ANNUAL REVIEWS

Annual Review of Law and Social Science

Business and Human Rights: Alternative Approaches to Transnational Regulation

Surya Deva

School of Law, City University of Hong Kong, Kowloon Tong, Hong Kong;
email: suryad@cityu.edu.hk

Annu. Rev. Law Soc. Sci. 2021. 17:139–58

First published as a Review in Advance on
July 6, 2021

The *Annual Review of Law and Social Science* is online
at lawsocsci.annualreviews.org

https://doi.org/10.1146/annurev-lawsocsci-113020-074527

Keywords

business and human rights, extraterritorial regulation, international treaty, mandatory human rights due diligence, polycentric governance, purpose of corporations

Abstract

In recent years, various approaches to transnational regulation of business conduct have evolved as an alternative to the command-and-control model focusing on conduct of domestic businesses and the soft law approach of international human rights law to regulate corporations. On reviewing the potential of five such approaches (i.e., polycentric governance, extraterritorial regulation, proposed international treaty, reform of corporate laws, and rebalancing of trade-investment agreements), this article makes two arguments. First, although polycentric governance is critical to fill regulatory deficits of state-based regulation, this approach should not ignore or weaken further the role and relevance of states in regulating businesses, given the dynamic relation between state-based and other regulatory approaches. Second, greater attention should be paid to nonhuman rights regulatory regimes to change the corporate culture, which tends to externalize human rights issues. The increasing focus on the role of corporate laws and trade-investment agreements should be seen in this context.

1. INTRODUCTION

Regulating corporations, especially those that operate at a transnational level through their subsidiaries or suppliers, to minimize the adverse impact of their activities on society has been an ongoing project in the business and human rights (BHR) field. Various regulatory initiatives have been tried at local, national, regional, and international levels over the years (and more are a work in progress) (Bernaz 2016; Clapham 2006; Deva 2003, 2012a; Kinley & Tadaki 2004; Muchlinski 2021; Ratner 2001; Simons & Macklin 2014; Zerk 2006). However, corporations have proved to be difficult regulatory targets, and developing a regulatory regime that is both effective and efficient has been an elusive goal so far.

Several continuing challenges in regulating transnational business remain: complex corporate structures, long supply chains, the emergence of the gig economy, the slow and reactive nature of legal norms, lack of political will on the part of states, asymmetry between the generally territorial nature of state regulations and the transnational nature of business operations, the foreign investment–driven model of development, the power of corporations, corporate capture of the state, shrinking civic space, barriers to corporate accountability, democratic deficits, and weak rule of law. Moreover, the impact of coronavirus disease 2019 (COVID-19) on the economy is also triggering a race to the bottom in terms of labor and environmental standards.

For these and other reasons, the command-and-control model of state regulation at the national level has struggled to ensure that corporations respect human rights. Moreover, international regulatory regimes in the BHR field have been either nonexistent or fragmented, soft, and ineffective (see Ruggie 2014, pp. 5–6). As an alternative to relying mostly on the traditional command-and-control model, scholars have proposed several regulatory approaches or theories, such as self-regulation, enforced self-regulation, international ethics, responsive regulation, reflexive regulation, smart regulation, integrated theory of regulation, direct international regulation, governance without government, polycentric governance, information-based regulation, and market mechanisms (Ayres & Braithwaite 1992, Backer 2010, Black 1997, Braithwaite & Drahos 2000, Buhmann 2009, Deva 2012a, Donaldson 1989, Gunningham et al. 1998, Haines 1997, Kinley & Tadaki 2004, Locke et al. 2013, Monshipouri et al. 2003, Parker 2002, Ratner 2001, Ruggie 2014, Teubner 1983, Wettstein 2009).

Against this backdrop, this article provides a critical overview of various approaches to transnational regulation of business conduct evolving as an alternative to the command-and-control model focusing on conduct of domestic businesses and the soft law approach of international human rights law to regulate corporations. Based on this review, this article advances two arguments. First, it argues that although polycentric governance is essential to fill regulatory deficits of state-based regulation, we should be careful that this approach does not (in)advertently ignore or weaken further the role and relevance of states in regulating businesses. There is a dynamic relation between state-based and other regulatory approaches. Non-state or multi-stakeholder approaches work more effectively if states perform their role as regulator, enabler, or facilitator of expected corporate behavior; at the same time, other regulatory approaches build the groundwork for states to act, or play a complementary role to fill gaps left by state regulation. Second, greater attention should be paid to nonhuman rights regulatory regimes to change the corporate culture, which tends to externalize human rights issues or encourages the adoption of a managerialist and compliance-based approach. The increasing focus on the role of corporate laws and trade-investment agreements illustrates this regulatory potential.

Section 2 discusses the UN Guiding Principles on Business and Human Rights (UNGPs) embodying the idea of polycentric governance (OHCHR 2011). It also assesses the influence of the UNGPs on the regulatory landscape at various levels and the effectiveness of national action plans

(NAPs) on BHR to implement the UNGPs. The next two sections then analyze the emerging resurgence in the role of state-based binding regulation unfolding at national, regional, and international levels. Section 3 examines two strands of extraterritorial regulation: one emanating from the direct duty of care jurisprudence of the courts in the United Kingdom, and the other related to the surge in the demands as well as the enactment of mandatory human rights due diligence (HRDD) legislation, especially in Europe. Section 4 reviews the current process of negotiating a legally binding international instrument to regulate corporations. Section 5 analyzes the relatively recent push to reorient the role and purpose of corporations in society by reforming corporate laws, whereas Section 6 investigates the potential of trade and investment agreements in promoting business respect for human rights. Finally, Section 7 draws general conclusions and offers some thoughts about what ought to happen to ensure that human rights become a nonnegotiable precondition for doing business.

Because of space constraints, it is not feasible to engage with all alternative regulatory approaches and the relevant literature in the fields of BHR, corporate social responsibility (CSR), and business ethics. This article focuses only on five prominent regulatory strands. At least two other regulatory approaches have potential but are not discussed here. The first is the use of public procurement by state agencies to incentivize responsible business conduct (Martin-Ortega & O'Brien 2019). The second is the role of various market variables, such as consumers, investors, benchmarks, financial institutions, stock exchanges, and civil society organizations (CSOs), in pressuring corporations to respect human rights throughout their operations (Ashman 2001; Invest. Alliance Hum. Rights 2020; Palazzo et al. 2016; PRI 2006; SSE Initiat. & WFE 2019; World Benchmarking Alliance 2019, 2020).

2. POLYCENTRIC GOVERNANCE: THE UNGPs AND EXISTING GOVERNANCE GAPS

The limited efficacy of traditional regulatory models has contributed to exploration of alternative regulatory theories and models. The rise of multi-stakeholder initiatives (MSIs) is one such example of different stakeholders coming together to find collective solutions to complex challenges. Van Tulder (2012, p. 8) notes, "Strategic alliances between civil society organizations (CSOs), corporations, citizens, research organisations and governments, show great potential in effectively addressing the (many) remaining societal issues of our time." According to Freeman (2020), "Beginning two decades ago, MSIs became cornerstones of the new global architecture to protect human rights and worker rights alongside trade unions, NGOs and local communities." Baumann-Pauly et al. (2017, p. 786) conclude that "industry-specific MSIs can, at least in principle, be a legitimate and effective approach to protect human rights." MSIs have become so popular that a review of global CSR standards developed during 1976–2015 revealed that "only a minority of standards were adopted *solely* by a state or an intergovernmental organization" (Kirkebo & Langford 2018, pp. 161–62).

However, doubts exist about the effectiveness of MSIs too. A major study concludes, "While MSIs can be important and necessary venues for learning, dialogue, and trust-building between corporations and other stakeholders—which can sometimes lead to positive rights outcomes—they should not be relied upon for the protection of human rights. They are simply not fit for this purpose" (MSI Integr. 2020, p. 4). MSIs can add value by facilitating dialogue, building trust, and allowing collaborative problem solving. All these outcomes are useful and may not be achievable in an adversarial or top-down regulatory process. Nevertheless, the key question to ask about MSIs' suitability should be: Suitable for whom—corporations or rights holders? The interests of corporations and rights holders may not often converge, and fitness for one may not be fitness for another.

Polycentric governance, which has received more attention in the BHR field after the adoption of the UNGPs, is another popular alternative to the old governance model. It "rests on the premise that the state by itself cannot do all the heavy lifting required to meet most pressing societal challenges and that it therefore needs to engage other actors to leverage its capacities" (Ruggie 2014, pp. 8–9). As the name itself indicates, polycentric governance combines various private and public governance systems "to add distinct value, compensate for one another's weaknesses, and play mutually reinforcing roles" (Ruggie 2013, p. 78).

Ruggie (2020, p. 74) invoked three governance systems that shape corporate conduct at the global level: (*a*) public law and governance at national and international levels; (*b*) corporate governance that shapes policies, including about risk management; and (*c*) civil governance involving various stakeholders concerned about the adverse impacts of business conduct. Whereas the first two systems correspond neatly to Pillars I and II of the UNGPs (the state duty to protect against human rights abuses by third parties and the business responsibility to respect human rights), it seems that civil governance is neither accommodated well within Pillar III (access to remedy) nor embedded deeply across the three pillars of the UNGPs (see Rodríguez-Garavito 2017b, pp. 23–31). This in fact led to demands for adding a fourth pillar concerning civil society's participation (Melish & Meidinger 2012).

The UNGPs have become the center of the regulatory universe in the BHR field. The following illustrative examples offer an indication of the impressive uptake of the UNGPs by a wide range of stakeholders as authoritative standards. The UNGPs have

- influenced the content of other international standards, such as the OECD (Organisation for Economic Co-operation and Development) Guidelines for Multinational Enterprises 2011 and the ILO (International Labour Organization) Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy 2017;
- informed the evolution of soft and hard norms at national levels, such as the Modern Slavery Acts of the United Kingdom and Australia, the French Duty of Vigilance Law, the Dutch Child Labor Act, and the Indian National Guidelines on Responsible Business Conduct;
- been embraced by numerous corporations and major industry associations in developing their policies;
- been used by investors, banks, and international financial institutions to set expectations for their clients;
- been invoked by CSOs in amicus briefs submitted in court cases; and
- impacted how bodies such as the International Olympic Committee and FIFA (International Federation of Association Football) govern mega-sport events.

In addition to influencing the evolution of standards and triggering actions on the part of a range of actors, the UNGPs have facilitated the socialization of human rights norms among nonstate actors, a prerequisite to ensuring that businesses respect human rights and remediate abuses. The UNGPs have also removed from discussion the "why" question in the BHR field: why businesses should respect human rights. The social expectations rationale the UNGPs advance may not be normatively very sound (Brenkert 2016, pp. 287–88; see also Deva & Bilchitz 2013). Yet, there is now a broad consensus that businesses have a responsibility to respect human rights. With a few exceptions (e.g., Hsieh 2015), hardly anyone (including businesses) is publicly defending Friedman's (1970) position that the only social responsibility of a business is to maximize its profits.

The UN Working Group on Business and Human Rights "strongly encourages all States to develop, enact and update" a NAP on BHR "as part of the State responsibility to disseminate and implement" the UNGPs (UNWG 2013). NAPs "are policy documents in which states outline

strategies and instruments to comply with their duty to prevent and redress corporate-related human rights abuse" in line with international human rights law (Augenstein et al. 2018, p. 2). NAPs could generate "coherence and synergy among the different governmental organs in charge of corporate regulation" as well as facilitate "governmental coordination to achieve a specific goal" (Cantú Rivera 2019, pp. 224–25). They could also "trigger government commitments to implement business and human rights standards" and achieve a "better 'vertical' alignment of national laws, policies, and institutional practices with international commitments" (O'Brien et al. 2016, p. 121).

As of the end of April 2021, 24 states had adopted a stand-alone NAP, and several others were in the process of doing so. However, what is often missing from NAPs is the action to fill regulatory gaps (see ICAR et al. 2017): Adopting a NAP in itself is seen by states as mission accomplished. Many NAPs do not specify concrete indicators and benchmarks, contain inadequate provisions to monitor the implementation, and do not make full use of the "smart regulatory mix" (Augenstein et al. 2018, pp. 6–11). NAPs are also struggling to achieve policy coherence among different government ministries and are unable to push for domestic legalization of business responsibility to respect human rights (Cantú Rivera 2019, pp. 226, 235).

Similar to states, businesses are increasingly becoming more aware of the UNGPs and HRDD to discharge their responsibility to respect human rights. However, it seems that not much has yet changed for the rights holders on the ground (see Martin et al. 2020). HRDD has become a box-ticking exercise to gain approval or legitimacy for business projects, and HRDD practices of even major transnational corporations (TNCs) leave much to be desired. A 2018 report concluded that "the majority of business enterprises around the world remain unaware, unable or unwilling to implement human rights due diligence as required of them in order to meet their responsibility to respect human rights" (UNWG 2018, para. 93). Similarly, in a 2019 benchmark, 49% of the 200 largest publicly traded companies scored 0 across all indicators related to HRDD (World Benchmarking Alliance 2019). A clear disconnect between corporations making a public commitment to respecting human rights and putting in place effective HRDD and remediation processes continues (World Benchmarking Alliance 2020, pp. 9–10).

Lack of tangible progress in businesses walking the talk on HRDD has led to the momentum for mandatory legislation in Europe and other parts of the world, even though Pillar II of the UNGPs was not intended to be legally binding. These gaps in implementing the UNGPs (coupled with limitations inherent in them; see Deva & Bilchitz 2013) have also fueled the Treaty Alliance's campaign for a legally binding international instrument. The current state of play regarding these two regulatory initiatives is discussed below.

Through the UNGPs, Ruggie had hoped to shift the narrative in the BHR field from naming and shaming to knowing and showing. Although businesses would have preferred such a shift, it is unclear whether this has happened, or whether doing so is even feasible or desirable. In fact, there is a dynamic relation between the two strategies: Naming and shaming may, for example, compel businesses to know and show by conducting HRDD. However, the expectation to communicate/disclose how businesses address their human rights impacts with stakeholders as part of HRDD may trigger more naming and shaming. After all, HRDD processes "only have value to the extent that they continually make business managers more open to critique by local and international activists as well as 'victims' of their whole model of business decision-making and its substantive results" (Parker & Howe 2012, p. 275). However, the fear of a backlash may discourage businesses from disclosing information publicly, thus posing a serious dilemma.

Global law generated through the lens of polycentric governance may end up becoming "the antithesis of the orderliness" (Backer 2012, p. 181). To avoid a scenario in which businesses operate in a jungle of regulatory chaos or there is a collision of regimes, Ruggie and others made

concerted efforts to align other BHR standards with the UNGPs. However, this process created another problem: The push for unifying polycentricity resulted in a glossing over of limitations and deficiencies of the UNGPs and in turn stifled the evolution of more ambitious standards.

Moreover, if states must invoke various levers within their domain—e.g., reform of corporate law, use of public procurement as incentives, and mandatory HRDD—to bring a change in corporate governance, one wonders whether the UNGPs are really illustrative of polycentric or state-centric governance in practice. In short, although governance gaps may not be filled by states alone, the relevance of state action should not be glossed over (see Simons & Macklin 2014). Part of the solution to the problem of weak state action is perhaps to explore ways to reinforce such action, rather than focusing mostly on alternatives to state action.

3. GOING EXTRATERRITORIAL: MANDATORY HUMAN RIGHTS DUE DILIGENCE LEGISLATION AND PARENT CORPORATIONS' DIRECT DUTY OF CARE

International law is built on the bedrock of the national sovereignty of states (Gaeta et al. 2020, pp. 49–52). Subject to certain exceptions, prescriptive jurisdiction of states is territorial. International human rights law generally follows this state-centric and territorial orientation. At the same time, business operations have been transnational for at least a few centuries. The operations across Asia of the British East India Company, which was established in 1600, provide an example (Dalrymple 2019). In recent times, operations of corporations have become truly global, with complex group structures and long supply chains spreading all over the world. This asymmetry between territorial laws and extraterritorial business operations, as well as abuses, is one of the reasons for the current regulatory gaps. The emergence of e-commerce, the gig economy, and the Fourth Industrial Revolution is likely to exacerbate these gaps in state-based territorial regulation of business.

We should consider a scholarly case for extraterritorial regulation of corporate behavior—especially by home states of TNCs—against this backdrop (Buhta 2016; Cassel 2020; Coomans & Kamminga 2004; Deva 2004a, 2012b; Gibney & Skogly 2010; McCorquodale & Simons 2007; Narula 2013; Simons & Macklin 2014; Skogly 2004). Cassel (2020, p. 200) prefers the term transnational over extraterritorial because activities of multinational corporations "are neither purely domestic nor entirely extraterritorial, but transnational." Although the label of transnational regulation may appear less problematic, it does not avoid objections inherent in regulating conduct outside one's physical territory.

Extraterritorial regulation by states, which could have prescriptive, adjudicative, and/or enforcement dimensions (Bernaz 2013, pp. 495–96), remains controversial. Nevertheless, it is invoked frequently in many areas, such as environmental pollution, tax evasion, terrorism, national security, money laundering, anticorruption, human trafficking, and anticompetitive behavior. A relatively recent addition to this growing list of areas is modern slavery and other business-related human rights abuses. Prescriptive extraterritorial legislation in the BHR field could be justified on the basis of the nationality principle, the protective principle, and the universality principle (Cassel 2020, pp. 201–6; Deva 2012b, pp. 1082–84).

Despite an emerging practice of extraterritorial regulation (indicating that states have a right to act extraterritorially in certain situations), heated debate continues among scholars about whether states have a duty to do so under international human rights law. A commentary to Principle 2 of the UNGPs provides a diplomatic answer to this question: "At present States are not generally required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction. Nor are they generally prohibited from doing so,

provided there is a recognized jurisdictional basis." De Schutter (2015, p. 45) argues that this is one area where the UNGPs "set the bar clearly below the current state of international human rights law." Ruggie might have paid "insufficient attention to the differences in the language of human rights treaties" (Knox 2012, p. 79). Cassel (2020, p. 198), in contrast, notes, "International law today broadly permits, generally encourages, and sometimes obligates states to exercise jurisdiction over transnational business activities."

Such a diversity in views may be due to the varied language of human rights treaties and diverse position taken by states (Cassel 2020, pp. 211–19). However, there seems to be a growing body of jurisprudence expecting states to regulate extraterritorially to discharge fully their tripartite human rights obligations. In addition to the Maastricht Principles adopted by a group of experts in 2011 (ETO Consort. 2011), the Committee on Economic, Social and Cultural Rights in its General Comment No. 24 unequivocally stated that "obligations under the Covenant did not stop at their territorial borders" (UNCESCR 2017, para. 26). Concluding observations of several treaty bodies also go in this direction (Cassel 2020, pp. 217–19; De Schutter 2015, pp. 45–46).

After examining all these developments and potential sources underpinning an obligation of states to act extraterritorially, O'Brien (2018, p. 72) concludes that "at present, there cannot be said to exist any positive legal basis for such a duty." It seems that O'Brien, similar to Ruggie, maintains a sharp distinction between the is and ought of international human rights law. However, as Bilchitz (2013, pp. 110–17) argues, this position pays inadequate attention to how international law develops. For international human rights to remain relevant in the twenty-first century, it should evolve as per the changing needs to protect human rights outside territorial boundaries in appropriate situations. Failure to recognize extraterritorial obligations on the part of states would have serious consequences because actions (or omissions) originating in one's territory could have serious consequences on the human rights of people outside the territory. Hate speech on social media platforms or business practices ignoring climate change, for example, show how a regulatory model of watertight territorial compartments is unsuitable.

The US Supreme Court has almost shut the door on the creative extraterritorial use of the 1789 Alien Tort Claims Act to pursue United States–based corporations for human rights abuses linked to their overseas operations (Dodge 2018, Stephens 2020). Nevertheless, two parallel strands of extraterritorial regulation are emerging in the BHR field, one legislative and the other judicial. The legislative strand includes HRDD legislation of varied types (ECCJ 2018), e.g., disclosure or transparency regulations (Mares 2018, Martin 2020), such as modern slavery laws in the United Kingdom and Australia (Nolan & Boersma 2019), and HRDD regulations, such as the 2017 Duty of Vigilance Law in France and the 2019 Child Labor Due Diligence Act in the Netherlands (Cossart et al. 2017).

The judicial strand of extraterritoriality, in contrast, is anchored in courts' recognition that parent corporations could have a direct duty of care toward individuals or communities affected by operations of their subsidiaries in certain circumstances (see Cassel 2016, Van Ho 2020). For example, the UK Supreme Court in *Vedanta Resources PLC v Lungowe* (2019, para. 49) held that "the liability of parent companies in relation to the activities of their subsidiaries is not, of itself, a distinct category of liability in common law negligence," and everything "depends on the extent to which, and the way in which, the parent availed itself of the opportunity to take over, intervene in, control, supervise or advise the management of the relevant operations (including land use) of the subsidiary." The liability under the direct duty of care principle—which in effect avoids the need to pierce the corporate veil—may also arise for omissions (para. 53). Although this principle is not inherently extraterritorial in nature [e.g., *Chandler v Cape* (2012)], it has been invoked mostly to hold parent corporations accountable for their overseas human rights abuses [e.g., *Choc v Hudbay Minerals Inc.* (2013), *Vedanta Resources PLC v Lungowe* (2019), *Esther Kiobel v Royal Dutch Shell PLC*

(2019), *Okpabi v Royal Dutch Shell Plc* (2021), *Nevsun Resources Ltd. v Araya* (2020)]. In most of these cases, human rights abuses occurred in countries with bigger regulatory gaps.

Although debate continues about what exactly HRDD means in practice for states and businesses (e.g., Bonnitcha & McCorquodale 2017, Ruggie & Sherman 2017), mandatory HRDD legislation as a new avatar of domestic regulation is here to stay in the BHR field. What is less clear is the efficacy of such regulation in both preventing and remedying business-related human rights abuses. For example, if a mandatory HRDD legislation merely imposes an "obligation of means" rather than an "obligation of result," creates a "safe harbor" exception, or does not provide for an option to seek remedies for abuses, it might end up triggering mechanical legal compliance and not bringing fundamental changes to how businesses are run. CSOs are, therefore, calling upon the European Union to introduce a due diligence legislation "with a strong liability and enforcement regime, which is fit for purpose to hold companies accountable, prevent and mitigate further corporate abuse, enable access to justice for victims, and, ultimately, build an equitable world where people and planet are put before profit" (Cranston et al. 2020, p. 36). It remains to be seen how the European Commission will balance these civil society demands with avoiding placing an unnecessary burden on Europe-based businesses, especially when not all businesses operating outside of Europe may have similar legal obligations.

Similarly, although tort litigation against corporations may advance the BHR agenda despite corporations not being held accountable (Schrempf-Stirling & Wettstein 2017), the case-by-case judicial determination of the existence of a direct duty of care should not be seen as a panacea, because such a route may not be available in all cases of business-related human rights abuses. This route is also likely to entail a long and costly legal battle that many victims and their lawyers may not be able to afford. Moreover, *Vedanta*'s direct duty of care principle poses a dilemma: If corporations adopt a hands-off approach toward their subsidiaries, they may not be able to operate in line with Pillar II of the UNGPs; however, if they proactively conduct HRDD throughout their operations, this may enhance risks of direct legal liability for abuses by subsidiaries (see Nestor & Drimmer 2019).

4. BACK ON THE TREATY ROAD: ANOTHER ATTEMPT TO NEGOTIATE A LEGALLY BINDING INTERNATIONAL INSTRUMENT

So far, three attempts have been made at the UN level to negotiate a legally binding international instrument to regulate the activities of (transitional) corporations. The first two attempts—the 1990 Draft UN Code of Conduct on Transnational Corporations and the 2003 Draft UN Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with Regard to Human Rights—failed to materialize owing to lack of consensus between developed and developing states, as well as corporate resistance to the very idea of binding corporate obligations under international law (Deva 2004b, Hamdani & Ruffing 2015, Kinley & Chambers 2006, Moran 2009, Sauvant 2015, Weissbrodt & Kruger 2003). Neither these failures nor the adoption of the UNGPs has prevented the third push for a binding international instrument in the BHR field. This shows at least three things: First, whatever other regulatory initiatives have been tried do not offer an acceptable level of efficacy in preventing and remedying corporate human rights abuses; second, there is a constant demand for legalization of human rights obligations of business at the international level; and third, the demand for an international treaty is not being met because of lack of political will on the part of many states.

The third attempt began in June 2014, with the UN Human Rights Council adopting a resolution to establish an open-ended intergovernmental working group "to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of

transnational corporations and other business enterprises" (UNHRC 2014, para. 1). Is the current third attempt any different from its two predecessors? There are several differentiating elements. For instance, unlike the previous two attempts, the third attempt can use the UNGPs as a springboard to build political consensus more easily. There is also a new global civil society alliance—the Treaty Alliance—to counterbalance corporate lobbying against the proposed treaty. Moreover, an emerging practice, or series of proposals, of mandatory HRDD in Europe signifies that nonbinding approaches alone will never suffice to motivate businesses to take human rights seriously. At the same time, it seems that the political divisions among states have not changed much in the last five decades (the June 2014 resolution was adopted by a recorded vote of 20 to 14, with 13 abstentions), though there has been a significant change in TNCs' states of origin.

Despite significant opposition from developed countries and business associations, the current treaty process has continued, with an annual session in Geneva and three drafts released so far. Serious divisions remain about both the process and desirability of an international treaty and its scope and content. Regarding the former, concerns are that the treaty will break consensus around the UNGPs or divert attention from their implementation and that negotiating a treaty would take too long. There are also differences in opinion about the scope and content of the proposed treaty: whether it should apply only to TNCs or to all business enterprises, what human rights it should cover, whether it should impose direct obligations on businesses, what should be the extent of HRDD obligations, what should be the relation of this treaty with past or future trade and investment agreements, and how to overcome barriers to access to remedy for corporate human rights abuses.

Ruggie (2007, p. 839) admits the role of international legal instruments in promoting business respect for human rights, but only "as carefully crafted precision tools." For him, adopting a comprehensive treaty to impose human rights obligations on businesses in a top-down fashion is reflective of the old governance model (Ruggie 2014, p. 8). However, the narrow or wide focus of a treaty alone should not really change its regulatory governance character. Despite problems with the efficacy of human rights treaties generally, they can still promote respect for human rights (Goodman & Jinks 2003). The same could be said about a BHR treaty (Bilchitz 2016, De Schutter 2015, Deva & Bilchitz 2017). Although such a treaty cannot fill all the existing regulatory gaps, it could still be a vital part of an effective regulatory ecosystem. It may, for example, build peer pressure and allow independent assessment of domestic situations by a treaty body (Carraro 2019). A BHR treaty could also clarify elements of states' duty to protect against human rights abuses by businesses, harmonize evolution of mandatory HRDD laws, empower CSOs vis-à-vis businesses (Melish 2017, pp. 93–94), and improve access to remedy for victims of corporate human rights abuses by facilitating mutual legal assistance and international cooperation among states.

Despite these potential benefits of a BHR treaty, securing even a "thin state consent" (Pauwelyn et al. 2014, p. 748) might not be easy for such a treaty. In addition to the contentious process and substance of the BHR treaty, traditional or formal international lawmaking may also be facing stagnation in recent times (Pauwelyn et al. 2014). Moreover, we know that despite civil society advocacy and reform options being on the table for several years (FRA 2017, Skinner et al. 2013), states have not shown much appetite or urgency to remove barriers to access effective remedies and hold corporations accountable for human rights abuses.

Therefore, lack of political commitment to introduce and enforce binding norms regulating business conduct is a real issue. Yet, several strategies could be employed to enhance the chances of bringing the third attempt to fruition. The treaty should build on the UNGPs and other soft international standards to develop consensus. Instead of micromanaging, the text should stipulate broad provisions in terms of various state obligations, and the treaty body could elaborate in due course the constructive ambiguity in the treaty provisions. Building stakeholder consensus

bottom up in smaller groups at regional levels between two sessions in Geneva, as well as building a coalition of corporations and investors supporting binding rules at national or regional levels, should also help. Moreover, the treaty should ride on the high tide of mandatory HRDD laws in Europe to create a level field for businesses globally and leave out politically infeasible issues, such as establishing an international court.

What about the proposed treaty imposing direct human rights obligations on businesses? Direct obligations may be desirable to reduce overdependency on individual states to create and enforce norms. They should also be normatively feasible under international law, because TNCs' status as subjects of international law "is neither a necessary, nor a sufficient conduction for accountability mechanisms to develop at international level" (De Schutter 2014, p. 468; see also Reinisch 2005). In fact, corporations already have direct obligations under customary international law, as well as certain instruments under environmental or international humanitarian law (Wilson 2006, pp. 51–53).

5. CHANGE FROM THE INSIDE: REDEFINING THE ROLE AND PURPOSE OF BUSINESS IN SOCIETY

"Company law has for far too long has [sic] been left out of the discussion of how to improve the impact business has on society" (Sjåfjell 2020, p. 182). However, in recent years, scholars have started paying greater attention to changing business behavior from the inside, that is, changing rules governing how businesses run their day-to-day affairs, take decisions, and interact with various stakeholders (Deva 2011, Dine 2005, Ireland 2010, Muchlinski 2012, Ruggie 2013, Sjåfjell 2020). This could be regarded as a type of reflexive regulation, in that regulation is trying "to influence the internal decision-making of business firms. . .through indirect approaches, rather than direct regulating of specific behavior or performance" (Orts 2013, p. 227).

Several aspects of corporate laws are considered problematic from a human rights perspective. For example, the "logic of the shareholder primacy perspective encourages the exploitation of regulatory and governance gaps" (Arnold 2016, p. 271). This means that corporations or their directors are rarely obliged expressly to consider interests of non-shareholders (Ruggie 2013, p. 133). Moreover, the corporate misuse of the twin principles of separate legal personality and limited liability to deny, delay, or altogether avoid liability for human rights abuses is well documented (Amnesty Int. 2014, Blumberg 2002). Another problem is the "ability of business enterprises currently to shield their directors, managers, and other employees from potential liability for contracts, torts, and other civil statutory damages" (Orts 2013, p. 151). Lack of personal liability for corporate officials operates as a major obstacle to deterring them from making decisions resulting in human rights abuses. Moreover, the "commodification of labor" and "abstraction of business from society" (Sjåfjell 2020, pp. 180–81) are other parts of the corporate law problem.

Various options have been mooted or tried to limit the unjust effects of some of these principles or elements. Corporate laws have been amended in countries like the United Kingdom and India to impose duties on directors to consider interests of employees, the community, and the environment (Deva 2012c). However, the imposition of such holistic duties as part of the enlightened shareholder theory seems to have changed little in practice (Sjåfjell 2020, p. 187). Similarly, although courts can lift or pierce the corporate veil in certain cases to disrobe the separate existence of a parent corporation to hold it accountable for abuses linked to its subsidiaries, in practice, doing so is very unpredictable, unprincipled, and inefficient. Courts also seem less keen to pierce the veil in tort cases as compared to breaches of contract or tax evasion (Thompson 1991). Moreover, as Orts (2013, p. 164) notes, "It is unlikely from an historical and economic perspective that the genie of limited liability for equity owners for torts will be forced back into the bottle."

What, then, are the options for victims of corporate human rights abuses? Enterprise liability has been proposed as a solution if certain conditions are satisfied (Blumberg 1996, 2002; Muchlinski 2010). However, the enterprise principle has not been embraced in practice in all regulatory areas across all world regions (Mares 2017). Ruggie (2013, p. 189) was also alive to the practical difficulties in adopting the enterprise principle. Therefore, rather than confronting the doctrine of separate legal personality, he tried to integrate human rights concerns into risk-management systems of business enterprises.

At this stage, three indirect approaches appear to dilute the effect of twin corporate law principles. The first is an increasing trend of requiring corporations to report or disclose about issues such as modern slavery, child labor, conflict minerals, climate change, gender equality, or ESG (environmental, social, and governance) generally. Such reporting/disclosure regimes, even if based on the comply-or-explain model, often capture entire corporate groups and supply chains, thus breaking strict legal separations. The second approach is the above-discussed mandatory HRDD laws: Without explicitly adopting the enterprise principle, this legal regime often requires corporations to manage adverse human rights risks throughout their operations (including subsidiaries, suppliers, and other business partners) (see Cossart et al. 2017). The third approach developed by common law courts is the imposition of a direct duty of care on parent corporations toward individuals affected by the activities of their subsidiaries in certain circumstances (Van Ho 2020).

These indirect approaches provide ad hoc interim relief with varying degrees of positive outcome. However, more fundamental changes to these principles, and corporate laws generally, are required to institutionalize disincentives for irresponsible corporate behavior, externalization of risks, and outsourcing of liability. Doing so is desirable not only to remove barriers to holding corporations accountable for human rights but also to stem the rising economic inequalities and concentration of wealth in selected hands.

It is in this context that we should see more recent demands to redefine the purpose of business in society. A 2020 report assessing the effectiveness of MSIs concludes,

> As long as corporations are primarily beholden to investors, not only will companies fail to adequately center vulnerable workers or communities in their business decisions, but they will also resist human rights initiatives that threaten their profits or power, and continue to run the unacceptable risk of making decisions that harm people and the planet. (MSI Integr. 2020, p. 225)

This project in a way seeks to bring us closer to how corporations were conceived historically as a social institution (Bakan 2004). Section 7(d) of South Africa's 2008 Companies Act somewhat follows this goal and reaffirms "the concept of the company as a means of achieving economic and social benefits."

In August 2019, the Business Roundtable, an association of chief executive officers of leading US corporations, articulated a new purpose of a corporation by committing to consider the interests of all stakeholders and by generating long-term value for shareholders (*Business Roundtable* 2019). Strikingly, this reconceptualization of the purpose of a corporation does not use the terms right or human rights even once. Arguably, the *Business Roundtable*'s declaration may be a rhetorical strategy to control BHR narratives (Deva 2020, pp. 7–8), meant mostly to create a "stakeholder capitalism" show (Bebchuk & Tallarita 2020) or indulge in "purpose-washing" (Ward & Bufalari 2020). In fact, "truly internalizing the meaning of their words would require [signatory CEOs] rethinking their whole business" (Winston 2019).

However, so far there are no significant signs of such fundamental changes taking place. Realizing this rhetoric might, for example, require integration of the purpose of business into the redefined duties of corporate directors (Sjåfjell 2020, p. 196). Moreover, such duties should be legally enforceable, even by non-shareholders in suitable cases. More fundamentally,

"challenging the corporation itself and reimagining our economic enterprises" may be required, e.g., placing workers and affected communities at the center of corporate decision making (MSI Integr. 2020, pp. 225–26). Doing so should help ensure that corporations become agents of creating an inclusive and sustainable society.

6. KNOCKING ON THE TRADE-INVESTMENT DOOR: HARNESSING THE POWER OF TRADE AND INVESTMENT AGREEMENTS

Trade and investment agreements are becoming the new frontier in promoting business respect for human rights. Like corporate law, this regulatory approach moves beyond the human rights law compartment to effect change in corporate behavior.

International investment agreements (IIAs)—negotiated mainly in a bilateral setting—have been conceived primarily as a tool to attract foreign investment and protect rights of foreign investors. However, in recent years, the adverse impact of IIAs on states' ability to realize human rights has been a matter of significant debate and calls for reform (Al Faruque 2010; Choudhury 2017, 2020; George & Thomas 2018; Hindelang & Krajewski 2016; UNCTAD 2018). For example, by conferring legally enforceable rights on investors, which are not generally subjected to human rights obligations under international law, IIAs worsen the existing asymmetry between corporate rights and obligations. Moreover, IIAs could create conflicts with states' obligations under international human rights law by constraining the regulatory space of states and creating barriers in access to remedy for communities affected by investment-related projects (Coleman et al. 2020, pp. 292–300). The asymmetry concerning investor rights and obligations, or the privileged justice offered to investors by the investor-state dispute settlement mechanism, is becoming increasingly indefensible in times of COVID-19 (Davitti et al. 2020).

How could greater coherence be achieved between international human rights law and international investment law? In 2017, Muchlinski (2017, p. 349) noted that to date, "human rights issues have made relatively little impact on the content of international investment law." Krajewski (2020, p. 128) further observed that "it seems unlikely that investor obligations to respect human rights will emerge in the foreseeable future in international treaty-making." Despite such cautionary assessments, at least three developments are changing the landscape of investors' human rights responsibility. First, the policy recommendations made by the UN Conference on Trade and Development (UNCTAD) from 2015 onward to reform IIAs are already having some impact in reforming old, and negotiating more balanced new, IIAs. For instance, most of the IIAs concluded in 2019 contain reform features—from preserving states' regulatory space to adopting a sustainable development orientation and modifying the investor-state dispute settlement mechanism (UNCTAD 2020, pp. 6–8). It is also "expected that the postpandemic period will witness an acceleration of countries' efforts to reform their IIAs to ensure their right to regulate in the public interest, while maintaining effective levels of investment protection" (p. 5).

Second, the UNGPs are finding their way in a few model bilateral investment agreements (Seif 2020). Alternatively, some states have started making a political commitment to reform/rebalance IIAs in their NAPs. In due course, this may result in a greater recognition of the human rights responsibility—if not obligation—of investors.

Third, evolution of mandatory HRDD laws and/or the direct duty of care of parent corporations discussed above will mean that investors (as well as arbitrators deciding disputes between states and investors) must start taking cognizance of increasing social and legal expectations from investors to respect human rights throughout their operations (Krajewski 2020).

Although the fate of the proposed BHR treaty is uncertain, it may also assist in rebalancing IIAs. It could, for example, obligate states to ensure that existing as well as future IIAs are

compatible with their international human rights obligations. States may be required to conduct an ex ante human rights impact assessment of IIAs in meaningful consultation with all stakeholders and expressly include investors' human rights obligations in their IIAs. Alternatively, the BHR treaty may stipulate that states require investors to conduct HRDD as per international standards. A more ambitious BHR treaty could provide an avenue for affected communities to seek remedy against corporations for investment-related human rights abuses (Muchlinski 2017, p. 371), either by creating a mechanism under IIAs (George & Thomas 2018, pp. 446–49) or by subjecting investors to domestic remedy mechanisms in both host and home states as a precondition for the protection of their investment (Choudhury 2017, pp. 472–74).

7. CONCLUSION

From a critical review of selected alternative approaches to transnational regulation of business, several conclusions and insights for the future can be drawn. First, the influence of the UNGPs, embodying polycentric governance, on diverse regulatory pathways is clear. What is less clear is whether UNGP-induced approaches will bring systemic changes needed to humanize business. For example, mandatory HRDD laws might end up becoming a tick-box compliance exercise with no effective remedy for victims of corporate human rights abuses. Caution should also be taken that the UNGPs are invoked neither to stop legalization of soft norms at national, regional, and international levels nor to freeze evolution of more ambitious standards in future.

Second, although there is admittedly "no single silver bullet solution to business and human rights challenges" (Ruggie 2010), even multiple bullets—as part of a "multi-channel perspective" to deliver a "strong rope from weak strands" (Mares 2017, pp. 295–96)—seem unable to achieve a reasonable level of effectiveness in preventing, remedying, and deterring human rights abuses by businesses.

Third, it seems that states remain a critical, if not central, player in guiding business behavior, even in polycentric governance or non-state-centric regulatory approaches. For example, transparency and disclosure rules by state agencies enable market actors like consumers, investors, and CSOs to assume a regulatory role. At the same time, states continue to show lack of political will, at both individual and collective levels, in regulating business behavior effectively. They often act incohesively and put profit (i.e., creating a business- and investment-friendly environment) over people and the planet (i.e., building an inclusive and sustainable society). Instead of accepting the currents deficits in political will or focusing attention mainly on developing and improving non-state regulatory regimes, multiple strategies should be employed to build the necessary political will, as "political and economic constraints can be overcome" to boost up states' commitment (Kirkebo & Langford 2018, p. 182).

Fourth, although obligations, binding state norms, and accountability are central to BHR in comparison to CSR (Ramasastry 2015), rights in BHR do not really mean legally enforceable rights on paper or in practice. Going forward, regulatory approaches should respond to the needs of rightsholders rather than deliver what is acceptable to businesses. Moreover, barriers to access to remedy and corporate accountability, as illustrated by the 1984 Bhopal gas disaster (Baxi & Paul 1986), must be overcome by collective action at regional and international levels (FRA 2017).

Fifth, assuming that most businesses are rational actors, different regulatory approaches should be employed in tandem to make corporate human rights abuses a costly business. A range of incentives and disincentives should also be employed to change the corporate culture that gives priority to profit over people and the planet. Corporate laws will be vital in internalizing human rights in all business decision-making processes.

Sixth, greater attention should be paid to the role of businesses to protect and fulfil human rights, rather than merely respect human rights. Equally critical will be to focus on corporate

responsibility for abuses of socioeconomic rights (Černič 2018), contributing to poverty (Meyersfeld 2017) or tax evasion (Darcy 2017). The COVID-19 pandemic has exposed many inequalities and vulnerabilities that would not be overcome by merely adopting a do-no-harm approach.

Seventh, developing an effective transnational framework combining various regulatory strands in the BHR field requires more clarity on several issues. How will soft social expectations under Pillar II of the UNGPs interact with hard HRDD regulations and legalization of business responsibility to respect human rights on the regional or international level? Should businesses have an obligation of result in certain situations, and should conducting HRDD operate as a defense to legal liability? In what circumstances, and how, could states be held accountable for breach of their duty to protect against human rights abuses by businesses? How to deal with hard cases of corporate impunity in the BHR field, situations in which there is no obvious business case to respect human rights and the concerned states are unable or unwilling to hold the relevant business actors accountable?

Regulatory approaches in the BHR field are at a critical crossroads. The next decade will perhaps be critical in determining whether BHR will end up becoming a new form of CSR and turn into "the business of human rights" (Deva 2020, pp. 5–10) or bring transformative changes to how business is done. Major challenges in the form of poverty and economic inequality (Oxfam Int. 2020), climate change (Seck 2017), artificial intelligence (Desierto 2020, Risse 2018), and the financialization and commodification of human rights (Birchall 2019) are knocking on the doors of humanity. Tackling such challenges requires transformative changes to the interface of business with human rights and society. This may not be easy, as corporations have "the tendency. . .not to change in fundamental ways based on international norms" (Scheper 2015, p. 751). Yet, some of the ideas articulated here might help in taking baby steps towards this goal.

DISCLOSURE STATEMENT

The author has been a member of the UN Working Group on Business and Human Rights since May 2016. The views expressed here are the personal opinion of the author.

LITERATURE CITED

Al Faruque A. 2010. Mapping the relationship between investment protection and human rights. *J. World Invest. Trade* 11:539–60

Amnesty Int. 2014. *Injustice Incorporated: Corporate Abuses and the Human Right to Remedy*. London: Amnesty Int.

Arnold DG. 2016. Corporations and human rights obligations. *Bus. Hum. Rights J.* 1:255–75

Ashman D. 2001. Civil society collaboration with business: bringing empowerment back in. *World Dev.* 29:1097–113

Augenstein D, Dawson M, Thielbörger P. 2018. The UNGPs in the European Union: The open coordination of business and human rights? *Bus. Hum. Rights J.* 3:1–22

Ayres I, Braithwaite J. 1992. *Responsive Regulation: Transcending the Deregulation Debate*. New York: Oxford Univ. Press

Backer LC. 2010. *Governance without government: an overview and application of interactions between law-state and governance-corporate systems*. Work. Pap., Legal Stud. Res. 10–2010, Pa. State Univ., Philadelphia. **https://ssrn.com/abstract=1568934**

Backer LC. 2012. The structural characteristics of global law for the 21st century: fracture, fluidity, permeability, and polycentricity. *Tilburg Law Rev.* 17(2):177–99

Bakan J. 2004. *The Corporation: The Pathological Pursuit of Profit and Power*. New York: Free

Baumann-Pauly D, Nolan J, Van Heerden A, Samway M. 2017. Industry-specific multi-stakeholder initiatives that govern corporate human rights standards: legitimacy assessments of the Fair Labor Association and the Global Network Initiative. *J. Bus. Ethics* 143:771–87

Baxi U, Paul T. 1986. *Mass Disasters and Multinational Liability: The Bhopal Case*. Bombay: NM Tripathi Pvt. Ltd.

Bebchuk L, Tallarita R. 2020. "Stakeholder" capitalism seems mostly for show. *Wall Street Journal*, Aug. 6. **https://www.wsj.com/articles/stakeholder-capitalism-seems-mostly-for-show-11596755220**

Bernaz N. 2013. Enhancing corporate accountability for human rights violations: Is extraterritoriality the magic potion? *J. Bus. Ethics* 117:493–511

Bernaz N. 2016. *Business and Human Rights: History, Law and Policy—Bridging the Accountability Gap*. Abingdon, UK: Routledge

Bilchitz D. 2013. A chasm between "is" and "ought"? A critique of the normative foundations of the SRSG's Framework and the Guiding Principles. See Deva & Bilchitz 2013, pp. 107–37

Bilchitz D. 2016. The necessity for a business and human rights treaty. *Bus. Hum. Rights J.* 1:203–27

Birchall D. 2019. Human rights on the altar of the market: the Blackstone letters and the financialisation of housing. *Transnatl. Legal Theory* 10:446–71

Black J. 1997. *Rules and Regulators*. Oxford, UK: Clarendon

Blumberg P. 1996. The increasing recognition of enterprise principles in determining parent and subsidiary corporation liabilities. *Conn. Law Rev.* 28:295–346

Blumberg P. 2002. Asserting human rights against multinational corporations under United States law: conceptual and procedural problems. *Am. J. Comp. Law* 50:493–529

Bonnitcha J, McCorquodale R. 2017. The concept of 'due diligence' in the UN Guiding Principles on Business and Human Rights. *Eur. J. Int. Law* 28:899–919

Braithwaite J, Drahos P. 2000. *Global Business Regulation*. Cambridge, UK: Cambridge Univ. Press

Brenkert GG. 2016. Business ethics and human rights: an overview. *Bus. Hum. Rights J.* 1:277–306

Buhmann K. 2009. Regulating corporate social and human rights responsibilities at the UN plane: Institutionalising new forms of law and law-making approaches? *Nordic J. Int. Law* 78:1–52

Buhta N, ed. 2016. *The Frontiers of Human Rights. Extraterritoriality and Its Challenges*. Oxford, UK: Oxford Univ. Press

Business Roundtable. 2019. Business Roundtable redefines the purpose of a corporation to promote "an economy that serves all Americans." *Business Roundtable*, Aug. 19. **https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans**

Cantú Rivera H. 2019. National action plans on business and human rights: Progress or mirage? *Bus. Hum. Rights J.* 4:213–37

Carraro V. 2019. Promoting compliance with human rights: the performance of the United Nations' Universal Periodic Review and treaty bodies. *Int. Stud. Q.* 63:1079–93

Cassel D. 2016. Outlining the case for a common law duty of care of business to exercise human rights due diligence. *Bus. Hum. Rights J.* 1:179–202

Cassel D. 2020. State jurisdiction over transnational business activity affecting human rights. See Deva & Birchall 2020, pp. 198–222

Černič LJ. 2018. *Corporate Accountability Under Socio-Economic Rights*. Abingdon, UK: Routledge

Chandler v Cape PLC, [2012] EWCA Civ. 525

Choc v. Hudbay Minerals Inc. (2013) ONSC 1414

Choudhury B. 2017. Spinning straw into gold: incorporating the business and human rights agenda into international investment agreements. *Univ. Pa. J. Int. Law* 38:425–81

Choudhury B. 2020. Investor obligations for human rights. *ICSID Rev.* 2020:siaa002. **https://doi.org/10.1093/icsidreview/siaa002**

Clapham A. 2006. *Human Rights Obligations of Non-State Actors*. Oxford, UK: Oxford Univ. Press

Coleman J, Cordes KY, Johnson L. 2020. Human rights law and the investment treaty regimes. See Deva & Birchall 2020, pp. 290–314

Coomans F, Kamminga M, eds. 2004. *Extraterritorial Application of Human Rights Treaties*. Antwerp, Belg.: Intersentia

Cossart S, Chaplier J, Beau De Lomenie T. 2017. The French law on duty of care: a historic step towards making globalization work for all. *Bus. Hum. Rights J.* 2:317–23

Cranston C, Domingo Ramos R, Ivers C, García Esteban A, Patz C, et al. 2020. *What if? Case studies of human rights abuses and environmental harm linked to EU companies, and how EU due diligence laws could help protect people and the planet*. Rep., Eur. Coalit. Corp. Justice, Brussels. **http://corporatejustice.org/wp-content/uploads/2021/03/asi_eccj_report_final.pdf**

Dalrymple W. 2019. *The Anarchy: The East India Company, Corporate Violence and the Pillage of an Empire*. London: Bloomsbury Publ.

Darcy S. 2017. "The elephant in the room": corporate tax avoidance & business and human rights. *Bus. Hum. Rights J.* 2:1–30

Davitti D, Ho J, Vargiu P, Yilmaz Vastardis A. 2020. COVID-19 and the precarity of international investment law. *Medium*, May 6. **https://medium.com/iel-collective/covid-19-and-the-precarity-of-international-investment-law-c9fc254b3878**

De Schutter O. 2014. *International Human Rights Law: Cases, Materials and Commentary*. Cambridge, UK: Cambridge Univ. Press

De Schutter O. 2015. Towards a new treaty on business and human rights. *Bus. Hum. Rights J.* 1:41–67

Desierto D. 2020. Human rights in the era of automation and artificial intelligence. *EJIL:Talk!*, Feb. 26. **https://www.ejiltalk.org/human-rights-in-the-era-of-automation-and-artificial-intelligence/**

Deva S. 2003. Human rights violations by multinational corporations and international law: Where from here? *Conn. J. Int. Law* 19:1–57

Deva S. 2004a. Acting extraterritorially to tame multinational corporations for human rights violations: Who should bell the cat? *Melb. J. Int. Law* 5:37–65

Deva S. 2004b. UN's human rights norms for transnational corporations and other business enterprises: An imperfect step in the right direction? *ILSA J. Int. Comp. Law* 10:493–523

Deva S. 2011. Sustainable development: What role for the company law? *Int. Comp. Corp. Law J.* 8:76–102

Deva S. 2012a. *Regulating Corporate Human Rights Violations: Humanizing Business*. Abingdon, UK: Routledge

Deva S. 2012b. Corporate human rights violations: a case for extraterritorial regulation. In *Handbook of the Philosophical Foundations of Business Ethics*, ed. C Luetge, pp. 1077–90. Dordrecht, Neth.: Springer

Deva S. 2012c. Socially responsible business in India: has the elephant finally woken up to the tunes of international trends? *Common Law World Rev*. 41:299–321

Deva S. 2020. From "business or human rights" to "business and human rights": What next? See Deva & Birchall 2020, pp. 1–21

Deva S, Bilchitz D, eds. 2013. *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* Cambridge, UK: Cambridge Univ. Press

Deva S, Bilchitz D, eds. 2017. *Building a Treaty on Business and Human Rights: Context and Contours*. Cambridge, UK: Cambridge Univ. Press

Deva S, Birchall D. 2020. *Research Handbook on Human Rights and Business*. Cheltenham, UK: Edward Elgar

Dine J. 2005. *Companies, International Trade and Human Rights*. Cambridge, UK: Cambridge Univ. Press

Dodge WS. 2018. Corporate liability under the US Alien Tort Statute: a comment on *Jesner v Arab Bank*. *Bus. Hum. Rights J.* 4:131–37

Donaldson T. 1989. *The Ethics of International* Business. New York: Oxford Univ. Press

Esther Kiobel v Royal Dutch Shell PLC, [2019] ECLI:NL:RBDHA:2019:4233

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

Eur. Coalit. Corp. Justice (ECCJ). 2018. *Key features of mandatory human rights due diligence legislation*. Position Pap., Eur. Coalit. Corp. Justice, Brussels

Eur. Union Agency Fundam. Rights (FRA). 2017. *Improving access to remedy in the area of business and human rights at the EU level: Opinion of the European Union Agency for Fundamental Rights.* Opin. 1/2017, FRA, Vienna

Freeman B. 2020. Rethinking MSIs: Time to bury MSIs?—Not so fast. *Human Rights@Harvard Law Blog*, Oct. 1. **https://hrp.law.harvard.edu/corporate-accountability/rethinking-msis-time-to-bury-msis-not-so-fast/**

Friedman M. 1970. The social responsibility of business is to increase its profits. *New York Times*, Sept. 13. **https://www.nytimes.com/1970/09/13/archives/a-friedman-doctrine-the-social-responsibility-of-business-is-to.html**

Gaeta P, Viñuales JE, Zappalá S. 2020. *Cassese's International Law*. Oxford, UK: Oxford Univ. Press

George E, Thomas E. 2018. Bringing human rights into bilateral investment treaties: South Africa and a different approach to international investment disputes. *Transnatl. Law Contemp. Probl.* 27:403–50

Gibney M, Skogly S. 2010. *Universal Human Rights and Extraterritorial Obligations*. Philadelphia: Univ. Pa. Press

Goodman R, Jinks D. 2003. Measuring the effects of human rights treaties. *Eur. J. Int. Law* 14:171–83

Gunningham N, Grabosky P, Sinclair D. 1998. *Smart Regulation: Designing Environmental Policy*. Oxford, UK: Clarendon

Haines F. 1997. *Corporate Regulation: Beyond "Punish" or "Persuade."* Oxford, UK: Clarendon

Hamdani K, Ruffing L, eds. 2015. *The United Nations Centre on Transnational Corporations: Corporate Conduct and the Public Interest*. Abingdon, UK: Routledge

Hindelang S, Krajewski M, eds. 2016. *Shifting Paradigms in International Investment Law: More Balanced, Less Isolated, Increasingly Diversified*. Oxford, UK: Oxford Univ. Press

Hsieh N-h. 2015. Should business have human rights obligations? *J. Hum. Rights* 14:2:218–36

Int. Corp. Account. Roundtable (ICAR), Eur. Coalit. Corp. Justice (ECCJ), Dejusticia. 2017. *Assessments of existing national action plans (NAPs) on business and human rights*. Assess., ICAR, ECCJ, Dejusticia. **https://static1.squarespace.com/static/583f3fca725e25fcd45aa446/t/599c543ae9bfdf40b5b6f055/1503417406364/NAP+Assessment+Aug+2017+FINAL.pdf**

Invest. Alliance Hum. Rights. 2020. *Human rights risks in Xinjiang Uyghur Autonomous Region: practical guidance for investors*. Publ., Invest. Alliance Hum. Rights. **https://investorsforhumanrights.org/publications/cover-human-rights-risks-xinjiang-uyghur-autonomous-region-practical-guidance**

Ireland P. 2010. Limited liability, shareholder rights and the problem of corporate irresponsibility. *Cambridge J. Econ.* 34:837–56

Kinley D, Chambers R. 2006. The UN Human Rights Norms for Corporations: the private implications of public international law. *Hum. Rights Law Rev*. 6:447–97

Kinley D, Tadaki J. 2004. From talk to walk: the emergence of human rights responsibilities for corporations at international law. *Va. J. Int. Law* 44:931–1023

Kirkebo TL, Langford M. 2018. The commitment curve: global regulation of business and human rights. *Bus. Hum. Rights J.* 3:157–85

Knox JH. 2012. The Ruggie rules: applying human rights law to corporations. See Mares 2012, pp. 51–83

Krajewski M. 2020. A nightmare or a noble dream? Establishing investor obligations through treaty-making and treaty-application. *Bus. Hum. Rights J.* 5:105–29

Locke RM, Rissing BA, Palet T. 2013. Complements or substitutes? Private codes, state regulation and the enforcement of labour standards in global supply chains. *Br. J. Ind. Relat.* 51:519–52

Mares R. 2012. *The UN Guiding Principles on Business and Human Rights: Foundations and Implementation*. Leiden, Neth.: Martinus Nijhoff Publ.

Mares R. 2017. Legalizing human rights due diligence and the separation of entities principle. See Deva & Bilchitz 2017, pp. 266–96

Mares R. 2018. Corporate transparency laws: A hollow victory? *Neth. Q. Hum. Rights* 36:189–213

Martin J. 2020. The use of disclosure-based regulation to advance the state duty to protect. See Deva & Burchall 2020, pp. 176–97

Martin J, Martin J, Van Ho TL, eds. 2020. *When Business Harms Human Rights: Affected Communities that Are Dying to Be Heard*. New York: Anthem

Martin-Ortega O, O'Brien CM. 2019. *Public Procurement and Human Rights: Opportunities, Risks and Dilemmas for the State as Buyer*. Cheltenham, UK: Edward Elgar

McCorquodale R, Simons P. 2007. Responsibility beyond borders: state responsibility for extraterritorial violations by corporations of international human rights law. *Mod. Law Rev.* 70:598–625

Melish TJ. 2017. Putting "human rights" back into the UN Guiding Principles on Business and Human Rights: shifting frames and embedding participation rights. See Rodríguez-Garavito 2017a, pp. 76–96

Melish TJ, Meidinger E. 2012. Protect, respect, remedy and participate: "new governance" lessons for the Ruggie framework. See Mares 2012, pp. 303–36

Meyersfeld B. 2017. Empty promises and the myth of mining: Does mining lead to pro-poor development? *Bus. Hum. Rights J.* 2:31–53

Monshipouri M, Welch C, Kennedy E. 2003. Multinational corporations and the ethics of global responsibility: problems and possibilities. *Hum. Rights Q.* 25:965–89

Moran TH. 2009. The United Nations and transnational corporations: a review and a perspective. *Transnatl. Corp.* 18:91–112

MSI Integr. 2020. *Not Fit-for-Purpose: The Grand Experiment of Multi-Stakeholder Initiatives in Corporate Accountability, Human Rights and Global Governance*. Berkeley, CA: MSI Integr. **https://www.traffickingmatters.com/wp-content/uploads/2020/08/MSI_Not_Fit_For_Purpose_FORWEBSITE.FINAL_.pdf**

Muchlinski P. 2010. Limited liability and multinational enterprises: A case for reform? *Cambridge J. Econ.* 34:915–28

Muchlinski P. 2012. Implementing the new UN Corporate Human Rights Framework: implications for corporate law, governance and regulation. *J. Bus. Ethics* 22:145–77

Muchlinski P. 2017. The impact of a business and human rights treaty on investment law and arbitration. See Deva & Bilchitz 2017, pp. 346–74

Muchlinski P, ed. 2021. *Multinational Enterprises and the Law*. Oxford, UK: Oxford Univ. Press

Narula S. 2013. International financial institutions, transnational corporations and duties of states. In *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law*, ed. Langford M, Vandenhole W, Scheinin M, Van Genugten W, pp. 114–50. Cambridge, UK: Cambridge Univ. Press

Nestor P, Drimmer J. 2019. How companies should respond to the Vedanta ruling. *BSR Blog*, April 30. **https://www.bsr.org/en/our-insights/blog-view/how-companies-should-respond-to-the-vedanta-ruling**

Nevsun Resources Ltd. v Araya, (2020) SCC 5

Nolan J, Boersma M. 2019. *Addressing Modern Slavery*. Sydney: UNSW Press

O'Brien CM. 2018. The home state duty to regulate the human rights impacts of TNCs abroad: a rebuttal. *Bus. Hum. Rights J.* 3:47–73

O'Brien CM, Mehra A, Blackwell S, Poulsen-Hansen CB. 2016. National action plans: current status and future prospects for a new business and human rights governance tool. *Bus. Hum. Rights J.* 1:117–26

Okpabi v Royal Dutch Shell Plc, [2021] UKSC 3

Orts EW. 2013. *Business Persons: A Legal Theory of the Firm*. Oxford, UK: Oxford Univ. Press

Oxfam Int. 2020. *Power, Profits and the Pandemic: From Corporate Extraction for the Few to an Economy that Works for All*. London, UK: Oxfam Int.

Palazzo G, Morhart F, Schremph-Stirling J. 2016. Shopping for a better world: how consumer decisions can help to promote sustainability and human rights. In *Business and Human Rights: From Principles to Practice*, ed. D Baumann-Pauly, J Nolan, pp. 200–9. Abingdon, UK: Routledge

Parker C. 2002. *The Open Corporation: Effective Self-Regulation and Democracy*. Cambridge, UK: Cambridge Univ. Press

Parker C, Howe J. 2012. Ruggie's diplomacy project and its missing regulatory infrastructure. See Mares 2012, pp. 273–301

Pauwelyn J, Wessel RA, Wouters J. 2014. When structures become shackles: stagnation and dynamics in international lawmaking. *Eur. J. Int. Law* 25:733–63

Princ. Responsible Invest. (PRI). 2006. *What are the Principles for Responsible Investment?* **https://www.unpri.org/pri/what-are-the-principles-for-responsible-investment**

Ramasastry A. 2015. Corporate social responsibility versus business and human rights: bridging the gap between responsibility and accountability. *J. Hum. Rights* 14:237–59

Ratner SR. 2001. Corporations and human rights: a theory of legal responsibility. *Yale Law J.* 111:443–545

Reinisch A. 2005. The changing international legal framework for dealing with non-state actors. In *Non-State Actors and Human Rights*, ed. P Alston, pp. 37–89. Oxford, UK: Oxford Univ. Press

Risse M. 2018. *Human rights and artificial intelligence: an urgently needed agenda*. Pap., Carr Cent. Hum. Rights Policy, Harvard Kennedy Sch., Cambridge, MA. **https://carrcenter.hks.harvard.edu/files/cchr/files/humanrightsai_designed.pdf**

Rodríguez-Garavito C, ed. 2017a. *Business and Human Rights: Beyond the End of the Beginning*. Cambridge, UK: Cambridge Univ. Press

Rodríguez-Garavito C. 2017b. Introduction: a dialogue across divides in the business and human rights field. See Rodríguez-Garavito 2017a, pp. 1–45

Ruggie JG. 2007. Business and human rights: the evolving international agenda. *Am. J. Int. Law* 101:819–40

Ruggie JG. 2010. *The "protect, respect and remedy framework": implications for the ILO*. Remarks, Int. Labour Conf., Geneva, June 3. **https://media.business-humanrights.org/media/documents/files/reports-and-materials/Ruggie-presentation-to-ILO-conference-3-Jun-2010.pdf**

Ruggie JG. 2013. *Just Business: Multinational Corporations and Human Rights*. New York: W.W. Norton & Co.

Ruggie JG. 2014. Global governance and "new governance theory": lessons from business and human rights. *Glob. Gov.* 20:5–17

Ruggie JG. 2020. The social construction of the UN Guiding Principles on Business and Human Rights. See Deva & Burchall 2020, pp. 63–86

Ruggie JG, Sherman JF III. 2017. The concept of 'due diligence' in the UN Guiding Principles on Business and Human Rights: a reply to Jonathan Bonnitcha and Robert McCorquodale. *Eur. J. Int. Law* 28:921–28

Sauvant KP. 2015. The negotiations of the United Nations Code of Conduct on Transnational Corporations: experience and lessons learned. *J. World Invest. Trade* 16:11

Scheper C. 2015. From naming and shaming to knowing and showing: human rights and the power of corporate practice. *Int. J. Hum. Rights* 19:737–56

Schrempf-Stirling J, Wettstein F. 2017. Beyond guilty verdicts: human rights litigation and its impact on corporations' human rights policies. *J. Bus. Ethics* 145:545–62

Seck SL. 2017. *Business responsibilities for human rights and climate change—a contribution to the work of the Study Group on Business and Human Rights of the International Law Association*. Work Pap., Dalhousie Univ., Halifax, Can. **https://ssrn.com/abstract=2974768**

Seif I. 2020. Business and human rights in international investment law: empirical evidence. In *Handbook of International Investment Law and Policy*, ed. J Chaisse, L Choukroune, S Jusoh. Singapore: Springer

Simons P, Macklin A. 2014. *The Governance Gap: Extractive Industries, Human Rights, and the Home State Advantage*. Abingdon, UK: Routledge

Sjåfjell B. 2020. How company law has failed human rights—and what to do about it. *Bus. Hum. Rights J.* 5:179–99

Skinner G, McCorquodale R, De Schutter O. 2013. *The third pillar: access to judicial remedies for human rights violations by transnational business*. Publ., Int. Corp. Account. Roundtable, Washington, DC

Skogly S. 2004. *Beyond National Borders: States' Human Rights Obligations in International Cooperation*. Antwerp, Belg.: Intersentia

Stephens B. 2020. The rise and fall of the Alien Tort Statute. See Deva & Burchall 2020, pp. 46–62

Sustain. Stock Exch. (SSE) Initiat., World Fed. Exch. (WFE). 2019. *How exchanges can embed sustainability within their operations: A blueprint to advance action*. Rep., SSE Initiat., WFE, Geneva. **https://sseinitiative.org/wp-content/uploads/2019/12/SSE-WFE-Embedding-Sustainability-Report.pdf**

Teubner G. 1983. Substantive and reflexive elements in modern law. *Law Soc. Rev.* 17:239–86

Thompson RB. 1991. Piercing the corporate veil: an empirical study. *Cornell Law Rev.* 76:1036–74

UN Comm. Econ. Soc. Cult. Rights (UNCESCR). 2017. *General comment No. 24 on state obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities*, Aug. 10. UN Doc. E/C. 12/GC/24

UN Conf. Trade Dev. (UNCTAD). 2018. *UNCTAD's Reform Package for the International Investment Regime*. Geneva: UNCTAD

UN Conf. Trade Dev. (UNCTAD). 2020. The changing IIA landscape: new treaties and recent policy developments. *IAA Issues Note*, July. **https://unctad.org/en/PublicationsLibrary/diaepcbinf2020d4.pdf**

UN Hum. Rights Counc. (UNHRC). 2014. *Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights*. UN Doc. A/HRC/RES/26/9. **https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/26/9**

UN Hum. Rights Off. High Commissioner (OHCHR). 2011. *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework (UNGPs)*. UN Doc. A/HRC/17/31

UN Work. Group Bus. Hum. Rights (UNWG). 2013. *State national action plans on Business and Human Rights*. **https://www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx**

UN Work. Group Bus. Hum. Rights (UNWG). 2018. *The report of the Working Group on the issue of human rights and transnational corporations and other business enterprises: corporate human rights due diligence—emerging practices, challenges and ways forward*. UN Doc. A/73/163

Van Ho T. 2020. Vedanta Resources Plc and Another v. Lungowe and Others. *Am. J. Int. Law* 114:110–16

van Tulder R. 2012. Foreword: the necessity of multi-stakeholder initiatives. In *Multistakeholder Initiatives: A Strategic Guide for Civil Society Organizations*, M van Huijstee, pp. 8–9. Amsterdam: SOMO

Vedanta Resources PLC v Lungowe, [2019] UKSC 20

Ward B, Bufalari V. 2020. *COVID-19 and inequality: a test of corporate purpose*. Rep., KKS Advis., Test Corp. Purpose, London. **https://c6a26163-5098-4e74-89da-9f6c9cc2e20c.filesusr.com/ugd/f64551_63f016a989db4dfeaa636d5a659d691a.pdf**

Weissbrodt D, Kruger M. 2003. Norms of the responsibilities of transnational corporations and other business enterprises with regard to human rights. *Am. J. Int. Law* 97:901–22

Wettstein F. 2009. *Multinational Corporations and Global Justice: Human Rights Obligations of a Quasi-Governmental Institution*. Stanford, CA: Stanford Bus. Books

Wilson AJ. 2006. Beyond *Unocal*: conceptual problems in using international norms to hold transnational corporations liable under the Alien Tort Claims Act. In *Transnational Corporations and Human Rights*, ed. O De Schutter, pp. 43–72. Oxford, UK: Hart Publ.

Winston A. 2019. Is the business roundtable statement just empty rhetoric? *Harvard Business Review*, Aug. 30. **https://hbr.org/2019/08/is-the-business-roundtable-statement-just-empty-rhetoric**

World Benchmarking Alliance. 2019. *Corporate Human Rights Benchmark: 2019 key findings*. Rep., World Benchmarking Alliance, Amsterdam. **https://www.corporatebenchmark.org/sites/default/files/2019-11/CHRB2019KeyFindingsReport.pdf**

World Benchmarking Alliance. 2020. *Corporate Human Rights Benchmark: 2020 key findings*. Rep., World Benchmarking Alliance, Amsterdam. **https://assets.worldbenchmarkingalliance.org/app/uploads/2020/11/WBA-2020-CHRB-Key-Findings-Report.pdf**

Zerk JA. 2006. *Multinational and Corporate Social Responsibility: Limitations and Opportunities in International Law*. Cambridge, UK: Cambridge Univ. Press