# ADVANCING THE BUSINESS AND HUMAN RIGHTS TREATY PROJECT THROUGH INTERNATIONAL CRIMINAL LAW: ASSESSING THE OPTIONS FOR LEGALLY-BINDING CORPORATE HUMAN RIGHTS OBLIGATIONS

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Abstract

*The current United Nations process for drafting a Business and Human Rights treaty employs international human rights law as its paradigmatic frame of reference, including for the scope of corporations' legal obligations. Applying an evaluative framework based on Thomas Franck, Robert Keohane and David Victor's works on the legitimacy and effectiveness of international law and governance, this Article critiques the use of international human rights law for this purpose. Instead, due to several conceptual and practical advantages, it argues that the set of corporate human rights obligations to be enshrined in this first treaty should be based on the narrower scope of international criminal law.*



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## I. INTRODUCTION

Corporations, especially transnational corporations (TNCs), have accrued sufficient socio-economic and even political and military power that their conduct and business decisions have the potential to adversely impact the human rights of millions of people, including along their supply chains, amongst their employees and customers, and in the communities surrounding their operations.[1] In response to the growing power of the corporate sector felt across the globe and the seeming under-regulation of the sector, there have been increasing calls for the adoption of a business and human rights (BHR) treaty to enshrine into international law binding human rights obligations for corporations. These efforts culminated in 2014 with the convening of a United Nations high-level working-group mandated to develop just such a treaty.[2] In July 2018, after years of consultations and debate, the

1. MARKOS KARAVIAS, CORPORATE OBLIGATIONS UNDER INTERNATIONAL LAW 84 (2013).
2. Human Rights Council Res. 26/9, U.N. Doc. A/26/9 (July 14, 2014).

working group released a "zero-draft" of a legally binding international instrument to regulate corporations in order to "strengthen the respect, promotion, protection and fulfillment of human rights in the context of business activities of transnational character."[3] In July 2019, the working group released a "revised draft" of the treaty, and the negotiations remain ongoing.[4] This treaty, if implemented, would be the first of its kind.

Prominent contemporary efforts in furtherance of the BHR agenda adopt international human rights law (IHRL) as their paradigmatic frame of reference, and the "zero-draft" and "revised draft" are no exception. Significantly, the 2014 U.N. Human Rights Council Resolution that launched the present treaty-drafting process mandates the development of "an international legally binding instrument to regulate TNCs and other business enterprises in international human rights law."[5] Indeed, the scope of the BHR treaty's "zero-draft" encompassed "all international human rights,"[6] while the scope of the "revised-draft" covers "all human rights."[7] This Article seeks to provide a note of caution to these efforts. It critiques the utility and viability of a BHR treaty with such an expansive scope as the drafts. Specifically, it questions whether IHRL is the most appropriate body of international law upon which to base such a treaty. Instead, I would contend that, due to several conceptual, political and practical advantages, international criminal law (ICL) is the preferred body of law on which to base the first BHR treaty, and from which to derive the scope of a legally binding corporate human rights obligations.

With a focus squarely on embedding companies—especially TNCs—into the international human rights regime, there are missed opportunities to enhance business conduct regarding their social responsibilities and the impact corporations have on the communities and

3. U.N. Hum. Rts. Council, Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises (Zero-Draft), art. 2(1)(a), (July 16, 2018), https://www.ohchr.org/documents/hrbodies/hrcouncil/wgtranscorp/session3/draftlbi.pdf [hereinafter Zero Draft].

4. U.N. Hum. Rts. Council, Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises (Revised-Draft), 16 July 2019, https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/OEIGWG_RevisedDraft_LBI.pdf. [hereinafter Revised Draft].

5. "Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights," United Nations Human Rights Council Resolution 26/9, A/HRC/RES/26/9 (July 14, 2014), available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/082/52/PDF/G1408252.pdf.

6. Zero Draft, *supra* note 3, art. 3(2).

7. *Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises (Revised-Draft)*, Article 3(3).

environments in which they operate in and rely upon. While efforts to entrench corporate human rights obligations within IHRL structures will continue, the limitations of such an approach must also be acknowledged especially when attempting to curtail TNCs' human rights abuses in developing countries. There remain significant challenges in developing a BHR treaty that imposes direct or indirect human rights obligations on companies, including clarifying the objectives and scope of any such treaty and its legal obligations, and ensuring that the final treaty text achieves widespread acceptance and adherence.[8]

This Article contends that greater corporate respect for human rights can be achieved by pursuing a BHR treaty that is narrow in scope, one confined to obliging corporations to abide by ICL norms of accepted behavior. To do so, this Article deploys a novel analytical framework that has heretofore not been applied to assess the appropriate scope of the BHR treaty under development. By applying evaluative principles derived from the scholarship of Thomas Franck on the legitimacy of international legal norms and from Robert Keohane and David Victor's work on the effectiveness of international regulatory regimes, this Article critiques the extraction of corporate human rights standards to be enshrined in a BHR treaty from IHRL.[9] Instead, in order to advance the broader BHR project, and the pursuit of a BHR treaty in particular, greater consideration should be given to ICL for the development of the treaty's legally binding corporate human rights standards.

As a body of law, ICL possesses several regulatory, pragmatic, political, and jurisprudential advantages over IHRL that make it the more legitimate and viable source for legally binding human rights standards to be incorporated into a treaty to regulate global corporate conduct.

Part II of this Article provides an overview of the treaty development process thus far. Part III then outlines the theoretical framework built upon Franck, Keohane, and Victor's influential works that serve as evaluative tools for international rules and governance regimes. Part IV presents an affirmative case for confining the treaty's binding standards of corporate conduct to the norms of ICL, as well as critiquing the lack

8. *See, e.g.*, Sara McBrearty, *The Proposed Business and Human Rights Treaty: Four Challenges and an Opportunity*, 57 HARV. INT'L L.J. (ONLINE SYMP.) 11 (2016); Surya Deva, *Scope of the Proposed Business and Human Rights Treaty: Navigating through Normativity, Law and Politics*, *in* BUILDING A TREATY ON BUSINESS AND HUMAN RIGHTS: CONTEXTS AND CONTOURS 154 (Surya Deva & David Bilchitz eds., Cambridge University Press 2017).

9. Thomas Franck, *Legitimacy in the International System*, 82 AM. J. INT'L L. 705 (1988); Robert Keohane & David Victor, *The Regime Complex for Climate Change*, 9 PERSPECTIVES ON POL. 7 (2011).

of regulatory effectiveness of IHRL as the source of corporate human rights standards for a BHR treaty. Finally, Part V proposes how IHRL can still play a role in an effective global regulatory regime for business and human rights.

While IHRL reflects some of humanity's great aspirations for how we *should* treat one another, the first BHR treaty has the more crucial purpose of identifying minimum standards of corporate conduct that *must* be upheld, and of which falling short must be punished and deterred. Victims of corporate actions that breach such standards should also have viable avenues of remedy and redress. Treaty advocates share these objectives. Yet these goals require a clearly articulated, legitimate, and coherent set of minimum standards of behavior for corporations to adhere to, with robust enforcement options and monitoring institutions, capable of attracting "thick-stakeholder consensus."[10] For these reasons, I contend that ICL is best equipped to resolve this "clash between normative objectives and political considerations" that is central to the treaty debate.[11]

## II. The Road to A Treaty: Developments and Debate

The issue of regulating corporate compliance with human rights standards has been the subject of international attention for decades.[12] Years of debate resulted in the establishment of an "open-ended intergovernmental working group" (OEIGWG) by the United Nations Human Rights Council in July 2014.[13] The mandate of the OEIGWG is

10. Joost Pauwelyn et al., *When Structures Become Shackles: Stagnation and Dynamics in International Law*, 25 Eur. J. Int'l L. 733, 734 (2014). Hart stated that the term "standards" provides a benchmark "by which particular actions may be thus critically appraised" with reference to which one can evaluate or critically appraise certain behaviour. H.L. Hart, The Concept of Law 33 (Clarendon Press, 2d ed.1 994).

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11. Deva, *supra* note 8, at 156.

12. *See generally* Michael Santoro, *Business and Human Rights in Historical Perspective*, 14 J. Hum. Rts. 155 (2015); Nadia Bernaz, Business and Human Rights: History, Law and Policy – Bridging the Accountability Gap (2016); Dorothée Baumann-Pauly & Justine Nolan, Business and Human Rights: from Principles to Practice (2016); Christopher May, *Multinational Corporations in World Development: 40 Years On*, 38 Third World Q. 2223 (2017); *see also* U.N. Econ. & Soc. Council, *Multinational Corporations in World Development Chapter IV - "Towards a Programme of Action"*, 12 Int'l L. Materials 1109 (1973); U.N. Hum. Rts. Comm'n, Subcomm. on the Promotion and Protection of Hum. Rts., Norms on the Responsibilities of Transnat'l Corps. and Other Bus. Enterprises with Regard to Hum. Rts., U.N. Doc. E/CN.4/Sub.2/2003/L.11 (2003).

13. H.R.C. Res. 26/9., *supra* note 2, art. 1.

to develop "an international legally binding instrument to regulate [TNCs] in international human rights law,"[14] in furtherance of the governance efforts initiated by the Council's 2011 endorsement of the non-binding UN *Guiding Principles on Business and Human Rights*.[15]

The treaty development process has proven divisive. Many states, industry groups and civil society organizations have expressed disagreement over the nature and scope of any such instrument, with many prominent industrialized states expressing reluctance towards the adoption of any legally binding instrument.[16] The content and parameters of such a treaty can take many forms. For instance, such an instrument could either indirectly regulate the operations of corporate actors by obligating states to protect human rights and remedy violations occurring at the hands of TNCs and other corporate entities, or it could instead impose direct legal obligations on corporations under IHRL.[17] Although the latter approach seems contradictory to the state-centric nature of international law and has been met with strong resistance from industrialized states and corporate stakeholders alike, many commentators have expressed a preference for an instrument that creates direct, binding obligations for corporations.[18]

Furthermore, the *range* of human rights norms to be encompassed within a BHR treaty based on IHRL also prompts many questions, given the panoply of international human rights instruments that exist, and the vast array of issues that they touch upon. Should the treaty enumerate specific human rights standards that are deemed relevant and

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14. *Id.*

15. *See* John Ruggie, *Report of the 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*, 29 NETH. Q. HUM. RTS. 224 (2011); Human Rights Council Res. 17/4, U.N. Doc. A/HRC/Res/17/4, ¶ 1 (July 6, 2011).

16. Indeed, the 2014 Human Rights Council resolution that launched the OEIGWG's treaty-drafting process was opposed by all Western States, including the France, Germany, Japan, United Kingdom and United States of America. *See* Press Release, United States Council for International Business, Employers Reaffirm Commitment to UN Principles on Business and Human Rights (Jun. 30, 2014); Press Release, International Chamber of Commerce, ICC Disappointed by Ecuador Initiative Adoption (Jun. 30 2014).

17. For a comparison of these two approaches, *see* Olivier De Schutter, *Towards a New Treaty on Business and Human Rights*, 1 BUS. HUM. RTS. J. 41, 58 (2016); Douglass Cassell & Anita Ramasastry, *White Paper: Options for a Treaty on Business and Human Rights* 6 NOTRE DAME J. INT'L & COMP. L. 1, 48-9 (2016); *See also* Claret Vargas, *A Treaty on Business and Human Rights? A Recurring Debate in a New Governance Landscape*, *in* BUSINESS AND HUMAN RIGHTS: BEYOND THE END OF THE BEGINNING 111 (Cesar Rodriguez-Garavito ed., 2017).

18. *See, e.g.*, David Bilchitz, *The Necessity for a Business and Human Rights Treaty* 1 BUS. HUM. RTS. J. 203, 208 (2016).

applicable to corporations and corporate activities, or merely—as reflected in the "revised-draft" instrument—make reference to "all human rights"? As discussed below, these questions are reflective of the many conceptual and practical difficulties associated with an IHRL-derived treaty when contrasted with one founded on ICL norms.

Unsurprisingly, then, the OEIGWG's deliberations over a potential treaty have been marked with contention.[19] One of the group's principal tasks is to determine the substantive scope or *ratione materiae* of a prospective BHR treaty, that is, the particular species of rights that the legally binding instrument should protect.[20] As Surya Deva, a member of the UN Working Group on Business and Human Rights and leading treaty-advocate, has noted, debate in terms of scope has been "underpinned by a normative aspiration to put in place a treaty which covers all civil, political, social, economic and cultural human rights and the political feasibility of negotiating a narrower treaty around which it might be easier to build consensus."[21] While civil society organizations, developing nations and some scholars have advocated for a broad treaty that encompasses all recognized IHRL norms,[22] other states, corporate stakeholders and commentators favor a narrow treaty to cover only the gravest international crimes.[23] The "zero-draft" legally binding instrument presented to the Human Rights Council in 2018 is reflective of the former approach—that is, a broadly framed BHR treaty covering "all international human rights."[24] The "revised-draft" instrument unveiled in 2019 maintains a broad scope, covering "all human rights."[25] This overly expansive and somewhat vague scope has received criticisms from several scholars, and reignited debate on what body of

19. *See, e.g.*, De Schutter, *supra* note 17; Bilchitz, *supra* note 18, at 208; Cassell & Ramasastry, *supra* note 17, at 48-9; Penelope Simons, *The Value-Added of a Treaty to Regulate Transnational Corporations and Other Business Enterprises: Moving Forward Strategically, in* BUILDING A TREATY ON BUSINESS AND HUMAN RIGHTS: CONTEXTS AND CONTOURS 48 (Surya Deva & David Bilchitz eds., 2017); Larry Cata Backer, *Principled Pragmatism in the Elaboration of a Comprehensive Treaty on Business and Human Rights, in* BUILDING A TREATY ON BUSINESS AND HUMAN RIGHTS: CONTEXTS AND CONTOURS 105 (Surya Deva and David Bilchitz eds., 2017).

20. Cassell & Ramasastry, *supra* note 17, at 48-9; International Commission of Jurists, *Proposals for Elements of a Legally Binding Instrument on Transnational Corporations and Other Business Enterprises* 19 (Working Paper, Oct. 2016).

21. Deva, *supra* note 8, at 173.

22. *See, e.g.*, Simons, *supra* note 19, at 72.

23. *See, e.g.*, John Ruggie, *Life in the Global Public Domain: Response to Commentaries on the UN Guiding Principles and the Proposed Treaty on Business and Human Rights*, HARVARD KENNEDY SCHOOL 5 (Jan. 23, 2015), https://ssrn.com/abstract=2554726.

24. Zero Draft, *supra* note 3, art. 3(2).

25. Revised Draft, *supra* note 4, art. 3(3).

international law provides the most suitable foundation for a BHR treaty. [26]

At first blush, IHRL may appear a likely candidate for sourcing minimum standards of conduct for corporations to protect and uphold human rights. Human rights law represents "a common and universal standard," since "[a]n overwhelming majority of governments have formally committed themselves to respect these standards," which have "been interpreted and applied around the world for more than half a century."[27] In that period, the development of a complex network of international organizations, advocacy groups, and interested governments has meant that the language of human rights possesses potent "advocacy power," and its invocation can mobilize widespread support.[28] Allegations of human rights abuses frequently attract media attention, the "opprobrium of society and, given the international dimension to human rights, [sic] the prospect that the conduct will be of international concern."[29]

Furthermore, human rights law is the paradigm currently adopted by leading global companies to report on their social responsibilities and associated activities.[30] Indeed, human rights law is the paradigm choice for many of the international and industry-based instruments designed to improve the corporate sector's impacts on the communities and environments in which they operate. Existing codes of conduct and soft-law multi-stakeholder initiatives attempting to improve corporations' human rights adherence refer to international human rights treaties and traditions, oftentimes explicitly, such as the UN Global Compact, the Extractive Industries'

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26. *See, e.g.*, Carlos Lopez, *Towards an International Convention on Business and Human Rights (Part I)* Opinio Juris (July 23, 2018), http://opiniojuris.org/2018/07/23/towards-an-international-convention-on-business-and-human-rights-part-i/.

27. INTERNATIONAL COUNCIL ON HUMAN RIGHTS POLICY, BEYOND VOLUNTARISM: HUMAN RIGHTS AND THE DEVELOPING INTERNATIONAL LEGAL OBLIGATIONS OF COMPANIES 15-16 (Report, Feb. 2002).

28. *Id.* at 18.

29. *Id.*

30. Respect for human rights is now incorporated into leading sustainability reporting guidelines. *See, e.g.*, *GRI 412*, GLOBAL REPORTING INITIATIVE, HUM. RTS. ASSESSMENT (2016), https://www.globalreporting.org/standards/gri-standards-download-center/gri-412-human-rights-assessment-2016/. Similarly, the sustainability reporting of leading companies now routinely reference human rights and related regulatory instruments. *See, e.g.*, *Sustainability Report* EXXONMOBIL, (2017), https://corporate.exxonmobil.com/Community-engagement/Sustainability-Report; *Sustainability Report*, BHP BILLITON (2016), https://www.bhp.com/-/media/bhp/documents/investors/annual-reports/2016/bhpbillitonsustainabilityreport2016.pdf.

Transparency Initiative, and the Voluntary Principles on Security and Human Rights.[31]

Similarly, many government-based regulatory efforts, such as the Organization for Economic Cooperation and Development (OECD)'s *Guidelines for Multinational Enterprises*, make reference to IHRL.[32] Coupled with the widespread endorsement of the *UN Guiding Principles on Business and Human Rights* (U.N. Guiding Principles) by governments and the global business community, the acceptance of human rights norms as relevant and applicable (in some form) to contemporary business practices is undeniable.[33]

Nevertheless, recognition of the political and practical complexities arising from a broad, all-encompassing IHRL treaty has prompted some to call for an instrument that is narrower in scope. For instance, John Ruggie, author of the U.N. Guiding Principles, has argued that if a BHR treaty is to have "any chance of success," it must be conceived as a "precision tool," enshrining only "gross abuses."[34] Similarly, Olivier De Schutter, a prominent Belgian international human rights scholar, examines the possibility of an instrument that creates direct obligations for corporations for "serious violations" of IHRL and international humanitarian law (IHL).[35] According to Ruggie and other proponents of a narrow-scope treaty, limiting the legally binding obligations imposed on corporations by a BHR treaty to the most egregious human rights violations is a more politically viable and practical option.[36] If its focus is on "the gravest crimes of concern to the international community,"[37] ICL is a natural source of norms for a narrow-scope BHR treaty.

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31. *See, e.g.*, U.N. Global Compact, http://www.globalcompact.org (last visited Nov. 25, 2019); *Voluntary Principles on Security and Human Rights*, http://www.voluntaryprinciples.org (last visited Nov. 25, 2019).

32. *See, e.g.*, ORG. FOR ECON. COOPERATION AND DEV., *OECD Guidelines for Multinational Enterprises* (OECD Publishing, 2011), http://www.oecd.org/daf/inv/mne/48004323.pdf. The 2011 update to the Guidelines explicitly incorporated the U.N.'s "Protect, Respect and Remedy Framework" for business human rights obligations.

33. *See* Ruggie, *supra* note 15, at 224; *see also* Nicole Deitelhoff & Klaus Dieter Wolf, BUSINESS AND HUMAN RIGHTS: HOW CORPORATE NORM VIOLATORS BECOME NORM ENTREPRENEURS, *in* THE PERSISTENT POWER OF HUMAN RIGHTS: FROM COMMITMENT TO COMPLIANCE 222, 224 (Thomas Risse, Stephen Ropp & Kathryn Sikkink eds., 2013).

34. Ruggie, *supra* note 23, at 5.

35. De Schutter, *supra* note 17, at 60.

36. JOHN RUGGIE, JUST BUSINESS: MULTINATIONAL CORPORATIONS AND HUMAN RIGHTS 200 (2013).

37. *About the Court*, INT'L CRIM. CT., https://www.icc-cpi.int/about?ln=en (last visited Oct. 2, 2019).

It is important to note that neither IHRL nor ICL has a mutually exclusive role in the BHR project. Regardless of which framework ultimately forms the basis for a legally binding instrument, both bodies of law have much to contribute to an effective governance regime of companies vis-à-vis their social responsibilities. As Deva has recognized, TNCs are "difficult regulatory targets" by nature, thus necessitating the employment of "a coherent combination of regulatory strategies."[38] A BHR treaty should form but "one tool in a broader toolkit";[39] a component of a regulatory regime that employs a multitude of judicial and non-judicial strategies, including both soft and hard law instruments, to achieve optimal compliance and efficacy.[40] However, as shown below, those hard law instruments, and in particular the very first international treaty outlining business' human rights obligations, stand a better chance of adoption and success if they are to be based on ICL rather than IHRL.

## III. An Analytical Framework to Assess The Alternatives

In order to substantiate the contention that the legally binding corporate human rights standards to be embedded in the first BHR treaty should be confined to those enshrined in ICL rather than a broader set of standards embodied in IHRL, this Article adopts an approach informed by global governance scholarship. A considerable body of literature exists in both international law and international relations theory contemplating and analyzing the various features and facets that make an individual treaty and associated governance regimes effective.[41] This Article applies two of the most well-regarded theories from this literature: Thomas Franck's criteria on the legitimacy of international rules, and Robert Keohane and David Victor's criteria for effective international governance regimes.[42] These sets of criteria can be

38. Surya Deva, *Business and Human Rights: Time to Move Beyond the "Present"?*, *in* Business and Human Rights: Beyond the End of the Beginning 62, 65 (Cesar Rodriguez-Garavito ed., 2017).

39. Cesar Rodriguez-Garavito, *Business and Human Rights: Beyond the End of the Beginning*, *in* Business and Human Rights: Beyond the End of the Beginning 38 (Cesar Rodriguez-Garavito ed., 2017).

40. Barnali Choudhury, *Balancing Soft and Hard Law for Business and Human Rights*, 67 Int'l Comp. L. Q. 961, 961 (2018).

41. *See, e.g.*, Jutta Brunnee & Stephen Toope, Legitimacy and Legality in International: An International Account (2010); Steven Burnstein & Benjamin Cashore, *Complex Global Governance and Domestic Policies: Four Pathways of Influence*, 88 Int'l Aff. 585 (2012); Oona Hathaway, *Do Human Rights Treaties Make a Difference?* 111 Yale L. J. 1935 (2002); Andrew Guzman, How International Law Works: A Rational Choice Theory (2008); The Power of Human Rights: International Norms and Domestic Change (Thomas Risse et al. eds., 1999).

42. Franck, *supra* note 9, at 705; Keohane & Victor, *supra* note 9, at 7.

used to assess the strength and feasibility of proposed global governance instruments *before* they are concluded.

When applying this evaluative framework to the issue of the scope of the proposed BHR treaty, the conclusion is clear. As the analysis that follows demonstrates, from a standpoint of maximizing effectiveness and legitimacy of the first BHR treaty, it would be prudent to consider using ICL as the source and basis for the scope of the treaty's legally binding corporate human rights obligations, rather than IHRL.

### A. *Franck and the Legitimacy of International Legal Rules*

Thomas Franck's work on legitimacy in the international system and of international law provides a useful framework to assess the feasibility of ICL and IHRL as the source from which to derive a set of corporate human rights-related standards that may be incorporated into a BHR treaty. Franck questions the teleology of law, and in particular studies what prompts obedience to international law given its dearth of enforcement measures.[43] While Franck's work focuses on rule compliance by states, his understanding of legitimacy of international rules is perhaps even more relevant to the development of international human rights standards for corporations, as the dearth of enforcement measures for international norms is even more apparent in relation to corporations.[44]

Concurring with distinguished former judge of the International Court of Justice and European Court of Human Rights Gerald Fitzmaurice's assertion that the legitimacy and authority of international law does not derive solely, nor even largely, from its enforceability,[45] Franck argues that international law does not require constant force, or the threat thereof, to attain compliance.[46] Rather, he suggests that the perceived legitimacy of the international legal rule is vital in attaining non-coerced compliance with a given international norm and maintaining the effectiveness of international law writ large.[47]

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43. Franck, *supra* note 9, at 706.

44. *See, e.g.*, FLORIAN WETTSTEIN, MULTINATIONAL CORPORATIONS AND GLOBAL JUSTICE: HUMAN RIGHTS OBLIGATIONS OF A QUASI-GOVERNMENTAL INSTITUTION (2009); SARAH JOSEPH, CORPORATIONS AND TRANSNATIONAL HUMAN RIGHTS LITIGATION (2004).

45. Gerald Fitzmaurice, *The Foundations of the Authority of International Law and the Problem of Enforcement*, 19 MOD. L. REV. 1, 8 (1956).

46. Franck, *supra* note 9, at 706-7; *See also* STEVE BARELA, INTERNATIONAL LAW, NEW DIPLOMACY AND COUNTER-TERRORISM: AN INTERDISCIPLINARY STUDY OF LEGITIMACY 13 (2014).

47. Franck, *supra* note 9, at 709; THOMAS FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS 16 (1990); BARELA, *supra* note 46, at 16.

Legitimacy of international legal rules, according to Franck, is the "inherent capacity of a rule to exert pressure on states to comply" and is derived from internal qualities of the rule itself, independent of robust judicial enforcement mechanisms to ensure compliance.[48] These include, namely, a rule's: (1) determinacy: the textual clarity of the rule;[49] (2) symbolic validation: the authority of the rule communicated through pedigree and rituals of recognition;[50] (3) coherence: the intrinsic integrity of the rule and its compatibility with higher-order norms;[51] and (4) adherence: whether the rule is embedded in a normative hierarchy and stakeholders agree to the application and interpretation of the rules.[52]

### B. *Keohane and Victor's Criteria for Effective Regime Complexes*

In 2011, Keohane and Victor, two international relations scholars, published an influential article about assessing and developing the effectiveness of "regime complexes" to address global concerns.[53] While Keohane and Victor's focus was on the regulatory regime complex responding to climate change, the six evaluative criteria they developed can be deployed to assess the quality and effectiveness of regime complexes for other global concerns, and are pertinent to an assessment of a regime's individual elements as well.[54] Keohane and Victor contend that a regime complex can be assessed by analyzing the following six "dimensions": (1) coherence, (2) accountability, (3) determinacy, (4) sustainability, (4) epistemic quality, and (6) fairness.[55]

The similarity between Keohane and Victor's set of evaluative criteria and Franck's is readily apparent. For instance, "determinacy" and "coherence" (with extremely similar understandings) are included in both. Moreover, Keohane and Victor's "epistemic quality" criterion, which assesses how aligned rules are with scientific knowledge, is comparable to facets of Franck's understanding of "coherence."

The other three criteria offered by Keohane and Victor are also reflected in Franck's notion of "legitimacy." For instance, the "accountability" dimension asks whether there are viable avenues for relevant

48. Franck, *supra* note 9, at 712.
49. *Id.* at 713.
50. *Id.* at 725.
51. *Id.* at 741.
52. *Id.* at 751.
53. Keohane & Victor, *supra* note 9.
54. *Id.*
55. *Id.* at 19-20.

stakeholders to hold others accountable for not fulfilling their responsibilities, and to impose sanctions if standards have not been met. This addresses a similar concern to Franck's emphasis on "adherence" and "symbolic validation" of the rules by the relevant actors. Keohane and Victor's "fairness" criteria argues that, to be legitimate and effective, an international regime or instrument should apply fairly, and "not discriminate against states that are willing to cooperate" with it.[56]

Thus, these two influential pieces of scholarship investigating the components of effective of international rules and regulation are complementary and together serve as a useful framework to assess the comparative viability of ICL and IHRL as sources for developing legally binding standards for business' human rights obligations. It is crucial for the sake of the larger BHR project that this first legally binding BHR instrument garners and sustains legitimacy amongst all key stakeholder groups, including the corporate sector. Ultimately, to achieve the better humanitarian outcomes that the BHR project is directed towards, the instrument must also be more than merely another well-meaning but ineffectual and under-enforced international agreement. Acknowledging this, the practicability of implementing any such treaty is integrated into assessments of its possible scope. Hereinafter, I will refer to this as the Franck-Keohane-Victor evaluative framework, and it suggests that ICL is the preferred paradigmatic choice for developing legally binding standards for corporate human rights.

## IV. The Case for Sourcing Legally-Binding Corporate Human Rights Obligations From International Criminal Law

### A. *Deriving Corporate Human Rights Standards from International Law*

By any measure, international law is the governance domain within which to identify a set of standards that holds out the greatest possibility of attracting strong legitimacy worldwide and, in turn, effectiveness in curtailing corporate human rights abuses wherever they may occur.[57] This is notwithstanding the critiques that have been shared (including from scholars of the Global South) that international law lacks genuine universality in its creation and continued practices.[58]

56. *Id.* at 17.

57. *See, e.g.*, Theodor Meron, The Humanization of International Law (2006); Franck, *supra* note 47.

58. *See, e.g.*, Sundhya Pahuja, Decolonising International Law: Development, Economic Growth and the Politics of Universality (2011).

In theory, international law reflects and builds upon universal values.[59] Thomas Risse and Kathryn Sikkink, two international relations scholars that study the influence and impact of human rights, view "international law as the primary vehicle for stating community norms and for collective legitimation."[60] In a similar vein, Martti Koskenniemi, a Finnish international lawyer and theorist, suggests international law has "the sole vocabulary with a horizon of transcendence."[61] The legitimacy attached to core international legal standards holds out hope for increased adherence and less fragmentation and competition among regulatory instruments and regimes.[62]

Contemporary regulation of corporate conduct with regard to human rights in large part derives its standards from international law and agreements. Even domestic and industry-based regulations derive relevant standards from international law, primarily IHRL. Existing codes of conduct, multi-stakeholder governance initiatives, and state-based regulatory efforts all borrow, oftentimes explicitly, from human rights treaties and principles to offer guidance on corporate conduct.[63]

Indeed, public international law has established the core, fundamental standards of behavior in our world today.[64] International humanitarian law (IHL) aims to ameliorate the worst effects of armed conflict, and international human rights law (IHRL) aims to safeguard the fundamental rights of all people. International criminal law (ICL) seeks to punish grave breaches of these bodies of law, to provide recompense to their victims, and to deter repeated violations.

Collectively, the rights, obligations, and prohibitions enshrined in these bodies of law are some of the most fundamental known to humankind.[65] But which body of international law is most fit to serve as

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59. INTERNATIONAL COUNCIL ON HUMAN RIGHTS POLICY, *supra.* note 27, at 15.

60. Thomas Risse & Kathryn Sikkink, *The Socialization of International Human Rights Norms into Domestic Practices: Introduction*, THE POWER OF HUMAN RIGHTS: INTERNATIONAL NORMS AND DOMESTIC PRACTICES 1, 8 (Thomas Risse et al. eds., 1999).

61. Martti Koskenniemi, *The Fate of Public International Law*, 70 MOD. L. REV. 1, 30 (2007).

62. ROBERT KOLB, PEREMPTORY INTERNATIONAL LAW-JUS COGENS: A GENERAL INVENTORY (2015).

63. Initiatives such as the U.N. *Global Compact*, the *Extractive Industries' Transparency Initiative*, and the *Voluntary Principles on Security and Human Rights* reference IHRL. Similarly, government-based regulatory efforts such as the OECD *Guidelines for Multinational Enterprises* and the U.N. *Guiding Principles on Business and Human Rights* borrow heavily from the substance and lexicon of IHRL.

64. JEFFREY DUNOFF, STEVEN RATNER & DAVID WIPPMAN, INTERNATIONAL LAW: NORMS, ACTORS, PROCESS 28-29 (3d ed. 2010); MARGARET YOUNG, TRADING FISH, SAVING FISH: THE INTERACTION OF REGIMES IN INTERNATIONAL LAW (2011).

65. *See generally* DJ HARRIS, CASES AND MATERIALS ON INTERNATIONAL LAW (5th ed., 1998).

the source of standards for current efforts to develop the first BHR treaty that places binding legal obligations on corporations?

ICL has several pragmatic, political, and jurisprudential advantages over the other likely bodies of public international law. These make ICL the preferred choice for the purpose of sourcing behavioral standards to further the BHR project, which should lie at the heart of the attempt to develop legally binding treaty obligations for corporations. Moreover, to a greater extent than IHRL, ICL possesses the characteristics identified by Franck, Keohane, and Victor that suggest it would be a more effective and more legitimate choice on which to base the scope of a BHR treaty.

### B. *Fundamental Nature of ICL Norms*

Franck, Keohane, and Victor recognized coherence as central to the efficacy and legitimacy of an international regime. A rule or norm that possesses an intrinsic integrity and compatibility with higher-order norms is far more likely to be perceived as legitimate, and for this reason, ICL standards should be favored for incorporation into any BHR treaty. By their very nature, ICL norms represent the most fundamental norms of all bodies of public international law, and reflect universally accepted standards of behavior.

### C. *ICL Reflects the Key Norms of IHRL and IHL*

There exists a close relationship between the three key bodies of public international law: IHRL, ICL, and IHL. They are all similar in their goals and underlying motivations, but of particular importance is the protection of human dignity.[66] They also have interwoven histories, as each area of law experienced substantial development in the aftermath of World War II, as part of the international community's response to the conflict and its atrocities.[67]

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66. *See, e.g.*, ROBERT CRYER, HAKAN FRIMAN, DARRYL ROBINSON AND ELIZABETH WILMSHURST, AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 13 (2014).

67. STEVEN RATNER ET AL., ACCOUNTABILITY FOR HUMAN RIGHTS VIOLATIONS IN INTERNATIONAL LAW 10 (Oxford University Press 3d ed. 2009); M. Cherif Bassiouni, *International Criminal Justice in Historical Perspective*, 29 INT'L CRIM. L. (2008); Boyd van Dijk, *Human Rights in War: On the Entangled Foundations of the 1949 Geneva Conventions*, 112 AM. J. INT'L L. 553 (2018). To be sure, the history of each body of law pre-dates World War II. For instance, the war crimes trials held at Leipzig and Istanbul post-World War I are considered by many scholars as the genesis of international criminal law. *See, e.g.*, Alan Kramer, *The First Wave of International War Crimes Trials: Istanbul and Leipzig*, 14 EUR. REV. 441 (2006).

ICL represents a rejection of the traditional conception of international law, under which states were thought to be the sole entities capable of committing and being held accountable for international wrongful acts.[68] The atrocities of World War II triggered a fundamental shift in notions of international law that has swept aside the traditional statist view, at least insofar as international wrongful acts are concerned.[69] Those wartime experiences prompted a renewed focus on the rights and obligations of *individuals* under international law. The "critical turning point" of the International Military Tribunal (IMT) convened at Nuremberg, Germany in 1945 that tried Nazi leaders, ushered in an era where grave violations of international legal norms were assigned to individuals, including civil, military, and corporate leaders.[70] The body of law that developed around this principle is referred to as ICL.[71]

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68. LASSA OPPENHEIM, INTERNATIONAL LAW: A TREATISE, VOL. 1 (PEACE) 17-19 (1912); ANTONIO CASSESE ET AL., INTERNATIONAL CRIMINAL LAW: CASES AND COMMENTARY (2011). There were some exceptions to this rule. For instance, for centuries pirates have been considered *hostes humani generis*–enemies of humanity. *See* Gerry Simpson, *Piracy and the Origins of Enmity*, *in* TIME, HISTORY AND INTERNATIONAL LAW 219 (Matthew Craven, Malgosia Fitzmaurice and Maria Vogiatzi eds., 2006).

69. GERHARD WERLE & FLORIAN JESSBERGER, PRINCIPLES OF INTERNATIONAL CRIMINAL LAW 1 (2014). Space prevents a fuller elaboration of the origins of International Criminal Law, although it is worthwhile to note that ICL pre-dates Nuremberg and the post-World War II tribunals: the Versailles Treaty (1919) between Germany and the Allies that ended World War I included provisions criminalising the conduct of German leadership (Art. 227), and envisaged criminal courts to be established to try them (Art.228-30). However, the German Emperor had successfully sought refuge in the Netherlands, which refused to extradite him, and no international criminal tribunals were established. Only twelve German officers were ever brought to trial, and then it was before a German court, seated in Leipzig. Six of the twelve were acquitted. At the League of Nations, a proposal to allow the Permanent Court of Justice to "try crimes constituting a breach of international public order or against the universal law of nations" was rejected by the Assembly of the League of Nations. These episodes are described by Antonio Cassese as "abortive early attempts" at international criminal justice. *See* ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 327-29 (2003).

70. CASSESE ET AL., *supra* note 68, at 40; *see also* Gideon Boas, *What is International Criminal Justice?*, *in* INTERNATIONAL CRIMINAL JUSTICE: LEGITIMACY AND COHERENCE 1, 3 (Gideon Boas et al. eds., 2012); CRYER ET AL., *supra* note 66, at 13; Quincy Wright, *Legal Positivism and the Nuremberg Judgment*, 2 AM. J. INT'L L. 405 (1948); Hersch Lauterpacht, *The Law of Nations and the Punishment of War Crimes*, 21 BRIT Y.B. INT'L L. 58 (1944); WADE MANSELL & KAREN OPENSHAW, INTERNATIONAL LAW: A CRITICAL INTRODUCTION 44 (2014); Hans Ehard, *The Nuremberg Trial Against the Major War Criminals and International Law*, 43 AM. J. INT'L L. 223. (1949).

71. Boas, *supra* note 70, at 1; Robert Cryer, *International Criminal Justice in Historical Context: The Post-Second World War Trials and Modern International Criminal Justice*, *in* INTERNATIONAL CRIMINAL JUSTICE: LEGITIMACY AND COHERENCE, *supra* note 66, at 188; CASSESE ET AL., *supra* note 68, at 15; WERLE & JESSBERGER, *supra* note 69, at 1-2; Hans Ehard, *The Nuremberg Trial Against the Major War*

The development of ICL since Nuremberg, through the 1990s ad hoc tribunals and the founding of the International Criminal Court (ICC) in 2001, has continued to eschew a focus on state responsibility in lieu of the principle of individual criminal responsibility.[72] The ICC's constitutive document, the Rome Statute, is signed by 137 countries and reflects an authoritative statement of contemporary ICL standards.[73]

The Nuremberg IMT judgment was influential in the drafting of international and regional human rights conventions, which in turn heavily influenced the drafting of the statutes of modern international criminal tribunals.[74] Similarly, "[d]evelopments in humanitarian law are reflected in the law of war crimes but . . . decisions of international criminal tribunals also sometimes feed back into humanitarian law."[75] Writing in 2005, Australian human rights practitioner and international lawyer Philip Alston emphasizes the link: "[h]uman rights and humanitarian law have moved much closer together, as the Statute of the ICC attests and the jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda illustrate."[76] Claire de Than and Edwin Shorts, two British-based legal academics, identify a

*Criminals and International Law*, 43 AM. J. INT'L L. 223 (1949); HANS KELSEN, PEACE THROUGH LAW (1944).

72. *See, e.g.*, BEYOND VICTOR'S JUSTICE? THE TOKYO WAR CRIMES TRIAL REVISITED, (Yuki Tanaka, Tim McCormack & Gerry Simpson eds., 2011 INT'L CRIM. TRIB. FOR THE FORMER YUGOSLAVIA, Updated Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 7(1), May 25, 1993, ("A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or the execution of a crime. . .. shall be individually responsible for the crime.") https://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf; *see also* Bassiouni, *supra* note 67.

73. Rome Statute of the International Criminal Court art. 7(2)(g), *opened for signature* July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute]; United Nations Treaty Collection, https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-10&chapter=18&lang=en (last visited Dec. 23, 2019) (providing an up to date listing of signatories to the Rome Statute); *see also* JAMES CRAWFORD, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 652-55 (2019); RATNER ET AL., *supra* note 67.

74. William A. Schabas, *Synergy or Fragmentation: International Criminal Law and the European Convention on Human Rights*, 9 J. INT'L CRIM. JUST. 609, 609-611 (2011); DUNOFF, RATNER & WIPPMAN, *supra* note 60; CRYER ET AL., *supra* note 66, at 13; *see also* 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/RES/827 (25 May 1993), art. 21; Statute of the International Tribunal for Rwanda, S.C. Res. 955 (Nov. 8, 1994), art. 20; Rome Statute, *supra* note 73, art. 55-56.

75. CRYER ET AL., *supra* note 66, at 15.

76. Philip Alston, *The "Not-A-Cat" Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors*, *in* NON-STATE ACTORS AND HUMAN RIGHTS 7 (Philip Alston ed. 2005); *see also* Boas, *supra* note 70, at 6.

"clear, visible cross-pollination and cross-referencing between international criminal law, international humanitarian law and international human rights, the first and last of which are really different perspectives on the same problem."[77] They go on to observe how the ad hoc international criminal tribunals frequently reference human rights conventions and legal decisions, for example those from the European Court of Human Rights.[78]

The three bodies of law are related, yet distinct. The overarching goals of ICL may be similar to IHRL and IHL, namely the safeguarding of human dignity and international peace and security (compare, for example, the striking similarities in the vocabularies of the preambles of ICL's Rome Statute, IHL's Geneva Conventions and IHRL's Universal Declaration of Human Rights).[79] Yet they serve different purposes and are addressed to different primary audiences.[80] IHL prohibits certain conduct during wartime and is primarily directed at regulating the conduct of military personnel on the battlefield; IHRL instruments emphasize that the primary obligation to uphold inviolable fundamental rights of all human beings rests upon the states.[81] These sets of international laws are focused squarely on "the prescription of norms for the protection of the individual in peace and war."[82] Yet, neither body of law extensively criminalizes conduct that breaches its provisions, nor establishes procedures and tribunals to punish transgressors.[83]

ICL fills that void by criminalizing the most egregious violations of IHRL and IHL and instituting mechanisms to enforce them.[84] ICL focuses on what Steven Ratner, Jason Abrams, and James Bischoff, in their volume on accountability for grave violations of international law, refer to as "atrocities"—those acts that are "characterized by the directness and gravity of their assault upon the human person, both corporeal and spiritual."[85] In this way, it is said that ICL "provides an answer to the failure of traditional mechanisms to protect human rights."[86]

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77. CLAIRE DE THAN & EDWIN SHORTS, INTERNATIONAL CRIMINAL LAW AND HUMAN RIGHTS 12 (2003).

78. *Id.* at 12-13.

79. CRYER ET AL., *supra* note 66, at 15.

80. RATNER ET AL., *supra* note 67, at 12.

81. *Id.* ; CRYER ET AL., *supra* note 66, at 15.

82. CRYER ET AL., *supra* note 66, at 15.

83. CASSESE, *supra* note 68, at 17; DUNOFF, RATNER & WIPPMAN, *supra* note 64, at 566.

84. RATNER ET AL., *supra* note 67, at 14; CRYER ET AL., *supra* note 66, at 13-15.

85. RATNER ET AL., *supra* note 67, at 14.

86. WERLE & JESSBERGER, *supra* note 69, at 51.

Deriving minimum corporate human rights obligations from ICL offers, to a great degree, the central elements of all three bodies of law. The *Rome Statute*'s definitions of crimes against humanity and war crimes substantially reference the core prohibitions of IHL and IHRL, demonstrating the overlap between the norms from all bodies of law.[87]

The four categories of international crimes detailed in ICL (as per the *Rome Statute*)—war crimes, crimes against humanity, genocide, and the crime of aggression[88]—represent the most serious violations of customary or treaty rules belonging to the corpus of IHL, specifically the 1949 Geneva Conventions and the 1948 Genocide Convention, and of IHRL, including the 1996 International Covenants on Civil and Political Rights (ICCPR) and the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR).[89] Many serious human rights violations and grave violations of IHL that can be imagined—including those likely to be perpetrated or aided by corporations—qualify as international crimes under the definitions provided by the Rome Statute of the ICC, and "[a]lmost every international crime would be a violation of human rights law."[90] Similarly, grave breaches of IHL that amount to a war crime under ICL "by their nature, involve violations of non-derogable rights."[91] Moreover, the well-developed case law under international human rights treaties (in particular, the ICCPR and 1953 European Convention on Human Rights) has informed the ICC's *Elements of Crime*—the practical ""check-list" of the necessary parts of offences that need to be proved."[92] Therefore, by choosing ICL we are embracing and validating core norms of behavior of the other bodies of law.[93]

87. Rome Statute, *supra* note 73, art. 7-8.

88. *Id.* at art. 5.

89. International Law Commission, *Draft Statute for an International Criminal Court with commentaries*, 22 July 1994, https://legal.un.org/ilc/texts/instruments/english/commentaries/7_4_1994.pdf.

90. CRYER ET AL., *supra* note 66, at 14; DE THAN & SHORTS, *supra* note 77, at 13; WERLE & JESSBERGER, *supra* note 69, at 53.

91. DE THAN & SHORTS, *supra* note 77, at 124.

92. Robert Cryer, *The Philosophy of International Criminal Law*, *in* RESEARCH HANDBOOK ON THE THEORY AND HISTORY OF INTERNATIONAL LAW 256 (A. Orakhelashvili ed., 2011).

93. The Rome Statute acknowledges this convergence of laws in several provisions. For example, the requirement in Article 36 that candidates to be judges should have established competence in criminal law and procedure, or in "relevant areas of international law and international humanitarian law and the law of human rights" Rome Statute, *supra* note 73, art. 36 (3) (b) (ii)). Article 21 outlines that the law that the Court shall apply "must be consistent with internationally recognized human rights." *See* Rome Statute, *supra* note 73, art. 21 (3).

Significantly, ICL also criminalizes *complicity* in these core crimes and so-called "inchoate crimes."[94] Conduct that substantially assists in the preparation or perpetration of an international crime is, in and of itself, a crime even if no crime is ultimately committed and no harm actually caused.[95] Given that allegations of corporation human rights abuses frequently revolve around the material assistance and/or encouragement provided to government actors or other private actors who then perpetrate crimes and grave human rights abuses, this is of particular relevance.[96] By creating legally binding obligations for corporations in relation to established norms of ICL, a BHR treaty could end corporate impunity for these most egregious international crimes.

When a viable, unitary option exists, one that draws upon the major bodies of international law to articulate a clear, cohesive set of fundamental prohibitions is the legitimate and expedient option.

### D. *ICL Proscribes Grave and Universal Human Rights Abuses*

The critiques of international law's Euro-centricity and commensurate lack of universality are strongest in relation to IHRL and weakest (albeit still existent[97]) when it comes to the prohibitions enshrined in ICL. For instance, the very notion and lexicon of "rights" is, arguably, a Western, liberal creation, not shared by all other cultures and religions.[98] On the other hand, ICL's purpose is the "protection of fundamental values of the international community."[99] It criminalizes those heinous acts that "shock the conscience of humanity"—the most unimpeachable minimum standards of humanity that have a more legitimate claim to universality than the panoply of human rights.[100] "Chinese, Islamic and Hindu tradition . . . underscore the universal values enshrined in the prohibition[s]," explains Leila Sadat, a renowned scholar of international criminal law and current adviser to the ICC

94. Rome Statute, *supra* note 73, art. 25(3); Tom Stenson, *Inchoate Crimes and Criminal Responsibility under International Law*, 5 J. INT'L L. & POL'Y 12 (2006-7).

95. CASSESE et al., *supra* note 68, at 190.

96. *See, e.g.*, Sarei v. Rio Tinto, PLC., 722 F.3d 1109 (9th Cir. 2013).

97. James G. Stewart & Asad Kiyani, *The Ahistoricism of Legal Pluralism in International Criminal Law*, 65 AM. J. COMP. L. 393 (2017).

98. *See, e.g.*, Mark Goodale, *The Myth of Universality: The UNESCO "Philosophers' Committee" and the Making of Human Rights*, 43 LAW & SOC. INQUIRY 596 (2018); PHILIP ALSTON & RYAN GOODMAN, INTERNATIONAL HUMAN RIGHTS LAW (2012).

99. WERLE & JESSBERGER, *supra* note 69, at 36.

100. Rome Statute, *supra* note 73, pmbl.

Prosecutor.[101] As Robert Cryer et al write in their seminal introductory text on ICL, the criminal prohibitions within ICL—genocide, crimes against humanity and war crimes—maintain their legitimacy in the face of scholarly scrutiny, as they are "considered contrary to universal norms."[102] They derive from the *core* provisions of IHL and IHRL treaties that have been signed and ratified by almost every country, and have been repeatedly denounced in international fora such as the U.N. General Assembly and Security Council.[103]

While admittedly capturing fewer questionable corporate practices than a human rights prism, deriving standards from ICL would demonstrate a commitment to curtailing (and punishing) the contributions corporations make that could exacerbate "atrocity"-style human rights abuses.[104] For instance, companies knowingly supplying logistics or financial assistance to tyrannical regimes, militaries, or militias that then go on to commit atrocities would likely fall foul of ICL-based standards of conduct.[105] Corporations paying off or even employing militia groups, government forces, or private contractors, for instance to protect company assets or provide access to natural resources, could also be liable under ICL for claims of criminal wrongdoing committed by these entities.[106] Prominent contemporary examples include 2018 French legal action against LaFarge-Holcim for bribing ISIS in Syria,[107] and a 2013 Swiss investigation of Argor-Heraeus for war crimes (including pillage) in the Democratic Republic of Congo.[108]

Business practices in fragile or conflict-affected areas, such as cutting lucrative deals with rogue governments or rebel groups in order to extract oil, precious minerals, or other resources, may also come under

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101. Leila Sadat, *The Effect of Amnesties before Domestic and International Tribunals: Law, Morality, Politics*, *in* ATROCITIES AND INTERNATIONAL ACCOUNTABILITY: BEYOND TRANSITIONAL JUSTICE 229 (Edel Hughes et al. eds, 2007).

102. CRYER ET AL., *supra* note 66, at 44.

103. *See, e.g.*, S.C. Res. 1366, U.N. Doc S/Res/1366 (2001) (creating the U.N. Special Adviser on the Prevention of Genocide).

104. Steven R. Ratner, *After Atrocity: Optimizing UN Action toward Accountability for Human Rights Abuses*, 36 MICH. J. INT'L L. 541 (2015).

105. *See, e.g.*, *Prosecutor v. Tadić*, Case No. IT-94-1-A, Judgment, Int'l Crim. Trib. For the Former Yugoslavia, Jul. 15, 1999, 228-229.

106. *See, e.g.*, JAMES STEWART, CORPORATE WAR CRIMES: PROSECUTING THE PILLAGE OF NATURAL RESOURCES (2011).

107. Liz Alderman, *French Cement Giant Lafarge Indicted on Terror Financing Charge in Syria*, N. Y. TIMES, June 28, 2018, https://www.nytimes.com/2018/06/28/business/lafarge-holcim-syria-terrorist-financing.html.

108. *Swiss refiner Argor accused of laundering DRC gold*, BBC NEWS, Nov. 4, 2013, https://www.bbc.com/news/world-europe-24811420.

scrutiny for breaching ICL standards of conduct, either directly or indirectly, if those beneficiaries of the company's largesse engage in criminal conduct. Over the years, examples of suspect business activities have drawn legal scrutiny: the Australian Wheat Board's corrupt practices in Iraq,[109] Oriental Timber's plunder of Liberian timber,[110] Royal Dutch Shell's activities in the Niger Delta,[111] and DeBeers' trade in West African blood diamonds.[112]

A narrower, more modest ICL framework for a BHR treaty may not capture all of the "business as usual" human rights violations that some scholars and advocacy organizations would like, such as labor standards and environmental harms.[113] However, it would capture the most egregious human rights abuses while simultaneously enhancing a BHR treaty's appeal amongst concerned governments and the corporate sector, thereby increasing the likelihood of any such treaty's adoption and implementation, as well as its sustainability into the future.[114] As Keohane and Victor remind us, acceptance by relevant stakeholders for the validity of a treaty's obligations is crucial to its success.[115]

### E. *Many ICL Standards are Jus Cogens Norms*

Human rights obligations for corporations derived from ICL draw added legitimacy from reflecting *jus cogens*—the "peremptory norm[s] of general international law."[116] Standing above and apart from any customary or treaty law obligations, legal norms that are said to have attained the status of *jus cogens* reflect the core commandments of

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109. REPORT OF THE INQUIRY INTO CERTAIN AUSTRALIAN COMPANIES AND THE U.N. OIL FOR FOOD PROGRAMME, CH. 2, THE COLE INQUIRY, PARLIAMENT OF AUSTRALIA, Nov. 27, 2006, https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/AFP_Oil/Report/d02.

110. Alice Harrison, *Dutch Court Makes Legal History by Sentencing Timber Baron Guss Kouwenhoven to 19 Years for War Crimes and Arms Smuggling During Liberian Civil War*, GLOBAL WITNESS (Apr. 21, 2017), https://www.globalwitness.org/en/press-releases/dutch-court-makes-legal-history-sentencing-timber-baron-gus-kouwenhoven-19-years-war-crimes-and-arms-smuggling-during-liberian-civil-war/.

111. Oladeinde Olawoyin, *Nigeria: Widows of Ogoni Leaders Killed by Abacha Sue Shell in the Netherlands*, PREMIUM TIMES (June 29, 2017), https://allafrica.com/stories/201706290125.html.

112. Lucinda Saunders, *Rich and Rare Are the Gems They War: Holding De Beers Accountable for Trading Conflict Diamonds*, 24 FORDHAM INT'L L. J. 1402 (2001).

113. Deva, *supra* note 8; CHRISTINE PARKER & JOHN HOWE, *Ruggie's Diplomatic Project and its Missing Regulatory Infrastructure*, *in* THE U.N. GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS: FOUNDATIONS AND IMPLEMENTATION (Radu Mares ed., 2012).

114. Pauwelyn et al., *supra* note 10.

115. Keohane & Victor, *supra* note 9.

116. Vienna Convention on the Law of Treaties art. 64, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980).

international behavior with universal applicability, from which no derogation is permitted—they are "mandatory and imperative in all circumstances."[117] As the ICJ stated in the *Corfu Channel Case, jus cogens* norms are "elementary considerations of humanity."[118] The ICJ has elsewhere stated that *jus cogens* norms derive "from principles and rules concerning the basic rights of the human person."[119]

While there exists no definitive list of *jus cogens* norms, it is widely accepted that there is substantial overlap between ICL standards and *jus cogens*.[120] ICL prohibitions drawn from the most egregious violations of IHRL and IHL, such as genocide and torture, and gross violations of human rights and human dignity are often considered norms having attained *jus cogens* status.[121] As German legal academic Otto Triffterer comments, ICL's function is "protecting the highest legal values of [this international] community."[122] Properly conceived, recognition of their *jus cogens* status strengthens the moral and legal force of ICL's behavioral standards in general, and contributes to the legitimacy of using ICL as the preferred source of legally binding corporate human rights standards.

ICL norms thus satisfy two of Franck's legitimacy criteria: coherence and symbolic validation.[123] He argues that a rule's legitimacy is derived, in part, from its compatibility with higher-order norms and whether relevant stakeholders overtly accept the rules.[124] Amongst the various bodies of international law, ICL encapsulates *the* highest-order norms of conduct yet devised: *jus cogens*. Similarly, ICL's status as *jus cogens* satisfies Keohane and Victor's call for international regulation to possess high epistemic quality and coherence.[125]

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117. ALEXANDER ORAKHELASHVILI, PEREMPTORY NORMS IN INTERNATIONAL LAW 8 (2008); *see also* CRAWFORD, *supra* note 73, at 581-3; M. Cherif Bassiouni, *International Crimes: Jus Cogens and Obligatio Erga Omnes*, 59 LAW & CONTEMP. PROBS. 63, 74 (1996).

118. Corfu Channel (U.K. v. Alb.), Judgment, 1949 I.C.J. Rep. 4, ¶ 22 (Apr. 9).

119. Barcelona Traction, Light and Power Company, Ltd. (Belg. v. Spain), Judgment, 1970 I. C.J. Rep. 3, ¶ 34 (Feb. 5).

120. KOLB, *supra* note 62.

121. ORAKHELASHVILI, *supra* note 117, at 50; LAURI HANNIKAINEN, PEREMPTORY NORMS (JUS COGENS) IN INTERNATIONAL LAW: HISTORICAL DEVELOPMENT, CRITERIA, PRESENT STATUS 633-87 (1988).

122. OTTO TRIFFTERER, COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVER'S NOTES, ARTICLE BY ARTICLE 1-14 (2008).

123. THOMAS FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS 38-41 (1995).

124. *Id.*

125. Keohane & Victor, *supra* note 9, at 16-17.

### F. *The Criminal Nature of ICL Standards*

Most well developed domestic legal orders around the world differentiate between two different types of law: civil and criminal. Criminal law is reserved for the more severe category of actions that warrant a legal response.[126] Generally, criminalization of conduct has a "condemnatory function" that civil law does not.[127] Labeling an illegal act as "criminal" conveys the gravity of the act and "heightens the stigma of the activity."[128] Whilst the distinction between these two categories of law may sometimes be hard to discern, there are some notable differences that lend support to the idea that ICL is the preferred body of law to base a BHR treaty upon.[129]

In the international legal order, there is no more heinous conduct conceivable than the prohibitions criminalized in ICL.[130] Recalling that symbolic validation and epistemic quality are criteria for assessing the legitimacy of legal rules and regulatory regimes, the gravity of ICL's prohibitions bodes well for achieving the purpose of gaining widespread adherence to a set of legitimate human rights duties for corporations.[131] The immorality and illegitimacy of breaching ICL standards is, to the extent possible, beyond contestation. This is reflected in the recognition by international and domestic courts of universal jurisdiction for the prosecution of grave international criminal offences.[132] The fact that the Rome Statute has attracted 137 signatories, despite fears expressed by some countries of the usurpation of state sovereignty prerogatives, is also proof of the global condemnation of these activities recognized as international crimes.

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126. R.A. DUFF, LINDSAY FARMER, S.E. MARSHALL, MASSIMO RENZO AND VICTOR TADROS (EDS.), THE BOUNDARIES OF THE CRIMINAL LAW (2010).

127. Victor Tadros, *Criminalization and Regulation*, *in* THE BOUNDARIES OF THE CRIMINAL LAW (2010), at 164.

128. Jordan Sundell, *Ill-Gotten Gains: The Case for International Corporate Criminal Liability*, 20 MINN. J. INT'L L. 648, 665 (2011).

129. *See generally*, Mordechai Kremnitzer, *A Possible Case for Imposing Criminal Liability on Corporations in International Criminal Law*, 8 J. INT'L CRIM. JUST. 909, 915 (2010).

130. KIRSTEN FISHER, MORAL ACCOUNTABILITY AND INTERNATIONAL CRIMINAL LAW: HOLDING AGENTS OF ATROCITY ACCOUNTABLE TO THE WORLD 17 (2012); MARK DRUMBL, ATROCITY, PUNISHMENT AND INTERNATIONAL LAW 4 (2007).

131. FRANCK, *supra* note 47, at 91; Keohane & Victor, *supra* note 9, at 16-17.

132. DAVID KINLEY, CIVILISING GLOBALISATION: HUMAN RIGHTS AND THE GLOBAL ECONOMY 149 (2009).

### G. *ICL Revolves around Collective Criminality*

Furthermore, ICL is particularly suited to regulating corporate human rights abuses, as it was developed to respond to collective criminal actions. As Gerry Simpson, a London-based professor of public international law, observes, ICL's focus on individual guilt is not necessarily to the exclusion of organizational or structural criminal activity.[133] Indeed, while individual responsibility may be a cornerstone of ICL, this body of law (necessarily) also deals with crimes that require a plurality of actors acting in cooperation for their commission, which confirms its applicability to instances of crime committed by corporations.[134]

Genocide, war crimes, and crimes against humanity all involve collective action.[135] "As a rule, it is a collective that is responsible [for the] systematic or large-scale use of force" that lies at the heart of international crimes.[136] Indeed, this fact led to the development of the doctrine of joint criminal enterprise (JCE) as a mode of liability under ICL.[137] Similar to conspiracy in domestic criminal laws, JCE acknowledges that many international crimes are committed within and on behalf of an organization—be it a state or non-state entity such as a corporation.[138] This organizational criminal responsibility opens up individuals within that organization to the possibility of prosecution.[139]

### H. *Clarity of ICL Standards*

To strengthen the effectiveness of a regulatory regime and its accountability mechanisms, the standards to which compliance is sought must be clear.[140] The notion of fairness also demands that duty-

133. Gerry Simpson, *Men and Abstract Entities: Individual Responsibility and Collective Guilt in International Criminal Law*, *in* SYSTEM CRIMINALITY IN INTERNATIONAL LAW 76 (André Nollkaemper & Harmen van der Wilt eds., 2009).

134. WERLE & JESSBERGER, *supra* note 69, at 35; Prosecutor v. Dusko Tadic, Case No. IT-94-1-A, Judgment, Int'l Crim. Trib. for the Former Yugoslavia, 15 July 1999, ¶ 191.

135. WERLE & JESSBERGER, *supra* note 69, at 35.

136. *Id.*

137. Gerry Simpson, *International Criminal Justice and the Past*, *in* INTERNATIONAL CRIMINAL JUSTICE: LEGITIMACY AND COHERENCE 113 (Gideon Boas et. al. eds., 2012); Steven Powles, *Joint Criminal Enterprise: Criminal Liability by Prosecutorial Ingenuity and Judicial Creativity*, 2 J. INT'L CRIM. JUST. 606 (2004).

138. Powles, *supra* note 133.

139. KARAVIAS, *supra* note 1, at 90; FISHER, *supra* note 130, at 74.

140. Gabrielle Simm, *International Law as a Regulatory Framework for Sexual Crimes Committed by Peacekeepers*, 16 J. CONFLICT & SECURITY L. 473, 475 (2012); GUNTHER TEUBNER, LAW AS AN AUTOPOIETIC SYSTEM (Blackwell, 1993).

holders must be able to reasonably comprehend their obligations.[141] Clarity of rules is crucial for creating and sustaining legitimacy of a regulatory regime, which in turn encourages voluntary compliance.[142] Franck identifies the need for an international legal rule to have determinacy—that is, clarity in its construction—in order to attract and sustain legitimacy.[143] Keohane and Victor concur, suggesting that the legitimacy and effectiveness of an overall regulatory regime increases when there is clarity and internal consistency of the set of norms that lie at the center of it.[144] A comparative assessment of ICL norms and those encompassed within the corpus of IHRL clearly shows a higher degree of clarity and determinacy attaches to ICL, due to its nature and structure.

### I. *ICL has a Singular Text*

Relying on ICL for its substance would dispel any suggestion that a corporation lacks sufficient guidance as to its expectations or its BHR treaty obligations. Specificity is a general principle of criminal law in domestic justice systems, no less with international criminal law.[145] ICL "needs substantive provisions that are clear and exact rather than the often more imprecise formulations of international law."[146]

In contrast to the diffusion of IHRL across numerous conventions and instruments, the Rome Statute is a single, unitary text encompassing contemporary ICL with a global scope.[147] As opposed to the aspirational and oftentimes vague language employed in IHRL instruments, this text is relatively clear, specific, and well defined. The Rome Statute is a key reason to prefer ICL to IHRL or indeed other bodies of public international law for sourcing legally binding BHR obligations. It is not merely a text, but also represents a body of international law that actively develops and deepens rules of procedure and clarifies the Elements of Crime in subsidiary documents utilized by the ICC.[148] Notwithstanding the acknowledged pluralism in how ICL is applied in international tribunals and domestic courts, the set of behavioral

141. FRANCK, *supra* note 43, at 52.

142. Franck, *supra* note 9, at 725.

143. *Id.*

144. Keohane & Victor, *supra* note 9, at 17; Simm, *supra* note 140.

145. CASSESE ET AL., *supra* note 68, at 31.

146. CRYER ET AL., *supra* note 66, at 17.

147. There is, it should be noted, pluralism in ICL standards that are applied in international tribunals and domestic courts, a practical guidance document, the Rome Statute stands.

148. *Elements of Crimes* (International Criminal Court, 2011).

standards—prohibitions—at the heart of ICL remain relatively consistent.[149] This provides ICL with a level of clarity and coherence which, when combined with the moral weight of its behavioral norms, provides ICL with a unique degree of legitimacy among the bodies of public international law.[150]

Furthermore, sourcing minimum standards from ICL diminishes the possibility of forum shopping by global corporations—a practice that undermines other spheres of transnational corporate regulation such as taxation and protection of intellectual property.[151] One of the key issues in gaining tangible support from the corporate sector for greater regulation is a classic collective action problem: the need for a level playing field.[152] In the past, the business community has resisted regulations (in a range of subject areas) on the basis that the regulations would create unfair business advantages to their more unscrupulous competitors.[153] Developing a core set of corporate human rights standards from ICL helps to overcomes issues of forum-shopping and selective adoption.[154]

### J. *Vague and Aspirational Nature of Human Rights Law*

The value of ICL's specificity when developing minimum legally binding obligations is especially apparent when contrasted with the more aspirational human rights legal principles some have advocated for to be the scope of any future BHR treaty,[155] and indeed that have been incorporated into the draft instrument.

IHRL has an innate vagueness to it. This is symptomatic of the diplomatic feats often required to finalize international instruments, but also reflects the bold, aspirational nature of the human rights project

149. *See, e.g.*, Stewart & Kiyani, *supra* note 97; ELIES VAN SLIEDREGT & SERGEY VASILIEV (EDS.), PLURALISM IN INTERNATIONAL CRIMINAL LAW (2014).

150. Simpson, *supra* note 137, at 125.

151. INT'L COUNCIL ON HUM. RTS. POL'Y, *supra* note 27, at 18-19.

152. *Id.*; *see also* Kathleen Getz & Jennifer Oetzel, *Research Summary: Survey on Business Response to Violent Conflict*, U.N. GLOBAL COMPACT: DOING BUSINESS WHILE ADVANCING PEACE AND DEVELOPMENT (2010); JESSICA BANFIELD ET AL., *Transnational Corporations in Conflict-Prone Zones: Public Policy Responses and a Framework for Action* 33 OXFORD DEV. STUD. 133 (2005).

153. INTERNATIONAL COUNCIL ON HUMAN RIGHTS POLICY, *supra* note 27.

154. Jonathan Charney, *Transnational Corporations and Developing Public International Law* 32 DUKE L.J. 748 (1983); Dan Danielsen, *How Corporations Govern: Taking Corporate Power Seriously in Transnational Regulation and Governance* 46 HARV. INT'L L.J. 411 (2005).

155. Justine Nolan, *A Business and Human Rights Treaty*, *in* BUSINESS AND HUMAN RIGHTS: FROM PRINCIPLES TO PRACTICE 70, 70-72 (Dorothée Baumann-Pauly & Justine Nolan eds., Routledge, 2016).

writ large. However, this feature of IHRL may also undermine the BHR project's objective of a robust framework for redress to victims and corporate accountability against human rights abuses.[156] As IHRL currently stands, there is no clarity as to the extent of human rights obligations of companies, the extent to which they should respect human rights norms, and in which contexts. At the moment, the OECD's Guidelines for Multinational Enterprises, the U.N.'s Global Compact and the U.N. Guiding Principles on Business and Human Rights—the three leading exemplars of international instruments embracing corporate responsibilities for human rights—are vague in their prescriptive requirements.[157]

There is a panoply of human rights treaties that address a range of issues—from economic and social rights, to the rights of women, children, and indigenous people. All have relevance to corporate activities, but which treaties and which human rights principles should be the basis of binding corporate obligations enshrined in a separate BHR treaty? How should such a determination be made, in order to ensure clarity and determinacy of those obligations? Notably, the U.N. Guiding Principles state that companies have a responsibility to respect, at minimum, only "internationally recognized human rights."[158] The U.N. Guiding Principles and their official Commentary suggest these are the human rights contained in the International Bill of Human Rights and several core International Labor Organization conventions.[159] Some observers have criticized the omission of any reference to other significant human rights treaties—especially those relevant to business conduct—such as the Convention on the Elimination of All Forms of Discrimination against Women, and even the Convention on the Rights of the Child, the most widely ratified of all human rights treaties.[160] These questions are especially pertinent, given that any outcome

156. Surya Deva, *Treating Human Rights Lightly: A Critique of the Consensus Rhetoric and the Language Employed by the Guiding Principles, in* HUMAN RIGHTS OBLIGATIONS OF BUSINESS 79 (Surya Deva and David Blichitz eds., 2013).

157. *Id.* at 88; JENNIFER ZERK, MULTINATIONALS AND CORPORATE SOCIAL RESPONSIBILITY: LIMITATIONS AND OPPORTUNITIES IN INTERNATIONAL LAW 93 (2006).

158. John Ruggie (Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises), *Guiding Principles on Bus. 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].

159. *Id.* at princ. 12 cmt

160. Convention on the Elimination of All Forms of Discrimination Against Women, *opened for signature* Mar. 1, 1980, 1249 U.N.T.S. 13.; Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3.

that is likely to alienate some stakeholders will endanger the broad consensus sought for effective international lawmaking.[161]

The difficulties that may arise from the often ill-defined ambit and scope of IHRL are clearly displayed in the *ratione materiae* of the "zero-draft" instrument. By stipulating in draft Article 3.2 that the treaty will cover "all international human rights," it has been observed that the draft instrument "fails to provide clarity on what rights are to be covered under the treaty . . . [and] flies in the face of the principle of legality."[162] This imprecision remains a shortcoming of 2019's "revised-draft" treaty that "shall cover all human rights."[163] The practical and conceptual difficulties that such a provision poses are reflective of the innate vagueness of IHRL as a body of law.

Furthermore, how does one translate the duties contained in human rights treaties that were drafted with states in mind to corporations?[164] Those debates will continue, but may unnecessarily delay the treaty-drafting process and undermine the larger BHR agenda.

There remains significant controversy among sovereign states as to the precise requirements of human rights law even as it applies to them,[165] which presents clear difficulties to fulfilling Franck's determinacy criteria. Adding to the lack of clarity of IHRL standards, IHRL treaties include the option for states to derogate from protecting some rights. This lack of clarity will be amplified when attempting to define human rights standards for an entity as incomparable to a sovereign state as the private, for-profit corporation.[166] The corporate sector could reasonably suggest that they should not be asked to uphold standards that even highly developed states frequently fail to adhere to.[167]

To be sure, a direct *transposing* of state human rights obligations onto corporations would be conceptually fraught and practically ineffectual.[168] As Deva puts it, "the process of transplantation [will be] neither easy nor free from conceptual problems."[169] Corporations are not

161. Pauwelyn et al., *supra* note 10.

162. *See* Lopez, *supra* note 26.

163. Revised Draft, *supra* note 4, art. 3, ¶ 3.

164. Deva, *supra* note 156, at 88.

165. David Kinley & Junko Tadaki, *From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law* (2004) 44 VA. J. INT'L L. 931, 961-64.

166. *Id.*

167. Robert McCorquodale, *Business, Rule of Law and Human Rights*, *in* THE RULE OF LAW IN INTERNATIONAL AND COMPARATIVE CONTEXT 27, 39 (Robert McCorquodale ed., 2010).

168. Deitelhoff and Wolf, *supra* note 33, at 222-23.

169. Deva, *supra* note 156, at 88.

states. They serve different social purposes and have different relationships to society at large. The depth of a sovereign state's obligation to uphold and protect human rights such as the right to freely assemble, to vote, and to free speech under the ICCPR, and the rights to adequate health and education under the ICESCR, surely cannot be the same as a corporation's obligations vis-à-vis those same rights.[170]

Developing human rights obligations for corporations requires an understanding of the inherent constraints and characteristics of the corporate form.[171] Practically, given the diversity amongst the world's corporations—different sizes, different industries, different cultures—applying human rights standards will require flexibility, adapting to different industries, contexts and other variables. In turn, this may give rise to accusations of unfairness, which will undermine the legitimacy and effectiveness of any BHR treaty.

Human rights are aspirational in nature, and the dream of a world where human rights are fully protected is utopian.[172] Many states fall short in fulfilling their human rights obligations, and many populations continue to suffer from human rights abuses. Even affluent, well-developed states are often accused by advocacy groups and UN human rights monitoring bodies of breaching various provisions of human rights treaties. Coupled with the profusion of international human rights instruments, its partial derogability, and its non-universal acceptance, deploying an IHRL framework to establish legitimate legally binding minimum standards for corporations' social responsibilities in a BHR treaty would likely be a lengthy and complex process, with uncertain eventual success.

### K. *"Rights" is Wrong*

Furthermore, the language and discourse of human rights are ill suited for the purpose of deriving minimum standards of conduct for corporations with regard to their human rights obligations.[173] Human rights are not naturally associated with corporations, in contrast to how they are intrinsic to human beings. But perhaps most importantly, it is

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170. *See* International Covenant on Civil and Political Rights, Dec. 19, 1966, 98 Stat. 3512, 999 U.N.T.S. 171; International Covenant on Economic, Social and Cultural Rights, Dec. 16 1966, 98 Stat. 3512, 993 U.N.T.S. 3.

171. ZERK, *supra* note 157, at 83; ANDREW CLAPHAM, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS (2006).

172. ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 96-97 (1994).

173. Deva, *supra* note 156, at 91.

what a human rights discourse tends to *exclude* that is the most salient point here. As Cass Sunstein, an American legal and regulatory scholar, notes, the "emphasis on rights tends to crowd out the issue of responsibility."[174] David Kennedy, a Harvard-based scholar of global governance, offers a critique of human rights law along similar grounds, suggesting that "there are other lost vocabularies which are equally global – vocabularies of duty, of responsibility, of collective commitment."[175] Kennedy's critique is even more incisive when it comes to searching for the most conducive body of international law with which to establish the legal *responsibilities* of TNCs and other businesses, and related accountability processes.

### 1. Corporatization of Human Rights

Ostensibly, the spread of human rights language into corporate boardrooms and workplaces is a positive development. However, there are some adverse consequences that should give BHR advocates pause.

While the application of human rights to business may humanize corporate processes, there is a danger of the reverse occurring too: the corporatization or privatization of human rights.[176] For instance, the U.N. Guiding Principles recommend the adoption of so-called "human rights due diligence" processes as one of the primary means of business implementation.[177] This is a deliberate choice to attempt to integrate human rights within common corporate risk management practices. However, the practice of due diligence—at least for most companies—is motivated by safeguarding their own interests (for instance, mitigating legal or financial risks to the corporation itself), whereas the motivation of human rights due diligence practices should be to protect the (likely non-commercial) interests of others that may be adversely affected by a company's conduct. This fundamental incongruence has the potential to cause serious difficulties.

The application of IHRL and the assigning of legal responsibilities to corporations may also obfuscate who needs to address human rights grievances in the future, making genuine accountability more difficult. This is a problem that is already confronting campaigners that have sought justice for victims of human rights abuses committed by private

174. Cass Sunstein, *Rights and Their Critics*, 70 NOTRE DAME L. REV. 727, 734 (1995).

175. DAVID KENNEDY, THE DARK SIDES OF VIRTUE: REASSESSING INTERNATIONAL HUMANITARIANISM 10 (2004).

176. *See, e.g.*, LAURA DICKINSON, OUTSOURCING WAR AND PEACE: PRESERVING PUBLIC VALUES IN A WORLD OF PRIVATIZED FOREIGN AFFAIRS (2011).

177. Guiding Principles, *supra* note 158.

corporations contracted to supply governmental services, such as the management of detention services.[178]

### L. *Applicability of ICL and IHRL to Corporations*

Proponents of corporate human rights accountability and a BHR treaty argue that the system must be responsive to the growing economic and political influence of the modern-day TNCs and other business enterprises.[179] Just as international law stands to constrain the raw power of states (e.g. in the realm of human rights protections) so too should corporate power be constrained. In comparing the ease and validity with which each paradigm of international law can be applied to the corporate form, ICL emerges as the more appropriate and legitimate source of legally binding obligations for a BHR treaty.

### M. *Overcoming the Problem of International Legal Personality for Corporations*

A major conceptual impediment to enshrining corporate human rights obligations in treaty form is the reticence in some quarters to recognize the international legal personality of corporations. Can corporations have obligations under international law? This complex issue goes to the heart of global governance and the regulation of transnational business.

Scholars as well as governmental and corporate actors continue to question the applicability of IHRL to the corporate form, and IHRL remains addressed to sovereign states.[180] Even when addressing business' impacts on human rights, human rights treaty bodies have been unwilling to recognize direct legal obligations for corporations.[181] Furthermore, the *UN Guiding Principles on Business and Human Rights* emphasize that any legal duties to protect human rights fall upon states,

178. *See, e.g.*, Matthew Taylor & Robert Booth, *G4S Guards Found Not Guilty of Manslaughter of Jimmy Mubenga*, THE GUARDIAN (Dec. 16, 2014), https://www.theguardian.com/uk-news/2014/dec/16/g4s-guards-found-not-guilty-manslaughter-jimmy-mubenga.

179. Keohane & Victor, *supra* note 9, at 8.

180. KARAVIAS, *supra* note 1, at 73; BETH STEPHENS, MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS (2009); Oliver de Schutter, *The Challenge of Imposing Human Rights Norms on Corporate Actors*, *in* TRANSNATIONAL CORPORATIONS AND HUMAN RIGHTS (Oliver de Schutter ed., 2006); Carlos Vasquez, *Direct vs. Indirect Obligations under International Law*, (2004) 43 COLUMBIA J. OF TRANSNAT'L L. 947.

181. *See, e.g.*, U.N. Committee on the Rights of the Child, "General comment No.16 (2013) on State obligations regarding the impact of the business sector on children's rights," CRC/C/GC/16 (2013).

and that a corporation's responsibility to respect human rights derives not from law but from "social expectations."[182] The draft instrument employs a similar framework of duty and responsibility, and the question of whether the proposed treaty should create direct or indirect legal obligations for corporations has been a recurring point of contention in the OEIGWG's sessions thus far.[183]

This is a significant conceptual shortcoming that puts at risk the legitimacy and effectiveness of any BHR treaty.[184] As Olga Martin-Ortega, professor of law and business and human rights expert, observes in relation to corporate international human rights duties, discussion "has stagnated in the technical debate . . . on international legal personality."[185] On the international plane, the issue of legal personhood remains a concept "giving rise to controversy."[186] In the absence of definitive pronouncements—for instance, from the ICJ—our perspective on international legal personality, as Roland Portmann, a Swiss international legal theorist, suggests, "tends to be a relatively philosophical and at times abstract topic."[187]

Traditionally, international law was seen as being crafted by, and exclusively concerned with, sovereign states—the sole "subjects" of international law.[188] International law exists, under this orthodox,

182. John Ruggie (Special Representative for Business and Human Rights), *Protect, Respect and Remedy: A Framework for Business and Human Rights, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises*, U.N. Doc. A/HRC/8/5 17 (2008).

183. Carlos Lopez, *Struggling to Take Off?: The Second Session of Intergovernmental Negotiations on a Treaty on Business and Human Rights* 2 BUS. & HUM. RTS. J. 365, 370 (2017).

184. Franck, *supra* note 9; Keohane & Victor, *supra* note 9.

185. Olga Martin-Ortega, *Business Under Fire: Transnational Corporations and Human Rights in Conflict Zones*," in INTERNATIONAL LAW AND ARMED CONFLICT: CHALLENGES IN THE 21ST CENTURY 200 (Noëlle Quénivet and Shilan Shah-Davis eds., 2010); *See, e.g.*, ROLAND PORTMANN, LEGAL PERSONALITY IN INTERNATIONAL LAW (2010); A.A. FATOUROS (ED), TRANSNATIONAL CORPORATIONS: THE INTERNATIONAL LEGAL FRAMEWORK (Routledge, 1994); Surya Deva, *Human Rights Violations by Multinational Corporations and International Law: Where from Here*, 19 CONN. J. INT'L L. 1 (2003); MATH NOORTMANN & CEDRIC RYNGAERT, NON-STATE ACTOR DYNAMICS IN INTERNATIONAL LAW: FROM LAW-TAKERS TO LAW-MAKERS (2010).

186. Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949 I.C.J. Rep. 174, at 178 (Apr. 11); PORTMANN, *supra* note 185, at 9.

187. PORTMANN, *supra* note 185, at 10.

188. Louis Henkin, *Law and the values of the State system: State values and human values*, 216 RECUEIL DES COURS 127, 208 (1989); Eric Mongelard, *Corporate Civil Liability of Corporations for Breaches of International Humanitarian Law*, 88 INT'L REV. RED CROSS 665 (2006); Peter Muchlinski, *Multinational Enterprises as Actors in International Law: Creating "Soft Law" Obligations and "Hard Law" Rights*, *in* NON-STATE ACTOR DYNAMICS IN INTERNATIONAL LAW: FROM LAW-TAKERS TO LAW-MAKERS 30 (Math Noortmann & Cedric Ryngaert eds., 2010).

positivist conception, "to regulate an international society made up, not of people, but of states,"[189] and is still sometimes referred to as the "law of nations."[190] According to this approach, corporations, as with other "objects" of international law, cannot be directly bound by it.[191] A host of jurists and scholars now reject an exclusively statist view of international law in favor of a more inclusive conception,[192] and many have proposed a BHR treaty to directly bind corporations rather than merely obligating states to regulate corporate conduct.

As prominent South African-based BHR scholar, David Bilchitz notes, one of the "central flaws" of previous BHR regulatory instruments such as the U.N. Guiding Principles has been their failure to create obligations for corporations that reach beyond mere moral claims.[193] Indeed, if a BHR regime is to ignite tangible change in corporate conduct, it requires enforcement incentives and mechanisms that extend further than social censure and the (often ungrounded) threat of domestic sanctions. However, creating such obligations in respect of IHRL is conceptually problematic and would be entirely unprecedented, given the nature, content, and structure of human rights norms, as outlined in the preceding sections.

However, by choosing ICL over IHRL, we can circumvent the respective difficulties associated with both a direct and indirect approach to creating IHRL obligations for corporations. As explored below, the extension of international law's reach to place direct obligations upon

189. ZERK, *supra* note 157, at 93.

190. HARRIS, *supra* note 65, at 1. The precise origins of "international law" as a term are often ascribed to Jeremy Bentham, 1748 – 1832: *see* Mark Janis, *Jeremy Bentham and the Fashioning of "International Law"* 78 AM. J. INT'L L. 405 (1984); Regis Bismuth, *Mapping a Responsibility of Corporations for Violations of International Humanitarian Law Sailing between International and Domestic Legal Orders*, 38 DENV. J. INT'L L. & POL'Y 203, 204 (2010); Anne-Marie Slaughter, *A Liberal Theory of International Law*, 94 AM. SOC'Y INT'L L. PROC. 240 (2000).

191. The U.N.'s "Business and Human Rights Framework" provides a contemporary restatement of this orthodox position in the realm of human rights: states have obligations to *protect* human rights, corporations should merely try and *respect* them. *See* Ruggie, *supra* note 182, at 8; HILARY CHARLESWORTH & CHRISTINE CHINKIN, THE BOUNDARIES OF INTERNATIONAL LAW: A FEMINIST ANALYSIS (2000).

192. *See, e.g.*, Philip Allott, *The Concept of International Law*, *in* THE ROLE OF LAW IN INTERNATIONAL POLITICS 69 (Michael Byers ed., 2000); W. Michael Reisman, *Foreword* to PARTICIPANTS IN THE INTERNATIONAL LEGAL SYSTEM: MULTIPLE PERSPECTIVES ON NON-STATE ACTORS IN INTERNATIONAL LAW, at xxxv (Jean d'Aspremont ed., Routledge, 2011); Slaughter, *supra* note 190, at 242; Harold Koh, *Separating Myth from Reality About Corporate Responsibility Litigation* 7 J. INT'L ECON. L. 263 (2004); WAYNE SANDHOLTZ, INTERNATIONAL NORMS AND CYCLES OF CHANGE (Oxford University Press, 2009); Deva, *supra* note 185; CHARLESWORTH & CHINKIN, *supra* note 191; PORTMANN, *supra* note 185, at 9.

193. Bilchitz, *supra* note 18, at 207.

corporations and its executives is most legitimate and conceptually sound when it comes to ICL prohibitions, rather than IHRL duties.

### N. *ICL Already Regulates Corporate Activities*

Unlike its public international law colleagues, ICL eschews state-centricity and is squarely addressed to individuals.[194] Indeed, individual criminal responsibility remains the cornerstone of modern-day ICL theory and practice.[195] Moreover, ICL has been explicitly extended to provide accountability for the crimes of non-state, private actors.

The post-World War II judgments at Nuremberg, and in particular, the so-called *Industrialist Trials* that convicted German business leaders, dispelled any suggestion that ICL did not extend to private actors.[196] On the contrary, due to these landmark trials, it is unequivocally accepted that corporate executives, employees and directors may be held personally and criminally liable for egregious abuses of ICL, or complicity thereof.[197] This stance is endorsed by a line of precedents at the ad hoc international criminal tribunals[198] and national courts,[199] the pronouncements of ICC Prosecutors,[200] and contemporary scholarship.[201]

It is established law that ICL is applicable to instances of corporate criminal conduct.[202] ICL applies to individual actions, whether they acted independently or as representatives of a state or a corporation. ICL's utility as a source of corporate human rights obligations remains intact,[203] and business executives, managers, and even employees who commit international crimes can be brought to justice through ICL processes.[204]

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194. CRYER ET AL., *supra* note 66, at 3.

195. DE THAN & SHORTS, *supra* note 77, at 117; WERLE & JESSBERGER, *supra* note 69, at 41.

196. Steven Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility* 111 YALE L.J. 443, 448 (2001).

197. INT'L COMM'N OF JURISTS, REPORT OF THE INTERNATIONAL COMMISSION OF JURISTS EXPERT LEGAL PANEL ON CORPORATE COMPLICITY IN INTERNATIONAL CRIMES, Vol I, at 2-6 (2008).

198. Prosecutor v. Musema, Case No. ICTR-96-13-A, Judgement and Sentence (Jan. 27, 2000).

199. Rechtbank's-Gravenhage *Van Anraat v. The Netherlands (2005)* LJN: AX6406 (Neth.).

200. Julia Graff, *Corporate War Criminals and the International Criminal Court: Blood and Profits in the Democratic Republic of Congo*, 11 HUM. RTS. BR. 23 (2004).

201. *See, e.g.*, Andrew Clapham, *Extending International Criminal Law beyond the Individual to Corporations and Armed Opposition Groups*, 6 J. INT'L CRIM. JUST. 899, 902 (2008).

202. *See, e.g.*, United States v. Krauch, VIII TWC 1081, Decision and Judgement of the Tribunal (1951).

203. Tilman Rodenhauser, *Beyond State Crimes: Non-State Entities and Crimes*, 27 LEIDEN J. INT'L L. 913, 913-14 (2014).

204. *Id.* at 194; Jonathan Kolieb, *Through the Looking Glass: Nuremberg's Confusing Legacy on Corporate Accountability under International Law*, 32 AM. UNIV. INT'L L. REV. 569 (2015).

### O. *Applying ICL to Corporate Entities: An Issue of Fairness*

Despite this, the question of whether ICL can be extended to legal persons such as corporations remains a matter of dispute.[205] Jurists and scholars have written incredulously about the perverse consequences that would arise if ICL is not applicable to corporations—essentially immunizing companies, large and small, from accountability for committing or abetting atrocities, even genocide.[206] Reflecting Keohane and Victor's fairness and sustainability criterion for international regimes, Navi Pillay, the former U.N. Human Rights Commissioner, argues that, in order to sustain the effectiveness of the international legal order, "a corporation cannot be permitted to commit genocide, crimes against humanity or war crimes, given that every other participant on the plane of international law is prohibited from doing so."[207] BHR scholars have also endorsed this basis for holding corporations accountable for human rights violations.[208]

This stance is echoed in international and national judicial decisions that seem to indicate that all entities—be they states, individuals or corporations—have a duty to abide by the limited set of ICL norms that "affect the whole of mankind and shock the conscience of all nations of the world."[209] For example, in a concurring opinion in the ICJ's *Arrest Warrant Case*, Justices Higgins, Kooijmans, and Buergenthal endorsed

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205. *See, e.g.*, Tyler Giannini & Susan Farbstein, *Corporate Accountability in Conflict Zones: How Kiobel Undermines the Nuremberg Legacy & Modern Human Rights*, 52 HARV. INT'L L. J. 119 (2010); Frederic Megret, "The subjects of international criminal law" in PHILIPP KASTNER (ED.), INTERNATIONAL CRIMINAL LAW IN CONTEXT 38-43 (2018).

206. ZERK, *supra* note 157, at 75; CLAPHAM, *supra* note 171; *see also Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010), at 154 (Leval, J. concurring in judgment).

207. Brief of Navi Pillay, United Nations Commissioner of Human Rights, Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108 at 16 (2013); *see also* ZERK, *supra* note 157, at 75; Celia Wells and Juanita Elias, *Catching the Conscience of the King* in NON-STATE ACTORS AND HUMAN RIGHTS (Phillip Alston ed., 2005); INTERNATIONAL COUNCIL ON HUMAN RIGHTS POLICY, *supra* note 27, at 12-13.

208. *See, e.g.*, WETTSTEIN, *supra* note 40; Philip Alston, *The Myopia of the Handmaidens: International Lawyers and Globalisation*, 80 EUR. J. INT'L L. 435 (1997); Sarah Joseph, *Taming the Leviathans: Multinational Enterprises and Human Rights*, 46 NETHERLANDS INT'L L. REV. 171, 186 (1999); Robert McCorquodale, *Non-State Actors and International Human Rights Law*, INTERNATIONAL HUMAN RIGHTS LAW 114 (Sarah Joseph & Adam McBeth eds., Edward Elgar, 2009); Larry Cata Backer, *Multinational Corporations, Transnational Law: The United Nations' Norms on the Responsibilities of Transnational Corporations As a Harbinger of Corporate Social Responsibility in International Law*, 37 COLUMBIA HUM. RTS. L. REV. 101 (2005).

209. Prosecutor v. Tadić, *(Decision on the Defence Motion on Jurisdiction)* (International Criminal Tribunal for the former Yugoslavia, Trial Chamber Case No IT-94-1-A, 10 August 1995), para. 42; *see also Kiobel*, 621 F.3d at 154.

universal criminal jurisdiction for violations of international norms that enjoy the status of *jus cogens*.[210] In the 2007 *Application of Convention on Prevention and Punishment of Crime of Genocide* judgment, regarding the 1995 Srebrenica massacre, the ICJ stated that all "persons or entities" are bound by the prohibition on genocide.[211] Further, the International Criminal Tribunal for Rwanda (ICTR) has "explicitly extended the genocide norm to corporations."[212] In 2014 African Union leaders endorsed the concept of corporate liability for international crimes with the finalization of the *Malabo Protocol of the African Court of Justice and Human Rights*, which (if and when it enters into force) would extend jurisdiction of the court to corporations.[213] Similarly, several countries' domestic legislation permits prosecution of corporations for international crimes such as genocide,[214] and some U.S. judicial decisions have recognized such crimes, as applicable to corporations.[215]

There is an inherent logic and coherence to the extension of international legal personhood to corporations in respect of the most serious violations of international law, such as ICL norms.[216] For this reason,

210. Arrest Warrant Case (Dem. Rep. of Congo v. Belg.) Judgment, 2000 I.C.J. Rep 3 (Apr. 11).

211. Bosnian Genocide Case (Bosn. & Herz. v. Montenegro) Judgment, 2007 I.C.J. Rep 43 (Feb. 26).

212. Brief for Yale Law School Center for Global Legal Challenges as Amici Curae Supporting [Respondents/Petitioner] Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, at 10 (2013).

213. African Union, Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, art. 46C (June 27, 2014), https://au.int/sites/default/files/treaties/36398-treaty-0045_-_rotocol_on_amendments_to_the_protocol_on_the_statute_of_the_african_court_of_justice_and_human_rights_e.pdf.

214. *See, e.g.*, *Lafarge charged with complicity in Syria crimes against humanity*, THEGUARDIAN.COM, https://www.theguardian.com/world/2018/jun/28/lafarge-charged-with-complicity-in-syria-crimes-against-humanity (last visited Jan. 22, 2020); Widows of hanged Nigeria activists can continue case vs Shell: Dutch court, REUTERS.COM, https://www.reuters.com/article/us-shell-widows-lawsuit/widows-of-hanged-nigeria-activists-can-continue-case-vs-shell-dutch-court-idUSKCN1S73CY (last visited Jan. 22, 2020); see also James Stewart, *The Turn to Corporate Criminal Liability for International Crimes: Transcending the Alien Tort Statute*, 47 N.Y. J. OF INT'L & POLICY 121 (2014); Robert Thompson, Anita Ramasastry & Mark Taylor, *Translating Unocal: The Expanding Web of Liability for Business Entities Implicated in International Crimes*, 40 GEO. WASH. U. INT'L L. REV. 841 (2009); Joanna Kyriakakis, *Australian Prosecution of Corporations for International Crimes: The Potential of the Commonwealth Criminal Code*, 5 J. INT'L CRIM. JUST. 809 (2007).

215. *See, e.g.*, *Jesner v Arab Bank, PLC*, 138 S. Ct. 1386, 1419 (Sotomayor, J., dissenting); *Sarei v Rio Tinto, PLC*, 671 F.3d 736, 747–49 (9th Cir. 2011); Paul Hoffman, *Kiobel v. Royal Dutch Petroleum Co: First Impressions*, 52 COLUM. J. TRANSNAT'L L. 28 (2013); *see generally Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013); *Doe I v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002); MICHAEL KELLY, PROSECUTING CORPORATIONS FOR GENOCIDE (Oxford University Press, 2016).

216. Robert Keohane, *Global Governance and Democratic Accountability*, *in* TAMING GLOBALIZATION: FRONTIERS OF GOVERNANCE 130 (David Held & Mathias Koenig-Archibugi eds.,

the criteria of coherence, adherence, and accountability that Franck, Keohane, and Victor all view as integral to the legitimacy of a regime are best fulfilled by a BHR instrument that creates legally binding obligations for corporations based on ICL, rather than IHRL.

### P. *Broader Accountability Opportunities for ICL*

Generally speaking, public international law establishes the basic rules of global conduct but lacks robust means to enforce such standards, instead largely devolving that task to states themselves.[217] There exists a paucity of accountability mechanisms, processes and institutions by which to monitor and seek compliance with even the most widely accepted of international norms among states, let alone charting the controversial path of pursuing corporations.[218] This is problematic, to say the least, given that Franck, Keohane, and Victor recognize that the possibility and viability of accountability are crucial elements in the effectiveness of an international legal regime.[219]

Regardless of the choice of law from which to derive corporate human rights standards to be enshrined in a BHR treaty, ensuring effective monitoring and enforcement mechanisms for those standards should be a paramount consideration.[220] This includes robust judicial and non-judicial accountability mechanisms. While market-based and other non-judicial mechanisms are vital for enforcing international corporate legal norms, be they sourced from IHRL or ICL,[221] ICL has a distinct advantage when it comes to judicial accountability mechanisms.

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2003); Alston, *supra* note 208, at 435; John Ruggie, *Taking Embedded Liberalism Global: The Corporate Connection*, in TAMING GLOBALIZATION: FRONTIERS OF GOVERNANCE (David Held and Mathias Koenig-Archibugi eds., 2003).

217. Brief for the United States as Amicus Curiae Supporting Petitioners at 18, Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108 (2013) (No. 10-1491); Ole Kristian Fauchald & Jo Stigen, *Corporate Responsibility before International Institutions*, 40 GEO. WASH. INT'L L. REV. 1025, 1032 (2009); Ratner, *supra* note 196, at 463; LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 245 (1996).

218. PORTMANN, *supra* note 185, at 224-6. This is a perennial problem when it comes to international law. *See, e.g.*, JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED (John Murray, 1832); HANS MORGENTHAU, LA RÉALITÉ DES NORMES, EN PARTICULIER DES NORMES DU DROIT INTERNATIONAL: FONDEMENTS D'UNE THÉORIE DES NORMES 34-5 (1934) (Fr.).

219. Keohane & Victor, *supra* note 9, at 17; FRANCK, POWER OF LEGITIMACY, *supra* note 47, at 15; Franck, "Legitimacy in the International System," *supra* note 9, at 708.

220. Keohane & Victor, *supra* note 9.

221. *See, e.g.*, Kenneth Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT'L ORG. 421 (2000); JOHN KIRTON & MICHAEL TREBILCOCK, HARD CHOICES, SOFT LAW: VOLUNTARY STANDARDS IN GLOBAL TRADE, ENVIRONMENT AND SOCIAL GOVERNANCE (2004); JOOST PAUWELYN ET AL., INFORMAL INTERNATIONAL LAWMAKING (2012).

Given the precarious state of human rights enforcement when states fail in their obligations, the practicalities of establishing additional monitoring and enforcement mechanisms for corporate human rights obligations seems unlikely, at least in the near term. Indeed, as human rights scholar and practitioner Douglas Cassel has noted, one of the biggest weaknesses of the "zero-draft" instrument was its failure to contemplate any binding international enforcement mechanism for corporate human rights violations.[222] This remains the case in the 2019 "revised-draft."[223] In contrast, utilizing ICL to derive legally binding corporate human rights standards opens up a range of viable enforcement pathways—both domestically and internationally.[224]

### Q. *Possibility of Corporate Accountability at the International Criminal Court*

The constitutive documents of the ICC expressly provides for jurisdiction over only natural persons.[225] Article 25(1) of the Rome Statute states that "the Court shall have jurisdiction over natural persons", notably precluding legal persons such as corporations from prosecution.[226] The precise reasoning for restricting the jurisdiction of the ICC in this way is a matter of some historical dispute.[227] In particular, there is confusion in the literature, and even among delegates to the Rome Conference who drafted the statute, as to why a French proposal to include jurisdiction over legal persons was ultimately left out of the final Rome Statute text.[228] Regardless, that corporations cannot be

222. Douglass Cassel, *At Last: A Draft Treaty on Business and Human Rights*, LETTERS BLOGATORY (Aug. 2, 2018), https://lettersblogatory.com/2018/08/02/at-last-a-draft-un-treaty-on-business-and-human-rights/#more-27105.

223. *Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and other Business Enterprises (Revised-Draft)*, Article 6.

224. Jonathan Kolieb, *Australia: The Great Southern Land of Corporate Accountability?*, 1 PANDORA'S BOX L. J. 61 (2013); Kyriakakis, *supra* note 214; Surya Deva, *Acting Extraterritorially to Tame Multinational Corporations for Human Rights Violations: Who Should Bell the Cat*, 5 MELB. J. INT'L L. 37 (2004).

225. Statute of the International Criminal Tribunal for the Former Yugoslavia, *supra* note 74, art 6; Statute of the International Tribunal for Rwanda, *supra* note 74, art. 5; Rome Statute, *supra* note 73, art. 25(1).

226. Rome Statute, *supra* note 73, art. 25(1).

227. Micaela Frulli, *Jurisdiction Ratione Personae*, *in* THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 527-534 (Antonio Cassese et al. eds., 2002).

228. U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *Report of the Preparatory Committee on the Establishment of an International Criminal Court, Draft Statute for the International Criminal Court*, art. 23, UN Doc A/CONF 183/2/Add.1 (Apr. 14, 1998). *See also* Frulli, *supra* note 225; KARAVIAS, *supra* note 1, at 100; Bismuth, *supra* note 190, at 209; Andrew Clapham, *The Complexity of International Criminal Law:*

currently prosecuted at the ICC is a procedural matter, rather than a reflection of substantive legal principles.[229]

Regardless of the precise reason, it is important to note that the current absence of a provision allowing for corporate criminal responsibility does not preclude its inclusion at some future date.[230] Indeed, a 2008 International Commission of Jurists report on corporate complicity in international crimes recommended just such an amendment.[231] As the movement towards recognition of corporate criminal liability continues apace, the possibility of this change grows.[232]

Moreover, despite the jurisdictional impediments preventing prosecution of corporations themselves at the ICC, the ICC currently has the jurisdictional scope to prosecute corporate executives and employees. Recent experience suggests it can be done, with the International Criminal Tribunal for Rwanda successfully prosecuting corporate employees for using their companies to commit war crimes and even genocide.[233] Moreover, successive ICC prosecutors have publicly stated their willingness to investigate corporate executives for complicity in international crimes.[234]

### R. *Domestic Accountability Mechanisms Responding to International Crimes*

A legally binding instrument based on ICL norms could also serve the purpose of confirming and clarifying the duties of states to respond to international crimes perpetrated by corporations through existing domestic mechanisms. Many national courts have jurisdiction to prosecute corporate executives and even corporations themselves for violations of ICL.[235] Significantly, some countries have recognized corporate

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*Looking Beyond Individual Responsibility to the Responsibility of Organizations, Corporations and States*, *in* FROM SOVEREIGN IMPUNITY TO INTERNATIONAL ACCOUNTABILITY: THE SEARCH FOR JUSTICE IN A WORLD OF STATES 244-45 (Ramesh Thakur ed., UN University Press, 2004); Kai Ambos, *General Principles of Criminal Law in the Rome Statute* 10 CRIM. L. F. 1, 7 (1999).

229. Brief of Yale Law School Center for Global Legal Challenges, *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, at 5 (2013).

230. INT'L COMM'N OF JURISTS, REPORT OF THE INTERNATIONAL COMMISSION OF JURISTS EXPERT LEGAL PANEL ON CORPORATE COMPLICITY IN INTERNATIONAL CRIMES, Vol II, at 56 (2008).

231. *Id.*

232. Sundell, *supra* note 128, at 676.

233. Prosecutor v. Nahimana, Case No. ICTR-99-52-A, Appeal Judgment (Nov. 28, 2007); Prosecutor v. Musema, Case No. ICTR-96-13-A, Judgement and Sentence (Jan. 27, 2000).

234. Graff, *supra* note 200; Fatou Bensouda, *ICC Prosecutor Warns: Corporate Executives Not Above International Law*, RADIO FRANCE INTERNATIONALE, (last updated 2013), https://soundcloud.com/radiofranceinternationale/icc-prosecutor-warns-corporate.

235. *See, e.g.*, INT'L COMM'N OF JURISTS, Vol. II, *supra* note 230; *see also* Hof 's-Hertogenbosch 21 april 2017, RvdW 2017, 20-001906-10 (Kouwenhoven) (Neth.); *Argor-Heraeus investigation (re Dem.*

accountability for international crimes when incorporating the Rome Statute into their domestic laws.[236] Moreover, as discussed above, domestic laws in many home-state countries offers civil law opportunities to pursue corporate accountability for international crimes.[237] Legal mechanisms such as the Alien Tort Statute in the United States and "regular" tort law in the UK have been used to pursue accountability for corporate human rights abuses amounting to international crimes. In contrast, the legal enforcement of IHRL standards against TNCs (and other corporations) in domestic legal orders is often impaired through an absence of adequate legislation and viable enforcement pathways.[238]

### S. *Overcoming Corporate Resistance to a BHR Treaty*

As the Franck-Keohane-Victor framework indicates, the acceptance and adherence by relevant stakeholder groups will be crucial to a BHR treaty's finalization, sustainability, and ultimately its effectiveness in achieving the objective of curtailing corporate human rights abuses.[239] The reality is that the global business community has successfully scuttled every effort to enshrine binding norms of corporate behavior into international legal instruments thus far, and have shown strong disapproval towards the OEIGWG's work to date. Collectively, they have rejected centralized "command-and-control" style regulation in lieu of industry-supported, often industry-specific, "self-regulation" through soft-law instruments.[240] It is posited that a treaty based on ICL norms presents far greater likelihood of acceptance and approval by corporate stakeholders.

#### 1. Universal Scope of Human Rights Law Cuts Both Ways

Whilst the corporate sector will likely be reticent of any global regulation, it is arguably the all-pervasive scope of IHRL that may have deterred them in the past from supporting greater regulation in the human rights domain. Human rights law, leaving to one side its checkered application and acceptance by states, seeks to regulate a vast array of conduct, carried out all across the globe. For a corporation,

*Rep. of Congo)*, BUSINESS AND HUMAN RIGHTS RESOURCE CENTRE, https://business-humanrights.org/en/argor-heraeus-investigation-re-dem-rep-of-congo.

236. Kyriakakis, *supra* note 214, at 810.

237. Kolieb, *supra* note 224.

238. Bismuth, *supra* note 190, at 219.

239. Franck, *supra* note 9; Keohane & Victor, *supra* note 9.

240. MATHIAS KOENIG-ARCHIBUGI, TRANSNATIONAL CORPORATIONS AND PUBLIC ACCOUNTABILITY 246-9 (2004).

regulation of a human rights legal character would apply to all their operations, everywhere and anywhere they operate. Respecting, protecting, and securing the human rights of people affected by a corporation's operations would doubtless result in significant compliance costs for many corporations—both small, local companies and TNCs. Furthermore, fulfilling these human rights obligations would need to be reconciled with a company's explicit obligations to its shareholders, including an obligation to maximize profits.

This may well be an admirable objective, but for the purposes of advancing the BHR agenda it is, at least for the foreseeable future, likely to encounter stiff resistance from the global business community. Indeed, the International Chamber of Commerce has expressed "deep concern" over the current treaty process,[241] and in a 2015 position paper prominent global business groups stated that any BHR treaty should "not create new legal liabilities for companies for social standards" and place no "direct [human rights] obligations on companies."[242] Similarly, a 2017 position paper issued in response to the OEIGWG's release of draft treaty elements indicated that business groups perceive treaty efforts thus far as a "big step backwards."[243]

This resistance to treaty efforts may imperil the eventual coming into force and effectiveness of any such BHR treaty, in particular ratification by developed countries—the home-states of many of the largest TNCs. Indeed, efforts to implement a broadly-drafted BHR treaty—such as the "revised draft" instrument—may unnecessarily complicate and interfere with attempts to effectively end corporate contributions to egregious human rights violations, such as those resulting in widespread violence and environmental harm.

A more modest and qualified paradigm and body of law, such as ICL—one that targets only the most egregious human rights abuses—has a greater chance of being accepted and perceived as fair by

241. *See* Press Release, International Chamber of Commerce *supra* note 16.

242. INTERNATIONAL ORGANIZATION OF EMPLOYERS, BUSINESS AND INDUSTRY ADVISORY COMMITTEE TO THE OECD, INTERNATIONAL CHAMBER OF COMMERCE, WORLD BUSINESS COUNCIL FOR SUSTAINABLE DEVELOPMENT, U.N. TREATY PROCESS ON BUSINESS AND HUMAN RIGHTS: INITIAL OBSERVATIONS BY THE INTERNATIONAL BUSINESS COMMUNITY ON A WAY FORWARD 3 (Position Paper, June 29, 2015).

243. BUSINESS AND INDUSTRY ADVISORY COMMITTEE TO THE OECD, INTERNATIONAL ORGANIZATION OF EMPLOYERS, INTERNATIONAL CHAMBER OF COMMERCE, FOREIGN TRADE ASSOCIATION, UN TREATY PROCESS ON BUSINESS AND HUMAN RIGHTS: RESPONSE OF THE INTERNATIONAL BUSINESS COMMUNITY TO THE "ELEMENTS" FOR A DRAFT LEGALLY BINDING INSTRUMENT ON TRANSNATIONAL CORPORATIONS AND OTHER BUSINESS ENTERPRISES WITH RESPECT TO HUMAN RIGHTS 1 (Position Paper, Oct. 20, 2017).

governments and the private sector, which is recognized as a crucial element of regime effectiveness.[244] Ultimately, it will be these actors that bear the burden of implementing the treaty's provisions. In this way, a more confined BHR treaty could be more sustainable and capable of attracting the requisite legitimacy and acceptance sought.

A narrowly-defined set of ICL-based corporate human rights standards may well be more effective in achieving the BHR goals of enhancing corporate adherence to human rights, and encouraging businesses to embrace their social and environmental responsibilities writ large.

### 2. A Plea for Incrementalism: Reflecting on the Fate of the U.N. Norms

The fate of the draft U.N. Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with Regard to Human Rights (U.N. Norms) must serve as a cautionary tale.[245] Attempting to mandate excessively high standards of conduct for corporations may be counter-productive, and avoiding this type of treaty that prompted a fair amount of the business community's animus towards the U.N. Norms.[246] If such an initiative fails to garner sufficient government and business support from around the world, much as the U.N. Norms failed to do, despite decades of advocacy, it risks setting back attempts to regulate the corporate sector's impacts on human rights.[247]

In contrast, the diplomatic success of the Ruggie-led U.N. Guiding Principles in garnering near-universal support for its more inclusive gradualism to the issue of business' human rights obligations suggests that sometimes incrementalism and inclusivity may very well be the more prudent and effective options.[248] In fulfilling his mandate,

244. Keohane & Victor, *supra* note 9.

245. U.N. Hum. Rts. Comm'n, Sub-Comm'n on the Promotion and Protection of Hum. Rts., Norms on the Responsibilities 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); *see also* Khalil Hamdani & Lorraine Ruffing, *Lessons from the UN Centre on Transnational Corporations for the Current Treaty Initiative, in* BUILDING A TREATY ON BUSINESS AND HUMAN RIGHTS: CONTEXTS AND CONTOURS 27 (Surya Deva & David Bilchitz eds., 2017).

246. Int'l Chamber of Commerce & Int'l Org. of Empl'rs, *Joint views of the IOE and ICC on the draft "Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights,"* (Mar. 2004), http://www.reports-and-materials.org/IOE-ICC-views-UN-norms-March-2004.doc.

247. U.N. Sub-Comm'n on Promotion and Protection of Hum. Rts. Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (draft), U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (Aug.13, 2003).

248. Karin Buhmann, *Business and Human Rights: Understanding the UN Guiding Principles from the Perspective of Transnational Business Governance Institutions*, 6 TRANSNAT'L LEGAL THEORY 399, 399 (2015).

Ruggie consciously "steered clear of employing concepts cognate to international human rights law."[249]

Indeed, the product of Ruggie's mandate is a strong indication that many governments, and certainly the global business community, reject any direct applicability of treaty or customary international human rights law to corporations and have a "distinct preference for limiting the debate to voluntary standards and self-regulation."[250] There simply does not exist the requisite political appetite for a wide-ranging, binding corporate human rights legal standards akin to the U.N. Norms. On the contrary, as the submissions to the Guiding Principles drafting process indicate, there is a "marked reluctance" amongst states to affirm *any* binding corporate human rights obligations under international law.[251]

The resistance and rancor that greeted the introduction of the U.N. Human Rights Council resolution in 2014 initiating the latest treaty-drafting process is further evidence that there remains considerable reluctance on the part of the international community (both governments and business) to formally recognize binding human rights obligations of businesses in international law.[252] While the Ecuadorian and South African-sponsored resolution garnered significant support from developing countries, it failed to attract any substantial support from OECD countries.[253] Leading business interests strongly opposed such a move, suggesting that it placed too great a financial burden on companies, misapprehended the purpose of the corporation, and unfairly saddled private companies with what should appropriately be considered state obligations.[254] In the face of resistance from developed countries—from which most powerful TNCs originate—it is hard to be

249. KARAVIAS, *supra* note 1, at 83; *see also* RUGGIE, *supra* note 36.

250. INTERNATIONAL COUNCIL ON HUMAN RIGHTS POLICY, *supra* note 27, at 2.

251. KARAVIAS, *supra* note 1, at 83.

252. Statement on behalf of a Group of Countries at the 24rd session of the Human Rights Council (Sept. 2013), https://business-humanrights.org/en/pdf-statement-on-behalf-of-a-group-of-countries-at-the-24rd-session-of-the-human-rights-council.

253. HUM. RTS. COUNCIL RES., *supra* note 2 (20 votes for: Algeria, Benin, Burkina Faso, China, Congo, Côte d"Ivoire, Cuba, Ethiopia, India, Indonesia, Kazakhstan, Kenya, Morocco, Namibia, Pakistan, Philippines, Russia, South Africa, Venezuela, Vietnam; 13 votes against: Austria, Czech Republic, Estonia, France, Germany, Ireland, Italy, Japan, Montenegro, South Korea, Romania, the Former Yugoslavia, UK, USA; 13 abstentions: Argentina, Botswana, Brazil, Chile, Costa Rica, Gabon, Kuwait, Maldives, Mexico, Peru, Saudi Arabia, Sierra Leone, UAE).

254. Bus. & Indus. Advisory Comm. to the OECD, *BIAC Comments: Ecuador Proposal for a New Business and Human Rights Treaty* (June 19, 2014), http://biac.org/wp-content/uploads/2014/12/FIN-14-06-COM-proposed-treaty-on-business-and-human-rights2.pdf; John Ruggie, *A UN Business and Human Rights Treaty?*, HARV. KENNEDY SCH. OF GOV'T (2014).

optimistic about the chances of success for this initiative, despite its continuing efforts. On the contrary, the day after this resolution was adopted, the Human Rights Council adopted a rival resolution drafted by Norway calling for the U.N. to embrace a more incremental approach to increasing corporate respect for human rights, one that is focused on implementing the soft-law Guiding Principles.[255] This proposal attracted support from OECD countries, which indicates that there is little appetite among the major TNC "home-countries" for a reprise of the draft U.N. Norms. [256] Efforts to foist human rights obligations or other legal obligations perceived as overly burdensome on a non-cooperative global business community seem unlikely to succeed anytime soon.

The power of corporations, and the weakening of state-based global governance institutions, has only increased in the intervening years since the draft U.N. Norms were shelved. Leaders of powerful countries openly question the utility of global governance regimes such as the U. N. and its human rights system. The recent wave of populism in the United States, Europe, and elsewhere suggests that this may be an inopportune historical moment to attempt such a heavy lift as securing broad human rights obligations for corporations.

Pursuing ambitious goals is admirable but extending the scope of any BHR treaty too far may well be counterproductive and ultimately self-defeating. The inevitable battle with the business community resulting from any attempt to extend a broad range of universally-applicable human rights obligations could be overcome by choosing to base corporate human rights obligations on ICL. On the other hand, as has been clearly displayed in the response to the drafting of a legally-binding BHR instrument, a treaty which includes sweeping corporate human rights duties will likely lack the necessary corporate and political support to be concluded, let alone implemented and adhered to.

## V. Conceptualizing the Place of IHRL Within BHR Governance Regime

The preceding analysis suggests that ICL is the most relevant and legitimate body of international law from which to derive a set of minimum standards to be enshrined in the first binding BHR treaty. The choice of ICL also offers the best likelihood of successfully concluding and implementation of any such treaty. However, this is *not* to dismiss

255. Human Rights Council Res. 26/22, U.N. Doc. A/HRC/RES/26/22 (June 27, 2014).

256. Nine OECD countries listed as the co-sponsors of the Norwegian-drafted Human Rights resolution. *See* Human Rights Council Res. 26/L.1, UN Doc. A/HRC/26/L.1 (June 23, 2014).

the value of IHRL in the governance of corporate human rights obligations. On the contrary, IHRL has a vital and significant role in the still-evolving complex BHR governance regime that aims to improve corporations' respect and protection of human rights across the globe.

Ever since the "naming and shaming" public campaigns of the 1990s against corporate giants such as Royal Dutch Shell (for its conduct in Nigeria) and Nike (for its sweatshop Asian workforce), global businesses are now routinely expected to secure and respect human rights.[257] Moreover, the bulk of regulatory activity surrounding corporate engagement with the communities in which they operate, including in weak-governance areas, has been within a human rights paradigm.[258] Many leading global corporations embrace the lexicon of human rights to benchmark their social responsibility, especially in developing country contexts.[259] Soft law multi-stakeholder governance initiatives, such as the U.N. Global Compact that employ the law and language of human rights are popular amongst states and industry. For instance, according to one study, 220 of the Fortune 500 largest corporations in the world are members of the U.N. Global Compact.[260]

Nevertheless, given its ambitious goals, aspirational wording, and incredible breadth of rights, the corpus of IHRL is better conceptualized as contributing to the aspirational regulation of corporations vis-à-vis their respect for human rights, rather than forming legally binding standards for which non-compliance risks legal liability.[261] Existing state-based initiatives that seek to improve corporate human rights conduct—such as the OECD Guidelines and the U.N. Guiding Principles—embrace this role for human rights law. As the names suggests, these instruments are not prescriptive in nature, nor do they coerce or compel compliance.

257. Deitelhoff and Wolf, *supra* note 33, at 222-23.

258. *See, e.g.*, VOLUNTARY PRINCIPLES ON SECURITY AND HUM. RTS., *supra* note 31; *see also* U.N. GLOBAL COMPACT, *supra* note 31; Ruggie, *supra* note 15, at 224.

259. *See, e.g.*, SINOPEC CORP., *2017 Communication on Progress for Sustainable Development* (2017), https://s3-us-west-2.amazonaws.com/ungc-production/attachments/cop_2018/462479/original/COP2017-SINOPEC.pdf?1523344464; COCA-COLA CO., *2017 Sustainability Report* (2017), https://www.coca-colacompany.com/2017-sustainability-report; SIEMENS, *Sustainability Information 2018*, (2018), https://www.siemens.com/investor/pool/en/investor_relations/siemens_sustainability_information2018.pdf; BHP BILLITON, *2013 Sustainability Report* (2013), https://www.bhp.com/-/media/documents/community/2013/bhpbillitonsustainabilityreport2013_interactive.pdf?la=en; RIO TINTO, *Sustainable Development Report, Rio Tinto 2015* (2015), http://www.riotinto.com/our-commitment-107.aspx.

260. Michel Coulmont et al., *The Global Compact and its Concrete Effects*, 8 J. GLOBAL RESP. 300, 303 (2017). For full list of signatories, *see* U.N. Global Compact, *supra* note 31.

261. Jonathan Kolieb, *When to Punish, When to Persuade and When to Reward: Strengthening Responsive Regulation with the Regulatory Diamond*, 41 MONASH U. L. REV. 136, 145 (2015).

Neither do they possess punitive accountability measures for non-compliance. Rather, they exert regulatory force through education and persuasion and adopt an unashamedly collaborative and voluntary approach. Multi-stakeholder governance initiatives, such as the U.N. Global Compact, Voluntary Principles for Security and Human Rights and Extractive Industries Transparency Initiative do similarly.[262]

Indeed, "the idea of human rights encompasses much more than law" and does more than *merely* enforce minimum standards of behavior.[263] These human rights instruments reflect this understanding and remain critical in encouraging corporations to go beyond mere compliance with legal standards and endeavor to continuously improve their conduct in the realm of human rights. These instruments have garnered considerable political and corporate acceptance—in no small measure due to their soft-law, non-legal nature. They—and IHRL—should be considered vital elements in a global "polycentric governance" regime that aims to strengthen corporate respect for and protection of the human rights of their customers, employees, and the people and communities impacted by their operations.[264] Their role is a significant one. As John Braithwaite and other regulatory scholars have observed, the ultimate purpose of regulation is to encourage corporations to go beyond compliance with minimum legal standards of conduct and "to catalyze continuous improvement."[265]

Moreover, there is tremendous scope for developing new and innovative measures that encourage and even incentivize greater corporate respect for the breadth of IHRL and the ideals it represents. As Anita Ramasastry, American legal academic and member of the U.N. Working Group on Business and Human Rights, notes, in this sense, the BHR discourse could borrow from the corporate social responsibility discourse to re-focus not only on the *legal* accountabilities of corporations but on conceptualizing what "role companies might play in a larger protection and fulfillment of human rights."[266]

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262. List of activities and publications within each initiative can be found on their respective web platforms: www.globalcompact.org; www.voluntaryprinciples.org; www.eiti.org.

263. INT'L COUNCIL ON HUM. RTS. POL'Y, *supra* note 27, at 2.

264. Elinor Ostrom, *Beyond Markets and States: Polycentric Governance of Complex Economic Systems* 100 AM. ECON. REV. 641 (2010); Ruggie, *supra* note 254, at 2.

265. JOHN BRAITHWAITE ET AL., REGULATING AGED CARE: RITUALISM AND THE NEW PYRAMID 322 (Edward Elgar ed. 2007); Kolieb, *supra* note 261, 159.

266. Anita Ramasastry, *Corporate Social Responsibility Versus Business and Human Rights: Bridging the Gap Between Responsibility and Accountability*, 14 J. HUM. RTS. 237, 238 (2015).

### A. *Start Here and Seek Continuous Improvement*

Suggesting that the BHR treaty's legally binding corporate human rights obligations should be derived from ICL rather than IHRL raises the question of whether this is setting the regulatory bar too low. After all, ICL norms will not stretch to encompass and effectively respond to the social harms caused by corporations' general "business as usual" conduct. Various commentators have expressed concerns that a treaty based on ICL norms would be so narrowly focused that it would fail to "capture how people are suffering in diverse ways . . . from human rights abuses linked to corporate activities."[267] Unfair labor and welfare conditions, intentional breaches of building safety or environmental laws, even those resulting in deaths, may not amount to international criminal conduct. Surely, the international community should expect more of corporations than merely refraining from committing war crimes or crimes against humanity. For example, some scholars advocate for international law to oblige corporations to protect all human rights within their "spheres of influence."[268] Moreover, it is worthwhile to note that this is a criticism leveled against the U.N. Guiding Principles as well. Christine Parker and John Howe, two notable governance scholars, write in their critique of the U.N. Guiding Principles that Ruggie "distances [himself] from the distributive justice concerns of activists and local communities that motivated the crisis that prompted the Ruggie process" in the first place.[269]

There is unquestionably merit to the assertion that expectations for corporate respect for human rights should be higher. But that is not the same as to suggest that applicable *minimum legal* standards for the *first* BHR treaty should be. The aspirational hopes for the regulation of corporations must be checked with a dose of reality and a clear-eyed feasibility assessment of the options to advance the BHR agenda. It is hoped that this Article's analysis serves not to temper the enthusiasm of those advancing the BHR agenda, but rather to ensure that their energies and resources are appropriately directed to achieve the objective of enhancing corporations' respect for, and protection of human rights.

Corporate impunity for international criminal acts is not a historical aberration, but rather an enduring, contemporary concern. Encouraging wide-ranging human rights-based social responsibility programs with lofty objectives are worthwhile regulatory endeavors, but cannot continue in

267. Deva, *supra* note 8, at 155; *see also* Bilchitz, *supra* note 18, at 226.

268. Kinley & Tadaki, *supra* note 165, at 961-64.

269. Parker & Howe, *supra* note 113, at 283.

the absence of efforts to first end impunity for the most egregious and shocking corporate human rights violations.

Besides, the minimum standards designated today as legally binding are not frozen in perpetuity. Nor does the first BHR treaty need to be the last. An effective BHR regulatory regime should be multifaceted, adaptable, and responsive.[270] It should also possess the flexibility to raise the applicable legally binding human rights standards for corporate conduct in the future, incrementally strengthening the expectations of corporations to uphold human rights and expanding their social and environmental responsibilities.

## VI. Conclusion

Efforts over the past decade and a half, led by the diplomatic work at the U.N. and successive campaigns by civil society organizations and corporate watchdog groups, have revived interest in businesses' human rights responsibilities and how to better embed them in global governance regimes. In 2014, this work culminated in the commencement of a drafting process for the first international BHR treaty. Led by the OEIGWG, a "zero-draft" of such a treaty was presented to the U.N. Human Rights Council in July 2018, and a "revised draft" in July 2019, with consultations currently underway to further refine the text. The scope of this draft instrument is as broad as it possibly could be; signatories would be legally obliged to regulate corporate conduct with reference to "all human rights." This is a flawed approach to the scope of the first BHR treaty, one that may prove fatal to its chances for adoption let alone implementation. For anyone concerned with achieving the improved humanitarian outcomes that the BHR project has set itself, this should give pause.

As has been laid out in the preceding analysis based on a framework derived from the work of Franck, Keohane, and Victor, a broad set of minimum standards derived from IHRL is ill-suited to be the source of minimum standards of corporate conduct to be enshrined in the first BHR treaty, especially when contrasted to ICL. Employing ICL for the purpose of defining the scope of the first BHR treaty would reflect more of the qualities and features that Franck, Keohane and Victor consider determinative of the legitimacy and effectiveness of an international legal regime. This challenges advocates of a BHR treaty to consider whether their limited resources and the goodwill engendered

270. *See, e.g.*, Explaining Compliance: Business Responses To Regulation (Christine Parker & Vibeke Lehmann Nielsen eds., 2011); John Braithwaite, *Fasken Lecture: The Essence of Responsive Regulation* 44 Univ. B.C. L. Rev. 475 (2011); John Braithwaite, Regulatory Capitalism: How It Works, Ideas For Making It Work Better (2008); Kolieb, *supra* note 261.

amongst the corporate and government sectors by the consensus-based development of the U.N. Guiding Principles are best directed toward pursuing a more narrowly conceived ICL-based treaty, rather than a broad treaty based on IHRL norms.

This Article has shown that ICL is a more legitimate source from which to derive legally binding corporate human rights standards to enshrine in the first BHR treaty. An instrument based on norms of ICL will have the greatest likelihood of effective uptake and implementation by the global business community and governments. Reasons for this conclusion range from the conceptual—the identification of international crimes as being the best reflection of the international community's collective "red-line" minimum standards of human rights-related conduct, to the practical—with the Rome Statute, ICL possesses a singular, positive law text to which all stakeholders can refer and it provides robust, pre-existing accountability mechanisms, at both the domestic and international levels. Choosing to base legally binding corporate human rights standards on ICL would also go some way to circumvent the conceptual difficulties in holding corporations liable under international law. Crucially, it would also help overcome the corporate and political resistance that a treaty based on wide-ranging IHRL obligations may face, avoiding a scenario of "dead-letter" treaty being concluded. In these ways, ICL has clear advantages over IHRL for the purposes of serving as the source of norms in a future BHR treaty.

The long and winding journey towards a BHR treaty and binding corporate human rights obligations reflects the larger global governance questions of the "proper" role and obligations of corporations within the international legal order. Regardless of which body of law—IHRL or ICL—ultimately becomes the basis for a BHR treaty's standards of conduct, embedding corporations more firmly into global governance regimes is a larger imperative, and vital to the maintenance of integrity and fairness in the international system.[271] Throughout modern history, challenges to the global order have often been met with a willingness to extend the reach of international law as a matter of necessity and regime-effectiveness, for just as the "*The Hostage Case" (US v. List)* judgment at Nuremberg asserted in 1948, international law "must be elastic enough to meet the new conditions that natural progress brings to the world."[272] Such innovative legal developments may again be required with regard to business' human rights obligations.

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271. Keohane, *supra* note 216; Ruggie, *supra* note 216.

272. UNITED NATIONS WAR CRIMES COMMISSION, LAW REPORTS OF TRIALS OF WAR CRIMINALS 54 (1947-1949).