

## INTRODUCTION TO THE SYMPOSIUM ON SOFT AND HARD LAW ON BUSINESS AND HUMAN RIGHTS

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This symposium turns to a major debate within a field of international law that has moved from the periphery to center stage in just a few decades—business and human rights, or BHR: Can and should international law’s approach to the human rights impacts of business activity shift from today’s mostly soft-law framework to a multilateral treaty regime? While advocates for and against such a treaty debate this point at the UN Human Rights Council and other venues, this symposium examines the problem from four theoretical perspectives. Each contribution offers insights for practitioners and scholars alike, but they suggest no easy answers.

### *The UN Guiding Principles as a Fount of—or Limit to—BHR Lawmaking*

For the many stakeholders concerned about the impact of business activity on human rights, the last decade has been a whirlwind of norm-making. The flurry began in 2011 with the issuance by the UN Special Rapporteur on Business and Human Rights, John Ruggie, of his long-awaited Guiding Principles on Business and Human Rights (UNGPs).<sup>1</sup> The UNGPs—the product of extensive consultations with business leaders, NGOs, governments, and various experts—offered an accessible, yet nuanced and flexible approach to BHR based on three pillars that Ruggie had developed.<sup>2</sup> Pillar I reaffirmed states’ duties under human rights law to protect individuals against violations by private actors, including business entities. Pillar II asserted a “responsibility” of all business enterprises to respect—i.e., not violate—human rights, and spelled out resultant duties of conduct and result. And Pillar III promoted the centrality of a remedy for all business-related violations of human rights. The UNGPs received the blessing of the Human Rights Council that same year.<sup>3</sup> They also received wide praise from business leaders and many NGOs, even as other civil society groups criticized them as too weak.

More important, they produced nothing less than a wave of lawmaking and standard-setting at the national, international, and corporate level—in particular to elaborate for business the scope of their responsibilities under Pillar II. Domestic laws included statutory requirements to implement the UNGPs’ promotion of due

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<sup>1</sup> [GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS: IMPLEMENTING THE UNITED NATIONS “PROTECT, RESPECT AND REMEDY FRAMEWORK”](#) (OHCHR, 2011) [hereinafter UNGPs].

<sup>2</sup> [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](#), UN Doc. HRC/8/5 (Apr. 7, 2008).

<sup>3</sup> [Human Rights Council Res. 17/4](#), UN Doc. A/HRC/RES/17/4 (June 16, 2011). Contrast this with the cold reception by Western states of the UN’s prior standard-setting exercise, the [Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights](#), UN Doc. E/CN.4/Sub.2/2003/12/Rev.2 (Aug. 26, 2003), produced by the Human Rights Commission’s Sub-Commission on the Promotion and Protection of Human Rights.

diligence by companies as a way of determining their exposure to and involvement with human rights violations.<sup>4</sup> International standards included guidelines by the Organisation for Economic Co-operation and Development for due diligence in the extractive industries, as well as multi-stakeholder initiatives by states, companies, and NGOs to set forth standards in certain industries.<sup>5</sup> Business groups developed guidance for particular industries (even professional sports), and many multinationals began incorporating them into internal operating procedures.<sup>6</sup> Pillar III also received follow-up from many actors, including new internal company grievance mechanisms, an uptick in litigation in domestic courts by victims of business related-abuses, and initiatives for the arbitration of disputes between victims and businesses.<sup>7</sup>

On top of all this, states began to invoke the UNGPs as the new starting point for their discussions on BHR. The Council became the institutional focal point for these interactions, including through a new expert body—the Working Group on Business and Human Rights—and an enormous annual forum in Geneva. Indeed, the UNGPs' penumbra extended beyond what is typically viewed as BHR. States and other actors seeking reform of international investment law have framed claims in terms of the need to preserve a state's policy space in order for it to be able to protect its residents, under Pillar I, against human rights violations by foreign investors.<sup>8</sup> One investor-state arbitral tribunal even invoked the UNGPs to ground a duty on investors not to violate human rights.<sup>9</sup> Debates over climate change now invoke the UNGPs as setting a standard for business.<sup>10</sup> If ever we have witnessed a norm cascade, to quote the constructivists,<sup>11</sup> the last decade surely represents one in the BHR space. And if ever a UN document has made that mystical journey from policy to soft law, it is the UNGPs.<sup>12</sup>

Yet for many stakeholders, the UNGPs have proved not enough, in at least three key senses. First, as a non-binding instrument, they place no new obligations on states or corporations under international law or domestic law. Second, Pillar I, while laying out possibilities for states to implement their existing duty to protect, does not resolve the precise duties of the home state of a company to regulate its activities beyond the state's borders.<sup>13</sup> It also does not create or propose any institutional mechanism to evaluate states' performance. Third, Pillar II—applying to companies of any size in any industry—deliberately leaves them with flexibility on how to carry out due diligence as well as on how to mitigate violations by suppliers, distributors, and others with whom

<sup>4</sup> [Modern Slavery Act 2015](#), 2015 c.30 (UK), [LOI n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre](#), J.O. No. 74 (Fr.), [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](#), O.J. (L 130) 1.

<sup>5</sup> See, e.g., [OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas](#) (3d ed., 2010); [Accord on Fire and Building Safety in Bangladesh](#) (May 2018).

<sup>6</sup> See, e.g., Shift Project, [UN Guiding Principles Reporting Framework](#) (corporate internal implementation); [FIFA's Human Rights Policy](#) (2017) (sports).

<sup>7</sup> See, e.g., [Vedanta Resources v. Lungowe](#), [2019] UKSC 20; [Nevsun Resources v. Araya](#), 2020 SCC 5 (Canada) (litigation); [The Hague Rules on Business and Human Rights Arbitration](#), Dec. 12, 2019 (arbitration).

<sup>8</sup> See United Nations Conference on Trade & Dev., [UNCTAD's Reform Package for the International Investment Regime](#) 65 (2018).

<sup>9</sup> [Urbaser v. Argentina](#), ICSID Case No. 07/26, Award, paras. 1195-96 (Dec. 8, 2016).

<sup>10</sup> See, e.g., [Framework Principles on Human Rights and the Environment](#), in Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, UN Doc. A/HRC/37/59, paras. 22, 35 (Jan. 24, 2018).

<sup>11</sup> See, e.g., Martha Finnemore & Kathryn Sikkink, [International Norm Dynamics and Political Change](#), 50 INT'L ORG. 887, 893 (1998).

<sup>12</sup> See, e.g., Daniel Augenstein, [Negotiating the Hard Law/Soft Law Divide in Business and Human Rights: The Implementation of the UNGPs in the European Union](#), 9 GLOBAL POL'Y 254 (2018).

<sup>13</sup> [UNGP](#)s, *supra* note 1, Principle 2 and Commentary.

they have business relationships.<sup>14</sup> Despite some national legislation, the legal requirements on companies remain unclear, subject only to the occasional lawsuit in which domestic tort law provides the answer. These reactions confirm that Ruggie's ability to gain significant multi-stakeholder support for the UNGPs depended on their softness in all three dimensions identified by Abbott and Snidal<sup>15</sup> and Reisman:<sup>16</sup> their lack of legal bindingness, their imprecise provisions on key issues, and their absence of any true control mechanism.

### *The Treaty-Making Process*

Hoping to remedy these perceived shortcomings and regulate companies through hard international law, a group of developing states long skeptical of transnational business enterprises prevailed upon the Human Rights Council to create, in 2014, an Open-Ended Intergovernmental Working Group (OEIGWG). It had a mandate to "elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises."<sup>17</sup> From the beginning, the treaty idea lacked the support of the home states of many multinationals, including the European Union and the United States. Those states voted against the 2014 resolution that created the Working Group (which passed by the slim plurality of 20-14-13). The OEIGWG produced its first draft for discussion in 2018 (the "Zero Draft"), which elicited strong support from many states and NGOs, but equally strong opposition from business groups.<sup>18</sup> Based on these reactions, the Working Group produced a significantly revised second draft in July 2019.<sup>19</sup>

The key features of the Working Group's drafts are (a) an elaboration of the rights of victims of business-related human rights violations; (b) duties on states to regulate companies operating on their territory for compliance with human rights law; (c) duties on states to provide civil and criminal liability for natural and legal persons carrying out business activities, with accompanying requirements of mutual legal assistance; and (d) a standing treaty body, akin to those in other human rights treaties, to monitor and improve compliance.<sup>20</sup> Despite some significant changes from the Zero to the Revised Draft, leading business organizations, and many of the states from which they hail, continue to oppose the treaty process. The essence of their complaint is that the process and the resultant drafts undercut the compromise among stakeholders that they argue is reflected in the UNGPs, ultimately stifling transnational business and economic development.<sup>21</sup> Discussions continue in Geneva, with consultations between the Working Group and both state and non-state stakeholders as well as academic experts.<sup>22</sup>

<sup>14</sup> *Id.* Principles 17-19 and Commentary.

<sup>15</sup> Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT'L ORG. 421 (2000).

<sup>16</sup> W. Michael Reisman, *The Concept and Functions of Soft Law in International Politics*, in 1 ESSAYS IN HONOUR OF JUDGE TASLIM OLAWALE ELIAS 135 (Emmanuel G. Bello & Bola A. Ajibola eds. 1992).

<sup>17</sup> [Human Rights Council Res. 26/9](#), UN Doc. A/HRC/RES/26/9 (July 14, 2014).

<sup>18</sup> [Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises, Zero Draft](#) (July 16, 2018).

<sup>19</sup> UN OEIGWG Chairmanship, [Revised Draft, Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises](#) (July 16, 2019).

<sup>20</sup> *Id.* arts. 4-13.

<sup>21</sup> *See, e.g.*, [Joint Business Response to the Revised Draft Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises \("Revised Draft Treaty"\)](#) (Oct. 2019).

<sup>22</sup> *See, e.g.*, [Report on the Fifth Session of the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights](#), UN Doc. A/HRC/43/55 (Jan. 9, 2020).

*A Moment for Academic Reflection*

With the treaty-drafting process still at a clearly initial stage, now is an ideal time to step back from the often predictable disagreements between stakeholders about the desirability and content of the draft treaty and instead address some foundational questions about the choices between different forms of international lawmaking. On the one hand is the broadly, but not universally, endorsed soft-law starting point of the UNGPs—an approach that has sparked significant normative development, but with clear limits. Domestic hard law regulatory approaches inspired by the UNGPs—statutes and case-law—are unsurprisingly inconsistent, whether on the type of human rights issue or business covered, the scope of a due diligence requirement, or the extent of tort liability of a parent company for the acts of its subsidiaries abroad. Industry codes of conduct that build on the UNGPs are non-binding and vary across industries, for example in terms of the scope of due diligence. This somewhat organic approach to BHR allows for experimentation and the development of best practices. It is also very slow-moving as normative development goes—maybe even slower than customary international law—which no doubt explains its appeal to many business organizations.

The treaty approach attempts to cut through all this diversity and impose on states parties, and through them on business entities, a specific regulatory regime, even as, like all treaties, it tolerates some diversity in its implementation. But its aim, first and foremost, can be summed up in three words: binding uniformity now. This trajectory has many advantages over the organic method in terms of its legitimacy and effectiveness—authority and control—but it depends on a critical mass of states accepting the treaty at the beginning and widespread ratification fairly quickly. The success of the World Health Organization Framework Convention on Tobacco Control, with its 181 member states, is probably Exhibit A of how to take this second path.<sup>23</sup>

The essays in this symposium focus on two key themes. First, what do we know now about the advantages and disadvantages of hard law as compared to soft law for regulating issues requiring international cooperation? In this context, Kish Parella of Washington and Lee School of Law takes as her starting point the political science and legal scholarship on soft versus hard law, which focuses on the incentives and preferences of states.<sup>24</sup> Parella examines how these dynamics play out when it comes to other stakeholders such as corporations and NGOs. She also considers distinct advantages business might see from having both a treaty and soft law in the BHR regulatory space. From a different perspective, Alonso Gurmendi Dunkelberg of the Universidad del Pacifico in Lima examines a separate regulatory area, the law on the use of force, to see what lessons its experiments with soft law might have for BHR.<sup>25</sup> He examines two key soft-law initiatives meant to overcome fundamental disagreements among states—one by the International Committee of the Red Cross on targeted killings (in the *jus in bello*), and one by a UK international lawyer on self-defense against non-state actors (in the *jus ad bellum*). Finding that both of these efforts ended up retrenching earlier positions of states, he cautions against abandoning treaty talks for an illusion of progress through soft law. Rather, BHR needs a solid foundation in treaty law as we already have for the law on the use of force.

Second, beyond a treaty's binding nature, how will and should its substantive provisions compare to those in the UNGPs if it is to achieve the acceptance needed to be a success? The empirical contribution by Tori Kirkebo and Malcolm Langford of the University of Oslo draws on a data set of dozens of BHR documents to suggest that states are unwilling to go beyond the edge of a “commitment curve” in terms of the bite of any duties on

<sup>23</sup> [World Health Organization Framework Convention on Tobacco Control](#), May 21, 2003, 2302 UNTS 166.

<sup>24</sup> Kishanthi Parella, *Hard and Soft Law Preferences in Business and Human Rights*, 114 AJIL UNBOUND 168 (2020).

<sup>25</sup> Alonso Gurmendi Dunkelberg, *Soft Law in Jus in Bello and Jus ad Bellum: What Lessons for Business & Human Rights?*, 114 AJIL UNBOUND 174 (2020).

themselves and corporations.<sup>26</sup> When the text of the Revised Draft is viewed with the benefit of this insight, its limitations on state duties become apparent, even inevitable, suggesting that any draft treaty will disappoint those expecting extensive constraints on corporations. Claire Methven O'Brien of the Danish Institute for Human Rights sees the gap between treaty proponents and opponents as multi-causal but nonetheless deep and wide, reflecting fundamentally incongruous visions of how to regulate corporations when it comes to human rights.<sup>27</sup> To avoid a treaty with few parties, which would be at best irrelevant and at worst a setback for human rights, she advocates a radically new approach: a framework convention, legally binding but goal- and process-oriented, drawing on the UNGPs, with future hard lawmaking over time as states narrow their differences.

We hope followers of BHR in the corridors of Geneva or elsewhere will engage with the insights of our authors. For one, their analysis should encourage decision-makers to consider carefully the advantages, challenges, and limits of treaty-making as a prescriptive process. Many players in international law, particularly in human rights, define progress based on the promulgation of treaties, the rise in the number of parties, and the ability of treaty implementation bodies to shape behavior and attitudes. As our authors suggest, this proposed human rights treaty may be the one that gets away or, at a minimum, requires more creativity and imagination than prior efforts (which were not themselves easy). These challenges also suggest that soft law will remain important in BHR—complementary and not an alternative to hard law. As Ruggie notes, the “mandatory/voluntary dichotomy inhibits rather than advances our coming to grips with . . . corporate globalization.”<sup>28</sup>

Second, the contributions invite us to consider more how domestic law is uploaded into international law. Treaties are often a projection of the domestic policies of states, whether a broad group or a vanguard of motivated states. Treaty advocates seek to lock in other states to the same policies, and indeed lock themselves in too.<sup>29</sup> In the case of BHR, treaty drafters will need to take into account the varied domestic approaches of states to regulating corporations generally, and, even more important, the still-sparse practice of BHR-specific regulation. The shape of any final instrument—whether a detailed treaty, framework convention, or otherwise—could reflect that practice or aim for greater obligations.

Finally, our four authors also highlight the challenges that arise any time states seek to negotiate arrangements that will insert them in the middle of a relationship between two other stakeholders—in this case, business and (actual or potential) victims. The BHR treaty is a particularly ambitious example insofar as it seeks to regulate all business with respect to all human rights. But our authors' analyses can also benefit discussions about other areas without global treaties—think privacy or cyber. While states negotiating treaties will tend to strike the balance as *they* see fit, those other stakeholders can clearly help shape state interests and identities.

<sup>26</sup> Tori Loven Kirkebo & Malcolm Langford, *Ground-Breaking? An Empirical Assessment of the Draft Business and Human Rights Treaty*, 114 AJIL UNBOUND 179 (2020).

<sup>27</sup> Claire Methven O'Brien, *Transcending the Binary: Linking Hard and Soft Law Through a UNGPs-Based Framework Convention*, 114 AJIL UNBOUND 186 (2020).

<sup>28</sup> John Gerard Ruggie, *Multinationals as Global Institution: Power, Authority and Relative Autonomy*, 12 REG. & GOVERNANCE 317, 329-30 (2017).

<sup>29</sup> See Steven R. Ratner, *International Investment Law and Domestic Investment Rules: Tracing the Upstream and Downstream Flows*, 21 J. WORLD INV. & TRADE 7, 21 (2020).