

[PRELIMINARY DRAFT FOR THE JILFA SYMPOSIUM PAPER WORKSHOP]

## **ENFORCEMENT MECHANISMS UNDER THE POTENTIAL UNITED NATIONS BUSINESS AND HUMAN RIGHTS TREATY: AN EXPLORATION**

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### **ABSTRACT**

Victims of corporate related human rights abuses have often encountered difficulties in enforcing their claims against corporations either at the national and international level. They often find hurdles due to the absence of binding human rights obligations of corporate actors. As a result, in recent years, civil society has in recent years voiced concerns and argued to strengthen existing regulation by adoption of binding corporate human rights obligations at domestic and international levels. Victims have faced several challenges in enforcing corporate accountability for human rights violations, which arise not only from a partially incomplete and ineffective domestic legal order, but also from the practical hurdles to the implementation of the institutional and regulatory framework. For those reasons, it is necessary to develop innovative normative approaches to reform international and domestic legal systems on business and human rights with the objective of better enforcement. For those reasons, their access to justice has been deficient at domestic and international level. The 2020 Draft of the United Nations Business and Human Rights Treaty places obligations on states to protect individuals from corporate related human rights abuses. In this way, this article explores ways to improve the 2020 Draft in order to include enforcement mechanisms under the potential United Nations Business and Human Rights Treaty. It submits four different models of enforcement of state and corporate accountability for business-related human rights abuses under the Treaty, namely judicial, quasi-judicial, non-judicial and administrative models. Those models are intertwined, inter-dependent and complement each other. In doing so it examines best practices, advantages and disadvantages from the current United Nations human rights supervision mechanisms in order to develop model enforcement mechanisms under the United Nations Business and Human Rights Treaty. In the closing part of the article, conclusions are drawn on how states should proceed to introduce an independent, impartial and fair enforcement mechanism under the United Nations Business and Human Rights Treaty that could be effectively employed by victims of corporate related human rights abuses.

**Keywords:** corporate human rights abuses, access to justice, victims, UN Business and Human Rights treaty, corporate accountability

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## INTRODUCTION

Victims of corporate related human rights abuses have often encountered difficulties in enforcing their claims against corporations either at the national and international level. They often find hurdles to enforce corporate and/or state responsibility for business related human rights abuses due to the absence of binding human rights obligations of corporate actors. For those reasons, their access to justice has been deficient at domestic and international level. Let us look at one hypothetical case scenario.

A is a company manufacturing automotive parts and is experiencing a downturn due to Covid-19. It operates in country X, which low income economy of the global South Company A has therefore in November 2020 decided to furlough 40% of its workers. The company decides after four months due to decreased demand to lay off hundreds of workers. Michael is worried that he will be laid off in the next round and will not be able to provide for his family. The government of country X has not provided any social assistance to laid-off workers. He has, therefore, joined the company's trade union and has together with fellow workers organized protests against the company and government. The protests were violently crushed by the company private security with several workers killed and injured. The executive and legislative branches government have turned a blind eye to workers' plight. Where can Michael and other workers enforce corporate and state responsibility for business-related human rights violations?

The international community and global civil society increasingly recognizes that not only states, but also corporations are duty-holders of human rights obligations.<sup>1</sup> Current system for business and human rights has been in the domestic and international legal order inadequate, insufficient and inappropriate, since it does not clearly establish framework for corporate obligations to respect human rights and to enforce corporate accountability.<sup>2</sup> Therefore, in recent years, civil society has in recent years voiced concerns and argued to strengthen existing

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<sup>1</sup> HUMAN RIGHTS OBLIGATIONS OF BUSINESS: BEYOND THE CORPORATE RESPONSIBILITY TO RESPECT (SURYA DEVA AND DAVID BILCHITZ (EDS. 2013) ANDREW CLAPHAM, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS, (OXFORD: OXFORD UNIVERSITY PRESS, 2006;.), HUMAN RIGHTS AND BUSINESS: DIRECT CORPORATE ACCOUNTABILITY FOR HUMAN RIGHTS (JERNEJ LETNAR ČERNIČ AND TARA VAN HO (EDS 2015); JOHN G. RUGGIE, JUST BUSINESS: MULTINATIONAL CORPORATIONS AND HUMAN RIGHTS, NEW YORK: W.W. NORTON & Co. (2013)..), HUMAN RIGHTS IN BUSINESS: REMOVAL OF BARRIERS TO ACCESS TO JUSTICE IN THE EUROPEAN UNION (JUAN JOSÉ ALVAREZ RUBIO, AND KATERINA YIANNIBAS, (EDS , 2017).

<sup>2</sup> Larry Catá Backer, Moving Forward the UN Guiding Principles for Business and Human Rights: Between Enterprise Social Norm, State Domestic Legal Orders, and the Treaty Law That Might Bind Them All (2015) *FORDHAM INTERNATIONAL LAW JOURNAL* 38, pp. 457-542; Larry Catá Backer, The Human Rights Obligations of State-Owned Enterprises: Emerging Conceptual Structures and Principles in National and International Law and Policy (2017) *VANDERBILT JOURNAL OF TRANSNATIONAL LAW* 50(4), pp. 827-888.

regulation by adoption of binding corporate human rights obligations at domestic and international levels. Victims have faced several challenges in enforcing corporate accountability for human rights violations, which arise not only from a partially incomplete and ineffective domestic legal order, but also from the practical hurdles to the implementation of the institutional and regulatory framework.<sup>3</sup> Domestic and global civil society has argued that states and corporations should not anymore turn a blind eye to corporate-related human rights abuses. For those reasons, it is necessary to develop innovative normative approaches to reform international and domestic legal systems on business and human rights with the objective of better enforcement.

The UN Treaty on Business and Human Rights would complement and strengthen domestic judicial systems.<sup>4</sup> States are primary duty-holders of human rights obligations. They are to respect, protect and respect human rights. Nonetheless, corporations also carry human rights obligations with the aim to protect human dignity of rights-holders.<sup>5</sup> Various scholars argue that they have obligations to respect, protect and fulfill human rights that they derive from domestic

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<sup>3</sup> Anil Yilmaz Vastardis, Rachel Chambers, *Overcoming the Corporate Veil Challenge: Could Investment Law Inspire the Proposed Business and Human Rights Treaty?* INTERNATIONAL AND COMPARATIVE LAW QUARTERLY, 2018, NO. 2 (2018), 389–423.

<sup>4</sup> THE FUTURE OF BUSINESS AND HUMAN RIGHTS : THEORETICAL AND PRACTICAL CONSIDERATIONS FOR A UN TREATY (JERNEJ LETNAR ČERNIČ, NICOLAS CARRILLO-SANTARELLI (EDS.). 2018); Lee McConnell, ‘Assessing the Feasibility of a Business and Human Rights Treaty’ (2017) 66 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 14; Humberto Cantu Rivera, ‘Negotiating a Treaty on Business and Human Rights: The Early Stages’ (2017) 40(2) UNSW LAW JOURNAL 1200; Olivier De Schutter, ‘Towards a New Treaty on Business and Human Rights’ (2016) 1 Business and Human Rights Journal 41. HUMAN RIGHTS OBLIGATIONS OF BUSINESS: BEYOND THE CORPORATE RESPONSIBILITY TO RESPECT (SURYA DEVA AND DAVID BILCHITZ (EDS., 2013) STEVEN R. RATNER, ‘CORPORATIONS AND HUMAN RIGHTS: A THEORY OF LEGAL RESPONSIBILITY’ (2001) 111, YALE LAW JOURNAL.

<sup>5</sup> SURYA DEVA, REGULATING CORPORATE HUMAN RIGHTS VIOLATIONS: HUMANIZING BUSINESS, LONDON/NEW YORK: ROUTLEDGE, 2012; David Bilchitz, ‘The Ruggie Framework: An Adequate Rubric for Corporate Human Rights Obligations?’, 12 SUR – INTERNATIONAL JOURNAL OF HUMAN RIGHTS 199 (2010). Robert McCorquodale, Lise Smit, Stuart Neely and Robin Brooks, *Human Rights Due Diligence in Law and Practice: Good Practices and Challenges for Business Enterprises*, BUSINESS AND HUMAN RIGHTS JOURNAL, 2017, 2(2), 195-224. NICOLÁS CARRILLO SANTARELLI, NECESSITY AND POSSIBILITIES OF THE INTERNATIONAL PROTECTION OF HUMAN DIGNITY FROM NON-STATE VIOLATIONS, PHD THESIS, UNIVERSIDAD AUTÓNOMA DE MADRID, 2013.

and international systems.<sup>6</sup> Corporate obligations to respect falls within negative obligations not to do any harm. On the other hand, corporate obligations to protect and fulfill positive obligations that require active measure on the part of corporations. Corporations are obliged among other to control respect for human rights in their supply chain.<sup>7</sup> As far as final consensus has been still forming concerning corporate human rights obligations, it is undoubtedly accepted that such obligations derive from ethical and philosophical foundations.<sup>8</sup>

Ordinary people have been in the contemporary world exposed to the positive as well as negative impacts of business, which can also indirectly or directly violate human rights. Such abuses include violations of civil and political rights as well as economic and social rights, including the most severe violations such as participation in genocides, crimes against humanity and war crimes. Corporations themselves or, even more commonly, jointly with state actors interfere with individual's absolute rights, such as the right to life, a prohibition of torture, as well

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<sup>6</sup> ANDRÉS FELIPE LÓPEZ LATORRE AF (2020) IN DEFENCE OF DIRECT OBLIGATIONS FOR BUSINESSES UNDER INTERNATIONAL HUMAN RIGHTS LAW. *BUSINESS AND HUMAN RIGHTS JOURNAL* 5(1):56-83; JERNEJ LETNAR ČERNIČ, CORPORATE ACCOUNTABILITY UNDER SOCIO-ECONOMIC RIGHTS, (TRANSNATIONAL LAW AND GOVERNANCE). OXON; NEW YORK: ROUTLEDGE, 2019. THE FUTURE OF BUSINESS AND HUMAN RIGHTS: THEORETICAL AND PRACTICAL CONSIDERATIONS FOR A UN TREATY. CAMBRIDGE; ANTWERP; PORTLAND: INTERSENTIA. JERNEJ LETNAR ČERNIČ, NICOLAS CARRILLO-SANTARELLI (EDS. 2018. ; Jelena Aparac, Business and Armed Non-State Groups: Challenging the Landscape of Corporate (Un)Accountability in Armed Conflicts, *BUSINESS AND HUMAN RIGHTS JOURNAL* 5, NO. 2 (2020): 270–75.

<sup>7</sup> JUSTINE NOLAN AND DOROTHY BAUMANN PAULY (EDS.), *BUSINESS AND HUMAN RIGHTS: FROM PRINCIPLES TO PRACTICE*, ROUTLEDGE, UK, 2016; JUSTINE NOLAN, HUMAN RIGHTS AND GLOBAL SUPPLY CHAINS: IS EFFECTIVE SUPPLY CHAIN ACCOUNTABILITY POSSIBLE?, IN SURYA DEVA AND DAVID BILCHITZ (ED.), *BUILDING A TREATY ON BUSINESS AND HUMAN RIGHTS: CONTEXT AND CONTOURS*, CAMBRIDGE, CAMBRIDGE UNIVERSITY PRESS, 2017, PP. 238-265; Jernej Letnar Černič, Moving Towards Protecting Human Rights in Global Business Supply Chains (2018) *BOSTON UNIVERSITY INTERNATIONAL LAW JOURNAL*, 36(2), PP. 101-116; Jolyon Ford, and Justine Nolan, , Regulating Transparency on Human Rights and Modern Slavery in Corporate Supply Chains: The Discrepancy between Human Rights Due Diligence and the Social Audit (May 26, 2020). *AUSTRALIAN JOURNAL OF HUMAN RIGHTS*, 26 (1), 1-19 (2020), UNSW LAW RESEARCH PAPER NO. 20-29; BEATE SJÁFJELL AND CHRISTOPHER M. BRUNER (EDS), *CAMBRIDGE HANDBOOK OF CORPORATE LAW, CORPORATE GOVERNANCE AND SUSTAINABILITY* (CAMBRIDGE UNIVERSITY PRESS, 2019).

<sup>8</sup> FLORIAN WETTSTEIN, *MULTINATIONAL CORPORATIONS AND GLOBAL JUSTICE: HUMAN RIGHTS OBLIGATIONS OF A QUASI-GOVERNMENTAL INSTITUTION* (STANFORD: STANFORD UNIVERSITY PRESS, 2009).

Denis G Arnold, Corporations and Human Rights Obligations, *BUSINESS AND HUMAN RIGHTS JOURNAL* 1, NO. 2 (2016): 255–75; Upendra Baxi, Human Rights Responsibility of Multinational Corporations, *Political Ecology of Injustice: Learning from Bhopal Thirty Plus?*, *BUSINESS AND HUMAN RIGHTS JOURNAL* 1, NO. 1 (2016): 21–40.

as rights such as rights to water, food and decent housing. The nature and extent of corporate violations varies according to geographical areas as well as there exists differences between corporations themselves. The bulk of violations are still committed in Americas, Africa, Asia and Central and Eastern Europe. The potential UN Treaty represents an opportunity to improve corporate accountability for human rights, however a number of strong and influential stakeholders oppose its adoption.<sup>9</sup> It is therefore necessary to investigate the theoretical basis and to arrive at convincing arguments that can lead to its adoption.

The 2020 Draft of the United Nations (UN) Business and Human Rights Treaty places obligations on states to protect individuals from corporate related human rights abuses.<sup>10</sup> It places principal obligations on domestic legal systems to enforce corporate accountability for alleged business related human rights abuses.<sup>11</sup> It is still based on state human rights obligations, however it nevertheless indirectly recognizes that corporations have human obligations.<sup>12</sup> In this way, this article explores ways to improve the 2020 Draft in order to include enforcement

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<sup>9</sup> See, for instance, Surya Deva (2015) *Multinationals, human rights and international law: time to move beyond the 'state-centric' conception?*. IN: *HUMAN RIGHTS AND BUSINESS: DIRECT CORPORATE ACCOUNTABILITY FOR HUMAN RIGHTS* (JERNEJ LETNAR ČERNIČ, TARA VAN HO (EDS.), 2015) 27-49; MARCO FASCIGLIONE, *AN INTERNATIONAL MECHANISM OF ACCOUNTABILITY FOR ADJUDICATING CORPORATE VIOLATIONS OF HUMAN RIGHTS? PROBLEMS AND PERSPECTIVES*. IN: *JUDICIAL POWER IN A GLOBALIZED WORLD* (PAULO PINTO DE ALBUQUERQUE, KRZYSZTOF WOJTYCZEK K (EDS) 2019) 179-195.

<sup>10</sup> Jonathan Kolieb, *Advancing the Business and Human Rights Treaty Project Through International Criminal Law: Assessing the Options for Legally-Binding Corporate Human Rights Obligations* (February 28, 2020). *GEORGETOWN JOURNAL OF INTERNATIONAL LAW*, VOL. 50, NO. 4 (2019), 789; Marco Fasciglione, *Another Step on the Road? Remarks on the Zero Draft Treaty on Business and Human Rights*, *Another Step on the Road? Remarks on the Zero Draft Treaty on Business and Human Rights*, *DIRITTI UMANI E DIRITTO INTERNAZIONALE*, vol. 12, issue 3, 2018, pp. 629-661, Sara McBrearty, *The Proposed Business and Human Rights Treaty: Four Challenges and an Opportunity*, 57 *HARV. INT'L L.J. (ONLINE SYMP.)* 11 (2016);

<sup>11</sup> *THE FUTURE OF BUSINESS AND HUMAN RIGHTS: THEORETICAL AND PRACTICAL CONSIDERATIONS FOR A UN TREATY*. CAMBRIDGE; ANTWERP; PORTLAND: INTERSENTIA. COP. 2018 JERNEJ LETNAR ČERNIČ, NICOLAS CARRILLO-SANTARELLI (EDS.)

<sup>12</sup> Markus Krajewski, *A Nightmare or a Noble Dream? Establishing Investor Obligations Through Treaty-Making and Treaty-Application*, *BUSINESS AND HUMAN RIGHTS JOURNAL*. CAMBRIDGE UNIVERSITY PRESS, 5(1), PP. 105–129.

mechanisms under the potential United Nations Business and Human Rights Treaty. This article in a way looks into the future and deals with scenarios if and when the United Nations Business and Human Rights will be finally adopted. It will critically investigate the shortcomings of the current frameworks in domestic legal systems, with emphasis on enforcement in order to thereafter develop a holistic theoretical and normative model for improving enforcement in the potential UN Treaty on business and human rights. It discusses which would be the most appropriate enforcement mechanism for right-holders to enforce alleged human rights violations against corporations.

This article is divided into five main parts. First section first set the scene of the discourse on business and human rights. It therefore discusses in Section II potential Business and Human Rights Treaty by examining the background and advantages and disadvantages of the treaty. It defines the fundamental theoretical concepts of business and human rights from the theoretical and legal bases of corporate responsibility to corporate accountability in the event of violations of human rights both in domestic legal systems and in international law. This section aims at exploring the current regime for business and human rights in domestic and international legal order and as the first research to design original theoretical and normative models and practical solutions for its reform in the area of enforcement of business – related human rights abuses. The original approaches to improving normative legal orders have been lacking in the business and human rights both at home and at international level, and thereafter at implementation phase. Section III is dedicated to the enforcement of corporate-related human rights abuses. Section IV submits four normative proposals for more efficient enforcement of corporate-related human rights abuses with the human rights provision of the potential UN Business and Human Rights Treaty. As a result, it submits four different models of enforcement of state and corporate

accountability for business-related human rights abuses under the Treaty, namely judicial, quasi-judicial, non-judicial and administrative models. Those models are intertwined, inter-dependent and complement each other. More specifically, it examines the judicial model of the European Court of Human Rights; the quasi-judicial model of United Nations Human Rights Committee under the International Covenant on Civil and Political Rights, the non-judicial mediation model of the Ombudsman Advisory Mechanism of the International Financial Corporation of the World Bank and the non-judicial administrative model of Special National Supervisory Mechanism under the UN Treaty. Section V thereafter examines best practices, advantages and disadvantages from the four proposed enforcement mechanism for the drafter of the United Nations Business and Human Rights Treaty to select the most appropriate both for the rights-holders and potential state parties. In the closing part of the article, conclusions are drawn on how states should proceed to introduce an independent, impartial and fair enforcement mechanism under the United Nations Business and Human Rights Treaty that could be effectively employed by victims of business related human rights abuses. As a result, this article attempts to fill the gap by providing a set of proposals for decision-makers both at domestic and international levels to reform domestic and international legal frameworks in the area of enforcement of corporate accountability for human rights. It provides in the conclusion set of proposals for improving the current Draft of the UN Business and Human Rights concerning enforcement. As a result, states will be able to improve their legal system at domestic and international level in order to achieve corporate responsibility for human rights and enforce corporate accountability for potential violations.

## I. STATE-OF-THE-ART OF BUSINESS AND HUMAN RIGHTS DISCOURSE

Business and human rights is one of the basic pillars required for the existence, development and realization of human dignity in domestic societies and globally. In the past years, numerous original research studies have already been published on business and human rights, both in the form of monographic publications<sup>13</sup>, chapters in monographic publications<sup>14</sup> and original scientific articles.<sup>15</sup> *Business and Human Rights Journal*, a specialized scientific journal on business and human rights, was launched by the Cambridge University Press.<sup>16</sup> Most research studies have so far focused on individual aspects of business and human rights, from various forms of demonstration of corporate human rights obligations<sup>17</sup>, exercising corporate accountability for violations<sup>18</sup>, the role of the state, its obligations and the exercise of its responsibility, the United Nations Guiding Principles on Business and Human Rights<sup>19</sup>,

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<sup>13</sup> HUMAN RIGHTS OBLIGATIONS OF BUSINESS: BEYOND THE CORPORATE RESPONSIBILITY TO RESPECT (SURYA DEVA AND DAVID BILCHITZ (EDS.) 2013) ANDREW CLAPHAM, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS, OXFORD: OXFORD UNIVERSITY PRESS, 2006; JERNEJ LETNAR ČERNIČ, HUMAN RIGHTS LAW AND BUSINESS, GRONINGEN: EUROPA LAW PUBLISHING, 2010);S.), CORPORATE ACCOUNTABILITY IN THE CONTEXT OF TRANSITIONAL JUSTICE (SABINE MICHALOWSKI (ED.), 2013); JOHN G. RUGGIE, JUST BUSINESS: MULTINATIONAL CORPORATIONS AND HUMAN RIGHTS, NEW YORK: W.W. NORTON & Co. (2013).

<sup>14</sup> See, for example, HUMAN RIGHTS AND BUSINESS: DIRECT CORPORATE ACCOUNTABILITY FOR HUMAN RIGHTS (JERNEJ LETNAR ČERNIČ AND TARA VAN HO, 2015), 27-49; BUSINESS AND HUMAN RIGHTS: FROM PRINCIPLES TO PRACTICE (DOROTHÉE BAUMANN-PAULY, JUSTINE NOLAN (EDS) 2016)

<sup>15</sup> See, for example Steven R. Ratner, Corporations and Human Rights: A Theory of Legal Responsibility (2001) 111, YALE LAW JOURNAL; Carlos M. Vasquez, Direct vs. Indirect Obligations of Corporations under International Law (2005) 43, COLUMBIA JOURNAL OF TRANSNATIONAL LAW, 927; David Kinley and Junko Tadaki, From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law (2004) 44, VIRGINIA JOURNAL OF INTERNATIONAL LAW, 931.

<sup>16</sup> BUSINESS AND HUMAN RIGHTS JOURNAL, CAMBRIDGE UNIVERSITY PRESS, <https://www.cambridge.org/core/journals/business-and-human-rights-journal>.

<sup>17</sup> NICOLA JÄGERS, CORPORATE HUMAN RIGHTS OBLIGATIONS: IN SEARCH OF ACCOUNTABILITY, ANTWERP: INTERSENTIA, 2002.

<sup>18</sup> SURYA DEVA, REGULATING CORPORATE HUMAN RIGHTS VIOLATIONS: HUMANIZING BUSINESS, LONDON/NEW YORK: ROUTLEDGE, 2012.

<sup>19</sup> SEE, FOR EXAMPLE, JOHN G. RUGGIE, JUST BUSINESS: MULTINATIONAL CORPORATIONS AND HUMAN RIGHTS, NEW YORK: W.W. NORTON & Co. (2013); John G. Ruggie, Business and Human Rights: The Evolving Agenda, 101 AMERICAN JOURNAL OF INTERNATIONAL LAW 819 (2004); Jena Martin Amerson, The End of the Beginning? A Comprehensive Look at the Business and Human Rights Agenda from a Bystander Perspective', 17 FORDHAM

protecting human rights in the supply chains<sup>20</sup>, studying various national action plans under the United Nations Guiding Principles on Business and Human Rights<sup>21</sup>, commitments by corporations under individual categories of human rights<sup>22</sup>, protecting human rights in investment law<sup>23</sup>, the specificities of individual national legal frameworks<sup>24</sup>, and examining the path towards an international treaty on business and human rights<sup>25</sup>, and analysing a wider field of corporate social responsibility.<sup>26</sup> Nonetheless, there appears to be a gap in research for in-depth studies on the current negotiations and assessment of different approaches taken particularly concerning enforcement of state and corporate accountability for business-related human rights abuses under the potential UN Business and Human Rights Treaty.

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JOURNAL OF CORPORATE AND FINANCE LAW 871 (2012); David Bilchitz, The Ruggie Framework: An Adequate Rubric for Corporate Human Rights Obligations?, 12 SUR – INTERNATIONAL JOURNAL OF HUMAN RIGHTS 199 (2010).; Susan Ariel Aaronson and Ian Higham, “Re-righting Business”: John Ruggie and the Struggle to Develop International Human Rights Standards for Transnational Firms’ 35 HUMAN RIGHTS QUARTERLY 333 (2013).

<sup>20</sup> See, for example, Justine Nolan, Business and human rights: The challenge of putting principles into practice and regulating global supply chains, *Alternative Law Journal* 2017, Vol. 42(1) 42–46;

<sup>21</sup> David Birchall, ‘Any Act, Any Harm, To Anyone: The Transformative Potential of “Human Rights Impacts” Under the UN Guiding Principles on Business and Human Rights’ UNIVERSITY OF OXFORD HUMAN RIGHTS HUB JOURNAL 1(2) (2019); Humberto Cantu Rivera, National Action Plans on Business and Human Rights: Progress or Mirage? (2019) BUSINESS AND HUMAN RIGHTS JOURNAL, 4(2), 213-237; Nicola Jägers, UN Guiding Principles on Business and Human Rights: Making Headway Towards Real Corporate Accountability? 29 NETHERLANDS QUARTERLY OF HUMAN RIGHTS, 159 (2011); David Birchall, The Consequentialism of the UN Guiding Principles on Business and Human Rights: Towards the Fulfilment of “Do No Harm” JOURNAL OF BUSINESS ETHICS AND ORGANIZATION STUDIES 24(1) (2019); Damiano de Felice & Andreas Graf, The Potential of National Action Plans to Implement Human Rights Norms: An Early Assessment with Respect to the UN Guiding Principles on Business and Human Rights, 7 JOURNAL OF HUMAN RIGHTS PRACTICE 40 (2015).

<sup>22</sup> JERNEJ LETNAR ČERNIČ, CORPORATE ACCOUNTABILITY UNDER SOCIO-ECONOMIC RIGHTS, (TRANSNATIONAL LAW AND GOVERNANCE). OXON; NEW YORK: ROUTLEDGE, COP. 2018.

<sup>23</sup> Tara van Ho, Is it Already Too Late for Colombia’s Land Restitution Process? INTERNATIONAL HUMAN RIGHTS LAW REVIEW 5 (1), 60-85.

<sup>24</sup> Sabine Michalowski, No Complicity Liability for Funding Gross Human Rights Violations (2012) 30, BERKELEY JOURNAL OF INTERNATIONAL LAW, 451.

<sup>25</sup> SARA BLACKWELL, NICOLE VANDER MEULEN, ‘TWO ROADS CONVERGED: THE MUTUAL COMPLEMENTARITY OF A BINDING BUSINESS AND HUMAN RIGHTS TREATY AND NATIONAL ACTION PLANS ON BUSINESS AND HUMAN RIGHTS’, 6 NOTRE DAME JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW 51 (2016); OLIVIER DE SCHUTTER, ‘TOWARDS A NEW TREATY ON BUSINESS AND HUMAN RIGHTS’, 1 BUSINESS AND HUMAN RIGHTS JOURNAL 41 (2016).

<sup>26</sup> David Scheffer and Caroline Kaeb, ‘The Five Levels of CSR Compliance: The Resiliency of Corporate Liability under the Alien Tort Statute and the Case for a Counterattak Strategy in Compliance Theory’ (2011) 29, BERKELEY JOURNAL OF INTERNATIONAL LAW, 334.

## II. NEGOTIATIONS ON THE POTENTIAL UN BUSINESS AND HUMAN RIGHTS TREATY

States have been traditionally the principal duty-bearer in human rights law. Nonetheless, also other actors may have obligations under human rights law. The Universal Declaration of Human Rights recognized already in 1948 that other actors may have human rights obligations. More specifically, the Preamble of the Universal Declaration of Human Rights provides “that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.”<sup>27</sup> The progress has been slow since the adoption of the Universal Declaration. International community has so far not agreed to directly recognized human rights obligations of corporations. The UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights have in 2003 advocated that “Within their respective spheres of activity and influence, transnational corporations and other business enterprises have the obligation to promote, secure the fulfillment of, respect, ensure respect of and protect human rights recognized in international as well as national law, including the rights and interests of indigenous peoples and other vulnerable groups.”<sup>28</sup> However, the project to adopt the UN Norms tragically failed in 2004 due to the

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<sup>27</sup> UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), <https://www.un.org/en/universal-declaration-human-rights/>. See for more details: WILLIAM A. SCHABAS, THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: TRAVAUX PRÉPARATOIRES (CAMBRIDGE: CAMBRIDGE UNIVERSITY PRESS, 2013).

<sup>28</sup> UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003), Article 1 See in detail David Weissbrodt and Maria Kruger, Muria, Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (2003) 97 AMERICAN JOURNAL OF INTERNATIONAL LAW 901–922

opposition by states and business community. Nonetheless, several international treaties have in the past indirectly recognized corporate human rights obligations.<sup>29</sup> Also, some regional organizations such as the European Union have in the recent decade adopted binding laws in the field of business and human rights.<sup>30</sup> Additionally, several domestic legal systems provide for corporate human rights obligations.<sup>31</sup> The field of business and human rights is a complex field where human dignity of rights-holders is to be protected in relation to the obligations of duty-holders such as corporations, states and other actors. It can be described as plural framework where obligations and commitments to business and human rights are shared among several stakeholders. The simultaneous level of these obligations is intertwined as they arise both from domestic and international law, as well as from the internal legal commitments of certain individual corporations. Such approach implies intertwining of the various levels of incurring accountability of states, corporations and individuals within corporations with the aim of providing legal and other channels and mechanisms to victims for enforcing corporate accountability.

First step towards binding obligations at the international level was taken in 2011. The

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<sup>29</sup> See, for instance, International Convention on Civil Liability for Oil Pollution Damage, 973 UNTS 3, 29 November 1969, art. 3(1); OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, S. Treaty Doc. 105-43, 37 ILM 1, 18 December 1997. Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, Treaty No. 150, Council of Europe, 21 June 1993; Convention on the Third Party Liability in the Field of Nuclear Energy, 956 UNTS 251, Paris 29 July 1960; Convention Relating to Civil Liability in the field of Maritime Carriage of Nuclear Material, 974 UNTS 255, Brussels 17 December 1971;

<sup>30</sup> See, for example, Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups Text with EEA relevance; Regulation (EU) 2017/821 of the European Parliament and of the Council of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas.

<sup>31</sup> Loi 2017-399 du 27 Mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre [Law 2017-399 of March 27, 2017] JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Mar. 27, 2017.; Modern Slavery Act (UK, 2015); California Transparency in Supply Chains Act, CAL. CIV. CODE § 1714.43 (West, 2010).

United Nations Human Rights Council “unanimously” has then adopted the “Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework”.<sup>32</sup> It is based on three pillars, namely on “States’ existing obligations to respect, protect and fulfil human rights and fundamental freedoms; the role of business enterprises as specialized organs of society performing specialized functions, required to comply with all applicable laws and to respect human rights; the need for rights and obligations to be matched to appropriate and effective remedies when breached.”<sup>33</sup> The UN Guiding Principles on Business and Human Rights (UNGPs) confirm first that states have obligations to protect individuals against corporate-related human rights abuses. They note in principle 1 that “States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises”<sup>34</sup> and add in Principle 2 that “States should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations.”<sup>35</sup> States carry therefore the most straight-forward obligations to ensure respect for human rights in domestic and global economy. Their obligations are even broader relating to the conduct of state-owned enterprises where they have to set leading examples and where their performance has been assessed more strictly. It is still contested if state obligations to protect human rights apply also extraterritorially.<sup>36</sup>

Secondly, corporations have a responsibility to respect human rights, i.e. not do any harm towards human dignity of the rights-holders. More specifically, UNGPs in Principle 12 establish

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<sup>32</sup> John Ruggie, *Protect, Respect and Remedy: A Framework for Business and Human Rights: Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, John Ruggie, A/HRC/8/5 (7 April 2008).

<sup>33</sup> *Id.*, page 1.

<sup>34</sup> *Id.*, Principle 1.

<sup>35</sup> *Id.*, Principle 2.

<sup>36</sup> GLOBAL JUSTICE AND STATE DUTIES: THE EXTRATERRITORIAL SCOPE OF ECONOMIC SOCIAL AND CULTURAL RIGHTS IN INTERNATIONAL LAW (MALCOLM LANGFORD, ET AL., EDS., 2013).

corporate responsibility to respect by submitting that “the responsibility of business enterprises to respect human rights refers to internationally recognized human rights – understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organization’s Declaration on Fundamental Principles and Rights at Work.”<sup>37</sup> Corporations have both negative and positive obligations to respect all internationally recognized human rights. UNGPs noted in Principle 13 that ‘The responsibility to respect human rights requires that business enterprises: ... (b) Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.’<sup>38</sup> As a result, corporations have obligations not to do any harm relating to the human dignity of the rights-holders. On the other hand, they have positive obligations to adopt active measures to attempt to protect human rights in their global supply chains. They are encouraged to conduct due diligence through their supply chains in order to prevent human rights abuses and supervise their business partners.<sup>39</sup> Thirdly, states are obliged to construct access to remedy frameworks for rights-holders to enforce state and corporate accountability for human rights violations.<sup>40</sup> The UN Guiding Principles are not international treaty and they are not directly binding in international law.<sup>41</sup> Nonetheless, they confirm the existing obligations of states and corporations in international law. States are obliged to adopt National Action Plans to implement

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<sup>37</sup> UN Guiding Principles, Principle 12.

<sup>38</sup> *Id.*, Principle 13(b).

<sup>39</sup> Rachel Chambers, Anil Yilmaz Vastardis, (2021). Human Rights Disclosure and Due Diligence Laws: The Role of Regulatory Oversight in Ensuring Corporate Accountability, *CHICAGO JOURNAL OF INTERNATIONAL LAW*. 21 (2), FORTHCOMING.

<sup>40</sup> UN Guiding Principles, Principle 25.

<sup>41</sup> LA IMPLEMENTACION DE LOS PRINCIPIOS RECTORES DE LAS NACIONES UNIDAS SOBRE EMPRESAS Y LOS DERECHOS HUMANOS POR LA UNION EUROPEA Y SUS ESTADOS MIEMBROS, THOMSON REUTERS-ARANZADI, PP 145-165, CARMEN MARQUEZ CARRASCO, I. VIVAS TESON (EDS.), 2017)

the UN Guiding Principles in domestic systems and show commitment to propel reform within set objectives. However, since the adoption of the UN Guiding Principles in 2011 only 24 states have so far adopted National Action Plans.<sup>42</sup> Majority of those states are European, whereas first countries from for instance, Africa and Asia have only recently introduce National Action Plans.<sup>43</sup> Many states from the Global South have objected that the UN Guiding Principles do not establish binding obligations and direct access to remedy in the field of business and human rights.<sup>44</sup>

As a result, the global movement for the binding UN Treaty on Business and Human Rights has gained foothold. States and some civil society organisations have been in the past years working on the proposal to adopt the UN Business and Human Rights Treaty. The UN Treaty would establish binding state and corporate obligations in the area of business and human rights. It would grant rights-holder an access to remedy in the cases of business-related human rights violations. Moreover, it would strengthen the domestic civil, administrative and criminal liability systems to enforce corporate accountability for business-related human rights abuses. As a result, the United Nations Human Rights Council adopted on 26 June 2014 resolution A/HRC/RES/26/9 by which it decided “to establish an open-ended intergovernmental working group on

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<sup>42</sup> UN Working Group on the issue of human rights and transnational corporations and other business enterprises, State National Action Plans, <https://www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx>.

<sup>43</sup> JOANNE BAUER, WHAT GOOD IS A NAP FOR DEVELOPING COUNTRIES? A PRELIMINARY ASSESSMENT OF ACHIEVEMENTS AND PROSPECTS FOR NATIONAL ACTION PLANS ON BUSINESS AND HUMAN RIGHTS IN THE GLOBAL SOUTH (OCTOBER 27, 2016); [HTTPS://SSRN.COM/ABSTRACT=3221052](https://ssrn.com/abstract=3221052) OR [HTTP://DX.DOI.ORG/10.2139/SSRN.3221052](http://dx.doi.org/10.2139/ssrn.3221052)

<sup>44</sup> See for instance, Raphaela Lopes and Arnold Kwesiga, What the Zero Draft and Protocol Lack: Meaningful Access to Justice – a Global South Perspective, Business and Human Rights Resource Centre, 8 October 2018, <https://www.business-humanrights.org/en/blog/what-the-zero-draft-and-protocol-lack-meaningful-access-to-justice-a-global-south-perspective/>; Kate Lappin, Haley Pedersen & Tessa Khan, Influence of corporations in treaty process would undermine affected communities’ interests, Business & Human Rights Resource Centre, Mar. 28, 2016, <http://business-humanrights.org/en/influence-of-corporations-in-treaty-process-would-undermine-affected-communities%E2%80%99-interests>. See also Nicola Jägers, UN Guiding Principles on Business and Human Rights: Making Headway Towards Real Corporate Accountability?, 29 NETH. Q. HUM. RTS. 159 (2011).

transnational corporations and other business enterprises with respect to human rights, whose mandate shall be to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises.”<sup>45</sup> The UN open-ended intergovernmental working group has firstly attempted to draft the UN Treaty on the basis of corporate human rights obligations and accountability. The Treaty Alliance, a global association of NGOs, submitted in 2015 that »the treaty must stipulate the primacy of human rights law over corporate rights and privileges which are enshrined in the biased and unfair framework created in trade and investment agreements. It must also establish a strong international framework for corporate legal accountability to ensure access to justice for affected individuals and communities and thus put an end to business impunity.«<sup>46</sup> The UN Working Group has so far organised six negotiating sessions, the last one in October 2020. The drafters have in the early stages considered whether to focus on corporate and state human rights obligations.<sup>47</sup>

The Elements for the Draft Legally Binding Instrument reflected that approach in that they focused on the corporate accountability for human rights. They provided that »TNCs and OBEs, regardless of their size, sector, operational context, ownership and structure, shall comply with all applicable laws and respect internationally recognized human rights, wherever they operate, and

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<sup>45</sup> Human Rights Council Resolution A/HRC/RES/26/9, adopted 14 July 2014, available at: <https://undocs.org/A/HRC/RES/26/9>, p. 2.

<sup>46</sup> Treaty Alliance, We call on states to participate actively in upcoming negotiations of the international treaty to ensure protection of human rights from the activities of transnational corporations and other business enterprises, <https://www.business-humanrights.org/en/treaty-alliance-joint-statement-calls-for-signatures-in-favour-of-proposed-binding-treaty-to-enhance-corporate-legal-accountability-for-rights-abuses>, 29 May 2015.

<sup>47</sup> Surya Deva, Defining the Scope of the Proposed Treaty on Business and Human Rights, Submission to the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights (2016), <http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session2/SuryaDeva.doc>.

throughout their supply chains«. <sup>48</sup> Such provision reflected that the approach that corporations would have direct human rights obligations in international law. As for access to remedy, they noted that »TNCs and OBEs shall prevent human rights impacts of their activities and provide redress when it has been so decided through legitimate judicial or non-judicial processes.« <sup>49</sup> They also submitted that »TNCs and OBEs shall design, adopt and implement internal policies consistent with internationally recognized human rights standards (to allow risk identification and prevention of violations or abuses of human rights resulting directly or indirectly from their activity) and establish effective follow up and review mechanisms, to verify compliance throughout their operations.« <sup>50</sup> In contrast, such approach was not followed up in first versions of the Draft Treaty. The 2018 Zero Draft provided for some corporate human rights obligations <sup>51</sup>. It noted that that “This Convention shall apply to human rights violations in the context of any business activities of a transnational character”. <sup>52</sup> It also included the Zero Draft also included Draft Option Protocol to be annexed. <sup>53</sup> The 2019 Draft focused on state responsibility. It includes provision in Article 6 on “legal liability”, which provides that “1. State Parties shall ensure that their domestic law provides for a comprehensive and adequate system of legal liability for human rights violations or abuses in the context of business activities, including those

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<sup>48</sup> Elements for the Draft Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights, Chairmanship of the OEIGWG established by HRC Res. A/HRC/RES/26/9, 29 September 2017, para. 3.3.

<sup>49</sup> Id.

<sup>50</sup> Id.

<sup>51</sup> Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and other Business Enterprises, Zero Draft (16 July 2018) Preamble <https://www.ohchr.org/documents/hrbodies/hrcouncil/wgtranscorp/session3/draftlbi.pdf>.

<sup>52</sup> Id., Article 3 (1).

<sup>53</sup> Draft Optional Protocol to the Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and other Business Enterprises, available at: <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session4/ZeroDraftOPLegally.pdf>.

of transnational character.”<sup>54</sup> The 2020 Draft of the UN Treaty has identified its aims in enforcing state human rights obligations as to business and human rights; preventing business-related human rights; guaranteeing access to justice and to enhance mutual legal and judicial assistance and corporation.<sup>55</sup> The 2020 Draft has much as the previous Draft concentrated on the state responsibility and obligations for business – related human rights abuses.<sup>56</sup> Nonetheless, the rationale behind the whole Treaty movement to protect human dignity of the rights-holders against the potential adverse corporate conduct.<sup>57</sup> The sixth round of negotiations, which took place in October 2020 did not bring much progress in the negotiations.<sup>58</sup> The majority of states of the global North have expressed support to the continuation of work on the UN Guidelines on Business and Human Rights.<sup>59</sup> States agreed to reconvene in the autumn to 2021 at the seventh round of negotiations.

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<sup>54</sup> Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and other Business Enterprises, 16.7.2019, [https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/OEIGWG\\_RevisedDraft\\_LBI.pdf](https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/OEIGWG_RevisedDraft_LBI.pdf), Article 6.

<sup>55</sup> United Nations Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and other Business Enterprises, 6 August 2020, Article 2 (1), [https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/OEIGWG\\_Chair-Rapporteur\\_second\\_revised\\_draft\\_LBI\\_on\\_TNCs\\_and\\_OBEs\\_with\\_respect\\_to\\_Human\\_Rights.pdf](https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/OEIGWG_Chair-Rapporteur_second_revised_draft_LBI_on_TNCs_and_OBEs_with_respect_to_Human_Rights.pdf).

<sup>56</sup> Tara Van Ho, Band-aids don't fix bullet holes., In defence of a traditional State-centric approach. In: THE FUTURE OF BUSINESS AND HUMAN RIGHTS (JERNEJ LETNAR ČERNIČ, NICOLAS CARRILLO-SANTARELLI (EDS., 2018), 111-137.

<sup>57</sup> Penope Simons, The value-added of a treaty to regulate transnational corporations and other business enterprises moving forward strategically. In: BUILDING A TREATY ON BUSINESS AND HUMAN RIGHTS: CONTEXT AND CONTOURS (SURYA DEVA, DAVID BILCHITZ, EDS., 2018). 48-78.

<sup>58</sup> Surya Deva, BHR Symposium: The Business and Human Rights Treaty in 2020–The Draft is “Negotiation-Ready”, but are States Ready?, *Opinio Iuris*, 8 September 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/>.

<sup>59</sup> Claire Methven O'Brien, Transcending the Binary: Linking Hard and Soft Law Through a UNGPS-Based Framework Convention (2020) *AJIL UNBOUND*, 114, 186-191.

### **III. ENFORCEMENT OF CORPORATE-RELATED HUMAN RIGHTS ABUSES AT UNITED NATIONS LEVEL: AN OVERVIEW**

Most domestic legal systems do not allow or only partially allow for the enforcement of corporate accountability for human rights violations in domestic systems as well as in third countries, which requires victims to resort to often ineffective and reluctant domestic courts of Asian, African and South American countries. In recent years, progress has been made only in Anglo-Saxon jurisdictions, especially in the English legal system. Victims can only in rare cases enforce corporate accountability within the jurisdictions of the countries where they are registered. The right to effective remedy is one the basic tenets of human rights justice. The UN Basic Principles on the right to remedy provide in Article 11 that: “Remedies for gross violations of international human rights law...” include “(a) Equal and effective access to justice;”, “(b) Adequate, effective and prompt reparation for harm suffered;” “(c) Access to relevant information concerning violations and reparation mechanisms.”<sup>60</sup> Those are some basic constituting parts of any fair judicial or non-judicial proceedings in the field business and human rights and beyond.

The United Nations High Commissioner for Human Rights echoed those concerns in its 2016 Report that “... accountability and remedy in such cases is often elusive. Although causing or contributing to severe human rights abuses would amount to a crime in many jurisdictions, business enterprises are seldom the subject of law enforcement and criminal sanctions.”<sup>61</sup> It added that the challenges to enforcing state and corporate accountability most commonly “... include fragmented, poorly designed or incomplete legal regimes; lack of legal development; lack

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<sup>60</sup> 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, C.H.R. res. 2005/35, U.N. Doc. E/CN.4/2005/L.10/Add.11 (19 April 2005), Article 11.

<sup>61</sup> United Nations High Commissioner for Human Rights, Report on “Improving accountability and access to remedy for victims of business-related human rights abuse, United Nations General Assembly, A/HRC/32/19, 10 May 2016, para. 2.

of awareness of the scope and operation of regimes; structural complexities within business enterprises; problems in gaining access to sufficient funding for private law claims; and a lack of enforcement.”<sup>62</sup> The normative structure for access to remedy is therefore both at the normative, but also in practice deficient and not effective. For those reasons, what is required is a reform of the domestic and international legal orders concerning corporate responsibility and accountability for human rights.

The UNGPs provide in the principle 25, the main principle of its Pillar III, that “As part of their duty to protect against business-related human rights abuse, States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy.”<sup>63</sup> The obligations to provide the access to remedy therefore rest with states, which traditionally through the judicial branch of government enforce different forms of responsibility for human rights abuses. For those reasons, what is required is a reform of the domestic and international legal orders concerning corporate responsibility and accountability for human rights. We will in the first part therefore define the fundamental theoretical concepts of business and human rights from the theoretical and legal bases of corporate responsibility to corporate accountability in the event of violations of human rights both in domestic legal systems and in international law.

The UN Working Group has considered adopting special protocol on the enforcement. As result, the Zero Draft of the UN Treaty included in its Annex Draft Optional Protocol to the

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<sup>62</sup> Id., Para. 4.

<sup>63</sup> John Ruggie, *Protect, Respect and Remedy: A Framework for Business and Human Rights: Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, John Ruggie, A/HRC/8/5 (7 April 2008) Principle 25.

Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and other Business Enterprises.<sup>64</sup> It provided in Article 1 that “Each State Party shall, in accordance with their legal and administrative systems, designate or establish, no later than two years after the entry into force of the present Protocol in the Party, a National Implementation Mechanism to promote compliance with, monitor and implement the [LEGALLY BINDING INSTRUMENT].”<sup>65</sup> The Draft noted that the mechanism shall guarantee the respect for the right to fair trial when considering the merits of complaint.<sup>66</sup> The drafters did not envisage that the Draft would deliver binding decisions or even judgements. On the contrary, the Draft Protocol noted that the mechanism “... shall make available its good offices to the parties concerned with a view to reaching an amicable settlement of the matter, consistent with the legal and administrative system of the State party concerned.”<sup>67</sup> The mechanism “will monitor ex-officio the compliance by the parties of the agreement”.<sup>68</sup> If the agreement is complied with, the mechanism may commence binding legal procedures against the non-respecting party.<sup>69</sup>

It appears that “a National Implementation Mechanism” was on the example of the National Contact Points under the OECD Guidelines for Multinational Enterprises as it concentrates on the methods of mediation and providing good offices in resolving disputes. Such proposal was not well received by the global civil society as it did not provide an effective legal remedy for

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<sup>64</sup> Draft Optional Protocol to the Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and other Business Enterprises, available at: <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session4/ZeroDraftOPLegally.pdf>.

<sup>65</sup> Id., Article 1.

<sup>66</sup> Id., Article 6 (2).

<sup>67</sup> Id., Article 6 (3).

<sup>68</sup> Id., Article 6 (4).

<sup>69</sup> Id., Article 6 (4).

enforcing corporate accountability for business related human rights violations.<sup>70</sup> The majority of states have in the fourth round of negotiations ignored the draft Annex and did not provide written or oral comments.<sup>71</sup> Those states that have submitted comments have expressed concerns about the necessity of such mechanism. The Russian Federation, for instance, noted that “The new mechanisms provided for in the document in many ways duplicate the functions of existing international organizations and bodies...<sup>72</sup>. The Draft Annex thereafter disappeared from 2019 Draft of the UN Business and Human Rights Treaty, nor it can be found its 2020 Draft.

The 2020 Draft of the UN Business and Human Rights Treaty recognizes the importance that the rights-holders have access to remedies in the case of business-related human rights abuses. Nonetheless, it primarily places responsibility on the domestic system to provide and thereafter provide access to judicial, quasi-judicial and non-judicial forums to enforce business-related human rights abuses. As a result, the draft Article provides that “States Parties shall provide their courts and State-based non-judicial mechanisms, with the necessary jurisdiction in accordance with this (Legally Binding Instrument) to enable victims’ access to adequate, timely and effective remedy.”<sup>73</sup> The drafters have therefore avoided to establish direct obligations and

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<sup>70</sup> GABRIELA KLETZEL, ANDRÉS LÓPEZ CABELLO, DANIEL CERQUEIRA, (2018) A TOOTHLESS TOOL? FIRST IMPRESSIONS ON THE DRAFT OPTIONAL PROTOCOL TO THE LEGALLY BINDING INSTRUMENT ON BUSINESS AND HUMAN RIGHTS. BUSINESS AND HUMAN RIGHTS RESOURCE CENTRE, ESCR-NET, 13 October 2018, <https://www.eschr-net.org/news/2018/blog-first-impressions-draft-op-protocol-treaty-business-human-rights>.

<sup>71</sup> United Nations, The open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, Fourth Session, Oral and Written Comments, 15-19 October 2018, <https://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session4/Pages/Session4.aspx>.

<sup>72</sup> “Comments and proposals of the Russian Federation on the draft legally binding instrument on transnational corporations and other business enterprises with respect to human rights”, October 2018, <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session4/SubmissionLater/RussianFederation.pdf>.

<sup>73</sup> The Open-ended inter-governmental working group chairmanship revised draft on Legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises, 6 August 2020, [https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/OEIGWG\\_Chair-Rapporteur\\_second\\_revised\\_draft\\_LBI\\_on\\_TNCs\\_and\\_OBEs\\_with\\_respect\\_to\\_Human\\_Rights.pdf](https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/OEIGWG_Chair-Rapporteur_second_revised_draft_LBI_on_TNCs_and_OBEs_with_respect_to_Human_Rights.pdf), Article 7 (1).

accountability of corporations at the international level. The 2020 Draft of the UN Business and Human Rights Treaty can be described as weak instrument as to the access to remedy for rights-holders concerning business-related human rights abuses. It provided in Article 15 for creation of the special supervisory Committee, which is to oversee the implementation of the UN Treaty. It provides that “The Committee shall consist, at the time of entry into force of the present (Legally Binding Instrument), (12) experts.”<sup>74</sup> It adds that “After an additional sixty ratifications or accessions to the (Legally Binding Instrument), the membership of the Committee shall increase by six members, attaining a maximum number of eighteen members...”.<sup>75</sup> It creates obligations for states parties to submit reports on the implementation of the Treaty. The Committee would thereafter examine state reports and provide concluding observations in order for states to improve its practice. More specifically, the 2020 Draft notes that “State Parties shall submit to the Committee, through the Secretary-General of the United Nations, reports on the measures they have taken to give effect to their undertakings under this (Legally Binding Instrument), within one year after the entry into force of the (Legally Binding Instrument) for the State Party concerned.”<sup>76</sup> It adds that “thereafter the State Parties shall submit supplementary reports every four years on any new measures taken and such other reports as the Committee may request.”<sup>77</sup> Usually, international human rights bodies do not have in place supervisory mechanism to monitor whether state parties have implemented concluding observations. They often rely on the good faith and commitments by the state parties to implement their commitments.

Article 15 provides in Subsection 4 that the Committee will have 5 main functions. More specifically, it notes that it will “a. Make general comments and normative recommendations on

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<sup>74</sup> Id., Article 15 (1) (a).

<sup>75</sup> Id.

<sup>76</sup> Id., Article 15 (2).

<sup>77</sup> Id.

the understanding and implementation of the (Legally Binding Instrument) based on the examination of reports and information received from the State Parties and other stakeholders;”<sup>78</sup> “b. Consider and provide concluding observations and recommendations on reports submitted by State Parties as it may consider appropriate and forward these to the State Party concerned that may respond with any observations it chooses to the Committee. The Committee may, at its discretion, decide to include this suggestions and general recommendations in the report of the Committee together with comments, if any, from State Parties;”<sup>79</sup> “c. Provide support to the State Parties in the compilation and communication of information required for the implementation of the provisions of the (Legally Binding Instrument);”<sup>80</sup> “d. Submit an annual report on its activities under this (Legally Binding Instrument) to the State Parties and to the General Assembly of the United Nations;”<sup>81</sup> “e. [The Committee may recommend to the General Assembly to request the Secretary-General to undertake on its behalf studies on specific issues relating to the present (Legally Binding Instrument)].”<sup>82</sup> Those five main functions are traditional functions, which the UN Treaty bodies usually possess. For instance, the International Covenant on Civil and Political Rights (ICCPR) provides in Article 40 (1) that “The States Parties to the present Covenant undertake to submit reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made in the enjoyment of those rights....”.<sup>83</sup> However, the ICCPR also provides the right to submit individual communication to the Human Rights Committee concerning its alleged violations by a state party. On the contrary,

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<sup>78</sup> Id., Article 15 (4).

<sup>79</sup> Id.

<sup>80</sup> Id.

<sup>81</sup> Id.

<sup>82</sup> Id.

<sup>83</sup> International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, Mar. 23, 1976; Article 40 (1).

the 2020 Draft of the UN Business and Human Rights Treaty does unfortunately provide for the right of victims to submit individual communication. Such absence of the right to resort to quasi-judicial forum is worrisome. If rights-holders are left without the recourse to the independent monitoring mechanism, the whole added value of the UN Treaty on Business and Human Rights would be undermined. As a result, it is necessary, as we explain in the next section, to drafters of the UN Treaty on Business and Human Rights and negotiating states consider redrafting the current Article 15 of the 2020 Draft of the Business and Human Rights Treaty to also establish the right to submit individual communication.

#### **IV. A NORMATIVE PROPOSAL FOR MORE EFFICIENT ENFORCEMENT OF CORPORATE-RELATED HUMAN RIGHTS ABUSES WITH THE UN BUSINESS AND HUMAN RIGHTS TREATY**

Enforcement of corporate and state accountability for corporate-related human rights abuses has been for a long time an Achilles' heel in the field of human rights. No many efficient judicial, quasi-judicial and non-judicial remedies have been available either at the domestic, regional and international level for rights-holders to enforce state and/or corporate accountability for business-related human rights abuses.

A binding international treaty signifies the development of normative solutions that will place individuals as the rights-holders in relation to the obligations of duty-holders such as corporations, states and other actors. Nonetheless, a binding treaty can, on the one hand, work only in plural framework where obligations and commitments to business and human rights are

shared among several stakeholders.<sup>84</sup> The simultaneous level of these obligations is intertwined as they arise both from domestic and international law, as well as from the internal legal commitments of certain individual corporations. On the other hand, a holistic approach implies intertwining of the various levels of incurring accountability of states, corporations and individuals within corporations with the aim of providing legal and other channels and mechanisms to victims for enforcing corporate accountability. Domestic systems lack effective legal redress to enforce corporate accountability, the realization of the protection of human dignity in supply chains and in the operation of corporations established in most domestic legal order.<sup>85</sup> As a result, this section formulates normative solutions for an international treaty on business and human rights concerning enforcement of state accountability for corporate related human rights abuses.

This article therefore explores several normative proposals for more efficient enforcement of Corporate-related Human Rights Abuses within the UN Business and Human Rights Treaty. It aims to submit reform proposals in order to enhance the right of the rights-holders to enforce state and corporate accountability for corporate-related human rights abuses through judicial, quasi-judicial and non-judicial remedies. As a result, it first explores if the model of the United Nations Human Rights Committee under the International Covenant on Civil and Political Rights could be employed as a model for enforcing the rights provisions in the Treaty. Secondly, it explores the model of the European Court of Human Rights. Thirdly, it examines the model of

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<sup>84</sup> THE FUTURE OF BUSINESS AND HUMAN RIGHTS : THEORETICAL AND PRACTICAL CONSIDERATIONS FOR A UN TREATY. CAMBRIDGE (JERNEJ LETNAR ČERNIČ, NICOLAS CARRILLO-SANTARELLI (EDS.). COP. 2018); Humberto Cantu Rivera, Negotiating a Treaty on Business and Human Rights: The Early Stages (2017) 40(2) UNSW LAW JOURNAL 1200.

<sup>85</sup> See, for instance, Dylan Hays My Brother's Keeper: A Framework for a Legal Obligation to Respect Human Rights in Global Supply Chains, 88 GEO. WASH. L. REV. 454.

Ombudsman Advisory Mechanism of the International Financial Corporation of the World Bank and explores if it can serve as a model for the enforcement mechanism under the potential Business and Human Rights Treaty. Fourthly, it explores possibilities to adopt Special National Supervisory Mechanism under the UN Treaty.

All those different enforcement models provide a text book examples of successful enforcement mechanisms of different legal nature. Some of them are more of judicial nature, others are mainly of quasi-judicial or non-judicial character. Those of judicial or quasi-judicial nature are more likely to guarantee justice for rights-holders. Nonetheless, they all provide legal avenues for rights-holders to enforce mainly state accountability for human rights violations. The drafters of the UN Business and Human Rights Treaty should not turn blind eye to the right of individuals to bring their complaint to the independent, impartial and fair enforcement body.

## **1. The judicial model of the European Court of Human Rights**

The European Court of Human Rights, supervises compliance with the European Convention for the Protection of Human Rights and Fundamental Freedoms in forty-seven countries of the Council of Europe, which are all bound by the Convention.<sup>86</sup> The European Convention is basically a “constitutional instrument of European public order”.<sup>87</sup> It guarantees individuals on the territory one of the 47 State parties the right to individual application against the states parties

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<sup>86</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222, entered into force Sept. 3, 1953, as amended by Protocols Nos 1, 3, 4, 5, 6, 7, 8, 11, 12, 14, 15 and 16. See, for example, Kanstantsin Dzehtsiarou, Vassilis P Tzevelekos, The Conscience of Europe that Landed in Strasbourg: A Circle of Life of the European Court of Human Rights, EUROPEAN CONVENTION ON HUMAN RIGHTS LAW REVIEW, 2020, VOL. 1, ISSU. 1, PP. 1-6.

<sup>87</sup> European Court of Human Rights (Grand Chamber); Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland, no. 45036/98, para. 156. Angelika Nussberger, The European Court of Human Rights at Sixty – Challenges and Perspectives, European Convention on Human Rights Law Review, 2020, Vol. 1, Issu. 1, pp. 11-13.

for the alleged violations one or more rights of the European Convention. The European Convention on Human Rights and Fundamental Freedoms is the most effective and efficient mechanism for the protection of human rights in the world.<sup>88</sup> With its entry into the membership of the Council of Europe and ratification of the European Convention, state enable its citizens and other individuals residing on their territory to file individual application with the European Court of Human Rights.<sup>89</sup> The European Convention provides in Article 34 that “The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.”<sup>90</sup> Individuals are to exhaust domestic remedies in the domestic system in order to be able to lodge complaints before the European Court. The European Court of Human Rights thereafter delivers binding judgement; which relevant state party has to execute its domestic legal systems. The Committee of Ministers of the Council of Europe monitors the execution of judgments of the European Court of Human Rights in domestic legal systems. As with other regional and international conventions, as well as domestic legal systems, many states with weak rule of law and weak institutions have faced difficulties in the application of the European Convention and as well as implementation of judgments of the European Court of Human Rights. Many state parties are not able nor willing to

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<sup>88</sup> See, for example, CHRISTOPH GRABENWARTER, EUROPEAN CONVENTION ON HUMAN RIGHTS – COMMENTARY, BECK, 2014. DAVID HARRIS, MICHAEL O'BOYLE, ED BATES, CARLA BUCKLEY, LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS, OUP, 2009; CHRISTIAN TOMSCHUT, HUMAN RIGHTS: BETWEEN IDEALISM AND REALIS, OXFORD UNIVERSITY PRESS, 2003; DAVID HARRIS, MICHAEL O'BOYLE, ED BATES, CARLA BUCKLEY, LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS, OXFORD UNIVERSITY PRESS, 2009.

<sup>89</sup> Geir Ulfstein, The European Court of Human Rights as a Constitutional Court? (March 19, 2014). Festschrift to the 40th Year Anniversary of the Universität der Bundeswehr, Munich: 'To Live in World Society – To Govern in the World State', Forthcoming, PluriCourts Research Paper No. 14-08, <https://ssrn.com/abstract=2419459>.

<sup>90</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 34.

enforce the European Convention and judgment of the European Court in the domestic legal systems.

The European Court of Human Rights could be employed as a model for binding mechanisms under the UN Business and Human Rights Treaty by transferring the relevant know-how and experience related to the application of the European Convention and judgement of the European Court of Human Rights. The judicial model of the European Court of Human Rights would surely be one the most appropriate supervisory mechanism for the enforcement of the UN Business and Human Rights Treaty. It is a textbook example of an idealistic approach to the international law and international community, where states have bet on their mutual cooperation in the field of the rule of law and human rights protection. The rule of law would provide rights-holders an effective judicial mechanism where would their claims would be heard concerning state responsibility for the alleged business-related human rights violations. State parties could take up such model if they would agree to provide individuals with access to binding mechanism to enforce state responsibility for business-related human rights abuses. It would provide at least ex-post facto justice to the victims. States would thereafter be obliged to execute judgements in their domestic legal systems. Nonetheless, one has to observe that the European Court of Human Rights has been the fruit of its time. Perhaps, the model of the European Court could be extended and included in the proposal for the World Court of Human Rights.<sup>91</sup> To be clear, it appears unlikely that the state parties would consent to the establishment of such binding judicial

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<sup>91</sup> Stefan Trechsel, *A World Court for Human Rights?*, 1 *NW. J. INT'L HUM. RTS.* 1 (2004); Manfred Nowak (2018) *A World Court of Human Rights*. IN: *INTERNATIONAL HUMAN RIGHTS INSTITUTIONS, TRIBUNALS, AND COURTS. INTERNATIONAL HUMAN RIGHTS* (GERD OBERLEITNER (EDS) 2018); Manfred Nowak, , "It's Time for a World Court of Human Rights," in *NEW CHALLENGES FOR THE UN HUMAN RIGHTS MACHINERY: WHAT FUTURE FOR THE UN TREATY BODY SYSTEM AND THE HUMAN RIGHTS COUNCIL PROCEDURES?* (M. CHERIF BASSIOUNI, WILLIAM SCHABAS (EDS.), 2011); JULIA KOZMA, MANFRED NOWAK, AND MARTIN SCHEININ, *A WORLD COURT OF HUMAN RIGHTS: CONSOLIDATED STATUTE AND COMMENTARY*, VIENNA/GRAZ, NEUER WISSENSCHAFTLICHER VERLAG, 2010, RECHT, STUDIENREIHE DES LUDWIG BOLTZMANN INSTITUTS FUR MENSCHENRECHTE, Bd. 22;

mechanism as it would require that they withdraw at least part of their sovereignty. However, at the current stage of international affairs the creation of binding international human rights mechanism is more utopia than reality.<sup>92</sup> One could argue that such a binding mechanism could in the end endanger the whole project of the UN Business and Human Rights Treaty. Nonetheless, the judicial model is certainly the most appropriate for enforcing direct corporate accountability for human rights and providing justice to the victims.

## **2. The quasi-judicial model of the United Nations Human Rights Committee**

The second proposal for the enforcement of the UN Treaty is that of the quasi-judicial model of the United Nations Human Rights Committee. In order to ensure that individuals can directly voice concerns concerning violations of business-related human rights violations, a Committee should have competences to hear individual complaints regarding alleged violations of the UN Treaty. There exists several Committees under the UN Conventions in the area of human rights to supervise that states comply with their obligations. For instance, The ICCPR provides in Article 41 that “1. A State Party to the present Covenant may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the present Covenant.”<sup>93</sup> It add that “Communications ... may be received and considered only if submitted by a State Party which has made a declaration recognizing in regard to itself the

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<sup>92</sup> Phillip Alston, Against a World Court for Human Rights. *ETHICS & INTERNATIONAL AFFAIRS* 28, no. 2 (2014): 197–212.

<sup>93</sup> ICCPR, Article 41 (1).

competence of the Committee.”<sup>94</sup> The ICCPR therefore provides legal basis for individual to submit individual communications to the UN Human Rights Committee. Article 41 has there further implemented by the Optional Protocol I to the International Covenant on Civil and Political Rights provided in Article 1 that “A State Party to the Covenant that becomes a Party to the present Protocol recognizes the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant....”<sup>95</sup> Article 2 of the Optional Protocol 1 provides that “... individuals who claim that any of their rights enumerated in the Covenant have been violated and who have exhausted all available domestic remedies may submit a written communication to the Committee for consideration.”<sup>96</sup> UN Human Rights Committee has noted that in General comment no. 33 that “The Optional Protocol sets out a procedure, and imposes obligations on States parties to the Optional Protocol arising out of that procedure, in addition to their obligations under the Covenant.”<sup>97</sup> The procedure of individual communication before the UN Human Rights Committee provides for enforcement avenue that the rights-holders have in enforcing state obligations and accountability for violations of civil and political rights under the ICCPR. As for conclusions goes, Article 5 (4) provides that “The Committee shall forward its views to the State Party concerned and to the individual.”<sup>98</sup> The Optional protocol does not explain the legal nature of the views, particularly whether their

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<sup>94</sup> Id. See in more details ALEX CONTE, RICHARD BURCHILL, *DEFINING CIVIL AND POLITICAL RIGHTS: THE JURISPRUDENCE OF THE UNITED NATIONS HUMAN RIGHTS COMMITTEE* 2ND EDITION, ROUTLEDGE; 2009. Oona A. Hathaway, Philip Levitz, Elizabeth Nielsen, Aileen Nowlan, William Perdue, Chelsea Purvis, Sara Solow, and Julia Spiegel, *Human Rights Abroad: When Do Human Rights Obligations Apply Extraterritorially?* (June 1, 2011). *Arizona State Law Journal*, Vol. 43, 2011.

<sup>95</sup> Optional Protocol to the International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 59, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 302, 23 March 1976, Article 1.

<sup>96</sup> Id., Article 2.

<sup>97</sup> UN Human Rights Committee (HRC), General comment no. 33, *Obligations of States parties under the Optional Protocol to the International Covenant on Civil and Political Rights*, 25 June 2009, CCPR/C/GC/33, para. 3.

<sup>98</sup> Optional Protocol to the International Covenant on Civil and Political Rights, *Ibid*, Article 5 (4).

binding or not. The Committee only determines whether or not there has been violations, and is not in a position to impose sanctions states in the event of violations as it is the practice of the European Court of Human Rights. Certainly, however, States have an obligation to implement the requirements of the Committee in its opinions within the framework of their general obligations under the ICCPR.

The UN Human Rights Committee has in General Comment no. 33 attempted to itself explain the binding and authoritative nature of the views. It noted that “The views of the Committee under the Optional Protocol represent an authoritative determination by the organ established under the Covenant itself charged with the interpretation of that instrument. These views derive their character, and the importance which attaches to them, from the integral role of the Committee under both the Covenant and the Optional Protocol.”<sup>99</sup> If a State ratifies Protocol No. 1 to the International Covenant, the latter means that it feels committed to the decisions of the Committee, making its opinions legally binding on it. The problem is that states do not take “views” seriously and, in most cases, do not enforce them in the domestic legal order.<sup>100</sup> The very word “views” indicates that the Committee's decisions may not be binding. The Committee added that “the character of the views of the Committee is further determined by the obligation of States parties to act in good faith, both in their participation in the procedures under the Optional Protocol and in relation to the Covenant itself.”<sup>101</sup> The authoritative character of the views of the Committee is nonetheless questionable. State parties have not been so far prepared to recognize

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<sup>99</sup> UN Human Rights Committee (HRC), General comment no. 33, para. 13.

<sup>100</sup> Nikolaos Sitaropoulos, States are Bound to Consider the UN Human Rights Committee's Views in Good Faith, (OxHRH Blog, March 1, 2015) <http://humanrights.dev3.oneltd.eu/states-are-bound-to-consider-the-un-human-rights-committees-views-in-good-faith>; Rosanne van Alebeek; André Nollkaemper, The Legal Status of Decisions by Human Rights Treaty Bodies in National Law, In UN HUMAN RIGHTS TREATY BODIES: LAW AND LEGITIMACY (HELEN KELLER & GEIR ULFSTEIN, 2012) 356–413.

<sup>101</sup> UN Human Rights Committee (HRC), General comment no. 33, para. 15.

that the views are of binding nature. Most of them consider them as recommendations and as quasi-binding at best. Such practices are strongly opposed by the Committee in its general opinions, which always emphasize their binding legal nature.

In spite of the weaknesses of the enforcement mechanisms under the ICCPR, such mechanisms could be a starting point for the enforcement of the UN Treaty on Business and Human Rights. It could provide individuals with the possibility to enforce state responsibility for corporate-related human rights abuses. Rights-holders would in such manner gain access to international supervisory mechanisms in business and human rights. The mechanism itself could at least partially provide justice to the rights-holders against the adverse corporate conduct. The Committee under the UN Treaty would only be triggered only if it is determined that the domestic system is neither able nor willing to address alleged business related human rights. However, it would only function properly if states would implement the recommendations of the Committee in the domestic systems by providing compensation or any kind of justice to the victims.

### **3. The non-judicial model of Ombudsman Advisory Mechanism of the International Financial Corporation of the World Bank**

The Ombudsman Advisory Mechanism of the International Financial Corporation of the World Bank is a global ombudsman mechanism of the World Bank. It should not be mistaken with the national ombudsman mechanism and national human rights institutions. It mediates between the rights-holders and corporations concerning business-related human rights abuses. The Compliance Advisory Ombudsman (hereinafter CAO) “function responds to complaints from project-affected communities about the social and environmental impacts of [the

International Finance Corporation] IFC/ [the Multilateral Investment Guarantee Agency] MIGA projects. Through an ombudsman process, the CAO helps parties identify alternatives for resolving the issues of concern.”<sup>102</sup> The CAO<sup>103</sup> aims to “Address complaints from people affected by IFC/MIGA projects (or projects in which those organizations play a role) in a manner that is fair, objective, and equitable”; and also to “Enhance the environmental and social outcomes of IFC/MIGA projects (or projects in which those organizations play a role).”<sup>104</sup> The complaint can be submitted by an individual or group of individuals affected by the project funded by IFC/MIGA.<sup>105</sup> The complaints can be raised as to the “processes followed in the preparation of a project”<sup>106</sup>, “The adequacy of measures to mitigate environmental and social impacts of the project”<sup>107</sup>, “Arrangements for involvement of affected communities, minorities, and vulnerable groups in the project”<sup>108</sup>, “The manner in which the project is implemented”<sup>109</sup> or any other matter. CAO thereafter assesses the complaint, which concludes in an “agreement to undertake CAO-facilitated dispute resolution”.<sup>110</sup> The procedure before the CAO is basically mediation procedure, which does not provide final opinion on the merits complaint. The Guidelines state quite clearly that “CAO’s assessment of the complaint does not entail any judgment on the merits of the complaint.”<sup>111</sup> Such nature of CAO’s assessment does not appear at

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<sup>102</sup> COMPLIANCE ADVISORY OMBUDSMAN, CAO DISPUTE RESOLUTION (FORMERLY OMBUDSMAN)”, <http://www.cao-ombudsman.org/howwework/ombudsman/> (last accessed 15 July 2020).

<sup>103</sup> CAO OPERATIONAL GUIDANCE, 2013, [http://www.cao-ombudsman.org/howwework/documents/CAOOperationalGuidelines2013\\_ENGLISH.pdf](http://www.cao-ombudsman.org/howwework/documents/CAOOperationalGuidelines2013_ENGLISH.pdf) (last accessed 15 January 2021), p. 4.

<sup>104</sup> Id., p. 4.

<sup>105</sup> Id., para. 2.1.1. at p. 10.

<sup>106</sup> Id., para. 2.1.2 at p. 10.

<sup>107</sup> Id.

<sup>108</sup> Id.

<sup>109</sup> Id.

<sup>110</sup> Id., para. 2.3. at p. 14.

<sup>111</sup> Id., para. 2.3. at p. 13.

the first glance very favourable to the rights-holders. Nonetheless, also such mediation procedure can bring about advantages for mutual satisfactory resolution of dispute. The CAO dispute resolution is based on the agreement between parties as to the objectives and deadlines, which are subsequently closely and diligently monitored by the CAO Dispute Resolution Team.<sup>112</sup> If no agreement has been reached, "... the complaint will proceed to the CAO Compliance role."<sup>113</sup> The CAO Operational Guidelines vaguely note that "In cases where IFC/MIGA is/are found to be out of compliance, CAO will keep the compliance investigation open and monitor the situation until actions taken by IFC/MIGA assure CAO that IFC/MIGA is addressing the noncompliance. CAO will then close the compliance investigation."<sup>114</sup> The CAO Operation Guidelines, however, do not reveal what kind of steps are to be taken to meet the requirements of compliance mechanisms. Nonetheless, it appears that the CAO advisory dispute resolution and compliance mechanism proceeds on the basis of mediation and providing good offices between individuals and communities concerned and businesses and funders involved to negotiate mutually agreed conclusions. The CAO Operational Guidelines nonetheless strive to ensure that the CAO advisory dispute resolution and compliance mechanism respects procedural fair trial guarantees. Despite its shortcomings, the Compliance Ombudsman Advisory Mechanism of the International Financial Corporation of the World Bank can provide a non-judicial model for the enforcement of the UN Treaty on Business and Human Rights. What remains to be seen is whether such mechanisms can provide effective justice to victims of business-related human rights abuses.<sup>115</sup>

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<sup>112</sup> *Id.*, para. 3.2.3 at p. 19.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*, para. 4.4.6. at p. 25.

<sup>115</sup> Lynn Ta & Benjamin A. T., Graham, Can Quasi-Judicial Bodies at the World Bank Provide Justice in Human Rights Cases? (2018), *GEORGETOWN JOURNAL OF INTERNATIONAL LAW*, 50 (1), pp. 113-142, <https://www.law.georgetown.edu/international-law-journal/wp-content/uploads/sites/21/2019/06/GT-GJIL190017.pdf>. See also Benjamin M. Saper, The International Finance Corporation's Compliance Advisor/Ombudsman (CAO): An Examination of Accountability and Effectiveness from a Global Administrative

Nonetheless, it certainly can complement proper judicial mechanisms in enforcing corporate accountability for business related human rights violations.

The CAO advisory dispute resolution and compliance mechanism offers an alternative way to reach corporate accountability for business-related human rights abuses. Its nature has not been legally binding nor it does not provide access to judicial remedies. Nonetheless, it would establish access to non-judicial remedies, which can through mutual dialogue and agreement between complainants and corporations reach a satisfactory solution for both parties. The ombudsman mechanism under the UN Treaty would certainly have a much broader mandate as the Ombudsman Advisory Mechanism of the International Financial Corporation of the World Bank is limited to the project funded by those institutions.

Nonetheless, the non-judicial model of Ombudsman Advisory Mechanism of the International Financial Corporation of the World Bank provides alternatives to judicial path in the search of state and/or corporate accountability for business-related human rights abuses. The drafters of the potential UN Treaty could consider such a model if the state parties prefer to grant right-holders access to non-judicial mechanisms, which have as their objective mutual agreement between aggrieved parties. They do not aim to deliver binding judgments with sanctions such as the model of the European Court of Human Rights. This non-judicial mechanism complements state judicial mechanisms, however it is questionable if they can bring justice to the rights-holders.

#### **4. The non-judicial administrative model of the Special National Supervisory Mechanism under the UN Treaty**

The fourth proposal concerns special national supervisory mechanism under the UN Treaty, which would directly supervise the implementation in domestic sphere. As noted above, the drafters included in the Annex of Zero Draft also the Draft Optional Protocol to the Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and other Business Enterprises.<sup>116</sup> The Zero Draft envisaged creation of the “National Implementation Mechanisms”<sup>117</sup>, which would have wide range of competence, among others: “Responding to enquiries by victims, business [enterprises] and the general public, as appropriate;”<sup>118</sup> “Submitting recommendations to relevant national authorities for improving the implementation of the [LEGALLY BINDING INSTRUMENT] and the prevention of human rights [violations] in the context of any business activities of a transnational character;”<sup>119</sup> “Make recommendations to the competent authorities of the [State Party concerned]” ... and “...enter into dialogue on possible implementing measures, as appropriate according to their legal and administrative systems”<sup>120</sup> and “... to conduct visits and inspections to the business [enterprise’s] facilities, and conduct joint visits [and inspections] with other National Implementation Mechanisms and relevant authorities of the concerned State Party to monitor the implementation and follow up of due diligence plans or policies”<sup>121</sup> among others. The Draft Proposal includes a wider range of investigation and quasi-legal powers. For those reasons, states have not shown a very favourable stance towards such a proposal. It appears that the structure of the Draft Protocol

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<sup>116</sup> Draft Optional Protocol to the Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and other Business Enterprises, available at: <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session4/ZeroDraftOPLegally.pdf>.

<sup>117</sup> Id., Article 2.

<sup>118</sup> Id., Article 3 (2) (a).

<sup>119</sup> Id. Article 3 (2) (b).

<sup>120</sup> Id., Article 3 (3).

<sup>121</sup> OECD (2011), OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES, OECD PUBLISHING (2011).

has not been well thought of as it is not coherently inter-twinned. The content of the Draft Protocol combines investigations and decision-making powers with fact-finding powers. Therefore, the Draft Protocol has been a good idea if its content reformed.

As a result, it appears more appropriate to base the enforcement mechanism with already proven quasi-judicial mechanisms in the form of the Special National Supervisory Mechanism under the UN Treaty. It is submitted that the enforcement mechanisms in the form of National Contact Points (NCPs) under the OECD Guidelines could be also translated to the enforcement under the potential UN Treaty. The OECD Guidelines for Multinational Enterprises impose quasi-legal binding obligations to multinational enterprises to observe human rights, environment and anti-bribery standards. Their Procedural Guidance notes that »The NCP will offer a forum for discussion and assist the business community, worker organisations, other non-governmental organisations, and other interested parties concerned to deal with the issues raised in an efficient and timely manner and in accordance with applicable law.«<sup>122</sup> NCPs are not judicial organs, they are most commonly part of public administration. Nonetheless, they attempt to resolve dispute on the basis of mediation and dialogue between complainant and corporations. NCPs are “composed and organised such that they provide an effective basis for dealing with the broad range of issues covered by the Guidelines and enable the NCP to operate in an impartial manner while maintaining an adequate level of accountability to the adhering government.”<sup>123</sup> The NCP have at the end of mediation process three options. They can “(a) a statement when the NCP decides that the issues raised do not merit further consideration”<sup>124</sup>, “b) a report when the parties

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<sup>122</sup> Id., Procedural Guidance C, p. 72.

<sup>123</sup> Id., Procedural Guidance A (1), p. 71.

<sup>124</sup> Id., Procedural Guidance C (3), p. 73.

have reached agreement on the issues raised”<sup>125</sup>, and finally “c) a statement when no agreement is reached or when a party is unwilling to participate in the procedures”.<sup>126</sup> The NCP cannot impose sanctions on corporations, they can only deliver recommendations with the aim of mutual agreed dispute resolution.

As National Contact Points are not judicial organs, but institutions of alternative dispute resolution, they will be likelier to be accepted by the state parties. As far as non-judicial dispute mechanism goes, such proposal could appeal to those states with concerns as to the erosion of their sovereignty. However, also such the Special National Supervisory Mechanism under the UN Treaty would have to complement judicial procedures before courts. The possibilities of non-judicial model to bring justices to rights-holders are limited. Nonetheless, it can fulfil other objectives such as alternative dispute settlement and reconciliation between parties for the benefit of future human and sustainable development.

## **V. ADVANTAGES AND DISADVANTAGES OF ALL FOUR PROPOSED SUPERVISORY MECHANISMS**

All proposed and examined mechanisms provide a good possibility for enforcement of the UN Business and Human Rights Treaty. Any of the proposed mechanisms would be a step forward concerning the reform of the 2020 Draft of the Treaty, which at moments does not provide any possibility to enforce state accountability for business-related human rights abuses. The quality of domestic (judicial) systems varies between states. Traditionally, the states of global North have stronger institutions of the constitutional democracy than states of global

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<sup>125</sup> Id.

<sup>126</sup> Id.

South.<sup>127</sup> Not all states are able or willing to ensure and protect the right to fair, independent and impartial trial before judicial organs or to ensure similar quasi-judicial or non-judicial mechanisms. Judicial institutions are in many states under-funded, under-equipped and subject to the external and internal pressures.

It is submitted that the success of the UN Treaty hinges on the existence of strong institutions, which will be willing to examine complaints concerning state responsibility concerning alleged business-related human rights abuses. If state institutions do not commit to the rule of law and translate it to the practice, the provisions in the UN Treaty will be left unenforced. This article identified and proposed four different avenues for the enforcement of the UN treaty by offering the drafting states a wide array of choices ranging from binding and judicial enforcement mechanism to the supervisory mechanisms based on the alternative dispute resolution. Surely, it would be most appropriate from the point of view of victims if states would agree on binding judicial mechanisms to provide them justice against adverse corporate conduct. However, the past and current realities of the international community illustrate that the state are not willing and able to disregard its national sovereignty.

The judicial model of the European Court of Human Rights brings to the table the most successful international court where rights-holders can bring complaints against state parties for the alleged violations of the European Convention after they exhausted domestic remedies. The European Court delivers binding judgments; which state parties are obliged to execute in their domestic legal systems. The judicial model would surely be most of them all appreciated by the rights-holders as it grants them with access to the binding judicial mechanism. Victims would be

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<sup>127</sup> See, for instance, World Justice project, <https://worldjusticeproject.org/our-work/wjp-rule-law-index/wjp-open-government-index/global-scores-rankings>.

able to bring directly corporations to the court for the alleged business related human rights abuses. On the other hand, the judicial model of the European Court directly affects national sovereignty of the future state parties, which would have to subject their national institutions to international supervision. If the drafters decided to employ this proposal, they should be prepared for the low number of ratification in the first decades of the functioning of Mechanism.

The quasi-judicial model of the individual communication of the United Nations Human Rights Committee under the International Covenant on Civil and Political Rights is the textbook example of a legal, however quasi-judicial procedure. It provides rights-holders with individual access to the enforcement procedure which eventually delivers recommendations to the state parties in the case of violations. In contrast with the judicial model, the UN Human Rights Committee does not provide rights-holders with the judicial avenue to enforce their accountability for business-related human rights abuses. The Human Rights Committee does not deliver judgments, but recommendations in the form of views. The quasi-judicial model is located somewhere between judicial and non-judicial. Moreover, state parties dispute the binding nature of the final views of the UN Human Rights Committee, therefore the majority of them are left unenforced and non-executed in the domestic systems. The Committee has struggled to supervise state in their implementation of views. Nonetheless, the individual communication procedure provides victims with access to the supervision process within the United Nations. As a result, it is able to at least partially provide justice to victims. Both of those first models illustrate binding procedures, which states at the UN level perhaps are not often willing and able to support as they undermine their national sovereignty.

The third and fourth proposal concern two different models of alternative dispute resolution. The non-judicial model of the Ombudsman Advisory Mechanism of the International

Financial Corporation of the World Bank is an example of an alternate resolution body. It uses tools and methods in the field of mediation, negotiations and good offices to reach a favorable outcome to both parties, individuals and corporations. It is doubtful if such procedure is able to meet victims' expectations about bringing corporations to justice. Accordingly, it is more than questionable if alleged human rights violations can be subject to mediation and other methods of alternative dispute resolution. In contrast, there is no doubt that such proposals would better function as future preventive solutions and provide human and sustainable development for victims and their communities. It is just not the correct mechanism for providing justice to victims for business related human rights abuses.

The administrative model of Special National Supervisory Mechanism under the UN Treaty would assist through mediation and dialogue to the parties in order to reach agreement. It would proceed on the basis of the rules of administrative procedure. Such administrative models can complement existing domestic judicial and quasi-judicial structures in business and human rights, however it cannot replace them. Mediation procedures may work properly to the benefit of parties in the corporate arena, however not in human rights law. As a result, it is questionable if such mechanism provides binding conclusions with sanctions in the case of violations. Nonetheless, it would surely be a more acceptable solution for states.

All four models; judicial, quasi-judicial, non-judicial and non-judicial administrative models are to be considered in the negotiations on the potential UN Treaty. Judicial and non-judicial models would in theory provide more justice for victims of business related human rights violations. Non-judicial mechanisms are to complement judicial mechanisms by offering mediation and good office to both rights-holders and corporations. All the proposed mechanisms

would provide added value for the enforcement of state and corporate responsibility for business-related human rights abuses. All of such mechanisms would have to comply with procedural principles of fairness, independence, impartiality, transparency and legality of procedures. The chosen enforcement mechanism should follow the objective of the UN Treaty on Business and Human Rights, which is to protect human dignity of the rights-holders and provide with the effective legal remedy for business related human rights abuses. As a result, the consensus on the enforcement mechanism under the UN Treaty to protect human dignity of the rights-holders is indispensable for it to succeed in the long run.

## CONCLUSION

The enforcement of corporate accountability of business related human rights abuses remains one of the weak and under-developed areas in the wider field of business and human rights.<sup>128</sup> Victims are too often left without any viable options to enforce corporate or state accountability for business related human rights violations. Their plight often remains without any domestic and/global attention. This article explored one of the under-researched area of debates around the forth-coming UN Treaty on Business and Human Rights namely its enforcement mechanism that will have to be somehow developed to enforce state and corporate accountability for business related human rights abuses. It analyzed ways how to improve the 2020 Draft in order to include enforcement mechanisms under the potential United Nations Business and Human Rights Treaty.

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<sup>128</sup>THE FUTURE OF BUSINESS AND HUMAN RIGHTS : THEORETICAL AND PRACTICAL CONSIDERATIONS FOR A UN TREATY. CAMBRIDGE; ANTWERP (JERNEJ LETNAR ČERNIČ, NICOLAS CARRILLO-SANTARELLI (EDS., 2018); Lee McConnell, Assessing the Feasibility of a Business and Human Rights Treaty (2017) 66 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 14; Humberto Cantu Rivera, Negotiating a Treaty on Business and Human Rights: The Early Stages' (2017) 40(2) UNSW LAW JOURNAL 1200; Olivier De Schutter, Towards a New Treaty on Business and Human Rights (2016) 1 BUSINESS AND HUMAN RIGHTS JOURNAL 41.

In doing so it analyzed best practices, advantages and disadvantages from the current United Nations human rights supervision mechanisms and beyond in order to develop model enforcement mechanism under the United Nations Business and Human Rights Treaty. As a result, It examined four different models of the enforcement under the potential of the UN Treaty, namely the quasi-judicial model of the United Nations Human Rights Committee under the International Covenant on Civil and Political Rights, the judicial model of the European Court of Human Rights, the non-judicial model Ombudsman Advisory Mechanism of the International Financial Corporation of the World Bank and the non-judicial administrative model of Special National Supervisory Mechanism under the UN Treaty. Those proposals provide judicial, quasi-judicial, non-judicial and administrative options that the drafters are to entertain in the next rounds of negotiations. It is not an exaggeration that the long-term success of the Treaty rests on the real possibility for rights-holders to enforce state and corporate accountability for business-related human rights abuses. The drafters of the Treaty should be aware that the Treaty without enforcement will convert itself in *lex imperfecta*. In the closing part of the article, conclusions are drawn on how states should proceed to introduce an independent, impartial and fair enforcement mechanism under the United Nations Business and Human Rights Treaty that could be effectively employed by victims of corporate related human rights abuses. The commitment to the rule of law, human dignity and global justice requires that victims are able to bring responsible state and/or corporate actors to justice.

