

# International Standards on Business and Human Rights: Is Drafting a New Treaty Worth It?

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## Introduction

CURRENTLY, THERE IS NO BINDING INSTRUMENT that enumerates the human rights obligations of businesses. In the aftermath of the United Nations Human Rights Council Resolution on Business and Human Rights establishing a Working Group to draft a treaty on the topic,<sup>1</sup> much is being written on what such a treaty would cover.<sup>2</sup> The very close vote approving the resolution,<sup>3</sup> combined with the likelihood that few developed countries will ratify a treaty that places human rights obligations on businesses, may raise questions as to whether the effort to draft the treaty is worthwhile.

To answer these questions, this article will first provide an overview of the international standards relevant to human rights obligations of businesses. Since the primary actors for human rights protection are States, the article will first examine States' obligations

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1. Human Rights Council Res. 26/9, U.N. Doc. A/HRC/RES/26/9 ¶ 1 (July 14, 2014), <http://www.ihrb.org/pdf/G1408252.pdf> [<https://perma.cc/RFV6-854K>].

2. See e.g., *Needs and Options for a New International Instrument In the Field of Business and Human Rights*, INT'L COMM. OF JURISTS (2014) [http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2014/06/NeedsandOptionsinternationalinst\\_ICJReportFinalelecvers.compressed.pdf](http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2014/06/NeedsandOptionsinternationalinst_ICJReportFinalelecvers.compressed.pdf) [<https://perma.cc/97KK-ZQM7>].

3. See H.R.C. Res. 26/9, *supra* note 1; *UN Human Rights Council Sessions*, BUS. & HUMAN RIGHTS RES. CTR., <https://business-humanrights.org/en/binding-treaty/un-human-rights-council-sessions> (last visited Mar. 19, 2017) [<https://perma.cc/6U33-VABF>].

under human rights treaties toward non-state actors, which include businesses as well as individuals.

The article will also address treaties that have an effect on States' obligations regarding non-state actors in other contexts, such as those creating the International Criminal Tribunals and the Convention Against Transnational Organized Crime.<sup>4</sup> Other instruments—while not treaties—are also relevant to the overall query of international obligations because they are helping to develop customary standards and are further indication of the development of international standards on human rights obligations of businesses. These include the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights<sup>5</sup> and the Guiding Principles on Business and Human Rights.<sup>6</sup>

It is important to keep in mind that the latest actions advancing customary international law standards regarding businesses' human rights obligations were preceded by a number of efforts going back to the 1970s, when the Organization for Economic Cooperation and Development ("OECD") adopted the Guidelines for Multinational Enterprises.<sup>7</sup> In 1999, the United Nations Secretary-General Kofi Annan urged world business leaders to adopt the Global Compact.<sup>8</sup> The International Labour Organization ("ILO") adopted the Tripartite Dec-

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4. United Nations Convention Against Transnational Organized Crime, *opened for signature* Nov. 15, 2000, TIAS No. 13127, 2225 U.N.T.S. 209, <https://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf> [<https://perma.cc/UY3W-R8VG>] [hereinafter UNCATOC].

5. The ETO Consortium, *Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights*, ETO CONSORTIUM (2013), [http://www.etoconsortium.org/nc/en/main-navigation/library/maastricht-principles/?tx\\_drblob\\_pi1%5BdownloadUid%5D=23](http://www.etoconsortium.org/nc/en/main-navigation/library/maastricht-principles/?tx_drblob_pi1%5BdownloadUid%5D=23) [<https://perma.cc/8DRX-QBLB>] [hereinafter *Maastricht Principles*].

6. John Ruggie (Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises), *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, Human Rights Council, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011) [hereinafter *Guiding Principles*].

7. Org. for Econ. Cooperation and Dev. (OECD), *Guidelines for Multinational Enterprises*, 15 I.L.M. 967 (1976). The OECD updated these Guidelines in 2000. OECD, *Guidelines for Multinational Enterprises*, <http://www.oecd.org/dataoecd/56/36/1922428.pdf> [<https://perma.cc/LZ66-38FR>] [hereinafter OECD *Guidelines*].

8. Press Release, World Economic Forum, Secretary-General Proposes Global Compact on Human Rights, Labour, Environment in Address to World Economic Forum in Davos, U.N. Press Release SG/SM/6881 (Feb. 1, 1999), <http://www.un.org/press/en/1999/19990201.sgsm6881.html> [<https://perma.cc/45SJ-LMAG>]; *The Ten Principles of the UN Global Compact*, U.N. GLOBAL COMPACT (2005), <https://www.unglobalcompact.org/what-is-gc/mission/principles> [<https://perma.cc/UZV8-ZTPC>].

laration on Multinational Enterprises and Social Policy in 2000.<sup>9</sup> This was followed by the efforts by the Sub-Commission on the Protection of Human Rights, who worked on this issue between 1999 and 2002.<sup>10</sup> This effort culminated in the adoption of the Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights.<sup>11</sup> While the Commission on Human Rights (parent-body of the Sub-Commission) did not approve the Norms, the Human Rights Council (the body that replaced the Commission) set up a procedure for addressing the issue and adopted the Guiding Principles in 2011.<sup>12</sup> While the Guiding Principles are a laudable step forward, they suggest purely voluntary efforts for States to follow regarding corporate accountability and provide no remedy for claims against either States or corporations when corporate actors violate human rights.

These past efforts reflect the international community's inability to adopt binding law regarding the human rights obligations of businesses. It was therefore surprising that the Human Rights Council passed the resolution regarding the drafting of a treaty to address this issue in 2014, albeit by the smallest of margins.<sup>13</sup> The article will review the first two meetings held pursuant to that resolution. It will also cover the potential topics that have thus far been raised for coverage in the treaty.

Difficulties in passing a binding instrument to address the human rights obligations of businesses call into question whether the efforts for drafting this treaty will be worthwhile. This inquiry is especially poignant when considering the improbability of developed countries—where most multinational corporations are based—ratifying the treaty, even if it goes into effect. In light of this fact, it will also be

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9. Int'l Labor Org., Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, OB Vol. LXXXIII, 2000, Series A, (No. 3), adopted by the Governing Body of the International Labour office at its 204th Session (Geneva, Nov. 2000) ILO Doc. GB.277/MNE/3 (2000), [http://www.ilo.org/wcmsp5/groups/public/—ed\\_emp/—emp\\_ent/documents/publication/wcms\\_101234.pdf](http://www.ilo.org/wcmsp5/groups/public/—ed_emp/—emp_ent/documents/publication/wcms_101234.pdf) [https://perma.cc/BCY5-DV9D] [hereinafter ILO Tripartite Declaration].

10. See David Weissbrodt & Muria Kruger, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, 97 THE AM. J. OF INT'L L. 901, 904–905 (2003).

11. Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003), <http://www.refworld.org/docid/403f46ec4.html> [https://perma.cc/X4BP-6SGH] [hereinafter Norms].

12. *Guiding Principles*, *supra* note 6.

13. The resolution passed by a vote of twenty in favor, fourteen against, and thirteen abstentions in 2014. H.R.C. Res. 26/9, *supra* note 1, at 3.

asked if the treaty would provide any meaningful redress for human rights violations by businesses. Similar issues plagued the ratification of the International Convention for the Protection of the Rights of All Migrant Workers and Their Families,<sup>14</sup> which has primarily been ratified by countries that send immigrants to other countries. The lessons learned in the process of drafting and implementing the Convention on Migrant Workers Convention support the conclusion that drafting the treaty is worthwhile. The treaty would help to advance the standards related to business and human rights. Additionally, the countries that ratify the treaty will advance the protection of human rights in relation to business activities within their jurisdictions. While the motivations for ratifying the two treaties may be different, that should not diminish the lessons learned from the implementation of the Convention on Migrant Workers.

It is not the intention of this article to cover the myriad of issues that arise in relation to holding corporations responsible for compliance with human rights standards and liable for violations when they do not. Some of those issues include the responsibility of the home and host States for addressing violations by businesses, crimes that are covered under universal jurisdiction, whether “corporate responsibilities” are legal in nature, what actors and crimes are covered, and what immunities are involved.<sup>15</sup> Citations may be provided regarding some of these issues, but the focus of this article will be the usefulness of a treaty on corporate accountability protecting human rights, regardless of which countries ratify it.

## **I. Overview of International Human Rights Standards Relevant to Businesses**

Because States are the primary subjects of international obligations, they are the primary focus of accountability for non-state actors’ compliance with international human rights standards. It typically falls upon States to regulate and address violations of businesses because businesses are non-state actors (regardless of how “business” is defined). As such, this section will first give an overview of States’ obligations under the major international and regional treaties with respect to non-state actors, as well as other treaties and instruments that pro-

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14. International Convention for the Protection of the Rights of All Migrant Workers and Their Families, *opened for signature* Dec. 18, 1990, 2220 U.N.T.S. 3 (entered into force July 1, 2003) [hereinafter *Convention on Migrant Workers*].

15. See generally SIMON BAUGHEN, HUMAN RIGHTS AND CORPORATE WRONGS: CLOSING THE GOVERNANCE GAP 7—48 (2015) (giving an overview of some of these issues).

vide additional guidance. It will then discuss the few treaties that hold non-state actors responsible for specific international crimes. Although these treaties reach non-state actors, they create an underutilized patchwork and do not explicitly mention businesses. The potential treaty on the human rights obligations of businesses would seek to address the current piecemeal approach.

This section will also address the issue of States' extraterritorial obligations under international law.<sup>16</sup> This issue often comes up when large corporations based in developed countries commit human rights violations in developing countries. In these cases, the corporation's size and the developing country's lack of resources limits the State's capacity to hold the corporate actor accountable. This section will conclude with the existing law at the international level holding non-state actors accountable independent of States' obligations.<sup>17</sup>

## **A. States' Obligations Regarding Non-state Actors Under Their Jurisdiction**

### **1. International Human Rights Treaties**

International human rights treaties in general provide that States Parties are responsible for taking steps to give effect to the treaties they are party to and ensure that remedies are available when a person's rights under the treaty are violated. For example, Articles 2 and 3 of the International Covenant on Civil and Political Rights ("ICCPR") provide the following requirements:

2. [E]ach State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.
3. Each State Party to the present Covenant undertakes:
  - (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, not-

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16. *See generally* KAREN DA COSTA, *THE EXTRATERRITORIAL APPLICATION OF SELECTED HUMAN RIGHTS TREATIES* (2013) (focusing on the extraterritorial application of the International Covenant on Civil and Political Rights, European Convention on Human Rights, and Convention Against Torture).

17. By focusing on existing treaties, it is not the intention of the author to ignore the theoretical underpinnings for holding non-state actors' responsible to respect human rights. For one excellent analysis, see generally DAVID JASON KARP, *RESPONSIBILITY FOR HUMAN RIGHTS: TRANSNATIONAL CORPORATIONS IN IMPERFECT STATES* (2014). The analysis includes the reasons for why multinational corporations should be held liable on a different basis than other non-state actors. *Id.* at 26–30.

withstanding that the violation has been committed by persons acting in an official capacity.<sup>18</sup>

This latter provision implies that there should be a remedy regardless of who committed the violation, including persons acting in an official capacity. However, this language has not thus far been used to hold non-state actors—like businesses—directly liable under the treaty at the international level. Each of the following treaties or covenants discussed similarly contain some language that can be construed to reach into the realm of regulating non-state actors.

The International Covenant on Economic, Social and Cultural Rights,<sup>19</sup> which was drafted at the same time as the ICCPR, focuses on the obligations of States Parties to take steps to achieve the rights of the treaty. However, the Committee on Economic, Social and Cultural Rights adopted General Comment 15 in 2002, requiring States Parties to prevent violations by private actors with respect to the right to water.<sup>20</sup>

As new human rights treaties were drafted, the obligation of States Parties with respect to non-state actors became more concrete. The Convention on the Elimination of all Forms of Racial Discrimination<sup>21</sup> provides that “[e]ach State party shall prohibit and bring to an end, by all appropriate means, including legislation as required by cir-

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18. International Covenant on Civil and Political Rights, arts. 2, 3, *opened for signature* Mar. 23, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR]. For this article, it is generally not important to know whether the United States is a party to any of the treaties cited. However, Version 20 of the Bluebook Citation Manual, Rule 21.4, requires a U.S. source for treaties to which the United States is a party. U.N. international treaties to which the United States is a party are supposed to be housed in official records by both the U.S. government as well as the U.N. However, the record keeping of the United States has lapsed, meaning many treaties are housed only with the U.N. even when the United States is a party. When that happens in this article, as it does here, only the U.N. citation is used because the U.S. version may not exist in an official and accessible format. See *Treaties in Force: A List of Treaties and Other International Agreements of the United States in Force on January 1, 2016*, U.S. DEP’T. OF STATE, <https://www.state.gov/documents/organization/267489.pdf> (last visited Apr. 15, 2017) (providing a list of treaties to which the United States is a party) [<https://perma.cc/6X5Z-UTM9>]; see also Julia Hsieh, *Citing a Treaty According to the Bluebook*, YALE LAW SCHOOL LIBRARY (Oct. 23, 2012), <http://library.law.yale.edu/news/citing-treaty-according-bluebook> (explaining the citing anomaly created by the absence of official U.S. treaty records) [<https://perma.cc/F7UX-RX2Z>].

19. International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976).

20. U.N., Econ. & Soc. Council, Comm. on Econ., Soc. & Cultural Rights, Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights, *General Comment 15: The Right to Water*, ¶ 24 UN Doc. E/C.12/2002/11 (Jan. 20, 2003).

21. Convention on the Elimination of all Forms of Racial Discrimination, *opened for signature* Mar. 7, 2016, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969).

cumstances, racial discrimination by any persons, group or organization.”<sup>22</sup> In 1996, the Committee on the Elimination of Racial Discrimination adopted General Recommendation XX, which provides that “[t]o the extent that private institutions influence the exercise of rights or the availability of opportunities, the State party must ensure that the result has neither the purpose nor the effect of creating or perpetuating racial discrimination.”<sup>23</sup>

The Convention on the Elimination of all Forms of Discrimination Against Women<sup>24</sup> (“CEDAW”) has language that similarly extends to non-state actors like businesses. CEDAW provides that States Parties undertake “all appropriate measures to eliminate discrimination against women by any person, organization or enterprise.”<sup>25</sup> Article 11 addresses the specific rights in the area of employment,<sup>26</sup> and Article 15 provides that “all contracts and all other private instruments of any kind with a legal effect which is directed at restricting the legal capacity of women shall be deemed null and void.”<sup>27</sup> Depending on the status of treaties in a particular country, this provision could be directly applicable to non-state actors including businesses. The enforcement body of CEDAW adopted Recommendation 19 in 1994, which provides that “States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation.”<sup>28</sup>

Next, the Convention Against Torture<sup>29</sup> (“CAT”) prohibits pain and suffering for certain purposes when it is “inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”<sup>30</sup> Article 2 of CAT provides that “[e]ach State Party shall take effective legislative, adminis-

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22. *Id.* art. 2(1)(d).

23. U.N., Comm. on the Elimination of Racial Discrimination, General Recommendation XX, Article 5, U.N. Doc. CERD/48/Misc.6/Rev.2 (1996).

24. Convention on the Elimination of all Forms of Discrimination Against Women, *opened for signature* Dec. 18, 1979, 1249 U.N.T.S. 13 (entered into force Sept. 3, 1981) [hereinafter CEDAW].

25. *Id.* art. 2(e).

26. *Id.* art. 11.

27. *Id.* art. 15.

28. U.N., Comm. on the Elimination of Discrimination Against Women, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, General Recommendation 19: Violence Against Women, ¶ 9, U.N. Doc. HRI/GEN/1/Rev.1, (1992).

29. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 1, *opened for signature* Dec. 10, 1984, 1465 U.N.T.S. 85 (entered into force June 26, 1987).

30. *Id.* art. 1.

trative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.”<sup>31</sup> CAT requires States Parties to ensure that the prohibited acts are offenses under criminal law, including criminalization of “an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.”<sup>32</sup> CAT also requires that States Parties ensure that victims of acts of torture are able to obtain redress and have an enforceable right to fair and adequate compensation, including rehabilitation, and if the victim dies, his dependents are able to obtain compensation.<sup>33</sup> These provisions of redress also apply to acts of cruel, inhuman or degrading treatment or punishment.<sup>34</sup>

The Convention on the Rights of the Child (“CRC”) provides that States Parties must respect and ensure the rights enumerated in the Convention and take measures to ensure that children are protected against discrimination or punishment on the “basis of the status, activities, expressed opinions, or beliefs of the child’s parents, legal guardians, or family members.”<sup>35</sup> In following with the concept that States Parties have the responsibility of ensuring that private actors comply with children’s rights under the treaty, the Committee on the Rights of the Child (the body that oversees compliance with the CRC) adopted General Comment 16 on State obligations regarding the impact of the business sector on children’s rights in 2013.<sup>36</sup> Article 3 of CRC General Comment 16 includes the following provision:

For the purposes of the present general comment, the business sector is defined as including all business enterprises, both national and transnational, regardless of size, sector, location, ownership and structure. The general comment also addresses obligations regarding not-for-profit organizations that play a role in the provision of services that are critical to the enjoyment of children’s rights.<sup>37</sup>

CRC General Comment 16 goes on to describe in great detail States Parties’ obligations to respect, protect, and fulfill children’s rights, including providing remedies and reparations in relation to

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31. *Id.* art. 2.

32. *Id.* art. 4.

33. *Id.* art. 14.

34. *Id.* art. 16.

35. Convention on the Rights of the Child, art. 2, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990).

36. Comm. on the Rights of the Child, *General Comment 16: State obligations regarding the impact of the business sector on children’s rights*, UN Doc. CRC/C/GC/16 (Apr. 17, 2013) [hereinafter *CRC General Comment 16*].

37. *Id.* ¶ 3.



business activities that affect the rights of the child as set forth in the CRC.<sup>38</sup> States Parties are also required to provide for remedies and reparations that take into account the special needs of children.<sup>39</sup> As discussed below, CRC General Comment 16 also includes detailed provisions regarding the CRC's extraterritorial obligations as they relate to businesses<sup>40</sup> and international development, trade, and finance institutions.<sup>41</sup>

## 2. Regional Human Rights Treaties

Regional human rights treaties also include provisions regarding the obligation of States to address violations by non-state actors. This section discusses several examples.

The African [Banjul] Charter on Human and Peoples' Rights<sup>42</sup> ("African Charter") is focused on the rights of individuals in relation to the State, but a few of the rights also would affect non-state actors. These include the right to work,<sup>43</sup> rights related to the family,<sup>44</sup> and the right to equality.<sup>45</sup> The African Charter also includes one especially interesting article requiring States Parties "to eliminate all forms of foreign economic exploitation particularly that practiced by international monopolies."<sup>46</sup> This is one of the clearest treaty obligations requiring States Parties to regulate non-state actors, and, in particular, corporations or business groups. The Draft Protocol on Amendments to the Protocol of the Statute of the African Court of Justice and Human Rights (Malabo Protocol) includes innovative provisions giving the Court jurisdiction over corporations in criminal matters.<sup>47</sup>

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38. *Id.* ¶¶ 26–29.

39. *Id.* ¶¶ 30–31.

40. *Id.* ¶¶ 38–46.

41. *Id.* ¶¶ 47–48.

42. African [Banjul] Charter on Human and Peoples' Rights, *adopted* June 27, 1981, Org. of African Unity [OAU] Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) (entered into force Oct. 21, 1986) [http://www.achpr.org/files/instruments/achpr/banjul\\_charter.pdf](http://www.achpr.org/files/instruments/achpr/banjul_charter.pdf) [<https://perma.cc/8CN6-KCXT>].

43. *Id.* art. 15.

44. *Id.* art. 18.

45. *Id.* art. 19.

46. *Id.* art. 21.

47. Draft Protocol on Amendments to the Protocol of the Statute of the African Court of Justice and Human Rights, EX.CL/846 (XXV) Annex 5, Article 46C (May 15, 2014), [http://www.iccnw.org/documents/African\\_Court\\_Protocol\\_-\\_July\\_2014.pdf](http://www.iccnw.org/documents/African_Court_Protocol_-_July_2014.pdf) [<https://perma.cc/87EE-PZWG>]. *See also* Franziska Oehm, *Thinking globally, acting globally*, VÖLKERRECHTSBLOG (May 31, 2014), <http://voelkerrechtsblog.org/thinking-globally-acting-globally-ii/> [<https://perma.cc/73H7-UK7Y>].

Although the American Convention on Human Rights<sup>48</sup> is focused on the rights of persons in relation to the States, it provides that “[e]veryone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights . . . even though such violation may have been committed by persons acting in the course of their official duties.”<sup>49</sup> Again, the inference in this provision is that there should also be recourse against non-state actors. The right to freedom of thought and expression, included in a provision of the American Convention, specifically mentions prohibiting government abuse of the right, as well as private controls over the means of dissemination of information.<sup>50</sup> The right of reply and rights of the family also address protections against acts of non-state actors.<sup>51</sup> Article 14 includes one provision that applies to non-state actors by requiring that “every publisher, and every newspaper, motion picture, radio, and television company, shall have a person responsible who is not protected by immunities or special privileges.”<sup>52</sup> This is one of the few treaty provisions that would appear to apply directly to businesses, and presumably could be the basis for direct enforcement against private companies, though this might depend on how treaties are applied in the specific country.

The American Declaration of the Rights and Duties of Man<sup>53</sup> (“American Declaration”) is also focused on the rights of every person, but Article XXIV provides that “[e]very person has the right to submit respectful petitions to any competent authority, for reasons of either general or private interest.”<sup>54</sup> While the American Declaration was adopted in 1948 by the Ninth International Conference of American States and is technically not a treaty, the Inter-American Court of Human Rights ruled in 1989 that the American Declaration “is the text that defines the human rights referred to in the Charter” of the

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48. American Convention on Human Rights, Nov. 22 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 (entered into force July 18, 1978).

49. *Id.* art. 25.

50. *Id.* art. 13.

51. *Id.* arts. 14, 17.

52. *Id.* art. 14(3).

53. Organization of American States, American Declaration of the Rights and Duties of Man, O.A.S. res. XXX, *adopted* May 2, 1948 by the Ninth International Conference of American States *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992).

54. *Id.* art. XXIV.

Organization.<sup>55</sup> Thus, this provision is part of the obligations of the States Parties to the Organization of American States.

The Inter-American Convention to Prevent and Punish Torture<sup>56</sup> provides that both public servants and employees acting in that capacity or a “person who at the instigation of a public servant or employee” institute or induce torture can be held guilty of the crime of torture.<sup>57</sup> Thus, non-state actors may be liable if working with a State employee. Likewise, the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women<sup>58</sup> describes violence against women as a violation whether it occurs in the public or private sphere.<sup>59</sup> However, the obligation to address both preventative and remedial measures falls upon the States Parties.<sup>60</sup>

The [European] Convention for the Protection of Human Rights and Fundamental Freedoms<sup>61</sup> is also focused on individual’s rights as they relate to the States Parties, yet Article 17 provides that “any State, group or persons” does not have the right to “engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth” in the Convention.<sup>62</sup> The European Social Charter (Revised) addresses economic, social, and cultural rights.<sup>63</sup> States Parties to the Social Charter agree to pursue the attainment of the rights listed, that often implicate non-state actors, by all appropriate means, both national and international in character.<sup>64</sup> The enforcement mechanism provides that international organizations of employers and trade unions, international non-governmental organizations with consultative status with the Council of Europe, and representatives of

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55. Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights, Advisory Opinion OC-10/89, July 14, 1989, Inter-Am. Ct. H.R. (Ser. A) No. 10 (1989), [http://hrlibrary.umn.edu/iachr/b\\_11\\_4j.htm](http://hrlibrary.umn.edu/iachr/b_11_4j.htm) [<https://perma.cc/964D-76DQ>].

56. Inter-American Convention to Prevent and Punish Torture, O.A.S.T.S. No. 67, *entered into force* Feb. 28, 1987, *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 83 (1992).

57. *Id.* art. 3.

58. Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, *opened for signature* June 9, 1994, 33 I.L.M. 1534 (*entered into force* Mar. 5, 1995).

59. *Id.* art. 1.

60. *Id.* arts. 7–8.

61. [European] Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Nov. 4, 1950, 213 U.N.T.S. 222 (*entered into force* Sept. 3, 1953, as amended by protocol nos. 3, 5, 8, and 11 *entered into force* Sept. 21, 1970, Dec. 20, 1971, Jan. 1, 1990, and Nov. 1, 1998, respectively).

62. *Id.* art. 17.

63. European Social Charter (Revised), May 3, 1996, E.T.S. No. 163.

64. *Id.* pmb1.

national organizations of employers and trade unions within the jurisdiction of the Parties have the right to file complaints against the Contracting Parties with the Council of Europe.<sup>65</sup> A Contracting Party can also consent to allow other representatives of national non-governmental organizations within their jurisdiction to file complaints against itself.<sup>66</sup>

## B. Treaties Holding Individuals Responsible for International Crimes

To address limited situations, States have adopted treaties that punish non-state actors for certain international crimes. These include the treaties following World War II for the punishment of major war criminals<sup>67</sup> and the treaties setting up tribunals for violations of humanitarian law in the former Yugoslavia<sup>68</sup> and Rwanda.<sup>69</sup> These treaties apply to persons who have committed the specific crimes addressed by the treaties. Indeed, since World War II, the international tribunals have only assumed jurisdiction over natural persons.<sup>70</sup> This is also true of the Rome Statute of the International Criminal Court which provides, "The Court shall have jurisdiction over natural persons pursuant to this Statute."<sup>71</sup>

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65. Additional Protocol to the European Social Charter Providing for a System of Collective Complaints, art. 1, *opened for signature* Sept. 11, 1995, E.T.S. No.158 (entered into force Jan. 7, 1998).

66. *Id.* art. 2.

67. Charter of the Int'l Military Tribunal (IMT), Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (London Agreement), *adopted* Aug. 8, 1945, 58 Stat. 1544, 82 U.N.T.S. 280; Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, December 20, 1945, 3 Official Gazette Control for Germany 50-55 (1946).

68. Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, U.N. Doc. S/25704 at 36, annex (1993) and S/25704/Add.1 (1993), *adopted by* S.C. Res.827 (May 25, 1993).

69. Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Rwanda, *adopted by* S.C. Res 955, at 3 (Nov. 8, 1994).

70. BAUGHEN, *supra* note 15, at 33.

71. Rome Statute of the International Criminal Court, art. 25(1), U.N. Doc. A/CONF.183/9, *adopted* July 17, 1988, *as corrected by the procès-verbaux* of Nov. 10, 1988, July 12, 1999, and May 8, 2000 (entered into force July 2, 2002).

### C. Non-treaty International Instruments Addressing Corporate Accountability

There have been various efforts at imposing human rights obligations on businesses in recent decades, and those efforts have begun to pick up steam in recent years. Starting in the 1970s, several international organizations adopted non-treaty instruments in an attempt to address corporate accountability. The first of these were the OECD Guidelines for Multinational Enterprises adopted in 1976.<sup>72</sup> After the U.N. Secretary-General issued a challenge in 1999, a convention of world business leaders drafted the Global Compact, which consisted of ten principles that “outlined basic standards for corporate conduct relating to human rights and supported global human rights policy for business.”<sup>73</sup> The Ten Principles of the Global Compact are general statements supporting general protection of human rights (Principles 1–2), labor standards (Principles 3–6), and the environment (Principles 7–9), as well the need to work against corruption, including extortion and bribery (Principle 10).<sup>74</sup>

In 2000, the ILO adopted the Tripartite Declaration,<sup>75</sup> which included recommendations that governments, employers’ and workers’ organizations, and multinational enterprises observe on a voluntary basis.<sup>76</sup> The ILO Tripartite Declaration refers to a number of human rights and ILO instruments.<sup>77</sup> The Declaration also specifically provides what principles constitute good practices for both multinational and national enterprises.<sup>78</sup> Both multinational and national corporations are urged to address child labor.<sup>79</sup> The Declaration also includes specific recommendations for multinational enterprises in the context of safety and health.<sup>80</sup>

Around the same time, the expert body of the U.N. Commission on Human Rights, the Sub-Commission on the Promotion and Protection of Human Rights, started working on the Norms on the Responsibility of Transnational Corporations and Other Business Enterprises

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72. OECD *Guidelines*, *supra* note 7.

73. DAVID WEISSBRODT, ET AL., *INTERNATIONAL HUMAN RIGHTS: LAW, POLICY, AND PROCESS* 51, (4th ed. 2009).

74. UN Global Compact, *supra* note 8.

75. ILO Tripartite Declaration, *supra* note 9.

76. *Id.* art. 7.

77. *Id.* art. 8.

78. *Id.* art. 11.

79. *Id.* art. 36.

80. *Id.* art. 38.

with Regard to Human Rights, which it adopted in 2003.<sup>81</sup> The Norms reiterated that States have the primary responsibility for protecting human rights, including “ensuring that transnational corporations and other business enterprises respect human rights.”<sup>82</sup> The Norms list the rights related to equality and non-discrimination, security of persons, workers, respect for national sovereignty and human rights, and environmental protections.<sup>83</sup> The Norms note that “transnational corporations and other business enterprises shall not” violate, or, conversely, “shall recognize and respect” each of the rights listed.<sup>84</sup> The Norms require corporations and businesses to “adopt, disseminate and implement internal rules of operation in compliance with the Norms.”<sup>85</sup> Businesses are also subjected to monitoring and verification by international or national mechanisms,<sup>86</sup> and must provide reparations for violations.<sup>87</sup> States are required to establish the legal and administrative framework for ensuring that the Norms are implemented by transnational corporations and business enterprises.<sup>88</sup>

The Norms were submitted to the Commission on Human Rights, but were never approved by that body. In 2006, the Commission on Human Rights was replaced by the U.N. Human Rights Council, which took over the responsibilities and mandates of the Commission.<sup>89</sup> The Council finally adopted the Guiding Principles in 2011.<sup>90</sup> John Ruggie had been appointed U.N. Special Representative in 2005,<sup>91</sup> and in June 2008 he proposed a framework on business and human rights to the Human Rights Council.<sup>92</sup> The proposal included

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81. Norms, *supra* note 11.

82. *Id.* ¶ 1.

83. *Id.* ¶¶ 2–14.

84. *Id.*

85. *Id.* ¶ 15.

86. *Id.* ¶ 16.

87. Norms, *supra* note 11, ¶ 18.

88. *Id.* ¶ 17.

89. G.A. Res. 60/251, ¶ 1 (Mar. 15, 2006).

90. *Guiding Principles*, *supra* note 6; Scott Jerbi, *UN Adopts Guiding Principles on Business and Human Rights—What Comes Next?*, INST. FOR HUM. RIGHTS & BUS. (June 17, 2011), <https://www.ihrb.org/other/commentary-un-guiding-principles-business-human-rights> [<https://perma.cc/H3M2-AHR4>].

91. Press Release, Secretary-General, Secretary-General Appoints John Ruggie of United States Special Representative on Issue of Human Rights, Transnational Corporations, Other Business Enterprises, U.N. Press Release SG/A/934 (July 28, 2005), <http://www.un.org/press/en/2005/sga934.doc.htm> [<https://perma.cc/ZVP3-PUNT>].

92. John Ruggie (Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corp. and Other Bus. Enters.), *Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development: Protect, Respect and Remedy: a Framework for Business and Human Rights: Report of*

three pillars: (1) the State's duty to protect against human rights abuses by third parties; (2) corporate responsibility to protect human rights; and (3) greater access for victims to effective remedy, both judicial and non-judicial.<sup>93</sup> From November 2010 through January 2011, the Special Representative held Consultations in accordance with the draft Guiding Principles.<sup>94</sup> In March 2011, Special Representative Ruggie issued the "Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework," which were adopted by the Human Rights Council in June 2011.<sup>95</sup>

At the same time the Human Rights Council decided to establish a Working Group on the issue of human rights and transnational corporations and other business enterprises (consisting of five independent experts of balanced geographical representation) for a period of three years.<sup>96</sup> In June 2014, the Human Rights Council extended the Working Group mandate for another three years.<sup>97</sup> Meanwhile, starting in December 2012, the Annual Forum on Business and Human Rights began to take place on an annual basis.<sup>98</sup>

Also during this time period, the Office of the High Commissioner for Human Rights ("OHCHR") undertook various actions on related topics. These included OHCHR issuing a report in 2011 entitled "The Corporate Responsibility to Respect Human Rights: An In-

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*the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises*, UN Doc. A/HRC/8/5 (Apr. 7, 2008).

93. *Id.* ¶ 9.

94. John Ruggie (UN Special Representative on business & human rights), *Draft Guiding Principles: UN "Protect, Respect and Remedy" Framework*, BUS. & HUM. RIGHTS RES. CTR. (June 30, 2011), <http://business-humanrights.org/en/un-secretary-generals-special-representative-on-business-human-rights/un-protect-respect-and-remedy-framework/guiding-principles/draft-guiding-principles> [<https://perma.cc/6UNN-AVUJ>].

95. *Guiding Principles*, *supra* note 6, Annex (2011); see *Regional Forum on Business and Human Rights Convened in Qatar*, INT'L JUSTICE RES. CTR. (Apr. 26, 2017), <http://www.ijrcenter.org/2016/04/26/regional-forum-on-business-and-human-rights-convenes-in-qatar/> (explaining that Special Representative Reggie's report was adopted by the Human Rights Council in 2011) [<https://perma.cc/YSY6-J3AB>].

96. Human Rights Council Res. 17/4, U.N. Doc.A/HRC/17/4, ¶ 6 (June 16, 2011), [http://ap.ohchr.org/documents/dpage\\_e.aspx?si=A/HRC/RES/17/4](http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/17/4) [<https://perma.cc/B3VZ-YBX7>].

97. Human Rights Council Res. 26/22, U.N. Doc. A/HRC/26/22, ¶ 10 (July 15, 2014), [http://ap.ohchr.org/documents/dpage\\_e.aspx?si=A/HRC/RES/26/22](http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/26/22) [<https://perma.cc/U53Z-4UNB>].

98. See INT'L JUSTICE RES. CTR., *supra* note 95.

terpretive Guide;<sup>99</sup> an initial study in 2013 into the effectiveness of domestic judicial mechanisms in cases of alleged business involvement in gross human rights abuses;<sup>100</sup> and publishing a study in 2014 by independent legal expert Dr. Jennifer Zerk on the effectiveness of domestic judicial mechanisms in relation to business involvement in gross human rights abuses.<sup>101</sup>

With the exception of the Norms—which were not approved by the Commission on Human Rights—all of these efforts moved the discussion forward on the issue of corporate accountability, but were all due to voluntary efforts by both the States and businesses. This lack of accountability and remedies might have led to the frustration felt by some members of the Human Rights Council, who voted to adopt Resolution 26/9 in 2014 by a vote of twenty in favor, fourteen against, and thirteen abstentions.<sup>102</sup> In Paragraph One of the resolution, the Human Rights Council decided “to establish an open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights; whose mandate shall be to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises.”<sup>103</sup>

At the same session, the Human Rights Council adopted Resolution 26/22, which requested the High Commissioner to

continue the work to facilitate the sharing and exploration of the full range of legal options and practical measures to improve access to remedy for victims of business-related human rights abuses, in collaboration with the Working Group, and to organize consultations with experts, States and other relevant stakeholders to facili-

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99. OHCHR, *The Corporate Responsibility to Respect Human Rights: An Interpretive Guide*, at 1, UN Doc. HR/PUB/12/02 (2012), [http://www.ohchr.org/Documents/Publications/HR.PUB.12.2\\_En.pdf](http://www.ohchr.org/Documents/Publications/HR.PUB.12.2_En.pdf) [<https://perma.cc/H6QL-RMEE>].

100. OHCHR, *Business and Human Rights: The Accountability and Remedy Project*, Background Paper Accompanying Consultation Report, at 4, [http://www.ioe-emp.org/fileadmin/ioe\\_documents/publications/Policy%20Areas/business\\_and\\_human\\_rights/EN/\\_2016-02-22\\_C-362\\_OHCHR\\_Bus\\_Human\\_Rights\\_Accountability\\_\\_Remedy\\_Project\\_-\\_Background\\_Paper\\_to\\_draft\\_guidance\\_final\\_.pdf](http://www.ioe-emp.org/fileadmin/ioe_documents/publications/Policy%20Areas/business_and_human_rights/EN/_2016-02-22_C-362_OHCHR_Bus_Human_Rights_Accountability__Remedy_Project_-_Background_Paper_to_draft_guidance_final_.pdf) [<https://perma.cc/75F7-BAER>] [hereinafter OHCHR Background Paper].

101. OHCHR, *OHCHR Accountability and Remedy Project: improving accountability and access to remedy in cases of business involvement in human rights abuses*, <http://www.ohchr.org/EN/Issues/Business/Pages/OHCHRstudyondomesticlawremedies.aspx> (last visited Mar. 19, 2017) [<https://perma.cc/H2NC-EJBK>]; referring to Jennifer Zerk, *Corporate Liability for Gross Human Rights Abuses: Towards a Fairer and More Effective System of Domestic Law Remedies*, OHCHR (Feb. 2014), <http://www.ohchr.org/EN/Issues/Business/Pages/OHCHRstudyondomesticlawremedies.aspx> [<https://perma.cc/WV6R-UXQR>].

102. H.R.C. Res. 26/9, *supra* note 1, at 3.

103. *Id.* ¶ 1.



tate mutual understanding and greater consensus among different views.<sup>104</sup>

In response, the OHCHR convened a meeting of experts in September 2014 to discuss the feedback received regarding the Initial Study Report and OHCHR's proposed work plans.<sup>105</sup> In November 2014—in response to the issues identified in the initial study and in subsequent submissions and expert meetings—the OHCHR launched the Accountability and Remedy Project to contribute to making domestic legal responses fairer and more effective for victims of business-related human rights abuses, particularly in cases of severe abuses.<sup>106</sup> The progress report to the UN General Assembly emphasized that the overall goal of the Project is to develop recommendations and guidance for States on how to achieve those ends.<sup>107</sup>

Before addressing what drafting the treaty will encompass, this article will first address the issue of extraterritoriality, which comes into play with respect to States' obligations related to businesses, in particular multi-national corporations.

#### D. States' Extraterritorial Obligations

The concept of extraterritoriality affects a State's level of responsibility to regulate non-state actors within its jurisdiction for acts they have committed outside of their territory. One international treaty that includes extraterritorial obligations for States Parties is the U.N. Convention against Transnational Organized Crime ("UNCATOC"), adopted in 2000.<sup>108</sup> UNCATOC entered into force in 2003 and remains the "main international instrument in the fight against transnational organized crime."<sup>109</sup> The Convention currently includes three protocols: (1) the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children;<sup>110</sup> (2) the Protocol

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104. OHCHR Background Paper, *supra* note 100.

105. *Business and Human Rights: The OHCHR Accountability and Remedy Project, Programme of Work*, OHCHR (Feb 2015), <http://www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/RemedyWorkPlans.pdf> [<https://perma.cc/W7Q3-CUYM>].

106. OHCHR Background Paper, *supra* note 100.

107. U.N. General Assembly, *Progress report of the United Nations High Commissioner for Human Rights on legal options and practical measures to improve access to remedy for victims of business-related human rights abuses*, ¶ 6, U.N. Doc. A/HRC/29/39 (May 7, 2015).

108. See UNCATOC, *supra* note 4.

109. U.N. Office on Drugs and Crime, United Nations Convention against Transnational Organized Crime and the Protocols Thereto, <https://www.unodc.org/unodc/treaties/CTOC/> [<https://perma.cc/HTP9-AR3X>].

110. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational

against the Smuggling of Migrants by Land, Sea and Air;<sup>111</sup> and (3) the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition.<sup>112</sup> UN-CATOC consists of forty-one Articles.<sup>113</sup> Many of these Articles include possible extraterritorial obligations for the States Parties and mandate State actions. Specific articles requiring possible extraterritorial obligations include the following examples:

- Article 5, *Criminalization of participation in an organized group*, which requires States Parties to adopt domestic legislation and other measures “as may be necessary to establish as criminal offences, when committed intentionally.”<sup>114</sup> These legislative measures, although domestic, may lead to extraterritorial obligations such as pursuing citizens who committed crimes abroad.
- Article 6, *Criminalization of the laundering of proceeds of crime*, similarly requires domestic legislation that may cause extraterritorial obligations of States parties.<sup>115</sup>
- Article 13, *International cooperation for purposes of confiscation*, requires States Parties to work with other States Parties for confiscation of proceeds of crime and requires States to “take measures to identify, trace and freeze or seize proceeds of crime, property, equipment or other instrumentalities.”<sup>116</sup>
- Article 15, *Jurisdiction*, requires States to establish jurisdiction over any of the specific offenses within the Convention committed against its nationals or residents.<sup>117</sup>
- Article 18, *Mutual legal assistance*, requires assistance between States Parties in investigations, prosecutions and judicial proceedings in relation to offenses under UNCATOC and specifically addresses offenses that are “transnational in nature.”<sup>118</sup> Under 18(2), “[m]utual legal assistance shall be afforded to the

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Organized Crime, Annex II at 41, <https://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf> [<https://perma.cc/A6UC-XFU6>].

111. Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, Annex III at 53 <https://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf> [<https://perma.cc/A6UC-XFU6>].

112. Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime, Annex at 71, <https://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf> [<https://perma.cc/A6UC-XFU6>].

113. UNCATOC, *supra* note 4.

114. *Id.* art. 5.

115. *See id.* art. 6.

116. *Id.* art. 13.

117. *Id.* art. 15.

118. *Id.* art.18(1).

fullest extent possible under relevant laws, treaties, agreements and arrangements of the requested State Party.”<sup>119</sup>

- Article 30, *Other measures: implementation of the Convention through economic development and technical assistance*, provides that, “States Parties shall take measures conducive to the optimal implementation of this Convention to the extent possible, through international cooperation, taking into account the negative effects of organized crime on society in general, in particular on sustainable development.”<sup>120</sup>

The UNCATOC focuses on States Parties’ obligations generally without specifically referencing extraterritorial obligations regarding non-state actors. Although there are no specific obligations under the UNCATOC in this regard, Article 7(2), *Measures to combat money-laundering*, requires States Parties to

consider implementing feasible measures to detect and monitor the movement of cash and appropriate negotiable instruments across their borders, subject to safeguards to ensure proper use of information and without impeding in any way the movement of legitimate capital. Such measures may include a requirement that individuals and businesses report the cross-border transfer of substantial quantities of cash and appropriate negotiable instruments.<sup>121</sup>

This language demonstrates that States Parties have obligations to control and regulate acts that involve non-state actors and take place across borders.

A recent effort to address extraterritorial obligations with respect to economic, social and cultural rights resulted from a gathering convened by Maastricht University and the International Commission of Jurists in 2011.<sup>122</sup> The group of experts adopted the Maastricht Principles, outlining States’ obligation to protect.<sup>123</sup> Principle 9 provides that a State has obligations to respect, protect and fulfill economic,

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119. UNCATOC, *supra* note 4, art. 18(2).

120. *Id.* art. 30(1).

121. *Id.* art. 7(2).

122. *Needs and Options for a New International Instrument in the Field of Business and Human Rights*, INT’L COMM’N OF JURISTS 11 (June 2014), [http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2014/06/NeedsandOptionsinternationalinst\\_ICJReportFinalecvers.compressed.pdf](http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2014/06/NeedsandOptionsinternationalinst_ICJReportFinalecvers.compressed.pdf) [https://perma.cc/ED5L-EJ]7].

123. *Maastricht Principles*, *supra* note 5. The members of the drafting group published a commentary on the legal basis for the Principles. Olivier De Schutter et al., *Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights*, 34 HUM. RIGHTS Q. 1084 (2002). The members also published Principles and Commentary. *Protecting Human Rights Beyond Borders*, INT’L COMM’N OF JURISTS (Nov. 25, 2012), <http://www.icj.org/protecting-human-rights-beyond-borders/> [https://perma.cc/PQ6H-4LSF].

social and cultural rights in a number of contexts.<sup>124</sup> These include situations in which State acts or omissions foreseeably affect these rights whether within or outside its territory. The Principles also recognize situations in which the State—acting separately or through the various branches of government—is in a position to realize those rights extraterritorially, in accordance with international law.<sup>125</sup> Principle 24 provides that States must take measures to “ensure that non-State actors which they are in a position to regulate” do not nullify or impair the enjoyment of economic social and cultural rights.<sup>126</sup> Further, under Principle 25, States must adopt and enforce measures to protect these rights through legal and other means “as regards business enterprises, where the corporation, or its parent or controlling company, has its cent[er] of activity, is registered or domiciled, or has its main place of business or substantial activities, in the State concerned.”<sup>127</sup>

While the Maastricht Principles are not binding (as the outcome of a meeting of a group of experts), they provide guidance to business and human rights treaty drafters on extraterritorial obligations. In 2011, another group of experts urged governments to receive expert guidance in their dealings with human rights issues.<sup>128</sup> The drafters of the proposed treaty on business and human rights should consider the outcome documents of these different group of experts.

## II. Proposed Treaty on Business and Human Rights

This section will discuss the provisions of the Human Rights Council resolution establishing the process for drafting the treaty on business and human rights, the Working Group’s first meeting addressing the treaty, and the treaty’s potential topics.

### A. Provisions of the Human Rights Council Resolution

The Preamble of Human Rights Council Resolution 26/9 discusses the various international human rights treaties, the Guiding Principles, and incorporates the work of the Commission on Human

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124. *Maastricht Principles*, *supra* note 5, princ. 9.

125. *Id.*

126. *Id.* princ. 24.

127. *Id.* princ. 25.

128. *Human rights beyond borders: UN experts call on world governments to be guided by the Maastricht Principles*, OHCHR (Sept. 28, 2013), <http://newsarchive.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=13792&LangID=E> [https://perma.cc/6W8V-6FMC].

Rights and Human Rights Council on the topic of the human rights responsibilities of transnational corporations and other business enterprises.<sup>129</sup> It recognizes that the obligations and responsibilities for promoting and protecting human rights lie with States, but it also emphasizes “that transnational corporations and other business enterprises have a responsibility to respect human rights.”<sup>130</sup> Further, the preamble emphasizes that civil society actors have a role to play in promoting corporate responsibility and seeking redress for violations caused by businesses.<sup>131</sup>

The first operative paragraph sets up an open-ended intergovernmental Working Group with 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>132</sup> The rest of the resolution sets up the process for drafting the treaty, which includes two meetings of the Working Group with the goal of “conducting constructive deliberations on the content, scope, nature and form of the future international instrument.”<sup>133</sup> Subsequently, the Chair-Rapporteur of the Working Group is tasked with preparing elements for negotiations on the instrument starting with the third session.<sup>134</sup>

It is somewhat unusual to give the Working Group such little guidance in drafting the treaty, which is related to the complex nature and numerous topics it could cover. At the time of the drafting of this article, the Working Group has held two meetings, the first in August 2014, and the second in October 2016. This article will now review the reports from the two meetings and then discuss the potential topics the treaty may address that have come to light thus far.

## B. Reports of the Working Group Drafting the Treaty

The Working Group’s first meeting report summarized a number of topics and the interventions from all the participants: States, businesses, and non-governmental organizations (“NGOs”).<sup>135</sup> Sixty-one

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129. H.R.C. Res. 26/9, *supra* note 1, pmb1.

130. *Id.*

131. *Id.*

132. *Id.* ¶ 1.

133. *Id.* ¶ 2.

134. *Id.* ¶ 3.

135. U.N. General Assembly, *Report on the first session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, with the mandate of elaborating an international legally binding instrument*, U.N. Doc. A/HRC/31/50 (Feb. 5, 2016) [hereinafter *Report on First Session*].

States participated, including a number of developing countries: China, Russia, and a few European countries including Italy, the Netherlands and Switzerland.<sup>136</sup> The European Union attended for a day and a half, and France remained for the full session.<sup>137</sup> Based on its “no” vote on the treaty,<sup>138</sup> it is probably not surprising that the United States did not participate at all.<sup>139</sup>

The various panels held during the week addressed a number of subjects, including what topics a treaty should cover, the need to define “transnational,” what rights would be covered, how to address violations in conflict zones, and what types of sanctions should be included. The report recognizes that States are the primary holders of obligations to address violations, but a number of participants indicated that the treaty should provide for direct responsibility for businesses.<sup>140</sup> One example of such a law that was discussed was the Modern Slavery Act of the United Kingdom of Great Britain and Northern Ireland, where the law was applied throughout the supply chain of corporations with the goal of ending slavery.<sup>141</sup> ILO Conventions that imply specific obligations on businesses in the context of carrying out due diligence were also referenced.<sup>142</sup> Many delegations emphasized that the treaty should set out the direct human rights obligations of corporations.<sup>143</sup>

The Guiding Principles were mentioned throughout the discussions as a complementary process to drafting the treaty. However, the discussion also noted that “responsibility,” as defined under the Guiding Principles, does not recognize “legal accountability and legal duty”<sup>144</sup> and therefore it is important to include that concept in the treaty.

Several participants noted the importance of drafting a treaty. The African Group mentioned that it was glad to participate in the progressive development of human rights law.<sup>145</sup> While recognizing the role that corporations play in the economy, the Group supported the need for remedies and solutions for victims of human rights viola-

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136. *Id.* ¶ 6.

137. *Id.* ¶ 7.

138. *See* H.R.C. Res.26/9, *supra* note 1, at 3.

139. *Report on First Session, supra* note 135, ¶ 6.

140. *See, e.g., id.* ¶ 80.

141. *Id.* ¶ 56.

142. *Id.* ¶ 80.

143. *See id.* ¶ 83.

144. *Id.* ¶ 79.

145. *Report on First Session, supra* note 135, ¶ 22.

tions.<sup>146</sup> Further, some States stressed that the treaty should consolidate current norms of international law.<sup>147</sup> As will be discussed below, this consolidation has been one of the benefits of drafting the Convention on Migrant Workers. Before addressing that point, it is useful to note the topics that the Working Group, as well as others, have identified as needing to be included in the potential treaty on business and human rights.

The Working Group's second meeting was held in October 2016.<sup>148</sup> Eighty countries participated along with observers such as the EU and Council of Europe, UN and international organizations, and a number of NGOs.<sup>149</sup> The six panels over the course of five days covered a number of topics. This time, discussion was more focused on the topics of implementation of international human rights obligations at both the national and international level, the implementation of the Guiding Principles, and access to remedy.<sup>150</sup>

Most panels discussed the need for a binding international agreement to address corporate accountability in order to fill the legal vacuum created by the lack of coordination between States on this topic.<sup>151</sup> The lack of an enforcement procedure for the Guiding Principles was mentioned throughout the panel discussions.<sup>152</sup> One panelist identified the different levels for providing a remedy for victims of human rights abuses by transnational corporations: (1) national and subnational legal systems; (2) engagement of an international or regional ombudsperson to intervene on behalf of weaker plaintiffs against more powerful corporations or States; (3) at the home State or country where there are significant assets of transnational corporations, where there would be a specific role for the extraterritorial application of the law; (4) at the international level with an international court on transnational corporations and human rights; and (5) a register of all pending cases involving transnational corporations and human rights.<sup>153</sup>

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146. *Id.*

147. *Id.* ¶¶ 51, 57.

148. U.N. General Assembly, *Report on the second session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights*, U.N. Doc. A/HRC/34/47 (Jan. 4, 2017) [hereinafter *Report on Second Session*].

149. *Id.* Annex I (showing that twelve European countries participated this time, but not the United States).

150. *Id.* Annex II.

151. *Id.* at ¶¶ 54, 71 (delegations noting that due to lack of cooperation between home and host States, victims did not have access to justice).

152. *See, e.g., id.* ¶ 97.

153. *Id.* Panel II ¶ 55.

The panels also covered topics related to challenges surrounding access to remedy, which included legal concepts such as the need to shift the burden of proof and the need to address jurisdiction over claims made by non-citizens, with an example of the Alien Tort Statute in the United States.<sup>154</sup>

The Chair-Rapporteur recommended that the third session be held in 2017 after informal consultations with the various stakeholders, with a program of work based on the first two sessions.<sup>155</sup> These recommendations were approved by the Working Group.<sup>156</sup>

### C. Potential Topics for the Treaty

The Working Group identified a number of topics that need to be addressed in the treaty. These included: whether it should apply only to transnational businesses and if so what is the definition of “transnational;”<sup>157</sup> what businesses should be included;<sup>158</sup> what conduct to prohibit;<sup>159</sup> what rights to include;<sup>160</sup> whether to cover violations in conflict zones;<sup>161</sup> types of remedies and sanctions;<sup>162</sup> addressing barriers to effective remedies;<sup>163</sup> extraterritorial jurisdiction;<sup>164</sup> and relationship of this treaty with trade agreements.<sup>165</sup>

There was a general view that the rights to be covered by the treaty should protect from more than “gross violations,” and some delegations argued that there should not be a limit on rights.<sup>166</sup> Rights that were specifically mentioned include: the right to food and housing;<sup>167</sup> workers’ rights;<sup>168</sup> the rights to development and peace;<sup>169</sup> and environmental issues including the use of pesticides.<sup>170</sup>

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154. *Report on Second Session, supra* note 148, Panel VI ¶¶ 118–119.

155. *Id.* ¶¶ 129–130.

156. *Id.*

157. *See, e.g., id.* ¶ 93.

158. *See Report on First Session, supra* note 135, ¶ 13.

159. *Id.* ¶¶ 30–36.

160. *Id.* ¶ 24.

161. *Id.* ¶ 84.

162. *Id.* ¶¶ 86, 98.

163. *Id.* ¶ 105.

164. *Report on First Session, supra* note 135, ¶ 67.

165. *Id.* ¶ 91.

166. *Id.* ¶¶ 31, 43.

167. *Id.* ¶ 32.

168. *Id.* ¶ 33.

169. *Id.* ¶ 66.

170. *Report on First Session, supra* note 135, ¶¶ 24, 35.



The Working Group raised the issue of the proper relationship between human rights and investment instruments,<sup>171</sup> and the implications of international trade and investor agreements on State policies to comply with human rights obligations.<sup>172</sup> The Working Group also discussed corporate claims against governments under these agreements for losses stemming from government actions taken to protect human rights, which can result in large payments from governments in the form of damages and fees.<sup>173</sup> A recent example of this is a case filed by TransCanada against the United States before a North American Free Trade Agreement tribunal.<sup>174</sup> TransCanada's claim was for \$15 billion for the United States' refusal—amidst concerns about addressing climate change—to grant a permit for the Keystone XL Pipeline.<sup>175</sup> The Working Group also considered the various hurdles victims face to sue transnational corporations.<sup>176</sup>

One issue broadly debated was what kinds of sanctions would be available under the treaty, which could include criminal, civil, and administrative;<sup>177</sup> as well as what kinds of remedies would be available to victims of violations, which could include administrative, judicial, and non-judicial.<sup>178</sup> Interestingly, despite concerns already raised regarding the trade pact treaties arbitration panels' conflict of interest and impartiality standards,<sup>179</sup> some have proposed using international ar-

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171. *Id.* ¶ 52.

172. *Id.* ¶ 91.

173. *Id.*

174. Amy Goodman, *TransCanada Sues the US for Rejecting the Keystone XL; Will this Be the New Normal under TPP?*, TRUTHOUT (Jan. 7, 2016), <http://www.truth-out.org/news/item/34329-transcanada-sues-the-us-for-15b-for-rejecting-keystone-xl-will-this-be-the-new-normal-under-tpp> [https://perma.cc/Q59K-ZZ8C].

175. *Id.*

176. See *Report on First Session*, *supra* note 135, ¶ 72.

177. See, e.g., *id.* ¶¶ 72, 86, 88, 90, 105; see also *The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Corporations*, THE INT'L CORP. ACCOUNTABILITY ROUNDTABLE ("ICAR") (Dec., 2013), <http://corporate-responsibility.org/wp-content/uploads/2013/12/The-Third-Pillar-Access-to-Judicial-Remedies-for-Human-Rights-ViolationFalsepdf> [https://perma.cc/Q99F-ZCL6]; INT'L COMM. OF JURISTS, *supra* note 2, at 12–22 (assessing of the various problems related to judicial decisions at the national level and the regulation and liability of parent companies).

178. *Report on First Session*, *supra* note 135, ¶ 105.

179. Goodman, *supra* note 174; see also Elizabeth Warren, *The Trans-Pacific Partnership clause everyone should oppose*, WASH. POST (Feb. 25, 2015), [https://www.washingtonpost.com/opinions/kill-the-dispute-settlement-language-in-the-trans-pacific-partnership/2015/02/25/ec7705a2-bd1e-11e4-b274-e5209a3bc9a9\\_story.html](https://www.washingtonpost.com/opinions/kill-the-dispute-settlement-language-in-the-trans-pacific-partnership/2015/02/25/ec7705a2-bd1e-11e4-b274-e5209a3bc9a9_story.html) [https://perma.cc/54AM-VF89]; *Investor-state dispute settlement: The Arbitration Game*, THE ECONOMIST (Oct. 11, 2014), <http://www.economist.com/news/finance-and-economics/21623756-governments-are-souring-treaties-protect-foreign-investors-arbitration> [https://perma.cc/W3J3-3LC4]; Georgios Dimitropoulos, *Constructing the Independence of International Investment Arbitrators: Past Pre-*

bitration tribunals for addressing human rights violations by businesses.<sup>180</sup> Before pursuing the latter option, it will be critical to address the problems related to conflicts of interest and impartiality that have arisen with international arbitration tribunals under trade pacts, as well as the discrepancy in power between businesses and individual claimants.

This article will now address whether it will be worthwhile to pursue drafting the treaty considering the possibility that few developed countries—where most of the multinational corporations (regardless of the definition) are based—will become parties to the treaty.

### III. Is Drafting the Treaty Worth It?

As noted above, Human Rights Council Resolution 26/9 (the resolution establishing the process for drafting a treaty on business and human rights) passed with a vote of less than half the members of the Human Rights Council: twenty in favor; fourteen against; thirteen abstentions.<sup>181</sup> The twenty countries in favor were primarily developing countries: Algeria, Benin, Burkina Faso, China, Congo, Côte d'Ivoire, Cuba, Ethiopia, India, Indonesia, Kazakhstan, Kenya, Morocco, Namibia, Pakistan, Philippines, Russian Federation, South Africa, Venezuela (Bolivarian Republic of), and Vietnam.<sup>182</sup> The countries voting against were countries in Europe along with the United States and Japan: Austria, Czech Republic, Estonia, France, Germany, Ireland, Italy, Montenegro, Republic of Korea, Romania, the former Yugoslav Republic of Macedonia, and the United Kingdom of Great Britain and Northern Ireland.<sup>183</sup> The countries abstaining were primarily developing countries along with Saudi Arabia and the United Arab Emirates: Argentina, Botswana, Brazil, Chile, Costa Rica, Gabon, Kuwait, Maldives, Mexico, Peru, and Sierra Leone.<sup>184</sup>

While this vote might vary depending on who is a member of the Human Rights Council, the vote on the resolution clearly suggests that developed countries are not going to support a treaty on business

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*sent, and Future*, 36 *Nw. J. INT'L L. & BUS.* 371, 373–74 (2016); Joseph Brubaker, *The Judge Who Knew Too Much: Issue Conflicts in International Adjudication*, 26 *BERKELEY J. INT'L L.* 111, 112–13 (2008).

180. See, e.g., Claes Cronstedt & Robert Thompson, *A Proposal for an International Arbitration Tribunal on Business and Human Rights*, 57 *HARV. INT'L L. J.* 66 (July 7, 2016) (on-line symposium).

181. H.R.C. Res. 26/9, *supra* note 1, at 3.

182. *Id.*

183. *Id.*

184. *Id.*

and human rights. The question may arise, therefore, whether going through the drafting process is worth it. The Convention on Migrant Workers<sup>185</sup> provides some guidance on this issue since it is an example of another treaty that primarily has been ratified by one side of the States involved in migration—the sending States—though some sending States do receive some migrants as well. This section will review the Convention on Migrant Workers and assess what value the treaty itself provides. It will also analyze the country reports that have resulted from review of the States Parties to the treaty to assess whether there has been a benefit from having only sending countries ratify it.

### A. The Convention on Migrant Workers

The drafting of the Convention on Migrant Workers (“the Convention”) was completed in 1990, but it did not enter into force until July 2003, in accordance with article 87(1).<sup>186</sup> The Convention’s main objective is to protect migrant workers and their families from exploitation and human rights violations. The Convention seeks to establish minimum standards that States Parties should apply to migrant workers and their families, regardless of documentation status.<sup>187</sup> Currently, there are thirty-eight signatories and forty-eight States Parties that have ratified the Convention.<sup>188</sup>

In 2015, two-thirds of all international migrants were living in only twenty countries.<sup>189</sup> Countries hosting the highest number of international migrants include: the United States (hosting approximately nineteen percent of total migrants), Germany, Russia, Saudi Arabia, the United Kingdom, and the United Arab Emirates.<sup>190</sup> Although each of these countries accounts for a high percentage of total

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185. Convention on Migrant Workers, *supra* note 14.

186. *International Convention on Migrant Workers and its Committee: Fact Sheet No. 24 (Rev. 1)*, OHCHR 1-2 (2005), <http://www.ohchr.org/Documents/Publications/FactSheet24rev1en.pdf> [https://perma.cc/3WZ7-T9ZU].

187. *International Migration Convention*, UNESCO, <http://www.unesco.org/new/en/social-and-human-sciences/themes/international-migration/international-migration-convention/> (last visited Apr. 9, 2017) [https://perma.cc/84DB-QUBS].

188. *International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families*, U.N. TREATY COLLECTION, [https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-13&chapter=4&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-13&chapter=4&lang=en) (last visited Apr. 9, 2017) [https://perma.cc/FL5D-M8QT].

189. *244 million international migrants living abroad worldwide, new UN statistics reveal*, U.N. SUSTAINABLE DEVELOPMENT GOALS (Jan. 12, 2016), <http://www.un.org/sustainabledevelopment/blog/2016/01/244-million-international-migrants-living-abroad-worldwide-new-un-statistics-reveal/> [https://perma.cc/6MY5-44RM].

190. *Id.*

international migrants, not one has signed the Convention.<sup>191</sup> In fact, none of the Western migrant-receiving countries have signed the Convention.<sup>192</sup> States Parties to the convention are primarily countries of origin from Latin America and Africa,<sup>193</sup> though some countries like Mexico and Turkey have become both sending and receiving countries.<sup>194</sup>

The Convention on Migrant Workers addresses a number of issues. First, it defines who it would cover<sup>195</sup> and the terms “State of origin,” “State of employment,” and “State of transit.”<sup>196</sup> Article 7 provides for non-discrimination for all migrant workers.<sup>197</sup> Part III of the Convention addresses the rights all migrant workers have regardless of their status,<sup>198</sup> and Part IV covers the rights of migrant workers who are documented or in a regular situation.<sup>199</sup> Part V includes the provisions for categories of migrant workers and their families, such as frontier, seasonal, itinerant, and project-tied workers.<sup>200</sup> Part VI addresses the promotion of sound, equitable, humane, and lawful conditions for international migration of workers and their families, which includes a number of obligations to provide information and services and entail cooperation between States Parties.<sup>201</sup> Like the topics related to a treaty on business and human rights, these provisions are reflective of the numerous issues that States had to address during the drafting of that treaty. Discussing and reaching agreement on these topics has helped to advance the protection of migrant workers and their families, even though only forty-eight countries have ratified the treaty as these provisions can now serve as guidelines for standards for all countries.

The Committee on Migrant Workers (“CMW”) is a body of independent experts responsible for monitoring the implementation of

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191. See U.N. TREATY COLLECTION, *supra* note 188.

192. See *id.*

193. *Id.*

194. See Francisco Alba, *Mexico: The New Migration Narrative*, MIGRATION POL’Y INST. (Apr. 24, 2013), <http://www.migrationpolicy.org/article/mexico-new-migration-narrative> [<https://perma.cc/TE65-6ESG>]; Kemal Kirisci, *Turkey: A Transformation from Emigration to Immigration*, MIGRATION POL’Y INST. (Nov. 1, 2003), <http://www.migrationpolicy.org/article/turkey-transformation-emigration-immigration> [<https://perma.cc/C9S3-FTH6>].

195. Convention on Migrant Workers, *supra* note 14, arts. 2–5.

196. *Id.* art. 6.

197. *Id.* art. 7.

198. *Id.* arts. 8–35.

199. *Id.* arts. 36–56.

200. *Id.* arts. 57–63.

201. Convention on Migrant Workers, *supra* note 14, arts. 64–71.

the convention.<sup>202</sup> Its first session was held in March 2004, and it generally holds two sessions each year.<sup>203</sup> The CMW requires States Parties to submit regular reports on the implementation of rights guaranteed under the Convention.<sup>204</sup> The CMW has adopted a simplified reporting procedure through which the CMW lists issues and the State Party replies.<sup>205</sup> The CMW can receive individual complaints only if States Parties “formally recognize the competence of the committee to do so” by making a declaration under Article 77 of the Convention.<sup>206</sup> However, as of August 2015, only three States Parties<sup>207</sup> had made the relevant declaration to give the CMW such authority.<sup>208</sup>

To date, there have been two general comments filed under the Convention. General Comment No. 1 focuses on who are considered migrant domestic workers under the treaty.<sup>209</sup> It also addresses various problems faced by migrant workers and their families<sup>210</sup> and gaps in protection.<sup>211</sup> There are also several recommendations to States Parties. These recommendations include pre-departure training,<sup>212</sup> cooperation among States,<sup>213</sup> and recommendations around work conditions.<sup>214</sup>

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202. *Committee on Migrant Workers: Introduction*, OHCHR, <http://www.ohchr.org/EN/HRBodies/CMW/Pages/CMWIntro.aspx> (last visited Mar. 19, 2017) [<https://perma.cc/F84W-XJQM>].

203. *Id.*

204. *Id.*

205. *Committee on Migrant Workers*, INT’L JUSTICE RES. CTR., [http://www.ijrcenter.org/un-treaty-bodies/committee-on-migrant-workers/#WORKING\\_METHODS](http://www.ijrcenter.org/un-treaty-bodies/committee-on-migrant-workers/#WORKING_METHODS) (last visited Apr. 9, 2017) [<https://perma.cc/7LYX-DNSH>].

206. *Convention on Migrant Workers*, *supra* note 14, art. 77.

207. Guatemala, Mexico and Uruguay have recognized the CMW’s competence to receive individual complaints through declarations under Article 77 of the Convention. *See View the ratification status by country or by treaty*, OHCHR, [http://tbinternet.ohchr.org/\\_layouts/TreatyBodyExternal/Treaty.aspx?Treaty=CMW&Lang=en](http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?Treaty=CMW&Lang=en) (scroll down to status report labeled “Acceptance of individual complaints procedures for CMW, Art.77—Individual complaints procedure under the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families”) [<https://perma.cc/6QHN-j7T7>].

208. INT’L JUSTICE RES. CTR., *supra* note 205.

209. Comm. on the Prot. of All Migrant Workers and Members of their Families, *General Comment No. 1 on migrant domestic workers*, U.N. Doc. CMW/C/GC/1 (Feb. 23, 2011), [http://www2.ohchr.org/english/bodies/cmw/cmw\\_migrant\\_domestic\\_workers.htm](http://www2.ohchr.org/english/bodies/cmw/cmw_migrant_domestic_workers.htm) [<https://perma.cc/KYT7-G5PP>].

210. *Id.* ¶¶ 8–17.

211. *Id.* ¶¶ 18–27.

212. *Id.* ¶¶ 28–30.

213. *Id.* ¶¶ 31–36.

214. *Id.* ¶¶ 37–41.

The General Comment No. 2 focuses on the rights of migrant workers in an irregular (or undocumented) situation and members of their families.<sup>215</sup> To implement the Convention, the Comment includes (1) power to regulate entry and stay; (2) duty to comply with the laws and regulations; (3) regularization; and (4) international cooperation as basic principles.<sup>216</sup> It also discusses protection of civil and political rights including protection against violence,<sup>217</sup> protection against arbitrary arrest and detention,<sup>218</sup> protection against inhumane treatment,<sup>219</sup> and protection in expulsion proceedings.<sup>220</sup> Economic, social, and cultural rights protections include protection against forced and compulsory labor and child labor,<sup>221</sup> right to social security,<sup>222</sup> right to urgent medical care,<sup>223</sup> and right to education.<sup>224</sup>

## B. Recent Country Reports

To examine the success or impact of the Convention further, one can look to recent country reports of the CMW (22nd, 23rd, and 24th Sessions). The CMW issues country reports after reviewing the reports submitted by the States Parties. As is the case with other treaty body reports, the reports generally include good practices by the States Parties and the CMW's recommendations for complying with the treaty. These reports demonstrate some similar concerns with respect to the implementation of the Convention by States Parties. Concerns include an overall lack of information available to migrant workers on their rights and obligations, a lack of training programs, a lack of adequate information on migration flows in individual countries, and a lack of information on application and implementation of the Convention's various provisions. This analysis is derived from the Concluding Observations of the States Parties reports: Mexico,<sup>225</sup> Guinea,<sup>226</sup> Peru,<sup>227</sup>

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215. Comm. on the Prot. of All Migrant Workers and Members of Their Families, *General comment No. 2 on the rights of migrant workers in an irregular situation and members of their families*, U.N. Doc. CMW/C/GC/2 (Aug. 28, 2013), [http://www2.ohchr.org/english/bodies/cmw/cmw\\_migrant\\_domestic\\_workers.htm](http://www2.ohchr.org/english/bodies/cmw/cmw_migrant_domestic_workers.htm) [<https://perma.cc/D663-552F>] [hereinafter *Migrant Worker General Comment No. 2*].

216. *Id.* ¶¶ 13–17.

217. *Id.* ¶¶ 21–22.

218. *Id.* ¶¶ 23–35.

219. *Id.* ¶¶ 36–48.

220. *Id.* ¶¶ 49–59.

221. *Migrant Worker General Comment No. 2*, *supra* note 215, ¶¶ 60–66.

222. *Id.* ¶¶ 66–71.

223. *Id.* ¶¶ 72–74.

224. *Id.* ¶¶ 75–79.

225. Comm. on the Prot. of Rights of All Migrant Workers and Members of Their Families, Concluding observations of the Committee on the Protection of the Rights of All

Ghana,<sup>228</sup> El Salvador,<sup>229</sup> Uruguay,<sup>230</sup> The Philippines,<sup>231</sup> Seychelles<sup>232</sup> and Belize.<sup>233</sup> The Concluding Observations on Uganda also raise more specific violations such as reports that child migrant workers are exploited into forced labor<sup>234</sup> and that some national rights are only guaranteed to documented migrant workers and not workers in an irregular situation.<sup>235</sup>

Country reports to the CMW do indicate that the treaty is being implemented through legislation in States Parties and this in turn is affecting migrant workers, particularly in relation to education of migrant workers about migration issues. The following are examples of legislative actions taken by States Parties to the Convention on Migrant Workers after ratification or accession to the treaty, as well as the concerns raised by the CMW regarding the reports:

MEXICO: ratified the Convention in 1999.<sup>236</sup> Mexico has reported twice under the Convention and is thus a good example of how the treaty has had an effect on the protection of migrant workers, espe-

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Migrants Workers and Members of Their Families, U.N. Doc. CMW/C/MEX/CO/1, at 4–5 (Dec. 20, 2006) [hereinafter Mexico Initial Report].

226. Comm. on the Prot. of Rights of All Migrant Workers and Members of Their Families, Concluding observations on the initial report of Guinea, U.N. Doc. CMW/C/GIN/CO/1, at 3 (Oct. 8, 2015) [hereinafter Guinea Initial Report].

227. Comm. on the Prot. of Rights of All Migrant Workers and Their Families, Concluding observations on the initial report of Peru, U.N. Doc. CMW/C/PER/CO/1, at 3–6 (May 13, 2015) [hereinafter Peru Initial Report].

228. Comm. on the Prot. of the Rights of Migrant Workers and Members of Their Families, Concluding observations on the initial report of Ghana, U.N. Doc. CMW/C/GHA/CO/1, at 2–3 (Sept. 26, 2014) [hereinafter Ghana Initial Report].

229. Comm. on the Prot. of Migrant Workers and Members of Their Families, Concluding observations on the second periodic report of El Salvador, U.N. Doc. CMW/C/SLV/CO/2, at 2–3 (May 2, 2014) [hereinafter El Salvador Second Report].

230. Comm. on the Prot. of the Rights of Migrant Workers and Members of Their Families, Concluding observations on the initial report of Uruguay, U.N. Doc. CMW/C/URY/CO/1, at 2, 6 (May 2, 2014) [hereinafter Uruguay Initial Report].

231. Comm. on the Prot. of the Rights of All Migrant Workers and Members of Their Families, Concluding observations on the second periodic report of the Philippines, U.N. Doc. CMW/C/PHL/CO/2, at 2–3 (May 2, 2014) [hereinafter Philippines Second Report].

232. Comm. on the Prot. of all Migrant Workers and Members of Their Families, Concluding Observations on the initial report of Seychelles, U.N. Doc. CMW/C/SYC/CO/1, at 2–8 (Oct. 8, 2015) [hereinafter Seychelles Initial Report].

233. Comm. on the Prot. of the Rights of All Migrant Workers and Members of Their Families, Concluding observations on Belize in the absence of a report, U.N. Doc. CMW/C/BLZ/CO/1, at 2–3 (Sep. 26, 2014) [hereinafter Belize Concluding Observations].

234. Comm. on the Prot. of Rights of All Migrant Workers and Members of Their Families, Concluding observations on the initial report of Uganda, ¶ 30, U.N. Doc. CMW/C/UGA/CO/1 (May 22, 2015).

235. *Id.* ¶¶ 26, 36.

236. U.N. TREATY COLLECTION, *supra* note 188.

cially since it is both a sending and receiving country. The CMW noted in its first report that Mexico had extended voting rights to Mexican citizens residing abroad.<sup>237</sup> The CMW also referred to the government's migration reform initiatives, including amendments to the General Population Act of 1974 which had not yet passed.<sup>238</sup> It also noted that several acts regarding discrimination had been enacted, but expressed concern that migrant workers and their families continued to suffer from employment discrimination and social stigmatization.<sup>239</sup> The CMW also mentioned several programs aimed at upgrading migrant holding centers but expressed concern that conditions continued to violate migrants' rights.<sup>240</sup> In the review of Mexico's second report, among the positive developments, the CMW noted that the General Population Act had passed in 2008 and it included a reduction in prison terms from ten years to eighteen months for undocumented migrant workers.<sup>241</sup> It also mentioned the adoption of legislation that addressed trafficking in persons and kidnapping of migrants.<sup>242</sup> The CMW also expressed concern about a number of issues affecting migrants such as the need to educate judges about the treaty,<sup>243</sup> corruption issues,<sup>244</sup> and a lack of proper access to justice for undocumented workers who were victims of abuse.<sup>245</sup>

GUINEA: acceded to the Convention on Migrant Workers in 2000.<sup>246</sup> As noted by the CMW, the government took various initiatives to implement the treaty such as the creation of the Ministry Responsible for Guineans Abroad in 2011,<sup>247</sup> and the Ministry of Human Rights and Public Liberties in 2012.<sup>248</sup> The CMW expressed a number of concerns, including the failure to protect the rights of their own citizens living abroad,<sup>249</sup> and discrimination against migrant workers

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237. Mexico Initial Report, *supra* note 225, ¶ 10.

238. *Id.* ¶ 14.

239. *Id.*

240. *Id.* ¶ 27.

241. Committee on the Protection of Rights of All Migrant Workers and Their Families, Concluding observations of the Committee on the Protection of the Rights of All Migrants Workers and Members of Their Families, ¶ 7(a), U.N. Doc. CMW/C/MEX/CO/2 (May 3, 2011) (Observations on the second report of Mexico).

242. *Id.* ¶ 7(b), (f).

243. *Id.* ¶¶ 21–22.

244. *Id.* ¶ 28.

245. *Id.* ¶ 25.

246. U.N. TREATY COLLECTION, *supra* note 188.

247. Guinea Initial Report, *supra* note 226, ¶ 5 (a).

248. *Id.*

249. *Id.* ¶ 26.



living in Guinea.<sup>250</sup> As the CMW did in its review of other States' reports, it urged the need to collect data regarding migrant workers.<sup>251</sup>

PERU: ratified the Convention in 2005.<sup>252</sup> In January 2007 Act No. 28950 on Trafficking in Persons and Smuggling of Migrants was passed.<sup>253</sup> In March 2013, an act on the Economic and Social Reintegration of Returned Migrants was passed.<sup>254</sup> In November 2013, Act No. 30103 establishing residency procedure for foreign nationals in an irregular situation was passed.<sup>255</sup> In July 2014, Peru adopted the National Human Rights Plan for 2014–2016, and then in December 2014 adopted the National Human Rights and Fundamental Duties Education Plan for 2021.<sup>256</sup> Despite all of these developments, the CMW expressed concern that Peru “is still in the midst of a long shift towards the development of new legislation on migration” consistent with the provisions of the Convention.<sup>257</sup> It appears that Peru is attempting to take positive steps with respect to migrant workers and it is hoped that the country will continue to implement programs to both educate and support all workers irrespective of their residency status.

GHANA: ratified the Convention in 2000.<sup>258</sup> In the review of its first report, the CMW noted that Ghana had established the Inter-Ministerial Committee on Migration and has made prominent efforts to adopt a draft national migration policy.<sup>259</sup> However, the CMW expressed concern that the framework of the policy and its implementing legislation is fragmented and had insufficient coordination between institutions and services.<sup>260</sup> The CMW made various suggestions for implementing the Convention, and specifically made a recommendation that would be useful for all Party reports.

EL SALVADOR: ratified the Convention in 2003.<sup>261</sup> In its second review, the CMW noted Salvadoran legislation enacted, including the Special Act on the Protection and Development of Salvadoran Mi-

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250. *Id.* ¶¶ 35–41.

251. *Id.* ¶ 22.

252. U.N. TREATY COLLECTION, *supra* note 188.

253. Peru Initial Report, *supra* note 227, ¶ 7 (c).

254. *Id.* ¶ 7 (b).

255. *Id.* ¶ 7(a).

256. *Id.* ¶ 8 (a)–(b).

257. *Id.* ¶ 10.

258. U.N. TREATY COLLECTION, *supra* note 188.

259. Ghana Initial Report, *supra* note 228, ¶ 6.

260. *Id.* ¶ 6 (a)–(b).

261. U.N. TREATY COLLECTION, *supra* note 188.

grants and their Families in 2011,<sup>262</sup> and the Project to Regularize Nicaraguan Citizens and their Families in El Salvador in 2011–2012, which resulted in the regularization of 400 people.<sup>263</sup> The CMW also mentioned that the government had held limited training programs on the Convention for public officials, but noted a need for more.<sup>264</sup> It also mentioned a number of problems related to the lack of access to justice,<sup>265</sup> as well as work-related rights,<sup>266</sup> and rights to health and education for workers and their families.<sup>267</sup> The CMW had very specific recommendations to address these and other issues related to the rights of migrant workers, as this was the second review of El Salvador. It will be interesting to see to what extent El Salvador is able to address all of this before their next report.

URUGUAY: acceded to the Convention in 2001.<sup>268</sup> In 2008, it adopted Migration Act (No. 18250), “which adheres to the provisions of the Convention and could serve as a model for other States parties to follow.”<sup>269</sup> The Concluding Observations on Uruguay’s report reference specific provisions of the Act,<sup>270</sup> including bilateral and multi-lateral agreements relating to migrant workers and efforts to support returning migrant workers through the “Return and Welcome Office.”<sup>271</sup> The Concluding Observations also mention problems related to the latter and notes the need to provide more information and publicize services to returning migrant workers.<sup>272</sup> The CMW notes that while Uruguay was traditionally a sending country, it has recently become a receiving country.<sup>273</sup> The CMW addressed a number of rights related to migrant workers in the Concluding Observations in addition to calling for the collection of data.

THE PHILIPPINES: ratified the Convention in 1995.<sup>274</sup> The MWC reviewed The Philippines’ second report in 2014 and noted that the State Party had “expressed high level political will . . . to respond to the needs of migrant workers abroad” with a multitude of programs

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262. El Salvador Second Report, *supra* note 229, ¶ 5.

263. *Id.* ¶ 6.

264. *Id.* ¶ 18.

265. *Id.* ¶¶ 22–25.

266. *Id.* ¶¶ 29–30.

267. *Id.* ¶¶ 30–31.

268. U.N. TREATY COLLECTION, *supra* note 188.

269. Uruguay Initial Report, *supra* note 230, ¶ 5.

270. *Id.* ¶5 (a)–(d).

271. *Id.* ¶ 43.

272. *Id.*

273. *Id.* ¶ 3.

274. U.N. TREATY COLLECTION, *supra* note 188.

and support structures for overseas working, covering all stages of the migration process.<sup>275</sup> This included: The Migrant Worker and Overseas Filipino Act;<sup>276</sup> Overseas Preparedness and Response Team;<sup>277</sup> and Training on the Convention. The CMW noted that the target group for the programs is unclear and their dissemination is inadequate.<sup>278</sup>

Many of the comments and recommendations in the second report of The Philippines would be useful for other governments seeking to address the rights of their own citizens abroad as well as migrants in their country.

SEYCHELLES: acceded to the Convention in 1994.<sup>279</sup> In its first review of the Seychelles in 2015, the CMW noted that training programs on trafficking targeting “front-line officers, non-governmental organizations and journalists” are conducted in the country.<sup>280</sup> Anti-trafficking information is also disseminated through leaflets to migrant workers in their languages, but the CMW expressed concern that these efforts were inadequate.<sup>281</sup> Migrant workers and their families are also protected by the Employment Act,<sup>282</sup> granting them access to all services provided to nationals by the State’s social services division.<sup>283</sup> However, there is no legislation or policy on family reunification and programs are available but inadequate.<sup>284</sup> The Seychelles has adopted significant legislation and regulations to combat trafficking in persons and established a National Coordinating Committee on Trafficking in Persons in 2014.<sup>285</sup> Despite these efforts, the Committee expressed concern that the lack of studies, analyses, and disaggregated data would make it difficult to assess the extent of trafficking in the State Party.<sup>286</sup> The Committee also noted the lack of shelters for victims of trafficking in persons.<sup>287</sup>

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275. Philippines Second Report, *supra* note 231, ¶ 5.

276. Migrant Workers and Overseas Filipino Act of 1995, Rep. Act No. 10022, amended 2010, <https://www.colomboproccess.org/images/pdfs/philippines-migrant-workers-act.pdf>. [<https://perma.cc/5GCP-HZ3J>].

277. Philippines Second Report, *supra* note 231, ¶ 6(c).

278. *Id.* ¶ 20.

279. U.N. TREATY COLLECTION, *supra* note 188.

280. Seychelles Initial Report, *supra* note 232, ¶ 16.

281. *Id.*

282. *Id.* ¶ 24.

283. *Id.* ¶ 30.

284. *Id.*

285. *Id.* ¶ 36.

286. Seychelles Initial Report, *supra* note 232, ¶ 36.

287. *Id.* ¶ 36.

BELIZE: acceded to the Convention in 2001.<sup>288</sup> Since Belize had not submitted a report since becoming a party, the CMW decided to review them without the report and based its comments on information from other U.N. bodies and procedures.<sup>289</sup> The CMW also mentioned Belize's international treaty obligations, including the fact that Belize is a member of the ILO but has not yet ratified the ILO's Migrant Workers (Supplementary Provisions) Convention No. 143, or other ILO Conventions.<sup>290</sup> The CMW expressed concern that there is only limited access to justice for migrant workers in Belize regardless of their residency status and made recommendations for addressing this problem.<sup>291</sup> It also mentioned a number of discrimination issues regarding the entry of migrant workers and their families into the country.<sup>292</sup>

Despite limited reporting on the specific benefits the Convention on Migrant Workers has had on protecting migrant workers, the country reports since its ratification indicate that governments have in fact adopted legislation to both educate their own citizens who might emigrate to other countries, and provide some benefits to migrant workers in their own countries. Though these countries contain a very small percentage of the migrant workers worldwide, the legislation serves as an example of what can be accomplished to protect the rights of migrant workers—in both sending and receiving countries. The CMW has also helped to develop best practices to promote the rights of migrant workers. While the CMW has raised concerns regarding the adequacy of the legislation in individual countries, it has helped to develop the legal standards regarding the definition of migrant workers in addition to elaborating what rights those in irregular situations might have. These benefits will clearly have an effect on the evolution of the law protecting migrant workers and their families.

## Conclusion

Efforts to address corporate accountability for human rights violations in the international arena have spanned a least half a century with very few concrete procedures created to address violations and provide redress. While the Guiding Principles have raised awareness in States and corporations of the need to address the topic, few reme-

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288. U.N. TREATY COLLECTION, *supra* note 188.

289. Belize Concluding Observations, *supra* note 233, ¶ 1.

290. *Id.* ¶¶ 12–13.

291. *Id.* ¶¶ 22–23.

292. *Id.* ¶¶ 18.

dies exist for victims of violations when national mechanisms are not able or available to address them. The Human Rights Council finally recognized this gap in the protection of human rights when it decided to establish a procedure to draft a treaty on this topic in 2014. Unfortunately, the resolution to establish the procedure did not receive the support of the developed countries where the bulk of multinational corporations reside. The question then arises whether it is worth going through the process of drafting the treaty if it is likely that only less developed countries will become party to it. The answer is yes; it is still worthwhile.

First, the Convention on Migrant Workers provides good lessons on dealing with a treaty that addresses a long-time concern regarding the protection of rights, yet has not been ratified by many developed countries. The drafting of the Convention helped to coalesce the various standards regarding migrant workers' rights into a binding document that helped to develop the law on the topic. This benefit has already been raised in the discussions held by the Working Group tasked with elaborating on the process for drafting the treaty on business and human rights during the first week of meetings.<sup>293</sup> This included discussions on the need to define certain words such as "transnational," to address the question of whether the treaty should provide direct responsibility for businesses, and the need to provide for accountability.<sup>294</sup> While no decisions have been made, these discussions have helped to identify what a treaty might cover and ultimately should result in a treaty that will provide standards for further protecting human rights.

Second, the Convention on Migrant Workers entering into force has already seen the adoption of laws in States Parties that help to promote and protect the rights of persons who might become migrant workers, as well as the rights of migrant workers that are not from what are traditionally considered receiving countries. A treaty on business and human rights can have a similar effect on the development of procedures at the national level, as well as provide a forum for addressing redress at the international level when the latter are not sufficient. These benefits may not achieve the ultimate goal of providing a uniform international document defining human rights violations by businesses, but they are a worthwhile first step in making that happen.

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293. See, e.g., Report on First Session, *supra* note 135, ¶ 22.

294. See *supra* notes 157–165 and accompanying text.

I would provide one caveat in relation to the process. Because there are numerous unresolved issues at the international level with respect to holding corporations and States accountable for human rights violations resulting from business activities, it would likely be best to proceed with a limited number of topics at a time. Trying to address them all at once could result in years of drafting without resolving any issues. For example, the first step might be to draft a treaty on individual criminal liability for acts of a corporation based on developments at the International Criminal Court.<sup>295</sup>

Based on the experience of the implementation of the Migrant Worker Treaty, the adoption of a treaty to address human rights violations by corporate actors will provide three benefits regardless of the number of States that become party to it. First, it will help to develop international law regarding accountability for human rights violations by actors that have thus far escaped scrutiny. Second, as has been the case with the Migrant Worker Treaty, the States that do become party to it will take steps to enforce the treaty at the national level, which should provide new laws establishing accountability for violations that have thus far remained unaddressed. And, third, it would provide an international procedure for reviewing compliance with the treaty which, in turn, will further the development of the international standards for addressing liability for corporate actors.

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295. *See generally* THOMAS M. SCHMIDT, *CRIMES OF BUSINESS IN INTERNATIONAL LAW: CONCEPTS OF INDIVIDUAL AND CORPORATE RESPONSIBILITY FOR THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT* 25 (2015) (providing a study that lays out concepts to assess individual responsibility under the Rome Statute of the International Criminal Court, specifically in the context of corporate actors “providing material resources (utilities and funding) towards the commission of genocide, crimes against humanity, and war crimes.”).