights impacts, and that unnecessarily high regulatory burdens pose disproportionately higher operating costs to smaller corporations than MNCs.

The draft treaty makes it clear that effective due diligence obligations, imposed by law and not on the basis of self-regulation, represent the cornerstone of prevention. Given that human rights impact assessments currently operate on a voluntary basis, the draft treaty imposes a major shift in HRIAs. This is key to ensuring responsible corporate conduct.

V. LIABILITY OF MNCs

Liability of MNCs, envisaged in Article 6 of the 2019 draft BHR treaty, presupposes the conferral of legal personality. Legal personality entails that an entity possesses rights and duties under a legal system (domestic or international) and a capacity to enforce these, whether in the courts or through other binding mechanisms. Hence, liability is a necessary extension of legal personality. A distinction should be made here between the legal personality of MNCs under domestic and international law. Liability under domestic law is uncontested given that MNCs and their affiliates are incorporated under the laws of the territorial or host states. What remains unclear is the international legal personality of MNCs. Unlike natural persons who are conferred rights and duties directly – rather than through incorporated domestic laws – by a significant number of treaties (e.g., European Convention on Human Rights), this is rare as regards private legal persons.

The few examples serve to illustrate that even where legal entities are the subject matter of treaties, states are reluctant to confer duties directly upon them. Articles 9 and 10 of the Charter of the Nuremberg Tribunal, which gave authority to the Tribunal to assess and declare groups or organizations as being criminal in nature, were intended to target

¹⁰² See 2020 BHR Draft, *supra* note 34, at art. 3(2).

membership therein and not in the legal entity itself.¹⁰³ Corporate criminality was also rejected in the context of the ICC Statute, although a proposal to that effect was lodged with the aim of attributing criminal liability to a person in a position of control and acting under the consent of the corporation.¹⁰⁴ The rationale of this proposal was not so much the criminal liability of the wrongdoer, as it was the possibility of achieving a substantial compensation from the corporation. Ultimately, the idea was dropped because not all member states recognized this type of liability, which would consequently risk rendering the principle of complementarity moot.

Some transnational crime treaties have addressed the criminal liability of corporations but only through the medium of domestic laws that seek to harmonize sanctions – while leaving the nature of the liability to the law of each member state.¹⁰⁵ This is understandable given the lack of uniformity in the member states' legal systems on this matter. With regard to crime-specific corporate criminality, some degree of liability is prescribed in anti-corruption treaties, such as Articles 2 and 3(2) of the 1997 OECD Convention and Article 26 of the 2003 UN Convention against Corruption. It is true that these provisions do not oblige member states to promulgate the criminal liability of legal persons, but only to adopt “effective, proportionate and dissuasive” sanctions, whether of a civil, administrative, or criminal nature in conformity with their legal systems. Nonetheless, these conventions do provide for the criminal liability of the natural persons who committed the pertinent offences, particularly where they were acting as agents of the legal person.¹⁰⁶ Therefore, as a result of treaty law – under which only ratifying states are bound – corporate criminal liability with respect to corruption entails: a) criminal liability of the legal person only where this is possible in the law of the signatory; and b) the criminal liability of corporate agents for the crime they committed, as principals or accomplices, as a matter only of international law. The agents' link to the legal person, although not wholly relevant for ICC criminal proceedings except only for evidentiary purposes,

¹⁰³ See *Trials of War Criminals Before the Nuernberg Military Tribunals*, Control Council Law No. 10, at 15 (1952), https://www.loc.gov/rr/frd/Military_Law/pdf/NT_war-criminals_Vol-VI.pdf.

¹⁰⁴ See U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 1st mtg. at 132, U.N. Doc. A/CONF.183/C.1/SR.1 (June 16, 1998).

¹⁰⁵ See generally Council Framework Decision 2001/413, art. 7-8, 2001 O.J. (L 149) 1, 3 (EU); Council Framework Decision 2000/383, art. 8-9, 2001 O.J. (L 140) 2, 3 (EU); Council Framework Decision 2002/629, art. 4, 2002 O.J. (L 203) 3 (EU).

¹⁰⁶ G.A. Res. 55/25, at 4, 22 (Jan. 8, 2001). See also Ilias Bantekas, *The Legal Personality of World Bank Funds under International Law*, 56 TULSA L. REV. 101, 117 (2021) (explaining the complexity of international legal personality, which may take the form of a bank account all the way up to a fully fledged international organisation).

could provide the backbone for a subsequent civil suit brought by victims and their families against the legal person.¹⁰⁷

Article 8(9) of the 2020 draft treaty introduced the concept of “functional liability,” which eliminates the need for a long list of transnational and international crimes enunciated in the 2019 draft version. It states that:

Subject to their legal principles, States Parties shall ensure that their domestic law provides for the criminal or functionally equivalent liability of legal persons for human rights abuses that amount to criminal offences under international human rights law binding on the State Party, customary international law, or their domestic law. Regardless of the nature of the liability, States Parties shall ensure that the applicable penalties are commensurate with the gravity of the offence. States Parties shall individually or jointly advance their criminal law to ensure that the criminal offences covered in the listed areas of international law are recognized as such under their domestic criminal legislation and that legal persons can be held criminally or administratively liable for them. This article shall apply without prejudice to any other international instrument which requires or establishes the criminal or administrative liability of legal persons for other offences.¹⁰⁸

Article 6(1) of the 2019 draft obliges member states to domesticate the liability of MNCs through “comprehensive and adequate” legislative measures. This domestication follows the language of predecessor treaties, namely: “effective, proportionate and dissuasive” sanctions, but unlike those past treaties whose aim was solely to impose sanctions against the legal person, the BHR treaty’s aim is to link liability to reparation of victims.¹⁰⁹ The draft treaties seem to be replicating the language of past treaties dealing with transnational corporate criminality that provided significant latitude to participating states as to the nature of their legislative measures – chiefly because corporate criminality was not available in many jurisdictions. Paragraph 7 of Article 6 of the 2019 draft starts off with: “Subject to their domestic law, state parties shall ensure that their domestic legislation provides for criminal, civil or administrative liability of legal persons for the following offences....”¹¹⁰ It includes offences such as genocide, crimes

¹⁰⁷ See Ilias Bantekas, *Corruption as an International Crime and Crime against Humanity: An Outline of Supplementary Criminal Justice Policies*, 4 J. INT’L CRIM. JUST. 466, 471-79 (2006).

¹⁰⁸ See 2020 BHR Draft, *supra* note 34, at art. 8(9).

¹⁰⁹ See 2019 BHR Draft, *supra* note 11, at art. 6(4).

¹¹⁰ See *id.* at art. 6, ¶ 7.

against humanity, grave breaches (e.g., serious war crimes), torture, etc.¹¹¹ The disjunctive ‘or’ and the phrase “subject to their domestic laws” indicates that contracting states can frame corporate liability under the legal framework that conforms with their laws, that is, either criminal, administrative, or civil. Although this might seem rather light given the range of core international crimes, it is in fact logical. The liability of the legal person is effective when the sanctions imposed against it are commensurate with the harm caused by it; hence, the nature of the sanctions is irrelevant.

The liability of the legal entity is of course distinct from the personal liability of the directing minds of the legal person. This is strongly emphasized in Paragraph 6 of Article 6 of the 2019 draft treaty and in any event reflects customary international law.¹¹² Individual criminal liability arising out of corporate conduct may be distinguished twofold: a) under domestic law; and b) under international law.¹¹³ Article 6 attempts nothing unusual here. It does not create a new form of individual criminal liability under international law (i.e., under the 2019 draft treaty) and it is wholly unlikely that any industrialized state would have entertained such a notion. While Article 6(6) of the 2019 draft treaty is a conservative iteration of individual criminal liability, it leaves gaping a key issue, namely: on what grounds may a corporate employee, or a person associated with the operations of a corporation/legal person become criminally liable for the acts and conduct of said corporation/legal person. At the very least the “controlling mind(s)” of the legal entity, namely its decision makers, should incur criminal liability for any human rights abuses amounting to

¹¹¹ *See id.*

¹¹² *See id.* at art. 6, ¶ 6; *see generally*, ILIAS BANTEKAS, PRINCIPLES OF DIRECT AND SUPERIOR RESPONSIBILITY IN INTERNATIONAL HUMANITARIAN LAW (Manchester Univ. Press 2002).

¹¹³ The criminal liability of the directing minds of corporations was considered significant in post-WWII prosecutions. In *Government Commissioner of the General Tribunal of the Military Government for the French Zone of Occupation in Germany v. Roehling*, Judgment on Appeal to the Superior Military Government Court of the French Occupation Zone in Germany (Roehling Judgment on Appeal), 14 Trials of War Criminals Before the Nuremberg Military Tribunals under Control Council Law No. 10 1097 (1949), the accused were convicted for having permitted slave labor and ill-treatment and for not having done their best to end the abuses. *Id.* at 1136. Similarly, in *United States v. Flick*, the accused were leading industrialists who were charged with war crimes and crimes against humanity for their involvement in plans concerning the enslavement and deportation of civilian and POW slave labor in their industrial enterprises. *United States v. Flick* (The Flick Case), 6 Trials of War Criminals Before the Nuernberg Military Tribunals under Control Council Law No. 10. 1187, 1202 (1947). Of the six accused, only Flick and his inferior Weiss, were held accountable; the former under the theory that he had a duty to prevent the criminal acts of his subordinate, Weiss. *Id.*; *see also* *United States v. Krauch* (The I.G. Farbern Case), 8 Trials of War Criminals Before the Nuernberg Military Tribunals under Control Council Law No. 10 1081 (1948); *United States v. Krupp*, 10 Trials of War Criminals Before the Nuernberg Military Tribunals under Control Council Law No. 10 (1948).

international crimes.¹¹⁴ This will encompass directors and potentially shareholders, to the degree that they were complicit in the criminal conduct. The level and degree of participation will further dictate each person's liability, as either direct perpetrator,¹¹⁵ accomplice, or under the doctrine of superior responsibility.¹¹⁶ The enumeration of the various types of participation in crime in Article 6(9) of the 2019 draft treaty is far too superficial and generally insufficient.

The other, even bigger, problem with an ill-defined personal criminal liability arising from corporate-related conduct concerns the linkages of such conduct to human rights violations, and by extension criminal law-related violations. States habitually associate criminal conduct of corporate directors with financial crimes, typically in the fields of securities, antitrust, and corruption. The criminal liability of corporate directors for conduct linked to future human rights impact is a fiction in even the most advanced legal systems. In most cases the human rights impacts materialize over time,¹¹⁷ and/or legislators and prosecutors are untrained or not particularly interested in ascribing a criminal character to a human rights impact.¹¹⁸ Unfortunately, the BHR treaty fails to oblige states to stress this point and make the necessary connections.

In closing, it is perhaps Paragraph 6 of Article 6 of the 2019 draft treaty that is the most innovative and which breaks some new ground. It stipulates that:

States Parties shall ensure that their domestic legislation provides for the liability of natural or legal persons conducting business activities, including those of transnational character, for its failure to prevent another natural or legal person with whom it has a contractual relationships, from causing harm to third parties when the former sufficiently controls or supervises the relevant activity that caused the harm, or should foresee or should have foreseen risks of human rights violations or abuses in the conduct of business activities, including those of

¹¹⁴ See Nadia Bernaz, *Corporate Criminal Liability Under International Law*, 13 J. INT'L CRIM. JUST. 313 (2015). For a domestic approach, see Vikramaditya S. Khanna, *Corporate Criminal Liability: What Purpose does it Serve?*, 109 HARV. L. REV. 1477 (1996).

¹¹⁵ See Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9 at Pt. 3, Art. 25 (1998), reprinted in 37 I.L.M. 999 (1998) [hereinafter Rome Statute].

¹¹⁶ See Ilias Bantekas, *The Contemporary Law of Superior Responsibility*, 93 AM. J. INT'L L. 573, 577 (1999).

¹¹⁷ See Bantekas, *supra* note 107, at 474-76.

¹¹⁸ Human rights linkages are now commonplace in the U.N. Human Rights Council. See, e.g., Cephas Lumina, *Sovereign Debt and Human Rights: Making the Connection*, in SOVEREIGN DEBT AND HUMAN RIGHTS, 185 (Oxford Univ. Press 2018).

transnational character, regardless of where the activity takes place.¹¹⁹

This provision, while reiterating the enforcement of both personal and corporate liability – in relation to human rights violations – goes a step further by adding a crucial jurisdictional element; namely, that the laws and courts of the parent company, as well as of an affiliate *mutatis mutandis*, encompass conduct that is extra-territorial. This effectively gives rise to transnational treaty-based, albeit domesticated, tort and perhaps other forms of liability. Such liability is predicated on both direct as well as indirect conduct (supply chain and foreign incorporated affiliates), involving a high-threshold knowledge standard (foreseen or should have foreseen). It will be interesting to see how such a groundbreaking provision will be transposed in domestic laws. It may be wise for an entity such as the Hague Conference on Private International Law or UNCITRAL to explore the likelihood of a model law on transnational corporate tort liability.¹²⁰

The draft treaty sets out a *sui generis* international legal personality for MNCs, in the same manner as transnational criminal law treaties. Although the contours of such personality manifest in domestic law, which in turn under the terms of the draft treaty imposes liability on the person of the corporation and its directing minds, it is no less significant. Domestic legislation and effective prosecution by competent and independent law enforcement authorities is far more decisive than international liability absent effective domestic institutions.

VI. JURISDICTION FOR VICTIMS' RIGHTS

Two types of adjudicatory jurisdiction¹²¹ arise from the terms of the BHR treaty. The first concerns acts and omissions in respect of obligations incumbent on legal persons, irrespective if they produce harm. This is true, for example, with regard to due diligence obligations owed by legal persons to the territorial state. The second type of jurisdiction is key to the *raison d'être* of the BHR treaty. It links the rights of victims of human rights abuses to make claims to domestic courts. One needs to understand Articles 4 (victims) and 7 (adjudicative jurisdiction) of the 2019 draft as being inextricably linked. Victims are granted particular rights under Article 4 of the BHR treaty, in the same way as other international human rights treaties,

¹¹⁹ See 2019 BHR Draft, *supra* note 11, at art. 6, ¶ 6.

¹²⁰ At present, the only international instrument is EU Regulation 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II). See Regulation No. 864/2007, O.J. (L 199) 40 (EC). Chapter II of this Regulation covers torts/delicts, all of which may be committed by both physical and legal persons. See *id.* at ch. 2. The Regulation, however, simply delineates jurisdictional issues. See *id.*

¹²¹ It is assumed that readers are familiar with the concept of jurisdiction. For further reading, see JAN KLABBERS, INTERNATIONAL LAW, 91-98 (Cambridge Univ. Press 2d ed. 2017).

which are to be enforced through domestic courts. The right of access to remedies is aptly explained in Article 4(5) of the 2019 draft treaty as follows:

Victims shall have the right to fair, effective, prompt, and non-discriminatory access to justice and adequate, effective, and prompt remedies in accordance with this instrument and international law. Such remedies shall include, but shall not be limited to:

- a. Restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition for victims;
- b. Environmental remediation and ecological restoration where applicable, including covering of expenses for relocation of victims and replacement of community facilities.¹²²

It is only in the context of Article 4(5) that the type of jurisdiction stipulated in Article 7 of the 2019 draft treaty can be fully understood. Normally, any claims for human rights violations (whether the state is the direct perpetrator or complicit), save in respect of core international crimes, are usually subject to territorial jurisdiction.¹²³ Exceptionally, some courts are willing to entertain extra-territorial tort jurisdiction, chiefly on grounds suggesting some link with the forum, such as conduct attributed to an affiliate abroad controlled by the parent company.¹²⁴ But this is exceptional and even U.S. courts have limited the scope of the Aliens Tort Claim Act (ATCA), which confers federal jurisdiction over “any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”¹²⁵ In 2010, the Second Circuit Court of Appeals in *Kiobel v. Royal Dutch Petroleum Co.* entertained a suit by Nigerian nationals alleging that various MNCs, including the sued oil giant, were complicit in human rights violations in Nigeria.¹²⁶ The allegations were dismissed on the ground that the ATCA does not allow claims against corporations.¹²⁷ Upon *certiorari*, the U.S. Supreme Court affirmed the District Court’s ruling against the extraterritorial presumption of claims under the ATCA, holding that: “all the relevant conduct took place outside the United States. Even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application... Corporations are often present in many countries, and it would

¹²² See 2019 BHR Draft, *supra* note 11, at art. 4(5).

¹²³ See Vandeveld, *supra* note 26.

¹²⁴ See, e.g., *Chandler v. Cape PLC* [2012] EWCA (Civ) 525 (Eng.); see also *Vedanta Resources*, *supra* note 70; but see Rep. of the Fourth Session, *supra* note 10, at ¶ 82 (raising concerns).

¹²⁵ 28 U.S.C. § 1350 (1948).

¹²⁶ *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 116-17 (2d Cir. 2010).

¹²⁷ *Id.* at 149.

reach too far to say that mere corporate presence suffices.”¹²⁸ The U.S. Supreme Court’s opinion seems to exclude tort claims alleging violations of customary law based solely on conduct occurring abroad.¹²⁹ However, given that the Supreme Court never actually stated that corporations may never incur criminal liability, other district courts have taken the view that, although exceptional, corporations can indeed be found liable under the ATCA.¹³⁰

Against this background that increasingly seeks to limit¹³¹ the jurisdiction of courts in respect of extra-territorial tort claims, Article 7(1) of the 2019 draft boldly held that:

1. Jurisdiction with respect to claims brought by victims, independently of their nationality or place of domicile, arising from acts or omissions that result in violations of human rights covered under this (Legally Binding Instrument), shall vest in the courts of the State where:
 - a. such acts or omissions occurred; or
 - b. the victims are domiciled; or
 - c. the natural or legal persons alleged to have committed such acts or omissions in the context of business activities, including those of a transnational character, are domiciled.¹³²

Article 9(1) of the 2020 version makes a significant departure as opposed to Article 7(1) of the 2019 version. In elaborating on the jurisdiction of national courts, while retaining: a) the *locus delicti commissi* (the place where the abuse occurred); and b) the place of domicile of the MNC, it has removed the domicile of the victim. Article 9(1) of the 2019 version has replaced this

¹²⁸ *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1669 (2013).

¹²⁹ *See Balintulo v. Daimler AG*, 727 F.3d 174, 182 (2d Cir. 2013).

¹³⁰ By way of illustration, in *Doe v. Unocal Corp.*, the district court held that although Unocal benefited from the abuses it was not proven that the company wanted to control, or that it in fact controlled, the Burmese military to perpetrate these acts. *Doe v. Unocal Corp.*, 110 F.Supp.2d 1294, 1310 (2004). On appeal, the Court of Appeals for the Ninth Circuit reversed this decision, holding that plaintiffs need only demonstrate Unocal’s assistance to the military. *Doe I v. Unocal Corp.*, 395 F.3d 932, 945 (2002); *see also In Re South Africa Apartheid Litigation*, 15 F.Supp.3d 454, 465 (S.D.N.Y. 2014) (The court had no problem finding that corporations can indeed incur liability in tort, rejecting the idea that a group of individuals could escape liability simply because they had incorporated into a legal person.).

¹³¹ Several district and circuit courts have, nonetheless, been more permissive of ATCA actions than the Supreme Court. *See Doe v. Unocal (I)*, 963 F. Supp. 880, 892 (C.D. Cal. 1997); *In re South African Apartheid Litigation*, 15 F.Supp.3d 454, 465 (S.D.N.Y. 2014) (holding that corporations can indeed incur liability in tort, rejecting the idea that a group of individuals could escape liability simply because they had incorporated into a legal person); *Doe I v. Nestle USA, Inc.*, 766 F.3d 1013, (9th Cir. 2014) (holding that allegations whereby the corporation was aware of child slavery among its supply chain, yet none the less retained these suppliers motivated by profit, was sufficient to establish the ‘aiding and abetting’ of child slavery under the ATCA...).

¹³² *See* 2019 BHR Draft, *supra* note 11, at art. 7, ¶ 1.

with the place where “the act or omission contributing to the human rights abuse occurred.”¹³³

Paragraph 2 of Article 7 of the 2019 draft treaty goes on to explain the “place of domicile” of a natural and legal person conducting business activities of a transnational nature, as being its:

- a. place of incorporation; or
- b. statutory seat; or
- c. central administration; or
- d. substantial business interests.¹³⁴

What Article 7 of the 2019 draft treaty clearly suggests is that member states to the BHR treaty must adopt wide-ranging extra-territorial legislation as regards the rights of victims to seek remedies from MNCs. Some degree of forum shopping or strategic filing may even be available for victims – such as where a victim has a choice of applying to either the corporation’s statutory seat or place of incorporation, or where there are multiple victims and the suit is lodged by victims domiciled in a particular country – with the expectation that non-domiciled victims can be enjoined there.¹³⁵ Forum shopping may be encouraged by secondary matters, such as fees, speed of trial, expansive discovery, and others.¹³⁶ If adoption of the BHR is not universal, this can give rise to problems of comity, reciprocity, and conflicts of existing treaty obligations, particularly as regards conflicts of laws agreements.¹³⁷

In equal measure, lack of near universal ratification will render extra-territorial jurisdiction moot, particularly where the forum court or prosecutor is unable to obtain relevant evidence. It is for this purpose that a long provision on mutual legal assistance (MLA) has been inserted in the 2019 draft BHR treaty (Article 10), which seeks to facilitate the exchange of

¹³³ *Id.* at art. 9, ¶ 1.

¹³⁴ *Id.* at art. 7, ¶ 2.

¹³⁵ Domicile, both corporate and personal, differs in the various legal spheres, e.g., transnational family law or international commercial arbitration. Domicile shopping, not surprisingly, is rather common. See Leon Trakman, *Domicile of Choice in English Law: An Achilles Heel?*, 11 J. OF PRIV. INT’L L. 317, 318 (2015).

¹³⁶ See *Bristol-Myers Squibb Co. v. Superior Ct.*, 137 S. Ct. 1773, 1781 (2017) (holding that in order for state courts to exercise jurisdiction over tort claims arising in other states, the suit must arise out of or relate to the defendant’s contacts with the forum); see generally Mark Moller, *The Checks and Balances of Forum Shopping*, 1:1 STAN. J. COMP. LIT. 171, 189 (2012). With the proliferation of transnational commercial courts, these may well become forums for BHR litigation, especially since most have a regulatory tribunal. See Ilias Bantekas, *The Rise of International Commercial Courts: The Astana International Financial Center Court*, 33 PACE INT’L L. REV. 1 (2020).

¹³⁷ No wonder then that Art. 12 of the 2019 BHR treaty, and particularly Paragraph 3 thereof, stipulates that Art. 7 of the same treaty should not be construed in a manner that violates the sovereignty or the laws of other states. See 2019 BHR Draft, *supra* note 11, at arts. 7, 12.

evidence, investigation, information gathering, and others. The language and procedures are reminiscent of international and transnational criminal law treaties, such as the 2000 UN Transnational Organized Crime (TOC) Convention.¹³⁸ While the TOC and other similar treaties deal exclusively with transnational and international crimes, MLA requests need not be of a criminal nature. Member states may opt for any sanctions, as long as they are effective, proportionate, and dissuasive, and there is no obligation to treat a violation as criminal, at least as far as the legal person is concerned.¹³⁹ In any event, as is typical of multilateral transnational criminal law treaties, it is only exceptionally that member states predicate MLA requests on the basis of said multilateral treaties.¹⁴⁰ This is usually achieved on the basis of existing bilateral MLA agreements, or via newly negotiated ad hoc arrangements.

Separately, a recurrent theme, if not a cornerstone of the BHR treaty, is “to ensure effective access to justice and remedy for victims.”¹⁴¹ It obliges states to provide victims with “the right to fair, effective, prompt and non-discriminatory access to justice and adequate, effective and prompt remedies.”¹⁴² In addition, member states to the BHR treaty must guarantee to all victims “the right to submit claims to the courts and state-based non-judicial grievance mechanisms of the state parties.”¹⁴³ Non-judicial grievance mechanisms may comprise any adjudicatory or non-adjudicatory mechanism, so long as they are expressly agreed by the parties, satisfy fair trial guarantees, and are capable of providing adequate, effective, and prompt remedies.¹⁴⁴ It is now universally acknowledged that arbitral proceedings are tantamount to state-based proceedings and provide all fair trial guarantees.¹⁴⁵ The complementary nature of non-judicial mechanisms, particularly arbitration and ADR (particularly internal grievance boards, dialogue-based, or other), has been highlighted by the UN Guiding Principles.¹⁴⁶

With respect to arbitration, in particular, the Working Group on Business and Human Rights Arbitration (Hague Working Group) suggested that existing arbitration rules, such as the UNCITRAL Rules, could be

¹³⁸ See G.A. Res. 55/25, at art. 18 (Jan. 8, 2001).

¹³⁹ Art. 10 of the 2019 draft BHR treaty provides for the full range of typical MLA measures, including joint investigation teams, but only in respect of criminal offences. See generally CLIVE NICHOLLS et al., *THE LAW OF EXTRADITION AND MUTUAL LEGAL ASSISTANCE* (Oxford Univ. Press 3d ed. 2013).

¹⁴⁰ See 2019 BHR Draft, *supra* note 11, at art. 12, ¶ 4.

¹⁴¹ See *id.* at art. 2, ¶ 1; 2020 BHR Draft, *supra* note 34, at art. 2, ¶ 1.

¹⁴² See 2020 BHR Draft, *supra* note 34, at arts. 2, ¶ (1) (b); 4, ¶ 2(c).

¹⁴³ See *id.* at art. 4, ¶¶ 2(d), 8.

¹⁴⁴ See Stefan Zagelmeyer et al., *Non-State Based Non-Judicial Grievance Mechanisms: An Exploratory Analysis*, Report for U.N. Office of the High Commissioner (July 13, 2018), <https://www.ohchr.org/Documents/Issues/Business/ARP/ManchesterStudy.pdf>.

¹⁴⁵ See Ilias Bantekas, *Equal Treatment of Parties in International Commercial Arbitration*, 69 INT'L & COMP. L. Q. 991, 992 (2020).

¹⁴⁶ See *Guiding Principles*, *supra* note 3, at 35-36.

adapted for the exigencies of BHR disputes.¹⁴⁷ In consultation with other stakeholders, the Hague Working Group produced in 2019 the so-called Hague Rules on Business and Human Rights Arbitration (Hague Rules).¹⁴⁸ Although BHR arbitration is rare, some of the key attributes of international commercial arbitration, such as speed, confidentiality, and flexibility, have the potential to make it attractive for both victims and MNCs, especially if most access to justice guarantees stipulated in Article 4 of the 2019 draft BHR treaty (e.g., legal aid) are incorporated therein.¹⁴⁹ A paradigmatic illustration may be provided by the only (to the knowledge of this author) BHR arbitration following the Rana Plaza incident, which culminated in two arbitrations under the Accord on Fire and Building Safety in Bangladesh.¹⁵⁰ Both were administered by the Permanent Court of Arbitration.

VII. VICTIMHOOD UNDER THE BHR TREATY

There is considerable debate in international legal discourse about whether every human rights violation corresponds to an automatic remedy for the victim. If this is not so, it follows that victims must provide proof of a substantive right to a remedy and *locus standi* in respect of each and every violation.¹⁵¹ This seems to be a minority position, however, given that the general trend, particularly as this is expressly enshrined in the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, points to the opposite direction.¹⁵² The right to an effective and non-derogable remedy is amply

¹⁴⁷ See generally The Hague Rules on Business and Human Rights Arbitration Centre for International Legal Cooperation, pmbl. (Dec. 12, 2019), https://www.cilc.nl/cms/wp-content/uploads/2019/12/The-Hague-Rules-on-Business-and-Human-Rights-Arbitration_CILC-digital-version.pdf. [hereinafter "Hague Rules"].

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at art. 4.

¹⁵⁰ IndustriALL Global Union and UNI Global Union (Claimants) v. [Global fashion brand], (Perm. Ct. Arb. Case No 2016-36); IndustriALL Global Union and UNI Global Union (Claimants) v. [Global fashion brand] (Perm. Ct. Arb. Case No 2016-37).

¹⁵¹ This was claimed for example by the German Supreme Court in respect to the Compensation for Distomo Massacre, Bundesgerichtshof [BGH] [Federal Court of Justice] June 26, 2003, BGH III ZR 245/98, (Ger.). The suit for reparations against Germany was initially brought about by survivors and relatives of the Distomo victims before Greek courts. See Prefecture of Voitia v. Fed. Republic of Germany. Case No. 11/2000. Areios Pagos (Hellenic Supreme Court), May 4, 2000 cited in Bernard Oxman & Maria Gavouneli, *Sovereign Immunity-Tort Exception-Jus Cogens Violations- World War II Reparations-International Humanitarian Law*, 95 AM. J. INT'L L. 198, 198-204 (2001). See also CHRISTIAN TOMUSCHAT, HUMAN RIGHTS: BETWEEN IDEALISM AND REALISM, 309-11 (2d ed. 2008) (arguing against the existence of a right to reparation with regard to violations of humanitarian law).

¹⁵² G.A. Res. 60/147, (Mar. 21, 2006) [hereinafter Basic Principles]; U.N. Economic and Social Council Res. 2005/30, (July 25, 2005). See also Commission on Human Rights Report on the Sixty-First Session, U.N. Doc. E/2005/23 (Apr. 22, 2005). This was preceded twenty years earlier by the G.A. Res 40/34, Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (Nov. 29, 1985) [hereinafter Victims Declaration]. The 1985 Declaration remains the more authoritative of the two and has been cited as such by all ICC Chambers. See

recognized in all the global human rights instruments, namely Article 8 of the Universal Declaration of Human Rights,¹⁵³ Article 2(3) of the International Covenant on Civil and Political Rights (ICCPR),¹⁵⁴ and Article 14(1) of the UN Convention against Torture.¹⁵⁵ These, alongside regional human rights treaties, provide either for an individual entitlement to an effective remedy, or oblige states parties to ensure their availability to victims of crimes.¹⁵⁶ The definition of victimhood in the 2020 draft version is significantly more detailed than its predecessor, encompassing the infliction of “physical or mental injury, emotional suffering, or economic loss, or substantial impairment of their human rights, through acts or omissions in the context of business activities, that constitute human rights abuse.”¹⁵⁷ Beyond immediate family members, victims are also considered those “persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.”¹⁵⁸

The right to an effective remedy does not encompass merely a procedural right to seek redress but includes a positive obligation to provide substantive reparation.¹⁵⁹ The trend towards an automatic individual entitlement in respect of violations of human rights and humanitarian law seems to be shared also by the ICJ, as expressed in its Advisory Opinion in the *Palestinian Wall* case.¹⁶⁰ The right to a remedy is a feature found only in contemporary international instruments. It is absent, for example, in humanitarian law treaties adopted prior to the 1990s, despite the existence of provisions such as Article 3 of the 1907 Hague Convention IV and Article 91 of Protocol I of 1977, which require parties to pay compensation for violation of the laws and customs of war. These were addressed to states and were not meant to produce direct effect before national courts.¹⁶¹ The Basic

ICC Prosecutor v. Lubanga, ICC-01/04-01/06, Decision on the Applications by Victims to Participate in the Proceedings, ¶ 48 (Dec. 15, 2008).

¹⁵³ G.A. Res. 217 (III) A, art. 8, Universal Declaration of Human Rights, (Dec. 10, 1948).

¹⁵⁴ See ICCPR, *supra* note 30, at art. 2(3).

¹⁵⁵ U.N. Human Rights Comm., General Comment 29, States of Emergency (Article 4), ¶ 14, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (Aug. 31, 2001). The Committee stressed the non-derogable nature of this entitlement.

¹⁵⁶ See Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222 (entered into force Sept. 3, 1953) [hereinafter “ECHR”]; OAS, American Convention on Human Rights, art. 25, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123; Eur. Parl. Directive 2012/29, 2012 O.J. (L 315/57).

¹⁵⁷ See 2020 BHR Draft, *supra* note 34, at art. 1(1).

¹⁵⁸ Victimhood in international law and international human rights law has a long and distinguished history. See, e.g., Basic Principles, *supra* note 152; see Victims Declaration, *supra* note 152; Comm’n on Human Rights Rep. on the Sixty-First Session, *supra* note 152.

¹⁵⁹ See U.N. Human Rights Comm., 80th Sess., General Comment 31: Nature of the General Legal Obligation on States Parties to the Covenant, ¶ ¶ 15-16, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004).

¹⁶⁰ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, paras. 149–160 (July 9).

¹⁶¹ Nonetheless, it is fair to argue that these treaties should be construed in accordance with contemporary developments, which necessitates reading a right to effective remedy therein. See

Principles recognize five basic forms of reparation: restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition.¹⁶² A more contemporary application of these principles has given rise to two additional distinct rights for victims of crime, namely: the right to physical protection, which is guaranteed by states as well as international criminal tribunals, and the right to participation in criminal proceedings.¹⁶³

Victimhood is at the heart of the BHR treaty because one of its key aims is to link human rights abuses and violations with a right of one or more victims to effective reparation and respect for fundamental human rights.¹⁶⁴ This link is apparent in the extensive provisions on the obligations and liability of legal persons and the jurisdiction of national courts.¹⁶⁵ Although reparation is inherent in other human rights treaties, the obligations thereto are addressed directly to states, whereas in the context of the BHR treaty states are mandated to establish reparation mechanisms in respect of violations committed (mostly, but not exclusively) by non-state actors, chiefly MNCs and other business entities.¹⁶⁶ Ordinarily, reparations of this nature would be encompassed under the law of tort in national legal systems, without the infraction being classified as a human rights violation. Moreover, it is not self-evident that human rights abuses under the BHR treaty would otherwise qualify as torts under domestic laws. Therefore, the concept of victimhood under Article 4 of the 2019 treaty and its links to corporate obligations, liability and jurisdiction are wholly innovative under international law. The drafters of Article 4 of the 2019 draft were cognizant of the fact that submitting a claim against a large MNC is not a simple exercise, particularly for persons with few resources and in countries that have little, or no, respect for the rule of law. It is important in such contexts that all rights of victims are fully respected and protected in the run up to filing a claim until an award or judgment is rendered.¹⁶⁷ Access to justice in the context of a claim submitted against an MNC is of a wholly different nature because, ordinarily, disputes or claims between private actors are not amenable to legal aid for the weaker of the two parties. Access to justice, and

ILIAS BANTEKAS & LUTZ OETTE, *INTERNATIONAL HUMAN RIGHTS LAW AND PRACTICE*, 668-717 (3d ed. 2020).

¹⁶² See Basic Principles, *supra* note 152, at princ. 18.

¹⁶³ See *e.g.*, ICC Statute, *supra* note 98, at art. 68(3). See also S.C. Res. 827, arts. 15, 20, 22, Statute of the International Criminal Tribunal for the Former Yugoslavia, (May 25, 1993) [hereinafter "ICTY Statute"]; S.C. Res. 955, arts. 14, 19, 21, Statute of the International Criminal Tribunal for Rwanda, (Nov. 8, 1994) [hereinafter "ICTR Statute"]; Statute of the Special Court for Sierra Leone, arts. 15, 16, 19(3), Jan. 16, 2002, 2178 U.N.T.S. 138.

¹⁶⁴ Even so, many delegations to the Working Group sessions have doubted the utility of such a provision altogether, as well as the absence of distinction between victims and alleged victims. See Human Rights Council, Draft report on the fifth session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human right, para. 34, A/HRC/43/XX, (Mar. 2020).

¹⁶⁵ See generally 2020 BHR Draft, *supra* note 34.

¹⁶⁶ *Id.* at arts. 7(7), 9.

¹⁶⁷ See 2019 BHR Draft, *supra* note 11, at art. 4(1)-(4).

all its sub-rights such as legal aid and the right to legal representation, serves to provide minimal arm's length guarantees against the state machinery and the overwhelming power of MNCs. No such protection is recognized or afforded in respect of private disputes; but clearly this is an artificial and legalistic approach to human rights-based claims against an MNC by affected stakeholders.¹⁶⁸ Paragraphs 6-9 of Article 4 of the 2019 draft BHR treaty aptly recognize this reality and confer wide-ranging access to justice rights to victims of human rights violations. The 2020 version of the treaty expands on the range of human rights that are applicable. Unlike Article 3(3) of the 2019 version, which referred to "all human rights," the 2020 draft version covers:

all internationally recognized human rights and fundamental freedoms emanating from the Universal Declaration of Human Rights, any core international human rights treaty and fundamental ILO convention to which a state is a party, and customary international law.¹⁶⁹

Article 4 of the 2019 draft, moreover, took into consideration, as indeed the treaty does throughout, that BHR disputes are triangular in nature, involving not only the corporation and the victims, but also the concerned state (as guarantor and preventive agent). Victims' rights are meaningless without a fair judicial system, the existence of remedies, or the availability of a safe and secure environment to make claims. Paragraphs 9 to 14 of Article 4 of the 2019 draft treaty, therefore, set forth a number of procedural

¹⁶⁸ This matter has been addressed, albeit sparsely by some national courts.

Exceptionally, the Portuguese Supreme Court in *Wall Street Institute de Portugal - Centro des Ingles SA WSI – Consultadoria e Marketing and others v Centro des Ingles Santa Barbara LDA*, judgment no. 311/2008 (May 30, 2008) (Port.), held that where a party to arbitral proceedings had become indigent it was entitled to legal aid and hence recourse to litigation, whereby legal aid is available. The Court's rationale was based on the argument that the interest sacrificed by the rejection of the arbitration clause was purely procedural as opposed to the substantive interest in the case of the right to a fair trial. The general rule strongly and universally rejects this approach. The German Federal Supreme Court has approached the same issue from a different (i.e., contractual) perspective, holding that where a party to an agreement containing an arbitration clause is genuinely unable to finance the costs associated with arbitration, then the arbitration agreement is incapable of performance and the indigent party may seek to resolve the dispute in the courts and receive legal aid. CLOUT Case 404, III ZR 33/001 (Sept. 4, 2000). For an account of the standard position, see *Schweizerisches Zivilprozessordnung, [ZPO] [Code on Civil Procedure] Dec. 19, 2008, SR 101, art. 380* (Switz.), which excludes the possibility of legal aid from domestic arbitral proceedings. The Swiss Federal Supreme Court in *Bundesgericht [BGer] [Federal Supreme Court] July 29, 2020, 4A_178/2014* (Switz.), confirmed that the same exclusion applies also to international arbitrations; equally *D.L.T. Holdings Inc. v Grow Biz International*, decided by Canada's Prince Edward Island's Supreme Court, [2001] 199 Nfld. & Prince-Edward-Island Reports 135, CLOUT Case 501. The Court held that the financial bargaining disparity between the parties did not offend public policy.

¹⁶⁹ See 2020 BHR Draft, *supra* note 34, at art. 3 ¶ 3.

rights and guarantees that are essential for a weak litigant to go up against a formidable opponent with vast resources.¹⁷⁰

Article 4 (rights of victims) of the 2019 draft version was broken down into two more manageable provisions in the 2020 draft version, namely Articles 4 (rights of victims) and 5 (protection of victims).¹⁷¹ Article 7 of the 2020 version is equally a new provision, albeit building on bits and pieces found in various provisions of the 2019 version. Its aim is to accentuate the existence of "access to remedies" for victims.¹⁷² A significant innovation is Paragraph 5 of the 2020 draft version, which removes one of the most burdensome hurdles in the litigation of transnational tort claims, namely *forum non conveniens*.¹⁷³ Paragraph 5 of the 2020 version obliges states to eliminate the likelihood of their courts dismissing legitimate proceedings brought by victims on the basis of the *forum non-conveniens* doctrine.¹⁷⁴

A significant innovation is introduced through Article 9, Paragraphs 3-5 of the 2020 draft treaty, for which there is nothing equivalent in the 2019 version. More specifically:

3. Where victims choose to bring a claim in a court as per Article 9.1, jurisdiction shall be obligatory and therefore that courts shall not decline it on the basis of *forum non conveniens*.
4. Courts shall have jurisdiction over claims against legal or natural persons not domiciled in the territory of the forum State, if the claim is closely connected with a claim against a legal or natural person domiciled in the territory of the forum State.
5. Courts shall have jurisdiction over claims against legal or natural persons not domiciled in the territory of the forum State if no other effective forum guaranteeing a fair trial is available and there is a sufficiently close connection to the State Party concerned.¹⁷⁵

The draft treaty connects the liability of MNCs and the obligation of states to assume jurisdiction over corporate human rights violations with a corresponding right of victims to remedies. Under the existing self-regulatory

¹⁷⁰ In *Steel and Morris v. United Kingdom*, the ECtHR found that the vast financial disparity between an MNC, McDonalds, and the two defendants, a gardener and a postman, rendered the subsequent litigation in tort wholly unfair from a procedural perspective. See *Steel and Morris v. United Kingdom*, 41 Eur. Ct. H.R. 22 (2005).

¹⁷¹ See 2020 BHR Draft, *supra* note 34, at art. 4, 5; 2019 BHR Draft, *supra* note 11, at art. 4.

¹⁷² See 2020 BHR Draft, *supra* note 34, at art. 7.

¹⁷³ *Id.* at art. 9, ¶ 5.

¹⁷⁴ See *id.* art. 9, ¶ 3.

¹⁷⁵ See *id.* art. 9, ¶ 3-5.

regime, no victimhood or remedies are universally available and tort-based remedies were sparingly used. Victimhood and remedies under the draft treaty are now streamlined and the restrictions previously imposed by private international law against extra-territorial remedies are removed.

VIII. INSTITUTIONAL ARRANGEMENTS

In the mold of the core UN international human rights treaties, the BHR treaty sets up three important institutions, namely: a BHR Committee, an Assembly of States Parties (ASP), and a trust fund for victims. An additional protocol “to regulate in international human rights law the activities of transnational corporations and other business enterprises” obliges member states (to the protocol) to establish so-called national implementation mechanisms (NIMs) and to recognize the competence of the Committee to receive individual and group/collective communications.

A. *The Committee*

The BHR treaty Committee’s role and function are set out in Article 13 of the 2019 draft BHR treaty. Its key role is to assist states in compiling their reports on the implementation of the BHR treaty, as well as examining these reports. This corresponds to one of the key roles of human rights treaty bodies.¹⁷⁶ Treaty bodies are typically endowed with two other functions, besides state reporting, namely: receipt of individual communications and resolution of inter-state disputes, as well as the conduct of inquiries.¹⁷⁷ More recently, treaty bodies have undertaken other roles on their own initiative, the most significant of which is the production of General Comments.¹⁷⁸ This

¹⁷⁶ See The United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. Doc A/39/51 at art. 19 (Dec. 10, 1984) [hereinafter CAT]; The U.N. Convention on the Rights of the Child, G.A. Res. 44/25, at art. 44 (Nov. 20, 1989); Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, G.A. Res. 45/158, at art. 73 (Dec. 18, 1990); Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), G.A. Res. 34/180, at art. 18 (Dec. 18, 1979). Treaty bodies have gone on to produce guidelines for state reporting. See, e.g., Guidelines on Periodic Reporting to the Committee on the Rights of Persons with Disabilities, Including Under the Simplified Reporting Procedures, U.N. Doc. CRPD/C/3 (Sept. 2, 2016).

¹⁷⁷ CAT art. 20 sets forth a confidential inquiry procedure on the basis of information containing “well-founded indications that torture is being systematically practiced in the territory of a state party.” See CAT, *supra* note 176, at art. 20. Rule 81 of the CAT’s Rules of Procedure, U.N. Doc. CAT/C/3/Rev.6 (Sept. 1, 2014), set out practical guidance. This procedure inspired Art. 8 of the Optional Protocol to CEDAW and Art 6. of the Optional Protocol to the CRPD relating to inquiries into grave and systemic violations of rights.

¹⁷⁸ For U.N. treaty bodies’ general comments, see Human Rights Treaty Bodies – General Comments, U.N. HUMAN RIGHTS, <https://www.ohchr.org/EN/HRBodies/Pages/TBGeneralComments.aspx> (last visited Feb. 14, 2021).

function is specifically stipulated in Article 13(4)(a) of the 2019 draft BHR treaty.¹⁷⁹

The BHR treaty does not confer authority on the Committee to entertain individual or group communications; this is stipulated in the Optional Protocol that is explored below. The importance of the reporting procedure should not be under-estimated. It will allow the Committee to assist states to rectify shortcomings in their laws and practices, as well as harmonize best practices across all member states. It is also likely that if the BHR treaty becomes part of the core UN human rights treaties it will be included in the Universal Periodic Review (UPR) process.¹⁸⁰ This would allow universal scrutiny of pertinent issues by the entire human rights community, including civil society organizations.

The Optional Protocol sets out further competences for the Committee. As will be explored in the next sub-section, NIMs may transmit to the Committee all cases of non-compliance with the terms of an amicable settlement. Its most important function, however, is its competence to receive individual and group complaints from alleged victims, in accordance with Article 8 of the Optional Protocol.¹⁸¹ The admissibility requirements are the same as other treaty bodies,¹⁸² namely that applications not be anonymous, not manifestly ill-founded, the facts occurred prior to the entry in force of the Protocol and domestic remedies have been exhausted, unless these are ineffective or unnecessarily prolonged.¹⁸³

Traditionally, individual or group communications pit the complainant/victim against the state. This is naturally not the case here, unless of course the violating legal entity is a state-owned enterprise. States have an interest, no doubt, as to how their corporations are affected by human rights claims before an international quasi-judicial committee. It is for this reason that 'concerned' states are involved in the resolution of individual or group complaints against corporations.¹⁸⁴ When the Committee receives a

¹⁷⁹ See 2019 BHR Draft, *supra* note 11, at art. 13 ¶ 4(a).

¹⁸⁰ See HILARY CHARLESWORTH & EMMA LARKING, *HUMAN RIGHTS AND THE UNIVERSAL PERIODIC REVIEW: RITUALS AND RITUALISM* (Cambridge Univ. Press 2015).

¹⁸¹ See *Draft Optional Protocol*, *supra* note 12, at art. 8.

¹⁸² For a comparative study on all U.N. treaty-based complaint procedures, see Tina Stavrinaki, *Le Régime des Procédures de Communications Individuelles dans le Système des Traités des Nations Unies relatifs aux Droits de l'Homme* (Editions Pedone 2016).

¹⁸³ See *Draft Optional Protocol*, *supra* note 12, at art. 9.

¹⁸⁴ The Protocol leaves open the question of corporate "nationality." Although ordinarily this would be the country of incorporation, the parent company of a MNC affiliate may wish the diplomatic protection of the parent company's country of incorporation, as may also said country itself. There are no conflict rules in the likelihood of a tug-of-war between the two competing countries. This issue arises, in more or less similar circumstances, in the determination of an investor's country of nationality with a view to applying the pertinent bilateral investment treaty (BIT). See Joost Pauwelyn & Luiz Eduardo Salles, *Forum Shopping before International Tribunals: (Real) Problems, (Im)possible Solutions*, 42 CORNELL INT'L L.J. 72 (2009).

complaint it shall invite the concerned state, the corporation, and the alleged victim to co-operate in the examination of the communication and submit within six months “written explanations or statements clarifying the matter and the remedy, if any, that may have been taken in the matter.”¹⁸⁵ Following explanations by all three parties, as well as “any other relevant information available to it,”¹⁸⁶ which is a reference to any third party, including CSOs and NIMs,¹⁸⁷ the Committee commences a confidential inquiry procedure by assigning one or more of its members to the case at hand.¹⁸⁸ The force or outcome of this procedure is rather weak. After completing its inquiry, the Committee shall transmit its findings to the three parties concerned “together with any comments or suggestions which seems appropriate in view of the situation.”¹⁸⁹

The confidentiality of the procedure is disappointing. Even a weak mechanism, without the possibility of any recommendations, would have been preferable because of the reputational risks to the corporation, particularly given the involvement of CSOs. Alas, it is doubtful that this process will be of much use to potential complainants, unless corporations perceive that the claim will not escape the attention of the global CSO community and will inevitably trigger the jurisdiction of national courts under Article 7 of the 2019 draft BHR treaty.

B. *Assembly of States Parties*

The older generation of human rights treaties prior to the 1990s simply set out the pertinent rights and at best established a quasi-judicial entity to receive and assess periodical state reports and individual communications. This monitoring and implementation model is best exemplified with the ICCPR. The absence in this model of an inter-governmental entity that would possess several administrative, fundraising, and enforcement capacities led to the adoption of treaties since the early 1990s whereby a conference (or assembly) of parties (COP) undertook a variety of functions and powers.¹⁹⁰ The greatest advancements typically

¹⁸⁵ See *Draft Optional Protocol*, *supra* note 12, at art. 10.

¹⁸⁶ *Id.* at art. 11.

¹⁸⁷ This may be achieved through several means, including third party intervention, submission of amicus briefs, personal communication, or others. These would not probably be as of right, but rather by permission.

¹⁸⁸ See *Draft Optional Protocol*, *supra* note 12, at art. 11.

¹⁸⁹ See *id.* at art. 11(2).

¹⁹⁰ See Jutta Brunnée, *COPing with Consent: Law-Making under Multilateral Environmental Agreements*, 15 LEIDEN J. INT'L L. 1 (2002); Art. 63(1) of the 2003 U.N. Convention against Corruption (CAC) established a COSP with extensive powers, namely, to improve capacity and cooperation between states, as well as promote and review the implementation of CAC. To this end it has established an elaborate review mechanism of CAC. See U.N. Convention Against Corruption, *Summary of the State of Implementation of CAC*, U.N. Doc. CAC/COSP/2015/5 (Aug. 19, 2015). For an analysis of COSP in the context of the negotiation of Art. 40 CRPD, see Expert Paper on Existing Monitoring Mechanisms,

associated with the operations of COP are in the field of environmental law, which in turn convinced treaty makers to establish similar entities in treaties dealing with international and transnational crimes, such as the Assembly of Parties (ASP) to the Rome Statute of the International Criminal Court (ICC)¹⁹¹ and its counterpart in the context of the 2003 UN Convention against Corruption.¹⁹² Article 13(5) of the 2019 draft BHR treaty sets up its own ASP, albeit none of its powers and functions are set out. The practice of existing ASP will, no doubt, be useful in setting up its own rules and procedures. It is in the interests of all stakeholders to establish such rules that render the ASP an institution that not only drives developments, but which also actively ensures greater accountability.

C. *Fund for Victims*

Although trust funds are common under international law, particularly as a means of collecting and channeling resources to identified causes, existing under a large variety of legal structures, they are rare as a means of satisfying reparation awards made by international courts and tribunals.¹⁹³ The most innovative such mechanism is the trust fund established under Article 79 of the ICC Statute. In order to facilitate the purpose of reparations to victims under the ICC Statute, Article 79 thereof provides for the creation of a trust fund for the benefit of victims and their families.¹⁹⁴ When the ICC Statute received the requisite sixty ratifications and came into existence the ASP speedily adopted a resolution giving life to the trust fund.¹⁹⁵ This was followed in 2005 by a resolution on the Fund's Regulations.¹⁹⁶ The Fund is managed by a Board of Trustees whose members participate in their individual capacity and serve on a *pro bono* basis.¹⁹⁷ The Fund is generally financed through voluntary donations by states and non-state entities, but does not accept voluntary contributions that create a manifest inequality between the recipient victims.¹⁹⁸ Besides voluntary

Possible Relevant Improvements and Possible Innovations in Monitoring Mechanisms for a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, prepared by the Office of the United Nations High Commissioner for Human Rights for the Ad Hoc Comm. on a Comprehensive & Integral Int'l Convention on Protection & Promotion of the Rights & Dignity of Persons with Disabilities, 7th Sess., U.N. Doc. A/AC.265/2006/CRP.4 at 65-66 (2006).

¹⁹¹ See Rome Statute, *supra* note 115, at art. 112. It should be remembered, however, that unlike the CRPD the ICC was constituted as an international organization.

¹⁹² U.N. Convention Against Corruption, Ch. VII, Dec. 2, 2003, 2349 U.N.T.S. 41; *see also* G.A. Res. 61/106, Convention on the Rights of Persons with Disabilities, art. 40 (Jan. 24, 2007).

¹⁹³ See generally Ilias Bantekas, *The Emergence of the Intergovernmental Trust in International Law*, 81 BRIT. Y.B. INT'L L. 224 (2011).

¹⁹⁴ See Rome Statute, *supra* note 115, at art. 79.

¹⁹⁵ International Criminal Court Assembly of States Parties Res. 1/6 ¶ 1 (Sept. 9, 2002).

¹⁹⁶ International Criminal Court Assembly of States Parties Res. 4/3 (Dec. 3, 2005).

¹⁹⁷ International Criminal Court Assembly of States Parties Res. 4/3, Annex ¶ 16 (Dec. 3, 2005).

¹⁹⁸ International Criminal Court Assembly of States Parties Res. 1/6 (Sept. 9, 2002).

contributions, the ICC trust fund may be replenished by “money and other property collected through fines or forfeiture transferred to the Fund if ordered by the Court pursuant to Article 79(2) of the ICC Statute,” as well as from “resources collected through awards for reparation if ordered by the Court.”¹⁹⁹

Unlike the ICC Statute, the BHR fund for victims is only meant to “provide legal and financial aid to victims.”²⁰⁰ This is in line with Articles 4(7), (12), and (13) of the 2019 draft BHR treaty, which oblige member states to ensure that lack of resources is never an impediment for victims to make or continue their claims. It is expected, of course, that any judgments or awards made will themselves offer reparation to the victims that is to be paid by the incumbent corporation. There is thus no need for a compensation fund, which is otherwise the case in criminal proceedings where convicted persons may possess little, or no, assets.

D. National Implementation Mechanisms

The NIMs set out in the optional protocol are meant to emulate independent national human rights institutions under the Paris Principles.²⁰¹ Unlike many national human rights institutions, NIMs possess the following authority to monitor human rights and receive complaints from victims. Article 6 of the Optional Protocol provides competence to NIMs to:

1. ... receive and consider complaints of human rights violations alleged to have been committed by natural or legal persons conducting business activities of a transnational character brought by victims or a group of victims, their representatives, or other interested parties.
2. The National Implementation Mechanism shall investigate the complaint received under the requirements of due process of law [recognized] under the legal and administrative system of the State Party concerned.
3. The National Implementation Mechanisms shall bring any complaint under the present [Protocol] to the attention of the natural or legal persons conducting business activities of a transnational character and the State party concerned as soon as possible, and shall, among others, have the competence to:

¹⁹⁹ International Criminal Court Assembly of States Parties Res. 4/3, Annex ¶ 21(b-c) (Dec. 3, 2005). See Carla Ferstman, *The Reparation Regime of the International Criminal Court: Practical Considerations*, 15 LEIDEN J. INT'L L. 667 (2002).

²⁰⁰ See 2019 BHR Draft, *supra* note 11, at art. 13, ¶ 7.

²⁰¹ G.A. Res. 48/134, National Institutions for the Promotion and Protection of Human Rights Annex (Dec. 20, 1993) (the so-called “Paris Principles”).

- a. Request and receive all necessary information from States Party concerning the grounds of the complaint;
- b. Request and receive additional information from States Parties, intergovernmental or non-governmental organizations, or other reliable sources it deems appropriate, and receive written or oral testimony from victims, the concerned business [enterprise], experts, witnesses, victims associations and others;
- c. Conduct visits or inspections to the place where the violation occurred or it is taking place and conduct joint inquiries with other National Implementation Mechanisms and relevant authorities of the State Party concerned;
- d. Transmit to the State Party concerned, for its urgent consideration, a request to relevant authorities to take interim measures as it might be necessary to avoid possible irreparable damage to the victim or victims of the alleged violations.²⁰²

The purpose of this procedure is to reach an amicable settlement between the author(s) of the complaint and the legal entity against which the complaint has been submitted. In a case of non-compliance with the terms of the amicable settlement, the NIM may transmit the case to the Protocol Committee, in accordance with Article 6(6) of the Optional Protocol to the BHR treaty.²⁰³ Article 7 of the Protocol makes clear that victims may submit claims before a court or other entity enjoying jurisdiction under Article 7 of the 2019 draft BHR treaty.²⁰⁴ However, in that case the NIM shall discontinue its good offices to reach an amicable settlement.

The NIM goes well beyond existing 'enforcement' mechanisms in the UN Global Compact and the OECD Guidelines for Multinational Enterprises. The former has set up an annual reporting procedure known as Communication on Progress, on the basis of which listed corporations self-assess their progress against the ten principles in the Compact.²⁰⁵ The enforcement mechanism in the OECD Guidelines is closer to the model set forth in the NIM. Although the Guidelines do not constitute a treaty, member

²⁰² See *Draft Optional Protocol*, *supra* note 12, at art. 6.

²⁰³ See *id.*

²⁰⁴ See *id.* at art. 7.

²⁰⁵ See Uzma Hamid & Oliver Johner, *The United Nations Global Compact Communication on Progress Policy: Origins, Trends and Challenges*, in *THE UNITED NATIONS GLOBAL COMPACT: ACHIEVEMENTS, TRENDS AND CHALLENGES* 265 (Andreas Rasche & Georg Kell eds., Cambridge Univ. Press 2010).

states have agreed to 'adhere' to the creation and operationalization of National Contact Points. These are engaged where an affected party, usually (but not exclusively) trade unions lodge a complaint against a corporation.²⁰⁶ The National Contact Point will try to reach agreement between the parties through mediation, and if this proves fruitless will issue a public statement.²⁰⁷ There is no obligation on corporations to even address the National Contact Point, although large multinationals will consider the reputational costs associated with non-engagement. Many scholars take the view that both of these systems have generally failed to achieve the objectives for which they were set up.²⁰⁸

The international enforcement mechanism of the draft BHR treaty and its protocol is a hybrid between global human rights treaties and CSR soft law instruments. The absence of a quasi-judicial mechanism (such as the Human Rights Committee of the ICCPR) is compensated by the obligation to set up extensive jurisdiction and conferral of remedies at the domestic law. The NIM, in turn, ensures that all alleged violations are investigated and, at the very least, brought to light.

IX. CONCLUSION

The proposed BHR treaty is remarkable in many respects, even if it never moves beyond a draft treaty. One of its key political aims is to avoid upsetting the existing status quo, while at the same time making MNCs accountable in a manner that renders any obligation justiciable, thus moving away from self-regulation. While some elements of the status quo remain unchanged (e.g., the supremacy of the rights of investors under BITs), others, such as tort-based jurisdiction for victims of corporate human rights violations reflect ongoing developments in key states. The 2020 version retains the state as the chief incumbent duty bearer of human rights obligations, but creates a triangular relationship encompassing victims of human rights violations and MNCs. The regulatory gap evident in BITs and the permissive laws of developing states is being mitigated through broad extra-territorial jurisdiction, concrete reporting and due diligence obligations on corporations and an over-arching duty on states to ensure that such

²⁰⁶ See OECD, STRUCTURES AND PROCEDURES OF NATIONAL CONTACT POINTS FOR THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES (OECD Publishing 2018); Juan Carlos Ochoa Sanchez, *The Roles and Powers of the OECD National Contact Points Regarding Complaints on an Alleged Breach of the OECD Guidelines for Multinational Enterprises by a Transnational Corporation*, 84 NORDIC J. INT'L L. 89 (2015).

²⁰⁷ See Juan Carlos Ochoa Sanchez, *The Roles and Powers of the OECD National Contact Points Regarding Complaints on an Alleged Breach of the OECD Guidelines for Multinational Enterprises by a Transnational Corporation*, 84 NORDIC J. INT'L L. 89 (2015); John Ruggie & Tamaryn Nelson, *Human Rights and the OECD Guidelines for Multinational Enterprises: Normative Innovations and Implementation Challenges*, working Paper No. 66 at Kennedy School of Government (Harv. U. 2015).

²⁰⁸ Stefanie Khoury and David Whyte, *Sidelining Corporate Human Rights Violations: The Failure of the OECD's Regulatory Consensus*, 18 J. HUM. RIGHTS 363 (2019).

obligations are fully justiciable and victims are equipped with remedies and ample access to justice.

There is little doubt that industrialized states yielding global financial power will disfavor the BHR treaty. They will naturally fear that the regime of the BHR treaty will threaten to not only upset but abolish decades of BIT work that has resulted in enhanced protection of the corporations abroad. Although there is some truth to such argument, the absence of strong extra-territorial corporate laws, lack of adequate regulation by developing host states, and an international financial/investor architecture that imposes only rights but no discernible obligations on powerful corporate actors, has unsurprisingly led to a significant lack of accountability. The reparation and jurisdictional mechanism in the BHR treaty is by no means comparable to 'lawfare',²⁰⁹ which many industrialized states find detestable. It is a natural extension of the customary principles of the right to reparation for harm and access to justice for victims of harm. The fact that these principles have dismissed against transnational business conduct is the direct result of the one-sided international financial/investment architecture as described above.

Despite the opposition against this treaty, this author is confident that it will ultimately be adopted, chiefly because civil society will play a significant part in lobbying in its favor.²¹⁰ While the business community will equally voice its antipathy against the treaty, states will ultimately have to balance competing interests, with corporate accountability outweighing deference to self-regulation.

²⁰⁹ See Tung Yin, *Boumediene and Lawfare*, 43 U. RICH. L. REV. 865 (2009).

²¹⁰ See Nadia Bernaz & Irene Pietropaoli, *The Role of Non-Governmental Organizations in the Business and Human Rights Treaty Negotiations*, 9 J. HUM. RTS. PRAC. 287 (2017).