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Human Rights Incorporated, Not Everyone Agrees

Dana Johnston

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HUMAN RIGHTS INCORPORATED, NOT EVERYONE AGREES

Dana Johnston*

INTRODUCTION	95
I. HISTORY OF HUMAN RIGHTS AND BUSINESS.....	97
A. <i>Businesses Human Rights Violations</i>	97
B. <i>Combating Human Rights Violations by Businesses</i>	101
II. UNITED NATIONS GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS	105
III. ZERO DRAFT	110
IV. MAJOR OPPOSITION AND SUPPORT FOR ZERO DRAFT.....	113
A. <i>Why Are Countries Supporting and Rejecting Zero Draft?</i>	114
1. Many Countries Have Human Rights Issues	115
2. Many Countries Have Transnational Corporations Domiciled within Them.....	116
B. <i>What Do Businesses Think?</i>	118
V. ACTION PLAN—WHAT NEEDS TO BE DONE?.....	119
VI. IMPACT AND SIGNIFICANCE	123
CONCLUSION.....	126

INTRODUCTION

There is a massive gap between the operations of businesses and the fundamental human rights of the workers, and people impacted by the businesses. This became apparent in the multiple major cases of abuse that have occurred in recent history.¹ Businesses should be looking to hold

* J.D. Pepperdine University School of Law 2020

¹ *Business & Human Rights – A Brief Introduction*, BUSINESS & HUMAN RIGHTS RESOURCE CENTER, <https://www.business-humanrights.org/en/business-human-rights-a-brief-introduction> (last visited Mar. 14, 2019).

their operations to high human rights requirements.² Companies should be required to respect all human rights and not pick and choose which rights to deal with, or which rights are easy for the companies to handle.³ Businesses can negatively or positively impact all human rights issues including: health and safety, freedom of association, discrimination, sexual harassment, freedom of expression, rape, torture, privacy, food and water, education and housing, and poverty.⁴ The growing impact that businesses have on human rights gave rise to a debate over the roles and responsibilities of the enterprises regarding human rights.⁵ This debate made its way on to the United Nations (UN) agenda.⁶ The UN released the United Nations Guiding Principles on Business and Human Rights (UNGP) to act as principles and suggestions on how businesses and human rights should be handled.⁷ These principles aided countries (hereinafter referred to as “States”) in setting up laws around businesses and human rights, and the principles lay out the roles of States, businesses, and individuals when it comes to combating human rights violations.⁸

However, the UNGP is only a guideline to aid States in creating laws and regulations for businesses. Currently, the UN is working toward creating a treaty among States to:

[S]trengthen the respect, promotion, protection and [fulfillment] of human rights in the context of business activities of transnational character; to ensure an effective access to justice and remedy to victims of human rights violations in the context of business activities of transnational character, and to prevent the occurrence of such violations;

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Business and human rights*, UNITED NATIONS HUMAN RIGHTS OFFICE OF HIGH COMMISSIONER, <https://www.ohchr.org/en/issues/business/pages/businessindex.aspx> (last visited Mar. 14, 2019).

⁶ *Id.*

⁷ UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER, GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS: IMPLEMENTING THE UNITED NATIONS “PROTECT, RESPECT AND REMEDY” FRAMEWORK, at 6 (2011), available at http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf [hereinafter UNGP].

⁸ *Id.*

[and] [t]o advance international cooperation with a view towards fulfilling States' obligations under international human rights law.⁹

Unfortunately, there is a major downfall to this treaty proposal. Many of the major States—that hold the majority of business enterprises that need to be held accountable for their impact on human rights—oppose the treaty.¹⁰ This treaty proposal also has large holes that need to be closed before it could have the desired impact on businesses and human rights.¹¹ For fundamental human rights to be upheld in this world, businesses need to be held accountable for their actions, the major States need to agree on an action plan, and the major holes in the proposed treaty need to be closed.

I. HISTORY OF HUMAN RIGHTS AND BUSINESS

There has been a push for a legal mechanism to hold businesses accountable for human rights abuses since Salvador Allende's speech in 1972 to the UN General Assembly.¹² Corporate crimes against peoples' rights have remained constant since then.¹³ Violence against defenders of these rights have reached extreme levels, and businesses are rarely held accountable.¹⁴

A. *Businesses Human Rights Violations*

Over the past decade major companies, like Nike, Apple, Shell, and Yahoo, have had human rights violations brought to light. They all failed to uphold the expected Human Rights standards. Factories collapsed, people have been trafficked and forced to work, and there are people today who are still slaves and trapped in indentured servitude.

On April 24, 2013, Rana Plaza—an eight-story factory building in Savar, Bangladesh—collapsed killing more than 1,300 workers and

⁹ Human Rights Counsel, Legally Binding Instrument to Regulate, In International Human Rights Law, The Activities Of Transnational Corporations and Other Business Enterprises art. 2, July 16, 2018 [hereinafter *Zero Draft*].

¹⁰ Human Rights Counsel Res. 26/9, Elaboration of an International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights, 26th Sess., June 26, 2014, U.N. Doc. A/HRC/RES/26/9 (July 14, 2014).

¹¹ *Zero Draft*, *supra* note 9.

¹² Lúcia Ortiz & Anne van Schaik, *Why does the European Union fear a binding human rights treaty on transnational corporations?*, FRIENDS OF THE EARTH INT'L (July 11, 2018), <https://www.foei.org/news/why-does-the-european-union-fear-a-binding-human-rights-treaty-on-transnational-corporations>.

¹³ *Id.*

¹⁴ *Id.*

leaving over 2,000 workers injured.¹⁵ This collapse was a result of the company's sub-standard construction and lack of routine maintenance on the building.¹⁶ Rana Plaza was the second largest exporter of ready-made garments, and with the monthly wage of sixty-eight dollars, it was very cheap for companies to produce their garments there.¹⁷ Many Western companies produced clothing at Rana Plaza; such companies include: Nike, H&M, Zara, Benneton, Walmart, and The Children's Place.¹⁸ After the collapse, murder charges were brought against thirty-eight people connected to the management of the building, and over two-hundred apparel companies signed the Accord for Fire and Building Safety in Bangladesh.¹⁹ However, this action came too late for the thousands of workers already affected by the collapse in 2013.²⁰

In 2010, assembly line workers at the Foxconn Longhua plant began killing themselves.²¹ Foxconn is the single largest employer in the mainland of China.²² The Longhua plant is one of the most well-known assembly plants in the world, as it produces the majority of Apple's products.²³ The low cost of labor and the highly skilled workforce made Foxconn an ideal company to manufacture Apple products.²⁴ Foxconn has "1.3 million workers on its payroll," and is the single largest employer

¹⁵ Harpreet Kaur, *The Rana Plaza building collapse in Bangladesh - one year on*, BUSINESS & HUMAN RIGHTS RESOURCE CENTER, <https://www.business-humanrights.org/en/the-rana-plaza-building-collapse-in-bangladesh-one-year-on-0> (last visited Mar. 14, 2019).

¹⁶ *Id.*

¹⁷ *Rana Plaza collapse: 38 charged with murder over garment factory disaster*, THE GUARDIAN (July 18, 2016, 11:28 AM), <https://www.theguardian.com/world/2016/jul/18/rana-plaza-collapse-murder-charges-garment-factory>.

¹⁸ Nadra Nittle, *What the Rana Plaza Disaster Changed About Worker Safety*, RACKED (Apr. 13, 2018, 11:00 AM), <https://www.racked.com/2018/4/13/17230770/rana-plaza-collapse-anniversary-garment-workers-safety>.

¹⁹ *Id.*

²⁰ Tejshree Thapa, *Remember Rana Plaza: Bangladesh's Garment Workers Still Need Better Protection*, HUMAN RIGHTS WATCH (Apr. 24, 2018, 9:02 PM), <https://www.hrw.org/news/2018/04/24/remember-rana-plaza>.

²¹ Brian Merchant, *Life and death in Apple's forbidden city*, THE GUARDIAN (June 18, 2017, 4:30 PM), <https://www.theguardian.com/technology/2017/jun/18/foxconn-life-death-forbidden-city-longhua-suicide-apple-iphone-brian-merchant-one-device-extract>.

²² *Id.*

²³ *Id.*

²⁴ *Id.*

in mainland China.²⁵ In 2010, workers began throwing themselves off of the Longhua plant buildings in protest over the working conditions inside the plant.²⁶ There were eighteen reported suicide attempts in 2010 alone, fourteen confirmed deaths, and twenty others who were talked down from the roof.²⁷ During this time “[s]uicide notes and survivors told of immense stress, long workdays and harsh managers who were prone to humiliate workers for mistakes, of unfair fines and unkept promises of benefits.”²⁸ Large nets were installed around the buildings to prevent future desperate suicide attempts.²⁹ Foxconn took steps to correct these working conditions,³⁰ but with the demand for lower prices from consumers, and Foxconn’s ability to produce Apple products at lower prices, the changes were minimal.³¹

There is an ongoing fight for land in the Congo’s Virunga National Park, primarily driven by corporations’ need to produce their products from the resources that can be found on this land.³² The UN has characterized this war as “a process [fueled] by the trafficking of the Congo’s vast biological and mineral resources, which funds the activities of more than 60 armed militias.”³³ Rangers in the National Park have a forty-four percent chance of suffering a violent death in their career, which is higher than any other park in the world.³⁴ This rate is due to the rangers’ need to protect civilians in the park, and not even the park itself.³⁵ These rangers are at the frontline of a grave conflict, described by Oxfam as “the greatest human tragedy since the second world war, and which has led to the deaths of more than six million civilians.”³⁶ Companies’ need for the resources in the Congo makes them overlook the rights of the civilians in the park and has brought about the all-out war in the region.³⁷

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.* “The company hired counsellors and workers were made to sign pledges stating they would not attempt to kill themselves.” *Id.*

³¹ *Id.*

³² Emmanuel de Mérode, ‘*My park rangers protect Congo’s people and ecosystems as war rages all around.*’ THE GUARDIAN (May 7, 2016, 7:04 PM), <https://www.theguardian.com/commentisfree/2016/may/08/congo-rangers-wildlife-gorillas-war>.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

Nike has been infamous for sweatshops and poor working conditions. Over the past decade, Nike worked to clean up its image, but the problem became a reoccurring issue in the company's history.³⁸ In the 1990s, Nike was reported to use sweatshops and child labor.³⁹ In response, Nike co-founder, Phil Knight, vowed to clean up the company's image and correct the injustice.⁴⁰ In 2017 it was reported that the workers in the Nike factory in Vietnam suffered from wage theft, extreme labor conditions,⁴¹ and verbal abuse.⁴² Around the United States, concerned citizens held rallies over the past few years to protest Nike's regression toward the inhumane treatment of its workers.⁴³ Since the protests, Nike took it upon itself to inspect its factories, and Nike stated it is allowing third parties to audit its shops' working conditions, but there still needs to be major strides before the human rights of the companies' workers are upheld to the necessary standard.⁴⁴

In the 1990s, Amnesty International ("Amnesty") accused Shell Oil Company of involvement with human rights violations carried out by the Nigerian military.⁴⁵ Amnesty also accused Shell of providing money and support to the Nigerian military who worked to stop protesters from opposing the new oil pipeline from being built in the area.⁴⁶ The Nigerian military violated multiple human rights when dissuading protesters from standing up against the pipeline.⁴⁷ Examples of these violations include unlawful killings, rape, torture, and burning of villages.⁴⁸ Shell announced

³⁸ Marc Bain, *Nike is facing a new wave of anti-sweatshop protests*, QUARTZ (Aug. 1, 2017), <https://qz.com/1042298/nike-is-facing-a-new-wave-of-anti-sweatshop-protests/>.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* Workers were working for hours in temperatures well above ninety degrees (the legal limit of working temperatures), causing workers to collapse at their sewing machines. *Id.*

⁴² *Id.*

⁴³ Elizabeth Segran, *Escalating Sweatshop Protests Keep Nike Sweating*, FAST COMPANY (July 28, 2017), <https://www.fastcompany.com/40444836/escalating-sweatshop-protests-keep-nike-sweating>.

⁴⁴ *Id.*

⁴⁵ Antonia Blumberg, *Amnesty Accuses Shell Of Complicity In Killings, Torture In Nigeria In The 1990s*, HUFFINGTON POST (Nov. 28, 2017, 6:21 PM), https://www.huffingtonpost.com/entry/amnesty-shell-nigeria_us_5a1db128e4b06a14100a940a.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

that it was ending operations in the area due to security concerns, but it moved forward with plans to build a new pipeline in Nigeria all the same.⁴⁹ In the end, Shell agreed to pay a \$15.5 million settlement after being accused of collaborating with the executions of protesters.⁵⁰ In 2005 the High Court of Nigeria ordered Shell to stop the practice of gas flaring in Nigeria, as Nigeria deemed it a violation of human rights.⁵¹ Shell has not complied with the order, and the case was dropped.⁵²

B. Combating Human Rights Violations by Businesses

As these human rights and business issues became more prominent, there was a growing demand for legislation on the matter to hold companies accountable for their actions.⁵³ As national organizations grew, demand for regulations became more prominent.⁵⁴ With this demand, corporations wanted voluntary schemes, and NGOs wanted enforceable rights rooted in hard law.⁵⁵ The UN Commission on Transnational Corporations produced a draft Code of Conduct on Transnational Corporations, but this was abandoned in 1993 due to a lack of agreement.⁵⁶ UN Sub-Commission on Human Rights mandate (2003) led to the release of the “Norms” which would impose the same human rights duties as States have on corporations.⁵⁷ This would start the privatization of human rights.⁵⁸ In 2005 the UN Commission on Human Rights (predecessor to the Human Rights Council) issued a mandate that led to John Ruggie’s appointment as Special Representative to the Secretary-General.⁵⁹

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ Charlie Holt, Shira Stanton & Daniel Simons, *The Zero Draft Legally Binding Instrument on Business and Human Rights*, GREENPEACE (Sep. 15, 2018), <https://www.greenpeace.org/international/story/18581/zero-draft-human-rights-corporate-accountability/>.

⁵² *Id.*

⁵³ *Integrating human rights in development and economic sphere*, UNITED NATIONS HUM. RTS. OFF. OF THE HIGH COMMISSIONER, <https://www.ohchr.org/en/aboutus/pages/developmentintheeconomicsphere.aspx> (last viewed Mar. 14, 2018).

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ Jed Greer & Kavaljit Singh, *A Brief History of Transnational Corporations*, GLOBAL POL’Y F. (2000), <https://www.globalpolicy.org/empire/47068-a-brief-history-of-transnational-corporations.html>.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

Before John Ruggie's appointment, which led to the creation of the UNGP, multiple regulations were in motion.⁶⁰ The Fair Labor Association (FLA) and its Code of Conduct were put in place "to combine the efforts of business, civil society organizations, and colleges and universities to promote and protect workers' rights and to improve working conditions globally through adherence to international standards."⁶¹ The FLA believes that all goods should be produced ethically and fairly.⁶² The FLA is working to bring together universities, civil society organizations, and companies "to find sustainable solutions to systemic labor issues."⁶³ Additionally, it is working to improve workers' lives by holding companies accountable for FLA's Code of Conduct across the company's whole supply chain, conducting assessments to assure the consumers of the integrity of the products they are buying, and creating a space that civil society organizations can engage with companies and stakeholders to find solutions to human rights concerns.⁶⁴

The Kimberly Process (KP) was created as a "commitment to remove conflict diamonds from the global supply chain."⁶⁵ The KP was established in 2003 as a trade regime to prevent the flow of conflict diamonds and to help the legitimate trade of rough diamonds.⁶⁶ The KP has a certification scheme in which states implement regulations on shipments of rough diamonds, and the KP inspects them and certifies them as conflict-free.⁶⁷

Voluntary Principles on Security and Human Rights were established in 2000, and they are "a set of principles designed to guide companies in maintaining the safety and security of their operations within an operating framework that encourages respect for human rights."⁶⁸

⁶⁰ UNGP, *supra* note 7.

⁶¹ *Mission & Charter*, FAIR LAB. ASS'N, <http://www.fairlabor.org/our-work/mission-charter> (last visited Mar. 14, 2019).

⁶² *Our Work*, FAIR LAB. ASS'N, <https://www.fairlabor.org/our-work> (last visited Mar. 14, 2019).

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *What is the KP*, KIMBERLY PROCESS, <https://www.kimberlyprocess.com/en/what-kp> (last visited Mar. 14, 2019). Conflict diamonds are "rough diamonds used . . . to finance wars against . . . governments" around the world. *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *What are the Voluntary Principles?*, VOLUNTARY PRINCIPLES ON SECURITY & HUM. RTS., <http://www.voluntaryprinciples.org/what-are-the-voluntary-principles/> (last visited Mar. 14, 2019).

Governments in the United States and United Kingdom, companies in the energy and extractive sectors, and Non-Governmental Organizations that have an interest in corporate social responsibility and human rights, have engaged in conversation and developed these principles to ensure respect for human rights and the fundamental freedoms.⁶⁹ “Mindful of these goals, the participants agree to the importance of continuing this dialogue and keeping under review these principles to ensure their continuing relevance and efficacy.”⁷⁰

The UN Global Compact and its Communications on Progress is a voluntary initiative based on CEO commitments to implement universal sustainability principles and to take steps to support UN goals.⁷¹ Its corporate initiative is “[a] call to companies to align strategies and operations with universal principles on human rights, [labor], environment and anti-corruption, and take actions that advance societal goals.”⁷² The UN Global Compact believes “[b]y committing to sustainability, business[es] can take shared responsibility for achieving a better world.”⁷³

The Ethical Trading Initiative (ETI) works to:

influence business[es] to act responsibly and promote decent work. Taking a unique approach to business and human rights, [their] members are forward-thinking companies, trade unions, and NGOs. Together, [they] tackle the complex challenges of today’s global supply chains, improving the lives of workers worldwide.⁷⁴

Companies may voluntarily join ETI to agree to their ETI Base Code of labor practices.⁷⁵ These practices are based on the International Labor Organization standards.⁷⁶

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Our Mission*, U.N. GLOB. COMPACT, <https://www.unglobalcompact.org/what-is-gc/mission> (last visited Mar. 14, 2019).

⁷² *Who We Are*, U.N. GLOB. COMPACT, <https://www.unglobalcompact.org/what-is-gc> (last visited Mar. 14, 2019).

⁷³ *Our Mission*, U.N. GLOB. COMPACT, <https://www.unglobalcompact.org/what-is-gc/mission> (last visited Mar. 14, 2019).

⁷⁴ ETHICAL TRADING INITIATIVE, <https://www.ethicaltrade.org> (last visited Mar. 14, 2019).

⁷⁵ *What we do*, ETHICAL TRADING INITIATIVE, <https://www.ethicaltrade.org/about-eti/what-we-do> (last visited Mar. 14, 2019).

⁷⁶ *Id.* “The only tripartite U.N. agency, since 1919 the ILO brings together governments, employers and workers of 187 member States, to set

ETI “work[s] out the most effective steps companies can take to implement the Base Code in their supply chains.”⁷⁷ ETI has working groups that develop and try new ideas and approaches in sourcing countries.⁷⁸ Members take part in the working groups as well as roundtable discussions to establish good practices and ethical trade.⁷⁹

The Extractive Industries Transparency Initiative (EITI) is aimed at promoting disclosure of payments made to governments in order to access concessions.⁸⁰ “[EITI] is the global standard to promote the open and accountable management of oil, gas and mineral resources.”⁸¹ The standard requires disclosure of information down the industry value chain from extraction, to how money makes its way to the government, and how revenues benefit the public.⁸² EITI looks to “strengthen public and corporate governance, promote understanding of natural resource management, and provide the data to inform reforms for greater transparency and accountability in the extractives sector.”⁸³

Currently all of these regulations are voluntary, opt-in regulations.⁸⁴ A business is not held to these standards unless it voluntarily agrees to join the movement.⁸⁵ Therefore, if a company wanted to ignore these regulations and carry on violating human rights, either knowing or unknowing, then it has nothing holding its actions accountable.⁸⁶ Because of the occurrence of major human rights violations over the past decade, society is calling for businesses to be held to human rights standards.⁸⁷ Companies have historically voluntarily opted into the regulations mentioned above or relied on their corporate social responsibility (CSR)

[labor] standards, develop policies and devise [programs] promoting decent work for all women and men.” *About the ILO*, INT’L LABOUR ORG., <https://www.ilo.org/global/about-the-ilo/lang--en/index.htm> (last visited Mar. 14, 2019).

⁷⁷ ETHICAL TRADING INITIATIVE, *supra* note 75.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ EXTRACTIVE INDUS. TRANSPARENCY INITIATIVE, <https://eiti.org> (last visited Mar. 14, 2019).

⁸¹ *Who we are*, EXTRACTIVE INDUS. TRANSPARENCY INITIATIVE, <https://eiti.org/who-we-are> (last visited Mar. 14, 2019).

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Business & Human Rights – A Brief Introduction*, BUS. & HUMAN RTS RESOURCE CENTRE, <https://www.business-humanrights.org/en/business-human-rights-a-brief-introduction> (last visited Mar. 14, 2019).

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

programs, but CSRs are based on what the company voluntarily chooses to do; there is no standard to hold the company to human rights standards.⁸⁸ Human rights standards should be rigid; companies should not get to pick and choose which right they want to uphold.⁸⁹

As of 2011, the major principle in place is the United Nations Guiding Principles on Business and Human Rights (UNGPR), and the UN is currently working on a treaty to enforce Human Rights on Businesses called Zero Draft.⁹⁰ In 2014, the UN Human Rights Council adopted two resolutions: One established "an open-ended intergovernmental working group . . . with . . . [the] mandate . . . to elaborate an international legally binding instrument . . . [on] transnational corporations and other business enterprises [with respect to human rights]."⁹¹ The other requested that the existing UNGP prepare a report considering, among other things, the benefits and limitations of legally binding instruments.⁹²

II. UNITED NATIONS GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS

With the appointment of John Ruggie, the UN came up with the UNGP, which introduced three key elements to the framework: Protect, Respect, and Remedy.⁹³ These principles are a declaration by the UN. The downfall is that they are a suggestion, soft law,⁹⁴ and not binding, but they are basic principles that most States seem to agree on and are very persuasive in the global community.⁹⁵ The UNGP are grounded in recognition of

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights*, U.N. HUM. RTS. COUNS., <https://www.ohchr.org/en/hrbodies/hrc/wgtranscorp/pages/iwrgontnc.aspx> (last visited Mar. 14, 2019).

⁹² *Id.*

⁹³ UNGP, *supra* note 7.

⁹⁴ "Soft law refers to rules that are neither strictly binding in nature nor completely lacking legal significance. In the context of international law, soft law refers to guidelines, policy declarations or codes of conduct which set standards of conduct. However, they are not directly enforceable." *Soft Law Law and Legal Definition*, USLEGAL, <https://definitions.uslegal.com/s/soft-law> (last visited Mar. 14, 2019).

⁹⁵ UNGP, *supra* note 7, at 1.

(a) [s]tates' existing obligations to respect, protect and [fulfill] human rights and fundamental freedoms; (b) [t]he role of business enterprises as specialized organs of society performing specialized functions, required to comply with all applicable laws and to respect human rights; (c) [t]he need for rights and obligations to be matched to appropriate and effective remedies when breached.⁹⁶

The UNGP apply to all States and to all business enterprises, "regardless of their size, sector, location, ownership and structure."⁹⁷ The principles are non-obligatory principles and do not undermine any legal obligations that States may have made for businesses.⁹⁸ Additionally, they do not hold any entity to be subject under international law, regarding human rights.⁹⁹

The UNGP describes where the duty lies within each group when it comes to human rights.¹⁰⁰ First, it is the State's duty to protect human rights.¹⁰¹ Second, it is the businesses' responsibility to respect human rights in their organization.¹⁰² Third, States and businesses must ensure that there is access to a remedy for victims of corporate-related abuses.¹⁰³

The UNGP lays out foundational principles for each of the three categories: Protect (States), Respect (Businesses), and Remedy (Individuals).¹⁰⁴ These principles lay out the expectations of States, business, and individuals.¹⁰⁵ Moreover, the principles show the UNGP's intentions for society.¹⁰⁶ "States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication."¹⁰⁷ Additionally, States must set clear expectations for businesses in their jurisdictions to respect human rights throughout their operations.¹⁰⁸

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 6.

¹⁰¹ *Id.* at 3–12.

¹⁰² *Id.* at 13–26.

¹⁰³ *Id.* at 27–35.

¹⁰⁴ *Id.* at 13–26.

¹⁰⁵ *Id.* at 1.

¹⁰⁶ *See generally id.*

¹⁰⁷ *Id.* at 3.

¹⁰⁸ *Id.*

The UNGP says, in its foundational principles for businesses, that “[b]usiness enterprises should respect human rights. This means that businesses should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.”¹⁰⁹ Businesses have an obligation to respect the internationally recognized human rights expressed in the International Bill of Human Rights and in the International Labor Organization’s Declaration on Fundamental Principles and Rights at Work.¹¹⁰ Businesses must avoid adversely impacting human rights and address such impacts when they occur.¹¹¹ Businesses must “[s]eek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.”¹¹² This responsibility applies to all business enterprises across the globe.¹¹³ There are no exceptions.¹¹⁴ Finally, businesses must implement policies and processes that address human rights, and show how they handle these rights.¹¹⁵

To ensure that individuals have access to remedies for human rights violations, the UNGP states that “[a]s part of their duty to protect against business-related human rights abuse, States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy.”¹¹⁶

A majority of States acknowledged and accepted the UNGP. As a result, these States are working to implement these suggestions into their individual human rights rules.¹¹⁷ Since the release of the UNGP, many countries developed concrete proposals for implementing a binding treaty to enforce human rights law and improve access to justice for victims of human rights violations.¹¹⁸ The European Union established legal obligations for international corporations to prevent human rights violations along their supply chains.¹¹⁹ All in all, States made massive pushes to develop their human rights legislation because of the UNGP.¹²⁰

¹⁰⁹ *Id.* at 13.

¹¹⁰ *Id.*

¹¹¹ *Id.* at 14.

¹¹² *Id.*.

¹¹³ *Id.* at 15.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 15–16.

¹¹⁶ *Id.* at 27.

¹¹⁷ Ortiz & Van Schaik, *supra* note 12.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

The UNGP led to a plethora of standards, guidelines, and initiatives for companies to use. These include the Sustainable Development Goals,¹²¹ UN Working Group reports and other guidance,¹²² UNGP Reporting Framework,¹²³ OECD Guidelines for MNEs and NCPs,¹²⁴ Business and Human Rights Resource Center (BHRRC),¹²⁵

¹²¹ “The 2030 Agenda for Sustainable Development, adopted by all United Nations Member States in 2015, provides a shared blueprint for peace and prosperity for people and the planet, now and into the future. At its heart are the 17 Sustainable Development Goals (SDGs), which are an urgent call for action by all countries - developed and developing - in a global partnership. They recognize that ending poverty and other deprivations must go hand-in-hand with strategies that improve health and education, reduce inequality, and spur economic growth – all while tackling climate change and working to preserve our oceans and forests.” *Sustainable Development Goals*, U.N., <https://sustainabledevelopment.un.org/sdgs> (last viewed Mar. 14, 2019).

¹²² “The Working Group on the issue of human rights and transnational corporations and other business enterprises (also referred to as the Working Group on Business and Human Rights) was established by the Human Rights Council in 2011 The Working Group is composed of five independent experts, of balanced geographical representation. The Council renewed the Working Group’s mandate in 2014 . . . and 2017[.]” *Working Group on the issue of human rights and transnational corporations and other business enterprises*, U.N. HUM. RTS. COUNS, <https://www.ohchr.org/en/issues/business/pages/wghrandtransnationalcorporationsandotherbusiness.aspx> (last visited Mar. 14, 2019).

¹²³ “The UN Guiding Principles Reporting Framework is the world’s first comprehensive guidance for companies to report on how they respect human rights.” U.N. GUIDING PRINCIPLES REPORTING FRAMEWORK, <https://www.ungpreporting.org/> (last visited Mar. 14, 2019).

¹²⁴ *About OECD*, THE ORGANISATION FOR ECON. CO-OPERATION & DEV., <http://www.oecd.org/about/> (last visited Mar. 14, 2019). “The mission of the Organization for Economic Co-operation and Development (OECD) is to promote policies that will improve the economic and social well-being of people around the world.” *Organisation for Economic Co-operation and Development (OECD)*, DEVEX, <https://www.devex.com/organizations/organisation-for-economic-co-operation-and-development-oecd-29872> (last visited Sept. 18, 2019).

¹²⁵ BHRRC “work[s] with everyone to advance human rights in business and eradicate abuse.” *About us*, BUS. & HUM. RTS. RES. CTR., <https://www.business-humanrights.org/en/about-us> (last visited Mar. 14, 2019). They “amplify the voices of the vulnerable, and human rights advocates in civil society, media, companies, and governments.” *Id.* They “help communities and NGOs get companies to address human rights concerns, and provide companies an opportunity to present their response in full[,]” and they “track the human rights policy and performance of over 9000 companies in over 180 countries,

SA8000 Standard,¹²⁶ GRI Standards,¹²⁷ ISO 26000,¹²⁸ KnowTheChain,¹²⁹ and Corporate Human Rights Benchmark.¹³⁰ Though voluntary, these are all great organizations and standards working toward companies being responsible for their human rights violations and working to reduce the human rights violations across the globe. There is no legally binding aspect to hold business accountable for their human rights violations. Even with UNGP in place, the international community continues to call for legally binding legislation to hold businesses responsible for their human rights impact.

making information publicly available. [They] engage with companies and governments to urge them to share information publicly.” *Id.*

¹²⁶ “The SA8000® Standard is the leading social certification standard for factories and organizations across the globe. It was established by Social Accountability International in 1997 as a multi-stakeholder initiative. Over the years, the Standard has evolved into an overall framework that helps certified organizations demonstrate their dedication to the fair treatment of workers across industries and in any country.” *SA8000 Standard*, SOC. ACCOUNTABILITY INT’L, <http://www.sa-intl.org/index.cfm?fuseaction=Page.ViewPage&PageID=1689> (last visited Mar. 14, 2019).

¹²⁷ “The GRI Standards are the first global standards for sustainability reporting. They feature a modular, interrelated structure, and represent the global best practice for reporting on a range of economic, environmental and social impacts.” *GRI Standards*, GLOB. REPORTING INITIATIVE, <https://www.globalreporting.org/standards/> (last visited Mar. 14, 2019).

¹²⁸ “ISO 26000 provides guidance on how businesses and organizations can operate in a socially responsible way. This means acting in an ethical and transparent way that contributes to the health and welfare of society.” *ISO 26000 Social Responsibility*, INT’L ORG. FOR STANDARDIZATION, <https://www.iso.org/iso-26000-social-responsibility.html> (last visited Mar. 14, 2019).

¹²⁹ “KnowTheChain is a resource for companies and investors to understand and address forced labor risks within their global supply chains. Through benchmarking current corporate practices and providing practical resources that enable companies to operate more transparently and responsibly, KnowTheChain drives corporate action while also informing investor decisions. KnowTheChain is committed to helping companies make an impact in their efforts to address forced labor.” KNOWTHECHAIN, <https://knowthechain.org/> (last visited Mar. 14, 2019).

¹³⁰ “The Corporate Human Rights Benchmark is a unique collaboration led by investors and civil society organi[z]ations dedicated to creating the first open and public benchmark of corporate human rights performance.” *Who we are*, CORP. HUM. RTS. BENCHMARK, <https://www.corporatebenchmark.org/who-we-are> (last visited Mar. 14, 2019).

III. ZERO DRAFT

In June 2014, the UN Human Rights Council established, through a resolution, an open-ended intergovernmental working group on transnational corporations with the mandate “to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises.”¹³¹ This brought member States together to create an internationally binding treaty that would bring corporate accountability and access to justice for victims of the corporations’ human rights violations.¹³² The purpose of Zero Draft is:

(a) [t]o strengthen the respect, promotion, protection and fulfilment of human rights in the context of business activities of transnational character; (b) [t]o ensure an effective access to justice and remedy to victims of human rights violations in the context of business activities of transnational character, and to prevent the occurrence of such violations; (c) [t]o advance international cooperation with a view towards fulfilling States’ obligations under international human rights law[.]¹³³

The treaty applies to all human rights violations that come about through any transnational business activities, and it covers all international human rights and rights recognized under the State’s domestic law.¹³⁴

The proposed treaty would create obligations for States to take legislative and other measures to make businesses legally accountable and for victims to have access to remedies—not create or recognize under international law direct human rights obligations for businesses.¹³⁵ The proposed treaty follows the framework laid out in the UNGP; however, the treaty would add in legally binding obligations for States and

¹³¹ U.N. HUMAN RIGHTS COUNSEL, *supra* note 91.

¹³² ENNHRI Statement on the ‘Zero Draft’ of the proposed business and human rights treaty, EUROPEAN NETWORK OF INT’L HUM. RTS. INST. (Oct. 15, 2018), <http://www.ennhri.org/ENNHRI-Statement-on-the-Zero-Draft-of-the-proposed-business-and-human-Rights>.

¹³³ *Zero Draft*, *supra* note 9, at 2.

¹³⁴ *Id.* at 3.

¹³⁵ 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/>.

transnational corporations.¹³⁶ Zero Draft defines business activities of a transnational character as “any for-profit economic activity, including but not limited to productive or commercial activity, undertaken by a natural or legal person, including activities undertaken by electronic means, that take place or involve actions, persons or impact in two or more national jurisdictions.”¹³⁷

Zero Draft gives the rights to the victims.¹³⁸ The treaty defines victims as “persons who individually or collectively alleged to have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their human rights, including environmental rights, through acts or omissions in the context of business activities of a transnational character.”¹³⁹ The term “victim,” where appropriate, may also include “the immediate family or dependents of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.”¹⁴⁰ Article 8 of the draft states the rights of the victims as the right to “fair, effective and prompt access to justice and remedies” per international law, including (a) restitution, compensation, rehabilitation, non-repetition as well as (b) environmental remediation and ecological restoration.¹⁴¹ Zero Draft also states in Article 8 that States must:

[g]uarantee the right of victims to present claims to their Courts . . . [; i]nvestigate human rights violations and take action against perpetrators . . . [; p]rovide legal assistance to victims . . . [; e]stablish an International Fund for victims . . . [; p]rovide effective mechanisms for enforcement of remedies . . . [; and p]rotect victims, their representatives, families and witnesses from unlawful interference with their privacy and from intimidation, and retaliation.¹⁴²

¹³⁶ *Reflections on the Zero Draft*, BUS. & HUM. RTS. RES. CTR., <https://www.business-humanrights.org/en/about-us/blog/debate-the-treaty/reflections-on-the-zero-draft> (last visited Mar. 14, 2019).

¹³⁷ *Zero Draft*, *supra* note 9, at 3.

¹³⁸ “*Zero Draft*” *Summary*, BUS. & HUM. RTS. RES. CTR., <https://www.business-humanrights.org/en/zero-draft-summary> (last visited Mar. 14, 2019) [hereinafter “*Zero Draft*” *Summary*].

¹³⁹ *Zero Draft*, *supra* note 9, at 3.

¹⁴⁰ *Id.*

¹⁴¹ “*Zero Draft*” *Summary*, *supra* note 138; *Zero Draft*, *supra* note 9, at 4.

¹⁴² “*Zero Draft*” *Summary*, *supra* note 138; *Zero Draft*, *supra* note 9, at 4.

The proposed treaty also stipulates that through domestic law, States must hold companies criminally, civilly, and administratively liable for human rights violations.¹⁴³ The legal liability is subject to criminal and non-criminal sanctions, including monetary.¹⁴⁴ The liable party must “provide reparation to the victim or compensate the State if the State has already provided reparation to the victim.”¹⁴⁵ “States are required to incorporate in their domestic law provisions for universal jurisdiction over human rights violations that amount to crimes.”¹⁴⁶

With this Zero Draft, the States have to ensure “in their domestic legislation that all persons with business activities of transnational character” start due diligence requirements throughout their activities.¹⁴⁷ If companies do not comply with due diligence, the companies will be liable and issued a fine.¹⁴⁸ States may exempt small and medium-sized businesses from the due diligence obligation.¹⁴⁹

To ensure the treaty is carried out, the proposed draft states that “States must ‘cooperate in good faith to enable the implementation of commitments’ under the Draft Convention and the fulfillment [of] its purposes and must ‘afford one another the widest measure of mutual legal assistance’ in initiating and carrying out investigations, prosecutions and judicial proceedings to this end.”¹⁵⁰ There will be a committee of experts created to monitor and promote the implementation of Zero Draft, and States must take “legislative and administrative measures to ensure the effective implementation of the Treaty and accord special attention to business activities in conflict-affected areas and to groups ‘facing heightened risks of violations of human rights within the context of business activities.’”¹⁵¹

143 “Zero Draft” Summary, *supra* note 138; *Zero Draft*, *supra* note 9, at 6–7.

144 “Zero Draft” Summary, *supra* note 138; *Zero Draft*, *supra* note 9, at 6–7.

145 “Zero Draft” Summary, *supra* note 138; *Zero Draft*, *supra* note 9, at 6.

146 “Zero Draft” Summary, *supra* note 138.

147 “Zero Draft” Summary, *supra* note 138; *Zero Draft*, *supra* note 9 at 5–6.

148 “Zero Draft” Summary, *supra* note 138; *Zero Draft*, *supra* note 9 at 5–6.

149 “Zero Draft” Summary, *supra* note 138; *Zero Draft*, *supra* note 9 at 5–6.

150 “Zero Draft” Summary, *supra* note 138.

151 *Id.*

With the treaty still in discussion and draft mode, there are multiple gaps and questions about the treaty itself. With specific obligations, businesses cannot hide their failure to act behind the missing legislation of the States.¹⁵² “The way [the treaty] is currently framed displaces or distorts corporations’ responsibility for human rights abuses. It also addresses the reality of States unwilling to do something about such abuses but does not address those States unable to—those, for example, with weak or non-functioning legal systems.”¹⁵³ The treaty also ignores the power that corporations already have in international law.¹⁵⁴ The disproportionate rights that transnational corporations have must be countered with clear and concise human rights obligations that are equal with the influence those corporations have on the world.¹⁵⁵

The treaty also only deals with international companies that operate within two or more countries.¹⁵⁶ This leaves a massive gap where local State businesses are concerned. Additionally, Zero Draft does not deal sufficiently with State commercial activity.¹⁵⁷ Another limitation is that treaties need a large number of States to enter into it to make it a binding force and that means long negotiations and a delayed process of any effect.¹⁵⁸ If this treaty is to go into effect, the UN Human Rights Council will have to fill these gaps and answer some questions. Where the treaty now sits, multiple States fully support the treaty, as they are desperate to have any form of binding legislation on these corporations; however, some States also oppose the treaty because they see it as incomplete and unhelpful the way it is laid out now.¹⁵⁹

IV. MAJOR OPPOSITION AND SUPPORT FOR ZERO DRAFT

In drafting Zero Draft, the original Resolution was adopted by a vote of twenty to fourteen, and there were thirteen abstentions.¹⁶⁰ This vote clearly showed division among the voters.¹⁶¹ This division was based on

¹⁵² Holt, *supra* note 51.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Zero Draft*, *supra* note 9.

¹⁵⁷ Holt, *supra* note 51.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ Makbule Sahan & Ruwan Subasinghe, *Let’s seize the opportunity to ensure a strong, international binding treaty on business and human rights*, EQUAL TIMES (Oct. 15, 2018), <https://www.equaltimes.org/let-s-seize-the-opportunity-to?lang=en#.XDknq89KhQK>.

¹⁶¹ *Id.*

ideology and economic power, and it showed what was to come next in the drafting.¹⁶² Over the last three years of this process the United States, along with others, rejected the draft entirely, while others, like the European Union, kept tabs on the proceedings.¹⁶³ The business lobbying groups also did their best to frustrate the process, for they see the binding treaty as more regulation on them with no benefit.¹⁶⁴

A. *Why Are Countries Supporting and Rejecting Zero Draft?*

There is a very distinct line between States that support the Zero Draft and States that oppose it. States that fully support the treaty are the countries with the most Human Rights violations occurring within their borders because of transnational corporations.¹⁶⁵ They are the States whose citizens' Human Rights are violated on a daily basis. These countries include China, Congo, Russia, India, and many more.¹⁶⁶ On the other hand, the States that oppose the treaty are the countries with the majority of the transnational corporations domiciled within their borders.¹⁶⁷ The treaty would have the biggest impact and obligation on these States as they would have to implement and monitor the majority of the transnational corporate activity.¹⁶⁸ From its face, the treaty seems like it would hinder international trade in and out of these countries the most. The States that oppose the treaty include the European Union, the United States, and the United Kingdom.¹⁶⁹

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ U.N. Human Rights Council, *Elaboration of an International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights*, U.N. Doc. A/HRC/26/L.22/Rev.1 (June 24, 2014) [hereinafter *Elaboration*].

¹⁶⁷ Domiciled refers to “[t]he permanent residence of a person[, corporation, or entity]; a place to which, even if he or she were temporary absent, they intend to return.” *Domicile Definition*, DUHAIME'S L. DICTIONARY <http://www.duhaime.org/LegalDictionary/D/Domicile.aspx> (last visited Mar. 14, 2019).

¹⁶⁸ Sahan, *supra* note 160.

¹⁶⁹ *Elaboration, supra* note 166.

1. *Many Countries Have Human Rights Issues*

Preventative measures and laws around human rights violations are very high priority in civil society and have significantly moved up on States' agendas as well.¹⁷⁰ For the countries that have agreed to the Zero Draft at this early stage, the benefit of having any kind of legislation over businesses and human rights greatly outweighs the downfalls and gaps that the treaty may have.¹⁷¹ Many of the countries that have signed on to the treaty are the same States that have had some of the biggest human rights violations happen within their political borders in the last decade.¹⁷² Right now, China has the Apple–Foxconn crisis.¹⁷³ Apple cleaned up these violations, but, with no treaty or legislation over transnational corporations, it is hard for any victim to bring any suit against Apple or Foxconn.¹⁷⁴ Currently, the Congo is in one of the biggest resource wars in history with companies trying to take the vast biological and mineral resources from the land.¹⁷⁵ With most of the companies being transnational, the victims in the Congo have little remedy within the country itself.¹⁷⁶ These are just a few of the many major human rights violations that have occurred in the past decade. It is no wonder that these countries are in favor of the Zero Draft, as they see a major benefit in bringing an action, within their own jurisdiction, against these transnational corporations. Whereas without Zero Draft, the companies are hard to touch as the States and citizens lack the jurisdiction to bring an action, and international judgments are hard to enforce on the companies.¹⁷⁷

¹⁷⁰ Antonella Angelini, *When it Comes to Human Rights, Zero is Better than Nothing*, FAIR OBSERVER (Oct. 1, 2018), <https://www.fairobserver.com/politics/un-human-rights-business-corporate-responsibility-treaty-news-01900/>.

¹⁷¹ *Id.*

¹⁷² *Elaboration*, *supra* note 166.

¹⁷³ Merchant, *supra* note 21.

¹⁷⁴ *Id.*

¹⁷⁵ Subir Ghosh, *Project to reduce land conflict around Virunga National Park*, DIGITAL J. (Sept. 16, 2010), <http://www.digitaljournal.com/article/297633>; Mérode, *supra* note 32.

¹⁷⁶ Ghosh, *supra* note 175; Mérode, *supra* note 32.

¹⁷⁷ Ghosh, *supra* note 175; Mérode, *supra* note 32.

2. *Many Countries Have Transnational Corporations**Domiciled within Them*

The European Union (EU) acts as a block in the UN.¹⁷⁸ The EU votes and makes the decision for the totality of the States that are a part of it.¹⁷⁹ That means that without the EU vote, the treaty would lose the vote of twenty-eight States, including the United Kingdom.¹⁸⁰ The EU has been uncooperative in the steps toward creating Zero Draft.¹⁸¹ The EU did not show up to the negotiations in 2015 and only showed up to negotiations in 2016 and 2017 because of pressure from civil society organizations.¹⁸² During recent negotiations in 2018, the EU dropped its initial reluctance and became an observer in the UN negotiations.¹⁸³ The EU called for a reduction in the working group's mandate; this allows for a change in scope of the treaty itself.¹⁸⁴ The EU laid out two main requirements to gain its support in the international treaty: "1) ensuring that the scope of the discussion is not limited to [transnational corporations] . . . , and 2) the treaty should be firmly rooted in the UNGPs, making sure that their implementation is not undermined."¹⁸⁵ The EU backs the UNGP, stating that it has "allowed for tangible progress on better protecting human rights in relation with business activities and they provide an efficient framework, which needs to be implemented."¹⁸⁶

The most controversial point addressed by the EU is that the treaty should not be limited to transnational corporations. The EU states that the

¹⁷⁸ Ortiz, *supra* note 12.

¹⁷⁹ *Id.*

¹⁸⁰ *Countries in the EU and EEA*, GOV.UK, <https://www.gov.uk/eu-eea> (last visited Mar. 14, 2019). The EU is made up of twenty-eight states. These states are Austria, Belgium, Bulgaria, Croatia, Republic of Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden and the United Kingdom. *Id.*

¹⁸¹ Ortiz, *supra* note 12.

¹⁸² *Id.*

¹⁸³ Ionel Zamfir, *Towards a binding international treaty on business and human rights*, EUROPEAN PARLIAMENT RES. SERVICE at 10 (Apr. 2018), [http://www.europarl.europa.eu/RegData/etudes/BRIE/2018/620229/EPRS_BRI\(2018\)620229_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2018/620229/EPRS_BRI(2018)620229_EN.pdf).

¹⁸⁴ Ortiz, *supra* note 12.

¹⁸⁵ Zamfir, *supra* note 183, at 10.

¹⁸⁶ *Id.*

treaty should also incorporate all business enterprises, including local companies in each State.¹⁸⁷ The EU argues that “the treaty would otherwise be incoherent, as many human rights violations are committed by purely local companies.”¹⁸⁸

The United States (US) also opposes the treaty Zero Draft proposes.¹⁸⁹ The US’s stance is all States should be given time to implement the UNGP as intended prior to implementing and negotiating the treaty.¹⁹⁰ The US states that the UNGP has only been around for a few years, and the UN needs to give the States more time to assess the impact and put the principles into action.¹⁹¹ Additionally, with a binding treaty, many States, including the US, say there is a huge complexity to a treaty on the subject of business and human rights.¹⁹² This is why the US prefers UNGP over a binding treaty.¹⁹³ The amount of subject area the treaty would have to cover would be too vast because it would have to include “all human rights, all rights holders, all business – large and small, transnational and national.”¹⁹⁴ Trying to cover too much would prevent the treaty from having any real impact.

Countries that oppose the treaty are worried that the implementation of this treaty causes companies to turn away from high-risk countries, they would not enter markets that are high risk, and companies would reduce or postpone investments in important projects to achieve the sustainable development goals that are laid out for companies in the treaty.¹⁹⁵ To reach these goals, businesses would have to add in their own regulatory groups and policies in their cross-border supply chain.¹⁹⁶ This addition would exceed companies’ power and further “undermine[s] the role of the State, given that some of its traditional functions and

¹⁸⁷ *Id.* at 7.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 5.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *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*, UN Treaty Process on Business and Human Rights at 5, BUS. & HUM. RTS. RES. CENTRE (Oct. 2018), <https://www.businesshumanrights.org/sites/default/files/documents/Joint%20Business%20Response%20%20Zero%20Draft%20Treaty%20and%20Draft%20Optional%20Protocol%20%20October%202018.pdf> [hereinafter *Business Response*].

¹⁹⁶ *Id.*

powers[—]such as carrying out inspections and awarding penalties of business partners[—]would need to be transferred to global business.”¹⁹⁷ These outcomes would greatly undermine the development and partnership plan, for which the sustainable development goals hoped.¹⁹⁸

B. What Do Businesses Think?

The Global Voice of Business, The World Business Organization, Business at OECD, and Business Europe released a response to the “Zero Draft Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises.”¹⁹⁹ Prior to stating their opposition to the Zero Draft, the organizations released a statement saying, “The business community is firmly committed to respecting human rights across the world in line with the UN Guiding Principles on Business and Human Rights (UNGP).”²⁰⁰ They state that they carry out many activities to positively contribute to the sustainable development goals at the local, national, regional, and international levels.²⁰¹ In their response to the treaty, they state that the “business community does not support the Zero Draft Treaty.”²⁰² Their stance is that the treaty moves the business and human rights agenda backward because it undermines the UNGP and further frustrates States by pointing out their failure to meet expectations.²⁰³ “[T]he problem is not the governance gap at the international level, but the lack of capacity at the national level to effectively implement and enforce laws.”²⁰⁴ Human rights violations of inappropriate working conditions and damaging impacts on the environment are because of “a high prevalence of informality, ineffective governmental inspection, a lack of governance frameworks, high levels of corruption, and ineffective judiciary systems’ at [the] national level.”²⁰⁵ Global supply chains usually have a positive impact on companies’ human rights working conditions by adding higher regulations and standards to the companies.²⁰⁶

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 2.

²⁰¹ *Id.*

²⁰² *Id.* at 5.

²⁰³ *Id.*

²⁰⁴ Zamfir, *supra* note 183, at 10.

²⁰⁵ *Id.*

²⁰⁶ *Id.*

Other business organizations: World Business Council for Sustainable Development, International Organization of Employers, International Chamber of Commerce, and the Business and Industry Advisory Committee, made statements in favor of the treaty as long as certain changes are made before it is binding.²⁰⁷ The organizations recommend that the scope of the treaty incorporates all business organizations and not just transnational corporations.²⁰⁸ They also propose that the treaty should build on the UNGP framework and promote the “protect, respect, and remedy” structure in the treaty.²⁰⁹ The business groups argue that this framework establishes a distinct division between the different groups affected by the treaty.²¹⁰

Additionally, the business community is wary of the Zero Draft Treaty release process.²¹¹ The community wishes to contribute to the discussion over business and human rights.²¹² “[The community] is concerned that no real effort has been made to ensure a robust, transparent[,] and open process that fully draws on the expertise and experience of all stakeholders.”²¹³ This release process does not focus on the overreaching value of significant private sector engagement and is contrary to the way the UNGPs were developed.²¹⁴ The business community would like to engage in more dialogue with the treaty and tackle human rights issues.²¹⁵

V. ACTION PLAN—WHAT NEEDS TO BE DONE?

Prior to this becoming a binding treaty, the major players must agree on many steps that need to be taken to address major gaps in the Zero Draft. One of the major gaps that needs to be closed and addressed is that the Zero Draft only relates to transnational companies, and completely ignores local businesses.²¹⁶ Analysts argue that the main reason the treaty only applies to transnational companies is because the treaty is implemented to fill the hole in international law on “determining the liability of parent or controlling companies beyond the jurisdiction of the

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Business Response*, *supra* note 195, at 2.

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Zamfir*, *supra* note 183, at 10.

State where the violations occurred.”²¹⁷ But in actual practice, the transnational companies benefit the most from the gap in the treaty.²¹⁸ A South Center policy advisor stated that “limiting the scope of the proposed treaty to [transnational companies] and business enterprises with transnational activities would not be discriminatory towards these in relation to domestic companies, but would put them on the same footing.”²¹⁹ Transnational companies are often able to avoid responsibility because their structure spans across multiple States.²²⁰

Another major downfall of the treaty is that it is trying to cover too many human rights, and therefore has diluted the effectiveness of the treaty itself. The Zero Draft includes many rights, including social and economic rights, and many of these rights are hard to enforce in a court of law.²²¹ The Zero Draft proposes a “broad approach covering all internationally [recognized] human rights, as reflected in all human rights treaties, as well as in international conventions on [labor] rights, environment[,] and corruption.”²²² However, according to many nations and groups that oppose the treaty, this could make the treaty so abstract that it has no impact on business and human rights, and is ineffective.²²³

The final major gap in the treaty is the responsibilities that are imposed on companies and States in the Zero Draft. The draft proposes that the treaty include States and international organizations with responsibility, as well as transnational companies, and additional natural persons.²²⁴

This unprecedented shift in the international law approach would hold corporations directly liable under the treaty for all of their human rights abuses.²²⁵ This would be a major shift from the current international law stance where the law holds States responsible for human rights abuses corporations commit in the State’s territory.²²⁶ This is a major reason many countries oppose the Zero Draft as it stands today, and why attempts to bind human rights on businesses have failed in the past.²²⁷ States would

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.* at 7.

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.*

²²³ *Id.*

²²⁴ *Id.* at 7–8.

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *Id.*

have the chance to ignore their responsibility to protect human rights.²²⁸ Additionally, requiring businesses to implement extravagant human rights policies pose huge economic implications on the companies.²²⁹ Danny Bradlow, a professor in international law, stated:

it would be imprudent to establish binding rules on how businesses should manage human rights issues before we fully understand how to draft such rules without causing unintended consequences... It [human rights law] has not yet worked out how to deal with human rights situations that require making trade-offs, setting priorities, and managing risk. These are standard in business.²³⁰

For the Zero Draft to work, the key elements needed to make the treaty effective would be “obligations for transnational corporations to respect human rights, corporate liability in case of violations, transparency in supply chains to pierce the corporate veil . . . , and an international human rights court that affected people can turn to if their national courts fail to provide access to justice.”²³¹ The Zero Draft must establish that human rights are the primary focus over trade agreements.²³² It must provide a way to obtain judgments and damages for the affected communities and individuals, and protect the defenders of human rights from future abuse.²³³ This means regulations need to be in the treaty that prevent international financial institutions from freely funding destructive projects or supporting rules and regulations that undermine human rights.²³⁴ There also needs to be a limit on the use of *forum non conveniens*.²³⁵ Additionally, there needs to be an alignment of the UNGP and the treaty to reduce operational and definitional ambiguities.²³⁶ Furthermore, there is a need for an international enforcement mechanism beyond the UNGP and Zero Draft set.²³⁷

With the UNGP recently released, it is hard to say what the Zero Draft additionally needs to become more effective than the guiding

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ Ortiz & van Schaik, *supra* note 12.

²³² *Id.*

²³³ *Id.*

²³⁴ Ortiz & van Schaik, *supra* note 12.

²³⁵ Sahan & Subasinghe, *supra* note 160. *Forum non conveniens* means: “A court’s discretionary power to decline to exercise its jurisdiction where another court may more conveniently hear a case.” Cornell Law School, *Forum Non Conveniens*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/forum_non_conveniens (last visited Sept. 10, 2019).

²³⁶ Sahan & Subasinghe, *supra* note 160.

²³⁷ *Id.*

principles. Prior to creating binding regulation, it is in the UN's best interest to let the effects of the UNGP play out to see what regulations work in certain States and what regulations do not. "The UN Working Group strongly encourages all States to develop, enact and update a national action plan on business and human rights as part of the State responsibility to disseminate and implement the Guiding Principles on Business and Human Rights."²³⁸ As of right now, twenty-two States published a national action plan on business and human rights, and thirty-one have committed to do so or taken initial steps to create one.²³⁹ It is hard to say what national action plans will work the best; only time will tell. If the Zero Draft is rushed to be a binding treaty, it could cause disastrous repercussions.

There is a challenge to relying on domestic law in the meantime though, and therefore, an international treaty is needed to make the most impact over businesses and human rights.²⁴⁰ With domestic law, the State ends up having a weak rule of law or no appropriate legislation.²⁴¹ The governing power of States usually extends no farther than the political borders of the State.²⁴² The corporate structure in the domestic sphere could prevent individuals from bringing liability against a State because of the liability shield that is in place.²⁴³ Because of *forum non conveniens* and forum shopping, international companies can look for the State domestic law that works best in their favor, and individuals may not have as much support in the forum they can bring the claim.²⁴⁴ Domestic law also may have a lack of legislation in the area that victims would need to bring the claim.²⁴⁵ Additionally, domestic law may provide foreign sovereign immunity, make it hard to identify the appropriate defendant,

²³⁸ *National Action Plans on Business and Human Rights*, OFFICE OF THE U.N. HIGH COMM'R FOR HUM. RTS., <https://www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx> (last visited Sept. 10, 2019).

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ Marjun Parcasio, *Working up from Zero: Initial Negotiations on the "Zero Draft" Treaty on Business and Human Rights*, JD SUPRA (Oct. 31, 2018), <https://www.jdsupra.com/legalnews/working-up-from-zero-initial-15072/>.

²⁴⁴ *Id.*; Zero Draft, *supra* note 9, at 4.

²⁴⁵ Zero Draft, *supra* note 9. For example, if an individual were tortured and the domestic law did not have legislation on torture, would that individual be satisfied by bringing a claim of assault or battery?

restrict service abroad on foreign defendants, make it difficult to gather evidence, and restrict the enforcement of foreign judgments.²⁴⁶

Based on the horrific history that businesses have with human rights violations there needs to be some form of binding regulation in place to hold businesses accountable for their actions. However, with so many gaps in the Zero Draft, and many major players in the UN opposing the draft at this point there needs to be a serious revamp of the proposed treaty. The intergovernmental working group on transnational corporations needs to rethink the legislation and take into consideration the feedback the EU and US have put forward. This entails “ensuring that the scope of the discussion is not limited to” transnational corporations and make sure that the treaty is based on the principles of the UNGP and does not undermine its efforts.²⁴⁷

VI. IMPACT AND SIGNIFICANCE

When the treaty is signed, a committee will be established to aid in implementing and promoting the treaty. Additionally, “States must take legislative and administrative measures to ensure the effective implementation of the Treaty[,]” and to closely monitor business activities in areas “facing heightened risks of violations of human rights within the context of business activities, such as women, children, persons with disabilities, indigenous peoples, migrants, refugees and internal displaced persons[.]” There would also be no statute of limitations on any human rights violations, which opens up companies’ liability to all violations they may commit.²⁴⁸

If the Zero Draft Treaty went into effect as it stands today there would be a major shift in corporate, State, and individual responsibility, but there would be a lot of questions as well. The draft would require participating governments to ratify laws aimed at guaranteeing businesses respect and uphold human rights.²⁴⁹ The treaty would hold companies liable civilly or criminally for human rights violations, and it would make a legal requirement for companies to perform due diligence to identify potential human rights impacts.²⁵⁰ Article 10 of the Zero Draft would have the biggest impact on corporations nationally as it states companies are liable for harm caused by business operations to the extent in which they

²⁴⁶ Zero Draft, *supra* note 9.

²⁴⁷ Zamfir, *supra* note 183, at 5, 10.

²⁴⁸ “Zero Draft” Summary, *supra* note 138.

²⁴⁹ Catherine Gilfedder & Esther McDermott, *Time for construction to step up to its human rights responsibilities?*, JD SUPRA (Jan. 8, 2019), <https://www.jdsupra.com/legalnews/time-for-construction-to-step-up-to-its-38054/>.

²⁵⁰ *Id.*

have “control over the operations[,]” “exhibits a sufficiently close relation with its subsidiary or entity in its supply chain and where there is a strong and direct connection between its conduct and the wrong suffered by the victim[,]” and to the extent in which risks “have been foreseen or should have been foreseen of human rights violations within its chain of economic activity.”²⁵¹ The impact of this would not only hold companies liable for violations committed by their subsidiaries but also “any other entity in their contractual or supply chain where there is a ‘strong and direct connection’ between their conduct and the violation.”²⁵²

This additional liability placed on transnational corporations opens doctrinal difficulties and inquiry into piercing the corporate veil.²⁵³ It also brings up the question of what does “control” over operations mean, and what is enough to make a “strong and direct connection” between the head company and the harm.²⁵⁴ From initial reactions, it seems that this legislation has a huge impact on trade, and how companies work internationally. Without this treaty going into effect, it is hard to know for sure, but as is, this treaty would significantly impact companies’ operations in and out of their domiciled country.

Adding human rights due diligence to corporations is not a new concept, but the articles in the Zero Draft would bring about a significant change.²⁵⁵ To begin with, the Zero Draft would demand States to require human rights due diligence. “Businesses would be obliged to monitor their human rights impacts and those of related entities on an ongoing basis, report on environmental and human rights matters, consult with stakeholders and carry out impact assessments, integrating the findings into their functions.”²⁵⁶ Next, the treaty would require a result from companies in stopping human rights violations.²⁵⁷ This is a big change from the “seeking to prevent” language that is in use at most companies today.²⁵⁸ “Third, businesses would be required to reflect due diligence requirements in all relevant contractual relationships. If implemented, this should result in every international business contract requiring both parties

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ Angelini, *supra* note 170.

²⁵⁴ *Id.*

²⁵⁵ Gilfedder, *supra* note 249.

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ *Id.*

to prevent human rights violations, meaning any violation could potentially result in a series of contractual claims.”²⁵⁹

This treaty would add a major burden on companies to align their business operations to follow the treaty’s road map. It would also require countries, within which major companies are domiciled, to regulate and monitor companies’ activities and impact on the global stage. But based on recent history there needs to be a change. There needs to be a shift in how companies do business in the world and the huge footprint that they leave in countries.

If this treaty is not passed, there is still the UNGP in place. Countries and businesses are still working on implementing procedures based on these principles. Just from the short time that the principles have been out, there have been major additions to the legislation on human rights. Acts like the Alien Torts Claims Act,²⁶⁰ UK Modern Slavery Act,²⁶¹ UK Companies Act,²⁶² UK Data Protection Act,²⁶³ UK Equality Act,²⁶⁴

²⁵⁹ *Id.*

²⁶⁰ Global Policy Forum, *Alien Tort Claim*, GLOBAL POL’Y F., <https://www.globalpolicy.org/international-justice/alien-tort-claims-act-6-30.html> (last viewed Mar. 14, 2019). “The Alien Tort Claims Act (ATCA) of 1789 grants jurisdiction to US Federal Courts over ‘any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.’” *Id.*

²⁶¹ *Modern Slavery Act 2015* (Mar. 26, 2015), <http://www.legislation.gov.uk/ukpga/2015/30/introduction/enacted>. “An Act to make provision about slavery, servitude and forced or compulsory [labor] and about human trafficking, including provision for the protection of victims; to make provision for an Independent Anti-slavery Commissioner; and for connected purposes.” *Id.*

²⁶² *Companies Act 2006* (Nov. 8, 2006), available at http://www.legislation.gov.uk/ukpga/2006/46/pdfs/ukpga_20060046_en.pdf. “An Act to reform company law and restate the greater part of the enactments relating to companies; to make other provision relating to companies and other forms of business [organization]; to make provision about directors’ disqualification, business names, auditors and actuaries; to amend Part 9 of the Enterprise Act 2002; and for connected purposes.” *Id.* at 61.

²⁶³ Data Protection, *Data Protection Act*, GOV.UK, <https://www.gov.uk/data-protection> (last viewed Mar. 14, 2019). “The Data Protection Act 2018 controls how your personal information is used by [organizations], businesses or the government.” *Id.*

²⁶⁴ *Equality Act 2010* (Apr. 8, 2010), <https://www.legislation.gov.uk/ukpga/2010/15/introduction>. “An Act to make provision to require Ministers of the Crown and others when making strategic decisions about the exercise of their functions to have regard to the desirability of reducing socio-economic inequalities; to reform and [harmonize] equality law and restate the greater part of the enactments relating to discrimination and harassment related to certain personal characteristics; to enable certain employers to be required to publish

France Duty of Vigilance Law,²⁶⁵ EU Non-Financial Reporting Directive,²⁶⁶ and California Transparency in Supply Chain Act.²⁶⁷ All of these acts have been enacted or altered in an effort to follow the UNGP. If Zero Draft is not signed or if it is not signed for years, there are still huge pushes in the right direction to hold businesses accountable for their human rights violations. Additionally, over time States will learn what works and what does not when it comes to legislation over human rights violations and can make the Zero Draft better than it is from experience with these acts.

CONCLUSION

While there are good arguments on both sides over where to go with regulations on business and human rights, there is a need to have laws

information about the differences in pay between male and female employees; to prohibit [victimization] in certain circumstances; to require the exercise of certain functions to be with regard to the need to eliminate discrimination and other prohibited conduct; to enable duties to be imposed in relation to the exercise of public procurement functions; to increase equality of opportunity; to amend the law relating to rights and responsibilities in family relationships; and for connected purposes.” *Id.*

²⁶⁵ Sarah A. Altschuller & Amy K. Lehr, *The French Duty of Vigilance Law: What You Need to Know*, CORP. SOC. RESP. AND THE L. (Aug. 3, 2017), available at <https://www.csrandthelaw.com/2017/08/03/the-french-duty-of-vigilance-law-what-you-need-to-know/>. “[T]he French National Assembly adopted a law establishing a ‘duty of vigilance’ for large multinational firms carrying out all or part of their activity in France.” *Id.*

²⁶⁶ European Commission, *Non-financial Reporting*, https://ec.europa.eu/info/business-economy-euro/company-reporting-and-auditing/company-reporting/non-financial-reporting_en (last viewed Mar. 14, 2019). “EU law requires large companies to disclose certain information on the way they operate and manage social and environmental challenges.” *Id.*

²⁶⁷ State of California Department of Justice, *The California Transparency in Supply Chains Act*, <https://oag.ca.gov/SB657> (last viewed Mar. 14, 2019). “In passing the Transparency in Supply Chains Act, the Legislature declared the intent of the State of California to ensure that large retailers and manufacturers provide consumers with information regarding their efforts to eradicate slavery and human trafficking from their supply chains, educate consumers on how to purchase goods produced by companies that responsibly manage their supply chains, and, thereby, improve the lives of victims of slavery and human trafficking.” *Id.*

in place to regulate the violations and bring a remedy to the individuals harmed. As stated by Maysa Zorob of the Business and Human Rights Resource Center, “[T]he Zero Draft offers a critical opportunity to move beyond a voluntary framework and establish an international framework for legal liability for companies who fail to live up to their human rights responsibilities.”²⁶⁸ The problem with Zero Draft as it stands now is there are major gaps and holes that companies can fly under the radar, and it is trying to cover too much, causing it to not have as much of an impact. As Arnold Kwesiga of the Initiative for Social and Economic Rights said, “We need to establish a victim-centered system with enough clarity, and until then affected communities . . . throughout the world will continue the struggle to access justice.”²⁶⁹ If the Zero Draft is to be effective, the UN needs to get States with major businesses domiciled within them to agree to the treaty, and that means working with the States to create and draft the treaty.

²⁶⁸ *Reflections on Zero Draft*, *supra* note 136.

²⁶⁹ *Id.*

