

ENFORCEMENT MODELS 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 confronted challenges in enforcing their claims against corporations, either in national or international legal systems. The 2021 Draft of the United Nations Business and Human Rights Treaty places obligations on states to protect individuals from corporate-related human rights abuses. This article explores improving the 2021 Draft to include enforcement mechanisms under the potential United Nations Business and Human Rights Treaty. It submits four different state and corporate accountability models for business-related human rights abuses under the Treaty: Judicial, quasi-judicial, non-judicial, and administrative. Those models are intertwined, interdependent, and complement each other. It examines the best practices, advantages, and disadvantages of the current United Nations human rights supervision mechanisms to develop model enforcement mechanisms under the United Nations Business and Human Rights Treaty. In the closing part of this 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 victims of corporate-related human rights abuses could effectively employ.

Introduction

Victims of corporate-related human rights abuses have often encountered difficulties enforcing their claims against corporations at the national or international level. They often stumbled on hurdles to implementing corporate and state responsibility for business-related human rights abuses due to the corporate actors' absence of binding

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human rights obligations. Their access to justice has been deficient at the domestic and international levels.

The international community and global civil society increasingly recognize that states and corporations are duty holders of human rights obligations.¹ However, the current business and human rights system has been inadequate, insufficient, and inappropriate in the domestic and international legal order since it does not establish a framework for corporate obligations to respect human rights and enforce corporate accountability.² Victims have faced several challenges in enforcing corporate accountability for human rights violations, which arise from incomplete and ineffective domestic legal orders as well as practical hurdles to implementing an institutional and regulatory framework.³ Therefore, civil society has in recent years voiced concerns and argued to strengthen existing regulations by adopting binding corporate human rights obligations at domestic and international levels. It has been argued that states and corporations should no longer 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 for business and human rights with better enforcement.

The United Nations (UN) Treaty on Business and Human Rights would complement and strengthen domestic judicial systems.⁴ States are the primary duty holders of human rights obligations. They are tasked with respecting and protecting human rights. Nonetheless, corporations also carry human rights obligations meant to protect the human dignity of rights-holders.⁵ Various scholars argue that corporations have responsibilities to respect, protect, and fulfill human rights deriving from

1. See generally, KHULEKANI MOYO, HUMAN RIGHTS OBLIGATIONS OF BUSINESS: BEYOND THE CORPORATE RESPONSIBILITY TO RESPECT? (Surya Deva & David Bilchitz eds., 2013); ANDREW CLAPHAM, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS (2006); JOHN G. RUGGIE, JUST BUSINESS: MULTINATIONAL CORPORATIONS AND HUMAN RIGHTS (2013).

2. 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*, 38 FORDHAM INT'L L. J. 457, 457-542 (2015).

3. Anil Yilmaz Vastardis & Rachel Chambers, *Overcoming the Corporate Veil Challenge: Could Investment Law Inspire the Proposed Business and Human Rights Treaty?*, 67 INT'L AND COMPAR. L. Q. 389, 389-423 (2018).

4. Humberto Cantu Rivera, *Negotiating a Treaty on Business and Human Rights: The Early Stages*, 40 UNSW L. J. 1200, 1200 (2017); Olivier De Schutter, *Towards a New Treaty on Business and Human Rights*, 1 Bus. & Hum. Rts. J. 41, 41 (2015); Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?, *supra* note 1.

5. See generally, SURYA DEVA, REGULATING CORPORATE HUMAN RIGHTS VIOLATIONS: HUMANIZING BUSINESS (2012).

domestic and international systems.⁶ Corporate obligations to respect fall within negative duties to do no harm. On the other hand, corporate obligations to protect and fulfill induce positive obligations which require active measures from corporations. Corporations are obliged to mandate respect for human rights in their supply chain.⁷ Although the final consensus concerning corporate human rights obligations is still in formation, it is undoubtedly accepted that such obligations derive from ethical and philosophical foundations.⁸

Ordinary people have been exposed to business' positive and negative impacts in the contemporary world, which can also indirectly or directly violate human rights. Practice suggests that such abuses include violations of civil and political rights and 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, can interfere with an individual's absolute rights such as the right to life, a prohibition of torture, and rights to water, food, and decent housing. The nature and extent of corporate violations vary according to geographical areas and the differences between corporations themselves. The bulk of human rights breaches are committed in the Americas, Africa, Asia, and Central and Eastern Europe. The potential UN Treaty represents an opportunity to improve corporate accountability for human rights; however, several robust and influential stakeholders oppose its adoption.⁹ Therefore, it is necessary to investigate the theoretical basis and arrive at convincing arguments that support its adoption.

The 2021 Draft of the UN Business and Human Rights Treaty places obligations on states to protect individuals from corporate-related human

6. Andrés Felipe López Latorre, *In Defence of Direct Obligations for Businesses Under International Human Rights Law*, 5 *BUS. & HUM. RTS. J.* 56, 74 (2020).

7. Jolyon Ford & 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*, 26 *AUSTL. J. OF HUM. RTS.* 27, 27-45 (2020).

8. FLORIAN WETTSTEIN, *MULTINATIONAL CORPORATIONS AND GLOBAL JUSTICE: HUMAN RIGHTS OBLIGATIONS OF A QUASI-GOVERNMENTAL INSTITUTION* (Stan. Univ. Press, 2009); Denis G. Arnold, *Corporations and Human Rights Obligations*, 1 *BUS. & HUM. RTS. J.* 255, 255-6 (2016); Upendra Baxi, *Human Rights Responsibility of Multinational Corporations, Political Ecology of Injustice: Learning from Bhopal Thirty Plus?*, 1 *BUS. & HUM. RTS. J.* 22, 35-6 (2016).

9. See, e.g., SURYA DEVA, *MULTINATIONALS, HUMAN RIGHTS AND INTERNATIONAL LAW: TIME TO MOVE BEYOND THE 'STATE-CENTRIC' CONCEPTION?* 27-49 (Jernej Letnar Čermeč & Tara Van Ho eds., 2015).

rights abuses.¹⁰ It sets principal obligations on domestic legal systems to enforce corporate accountability for alleged business-related human rights abuses.¹¹ It is still based on state human rights obligations; however, it indirectly recognizes that corporations have human commitments.¹² In this way, this article explores ways to improve the 2021 Draft to include enforcement mechanisms under the potential United Nations Business and Human Rights Treaty. This article considers the possible future of business and human rights and deals with scenarios if and when the United Nations Business and Human Rights Treaty is finally adopted. It will critically investigate the shortcomings of the current frameworks in domestic legal systems while emphasizing enforcement to develop a holistic theoretical and normative model to improve the potential treaty. It discusses the most appropriate enforcement mechanism against corporations for alleged human rights violations against corporations.

This Article is divided into four main parts. Section I discusses the potential Business and Human Rights Treaty by examining its background, advantages, and disadvantages. It defines the fundamental concepts of business and human rights from the theoretical and legal bases of corporate responsibility to corporate accountability in the event of human rights violations both in domestic legal systems and international law. It explores domestic and international legal orders' current business and human rights regimes. As a result, this Article aims to be the first original research to design theoretical and normative enforcement models under the potential treaty. Section II studies the theoretical examination of the enforcement of corporate-related human rights abuses. Section III explores 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 potential treaty, namely judicial, quasi-judicial, non-judicial, and administrative models. Those models are intertwined, interdependent, and complementary to each other. More specifically, it

10. Marco Fasciglione, *Another Step on the Road? Remarks on the Zero Draft Treaty on Business and Human Rights*, 12 DIRITTI UMANI E DIRITTO INTERNAZIONALE 629, 629 (2018).

11. THE FUTURE OF BUSINESS AND HUMAN RIGHTS: THEORETICAL AND PRACTICAL CONSIDERATIONS FOR A UN TREATY (Jernej Letnar Černič & Nicolas Carrillo-Santarelli eds., 2018).

12. Markus Krajewski, *A Nightmare or a Noble Dream? Establishing Investor Obligations Through Treaty-Making and Treaty-Application*, 5 BUS. & HUM. RTS. J. 105, 105-29 (2020).

examines the judicial model of the European Court of Human Rights; the quasi-judicial model of the 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 Business and Human Rights Treaty. Section IV following that examines the best practices, advantages, and disadvantages of the four proposed enforcement mechanisms for the United Nations Business and Human Rights Treaty that drafters must select to be the most appropriate for both the rights-holders and potential state parties. At its conclusion, this Article discusses how states should proceed to introduce independent, impartial, and fair enforcement mechanisms that victims of business-related human rights abuses could effectively employ under the treaty. As a result, this Article attempts to fill a gap by providing a set of proposals concerning potential enforcement models for decision-makers both at domestic and international levels to enforce the UN Business and Human Rights Treaty. Accordingly, states will be able to reform corporate accountability for business-related human rights abuses.

I. Negotiations on the Potential UN Business and Human Rights Treaty

States have traditionally been the principal duty bearers in human rights law. Nonetheless, other non-state actors may have obligations under human rights law. The Universal Declaration of Human Rights recognized that other actors may have also human rights obligations. More specifically, the Preamble of the Universal Declaration of Human Rights provides for “every organ of society” to work toward implementing human rights.¹³ This progress has been slow since the adoption of the Universal Declaration in 1948. Currently, the international community has been in total agreement in recognizing the human rights obligations of corporations directly. The UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights have advocated that businesses are obliged to respect and protect human rights.¹⁴ However, the UN

13. G.A. Res. 217 (III) A, pmb., Universal Declaration of Human Rights at Preamble (Dec. 10, 1948); *see also* THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: TRAVAUX PRÉPARATOIRES (William A. Schabas eds., 2013).

14. Preamble, Sub-Commission on the Promotion and Protection of Human Rights, Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises

Norms project tragically failed in 2004 due to the opposition by states and the business community. Nonetheless, several international treaties have indirectly recognized corporate human rights obligations in the past.¹⁵ Also, some regional organizations, such as the European Union, have adopted binding laws in business and human rights in the recent decade.¹⁶ Additionally, several domestic legal systems provide for corporate human rights obligations.¹⁷ As a result, business and human rights is a complex field where a plurality of duty holders such as corporations, states, and other actors protect the human dignity of rights holders. It can be described as a plural framework where several stakeholders share obligations and commitments under business and human rights. The simultaneous levels of these obligations are intertwined as they arise both from domestic and international law and the internal legal commitments of certain individual corporations. Such an approach implies intertwining the various levels of incurring accountability of states, corporations, and individuals within corporations to provide legal and other channels and mechanisms to victims to enforce corporate accountability.

The initial step toward binding obligations at the international level was developed in 2011. The United Nations Human Rights Council “unanimously” adopted the “Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’

with Regard to Human Rights, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003); see also David Weissbrodt & Muria Kruger, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, 97 AM. J. OF INT'L L. 901, 901-22 (2003).

15. See, e.g., International Convention on Civil Liability for Oil Pollution Damage art. 3(1), Nov. 29, 1969, 973 U.N.T.S. 3; OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions p. 105-43, Dec. 18, 1997, 37 I.L.M. 1; Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, June 21, 1993, E.T.S. No. 150; Convention Relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material, Dec. 17, 1971, 974 U.N.T.S. 255.

16. See, e.g., Council Directive 2014/95 of Oct. 22, 2014 (EU); Council Regulation 2017/821 of May 17, 2017 (EU).

17. See Gesetz über die unternehmerischen Sorgfaltspflichten in Lieferketten, Bundesgesetzblatt Jahrgang (July 22, 2021), available at https://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBI#_bgbl_%2F%2F%5B%40attr_id%3D%27bgbl121s2959.pdf%27%5D__1627115664209 (last visited Sept. 14, 2022); Relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre [Relating to the Duty of Care of Parent Companies and Ordering Companies], Loi n° 2017-399 (2017).

Framework.”¹⁸ It is based on three pillars: State obligations to protect, corporate responsibility to respect, and access to remedy.¹⁹

Firstly, the UN Guiding Principles on Business and Human Rights (UNGPs) confirm that states have obligations to protect individuals against corporate-related human rights abuses. States must ensure that businesses on their territory are not engaged in business-related human rights abuses.²⁰ States are obligated to protect, clarify, and promote their expectation of the private sector.²¹ Therefore, states carry the most straightforward obligations to ensure respect for human rights in the domestic and global economy. State-owned enterprises have even broader obligations. They must set leading examples as their performance is assessed under stricter standards. Still contested is whether state obligations to protect human rights against corporate conduct also apply extraterritorially.²²

Secondly, corporations have a responsibility to respect human rights, i.e., not harm the human dignity of the rights-holders.²³ Corporations have both negative and positive obligations to respect all internationally recognized human rights. They must identify, prevent, and respond to business-related human rights violations.²⁴ As a result, corporations have the passive obligation to do no harm relating to the human dignity of the rights-holders. However, they additionally have positive obligations to adopt active measures to protect human rights in their global supply chains. They are encouraged to conduct due diligence through their supply chains to prevent human rights abuses and supervise their business partners. Thirdly, states must construct access to remedy frameworks for rights-holders to enforce state and corporate accountability for human rights violations.²⁵

18. U.N. Office of the Commissioner, *Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework*, United Nations (June 6, 2011), available at https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf (last visited Oct. 26, 2022).

19. *Id.* at 1.

20. *Id.* at 3.

21. *Id.* at Principle 2.

22. MALCOLM LANGFORD, *GLOBAL JUSTICE AND STATE DUTIES: THE EXTRATERRITORIAL SCOPE OF ECONOMIC SOCIAL AND CULTURAL RIGHTS IN INTERNATIONAL LAW*, 334 (Cambridge Univ. Press, 2013).

23. UN Guiding Principles, *supra* note 18, Principles 11, 12.

24. *Id.* at Principle 13(b).

25. *Id.* at Principle 25.

The UN Guiding Principles are not international treaties, and they are not directly binding in international law.²⁶ Nonetheless, they confirm the existing obligations of states and corporations in international law. States are obliged to adopt National Action Plans to implement 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 twenty-six states have adopted National Action Plans.²⁷ The majority of those states are European, whereas the first countries from, for instance, Africa and Asia have only recently introduced National Action Plans.²⁸ Many states from the Global South have objected that the UN Guiding Principles do not establish binding obligations and direct access to remedy in business and human rights.²⁹

As a result, the global movement for the binding UN Treaty on Business and Human Rights has gained a foothold. States and some civil society organizations have been working on the proposal to adopt the UN Business and Human Rights Treaty in the past years. The UN Treaty would establish binding state and corporate obligations in business and human rights. It would grant rights-holder 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 June 26, 2014, resolution A/HRC/RES/26/9 to establish a working group to draft the Treaty.³⁰ The UN open-ended intergovernmental working group had first attempted to draft the UN Treaty based on corporate human rights obligations and accountability as

26. CARMEN M. CARRASCO, LA IMPLEMENTACIÓN DE LOS PRINCIPIOS RECTORES RE LAS NACIONES UNIDAS SOBRE EMPRESAS Y LOS DERECHOS HUMANOS POR LA UNION EUROPEA Y SUS ESTADOS MIEMBROS, 145–165 (2017).

27. *National action plans on business and human rights*, Working Group on Business and Human Rights, UNITED NATIONS, available at <https://www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx> (last visited Oct. 27, 2022).

28. 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*, SSRN, available at <https://ssrn.com/abstract=3221052> (last visited Oct. 27, 2022).

29. See, e.g., Raphaela Lopes & Arnold Kwesiga, *What the Zero Draft and Protocol Lack: Meaningful Access to Justice – a Global South Perspective*, Business and Human Rights Resource Centre, BUSINESS & HUMAN RIGHTS RESOURCE CENTRE, <https://www.business-humanrights.org/en/blog/what-the-zero-draft-and-protocol-lack-meaningful-access-to-justice-a-global-south-perspective/> (last visited Dec. 25, 2022).

30. G.A. Res. 26/9, at 1 (Jul. 14, 2014)

argued by global civil society.³¹ The UN Working Group organized seven negotiating sessions, the last one occurring in October 2021. In the early stages, the drafters considered whether to focus on corporate and state human rights obligations.³²

In 2017, “*The Elements for the Draft Legally Binding Instrument*” focused on corporate accountability for human rights. More specifically, they proposed that businesses of any size should have a responsibility to respect human rights.³³ In contrast, such an approach was not followed in the first versions of the Draft Treaty. The 2018 Zero Draft provided for some corporate human rights obligations.³⁴ It also noted that “[it] . . . shall apply to human rights violations in the context of any business activities of a transnational character.”³⁵ It also included in the annex the Zero Draft also included Draft Optional Protocol.³⁶ The 2019 Draft focused on state responsibility for business responsibility for human rights.³⁷ The 2021 Draft of the UN Treaty has identified its aims in

31. See *Treaty Alliance, joint statement calls for signatures in favour of proposed binding treaty to enhance corporate legal accountability for rights abuses*, BUS. & HUM. RTS. RESOURCE CTR., (May 29, 2015), available at <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> (last visited Sept. 4, 2022) (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).

32. 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*, U.N. Human Rights Office of the High Commissioner for Human Rights (2016), available at <https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/WGTransCorp/Session2/SuryaDeva.doc> (last visited Sept. 4, 2022).

33. Human Rights Council Res. 26/9, U.N. Doc. A/26/9, at ¶ 3.3 (Sept. 29, 2017) (Elements for the Draft Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights, Chairmanship of the OEIGWG).

34. LEGALLY BINDING INSTRUMENT TO REGULATE, IN INTERNATIONAL HUMAN RIGHTS LAW, THE ACTIVITIES OF TRANSNATIONAL CORPORATIONS AND OTHER BUSINESS ENTERPRISES, HUMAN RIGHTS COUNCIL (July 16, 2018), available at <https://www.ohchr.org/documents/hrbodies/hrcouncil/wgtranscorp/session3/draftlbi.pdf> (last visited Sept. 5, 2022).

35. *Id.* at ¶ 3(1).

36. Draft Optional Protocol to the Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and other Business Enterprises, U.N. Doc. available at <https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/WGTransCorp/Session4/ZeroDraftOPLegally.PDF> (last visited Oct. 31, 2022).

37. 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

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 cooperation.³⁸ The 2021 and previous Drafts concentrated on the state's responsibility and obligations for business-related human rights abuses.³⁹ Nonetheless, the rationale behind the Treaty movement is to protect the human dignity of the rights-holders against the potential adverse corporate conduct.⁴⁰ The seventh round of negotiations, which took place in October 2021, did not bring much progress.⁴¹ The majority of states of the global North have expressed support for continuing work on the UN Guidelines on Business and Human Rights.⁴² States agreed to reconvene in the autumn of 2022 at the seventh round of negotiations.

II. Enforcement of Corporate-Related Human Rights Abuses at United Nations Level: An Overview

Most domestic legal systems do not allow or only partially enforce corporate accountability for human rights violations in domestic

and other Business Enterprises, art. 6, Jul. 16, 2019, *available at* https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/OEIGWG_RevisedDraft_LBI.pdf (last visited Oct. 31, 2022).

38. 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, art. 2(1), Aug. 6, 2020, *available at* 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 (last visited Oct. 31, 2022).

39. 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 111-137 (Jernej Letnar Černič, Nicolas Carrillo-Santarelli eds., 2018).

40. Penelope 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 48-78 (Surya Deva, David Bilchitz, eds., 2018).

41. Surya Deva, BHR Symposium: The Business and Human Rights Treaty in 2020- The Draft is "Negotiation-Ready", but are States Ready?, *Opinio Iuris*, September 8 2020, *available at* <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> (last visited Oct. 31, 2022).

42. Claire Methven O'Brien, *Transcending the Binary: Linking Hard and Soft Law Through a UNGPS-Based Framework Convention* (2020) *AJIL Unbound*, 114, 186-191.

systems.⁴³ As a result, victims must often resort to ineffective and reluctant domestic courts of Asian, African, and South American countries. Progress has been made only in Anglo-Saxon jurisdictions in recent years, especially in the English legal system.⁴⁴ Victims can only enforce corporate accountability in rare cases within the jurisdictions of the countries where corporations are registered. The United Nations High Commissioner for Human Rights echoed those concerns in its 2016 Report, where it defined risks to the effective enforcement of corporate accountability for business-related human rights violations.⁴⁵ Therefore, the normative structure for access to remedy is both at the normative levels and deficient and not adequate in practice. The right to a fair trial and access to remedy are essential parts of any fair judicial or non-judicial proceedings in business and human rights. Therefore, we will first define the fundamental theoretical concepts of business and human rights from the theoretical and legal bases of corporate accountability for business-related human rights abuses. Hence, the obligations to provide victims access to remedy rest with states to enforce them through all branches of government.⁴⁶ For those reasons, a reform of the domestic and international legal orders concerning corporate responsibility and accountability for human rights is required.⁴⁷

The UN Working Group has considered adopting a particular protocol for enforcement. As a result, the Zero Draft of the UN Treaty included in its Annex Draft Optional Protocol to the Legally Binding

43. Surya Deva, *The UN Guiding Principles' Orbit and Other Regulatory Regimes in the Business and Human Rights Universe: Managing the Interface*, 6 BUS. & HUM. RTS. J. 336, (2021).

44. Civil Remedies and Human Rights in Flux, Key Legal Developments in Selected Jurisdictions (Ekaterina Aristova, Ugljesa Grusic eds., 2022).

45. United Nations High Commission for Human Rights, Rep. on Improving accountability and access to remedy for victims of business-related human rights abuse, para. 2-4, U.N. Doc. A/HRC/32/19 (May 10, 2016).

46. John Ruggie (Special Representative), Human Rights Council, Protect, Respect, and Remedy: A Framework for Business and Human Rights, Rep. of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, para. 4-5, A/HRC/8/5 (April 7, 2008). See also Deidre Kent (Special Rapporteur), United Nations Economic and Social Council, Rep. to The Economic and Social Council on the Sixty-First Session of the Commission, U.N. Doc E/CN.4/2004/L.10/Add.11 (April 19, 2005).

47. Surya Deva, *The UN Guiding Principles' Orbit and Other Regulatory Regimes in the Business and Human Rights Universe: Managing the Interface* 6 BUS. & HUM. RTS. J. (2021) 336. See also Tara Van Ho, Oops! They Did It Again

The USA's Counter-Diplomacy in Promoting the Framework Convention, *Völkerrechtblog*, 22 June 2022, available at <https://voelkerrechtsblog.org/oops-they-did-it-again/> (last visited Nov. 8 2022).

Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and other Business Enterprises.⁴⁸ In Article 1, states are to establish specific domestic enforcement mechanisms.⁴⁹ The Draft noted that the mechanism should guarantee respect for the right to a fair trial when considering the complaint's merits.⁵⁰ The drafters did not envisage that the domestic mechanism would deliver binding decisions or judgments. On the contrary, they would offer mediation and an alternative dispute mechanism. The mechanism "[w]ill monitor ex-officio the compliance by the parties of the agreement. . . ."⁵¹ If the agreement is complied with, the mechanism may commence binding legal procedures against the non-respecting party.⁵²

"A National Implementation Mechanism" was an example of the National Contact Points under the OECD Guidelines for Multinational Enterprises. It concentrated on the methods of mediation and providing good offices in resolving disputes.⁵³ The global civil society did not receive such a proposal well as it did not provide an adequate legal remedy for enforcing corporate accountability for business-related human rights violations.⁵⁴ In the fourth round of negotiations, most states omitted the draft Annex and did not provide any written or oral comments.⁵⁵ Those states that did submit comments expressed concerns about the necessity of such a mechanism.⁵⁶ The Russian Federation, for

48. 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> (last accessed Nov. 9, 2022).

49. *Id.*, Art. 1.

50. *Id.*, Art. 6, para. 2.

51. *Id.*, Art. 6, para. 5.

52. *Id.*, Art. 6, para. 4.

53. Kinnari Bhatt & Gamze Erdem Turkelli, *OECD National Contact Points as Sites of Effective Remedy: New Expressions of the Role and Rule of Law within Market Globalization?*, 6 BUS. & HUM. RTS. J. 423, 448 (2021).

54. Gabriela Kletzel, et al., *A toothless tool? First impressions on the Draft Optional Protocol to the Legally Binding Instrument on Business and Human Rights*, ESCR-NET.ORG (Oct. 13, 2018), available at <https://www.escr-net.org/news/2018/blog-first-impressions-draft-op-protocol-treaty-business-human-rights> (Last Visited Oct. 31, 2022).

55. *The open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights*, Fourth Session, Oral and Written Comments, OHCHR (Oct. 15-19, 2018), available at <https://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session4/Pages/Session4.aspx> (last visited Sept. 5, 2022).

56. *Id.*

instance, expressed concerns about “duplication” of international mechanisms.⁵⁷ The Draft Annex disappeared from the 2019 Draft of the UN Business and Human Rights Treaty, and it cannot be found in its 2020 and 2021 Drafts.

The 2021 Draft of the UN Business and Human Rights Treaty recognizes the importance of the rights-holders having access to remedies in the case of business-related human rights abuses. Nonetheless, it primarily places responsibility on the domestic systems to provide and after provide access to judicial, quasi-judicial, and non-judicial forums to enforce business-related human rights abuses.⁵⁸ Therefore, the drafters have avoided establishing direct obligations and accountability of corporations at the international level. The 2021 Draft envisages Article 15 to create the special supervisory Committee, which oversees the implementation of the UN Treaty.⁵⁹ It creates obligations for states parties to submit reports on the implementation of the Treaty.⁶⁰ After that, the Committee would examine state reports and provide concluding observations for states to improve their practice. Generally, international human rights bodies do not have a supervisory mechanism to monitor whether state parties have implemented concluding observations.⁶¹ They often rely on good faith commitments by the state parties to implement them in domestic legal systems. Moreover, Article 15 of the 2021 Draft provides in Subsection 4 that the Committee will have five main functions: Submitting general comments and recommendations,⁶² concluding observations,⁶³ assisting state parties,⁶⁴ drafting annual reports,⁶⁵ and preparing specific reports.⁶⁶

57. *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*, OHCHR (Oct. 2018), available at <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session4/SubmissionLater/RussianFederation.pdf> (last visited Oct. 31, 2022).

58. *Legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises*, The OEIGWG (Aug. 17, 2021) available at <https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/LBI3rdDRAFT.pdf> (last visited Oct. 31, 2022).

59. *Id.* at 18.

60. *Id.*

61. OCHR, *supra* note 58.

62. *Id.* at 19.

63. *Id.*

64. OEIGWG, *supra* note 55, at 19.

65. *Id.*

66. *Id.*

Those five main functions are traditional functions, which are usually included in the bodies of the UN Treaty. The proposal is built on the functions International Covenant on Civil and Political Rights (ICCPR) provides in Article 40 (1).⁶⁷ However, the ICCPR also provides the right to submit individual communication to the Human Rights Committee concerning alleged violations by a state party. On the contrary, the 2021 Draft of the UN Business and Human Rights Treaty does not guarantee victims' right to submit individual communications.⁶⁸ Such absence of the right to resort to a quasi-judicial forum is worrisome. No state has so far requested the inclusion of the right to individual communication in the draft proposal.⁶⁹ Nor has the topic of the right to individual communication been on the agenda of the eighth round of negotiations.⁷⁰

The 2021 Draft of the UN Business and Human Rights Treaty can be described as a weak instrument concerning access to remedy for rights-holders concerning business-related human rights abuses. If rights-holders are left without recourse to the independent monitoring mechanism, the entire added value of the UN Treaty on Business and Human Rights would be undermined. As a result, the drafters of the UN Treaty on Business and Human Rights and negotiating states must consider redrafting the current Article 15 of the 2021 Draft of the Business and Human Rights Treaty to establish the right to submit individual communications.

III. A Normative Proposal for More Efficient Enforcement of Corporate-Related Human Rights Abuses Under 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. Not many efficient judicial, quasi-judicial, and non-judicial remedies have been available at the domestic, regional, and international levels for rights-holders to enforce state and corporate accountability for business-related human rights abuses.

67. G.A. Res. 2200A (XXI) (Mar. 23, 1976).

68. *Supra* note 58.

69. U.N. H.R.C., Text of the third revised draft legally binding instrument with the concrete textual proposals submitted by States during the seventh session, 49th Sess., U.N. Doc. A/HRC/49/65 (Feb. 28 – Mar. 25, 2022).

70. U.N. H.R.C., Suggested Chair Proposals for Select Articles of the LBI (Oct. 6, 2022).

A binding international treaty signifies the development of normative solutions that will place individuals as the rights-holders concerning the obligations of duty-holders such as corporations, states, and other actors. Nonetheless, a binding treaty can, on the one hand, work only in a plural framework where several stakeholders share obligations and commitments under business and human rights.⁷¹ These obligations exist simultaneously and are intertwined. They arise both from domestic and international law and the internal legal commitments of certain individual corporations. On the other hand, a holistic approach implies intertwining the various levels of incurring accountability of states, corporations, and individuals within corporations to provide 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 the operation of corporations established in most domestic legal orders.⁷² As a result, this Section formulates normative solutions for an international treaty on business and human rights concerning the enforcement of state accountability for corporate-related human rights abuses.

This Article explores several normative proposals for more efficient enforcement of accountability for corporate-related human rights abuses within the UN Business and Human Rights Treaty. It aims to submit reform proposals to enhance the rights-holders right 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 as a potential enforcement mechanism under the Treaty. Thirdly, it examines the model of the 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 the possibility

71. JERNEJ L. ČERNI ET AL., *THE FUTURE OF BUSINESS AND HUMAN RIGHTS: THEORETICAL AND PRACTICAL CONSIDERATIONS FOR A UN TREATY*, (1st ed. 2018); Humberto C. Rivera, *Negotiating a Treaty on Business and Human Rights: The Early Stages* 40(2) UNSW L. J.1200 (2017).

72. 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 (2020).

of adopting a Special National Supervisory Mechanism under the UN Treaty.

All those different enforcement models provide textbook examples of successful enforcement mechanisms of different legal nature. Some are more of a 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 state and corporate accountability for business-related human rights abuses. Those four proposals are not exclusive. They have been chosen because they provide different possibilities for drafters to consider, from judicial to administrative. The UN Business and Human Rights Treaty drafters should not turn a blind eye to the right of individuals to bring their complaints to the independent, impartial, and fair enforcement body.

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-six countries of the Council of Europe, which are all bound by the Convention.⁷³ The European Convention is a “constitutional instrument of European public order.”⁷⁴ It guarantees individuals on the territory of one of the forty-six State parties the right to individual application against the states parties for the alleged violations of 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 protecting human rights globally.⁷⁵ With its entry into the membership of the Council of Europe and ratification of the European Convention, the state enabled its citizens and other individuals residing on their territory to file individual

73. *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 213 UNTS 222, (entered into force Sept. 3, 1953), Protocols Nos 1, 3, 4, 5, 6, 7, 8, 11, 12, 14, 15, and 16. 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*, Vol. 1, Eur. Conv. on H.R. L. REV. (2020).

74. *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland*, App. No. 45036/98, ¶ 156 Eur. Ct. H.R. (2005).; Angelika Nussberger, *The European Court of Human Rights at Sixty – Challenges and Perspectives*, 1(1) Eur. Conv. on H.R. L. REV. 11, 13 (2020)

75. See, for example, Christoph Grabenwarter, Commentary, *European Convention on Human Rights* (2014).

applications with the European Court of Human Rights.⁷⁶ The European Convention provides in Article 34 that the ECtHR is competent to receive complaints about alleged violations of one of its articles by its state party.⁷⁷ Individuals are to exhaust domestic remedies in the domestic system in order to be able to lodge complaints before the European Court.⁷⁸ After that, the European Court of Human Rights delivers binding judgment, which the relevant state party must execute in its domestic legal systems.⁷⁹ The Committee of Ministers of the Council of Europe monitors the execution of the European Court of Human Rights judgments in domestic legal systems.⁸⁰ As with other regional and international conventions and domestic legal systems, many states with weak rule of law and weak institutions have faced difficulties applying the European Convention and implementing the European Court of Human Rights judgments.⁸¹ Many state parties are not able nor willing to enforce the European Convention and judgment of the European Court in the domestic legal systems.

The European Court of Human Rights offers a model for binding mechanisms under the UN Business and Human Rights Treaty by transferring the relevant know-how and experience related to applying the European Convention and judgment of the European Court of Human Rights.⁸² The judicial model of the European Court of Human Rights would surely be one of the most appropriate supervisory mechanisms for the enforcement of the UN Business and Human Rights Treaty. It is a textbook example of an idealistic approach to international law and the international community, where states have bet on their cooperation in the rule of law and human rights protection. The rule of law would provide rights-holders an effective judicial mechanism where their claims

76. Geir Ulfstein, *The European Court of Human Rights as a Constitutional Court?* (Mar. 19, 2014). Festschrift to the 40th Year Anniversary of the Universit. . . t 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>

77. European Convention for the Protection of Human Rights and Fundamental Freedoms art. 34.

78. See, for instance, Janneke Gerards, *General Principles of the European Convention on Human Rights*, 2019.

79. *Id.*

80. Jernej Letnar Čerňič, *A Glass Half Empty? Execution of Judgments of the European Court of Human Rights in Central and Eastern Europe*, *BALTIC YEARBOOK OF INTERNATIONAL LAW* (2015), vo. 15, pp. 285-302.

81. Marko Milanović & Tatjana Papić, *The Applicability of the ECHR in contested territories*, 67 *INT'L AND COMP. L. Q.* 779–800 (2018); *Russia and the European Court of Human Rights: The Strasbourg Effect* (Lauri M. . . lksoo, Wolfgang Benedek (eds.)).

82. See generally, *id.*

would be heard concerning state responsibility for the alleged business-related human rights violations. State parties could take up such a model if they agreed to provide individuals with access to binding mechanisms to enforce state responsibility for business-related human rights abuses. It would provide at least ex-post-facto justice to the victims. States would, after that, be obliged to execute judgments in their domestic legal systems. Nonetheless, one must 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.⁸³ To be clear, however, it appears unlikely that the state parties would consent to establish such a binding judicial mechanism as it would require them to relinquish parts of their sovereignty. Due to the current status of international affairs, creating a binding international human rights mechanism is more utopian compared to reality.⁸⁴ It is submitted that such a binding mechanism could endanger the whole project of the UN Business and Human Rights Treaty. Nonetheless, the judicial model is undoubtedly the most appropriate for enforcing direct corporate accountability for human rights and providing justice to the victims.

THE QUASI-JUDICIAL MODEL OF THE UNITED NATIONS HUMAN RIGHTS COMMITTEE

The second potential enforcement model of the future UN Business and Human Rights Treaty is 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 the competencies to hear individual complaints regarding alleged violations of the UN Business and Human Rights Treaty. Several Committees under the UN Conventions on Human Rights supervise whether state parties meet human rights obligations. For instance, the International Covenant on Civil and Political Rights (ICCPR) guarantees in Article 41 the right to individual communication if states consent with the jurisdiction of the UN Human Rights Committee.⁸⁵ Therefore, the ICCPR guarantees a

83. Stefan Trechsel, *A World Court for Human Rights?*, 1 NW. J. INT'L HUM. RTS. 1 (2004); Manfred Nowak, *A World Court of Human Rights*, in INTERNATIONALS HUMAN RIGHTS INSTITUTIONS, TRIBUNALS, AND COURTS (Gerd Oberleitner ed., 2018).

84. Phillip Alston, *Against a World Court for Human Rights*, 28 ETHICS & INT'L AFF. 197 (2014).

85. G.A. Res. 2200A (XXI), Optional Protocol to the International Covenant on Civil and Political Rights, 21 UN GAOR Supp. (No. 16) at 59, U.N. Doc. A/6313, 999 U.N.T.S. 302, at art. 41, ¶ 1 (March 23, 1976); see also ALEX CONTE & RICHARD BURCHILL, *DEFINING*

legal basis for individuals to submit individual communications to the UN Human Rights Committee. Article 41 has been further reinforced by the Optional Protocol I to the International Covenant on Civil and Political Rights, which specifies in Article 2 the right to individual communication.⁸⁶ Corresponding obligations clarified by the UN Human Rights Committee have been noted in General comment no. 33.⁸⁷ The procedure of individual communication before the UN Human Rights Committee provides enforcement avenues that the rights-holders have in enforcing state obligations and accountability for violations of civil and political rights under the ICCPR. The Optional Protocol does not explain the legal nature of the views, particularly whether their binding or not. The Committee only determines whether or not there have been violations and is not in a position to impose sanctions on states in the event of violations as it is the European Court of Human Rights practice. Certainly, States must 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 explain the binding and authoritative nature of the views. It noted that there can be described as an “authoritative determination”⁸⁸ of issues concerned. 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.⁸⁹ The very word “views” indicates that the Committee’s decisions may not be binding. The Committee added that their nature depends on “the obligation of States parties to act in good

CIVIL AND POLITICAL RIGHTS: THE JURISPRUDENCE OF THE UNITED NATIONS HUMAN RIGHTS COMMITTEE (Routledge, 2nd ed. 2009).

86. G.A. Res. 2200A (XXI), Optional Protocol to the International Covenant on Civil and Political Rights, 21 UN GAOR Supp. (No. 16) at 59, U.N. Doc. A/6313, 999 U.N.T.S. 302, at art. 2 (March 23, 1976).

87. 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*, (June 25, 2009), CCPR/C/GC/33, para. 3, available at <https://www.refworld.org/docid/4ed34e0f2.html> (Sept. 5, 2022).

88. *Id.* ¶ 13.

89. Nikolaos Sitaropoulos, *States are Bound to Consider the UN Human Rights Committee’s Views in Good Faith*, OXFORD HUMAN RIGHTS HUB (March 1, 2015) available at <https://ohrh.law.ox.ac.uk/states-are-bound-to-consider-the-un-human-rights-committees-views-in-good-faith> (last visited Nov. 4, 2022); 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*, 356-413 (2012).

faith”⁹⁰ The authoritative character of the views of the Committee is nonetheless questionable. State parties have not shown willingness to recognize that the views are binding. Most of them consider them as recommendations and as quasi-binding at best. The Committee strongly opposes those views in its general comments, which always emphasize the binding legal nature of recommendations.

Despite the weaknesses of the enforcement mechanisms under the ICCPR, such mechanisms could be a starting point for enforcing the UN Treaty on Business and Human Rights. It could allow individuals to enforce state responsibility for corporate-related human rights abuses. In this manner, rights-holders would gain access to international supervisory mechanisms in business and human rights. The mechanism could partially provide justice to the rights-holders against adverse corporate conduct. The Committee under the UN Treaty will only be triggered 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 if states would implement the recommendations of the Committee in the domestic systems by providing compensation or any kind of justice to the victims.

THE NON-JUDICIAL MODEL OF THE 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. It should not be mistaken with the national ombudsman mechanism and national human rights institutions. It acts as a mediator between the rights-holders and corporations concerning business-related human rights abuses. The Compliance Advisory Ombudsman (CAO) examines complaints stemming from social and environmental concerns by local communities concerning projects funded by the IFC or the Multilateral Investment Agency of the World Bank.”⁹¹ The CAO’s supervision system responds to those concerns by trying to mediate between all stakeholders.⁹² Complaints are submitted by individuals or

90. U.N. Human Rights Committee, *supra* note 87, ¶ 15.

91. “Compliance Advisory Ombudsman, CAO Dispute Resolution”, *available at*: <https://www.cao-ombudsman.org/how-we-work/dispute-resolution> (last visited September 5, 2022).

92. *IFC/MIGA Independent Accountability Mechanism (CAO) Policy*, World Bank ¶ 8(a) at 2 (Jun. 28, 2021), *available at* <https://documents1.worldbank.org/curated/en/889191625065397617/pdf/IFC-MIGA-Independent-Accountability-Mechanism-CAO-Policy.pdf> (last visited Nov. 1, 2022).

groups of individuals affected.⁹³ The complaints can be submitted as “to CAO’s mandate to address environmental and social impacts of Projects.”⁹⁴ After that, CAO assesses the complaint, which may propel further procedures “if both Parties agree to undertake dispute resolution”⁹⁵

The CAO’s procedure is an example of mediation proceedings which does not provide a final opinion on the merit’s complaint. The CAO’s Policy provides in the absence of agreement between parties for compliance procedures that could end in a finding of non-compliance.⁹⁶ Such nature of the CAO’s assessment appears favorable to the rights-holders affected by the World Bank’s project. Nonetheless, such a mediation procedure can also benefit from the satisfactory mutual resolution of a dispute. The CAO dispute resolution is based on the agreement between parties regarding the objectives and deadlines, which the CAO closely and diligently monitors.⁹⁷ If no agreement has been reached, “the complaint will proceed to CAO Compliance function.”⁹⁸ As a result, The CAO Policy vaguely notes that CAO will continue in the case of non-compliance with the investigation.⁹⁹ The CAO Operation Guidelines subsequently specify what steps are to be taken to meet the requirements of compliance mechanisms, including finding non-compliance.¹⁰⁰ As a result, the CAO advisory dispute resolution and compliance mechanism proceeds based on mediation and providing good offices between individuals and communities concerned and businesses and funders involved to negotiate mutually agreed conclusions. To this end, the CAO’s Policy strives to ensure that the CAO advisory dispute resolution and compliance mechanism respect procedural fair trial guarantees. Despite its shortcomings, the Compliance Ombudsman Advisory Mechanism of the International Financial Corporation of the World Bank illustrates a viable non-judicial alternative for enforcing the UN Treaty on Business and Human Rights. What remains to be seen is whether such mechanisms can provide effective justice to victims of

93. *Id.* § 7, ¶ 30, at 7.

94. *Id.* § 7, ¶ 37(b), at 8.

95. *Id.* § 8, ¶ 59, at 13.

96. *See id.* § X, ¶ 76, at 17.

97. IFC & MIGA Indep. Accountability Mechanism (CAO) Pol’y, § IX, ¶ 68, at 15 [hereinafter IFC/MIGA Policy].

98. *Id.* at § VIII, ¶ 59, at 13.

99. *See id.* § X, ¶ 76, at 17.

100. *Id.* § X, at 17-27.

business-related human rights abuses.¹⁰¹ It would complement proper judicial mechanisms at domestic and international levels in enforcing corporate accountability for business-related human rights abuses.

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 does it provide access to judicial remedies.¹⁰² 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 must undoubtedly enjoy a similar mandate as the Ombudsman Advisory Mechanism of the International Financial Corporation of the World Bank is limited to the projects funded by those institutions.

Nonetheless, the non-judicial model of the Ombudsman Advisory Mechanism of the International Financial Corporation of the World Bank provides alternatives to the judicial path in the search for state and 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 like the European Court of Human Rights model. This non-judicial mechanism complements state judicial mechanisms. However, it is questionable if it can fully bring justice to the rights-holders for business-related human rights abuses.

THE NON-JUDICIAL ADMINISTRATIVE MODEL OF THE SPECIAL NATIONAL SUPERVISORY MECHANISM UNDER THE UN TREATY

The fourth proposal concerns a unique national supervisory mechanism under the UN Treaty, which would directly supervise the

101. Lynn M.G. & Benjamin A.T. Graham, *Can Quasi-Judicial Bodies at the World Bank Provide Justice in Human Rights Cases?*, 50 *Geo. J. of Int'l L.* 113 (2018), available at <https://www.law.georgetown.edu/international-law-journal/wp-content/uploads/sites/21/2019/06/GT-GJIL190017.pdf> (last visited Nov. 11, 2022); see also Benjamin M. Saper, *The International Finance Corporation's Compliance Advisor/Ombudsman (CAO): An Examination of Accountability and Effectiveness from a Global Administrative Law*, 44 *N.Y.U. J. OF INT'L L. & POL.* 1279 (2012).

102. Roxanna Altholz & Chris Sullivan, *Accountability & International Financial Institutions: Community Perspectives on the World Bank's Office of the Compliance Advisor Ombudsman*, IHRLC UNIV. OF CAL. BERKELEY (Mar. 2017).

implementation in the domestic sphere. As noted above, the drafters included in the Annex of Zero Draft 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.¹⁰³ The Zero Draft envisaged the creation of the “National Implementation Mechanisms,”¹⁰⁴ which would have a wide range of competence, including an examination of “enquiries by victims[,]”¹⁰⁵ drafting advice for state authorities,¹⁰⁶ and visiting and inspecting businesses¹⁰⁷ among others. The Draft Proposal includes a broader range of investigation and quasi-legal powers. For those reasons, states have not shown a favorable stance towards such a proposal. The draft protocol’s structure has not been well thought of as it is not coherently intertwined. The content of the Draft Protocol combines investigations and decision-making powers with fact-finding powers. Therefore, the Draft Protocol would be suitable if drafters reform its content.

As a result, it appears more appropriate to base the enforcement mechanism on 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 also be translated to 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.¹⁰⁸ Their Procedural Guidance notes that the NCPs guarantee assistance to different stakeholders of the dispute.¹⁰⁹ NCPs are not judicial organs, and they are most commonly part of public administration.¹¹⁰ Nonetheless, they attempt to resolve

103. U.N. HUMAN RIGHTS COUNCIL, 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> (last visited Nov. 11, 2022).

104. *Id.* at art. 2.

105. *Id.* Article 3 (2) (a).

106. *Id.* at art. 3(2)(b); *id.* at art. 3(3).

107. *Id.* at Article 5 (2).

108. *Guidelines for Multinational Enterprises*, ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (2011), *available at* <https://www.oecd.org/daf/inv/mne/48004323.pdf> (last visited Nov. 11, 2022).

109. *Id.* at 72.

110. Jernej Letnar Čerňič, *The Divergent Practices of NCPs under OECD Guidelines for Multinational Enterprises: Time for a More Uniform Approach?* INT’L LAB. RTS. CASE LAW J., 11, 11-16 (2021).

disputes based on mediation and dialogue between complainants and corporations. NCPs are obliged to conduct their proceeding in an impartial and fair manner.¹¹¹ At the end of the mediation process, the NCP has three options. First, they can decide to close the case if no further examination is necessary.¹¹² Second, they can publish a report on the joint conclusions reached.¹¹³ Third, they can publish a statement that no joint conclusions have been reached and that parties refuse to resolve the dispute.¹¹⁴ However, the NCPs cannot impose sanctions on corporations, and they can only deliver recommendations to meet mutually agreed dispute resolution.

As National Contact Points are not judicial organs, rather institutions of alternative dispute resolution, state parties will be more likely to accept their competencies. As far as a non-judicial dispute mechanism goes, such proposals could appeal to those states with concerns about the erosion of their sovereignty. However, the Special National Supervisory Mechanism under the UN Treaty would also have to complement judicial procedures. The possibilities of a non-judicial model to bring justice to rights-holders are limited. Nonetheless, it can fulfill other objectives such as those of alternative dispute settlement and reconciliation between parties and achieving symbolic justice for the benefit of future human and sustainable development.

IV. Advantages and Disadvantages of All Four Proposed Models of 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 the moment 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 the global North have more vital institutions of constitutional democracy than states of the global South.¹¹⁵ Not all states are able or willing to ensure and protect the right to a fair, independent, and impartial trial before judicial organs or to ensure similar

111. OECD Guidelines for Multinational Enterprises, *supra* note 108 at 72.

112. *Id.* at 73.

113. *Id.*

114. OECD, *supra* note 111, at 73.

115. See generally *Global Scores and Rankings*, WORLD JUST. PROJECT, available at <https://worldjusticeproject.org/our-work/wjp-rule-law-index/wjp-open-government-index/global-scores-rankings> (last visited Nov. 8, 2022).

quasi-judicial or non-judicial mechanisms. Judicial institutions are, in many states, underfunded, under-equipped, and subject to external and internal pressures.¹¹⁶

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 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 mechanisms to supervisory mechanisms based on alternative dispute resolution. Indeed, it would be most appropriate from the victims' point of view if states would agree on binding judicial mechanisms to provide them justice against adverse corporate conduct. As such, the field of business and human rights would, by providing access to individual remedies for Treaty violations, move away from voluntary approaches of corporate social responsibility.¹¹⁷ However, realities of the international community illustrate that states are not willing or able to disregard their national sovereignty.

The judicial model of the European Court of Human Rights has been the most successful international human rights court, where rights-holders can bring complaints against state parties for alleged violations of the European Convention after domestic remedies have been exhausted.¹¹⁸ The European Court delivers binding judgments, which state parties must execute in their domestic legal systems.¹¹⁹ The rights-holders would most appreciate the judicial model, granting them binding

116. See generally *WJP Rule of Law Index*, World Just. Project, available at <https://worldjusticeproject.org/rule-of-law-index/> (last visited Nov. 8, 2022).

117. Florian Wettstein, *Betting on the Wrong (Trojan) Horse: CSR and the Implementation of the UN Guiding Principles on Business and Human Rights*, 6 *BUS. & HUM. RTS. J.* 312, 312–25 (2021); see also Barnali Choudhury, *Balancing Soft and Hard Law for Business and Human Rights*, 67 *INT'L & COMPAR. L. Q.* 961, 961–86 (2018); see also Surya Deva, et al., *A Framework Agreement in Business and Human Rights?: An Interview with Surya Deva and Claire Methven O'Brien*, *VÖLKERRECHTSBLOG* (June 24, 2022), available at <https://voelkerrechtsblog.org/a-framework-agreement-in-business-and-human-rights/> (last visited Oct. 27, 2022).

118. Stefanie Schmahl, *The European Court of Human Rights—Can There Be Too Much Success? A Comment*, 14 *J. OF HUM. RTS. PRAC.* 191, 191–203 (2022); see also Robert Spano, *The Future of the European Court of Human Rights—Subsidiarity, Process-Based Review and the Rule of Law*, 18 *HUM. RTS. L. REV.* 473, 473–94 (2018).

119. ANGELIKA NUSSBERGER, *THE EUROPEAN COURT OF HUMAN RIGHTS* (Oxford Univ. Press 2020).

judicial mechanism access. Victims would be able to bring corporations directly to court for alleged business-related human rights abuses. On the other hand, the judicial model of the European Court directly affects the national sovereignty of the future state parties, which would have to subject their national institutions to international supervision of their conduct.¹²⁰ If the drafters decided to employ this proposal, they should expect a low number of ratifications in the first decades of the functioning of this 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.¹²¹ 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.¹²² 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.¹²³ 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.¹²⁴ The Committee has struggled to supervise states in their implementation of views.¹²⁵ Nonetheless, the particular communication procedure provides victims with access to the supervision process within the United Nations. As a result, it can at least

120. *Id.*

121. ALEX CONTE & RICHARD BURCHILL, *DEFINING CIVIL AND POLITICAL RIGHTS THE JURISPRUDENCE OF THE UNITED NATIONS HUMAN RIGHTS COMMITTEE* (Routledge 2020); see also Stefan Kadelbach, *The Human Rights Committee—Challenges and Prospects for Enhanced Effectiveness and Integration: A Comment*, 14 (1) J. OF HUM. RTS. PRAC., Feb. 2022, at 44–49.

122. *HUMAN RIGHTS OBLIGATIONS OF BUSINESS: BEYOND THE CORPORATE RESPONSIBILITY TO RESPECT?* (David Bilchitz & Surya Deva, eds., Cambridge Univ. Press 2013).

123. SARAH JOSEPH & MELISSA CASTAN, *THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: CASES, MATERIALS, AND COMMENTARY* (Oxford Univ. Press, 3d ed. July 2013); see also PAUL M. TAYLOR, *A COMMENTARY ON THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS THE UN HUMAN RIGHTS COMMITTEE'S MONITORING OF ICCPR RIGHTS* (Cambridge Univ. Press 2021).

124. *Id.*

125. Stefan Kadelbach, *The Human Rights Committee—Challenges and Prospects for Enhanced Effectiveness and Integration: A Comment*, 14 J. OF HUM. RTS. PRAC. 44, 44-49 (2022).

provide partial justice to victims. 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 proposals 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 mediation, negotiations, and good offices to reach a favorable outcome for both parties, individuals, and corporations.¹²⁶ However, it is doubtful that such a procedure can meet victims' expectations about bringing corporations to justice. Accordingly, it is questionable if alleged human rights violations can be subject to mediation and other alternative dispute resolution methods. 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 not the most appropriate mechanism for providing justice to business-related human rights abuses victims.

The administrative model of the Special National Supervisory Mechanism under the UN Treaty would assist through mediation and dialogue with the parties to reach an agreement.¹²⁷ It would proceed based on the rules of administrative procedure.¹²⁸ Such administrative models can complement existing domestic judicial and quasi-judicial business and human rights; however, they cannot replace them. Mediation procedures may work appropriately to the benefit of parties in the corporate arena, but not in human rights law. As a result, it is questionable if such a mechanism provides binding conclusions with sanctions in the case of violations. Nonetheless, it would surely be a more acceptable solution for states and corporations.

In the negotiations on the potential UN Treaty, Drafters can consider all four models (judicial, quasi-judicial, non-judicial, and non-judicial administrative), in the negotiations on the potential UN Treaty. In theory, judicial and non-judicial models would provide more justice for business-related human rights violations victims. Non-judicial mechanisms complement judicial mechanisms by offering mediation and good office

126. ROXANNA ALTHOLZ & CHRIS SULLIVAN, ACCOUNTABILITY & INTERNATIONAL FINANCIAL INSTITUTIONS: COMMUNITY PERSPECTIVES ON THE WORLD BANK'S OFFICE OF THE COMPLIANCE ADVISOR OMBUDSMAN 18-19 (2017).

127. Surya Deva, *Treaty tantrums: Past, present and future of a business and human rights treaty*, 40 NETH. Q. OF HUM. RTS. 211, 211-21 (2022).

128. *Id.*

to both rights-holders and corporations. The proposed mechanisms would add value for enforcing state and corporate responsibility for business-related human rights abuses. Such mechanisms would have to meet 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 the human dignity of the rights-holders and provide an adequate legal remedy for business-related human rights abuses.¹²⁹ As a result, the consensus on the enforcement mechanism under the UN Treaty to protect the human dignity of the rights-holders against adverse corporate conduct is indispensable for it to succeed in the long run.

Conclusion

The enforcement of corporate accountability of business-related human rights abuses remains a weak and under-developed area in the broader business and human rights field.¹³⁰ Victims are 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 or global attention. This article explored the potential enforcement mechanism under the UN Treaty on Business and Human Rights, which drafters will have to somehow develop in the future to enforce state and corporate accountability for business-related human rights abuses. It analyzed ways to improve the 2021 Draft to include enforcement mechanism(s) under the potential United Nations Business and Human Rights Treaty. It explored the best practices, advantages, and disadvantages of the existing human rights supervision mechanisms and beyond to develop model enforcement mechanisms 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

129. Kadelbach, *supra* note 125, at 45.

130. JERNEJ LETNAR ČERNIČ & NICOLÁS CARRILLO-SANTARELLI, THE FUTURE OF BUSINESS AND HUMAN RIGHTS: THEORETICAL AND PRACTICAL CONSIDERATIONS FOR A UN TREATY (2018); Lee McConnell, *Assessing the Feasibility of a Business and Human Rights Treaty*, 66 INT'L & COMPAR. L. Q. 14, 14 (2022).

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 Treaty drafters should be aware that the Treaty without enforcement will convert itself into *lex imperfecta*. The commitment to the rule of law, human dignity, and global justice requires that victims can bring state and corporate actors responsible for business-related human rights abuses to justice.