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Business & Human Rights: Optimism and Concern from the U.S. Perspective

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BUSINESS & HUMAN RIGHTS: OPTIMISM AND CONCERN FROM THE U.S.
PERSPECTIVE
Christiana Ochoa

ABSTRACT

Forty-five years passed between the release of the first major United Nations report referencing the need to regulate transnational corporations and the release of the Zero Draft. Those years were accompanied by vibrant scholarly work and debate, as well as a significant jurisprudence, corporate engagement, and civil society discourse and activism that, cumulatively, has resulted in a much better understanding of how the once very distinct ideas of “business” and “human rights” are now merged by an ampersand. The field of business & human rights signifies the introduction of polycentric governance and law that binds businesses, sometimes softly and sometimes concretely, to take cognizance of international human rights. The work of the intrepid scholars, judges, activists and individuals who have charted the course through the vexing problems impeding the course from the 1970s and 80s to the current day is largely recognized as completed, and this moment has been aptly called “the end of the beginning” in the field of business and human rights.

It is in this context that this Essay will discuss both the casualties and laments of the past forty-five years, as well as the grounding for optimism at this moment. This Essay was prepared as a contribution to a conference on Corporate Accountability for Human Rights Abuses and the Law held in Seoul, South Korea, in November 2018. Because I was invited to focus my reflections on the role of, and perspectives from, the United States, this Essay will rarely drift afield of these boundaries, though readers should not lose sight of the intrinsically global and transnational nature of all issues evoked by discussions on business and human rights.

BUSINESS & HUMAN RIGHTS: OPTIMISM AND CONCERN FROM THE U.S.
PERSPECTIVE
Christiana Ochoa⁺

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I. INTRODUCTION

In 1973, the United Nations released its first major report on multinational corporations.¹ This report referenced, for the first time, the need to regulate transnational corporations. Nearly 10 years later, the Economic and Social Council of the United Nations requested that an Intergovernmental Working Group on a Code of Conduct on Transnational Corporations convene with the purpose of drafting such a code.² The Code of Conduct was never adopted and remains abandoned as a draft in the archival history of Business & Human Rights. In 2004, it was joined there by the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights,³ when the Norms failed to garner the state support necessary to progress further down the path from soft norms to harder law. Finally, in 2005, the Sub-Commission of the then UN Secretary-General Kofi Annan (and later, Ban Ki-moon), appointed John Ruggie to the post of Special Representative of the Secretary General on human rights and transnational corporations and other business enterprises. His appointment ultimately resulted in the June 2011 endorsement of the Guiding Principles on Business and Human Rights by the UN Human Rights Council and the creation of a working group on business and human rights that same year. In 2014, another Intergovernmental Working Group was charged by the Human Rights Council with elaborating a draft treaty on business and human rights.⁴ In the four years since, a vibrant debate has ensued on the value of the Guiding Principles, their successes and failings, and the necessity and contents of a binding treaty. On July 16 of this year (2018), the Intergovernmental Working Group on the articulation of a business and human rights treaty (IGWG) produced the so-called Zero Draft of a Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises (the “Zero Draft”).⁵

The forty-five years from the release of the first report on the subject to the release of the Zero Draft have, of course, been accompanied by vibrant scholarly work and debate, as well as a significant jurisprudence, corporate engagement, and civil society discourse and activism that, cumulatively, has resulted in a much better understanding

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¹ See U.N. Dept. Econ. & Soc. Aff., MULTINATIONAL CORPORATIONS IN WORLD DEVELOPMENT (1973). For a full account of the negotiations surrounding the U.N. Code of Conduct, see Karl Sauvant, *The Negotiations of the United Nations Code of Conduct on Transnational Corporations*, 16 J. WORLD INV. & TRADE 11 (2015).

² See *Draft United Nations Code of Conduct on Transnational Corporations*, 23 Int'l Legal Materials 626 (1984).

³ See Sub-Comm'n Res. 2003/16, U.N. Doc. E/CN.4/Sub.2/2003/L.11 at 52 (Aug. 13, 2013).

⁴ See Human Rights Council Res. 26/9, U.N. Doc. A/HRC/RES/26/9 (July 14, 2014).

⁵ See U.N., Human Rights Council, Intergov'tal Working Group on Transnat'l Corp. & Other Bus. Enterprises with Respect to Hum. Rts., Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises, Zero Draft (July 16, 2018).

of how the once very distinct ideas of “business” and “human rights” are now merged by an ampersand that signifies the introduction of polycentric governance and law, binding businesses, sometimes softly and sometimes concretely, to take cognizance of international human rights. The work of the intrepid scholars, judges, activists and individuals who have charted the course through the vexing problems impeding the course from the 1970s and 80s to the current day is largely recognized as completed, and this moment has been aptly called “the end of the beginning” in the field of business and human rights.⁶

It is in this context that this Essay will discuss both the casualties and laments of the past forty-five years, as well as the grounding for optimism at this moment. This Essay was prepared as a contribution to a conference on Corporate Accountability for Human Rights Abuses and the Law held in Seoul, South Korea, in November 2018. Because I was invited to focus my reflections on the role of, and perspectives from, the United States, this Essay will rarely drift afield of these boundaries, though readers should not lose sight of the intrinsically global and transnational nature of all issues evoked by discussions on business and human rights. In addition, the multiple approaches to governance that have germinated in this field require that the Essay provide only a cursory overview of the current state of play, rather than a thorough exposition and theorization, of these innovations. This Essay will proceed by way of an exposition of the most important governance tools currently under discussion in the United States aimed at the prevention of and responsibility for human rights harms by business enterprises. It will conclude by reflecting on the plurality of governance tools that have arisen to address this complex and global area of scholarly and practical interest.

During the early years of the United Nations’ exploration into the conduct of transnational business activity, a transnational business engaged in a large-scale tort in far-off places operated under fairly generalized legal impunity. This reality was made possible by the combination of the ‘corporate veil’, together with a historically strict application of extraterritoriality principles (prohibiting the laws and courts of one state to reach into conduct occurring in another), and an absence of international human rights law directly governing businesses. This environment of impunity resulted in an assessment by business actors that the risk of participating in conversations about conduct that violated modern notions of human and environmental rights was much higher than the potential risks of abstaining from or denouncing these discussions. Even as the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights was drafted, the International Chamber of Commerce stood in clear opposition to the effort. Indeed, the United

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⁶ See generally, BUSINESS AND HUMAN RIGHTS: BEYOND THE END OF THE BEGINNING (Cesar A. Rodriguez Garavito ed. 2017).

States' and ICC's opposition was among the reasons the Norms failed to gain the support of a sufficient number of states, and failed to be adopted.

II. ACCOUNTABILITY THROUGH LITIGATION

The absence of an international treaty was resonant with the absence of concrete legal mechanisms for holding business actors accountable for violations of human rights. Only in extraordinary circumstances were the home state courts of parent companies willing to find that the acts of company subsidiaries, located in a different state, could be scrutinized. The obstacles to such determinations – extraterritoriality principles, doctrines maintaining the separate legal personality of the parents and subsidiaries of corporations, and *forum non conveniens* – were significant.

A. United States Federal Courts

Starting in 1996, however, the Alien Tort Statute became the focal point for the effort to use litigation to impose responsibilities for human rights harms on business actors into a set of concrete legal claims, rather than merely a set of efforts to make hortatory declarations through international institutions. In December 2004, just months before the UN Special Representative of the Secretary General on human rights and transnational corporations and other business enterprises (SRSG) was appointed, the parties to *Doe v. Unocal* agreed to settle their case. The undisclosed settlement amount was sufficient to “compensate plaintiffs and provide funds enabling plaintiffs and their representatives to develop programs to improve living conditions, health care and education and protect the rights of people from the pipeline region...[and to] provide substantial assistance to people who may have suffered hardships in the region.”⁷ This settlement was reached at a time when foreign defendants viewed the ATS with optimism and were using the statute to bring a record number of claims against the foreign subsidiaries of U.S. corporations.⁸ In retrospect, it represented the high water mark for ATS litigation.

As of April 2013, when the Supreme Court issued its decision in *Kiobel v. Royal Dutch Petroleum Co.*,⁹ not a single ATS claim had yielded a decision on the merits in favor of the plaintiffs against a U.S. or foreign corporate defendant. Still today, after decades of efforts by foreign plaintiffs, these cases have garnered little to no success in the doctrinal jurisprudence of U.S. federal courts. The legal mechanisms of the corporate veil,¹⁰ historical presumptions against extraterritorial application of U.S. law, and the

⁷ See Press Release, Earth Rights Int'l, Final Settlement Reached in Doe v. Unocal (Mar. 21, 2005) (on file with organization).

⁸ See Beth Stephens, *The Curious History of the Alien Tort Statute*, 89 NOTRE DAME L. REV. 1467, 1518.

⁹ *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013).

¹⁰ See, *Daimler AG v. Bauman*, 571 U.S. 117 (2014) in which the Court suggested that U.S. courts may have personal jurisdiction only over corporations incorporated or having their principle place of business in the U.S.

doctrine of *forum non conveniens*¹¹ have held strong, such that the plaintiffs in the corporate ATS cases continue to find no viable mechanism for redress in U.S. federal courts. Indeed, there were four outstanding questions after *Kiobel*: questions related to the court's general and personal jurisdiction over defendants, questions relating to the issue of "touch and concern" (i.e., how much conduct and of what character is required for a U.S. corporation to be subject to the jurisdiction of U.S. federal courts), questions about whether aiding and abetting was sufficient involvement for liability under the ATS, and questions about whether the ATS applied to corporations (or only to individuals).¹²

There continue to be cases in U.S. federal courts alleging human rights harms by corporate actors. In *Jesner v. Arab Bank, PLC.*, the Supreme Court decided this final question in April 2018 and insulated foreign corporations (and, depending on one's reading of the opinion, perhaps insulated U.S. corporations as well) from liability under the ATS.¹³ In the time since the original corporate ATS cases in 1996, there have been no final holdings in favor of plaintiffs in cases alleging human rights harms committed by corporate actors and in the months since the *Jesner* decision, academic discussion of the ATS bears the qualities of a funerary obituary. The funeral may be premature, however. In October 2018, a three-judge panel of the United States Ninth Circuit Court of Appeals ruled that a suit brought on behalf of former child slaves can proceed against Nestle and Cargill under the Alien Tort Statute for using former child slaves in cocoa harvesting. The ruling allows for the possibility that a U.S. corporation may be held liable under the ATS for aiding and abetting, and that the acts of Nestle and Cargill in the United States may amount to aiding and abetting of child slavery in Ivory Coast.¹⁴ The panel remanded the case "to allow plaintiffs to amend their complaint [in light of *Jesner v. Arab Bank*] to specify whether aiding and abetting conduct that took place in the United States is attributable to the domestic corporations in this case."¹⁵ The case may determine whether the ATS still has any life at all.

Since the *Kiobel* decision, and again since *Jesner*, a number of authors in the United States have also asked where the claims making up corporate ATS litigation might land, if not in U.S. federal courts. They have looked downward, upward, and sideways and found potential venues in each of those locations.

¹¹ See, e.g., *Acuña-Atalaya v. Newmont Mining Corp.*, 308 F.Supp.3d 812 (D. Del. 2018) (mem.), in which the Delaware district court judge dismissed a case in which Peruvian farmers were seeking relief from alleged evictions by Newmont Mining in the Yanacocha region of Peru. The dismissal was based on *forum non conveniens*.

¹² See William S. Dodge, *Business and Human Rights Litigation in U.S. Courts Before and After Kiobel*, in BUSINESS AND HUMAN RIGHTS: FROM PRINCIPLES TO PRACTICE 244 (Dorothee Baumann-Pauly & Justine Nolan eds., 2016).

¹³ *Jesner v. Arab Bank, PLC.*, 138 S. Ct. 1386 (2018). See also *Nowheresville (ft. Nina Totenberg)*, FIRST MONDAYS (Oct. 16, 2017), <http://www.scotusblog.com/2017/10/ot2017-3-nowheresville-ft-nina-totenberg/> (discussing, at some length, the oral arguments before the Supreme Court).

¹⁴ *Doe v. Nestle*, 906 F.3d 1120 (9th Cir. 2018).

¹⁵ *Id.*

B. State Courts

Soon after *Kiobel*, Professors Stevens and Hoffman contributed an excellent synopsis of the potential for state courts in the U.S. to hear claims by ATS-type plaintiffs.¹⁶ In the years since, others have made important contributions to this discussion.¹⁷ Two primary observations drive the view that state courts in the U.S. can serve as appropriate venues for these cases.

First, “courts, commentators, and litigators have long recognized that the ATS affords federal jurisdiction over common law claims that also fall within the jurisdiction of state courts.”¹⁸ Second, every human rights violation can also be characterized as a tort or set of torts. “Torture is assault and battery. Terrorism is wrongful death. Slavery is false imprisonment.”¹⁹ Importantly, state courts have jurisdiction over “transitory torts” (claims arising outside of their territory), if the court has jurisdiction over the defendant. State courts enjoy grants of general jurisdiction such that, as long as they have jurisdiction over the particular defendant, state courts will have jurisdiction over certain human rights claims for actions committed in a foreign location.²⁰

Authors writing in the area argue persuasively that the Supreme Court’s restrictive decisions in the ATS cases will push these cases into other courts and believe that U.S. state courts are not foreclosed, and indeed have long been open, to human rights claims that can be characterized as transitory torts. The states’ independent interests in redressing tortious wrongs, these authors contend, have and do extend to human rights violations. In the event that states are hearing claims characterized as violations of international law, there remains a possibility that states’ interests in providing remedies for these harms are outweighed by foreign relations concerns.²¹ Importantly, cases before state courts would not impose limitations on liability for corporate actors, nor for claims based on aiding and abetting, as both are firmly established in the tort doctrines of every state in the United States.²²

Roger Alford has made a similar observation, and argues that both state and federal courts could continue to hear human rights claims framed as torts: in cases in which

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¹⁶ See Paul Hoffman & Beth Stephens, *International Human Rights Cases under State Law and in State Courts*, 3 U.C. IRVINE L. REV. 9 (2013).

¹⁷ See Gwynne Skinner, *Beyond Kiobel: Providing Access to Judicial Remedies for Violations of International Human Rights Norms by Transnational Business in a New (Post-Kiobel) World*, 46 COLUM. HUM. RTS. L. REV. 158 (2014). See also Seth Davis & Christopher A. Whytock, *State Remedies for Human Rights*, 98 B.U. L. REV. 397 (2018).

¹⁸ See Hoffman & Stephens, *supra* note 16, at 10.

¹⁹ See Roger Paul Alford, *Human Rights after Kiobel: Choice of Law and the Rise of Transnational Tort Litigation*, 63 EMORY L.J. 1089, 1091 (2014).

²⁰ See *id.* at 11. Davis & Whytock, *supra* note 17, at 430.

²¹ See Davis & Whytock, *supra* note 17, at 430.

²² See Hoffman & Stephens, *supra* note 16, at 18. *Id.* at 10.

the United States has a strong interest in addressing the violation, domestic tort law will apply, while in other cases, foreign tort law would apply.²³

Not all scholars, and not all state courts, agree that this turn to state courts is a good idea. Austen Parrish, for example, has argued persuasively that state law is not appropriate for addressing human rights claims.²⁴ Similarly, state courts will certainly take a variety of views on this issue, and not all of them will be welcoming to such claims.²⁵

C. International Tribunals

Another potential avenue for redress for plaintiffs of at least a small set of human rights harms may be the International Criminal Court. However, as readers will be aware, the ICC's own rules will restrict jurisdiction over all but the most egregious claims, such as mass atrocities.²⁶ The great majority of claims originally brought under the corporate ATS litigation would fall outside of the ICC's purview.

D. Horizontal Solutions

Plaintiffs looking for legal accountability and redress have experimented with cases in legal systems outside of the United States, with mixed success.²⁷ In a small number of cases in Canada and the European Union, plaintiffs have overcome the barriers of *forum non conveniens* and corporate form. The Supreme Court of Canada, for example, has cleared the way for a case against Tahoe Resources Inc. to be heard in Canadian courts, despite defendant's arguments that Guatemalan courts were the more appropriate forum for the case.²⁸ Similarly, in December 2015, a Dutch appeals court held that Shell's Dutch-based parent company could be held liable for the harms resulting from an oil spill by its subsidiary in Nigeria, and that case is still proceeding.²⁹

²³ See Alford, *supra* note 20, at 1092.

²⁴ But see, Austen L. Parrish, *State Court International Human Rights Litigation: A Concerning Trend*, 3 U.C. IRVINE L. REV. 25, 40 (2013).

²⁵ See *Al Shimari v. CACI Int'l, Inc.*, 679 F.3d 205, 230 (4th Cir. 2012) (en banc) (Wilkinson, J., dissenting) (asserting that "there is no indication whatsoever that the Commonwealth of Virginia has any interest in having its tort law applied abroad" in torture claim against private U.S. military contractors and emphasizing that "federal government has exclusive power over foreign affairs").

²⁶ See Hannibal Travis, *Reparations for Mass Atrocities as a Path to Peace: After Kiobel v. Royal Dutch Petroleum Co., Can Victims Seek Relief at the International Criminal Court?*, 40 Brook. J. Int'l L. 547 (2015).

²⁷ See Gwynne Skinner, *Beyond Kiobel: Providing Access to Judicial Remedies for Violations of International Human Rights Norms by Transnational Business in a New (Post-Kiobel) World*, 46 COLUMBIA HUM. RTS. L. REV. 158 (2014).

²⁸ See *Supreme Court Clears Way for Lawsuit by Mine Protesters in Guatemala*, CTV (June 8, 2017), <https://www.ctvnews.ca/politics/supreme-court-clears-way-for-lawsuit-by-mine-protesters-in-guatemala-1.3449292>.

²⁹ See *Dutch Appeals Court Says Shell May be Held Liable For Oil Spills in Nigeria*, THE GUARDIAN (Dec. 18, 2015) <https://www.theguardian.com/global-development/2015/dec/18/dutch-appeals-court-shell-oil-spills-nigeria>. My co-panelist, Surya Deva, has contributed an excellent essay for this conference, further detailing developments in the European Union.

E. Creating New Causes of Action

Given the difficulty present in each of the litigation paths currently available, in U.S. state and federal courts, in the courts of other countries, and in international tribunals, scholars and advocates in the field of business & human rights have turned to the task of entrenching new binding legal obligations on corporations, primarily the duty of corporations to engage in human rights due diligence suggested by the Guiding Principles. They argue for the legalization of a requirement to engage in human rights due diligence which would be statutorily created and mandatory for all businesses, including parent companies.

Douglass Cassel in the United States, for example, argues persuasively, in the context of the Guiding Principles, for a “business duty of care to exercise human rights due diligence, judicially enforceable in common law countries by tort suits for negligence brought by persons whose potential injuries were reasonably foreseeable.”³⁰ Gwynne Skinner made similar arguments.³¹ This liability would extend to parents, as well as to subsidiaries of corporations. Under this proposal, in the event that a corporation did not exercise due diligence with respect to its human rights impacts, this would create a rebuttable presumption of causation such that “a company could then avoid liability only by carrying its burden to prove that the risk of the human rights violations was not reasonably foreseeable, or that the damages would have resulted even if the company had exercised due diligence.”³²

This would be a significant benefit to future plaintiffs in U.S. courts, who currently must demonstrate that the corporate form itself is being used in a fraudulent or improper manner in order to cause a parent company to be liable for the acts of its subsidiaries. It would also serve as a legal mechanism for the implementation of the Guidelines, and perhaps for implementation of a future treaty.

III. THE GUIDING PRINCIPLES AND TWO PATHS FORWARD

Well before the Guiding Principles were unanimously endorsed by the Human Rights Council in 2011, there was widespread anticipation of what would follow that endorsement. During the second phase of the SRSG’s work, many human rights activists and some academic human rights lawyers criticized the emerging Guiding Principles for not pointing toward international legalization. For this sector, a binding

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³⁰ See Douglass Cassel, *Outlining the Case for a Common Law Duty of Care of Business to Exercise Human Rights Due Diligence*, 1 BUS. & HUM. RTS. J. 179 (2016).

³¹ See Skinner, *supra* note 27.

³² See *id.*

international treaty would represent, at the very least, an expressive victory on the issue of business and human rights. For them, the pluralistic, soft law structure of the Guiding Principles was never going to fulfill their expectations.

On the other hand, many of the countries and companies that participated in the workshops and advisory sessions that resulted in the Guiding Principles did so precisely because the methodology of the SRSG's work and because the goal of the Guiding Principles was that the responsibilities arising from them would be based on the formation of global social norms,³³ rather than a set of legal duties.³⁴ This division, which was largely smoothed over by the work of the SRSG and the Guiding Principles, continues today, seven years after the Guiding Principles' endorsement, and reverberates through the international efforts regarding business responsibility for human rights harms and it is characterized most concretely by the current efforts of two distinct working groups charged by the Human Rights Council to make advances in the area of business and human rights.

On June 26, 2014, the day after the Human Rights Council adopted a proposal put forth by Ecuador to establish a working group charged with elaborating a treaty on business and human rights (the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights "OEIGWG"). The OEIGWG has met annually since the Ecuadoran proposal was adopted and, in July 2018, released a draft text for discussion on a treaty on business and human rights.³⁵

The very next day, the Council adopted a resolution co-sponsored by forty-four countries, extending the mandate of the expert working group established by the Council in 2011 to build on and promote the General Principles (the Working Group). This second resolution also requests the Commissioner for Human Rights to facilitate a consultative process with states, experts, and other stakeholders exploring the "full range of legal options and practical measures to improve access to remedy for victims of business-related human rights abuses," and asks the Working Group to report on implementation of the Guiding Principles.³⁶ The Working Group, made up of five

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³³ John Gerard Ruggie, *Regulating Multinationals: The UN Guiding Principles, Civil Society, and International Legalization*, in BUSINESS AND HUMAN RIGHTS: BEYOND THE END OF THE BEGINNING at fn 20 (César Rodríguez-Garavito, ed., 2014) forthcoming, available at: <https://ssrn.com/abstract=2474236>.

³⁴ The settlement reached in *Doe v. Unocal* (*supra* note 8) altered the risk assessments of United States-based corporations. The increased risk of litigation, together with John Ruggie's inclusive methodology, caused the ICC and many of the world's largest corporations to accept, rather than resist, the SRSG's overtures to participate in the multi-stakeholder process that would result in the Guiding Principles. *See id.* at 12. *See also* JOHN GERARD RUGGIE, GLOBAL GOVERNANCE AND 'NEW GOVERNANCE THEORY': LESSONS FROM BUSINESS AND HUMAN RIGHTS, GLOBAL GOVERNANCE, 20 (2014) (describing the Guiding Principles' process).

³⁵ *See supra* note 5.

³⁶ *See id.* Ruggie, *supra* note 33 at 10. Because the resolution was adopted by consensus, no vote was necessary. The Working Group's mandate was again renewed by consensus in 2017. *See* UN Document A/HRC/RES/35/7.

independent experts, has a broad mandate that includes promoting the effective and comprehensive dissemination and implementation of the Guiding Principles. Since it was established in 2011, the Working Group has submitted ten issue-based reports to the Council, as well as seven reports emerging from country visits. It has also submitted numerous reports to the General Assembly and continues to study and promote the implementation of the Guiding Principles.³⁷ The methodology of the Working Group has, to date, been consistent with the methodology that led to the development of the Guiding Principles. It is based on multi-stakeholder participation, informed by field work and stakeholder consultation, as well as submissions and reports on discrete human rights violations, and it aims to improve access to remedies for victims of such harms.

The Working Group is also charged with facilitating and providing support for all states to develop a national action plan on business and human rights. This is one of the chief strategies for domestic implementation of states' responsibility to operationalize the Guiding Principles.

A. National Action Plans

Starting in 2013, the Working Group has consulted with governments, companies, civil society, human rights institutions, and academics on the process and contents of national action plans on business and human rights (NAPs). NAPs are described by the Working Group as an “evolving policy strategy developed by a State to protect against adverse human rights impacts by business enterprises in conformity with the UN Guiding Principles on Business and Human Rights (Guiding Principles).”³⁸ As of October 2018, twenty-one countries have produced a NAP, twenty-three others are in the process of developing a NAP or have committed to doing so, and governments or civil society in nine additional countries have begun steps toward developing a NAP.³⁹

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³⁷ For a full catalogue of the Working Group's charge and submissions, see generally *Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, UNITED NATIONS HUMAN RIGHTS (last updated 2018) <https://www.ohchr.org/en/issues/business/pages/wgrandtransnationalcorporationsandotherbusiness.aspx>.

³⁸ See *UN Working Group on Business and Human Rights*, GUIDANCE ON NATIONAL ACTION PLANS ON BUSINESS AND HUMAN RIGHTS, at i., (2014).

³⁹ For a list of the countries under each stage of NAP development, see generally *State National Action Plans on Business and Human Rights*, UNITED NATIONS HUMAN RIGHTS (last updated 2018) <https://www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx>.

The Working Group has produced guidance on NAPs,⁴⁰ as have other organizations such as the Danish Institute for Human Rights,⁴¹ and academics.⁴² While each of the sources of guidance is different from the others in some form, they all have common features including 1) recommendations for multi-stakeholder participation, 2) recommendations for baseline assessments and analyses of the existing gaps between the national baseline and the Guiding Principles, 3) calls for transparency both in the formulation and monitoring of the NAPs, 4) the involvement of all relevant state agencies, and 5) recommendations for ongoing monitoring and modification of the NAPs. With respect to content, the sources of guidance also recommend that NAPs 1) express the State's commitment to the principles and content of the Guiding Principles, 2) contain as much of the form and content of the Guiding Principles as possible, 3) offer time lines, commitments and metrics for measuring success, and 4) contemplate capacity-building requirements of the state, civil society and private sectors.

The United States produced its first NAP in December 2016,⁴³ after much of the guidance cited herein was already available. The United States NAP conforms with some of the recommendations discussed above, and is out of step with others, as will now be discussed.

The United States' NAP is commendable in some respects. The White House National Security Council led and coordinated a multi-stakeholder process that included more than a dozen federal agencies, as well as consultations with civil society organizations, businesses and academics, labor unions, indigenous peoples representatives and foreign governments.⁴⁴ In addition, the U.S. government maintained an email address for submissions related to the NAP from the public at large, which were collected but never made public.⁴⁵ The NAP lists a number of new actions which various agencies within the government will undertake in order to effectuate the goals of the NAP.⁴⁶ Unfortunately, the praise for the U.S. NAP should probably stop there.

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⁴⁰ See *id.*

⁴¹ See *National Action Plans on Business and Human Rights Toolkit (2017 edition)*, DANISH INSTITUTE FOR HUMAN RIGHTS (Nov. 29, 2017), <https://www.humanrights.dk/publications/national-action-plans-business-human-rights-toolkit-2017-edition>.

⁴² See Damiano de Felice and Andreas Graf, *The Potential of National Action Plans to Implement Human Rights Norms: An Early Assessment with Respect to the UN Guiding Principles on Business and Human Rights*, 7 J. OF HMN. RTS. PRAC. 40 (2015).

⁴³ See John Kerry, *Responsible Business Conduct: First National Action Plan for the United States of America*, U.S. DEPT. OF STATE (Dec. 16, 2016), <https://www.state.gov/e/eb/eppd/csr/naprbc/index.htm>.

⁴⁴ See *id.* at Annex I.

⁴⁵ See *id.*

⁴⁶ The NAP has a number of "New Actions" that can be found within each "Outcome" under the NAP. See *id.*

With respect to the process for the development and monitoring of the NAP, the U.S. model falls short. Although the NAP states that the development of the NAP “included a stocktaking of laws and policies implemented to date that support [responsible business conduct],”⁴⁷ the United States did not carry out a baseline assessment, nor did it assess the gaps between the U.S. baseline and the Guiding Principles. And, while the drafting process was arguably inclusive, it was not transparent. In addition, the NAP was finalized during the last days of the Obama administration. Information on the implementation of the NAP, and information on the monitoring of the NAP in the United States, is scarce to non-existent. Indeed, the NAP does not include any framework for monitoring or assessment of the commitments made in the NAP, nor any timelines for assessments. Further, under the new administration, it is unclear that either the Labor Department or the State Department (the two Departments charged with the largest share of responsibilities under the NAP) have taken any action in connection with the NAP since the new administration took office, and there have been no reports to date on the United States’ progress or compliance with its NAP.

With respect to the substance of the NAP, the United States NAP again bears some positive and some disappointing features. While it does directly address particular behaviors, such as human trafficking, child labor, corruption, transparency and the role of the government in the supply chains implicated in public procurement, the NAP is framed as part of the U.S. effort to promote “responsible business conduct.” Human rights figure as just one of a set of issues addressed under the NAP, and the Guiding Principles do not figure more prominently in the document than other instruments, such as the OECD Guidelines for Multinational Enterprises.⁴⁸ Still, the NAP does address the Guiding Principles in stating that they “apply to all States and business enterprises”⁴⁹ and that the “U.S. government, through [the Department of] State, will continue to disseminate the UN Guiding Principles through our bilateral, multilateral, and public diplomacy efforts. State will continue to participate in and host discussions...on these Guiding Principles, including through its on-going UN Guiding Principles Workshop Series.”⁵⁰

The U.S. NAP introduces very few new obligatory, regulatory actions and is, instead, oriented heavily toward voluntary measures. Indeed, the new actions to be taken by the government under the NAP are almost entirely voluntary, and the mandatory regulatory actions included in the NAP are almost all on-going, rather than new. The one exception is arguably the 2016 enactment of the Trade Facilitation Act of 2015,

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⁴⁷ See *id.* at Annex I.

⁴⁸ See *id.* at 6.

⁴⁹ See *id.* at 5; *supra* note 2.

⁵⁰ See *id.* at 8.

which has “removed an exception...that allowed for the importation of certain forced labor-produced goods.”⁵¹

With respect to focusing on the most egregious human rights harms, the NAP focuses specifically on child labor, human trafficking and forced labor but no other human rights harms specifically. And, other than addressing child labor, the NAP does not address the specific vulnerability of any other groups, such as women, indigenous communities, LGBT people, or groups that are otherwise targeted because of their political, religious, racial or cultural identities.

As stated previously, the NAPs contain no timelines or measurable outcomes or metrics, largely because of the vagueness with which they were written. And, other than stating new commitments under each section, the NAP does not discuss whether the U.S. requires additional capacity building in order to promote and implement the Guiding Principles, nor what steps might be taken toward such capacity building.

With respect to victims’ access to remedies for human rights harms, the U.S. NAP is particularly disappointing. This is the shortest section of the NAP and includes no ongoing commitments or initiatives. It makes no commitments for creating new avenues for addressing harms, instead stating that it will “host stakeholder outreach and explore with one or more advisory committee(s) as to how the U.S. government can work with U.S. companies to help address concerns about the perceived lack of accessible and effective remedy available to those who feel they have been negatively impacted by U.S. business conduct abroad.”⁵² The only additional commitment under the NAP relates to the U.S. National Contact Point created under the OECD Guidelines. The U.S. commits to 1) undergo a peer review of its National Contact Point, 2) create an outreach plan which will include stakeholders outside of the United States, and 3) implement procedures for individuals who would like to file a complaint through the USNCP process and do not speak English.⁵³

The U.S. NAP falls short of best practice and it falls short of even the better existing NAPs.⁵⁴ For example, Germany and Scotland have both included baseline assessments

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⁵¹ See *id.* at 9.

⁵² See *id.* at 23.

⁵³ See *id.* The USNCP has considered fifty-five “Specific Instances” since June 2000. See, Specific Instance Final Statement, U.S. DEPARTMENT OF STATE (May 25, 2018), <https://www.state.gov/e/eb/oecd/usncp/specificinstance/finalstatements/index.htm> (“Specific Instances” are complaints of conduct by a business actor that are alleged by the complainant to be inconsistent with the OECD Guidelines).

⁵⁴ For an excellent synopsis and analysis of NAPs existing as of August 2017, see INTERNATIONAL CORPORATE ACCOUNTABILITY ROUNDTABLE, ASSESSMENT OF EXISTING NATIONAL ACTION PLANS (NAPS) ON BUSINESS AND HUMAN RIGHTS, AUGUST 2017 UPDATE (Aug. 2017), <https://static1.squarespace.com/static/583f3fca725e25fcd45aa446/t/599c543ae9bdfd40b5b6f055/1503417406364/NAP+Assessment+Aug+2017+FINAL.pdf>.

as part of their NAP drafting process,⁵⁵ the U.K. and Finland include information on implementation and monitoring,⁵⁶ and the U.K., Dutch, Danish and Finnish NAPs all contain an explicit commitment to the full text of the Guiding Principles, including the full range of human rights, as they apply domestically and extraterritorially.⁵⁷

The content of the U.S. NAP is most disappointing, however, in light of its posture toward the possibility of a treaty. As readers will recall, on June 26, 2014, the day before the Human Rights Council adopted the resolution extending the mandate of the Working Group, which has led to the further development of NAPs, the Council adopted the Ecuadoran proposal to establish a working group charged with elaborating a treaty on business and human rights.⁵⁸ The vote on the resolution exposed the deep divisions among the voting countries regarding work toward a legally binding instrument.⁵⁹

B. Treaty

The United States has stood in opposition to the elaboration of a treaty since the time of Ecuador's resolution. In addition to voting against the resolution, it also issued a statement explaining its vote. The United States' primary arguments against the elaboration of a treaty were that: 1) the treaty effort is unduly polarizing, contradicting the methods that led to the elaboration of the Guiding Principles; 2) the Guiding Principles, while contributing to improvements in the field of business and human rights, have not been given sufficient time to be fully implemented; 3) the treaty process will be a threat to the Guiding Principles, creating confusion and competition with their voluntary implementation; 4) a treaty is unlikely to handle the complexity of regulating business activity; 5) a treaty will only be binding on the states that become party to it; 6) the treaty elaboration process will not include key stakeholders, including the private sector; and 7) practical concerns, such as how the treaty will apply to private actors, and how states will implement such a treaty.

⁵⁵ See Claire Methven O'Brien, Amol Mehra, Sara Blackwell & Cathrine Hansen, *National Action Plans: Current Status and Future Prospects for a New Business and Human Rights Governance Tool*, 1 BUS. & HUM. RTS. J. 117, 126-27 (Aug. 7, 2015).

⁵⁶ See *id.* at 124.

⁵⁷ See *id.* at 122.

⁵⁸ Human Rights Council, U.N. Doc. A/HRC/26/L.22/Rev. 1 (June 24, 2014).

⁵⁹ The vote was **twenty in favor** (Algeria, Benin, Burkina Faso, China, Congo, Côte d'Ivoire, Cuba, Ethiopia, India, Indonesia, Kazakhstan, Kenya, Morocco, Namibia, Pakistan, Philippines, Russia, South Africa, Venezuela, Vietnam), **fourteen against** (Austria, Czech Republic, Estonia, France, Germany, Ireland, Italy, Japan, Montenegro, South Korea, Romania, Macedonia, UK, USA) and **thirteen abstentions** (Argentina, Botswana, Brazil, Chile, Costa Rica, Gabon, Kuwait, Maldives, Mexico, Peru, Saudi Arabia, Sierra Leone, UAE). See *UN Human Rights Council Sessions*, BUSINESS & HUMAN RIGHTS RESOURCE CENTRE, <https://www.business-humanrights.org/en/binding-treaty/un-human-rights-council-sessions> (last visited, Oct. 27, 2018).

The United States clearly stated that it would vote no to the resolution, that it would not participate in a treaty elaboration process, and that it would encourage others to do the same.⁶⁰ The United States' position has not changed. At the most recent session of the IGWG, the United States did not participate, stating that it "remains opposed to the treaty process and the manner in which it has been pursued."⁶¹

Importantly, the United States is not alone in its opposition to the treaty process. In addition to the other countries that have opposed the treaty process since its start, the International Organisation of Employers, Business at OECD, Business Europe, and the International Chamber of Commerce, which together represent millions of companies globally and which have (unlike the United States) participated in the treaty process, also currently stand united in their opposition to the treaty process.⁶²

On July 16, 2018, the Chair of the OEIGWG released the Zero Draft Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises (the Zero Draft Treaty)⁶³ and the Draft Optional Protocol to the Legally Binding Instrument (the Draft Optional Protocol),⁶⁴ which are to be the focus of future negotiations on the treaty. The business organizations cited above published a response to the Zero Draft that declares their belief that the Zero Draft Treaty and Optional Protocol "do not provide a sound basis for a possible future standard on business and human rights."⁶⁵ The response includes concerns about both the process and the substance of the Zero Draft Treaty and states, ominously, that the draft "takes the business and human rights agenda backwards by undermining the Guiding Principles and exacerbating the failure

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⁶⁰ See *Proposed Working Group Would Undermine Efforts to Implement Guiding Principles on Business and Human Rights*, U.S. MISSION TO INTERNATIONAL ORGANIZATIONS IN GENEVA (June 26, 2014), <https://geneva.usmission.gov/2014/06/26/proposed-working-group-would-undermine-efforts-to-implement-guiding-principles-on-business-and-human-rights/>.

⁶¹ See *The United States' Opposition to the Business and Human Rights Treaty Process*, U.S. MISSION TO INTERNATIONAL ORGANIZATIONS IN GENEVA (Oct. 15, 2018), <https://geneva.usmission.gov/2018/10/15/the-united-states-opposition-to-the-business-and-human-rights-treaty-process/>.

⁶² See The Global Voice of Business, International Chamber of Commerce, Business at OECD & Business Europe, *Business Response to the Zero Draft Legally Binding Instrument to Regulate in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises ("Zero Draft Treaty") and the Draft Optional Protocol to the Legally Binding Instrument ("Draft Optional Protocol") Annex*, (Oct. 2018) [hereinafter "ICC Response"], <https://cdn.iccwbo.org/content/uploads/sites/3/2018/10/icc-joint-business-response-zero-draft-2018.pdf>.

⁶³ See United Nations Human Rights Office of the High Commissioner, *Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises*, UNITED NATIONS HUMAN RIGHTS COUNCIL (July 16, 2018), <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/DraftLBI.pdf>.

⁶⁴ See United Nations Human Rights Office of the High Commissioner, *Draft Optional Protocol to the Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises* (Sept. 4, 2018), <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session4/ZeroDraftOPLegally.PDF>.

⁶⁵ See ICC Response, *supra* note 62, at 2.

of States to meet their existing obligations.”⁶⁶ This resonates strongly with the United States’ current view.

While the United States’ and ICC’s opposition to the Zero Draft Treaty may primarily rest in the U.S. and ICC resistance to useful hard-law mechanisms that could potentially lead to legal liability for businesses engaging in human rights violations, the Zero Draft Treaty is characterized by some significant design flaws that have drawn criticism from a wider variety of stakeholders.

For example, Greenpeace International has critiqued the Zero Draft Treaty for addressing only states’ obligations under human rights law, rather than extending direct responsibility for human rights harms to business enterprises, thus retrenching the idea that private actors cannot be subjects under international law in the business and human rights context. It further criticizes the Zero Draft Treaty for focusing solely on transnational activities of corporations, and not the domestic harms caused by corporations. Finally, the Zero Draft Treaty is critiqued for not creating either new domestic or international tribunals or mechanism for addressing human rights harms.⁶⁷ Other advocacy organizations have critiqued the Zero Draft Treaty and Draft Optional Protocol for not adequately addressing the problems of *forum non conveniens* and piercing the corporate veil discussed earlier in this essay, and for not establishing sufficiently strong institutions to receive and address complaints of human rights harms.⁶⁸

John Ruggie, the author of the Guiding Principles, has repeatedly made clear his view that “legalization is a necessary and inevitable component of future developments.”⁶⁹ However, he has also repeatedly expressed his skepticism that the current treaty process will produce the most benefit to the communities and individuals most affected by human rights harms. He reminds us that calls for a treaty to regulate transnational corporations date back to the 1970s, with each effort resulting in failure after being met with vigorous opposition from the business sector.⁷⁰ Given the strong

⁶⁶ See *id.* at 5.

⁶⁷ See Gabriela Kletzel & Andrés López Cabello, *Toothless Tool? First Impressions on the Draft Optional Protocol to the Legally Binding Instrument on Business and Human Rights*, BUSINESS & HUMAN RIGHTS RESOURCE CENTRE (Oct. 11, 2018), <https://www.business-humanrights.org/en/a-toothless-tool-first-impressions-on-the-draft-optional-protocol-to-the-legally-binding-instrument-on-business-and-human-rights>.

⁶⁸ See Gabriela Kletzel, Andrés López Cabello, Centro de Estudios Legales y Sociales & Daniel Cerqueira, Due Process of Law Foundation, *A Toothless Tool? First Impressions on the Draft Optional Protocol to the Legally Binding Instrument on Business and Human Rights*, BLOG: FIRST IMPRESSIONS ON THE DRAFT OP-PROTOCOL TO THE TREATY ON BUSINESS & HUMAN RIGHTS (OCT. 13, 2018), <https://www.escr-net.org/news/2018/blog-first-impressions-draft-optional-protocol>.

⁶⁹ See John Gerard Ruggie, *Regulating Multinationals: The UN Guiding Principles, Civil Society, and International Legalization*, at 7 (Mossavar-Rahmani Center for Business and Government, Harvard Kennedy School, Harvard University, Working Paper No. RPP-2015-04, 2015) (July 30, 2014), https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/files/RPP_2015_04_Ruggie.pdf.

⁷⁰ See *id.* at 1.

opposition from the business sector and the deep divisions from states regarding the process described above, one must wonder what the future of this treaty effort might be. But, Ruggie's concerns lie beyond just the likelihood of failure. He is also concerned that, even if the treaty process ultimately results in a vote on the treaty, the process leading to that result could take a decade or longer (it has already been four years, after all). What, he asks, do treaty supporters "propose to do between now and then – whenever then may be? The obvious answer should be to implement and build on the UN Guiding Principles on Business and Human Rights."⁷¹

Further, Ruggie has expressed the view that the field of business and human rights "encompasses too many complex areas of national and international law for a single treaty instrument to" address the full range of human rights, even if international law remained static, which it does not.⁷² Even in his most recent, and most optimistic analysis of the Zero Draft Treaty, Ruggie continues to cite to structural design failures in the Zero Draft Treaty, such as its failures to recognize the sheer scale of transnational business activity, the problem of how to monitor this activity, and how to determine who should be liable for human rights harms under the treaty.⁷³

Despite the criticism the Zero Draft Treaty has attracted, it also has garnered support from a large number of experts, even if that support is cautious. During October 2018, a group of [over 160] scholars and experts signed an "open letter to states concerning an international legally binding instrument on business and human rights."⁷⁴ While this letter recognizes the divisions that exist between states regarding the treaty effort, it also urges states to fill the regulatory gaps left by existing efforts through the creation of a legally binding instrument.⁷⁵ The open letter, and the available commentary to date, provide a sense that many commentators have come to the view that the Zero Draft Treaty "is on the right track,"⁷⁶ even if just for the purpose of keeping the dialogue about an internationally binding instrument alive.

⁷¹ See *id.* at 10 (He notes that, unfortunately, many of the countries and NGOs supporting the treaty process have done very little to implement and promote the UN General Principles.).

⁷² See *id.* at 11.

⁷³ See John G. Ruggie, *Comments on the "Zero Draft" Treaty on Business & Human Rights*, BUSINESS & HUMAN RIGHTS RESOURCE CENTRE, [https://www.business-humanrights.org/en/comments-on-the-%E2%80%9CZero-Draft%E2%80%9D-treaty-on-business-human-rights \(last visited Nov. 29, 2018\)](https://www.business-humanrights.org/en/comments-on-the-%E2%80%9CZero-Draft%E2%80%9D-treaty-on-business-human-rights%20(last%20visited%20Nov.%2029,%202018)). For resonant commentary, see Carlos Lopez, *Towards an International Convention on Business and Human Rights, Parts I and II*, OPINIOJURIS (July 23, 2018), <http://opiniojuris.org/author/carlos-lopez/>.

⁷⁴ See *An Open Letter to States Concerning an International Legally Binding Instrument on Business and Human Rights*, BUSINESS & HUMAN RIGHTS RESOURCE CENTRE (OCT. 1, 2018), <https://www.business-humanrights.org/sites/default/files/documents/Open%20Letter%20to%20States%20%281%20Oct%202018%29.pdf>.

⁷⁵ See *id.* (Letter in support of continued work on the zero draft has approximately 160 signers).

⁷⁶ See Doug Cassel, *At Last: A Draft UN 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> (For Cassel, one of the most promising aspects of the Zero Draft, in article 9.2, hones in on the requirement that companies exercise human rights due diligence and, in article 9.4, provides that companies that fail to comply with their due diligence duties will face "commensurate liability and compensation" obligations).

In October 2018, the Fourth Session of the Intergovernmental Working Group resolved to continue work on the Zero Draft. To that end, comments on the Zero Draft Treaty will be received until the end of February 2019, and a new draft will be released by the end of June 2019.⁷⁷

IV. CONCLUSION: THE MORE THINGS CHANGE...

Such a rapid tour of the current state of play of court-based, agency-based, and international law-based efforts toward the prevention of and remediation for human rights harms may understandably leave a reader with a sense that, despite the forty-five years of work on the global, national and local scale, business actors still enjoy the same level of impunity they as when the United Nations issued its first reports on the topic. To date, there is no reliable, transparent path to litigation against business actors alleged to have committed human rights harms; there is no instrument in international law binding states (much less private actors) to protect, respect, or remedy human rights harms committed by business actors; and, while the business community and the United States may have shifted slightly, they continue to hold a very similar posture regarding such a legally binding instrument as they have since the Code of Conduct and the Norms were drafted. In these respects – as it pertains to legally binding reliable access to viable remedies – indeed, nothing has changed.

Still, to conclude that the field of business and human rights has failed to change would be to overlook the tremendous data and understanding collected through the innovations of the Global Compact and the work leading to the Guiding Principles, not to mention the B-Corp Movement, the Equator Principles, the proliferate voluntary codes governing nearly every large industry, the creation of NAPs in an ever-larger number of States, the domestic legislation and press-garnering litigation in most of the world's most important home-state jurisdictions, the advancement of the language of human rights inside of the world's economic order, and, most importantly, the popular awareness that has come to surround the activities of business actors. These phenomena, viewed cumulatively, significantly bear on the evolving legal landscape for business actors. Indeed, transnational corporations and other business actors now find themselves enmeshed in a fabric of social and economic responsibility that has emerged throughout the past half century. This is the stuff of emerging social norms and, over time, the formation of legitimate law.⁷⁸

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⁷⁷ See *Fourth UN Intergovt. Working Group Session on Proposed Business & Human Rights Treaty (15-19 Oct 2018)*, BUSINESS & HUMAN RIGHTS RESOURCE CENTRE, <https://www.business-humanrights.org/en/binding-treaty/intergovernmental-working-group-sessions/fourth-un-intergovt-working-group-session-on-proposed-business-human-rights-treaty-15-19-oct-2018> (last visited Dec. 3, 2018).

⁷⁸ See generally Jean-Jacques Rousseau, *The Social Contract* (G.D.H. Cole trans., 1792).