

International Human Rights Obligations of Transnational Business Enterprises

Author – Ishani Mookherjee

4th yr. B.A., LL.B.(H.), Jindal Global Law School, 16jgls-imookherjee@jgu.edu.in

ABSTRACT

The business enterprises have become significant in determining the international economic order as well as law and policy framework worldwide as their leverage has increased due to speedy globalization. The rise in the significance of business enterprises is connected to the continued erosion of the economic and political dominance of States. Several transnational corporations have been able to exploit the political instability, corrupt administration and lack of effective remedies in developing countries to escape responsibility for violating human rights. Against this backdrop, firstly, the paper traces the evolution of law in the sphere of human rights ‘responsibilities’ of transnational business enterprises, which ultimately has culminated in the voluntary ‘United Nations Guiding Principles for Business and Human Rights’. Secondly, the paper elaborates upon the ‘Protect, Respect and Remedy’ Framework contained in the Guiding Principles. Thirdly, it critically analyses the Guiding Principles, with regard to its process of adoption, the inadequacy of the Three Pillar Framework, the voluntary-mandatory dichotomy and the issues it failed to address, which include environmental degradation, special interests of vulnerable groups and indigenous communities and barriers to remedies. Lastly, to conclude, the paper recommends ways to address such shortcomings and explores the viability of the proposed legally binding treaty about human rights ‘obligations’ of transnational and other business enterprises.

Keywords: Transnational Corporation, State, Human Rights, Developing Countries, Guiding Principles for Business and Human Rights

A Glimpse of the Problem: Human Rights Abuses by Transnational Corporations

The resource-rich country of Nigeria is classic example of a country inflicted by the ‘resource curse’ or ‘paradox of plenty’.¹ Several transnational corporations, like Royal Dutch Shell Company Limited (Shell), through its subsidiary, have been engaged in oil exploration in Nigeria,² leading to a mono-culture economy.³ The exploitative business environment and low economic growth, coupled with corruption by the authoritarian government, have condemned the conflict-ridden native population to poverty.⁴ While Shell has been able to maximize its profits,⁵ its activities in the Ogoni region of Niger Delta, since 1958, have caused oil spillage and pollution, environmental degradation, health hazards and have severely destroyed the farmlands of the indigenous communities, depriving them of their sole source of livelihood.⁶

The protest of the “Movement for Survival of Ogoni people” against such activities was suppressed by the Nigerian Government and military forces.⁷ The Ogoni people blamed Shell for, *inter alia*, extra-judicial killing, torture, deprivation of right to life, liberty and security,⁸ destruction of property, violation of right to water, food, health and environment and traditional way of living.⁹ Despite protesting and initiating tort action against Shell in Netherlands¹⁰ for

¹*The Resource Curse: The Political and Economic Challenges of Natural Resource Wealth*, NATIONAL RESOURCE GOVERNANCE INSTITUTE READER (March 2015), https://resourcegovernance.org/sites/default/files/nrgi_Resource-Curse.pdf, accessed Oct. 28, 2019.

²*Non State Actors and Human Rights* in INTERNATIONAL HUMAN RIGHTS 1464 (Philip Alston and Ryan Goodman, OUP 2012).

³ Yemisi Ilesanmi, *CSR and Ruggie: A View From Nigeria*, 17 (2) INTERNATIONAL UNION RIGHTS FOCUS ON BUSINESS AND HUMAN RIGHTS 4 (2010).

⁴ Ilesanmi, *supra* note 3.

⁵ Ilesanmi, *supra* note 3.

⁶ United Nations Environment Programme Report, *Environmental Assessment of Ogoniland*, UNEP (4 August 2011), <https://www.unenvironment.org/resources/assessment/environmental-assessment-ogoniland-site-factsheets-executive-summary-and-full> [hereinafter UNEP Report].

⁷ *Kiobel v. Royal Dutch Petro Co.*, 621 F.3d 111 (2nd Cir. 2010), cert granted 132 SCt 472 (2011); Alston and Goodman, *supra* note 2, at 1464.

⁸ *Id.*

⁹ UNEP Report, *supra* note 6.

¹⁰ *Dooh et al. v. RDS and SPDC* [2009] District Court of The Hague; *Oguru et al. v. RDS and SPDC* [2009] District Court of the Hague; *Akpan et al. v. RDS and SPDC* [2009] District Court of the Hague as cited in Tineke Lambooy, Aikaterini Argyrou and Mary Varner, *An Analysis And Practical Application Of The Guiding Principles On Providing Remedies With Special Reference To Case Studies Related To Oil Companies*, in HUMAN RIGHTS

massive oil leaks, the company refused to take any responsibility for its actions.¹¹ The exploitation continued, leaving the natives remedy-less.¹²

Such human rights violations by transnational corporations are not exclusive to Nigeria. In Ecuador, operations of Texaco Inc., which was a part of the Chevron group, caused significant oil pollution in the water basin and soil in the 1960s to 1990s.¹³ In Columbia, paramilitary forces were employed by Coca-Cola, subjecting union leaders to violence, torture and unlawful detention.¹⁴ Even in India, as seen in the Bhopal Gas Leaks, involving the Union Carbide Corporation, commercial activities by transnational organizations have led to environmental degradations and health hazards, without adequate remedy to the victims.¹⁵ Therefore, activities of transnational corporations across the world violate a plethora of human rights, including the right to life and liberty,¹⁶ property,¹⁷ a good standard of living, food and healthy environment,¹⁸ safe and healthy working conditions,¹⁹ remedy,²⁰ along with the right to clean environment.²¹ Additionally, such corporations, in their complex supply chains, have been complicit in harsh work conditions, discriminatory practices, child labour and use of poisonous chemicals.²² While

OBLIGATIONS OF BUSINESS: BEYOND THE CORPORATE RESPONSIBILITY TO RESPECT? 343-348 (Surya Deva and David Bilchitz eds., CUP 2013).

¹¹ Tineke Lambooy, Aikaterini Argyrou and Mary Varner, *An Analysis And Practical Application Of The Guiding Principles On Providing Remedies With Special Reference To Case Studies Related To Oil Companies*, in HUMAN RIGHTS OBLIGATIONS OF BUSINESS: BEYOND THE CORPORATE RESPONSIBILITY TO RESPECT? 343-348 (Surya Deva and David Bilchitz eds., CUP 2013).

¹²*Id.*, at 342.

¹³ *Id.*, at 336-341.

¹⁴ Lucy Kronforst, *Transnational Corporations And Human Rights Violations: Focus On Colombia*, (23) 2 WISCONSIN INTERNATIONAL LAW JOURNAL 322 (2012).

¹⁵ Charan Lal Sahu v. Union of India (1990) 1 SCC 613 (India).

¹⁶ G.A. Res. 217 (III) A, Universal Declaration of Human Rights art. 3 (Dec. 10, 1948) [hereinafter UDHR]; International Covenant on Civil and Political Rights arts. 6, 9, Dec. 16, 1966, S. Exec. Rep. 102-23, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR].

¹⁷ UDHR, *supra* note 16, art. 18.

¹⁸ UDHR, *supra* note 16, art. 25; International Covenant on Economic, Social and Cultural Rights art. 12, Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976) [hereinafter ICESCR].

¹⁹ *Id.*, art. 7(b).

²⁰ UDHR, *supra* note 16, art. 8.

²¹ Legal Principles for Environment Protection and Sustainable Development art. 1 (adopted by WCED June 18-20, 1986) UN Doc WCED/86/23/Add 1. See Dinah Shelton, *Human Rights, Health and Environment Protection: Linkages in Law and Practice* 1 HUM RTS & INT'L LEGAL DISCOURSE 9 (2007).

²² Alston and Goodman, *supra* note 2, at 1461.

the situation is aggravated in mineral and extractive industries operating in developing countries, such violations are common in other sectors, like Information Technology, too.²³

The aforementioned instances of human rights violation by a transnational business corporation capture the essence of the problem in the realm of international human rights and businesses. The State, which has traditionally been bound by a network of treaty obligations to protect human rights,²⁴ has failed to protect human rights. The business enterprise has been able to exploit the political instability, corrupt administration and rich resources for its benefit. Owing to their transnational character, the lack of transparency and accountability and ignorance of ideas like Corporate Social Responsibility,²⁵ they could escape responsibility for violating human rights. Further, slow, expensive and often, biased judicial process and lack of relevant information deprived the victims of a fair judicial process and effective remedy.²⁶

Initially, it was argued that market forces would regulate the corporate behavior and prevent such human rights violations. Over the years, it has been realized that since companies are largely profit-oriented, they inherently don't include awareness about human rights.²⁷ So, market forces become inadequate to ensure accountability and transparency regarding such abuses.²⁸ Consequently, it raises the question as to whether transnational or multi-national corporations and business enterprises should be subject to binding international legal obligations to protect human rights and prevent violations.

²³See C. Duhigg and D. Barboza, *In China, Human Costs Are Built Into An Ipad*, THE NY TIMES (Jan. 25, 2012), <https://www.nytimes.com/2012/01/26/business/ieconomy-apples-ipad-and-the-human-costs-for-workers-in-china.html?mtrref=www.google.com&gwh=E94A6B61D27F8E956B8EE97FB41133C6&gwt=pay&assetType=REGIWALL>, accessed Oct. 28, 2019.

²⁴Alston and Goodman, *supra* note 2, at 1461.

²⁵Ilesanmi, *supra* note 3.

²⁶Ilesanmi, *supra* note 3.

²⁷German Institute of Human Rights Position Paper, *Building on the UN Guiding Principles towards a Binding Instrument on Business and Human Rights: Comments on the 'Elements for the Draft Legally Binding Instrument' of the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises* (March 2018), https://www.institut-fuer-menschenrechte.de/fileadmin/user_upload/Publikationen/Stellungnahmen/Position_Paper_Building_on_the_UN_Guiding_Principles_towards_a_Binding_Instrument_on_Business_and_Human_Rights_2018_03_20.pdf, accessed Oct. 28, 2019.

²⁸ Nicholas Howen, *Business Human Rights and Accountability*, INTERNATIONAL COMMISSION OF JURISTS (21 September 2005), https://www.ihrb.org/pdf/Business_Human_Rights_and_Accountability.pdf, accessed Oct. 28, 2019.

Traditionally, the idea of human rights has been intrinsically linked to the idea of State sovereignty.²⁹ Ideally, States were required to regulate actors within their territories and protect human rights.³⁰ However, in reality, most governments, especially in developing Third World countries, are either reluctant or lack political will and governance structure to do so.³¹ When companies provide support to oppressive governments, in pursuit of profit, the States become complicit in human right violations.³² There is often a ‘race to the bottom’ among the host States, with regard to labour standards and industry regulation, to attract foreign investment.³³ There have been efforts by the judiciary to develop doctrines for horizontal application of rights to companies. Since most rights are enforceable against the State, doctrines like the State Instrumentality doctrine³⁴ and State Action Doctrine³⁵ have expanded the definition of ‘State’ enabling the Court to hold corporation under the control of the ‘State’ liable for violation of human rights. However, the courts in the host States have been unable to hold transnational companies accountable for their activities under such doctrines.³⁶ Even the home States i.e. developed countries, where these companies are incorporated, are not interested in regulating the extra-territorial activities of the companies.³⁷

Given the increasing instances of human rights violation by transnational corporations, in the recent years, international law has been engaging with the idea of rights and obligations of transnational corporations, in the realm of human rights.

Evolution of International Law regarding Business Enterprises and Human Rights:

²⁹See S. MOYN, *THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY* 28 (First Belknap Press of Harvard University Press USA (2010)).

³⁰German Institute of Human Rights Position Paper, *supra* note 27.

³¹*Id.*

³²Geoffrey Chandler, *Corporate Liability: Human Rights and the Modern Business*, CONFERENCE ORGANIZED BY JUSTICE AND SWEET AND MAXWELL (June 12, 2006) as cited in Alston and Goodman, *supra* note 2, at 1463.

³³Alston and Goodman, *supra* note 2, at 1465.

³⁴The State Instrumentality doctrine has been developed by The Supreme Court of India, wherein corporations controlled by the State or corporations performing a public function can be held liable for violation of fundamental rights enshrined in Part III of the Constitution, *See Ramana Dayaram Shetty v. The International Airport Authority AIR 1979 SC 1628 (India)*.

³⁵The State Action Doctrine, developed by the Supreme Court of United States, has been expanded in certain circumstances, wherein one may proceed against private individuals, *See Civil Rights Cases 109 US 3 (1883), Nixon v. Herndon 273 US 536 (1927), Burton v. Wilmington Parking Authority 365 US 715 (1961)*.

³⁶*See Charan Lal Sahu v Union of India (1990) 1 S.C.C. 613 (Singh J) 136, 138.*

³⁷German Institute of Human Rights Position Paper, *supra* note 27.

Bilchitz and Deva divide the development of law regarding obligation of transnational corporations and business enterprises about protection of human rights into three phases.³⁸

In the first phase, in 1970s, the United Nations (UN) established a Commission on MNCs to formulate a code of conduct to regulate corporate behavior.³⁹ While the *Draft Code on Transnational Corporations* provided that corporations must protect the human rights in host countries, it was not the exclusive concern of the Code.⁴⁰

The second phase began in 1999, with the *Global Compact*,⁴¹ which was a voluntary 'promotional tool', aiming to reward 'good corporate practices'. The companies pledged to support ten principles concerning human rights, labour rights, environment and anti-corruption in their 'sphere of influence' and not be complicit in human rights abuses.⁴² Similarly, the *Voluntary Principles on Security and Human Rights*,⁴³ adopted in 2000, aimed to guide extractive industries in maintaining safety and security, while ensuring respect for human rights.⁴⁴ However, such voluntary mechanism avoided binding obligations and instead relied upon public opinions and 'corporate altruism'.⁴⁵

Thus, in an effort to draft 'substantive human rights responsibilities' of transnational corporations, in 2003, the UN Sub-Commission for Promotion and Protection of Human Rights approved the *Norms on the Human Rights Responsibilities of Transnational Corporations and Other Business Enterprises* (Norms).⁴⁶ Even though States had the primary responsibility to 'promote, secure fulfillment, respect, ensure respect of and protect human rights', transnational

³⁸David Bilchitz and Surya Deva, *The Human Rights Obligations Of Business: A Critical Framework for the Future*, in HUMAN RIGHTS OBLIGATIONS OF BUSINESS: BEYOND THE CORPORATE RESPONSIBILITY TO RESPECT? 5-9 (Surya Deva and David Bilchitz eds., CUP 2013).

³⁹P. MUCHLINSKI, MULTINATIONAL ENTERPRISES AND THE LAW 593 (Oxford: Blackwell Publishing, 1999) as cited in Bilchitz and Deva, *The Human Rights Obligations Of Business: A Critical Framework For The Future*, *supra* note 38, at 5.

⁴⁰'Draft Code on Transnational Corporations' in UNCTC, *Transnational Corporations, Services and the Uruguay Round* (1990), Annex IV, 231 at 234, ¶ 14. The negotiations on the Code were ultimately suspended in 1990 owing to disagreements between the developing and developed countries. See Bilchitz and Deva, *The Human Rights Obligations Of Business: A Critical Framework For The Future*, *supra* note 38, at 6.

⁴¹United Nations Global Compact, 1999, <https://www.unglobalcompact.org/about>, accessed Oct. 28, 2019.

⁴²Alston and Goodman, *supra* note 2, 1468.

⁴³*Voluntary Principles on Security and Human Rights*, 2000, <https://www.voluntaryprinciples.org/>, accessed Oct. 28, 2019.

⁴⁴Alston and Goodman, *supra* note 2, at 1469.

⁴⁵*Id.*

⁴⁶Norms on the Human Rights Responsibilities of Transnational Corporations and Other Business Enterprises, UN doc E/CN.4/Sub.2/2003/12/Rev.2, (Aug. 13, 2003) [hereinafter Norms].

corporations and business enterprises were also responsible for promoting and securing the human rights, imbibed in international conventions.⁴⁷ They were praised by the human rights activists for providing ‘clear binding standards for corporate behaviour and enforcement mechanisms.’⁴⁸ However, the Norms were challenged for lacking ‘legal justification’ since they imposed obligations on corporations, which may not have been ratified by the host states.⁴⁹

The Third phase commenced in 2005, with the appointment of John Ruggie as the Special Representative on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises (SRSG) by the UN Secretary-General, as requested under the resolution adopted by the UN Commission on Human Rights.⁵⁰ The conceptual framework of ‘Protect, Respect and Remedy’,⁵¹ proposed by Ruggie, in 2008 as common policy framework, ultimately culminated in the *UN Guiding Principles on Business and Human Rights* (GPs) in 2011.⁵² Transcending ‘sector-specific voluntary’ measures, the GPs, characterized with a bottoms-up approach,⁵³ consultations and ‘principled pragmatism’, established a duty for states to ‘protect’ human rights, a responsibility for the business enterprises to ‘respect’ human rights and victim’s access to ‘remedy’, through voluntary norms.⁵⁴ At present, the GPs are the ‘most authoritative statement’ of human rights responsibilities of business enterprises.⁵⁵

⁴⁷ Olivier De Schutter, *Foreword*, in HUMAN RIGHTS OBLIGATIONS OF BUSINESS: BEYOND THE CORPORATE RESPONSIBILITY TO RESPECT? xvi (Surya Deva and David Bilchitz eds., CUP 2013).

⁴⁸ Nina Seppala, *Business and the International Human Rights Regime: A Comparison of UN Initiatives* 87 (2) JOURNAL OF BUSINESS ETHICS: SPHERES OF INFLUENCE/SPHERES OF RESPONSIBILITY: MULTINATIONAL CORPORATIONS AND HUMAN RIGHTS 401 (2009).

⁴⁹*Id.*

⁵⁰ Commission on Human Rights, Human Rights and Transnational Corporations and Other Business Enterprises, Resolution 2005/69, Ch. XVII, E/CN.4/2005/L.10/Add.17 (April 20, 2005) as cited in Carlos Lopez, *The ‘Ruggie Process’: From Legal Obligations to Corporate Social Responsibility?*, in HUMAN RIGHTS OBLIGATIONS OF BUSINESS: BEYOND THE CORPORATE RESPONSIBILITY TO RESPECT? 61 (Surya Deva and David Bilchitz eds., CUP 2013).

⁵¹ Human Rights Council, *Protect, Respect and Remedy: A Framework for Business and Human Rights*, ¶ 8, A/HRC/8/5 (April 7, 2008), as cited Bilchitz and Deva, *The Human Rights Obligations Of Business: A Critical Framework For The Future*, *supra* note 38, at 1.

⁵² Human Rights Council, Human Rights and Transnational Corporations and Other Business Enterprises, A/HRC/Res./17/4, (June 16, 2011) as cited in De Schutter, *supra* note 47, at xvii.

⁵³ The formulation of the Guiding Principles was based on extensive consultations with a wide range of stakeholders, such as multinational corporations, non-governmental organizations and scholars. Since the business sector played an important role in determining the rules that would be applicable to them, such a bottoms-up approach became a defining feature of the Third Phase. See Bilchitz and Deva, *The Human Rights Obligations Of Business: A Critical Framework For The Future*, *supra* note 38, at 8.

⁵⁴ Bilchitz and Deva, *The Human Rights Obligations Of Business: A Critical Framework For The Future*, *supra* note 38, at 8-9.

⁵⁵ De Schutter, *supra* note 47, at xvii.

The Guiding Principles: The ‘Protect, Respect and Remedy’ Framework:

The GPs neither create new legal obligations nor undermine the existing obligations under international human rights law.⁵⁶ Instead, they recognize and integrate the existing standards and practices within a ‘single, logically coherent and comprehensive template’ i.e. the Three Pillar ‘Protect, Respect and Remedy’ Framework.⁵⁷

The First Pillar provides that States have a legal obligation or *duty* to ‘protect’ against human rights abuses by third parties, including business enterprises, within their jurisdiction.⁵⁸ This requires preventive and remedial measures, through ‘policies, legislation, regulation and adjudication’.⁵⁹ Not only are the States required to enforce laws to ensure business enterprises respect human rights, but also ‘provide effective guidance’ and ‘encourage’ them.⁶⁰ Further, in case of State-controlled/aided companies, States should encourage and require human rights due diligence.⁶¹ Also, since the risk of human rights abuses is heightened in conflict-ridden areas, the States should ensure that business enterprises are not complicit in it.⁶² The State must also ensure policy coherence regarding human rights obligations.⁶³

The Second Pillar lays down the *responsibility* of ‘all’ Business Enterprises, ‘irrespective of their size, sector, operational context, ownership and structure’,⁶⁴ to ‘respect’ human rights,⁶⁵ in accordance with international conventions like International Bill of Human Rights.⁶⁶ Weak domestic laws or authoritarian regimes can no longer act as a defence for human rights

⁵⁶ United Nations Human Rights Office of the High Commission, Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework, UNHRCHR/PUB/11/04 (2011) [hereinafter Guiding Principles].

⁵⁷ UNHRCOR, Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework: Report of the Special Representative of the Secretary-General [SRSG] on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, John Ruggie, UN Doc A/HRC/17/31, (2011) as cited in Penelope C. Simons, *International Law’s Invisible Hand and the Future of Corporate Accountability for Violations of Human Rights*, 3 (1) JOURNAL OF HUMAN RIGHTS AND THE ENVIRONMENT (2012).

⁵⁸ Guiding Principles, *supra* note 56, Principle 1.

⁵⁹ *Id.*, Commentary on Principle 1.

⁶⁰ *Id.*, Principle 3.

⁶¹ *Id.*, Commentary on Principle 4.

⁶² *Id.*, Principle 7.

⁶³ *Id.*, Principles 8-10.

⁶⁴ *Id.*, Principle 14.

⁶⁵ *Id.*, Principle 11.

⁶⁶ *Id.*, Principle 12.

violation.⁶⁷ The corporations should avoid infringing human rights and address adverse human rights impact through ‘prevention, mitigation and remediation’.⁶⁸ One of the most essential requirements, as provided under Principle 17 is ‘human rights due diligence’, which the companies should continually conduct, ‘to identify and assess actual or potential human rights impacts, to act upon the findings and track responses, establish grievance mechanism and communicate how they are addressed’.⁶⁹ Principles 18 to 21 elaborate upon the essential components of due diligence, thereby setting a universal standard applicable to all.⁷⁰ The GPs cover three kinds of adverse human rights impacts – causing an adverse impact, contributing to it or if an adverse impact is ‘directly linked to its operations, products and services’.⁷¹ In case of such impacts, the corporations must provide and cooperate in remediation.⁷²

The Third Pillar aims to ensure that victims of corporate-related abuse have *access* to effective ‘remedy’, both judicial and non-judicial, thereby serving as a basis of empowerment.⁷³ States must take appropriate measures to investigate, punish and redress business-related human rights abuses’.⁷⁴ Remedies include ‘apologies, rehabilitation, compensation and punitive sanctions as well as the prevention of harm’.⁷⁵ Such remedial measures need to be provided by both States and non-state actors, which include business enterprises, multi-stakeholder groups and international human rights bodies.⁷⁶ The business enterprises are required to establish or participate in effective ‘operational level grievance mechanism’,⁷⁷ which must not undermine collective bargaining⁷⁸ and unionization.⁷⁹ Principle 31 provides that the non-judicial grievance

⁶⁷ Ben Moxham, *The UN Guiding Principles on Business and Human Rights*, 19 (4) INTERNATIONAL UNION RIGHTS: FOCUS ON BUSINESS AND HUMAN RIGHTS 4 (2012).

⁶⁸ Guiding Principles, *supra* note 56, Principle 11, 13, Commentary on Principle 11.

⁶⁹ *Id.*, Principle 17.

⁷⁰ *Id.*, Principle 18- 21; Penelope C. Simons, *International Law’s Invisible Hand and the Future of Corporate Accountability for Violations of Human Rights*, 3 (1) JOURNAL OF HUMAN RIGHTS AND THE ENVIRONMENT (2012).

⁷¹ Guiding Principles, *supra* note 56, Principle 17(a); Rachel Davis, *The UN Guiding Principles on Business and Human Rights and Conflict-affected Areas: State Obligations and Business Responsibilities*, 94 INT’L REV RED CROSS 961, 973 (2012).

⁷² Guiding Principles, *supra* note 56, Principles 22, 24.

⁷³ John Ruggie, *Business and Human Rights*, 2013 DQ 168 (2013).

⁷⁴ Guiding Principles, *supra* note 56, Principle 25.

⁷⁵ *Id.* Commentary on Principle 25.

⁷⁶ *Id.*, Principle 26, 27, 28.

⁷⁷ *Id.*, Principle 29.

⁷⁸ *Id.*, Commentary on Principle 29.

⁷⁹ Moxham, *supra* note 67.

mechanism must be ‘effective’ i.e. legitimate, accessible, predictable, equitable, transparent, rights-compatible and a source of continuous learning.⁸⁰

Thus, the GPs are tools for practical guidance, for both business enterprises and States, to ensure ‘compliance’ with human rights. These principles have been unanimously adopted and endorsed. Instead of being a static set of norms, they encourage further clarifications about the duties of States and business enterprises,⁸¹ through annual follow up mechanisms by the Working Group on Business and Human Rights.⁸² Thus, as envisioned by Ruggie, the GPs generate a mutually reinforcing dynamic framework, which aims to ‘strengthen governance systems and produce cumulative change regarding business and human rights’.⁸³

Critical Analysis of the Guiding Principles:

Despite being a significant achievement in this realm of law, the GPs are fraught with certain uncertainties and drawbacks. There are several contentious issues raised with regard to the process and methodology, the inadequacy of the Three Pillar Framework and the several issues ignored by the GPs.

With regard to the formulation and process of adoption of the GPs, Ruggie adopted a bottoms-up approach, engaging in consultations with variety of stakeholders. Since the voice of the business community was sufficiently heard,⁸⁴ this ensured legitimacy, consensus and unanimous support.⁸⁵ However, Bilchitz and Deva have criticized such a process owing to its failure to directly engage with the victims of corporate human rights abuses.⁸⁶ The belligerent voice of the business community led to narrowly-defined, non-binding, voluntary human rights standards⁸⁷ and conceptually ambiguous tools like due diligence.⁸⁸ Instead of adopting a top-down ‘command and control’ obligation, the GPs provided for the ‘responsibility’ to

⁸⁰ Guiding Principles, *supra* note 56, Principle 31.

⁸¹ De Schutter, *supra* note 47, at xxii.

⁸² *Id.*, at xvii.

⁸³ John G Ruggie, *Business and Human Rights*, 2013 DQ 168 (2013).

⁸⁴ Seppala, *supra* note 48.

⁸⁵ Bilchitz and Deva, *The Human Rights Obligations Of Business: A Critical Framework For The Future*, *supra* note 38, at 9.

⁸⁶ *Id.*, at 10.

⁸⁷ *Id.*, at 9.

⁸⁸ *Id.*, at 11.

respect.⁸⁹ Additionally, the GPs were based on the method of ‘principled pragmatism’, which entailed ‘pragmatic’ attempts to protect human rights.⁹⁰ Application of ‘pragmatism’ at every stage of determining norms set a very low threshold of corporate human rights obligations.⁹¹ Thus, in my opinion, the process of formulation and adoption played a significant role in tilting the GPs in the favour of business enterprises, compromising protection of human rights at the altar of consensus.

The Three Pillar Framework enshrined in the GPs has also been subject to criticisms, especially concerning the voluntary – mandatory dichotomy. While the state duty to protect is based on international human rights law, including both binding and non-binding norms, the business enterprises are governed by ‘soft’ or voluntary norms.⁹²

The First Pillar to ‘protect’ human rights retains the essential role of States under international law.⁹³ Ruggie hoped that a stronger push for human rights by the State would shape corporate conduct in positive ways.⁹⁴ However, due to the recent marginalization of the States, both host and home countries may be reluctant to regulate human rights impacts of corporations.⁹⁵ In the absence of such regulations, the victims may be left remedy-less. Further, the GPs created ambiguity about the responsibilities of the home States.⁹⁶

Moreover, according to Simons, the First Pillar was specifically condemned by the developing countries of the Third World, for its failure to recognize the ‘deep structural bias of international law’ and the ‘diminishing governance capacities of Third World states’, owing to interventions

⁸⁹ S. Deva, *Multinationals, Human Rights and International Law: How to Deal with the Elephant in the Room?*, Keynote Address at the ‘GLOTHRO Workshop on the Direct Human Rights Obligations of Companies in International Law’, held in Bled, Slovenia, on Jan. 17–19, 2013 as cited in Bilchitz and Deva, *The Human Rights Obligations Of Business: A Critical Framework For The Future*, *supra* note 38, at 8.

⁹⁰ Bilchitz and Deva, *The Human Rights Obligations Of Business: A Critical Framework For The Future*, *supra* note 38, at 9:

(Principled Pragmatism refers to) ‘an unflinching commitment to the principle of strengthening the promotion and protection of human rights as it relates to business, coupled with a pragmatic attachment to what works best in creating change where it matters most – in the daily lives of people’.

⁹¹ *Id.*, at 12.

⁹² Penelope C. Simons, *International Law’s Invisible Hand and the Future of Corporate Accountability for Violations of Human Rights*, 3 (1) JOURNAL OF HUMAN RIGHTS AND THE ENVIRONMENT (2012).

⁹³ Moxham, *supra* note 67.

⁹⁴ Giovanni Mantilla, *Emerging International Human Rights Norms for Transnational Corporations* 15 (2) GLOBAL GOVERNANCE 279 (2009).

⁹⁵ Howen, *supra* note 28.

⁹⁶ Guiding Principles, *supra* note 56, Commentary on Principle 2.

of international financial institutions.⁹⁷ While imposing extra-territorial obligations on home States may lead to interference in the domestic affairs and mark a return to colonial era,⁹⁸ imposing obligations on the host States may prove futile owing to their diminished abilities. While Ruggie acknowledged that when states fail or are unable to enforce their obligations, the corporations may become direct bearers of international human rights obligations, this was in context of conflict-ridden areas,⁹⁹ not situations of diminished governance capacities. I believe that given how international human rights framework has been used as a hegemonic tool for economic globalization and creating a protective environment for business activity,¹⁰⁰ it is unlikely that GPs would reflect their concerns. Moreover, in my opinion, the First Pillar fails to account for situations, wherein the government is itself culpable in corporate-related human rights abuses, like in Nigeria.¹⁰¹ Owing to slow national economic growth and poor population, the government generates significant revenue from such transnational business activities and hence, may be hesitant to protect human rights, at the cost of revenue.

The Second Pillar invokes the ‘social expectations’ rationale, which was presented as the ‘responsibility’ to respect human rights as a ‘global standard of expected conduct’.¹⁰² This allowed the companies to ‘choose’ their course of action – whether to maintain a ‘pre-GPs’ status quo or fulfill the requirements under the GPs.¹⁰³ Moreover, the GPs institute a ‘negative responsibility’, rather than a positive obligation to realize human rights.¹⁰⁴ The corporations are required to self-regulate through voluntary due-diligence and remediation process.¹⁰⁵ Ruggie commented that such a distinction of mandatory and voluntary is ‘misleading’ as there is nothing voluntary about conducting due diligence, since there is no other way to demonstrate respect for human rights. However, without complementing international legal obligations, such a

⁹⁷Simons, *supra* note 92.

⁹⁸ Alston and Goodman, *supra* note 2, at 1495.

⁹⁹ Guiding Principles, *supra* note 56, Principle 7.

¹⁰⁰See BS Chimni, *Third World Approaches to International Law: A Manifesto*, in THE THIRD WORLD AND INTERNATIONAL ORDER: LAW POLITICS AND GLOBALIZATION (A Anghie et al. eds., MartinusNijhoff Publishers Boston, 2003) 72 as cited in Simons, *supra* note 92.

¹⁰¹ Ilesanmi, *supra* note 3.

¹⁰² Guiding Principles, *supra* note 56, Commentary on Principle 11, Mantilla, *supra* note 94.

¹⁰³ Robert C Blitt, *Beyond Ruggie’s Guiding Principles on Business and Human Rights: Charting an Embrasive Approach to Corporate Human Rights Compliance*, 48 TEX INT’L L J 33 (2012).

¹⁰⁴Bilchitz and Deva, *The Human Rights Obligations Of Business: A Critical Framework For The Future*, *supra* note 38, at 15.

¹⁰⁵Simons, *supra* note 92.

‘privatised self-regulatory voluntary’ process would be insufficient.¹⁰⁶ Further, since the commentary on due diligence doesn’t clarify, if parent companies could be held responsible for activities of the subsidiaries, this may allow the parent company to avoid contentious issues.¹⁰⁷

Such voluntary norms instituted by the Second Pillar are severely criticized for its failure to impose binding legal obligations on business enterprises. In my opinion, while such norms could help in building consensus and culture of compliance, it would be subject to will and commercial interests of the companies, which might be at odds with human rights of the workers and the residents of the surrounding areas. Consequently, such voluntary norms would subject the victims to the ‘charity and philanthropy of the corporations’.¹⁰⁸

The Third Pillar of access to ‘remedy’ construes this as flowing from the other two Pillars, even though under international human rights instruments, it is considered to be an independent human right.¹⁰⁹ The existing conflict between transnational companies, workers and local communities regarding mining operations, dam construction and oil exploration reflect the difficulties in providing effective remedy.¹¹⁰ The case of studies of transnational companies involved in oil production in Ecuador, Nigeria and Gulf of Mexico reveal how the remedies provided to the victim were largely insufficient, failing to meet all the criteria laid down in Principle 31.¹¹¹ Lambooy, Argyrou and Varner assert that such remedies failed to ensure accessibility through co-operation and engagement with effective grievance mechanisms, establishment of access points, removal of access barriers, like literacy.¹¹² Moreover, there was no transparency in the process owing to rampant corruption, no active participation of parties, lack of information sharing, disclosure and dialogue between the parties.¹¹³ The companies did not engage in any apology and recognition of harm, physical or financial compensation, trust-building or collaborative approach.¹¹⁴ It was probably due to the adversarial mode of litigation

¹⁰⁶Bilchitz and Deva, *The Human Rights Obligations Of Business: A Critical Framework For The Future*, *supra* note 38, at 15.

¹⁰⁷*Id.*

¹⁰⁸Howen, *supra* note 28.

¹⁰⁹Bilchitz and Deva, *The Human Rights Obligations Of Business: A Critical Framework For The Future*, *supra* note 38, at 16.

¹¹⁰Lambooy, Argyrou and Varner, *supra* note 11, at 330.

¹¹¹*Id.*, 375.

¹¹²*Id.*, 375.

¹¹³*Id.*, 375.

¹¹⁴ *Id.*, 375.

that companies are reluctant to disclose information and a public apology and recognition of harm.¹¹⁵ Moreover, in these situations, there was heavy reliance on judicial remedies.

In my opinion, these situations highlight the importance of effective government oversight, co-operation and communication among the company, government and the community. Since the adversarial systems pits the parties against each other, alternate modes of dispute resolution, negotiations, apology, interaction and participatory dialogue could be more effective in building trust among the native population of the host states, especially, if they involve indigenous communities. Even in Nigeria, unionization and participatory dialogue could have strengthened the effectiveness of remedies.¹¹⁶

Another interesting aspect with regard to the Three Pillar Framework is the rise of Transnational Private Regulations, which refer to a body of rules and processes, created by private actors, exercising autonomous regulatory power or those conferred by international or national law.¹¹⁷ While offering an ‘operational’ critique, Jägers argues that the operationalization of the Framework depends upon voluntary measures by the corporations based on ‘societal expectation’, in the absence of national legislation requiring the corporations to do so.¹¹⁸ However, recently, a more ‘multifaceted form of accountability’ has been emerging in the courts of ‘public opinion’ – employees, consumers, civil society and even actual courts.¹¹⁹ This has led to the rise of transnational private regulation.¹²⁰

Nevertheless, for transnational private regulation to be effective, it requires greater participation by stakeholders, which in turn requires access to information on corporate activities to pressurize the corporations to join regulatory initiatives and to expose non-compliance.¹²¹ Despite mandate

¹¹⁵*Id.*, 375.

¹¹⁶ Ilesanmi, *supra* note 3.

¹¹⁷ F. Cafaggi, *New Foundations of Transnational Private Regulation*, 38 (1) JOURNAL OF LAW AND SOCIETY 20 (2011) as cited in Nicola Jägers, *Will Transnational Private Regulation Close The Governance Gap*, in HUMAN RIGHTS OBLIGATIONS OF BUSINESS: BEYOND THE CORPORATE RESPONSIBILITY TO RESPECT? 301 (Surya Deva and David Bilchitz eds., CUP 2013).

¹¹⁸ Nicola Jägers, *Will Transnational Private Regulation Close The Governance Gap*, in HUMAN RIGHTS OBLIGATIONS OF BUSINESS: BEYOND THE CORPORATE RESPONSIBILITY TO RESPECT? 298 (Surya Deva and David Bilchitz eds., CUP 2013).

¹¹⁹*Id.*, 300.

¹²⁰Cafaggi, *supra* note 117.

¹²¹Jägers, *supra* note 118, at 306.

of disclosing information¹²² owing to vulnerability of the stakeholders and exceptions, like commercial confidentiality, corporations¹²³ disclose information only when compelled to do so. In this light, State's duty to protect becomes linked to Corporation's responsibility to respect.¹²⁴ This necessitates a law or public policy to ensure transparency and disclosure of information.¹²⁵ Instead of mandating a top-down mandate, as suggested by Hess,¹²⁶ the Guiding Principles merely require the State to 'encourage' business enterprises to communicate how they are addressing their human rights impacts.¹²⁷ Such a weak formulation leaves it to the discretion of the State to legislate and determine the circumstances under which disclosure of information on human rights impact of corporate activities are required. While recently, in various countries, modest efforts have been made to mandate the companies to disclose their policies aimed at eradicating slavery and human trafficking,¹²⁸ which could improve transparency and disclosure of information, in my opinion, limiting such disclosure to slavery and human trafficking may ignore other violations, like oppressive work conditions and environmental degradation.

Additionally, for stakeholders to verify corporate compliance with standards, it might be necessary for them to have access to 'independently acquired information'.¹²⁹ While the Right to Information is provided under international human rights law,¹³⁰ this is not a 'right' conferred under the Framework for the civil society groups. In this regard, Melish and Meidinger propose that the Framework needs to be adjusted to include a Fourth Pillar on the 'Right to Participate',¹³¹ requiring States to enact a legislation providing stakeholders a right to receive independent information, to enable them to monitor corporate-related abuses.¹³²

¹²² Guiding Principles, *supra* note 56, Principle 17 and 21.

¹²³ *Id.*, Principle 21(c).

¹²⁴ Jägers, *supra* note 118, at 315.

¹²⁵ *Id.*

¹²⁶ D. Hess, *Social Reporting and New Governance Regulation: The Prospects of Achieving Accountability through Transparency*, 17 (3) BUSINESS ETHICS QUARTERLY 453 (2007) as cited in Jägers, *supra* note 118, at 317.

¹²⁷ Guiding Principles, *supra* note 56, Principle 3(d).

¹²⁸ See California Transparency in Supply Chains Act, S.B. 657 (2010), California Civil Code § 1714.43 (1872), Companies Act §417(5) (2006) (UK), Modern Slavery Act Part 6 § 54 (2015) (UK).

¹²⁹ Jägers, *supra* note 118, at 320.

¹³⁰ See UDHR, *supra* note 16, art 19, ICCPR, *supra* note 16, art 19.

¹³¹ T. J. Melish and E. Meidinger, *Protect, Respect, Remedy and Participate: "New Governance" Lessons for the Ruggie Framework*, in THE UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS: FOUNDATIONS AND IMPLEMENTATION 29 (R. Mares ed., Leiden: Brill Publishing, 2011) as cited in Jägers, *supra* note 118, at 321.

¹³² M. B. Taylor, *The Ruggie Framework: Polycentric Regulation and the Implications for Corporate Social Responsibility* 5:1 ETIKKIPRAKSIS – NORDIC JOURNAL OF APPLIED ETHICS 9, 27 (2011) as cited in Jägers, *supra* note 118, at 320.

While the aforementioned analysis proves how the existing Framework of ‘Protect, Respect and Remedy’ is fraught with loopholes and shortcomings, there are other issues which the GPs have ignored in its entirety. For instance, the GPs neither explicitly not implicitly provide any norms or guidance regarding environmental impacts of such corporations, which severely affect human rights of the residents of the host States. Moreover, despite being requested by the Human Rights Council to give special attention to vulnerable groups, including women and children,¹³³ the GPs don’t refer to international instruments concerning the special interests of these groups.¹³⁴ The GPs have also failed to adequately address the concerns of indigenous communities. Lastly, with regard to remedies, despite recognizing the barriers in ensuring accountability,¹³⁵ no attempt has been made to suggest steps to reduce or overcome such barriers.¹³⁶

Conclusion: Towards a Binding Treaty:

As evident from the aforementioned analysis, the GPs have failed to adequately address several contentious in the realm of business and human rights. In order to address such issues, firstly, any modification in the GPs or introduction of new norms must involve direct consultations with the victims of corporate-related human rights abuse. The focus should be to realize human rights and provide remedies in case of violations, instead of pacifying commercial interests of transnational corporations.

Secondly, with regard to the First and Second Pillar, the state ‘duty’ to protect human rights must reflect the concerns of the developing countries, with regard to their diminished governing capacities. The ‘responsibility’ of the business enterprises should entail a positive duty to protect and fulfill human rights. Such obligations of the corporations should be grounded on legal normative grounds, instead of merely social expectations and courts of ‘public opinion’.¹³⁷ They must be held liable, both under civil and criminal law, in home and host States. Further, in case of gross human rights violation involving corporate complicity, amounting to international

¹³³Bilchitz and Deva, *The Human Rights Obligations Of Business: A Critical Framework For The Future*, *supra* note 38, at 17.

¹³⁴*Id.*

¹³⁵ Guiding Principles, *supra* note 56, Principle 31, Commentary on Principle 31.

¹³⁶ Bilchitz and Deva, *The Human Rights Obligations Of Business: A Critical Framework For The Future*, *supra* note 38, at 17.

¹³⁷*Id.*, at 25.

crimes, arising in conflict zones or in areas where the domestic regime fails to protect human rights, the victims should be able to turn to home country courts for effective remedy.¹³⁸

Lastly, in order to strengthen the Third Pillar and overcome legal and practical barriers to access remedies,¹³⁹ efforts should be made to provide legal aid to the victims, ensure access to independently-acquired information and allow procedural flexibility. Further, instead of merely relying upon judicial remedies, non-judicial remedies, like adequate compensation, apologies, participatory dialogue could also be helpful.

However, the most crucial concern of the GPs is lack of binding obligations on the corporations to protect and fulfill human rights. In my opinion, there is a pressing need to go beyond such soft voluntary norms. For this, efforts should be made by both States and corporations. States could include such human rights obligations for transnational corporations within their constitutional and legislative frameworks. They could adopt National Actions Plans to integrate voluntary and regulatory measures.¹⁴⁰ For instance, recently, India has adopted the National Action Plan for India, to reaffirm India's commitments towards 'realization of human rights and promotion of socially responsible businesses'.¹⁴¹ Further, specific human rights obligations, including labour standards, environment issues and corruption, could be introduced into Bilateral Investment Treaties.¹⁴²

An alternative method is for the corporations to adopt an 'embrasive approach to human rights', as suggested by Blitt.¹⁴³ This implies that instead of abiding by the 'lowest common denominator' of the International Bill of Rights, as provided under the GPs, companies should seek a higher moral ground by 'complying with all applicable human rights treaty norms'. Such an approach would eliminate the uncertainty associated with determining the corporations'

¹³⁸ John Ruggie, *Business and Human Rights* 2013 DQ 168 (2013).

¹³⁹ Bilchitz and Deva, *The Human Rights Obligations Of Business: A Critical Framework for the Future*, *supra* note 38, at 25.

¹⁴⁰ Gosia Pearson, *Towards an International Legally Binding Instrument on Business and Human Rights*, OXFORD HUMAN RIGHTS HUB (Dec. 8, 2016), <https://ohrh.law.ox.ac.uk/towards-an-international-legally-binding-instrument-on-business-and-human-rights/>, accessed Oct. 28, 2019.

¹⁴¹ Ministry of Corporate Affairs, Government of India, *National Action Plan on Business and Human Rights*, 3 (2019), https://mca.gov.in/Ministry/pdf/NationalPlanBusinessHumanRight_13022019.pdf, accessed Oct. 28, 2019.

¹⁴² Simons, *supra* note 92.

¹⁴³ Robert C Blitt, *Beyond Ruggie's Guiding Principles on Business and Human Rights: Charting an Embrasive Approach to Corporate Human Rights Compliance* 48 TEX INT'L L J 33, 60 (2012).

human rights obligation based on treaty obligations of the host States.¹⁴⁴ Along with halting human rights violations, the embrasive approach could benefit the corporations too, through public goodwill and reducing liability risks for individuals associated with the corporations.¹⁴⁵

Nonetheless, in the long-run, international law must move ‘beyond voluntarism’¹⁴⁶ and look ‘beyond compliance’¹⁴⁷ to govern this realm of law. Thus, in my opinion, an international legally binding treaty to impose human rights obligations on business enterprises is essential. In 2014, the UN Human Rights Council established an open-ended Working Group to develop an ‘internationally legally binding instrument to regulate the activities of transnational corporations and other business enterprises in the international human rights law’.¹⁴⁸ However, such direct horizontal enforcement of human rights norms against corporations would be a departure from the traditional international human rights regime.¹⁴⁹ Further, since the treaty aims to replace the ‘Protect, Respect and Remedy’ framework without a clear division of responsibility, it raised apprehensions of misuse by States to shift the blame on corporations.¹⁵⁰ Moreover, a lack of clear objective and its exclusive application to transnational corporations further reduced support for such a treaty.¹⁵¹

Such concerns were addressed in negotiations, in 2016, wherein it was recognized that a clear purpose must be identified and the scope of the treaty was expanded beyond transnational companies.¹⁵² In the third round of negotiations in 2017, the Draft Elements¹⁵³ highlighted that business ‘shall prevent’ human rights impacts, imposing a form of strict liability on companies,

¹⁴⁴*Id.*, at 61.

¹⁴⁵*Id.*, at 62.

¹⁴⁶See International Council on Human Rights Policy, *Beyond Voluntarism: Human Rights And The Developing International Legal Obligations Of Companies* (2002), https://reliefweb.int/sites/reliefweb.int/files/resources/F7FA1F4A174F76AF8525741F006839D4-ICHRP_Beyond%20Voluntarism.pdf as cited in John Ruggie, *Business and Human Rights: The Evolving International Agenda*, 101 (4) AMERICAN JOURNAL OF INTERNATIONAL LAW 819 (2007).

¹⁴⁷ Amartya Sen, *Elements of a Theory of Human Rights* 32 PHIL & PUB AFF 315, 319 (2004) as cited in John Ruggie, *Business and Human Rights: The Evolving International Agenda*, 101 (4) AMERICAN JOURNAL OF INTERNATIONAL LAW 819 (2007).

¹⁴⁸ Sara McBrearty, *The Proposed Business and Human Rights Treaty: Four Challenges and an Opportunity*, 57 ONLINE SYMPOSIUM HARVARD INTERNATIONAL LAW JOURNAL (2016).

¹⁴⁹*Id.*

¹⁵⁰*Id.*

¹⁵¹*Id.*

¹⁵² Pearson, *supra* note 140.

¹⁵³Elements For The Draft Legally Binding Instrument On Transnational Corporations And Other Business Enterprises With Respect To Human Rights ¶ 3.2, OEIGWG Chairmanship, established by HRC Res. A/HRC/RES/26/9 (Aug. 29, 2017).

and emphasized on the role of mandatory due diligence and need to remove barriers to access to justice.¹⁵⁴ However, the revised draft for the proposed treaty,¹⁵⁵ which is still under consideration, seeks to bind State Parties, by requiring them to prevent human rights violations by business enterprises and provide remedy to victims. While the Preamble *underlines* that all business enterprises have the ‘responsibility’ to respect human right, avoid adverse impacts and prevent and mitigate such impacts, instead of expanding horizontal application of international human rights law, the revised draft imposes a duty to States to adopt the necessary domestic legislations to impose obligations on the business enterprises.

In my opinion, while this proposed treaty goes beyond the voluntary GPs, it fails to account for the ‘weak governance zones’ or the ‘conflict zones’, where states are unable or unwilling to regulate the transnational corporations.¹⁵⁶ The treaty merely reinforces the ‘responsibility’ instead of imposing ‘shall’ obligations on the transnational corporations.

Thus, I believe, instead of a ‘state-centric’ treaty, there is a need for a treaty, applicable to ‘all’ business enterprises to protect, respect and fulfill ‘all’ human rights, in their activities. The treaty should provide principles governing the extent of corporate obligations, envisage mechanism, by both state and non-state actors, to implement and enforce obligations against companies, recommend ways to overcome barriers to accessing remedies and provide for informal means for enforcing human rights, through dialogue and participation.¹⁵⁷ Such a treaty would reinforce the normative hierarchy of human rights over business, trade and investment concerns.

Deva argues that such a treaty should be supported by both States and corporations. Since, States are under a duty to protect human rights, given the increasing instances of corporate related abuses and failure of states and domestic regulations to hold corporations responsible, such an international instrument is necessary corollary to their duty.¹⁵⁸ Moreover, since all individuals

¹⁵⁴Julianne Hughes Jennett et al, *A Binding Treaty on Business and Human Rights? Still a Way To Go*, HOGAN LOVELLS FOCUS ON REGULATIO (Nov. 2, 2017), <https://www.hlregulation.com/2017/11/02/a-binding-treaty-on-business-and-human-rights-still-a-way-to-go/>, accessed Oct. 28, 2019.

¹⁵⁵ Legally Binding Instrument to Regulate, In International Human Rights Law, The Activities Of Transnational Corporations And Other Business Enterprises, OEIGWG Chairmanship Revised Draft (July 16, 2019).

¹⁵⁶See Surya Deva, *The Human Rights Obligations of Business: Reimagining the Treaty Business*, PAPER PRESENTED IN WORKSHOP ON HUMAN RIGHTS AND TRANSNATIONAL CORPORATIONS: PAVING THE WAY FOR A LEGALLY BINDING INSTRUMENT (2014), https://www.business-humanrights.org/sites/default/files/media/documents/reimagine_int_law_for_bhr.pdf, accessed Oct. 28, 2019.

¹⁵⁷*Id.*

¹⁵⁸*Id.*

have inherent human rights based on the notion of ‘dignity’, there is duty which corresponds to such rights. The ‘dynamic’ aspect of rights allows one to ‘reorient the duties and duty holders’ to include the transnational companies.¹⁵⁹ Further, the corporations should realize that being subject to well-defined legal obligations, instead of vaguely-phrased voluntary initiatives, would ensure certainty and be beneficial for them.¹⁶⁰ The corporations should look beyond their profit goals, investors should embrace the idea of ‘ethical and sustainable’ investment and consumers should make ‘socially responsible choices’.¹⁶¹

Thus, it must be realized that human rights protection and economic development are not mutually exclusive.¹⁶² I believe that with adequate government attention and effective campaigning for political consensus,¹⁶³ such ‘*re-imagination of international human rights law*’¹⁶⁴ is a viable alternative in the future.

¹⁵⁹*Id.*

¹⁶⁰ Mantilla, *supra* note 94.

¹⁶¹ Surya Deva, *The Human Rights Obligations of Business: Reimagining the Treaty Business*, *supra* note 156.

¹⁶² John J Keller, *Multinational Business and Human Rights*, 88 AM SOC’Y INT’L L PROC 271 (1994).

¹⁶³ Scott Jerbi, *Business and Human Rights at the UN: What Might Happen Next?*, 31 (2) HUMAN RIGHTS QUARTERLY 299 (2009).

¹⁶⁴ Surya Deva, *The Human Rights Obligations of Business: Reimagining the Treaty Business*, *supra* note 156.