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BETWEEN APOLOGY AND UTOPIA: THE INDETERMINACIES OF THE ZERO DRAFT TREATY ON BUSINESS AND HUMAN RIGHTS

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ABSTRACT

This paper analyses the recently released zero draft of the binding treaty on business and human rights focusing on the core questions of rights and duties under the treaty. The treaty would compel state parties to adopt extraterritorial jurisdiction for 'harm caused by human rights violations' in the context of 'business activities of a transnational character,' along with a range of other and supplementary obligations. While the treaty is inclusive and adopts many progressive concepts, there is a chronic unwillingness to address the hard questions, obfuscating between apology for current practices and utopian idealism beyond that to which states will commit. This is most evident in the failure to provide adequate definitions, content or interpretative tools to terms such as 'human rights violation' and 'business activities of a transnational character.' This gap may both do a disservice to rights-holders and disincentivize state uptake. While filling in these gaps will be controversial, this paper argues that addressing the hard cases must be seen as a core responsibility of the drafters if an ambitious treaty is to be realized.

I. INTRODUCTION

The open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights (OEIGWG) released the Zero Draft of the binding treaty on business and human rights (BHR), officially the Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises, in July 2018.[1] The Zero Draft has since been discussed at the

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[1] *See* Human Rights Council, Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises (Zero Draft), *proposed on* July 16, 2018, *available at* https://www.ohchr.org/documents/hrbodies/hrcouncil/wgtranscorp/session3/draftlbi.pdf [hereinafter Zero Draft]. For reasons of brevity I adopt various short forms of the terminology herein. Unless otherwise stated: the zero draft treaty is referred to as the "treaty," and referred to as "Zero Draft" in the footnotes. The open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to

fourth meeting of the OEIGWG in November 2018.[2] The treaty has been under negotiation since July 2014 and follows in the footsteps of two previous attempts to regulate corporate activity under international human rights law. The most recent attempt was the U.N. Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, drafted in 2003 but never accepted at the U.N.[4] Before this the (less human rights-centric) U.N. Code of Conduct on Transnational Corporations [5] was negotiated throughout the 1970s and 1980s but eventually disbanded.[6] A binding treaty has support from numerous stakeholders, including those who work in conflicts regions, on Lesbian, Gay, Bisexual, Transsexual, Intersex, Questioning (LGBTIQ) issues, and those who wish to protect human rights defenders.[7] Corporations frequently violate human rights, and all-too-rarely face legal or other sanctions. Numerous tools, including criminal and tort law, soft compliance metrics in labour rights, and popular protests, have been utilized in this fight, but significant governance gaps remain.[8]

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human rights (OEIGWG) is also referred to as the "drafters." Unless otherwise stated "business" refers to "business activities of a transnational character" as covered by the treaty.

[2] *See* U.N. Human Rights Council, Report on the Fourth Session of the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights, U.N. Doc. A/HRC/40/48, (Jan. 2, 2019) [hereinafter Fourth Session].

[4] *See* U.N. Econ. & Soc. Council, Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003); Larissa Van den Herik and Jernej Letnar Černič, *Regulating corporations under international law: from human rights to international criminal law and back again*, 8.3 J INT. CRIM. J. (2010) 725, 734.

[5] Commission on Transnational Corporations, Report on the Special Session (7-18 March and 9-21 May 1983) Official Records of the Economic and Social Council, 1983, Supplement No. 7 (E/1983/17/Rev. 1), Annex II.

[6] David Weissbrodt and Muria Kruger, *Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights*, 97.4 AM. JIL. (2003), 901, 902.

[7] Many activist organizations have blogged on the Zero Draft. *See* Business Human Rights Resource Centre, Compilation of Commentaries on the "Zero Draft" (Oct. 2018), *available at* https://www.business-humanrights.org/sites/default/files/documents/Zero%20Draft%20Blog%20Compilation_Final_0.pdf [hereinafter Compilation of Commentaries on the Zero Draft].

[8] For a selection of legal and extra-legal techniques see Daniel Augenstein & David Kinley, *Beyond the 100 Acre Wood: In Which International Human Rights Law Finds New Ways to Tame Global Corporate Power*, 19 INT'L J. HUM. RTS. 828 (2015); Michael Ineichen, *Protecting Human Rights Defenders: A Critical Step Towards a More Holistic Implementation of the UNGPs*, 3 BUS. & HUM. RTS J. 97 (2018); Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L. J. 443 (2001); Robert McCorquodale & Penelope Simons, *Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law*, 70 MOD. L. R. 598 (2007); RHYS JENKINS, RUTH PEARSON & GILL SEYFANG, CORPORATE RESPONSIBILITY AND LABOUR RIGHTS: CODES OF CONDUCT IN THE GLOBAL ECONOMY (Routledge 2013) (2002).

The Zero Draft proposes, inter alia, extraterritorial jurisdiction "for harm caused by human rights violations arising in the context of business activities."[9] The treaty covers "all international human rights and those rights recognized under domestic law."[10] Jurisdiction is based on where the "acts or omissions occurred" or where the business is domiciled.[11] Domicile is defined by a firm either having its "central administration", "statutory seat", "substantial business interests", or a branch, representative office or similar link in the state.[12] Victims may choose to adopt the law of another state party where the firm is considered domiciled.[13] Victims have various supplementary rights, including to diplomatic access and information, and will not be held liable for the defendant's legal costs.[14] Firms are liable for their own causal harms, harms of subsidiaries or suppliers where "it exhibits a sufficiently close relation . . . and where there is a strong and direct connection between its conduct and wrong," and for foreseeable harm "within its chain of economic activity."[15] Firms are also required to undertake due diligence obligations.[16] Overall, victims are offered a significant set of codified rights, and states and businesses have a significant set of obligations.

However, two major issues arise from the current treaty. First is the question of indeterminacies: many terms are adopted uncritically despite them having no clear definition, content, or limits within the literature. Second is the question of scope and interpretation: how will the treaty work in practice and how will it address issues like impinging on engrained state practice? Carlos Lopez notes this lack of precision and clarity,[18] and this article fully explicates

[9] *See* Zero Draft, *supra* note 1, art. 10.6.
[10] *See* Zero Draft, *supra* note 1, art. 3.2.
[11] *See* Zero Draft, *supra* note 1, art. 5.1(a)-(b).
[12] *See* Zero Draft, *supra* note 1, art. 5.2(a)-(d).
[13] *See* Zero Draft, *supra* note 1, art. 7.2.
[14] *See* Zero Draft, *supra* note 1, art. 8.4, 8.6, 8.9.
[15] *See* Zero Draft, *supra* note 1, art. 10.6(b)-(c).
[16] *See* Zero Draft, *supra* note 1, art. 9.1.
[18] *See* Carlos Lopez, *Human Rights Defenders and Corporate Accountability– Is there a place for them in a treaty on business & human rights?*, BUS. & HUMAN RIGHTS RES. CTR., https://www.business-humanrights.org/en/human-rights-defenders-and-corporate-accountability%E2%80%93-is-there-a-place-for-them-in-a-treaty-on-business-human-rights (last visited Dec. 13, 2018).

the major imprecisions of the text, revealing just how great a task lies ahead for the OEIGWG, while also offering an explanation as to the imprecision. My main argument is that the current draft hedges between "apology and utopia" – to modify Koskenneimi's famous phrase – through this imprecision.[19] The drafters, not wanting to exclude any stakeholder's concerns, have included a plethora of progressive options couched in terms that can be read expansively: a utopia of justice. However, knowing that states would be unlikely to adopt an overtly idealistic treaty, they have left a huge amount underdetermined and left many key interpretative questions in the hands of state parties.[22] In doing so, the treaty is at risk of becoming an apology for state and business power.

These indeterminacies are unlikely to be the result of lazy drafting. Rather, they are the result of the incredible scope required of any binding treaty that adequately addresses the needs of rights-holders. BHR has numerous stakeholders and exhibits extreme problem diversity. It interacts with all areas of economic production, many state practices, and issues from LGBTIQ rights to conflict zones. I discuss below how specific human rights, including free speech, discrimination, housing, environmental rights, and labour rights each pose unique definitional questions, and this is true for almost every right as well as distinct rights-contexts, such as privatized provision of public services and complicity.[24] The choice to subsume all these disparate areas into the phrase "harm caused by human rights violations"[25] leaves many questions unanswered. The problem with the treaty is that its central function is to provide judicial remedy in domestic courts.[26] This means that, unlike most areas of human rights law,

[19] MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT. Cambridge University Press, 2006.
[22] There will be a Committee established to undertake interpretative work, though, as I explain herein, this is not adequate for a treaty of this form.
[24] *See* U.N. Secretary-General, *Report of the Special Rapporteur on Extreme Poverty and Human Rights*, U.N. DOC. A/73/396 (Sept. 26, 2018) [hereinafter U.N. Secretary-General, *Extreme Poverty and Human Rights*].
[25] *See* Zero Draft, *supra* note 1, art. 10.6.
[26] *See* U.N. Human Rights Comm., *Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises: Access to effective remedies under the Guiding Principles on Business and Human Rights: Implementing the United Nations Protect, Respect and Remedy Framework*, U.N. DOC. GA/A/72/162 (June 9, 2016).

the precise limits and standards will be determined by judicial practice. Firm definitions, or at least interpretative standards,[27] are needed because specific cases will arise in each area. What would constitute a violation of environmental rights, for example, under the treaty is a fundamental question around which far more guidance is needed. Failure to provide definitions or standards risks uncertainty, minimalism, unpredictable interpretations, and overburdening more ambitious courts. It does a disservice to victims while also providing state parties with good reasons to avoid the treaty altogether.

Two conclusions to the treaty process would represent failure. First, its rejection by states. States, assumed to be skeptical about the treaty, have a right to demand clarity and explicated limits to their obligations.[28] Second, a treaty that was so minimalistic that it established liability in only a few cases, would perhaps be worse. While it would provide justice for these few, it would have only a very narrow impact. Deva describes such treaty "as merely serving a symbolic purpose."[29] It would also at least provide a basis to argue that these minimal requirements are the human rights obligations of business, and that the wider "impacts" framework of the UNGPs was more in realm of CSR.[30] This would be very damaging to the field. Treaty exponents, therefore, should feel a moral obligation to satisfy states, without too much appeasement. The obfuscation strategy currently adopted fails to do this. At a minimum, extensive research is needed into specific rights and issues to clarify, to some extent at least, what obligations are designed to stem from this treaty.

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[27] *See* David Bilchitz, *Corporate Obligations and a Treaty on Business and Human Rights: A Constitutional Law Model*, in BUILDING A TREATY ON BUSINESS AND HUMAN RIGHTS CONTEXT AND CONTOURS 185, 210-13 (David Bilchitz & Surya Deva eds., 2017).

[28] See Sigrun Skogly, *Regulating Obligations in a Complex World: States' Extraterritorial Obligations Related to Business and Human Rights* in Building a Treaty on Business and Human Rights Context and Contours 318, 322-324 (David Bilchitz & Surya Deva eds., 2017).

[29] *See* Surya Deva, *The Human Rights Obligations of Business: Reimagining the Treaty Business*, BUSINESS & HUMAN RIGHTS RESOURCE CENTRE (Mar. 12, 2014), https://www.business-humanrights.org/sites/default/files/media/documents/reimagine_int_law_for_bhr.pdf [hereinafter Deva, Treaty].

[30] *See* U.N. Secretary-General, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework,* ¶ 12, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011), Principle 13, *available at* https://www.ohchr.org/Documents/Issues/Business/A-HRC-17-31_AEV.pdf [hereinafter UNGPs].

I proceed by first providing a brief summary of the treaty. I then divide my analysis into the rights of victims and available remedies, and then the duties of both state and business, covering issues such as liability, jurisdictional scope and due diligence. In conclusion, I discuss some possible solutions to the issues analysed herein.

II. SUMMARY OF THE ZERO DRAFT TREATY

I will begin with a brief summary of the treaty, providing an overview of areas not covered in the analysis. The preamble, listed as Article 1, includes the only mention of direct business human rights obligations, stating that "all business enterprises . . . shall respect all human rights . . . ."[31] Article 2 is the statement of purpose, which includes strengthening business relationships with human rights and ensuring access to justice for those harmed.[32] Article 3 addresses the scope of the treaty, covering business violations and "all international human rights and those rights recognized under domestic law."[33] Article 4 defines "Victims" and "Business activities of a transnational character."[34] Article 5 details the wide jurisdictional scope, covering both where the acts or omissions occurred and the defendant's domicile.[35] Article 6 prohibits a statute of limitations for violations "which constitute crimes under international law . . . ," and states that other statutes of limitation "should not be unduly restrictive."[36] Article 7 discusses applicable law.[37] Article 8 provides a long list of the rights of victims, including to a range of remedies and legal assistance.[38] Article 8.7 requires the establishment of "an International Fund . . . to provide legal and financial aid to victims."[39] Article 9 discusses prevention, focusing on due diligence.[40] Article 10 is the key article

[31] *See* Zero Draft, *supra* note 1, art. 1.
[32] *See* Zero Draft, *supra* note 1, art. 2
[33] *See* Zero Draft, *supra* note 1, art. 3.
[34] *See* Zero Draft, *supra* note 1, art. 4.
[35] *See* Zero Draft, *supra* note 1, art. 5
[36] *See* Zero Draft, *supra* note 1, art. 6.
[37] *See* Zero Draft, *supra* note 1, art. 7.
[38] *See* Zero Draft, *supra* note 1, art. 8
[39] *See* Zero Draft, *supra* note 1, art. 8.7.
[40] *See* Zero Draft, *supra* note 1, art. 9.

addressing legal liability.[41] Article 11 provides details on the requirements of mutual legal assistance between state parties, including evidence gathering and enforcement of awards.[42] Article 12 sets broad principles for establishing international cooperation.[43] Article 13 covers consistency with international law, including potentially controversial clauses 13.6 and 13.7, which establish that future trade and investment deals must not conflict with the treaty, and that existing and future deal be interpreted in the least restrictive way toward treaty obligations herein.[44] Article 14 covers institutional arrangements establishing a Committee similar to the Human Rights Committee, tasked with writing general comments and observations on state parties.[45] Article 15 covers final provisions.[46] There is also a draft optional protocol regarding the establishment of a "National Implementation Mechanism to promote compliance with, monitor and implement the [treaty]."[47]

III. RIGHTS-HOLDERS: RIGHTS, VICTIMS, VIOLATIONS, AND REMEDIES

I begin with the topic of rights-holders. The main issues discussed here are which rights are covered, how these rights might be violated, how violations might be remedied and what additional rights, such as procedural rights, victims hold. This therefore deals with the scope of the treaty along multiple axes from the perspective of rights-holders.

A. Human Rights

Article 3.2 of the Zero Draft states that the Convention is to apply to "all international human rights and those rights recognized under domestic law."[48] It also specifically includes

[41] *See* Zero Draft, *supra* note 1, art. 10.
[42] *See* Zero Draft, *supra* note 1, art. 11.
[43] *See* Zero Draft, *supra* note 1, art. 12.
[44] *See* Zero Draft, *supra* note 1, art. 13, 13.6, 13.7.
[45] *See* Zero Draft, *supra* note 1, art. 14.
[46] *See* Zero Draft, *supra* note 1, art. 15.
[47] *See* Open-Ended Intergovernmental Working Group on Transnat'l Corp. [OEIGWG], *Draft Optional Protocol to the Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises*, art. 1, (last visited Dec. 13, 2018) *available at* https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session4/ZeroDraftOPLegally.pdf.
[48] *See* Zero Draft, *supra* note 1, art. 3.2.

"environmental rights."[49] The framing in Article 3.2 has no clear legal meaning.[50] It could be resolved by adopting the term *all internationally recognized human rights* or by listing specific treaties that will apply. It seems clear that the phrasing *all international human rights* and domestic rights is designed to be inclusive. All international human rights apply at all times to all "Business activities of a transnational character"[51] (see below for consideration of this term) and additionally, rights available under the domestic law of the jurisdiction hearing the case also apply. "All internationally recognized human rights," as the UNGPs cover, include the International Bill of Rights, comprised of the Universal Declaration of Human Rights (UDHR) and the main instruments through which it has been codified: the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the eight International Labour Organization (ILO) core conventions.[52] Environmental rights may include indigenous rights, protection of human rights defenders, and a range of obligations stemming from the right to a healthy environment. John H. Knox, Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, released 16 "framework principles"

[49] *See* Zero Draft, *supra* note 1, art. 4.1.
[50] *See* John G. Ruggie, *Comments on the "Zero Draft" Treaty on Business & Human Rights*, BUS. HUM. RTS RES. CTR., https://www.business-humanrights.org/en/comments-on-the-%E2%80%9Czero-draft%E2%80%9D-treaty-on-business-human-rights (last visited Dec. 13, 2018) [hereinafter Ruggie, *Comments*].
[51] *See* Zero Draft, *supra* note 1, art. 4.2.
[52] *See* U.N. Secretary-General, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework,* ¶ 12, U.N. DOC. A/HRC/17/31 (Mar. 21, 2011), *available at* https://www.ohchr.org/Documents/Issues/Business/A-HRC-17-31_AEV.pdf [hereinafter UNGPs]. The eight International Labour Organization (ILO) fundamental conventions are: the Forced Labour Convention, 1930 (No. 29), the Abolition of Forced Labour Convention, 1957 (No. 105), the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), the Equal Remuneration Convention, 1951 (No. 100), the Discrimination (Employment and Occupation) Convention, 1958 (No. 111), the Minimum Age Convention, 1973 (No. 138), and the Worst Forms of Child Labour Convention, 1999 (No. 182). *See* ILO,Conventions and Recommendations, at: https://www.ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang--en/index.htm

outlining state obligations in this regard in March 2018, many of which could be relevant to business operations.[53]

The list of international human rights is seemingly extensive but does not include some of the labour rights most frequently violated, such as working hours and minimum wage. The inclusion "those rights recognized under domestic law," however, would appear to encompass such rights.[54] It is not clear how such rights should be applied extraterritorially, because states have very different standards in many cases. Regarding labour rights, the inclusion of domestic rights would mean that were a case on working hours to be taken to a French court, the court would be obliged to apply the thirty-five-hour per week rule, and therefore find almost every business in the world to be in violation. This is of course is not the intention of the treaty, but there is no proposed method as to when "domestic rights" should be applied to the analysis. This article discusses this issue further in relation to "violations" and "applicable law" below. This is the first case of the treaty refusing to make a clear choice. The treaty must list what rights are included, what rights are excluded, and to what standards firms are to be held with regard to these rights. Given that sweatshops and the associated labour rights violations—including working hours and pay violations—are such a central issue within BHR, the adoption of ILO standards would be useful. This does not mean that certain jurisdictions should not be permitted to hold corporations domiciled therein to higher standards extraterritorially, though mandating that domestic rights are automatically extended extraterritorially is unworkable.

B. What is a Violation?

Greater specificity would assist in understanding which rights the treaty is intended to cover. The more problematic indeterminacy in the treaty is what would constitute a violation of these

[53] *See* John H. Knox, *Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment*, U.N. DOC. A/HRC/37/59 (Jan. 24, 2018), *available at* https://undocs.org/A/HRC/37/59.
[54] *See* Zero Draft, *supra* note 1, art. 3.2.

rights. There are some obvious cases, and many hard cases. The Zero Draft creates liability "for harm caused by violations of human rights arising in the context of their business activities"[55]. However, the scope and limits of this terminology is not explicated.

It is worth noting that the scope of "violation" will be narrower than human rights impacts under the UNGPs. For example "targeting high-sugar food and drinks at children, with an impact on child obesity" constitutes a contributory impact.[57] There are also detailed standards around impacts linked to the firm,[58] and explicated responsibilities in discrete areas such as lending.[59] Such responsibilities are presumably not violating the treaty and therefore the treaty is adopting a harder but more minimalistic scope than the UNGPs. A minimalistic approach is necessary for a binding treaty, but the relationship between the two documents should be better defined so as not to marginalize the UNGPs.

The draft includes two forms of violation. Criminal liability emerges from "human rights violations that amount to a criminal offence recognized under international law, international human rights instruments, or domestic legislation."[60] Civil liability emerges from "harm caused by violations of human rights."[61] Elsewhere the draft states: "Civil liability shall not be made contingent upon finding of criminal liability or its equivalent for the same actor."[62] This section will focus on civil liability, Criminal liability may be constituted by the patchwork of crimes applicable to private individuals in international law, most notably those established

[55] *See* Zero Draft, *supra* note 1, art. 10.6.
[57] *See* U.N. OFFICE OF THE HIGH COMM'R, THE CORPORATE RESPONSIBILITY TO RESPECT HUMAN RIGHTS: AN INTERPRETATIVE GUIDE, 17 (2012), *available at* https://www.ohchr.org/Documents/Publications/HR.PUB.12.2_En.pdf [hereinafter OHCHR, *Respect*].
[58] *See* OHCHR, *Respect*, *supra* note 49, at15-17. *See also* MONASH UNIVERSITY, HUMAN RIGHTS TRANSLATED 2.0: A BUSINESS REFERENCE GUIDE vii, 7 (2017), *available at* https://www.ohchr.org/Documents/Publications/HRT_2_0_EN.pdf.
[59] *See* Damiano De Felice, *Banks and Human Rights Due Diligence: A Critical Analysis of the Thun Group's Discussion Paper on the U.N. Guiding Principles on Business and Human Rights*, 19.3 INT'L. J. HUM. RTS. 1, 319 (2015). *See also* IHRB, *Prof. John Ruggie Comments on the Thun Group of Banks* (Feb. 17, 2017), https://www.ihrb.org/focus-areas/finance/prof.-john-ruggie-comments-on-the-thun-group-of-banks.
[60] *See* Zero Draft, *supra* note 1, art. 10.8.
[61] *See* Zero Draft, *supra* note 1, art. 10.6.
[62] *See* Zero Draft, *supra* note 1, art. 10.2.

by the International Criminal Court. The vast majority of international law, including human rights law, applies to states and does not create "criminal offences" directly. This then leaves the onus on domestic law and may promote divergent approaches.[63] I want to focus on civil liability because it is here that the notion of the violation becomes most vexed (though many of the examples I discuss may have criminal law implications).

Deva defines 'violation' as the 'causation of legal injury to [an identified set of people] in terms of a breach of human rights'.[64] Sometimes "violation" is replaced by "abuse", when dealing with non-state actors in international law, to note that while these legal obligations do not exist directly, they exist as at least moral obligations that should be enforced by a state or other actor.[65] Human rights bodies often replace "violation" with "breach," "non-compliance," or "inconsistent with," without defining what precisely these terms signify.[66] "Violation" can standalone, or can be described as "egregious," "severe," or "serious." The Geneva Academy produced a briefing to define what constitutes a "serious violation of international human rights law" in light of the U.N. Arms Trade Treaty (ATT) seeking to prevent arms deals which would lead to such violations.[67] It covers "international crimes" but also potentially other violations of civil and political and economic, social and cultural rights.[68] The Academy did not offer a

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[63] *See* Carlos Lopez, *Towards an International Convention on Business and Human Rights (Part II)*, OPINIO JURIS (Jul. 20, 2018), http://opiniojuris.org/2018/07/23/towards-an-international-convention-on-business-and-human-rights-part-ii/.

[64] *See* Fortieth Session, *supra* note 22, para. 12. This understanding is accepted by the OEIGWG. *Id.* *See also* Surya Deva, *Treating human rights lightly: a critique of the consensus rhetoric and the language employed by the Guiding Principles* CAMBRIDGE UNIV. PRESS, 78, 98 (2013) [hereinafter Deva, Rhetoric]. *See also* Anita Ramasastry, *Corporate social responsibility versus business and human rights: Bridging the gap between responsibility and accountability*, 14.2 J. HUM. RTS. 237, 240 (2015).

[65] *See* Andrew Clapham, *Human Rights Obligations of Non-State Actors*, OXFORD UNIV. PRESS (2006), https://www.icrc.org/eng/assets/files/other/irrc_863_clapham.pdf. *See also* Fortieth Session, *supra* note 2, ¶ 12.

[66] *See* CESCR, *General comment No. 24 (2017) on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities*, (Aug. 10, 2017) E/C.12/GC/24. For example, General Comment 24 uses 'breach' in para. 32 related to failure to regulate private entities, and 'inconsistent with' in para. 38 related to regressive tax policies. *Id.*

[67] *See* Takhmina Karimova, *What amounts to 'a serious violation of international human rights law'?*, GENEVA ACADEMY OF INT'L HUMANITARIAN LAW & HUM. RTS. 3 (2014), https://www.geneva-academy.ch/joomlatools-files/docman-files/Publications/Academy%20Briefings/Briefing%206%20What%20is%20a%20serious%20violation%20of%20human%20rights%20law_Academy%20Briefing%20No%206.pdf.

[68] *See* Compilation of Commentaries on the "Zero Draft", *supra* note 7.

conclusive definition or list, but the criteria included: "The nature of obligations engaged; The scale/magnitude of the violations; The status of victims (in certain circumstances); [and] The impact of the violations."[69] "Competent authorities concur" that violations including "[a]rbitrary arrests and detention [and] [d]eliberate targeting of civilians and civilian objects in situations of armed conflict" are considered serious.[70] Violations including "[f]orced evictions [and] [g]ender-based violence . . . may be considered 'serious.'"[71] One of the early debates around the treaty was whether to limit it to egregious or serious wrongs. This was unsatisfactory to many, as "all rights are equally important and companies can violate all of them."[72] While limiting the treaty to egregious cases would in practice exclude many human rights, adopting the term "violations" opens questions around almost every right.

The most minimalistic form of "violation" would limit it to "non-interference," meaning a restriction to "passive duties."[73] These compel the duty-bearer not to undertake a violative act, while invoking no "active" duties.[74] For some issues such a framework is coherent. For example, corporations should hold a duty not to practice slavery, defined to include their value chains, but no duties to prevent slavery beyond their own operations.[75] This holds because the condition of freedom from slavery requires only passivity on the part of duty-bearers. My right to freedom from slavery is upheld so long as no individual is actively enslaving me. Therefore the corporation that does not practice slavery is respecting the right to freedom from slavery. For many other rights non-interference is an inadequate and often inchoate standard. The

[69] *See* Karimova, *supra* note 67, at 5.
[70] *See* Karimova, *supra* note 67, at 5.
[71] *See* Karimova, *supra* note 67, at 5.
[72] *See* Deva, *supra* note 64, at 7.
[73] Florian Wettstein, *Making noise about silent complicity: the moral inconsistency of the 'Protect, Respect and Remedy' Framework*, in Hum. Rts. Obligations of Bus.: Beyond the Corp. Resp. to Respect?, 243, 258-260 (Surya Deva & David Bilchitz eds., 2013).
[74] id.
[75] Even here it only holds through the technical fiction that suppliers are part of the firm's operations. In practice these suppliers will have to be investigated, leading to active negative obligations.

central problem with the terminology of violations is that there is no limiting factor that applies equally well to all rights. I will explain the issue with reference to five areas.

First, some rights are provided in their material form by corporations, at least in part, such as housing. What obligations does non-violation impose here? Limiting the right to housing to non-interference would mean a corporation could not destroy or otherwise harm your home. But this would infer no duties upon those corporations that build or manage homes. Thus, an unsafe apartment building could collapse and no human rights obligation would be violated. For this reason, the right to housing, like many socio-economic rights include "active negative" obligations ensuing from respect obligations,[81] particularly around ensuring that housing is of sufficient quality and quantity. The General Comment on the Right to Housing provides a list of the core elements of the right to housing that create obligations upon states.[82] These are: legal security of tenure; availability of services; affordability; habitability; accessibility; location; and cultural adequacy.[83] Obligations restricted to "habitability" would appear to be the minimum requirement for the right to housing.[84] This states that "[a]dequate housing must be habitable, in terms of providing the inhabitants with adequate space and protecting them from cold, damp, heat, rain, wind or other threats to health, structural hazards, and disease vectors."[85] Even limiting the obligation to habitability provides only minimal guidance because exactly what constitutes a "structural hazard" is a complex question that is defined very differently in different jurisdictions.[86] There is also an obligation to ensure housing is "affordable"[87] which is certainly relevant to corporate builders and leasers, and is perhaps the

[81] *id.*
[82] *See* U.N. CESCR, General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant) U.N. Doc. E/1992/23, (Dec. 13, 1991).
[83] *id.* para. 8
[84] *id.* para. 8(d)
[85] *id.* 8(d).
[86] *id.* 8(d).
[87] *id.* 8(c).

central socio-economic problem in places such as Hong Kong,[88] but may be considered beyond a reasonable scope.

The treaty is presumably relying on domestic law to fill in these gaps, but this creates a problem: Article 7.1 states that "matters of substance or procedure" that "are not specifically regulated in the Convention shall be governed by the law of that court."[90] Therefore, a U.K. firm building houses abroad could be forced to obey U.K. standards even if these go far beyond local standards. This may render the project unviable. Meeting local standards – which is seemingly prohibited under Article 7—might be too minimalistic to ensure respect of the right. There is the additional problem that victims can choose to adopt the law of another party on "all matters of substance regarding human rights law."[91] As such the current draft appears to allow victims to apply the highest domestic standard of the right to housing to all housing developed or managed by businesses with transnational links. While the critical "joint business response" appears cynical in its concern for "economic development," the treaty as currently drafted would make house-building in the developing world very difficult.[92] The reliance on the term non-violation to be filled in with domestic standards obfuscates the real problem. The treaty drafters need to explicate their standards. It is not feasible to apply the highest standards globally, and it is not adequate to accept local law in all situations. Detailed, and inevitably controversial, work needs to be conducted to see what global standards would apply and whether standards would vary with development levels. Without this work, the obligations of

[88] *See* Luke Marsh, *The Strategic Use of Human Rights Treaties in Hong Kong's Cage-Home Crisis: No Way Out?*, 3.1 ASIAN. J. OF L. & SOC'Y., 159, 159-60 (2016).
[90] *See* Zero Draft, *supra* note 1, art. 7.1.
[91] *See* Zero Draft, *supra* note 1, art. 7.2.
[92] *See* Joint Business Response, *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*, BUS. HUM. RTS. RES. CTR., 8-9 (Oct. 2018), https://www.business-humanrights.org/sites/default/files/documents/Joint%20Business%20Response%20-%20Zero%20Draft%20Treaty%20and%20Draft%20Optional%20Protocol%20-%20October%202018.pdf. https://cdn.iccwbo.org/content/uploads/sites/3/2018/10/icc-joint-business-response-zero-draft-2018.pdf

states and businesses are unclear, and this lack of clarity provides good reason for states to reject the treaty.

Second, environmental issues require us to take another different lens on human rights. Here the major problem is determining which forms of interference in the right will be covered, and which will not. This relates primarily to the issue of causation: how direct and close a connection must a corporation have to an affected community to be held liable? Again, there is little in the way of agreed standards on this, and the scope of what constitutes a human rights violation through environmental harm can be seen broadly or narrowly. Greenpeace, in a blog on the zero draft, highlighted various forms of human rights-related environmental harm, "when forests are cleared without the consent of Indigenous People, when illegal fishing operations depend on slave labour, or when extreme weather fuelled by climate change threatens basic rights to food, water and shelter."[95] Greenpeace and many others will be able to provide extensive evidence of business links to serious harm, and they will seek a definition of "violation" that encompasses this, as they should. What would be the limit of liability under the "violations" framing of the treaty?

The major issue with environmental rights is what we could term a spectrum of causation. Sometimes harm is very direct, a single company provably and significantly pollutes a water source, for example, causing harm to a delineated group.[97] But many harms are more complex. At the far end of the scale sits atmospheric pollution and its effects on low-lying islanders and other groups. There is currently no remedy available for this, despite the scientifically-proven

[95] *See* Charlie Holt, et al.,*The Zero Draft Legally Binding Instrument on Business and Human Rights: Small Steps along the Irresistible Path to Corporate Accountability*, BUS. HUM. RTS. RES. CTR., (last visited Dec. 13, 2018), https://www.business-humanrights.org/en/the-zero-draft-legally-binding-instrument-on-business-and-human-rights-small-steps-along-the-irresistible-path-to-corporate-accountability.

[97] *See e.g.* Jasmine Spearing Bowen & Karl Schneider, *Industrial Waste Pollutes America's Drinking Water*, Public Integrity (Aug. 22, 2017), https://publicintegrity.org/environment/industrial-waste-pollutes-americas-drinking-water/.

links between corporate activity and the eventual harm.[99] Indigenous people forcibly removed from their land should be covered as a clear violation of human rights law, but what if their land is damaged, leading to reduced food and water security?[100] Elsewhere on the scale are situations like the Bille and Ogale farmers in Nigeria. Here, 45,000 farmers sought damages for harm caused by repeated long term oil spills and contamination, ranging from lost income to myriad health impacts.[101] Those whose lives are cut short in smog-filled cities present further issues: are their rights being violated by the firms responsible? Each case presents different issues, and jurisdictions often have divergent, and rapidly evolving, standards.[102] It is not feasible to assert the highest domestic standards globally, to proffer that firms in, for example, New Delhi are in violation of Norwegian laws. The OEIGWG must research and define what would constitute a violation of human rights through environmental harm under the treaty.[105] Again, their conclusions will be controversial.

A third issue relates to privatized providers of public goods, such as healthcare and prisons.[106] Would the operators of private prisons in the United States be at risk of human rights claims for actions that are legally permitted in the United States but in breach of international human rights standards? Is such coverage an aim of the treaty, or beyond the scope of the treaty? Might healthcare firms or private water companies be in violation of the

[99] *See* PAUL GRIFFIN, THE CARBON MAJOR DATABASE: CDP, CARBON MAJORS REPORT 20175-8 (Jun. 2017), http://www.indiaenvironmentportal.org.in/files/file/Carbon-Majors-Report-2017.pdf.
[100] *See* U.N. Conference on Environment and Development, *Rio Declaration on Environment and Development*, Leaflet No. 10 (Aug. 12, 1992), https://www.ohchr.org/Documents/Publications/GuideIPleaflet10en.pdf (see page 4)
[101] *See* Elena Merino Blanco & Ben Pontin, *Litigating Extraterritorial Nuisances under English Common Law and UK Statute*, 6 TEL 285, 286 (2017); Charity Ryerson, *Shell in Nigeria: The Case for New Legal Strategies for Corporate Accountability*, LEGAL DESIGN, July 5, 2018, https://legaldesign.org/calblog/2018/7/5/shell-in-nigeria-the-case-for-new-legal-strategies-for-corporate-accountability.
[102] Reviewed in: Jacqueline Peel and Hari M. Osofsky, *A Rights Turn in Climate Change Litigation?* 7.1 TRANS ENV. L. (2018), 37.
[105] Hum. Rts. Council, Rep. on the first session of the open-ended intergovernmental working group on transnat'l corp. & other bus. Enterprises with respect to hum. rts., with the mandate of elaborating an int'l legally binding instrument, U.N. Doc. A/HRC/31/50, ¶ 24, 35 (Feb. 5, 2016).
[106] *See* UNSR, Privatization, *supra* note 24, at 4; Aoife Nolan, *Privatization and economic and social rights*, 40.4 HUM. RGHTS. QUART. (2018), 815.

respective rights for failing to ensure secure access to services? U.S. healthcare provides a good example because the United States has not ratified the ICESCR, but companies would be bound by its obligations under the Zero Draft regardless of this,[107] and there is good evidence that firms prevent access to healthcare on the grounds of cost, a violation of state obligations under the right to health.[108] Would any obligations ensue for these companies? If so, the United States would surely reject the treaty, but even so, if the firms in question had transnational links they would remain liable. Impinging state policy is not the primary aim of the treaty, but it raises difficult questions regarding the limits of the treaty. If such issues are to be excluded, then an explanatory rationale is needed as to why corporations are permitted to act in ways which are conterminous to state violations under the treaty.

Discrimination and the right to free expression suggest a fourth type of problem, where extreme national and cultural differences are in play, and by most definitions the laws and policies of some states are innately rights-violative. The same issues regarding extra territorializing, for example, U.S. free speech laws globally would apply, but it also brings into focus the question of impinging on national sovereignty. The treaty does not seek to rewrite national policies and it will not succeed in doing so, but it is hard to see how a company could operate in the Chinese information sector or conduct business in Saudi Arabia without risking violation of human rights by either international or domestic standards. If there is any such risk it is likely that the treaty will be rejected by states. The drafters must therefore define the line between obeying local laws and norms in a rights-violative cultural, and causing harm through rights violations.

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[107] *See supra* note 1, at Art. 3.

[108] See for example, International Covenant on Economic, Social, and Cultural Rights art. 12, para12(b), Aug. 2009, 993 U.N.T.S. 3; Economic & Social Council, General Comment No. 14: The Right to the Highest Attainable Standard of Health, U.N. DOC. E/C.12/2000/4 11 on the principle of equity; and see also, International Covenant on Economic, Social and Cultural Rights art. 12, para. 15, May 2016; Economic & Social Council, General Comment No. 22: The Right to Sexual and Reproductive Health para. 15, U.N. DOC. E/C.12/GC/22 2 (May 2016).

Labour rights raise another distinct problem. Here, the issue is that there is too much clarity, too many violations, and therefore the risk is that an enormous number of tort claims could arise under the treaty, overwhelming national court systems. Labour rights such as maximum hours are precisely defined in domestic law and by the ILO. Groups such as the Fair Labour Association (FLA) monitor these rights in the high-risk areas from which transnational corporations often draw their suppliers. The FLA's 2017 annual report covered 149 factories and 175,472 workers in 27 countries.[113] It revealed that half the factories used compulsory overtime, and more than a third did not allow the mandatory one rest day per week.[114] A report on factories in Myanmar revealed high levels of child labour, forced overtime, non-payment of minimum wage, and other chronic problems.[115] Even by minimalistic global or host state standards millions of workers have their rights violated every year while working in the value chains of large transnational corporations. Even with a treaty there will be practical barriers to making claims, but the number of possible cases would seem a legitimate concern for states. Meeran supports the explicit inclusion of 'opt-out' class actions, which allow representatives to sue on behalf of a group of individuals..[117] This would address the needs of rights holders and may reduce the burden on states, though could still create many new cases. The drafters will have to respond to this problem because states are not going to sign a treaty that threatens to overwhelm their courts.

I have proposed a series of issues centred around five areas of human rights. Far more research is required into exactly what the requirements of each right should be, but this initial

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[113] FAIR LABOR ASSOCIATION, 2017 ANNUAL PUBLIC REPORT 14 (2017), http://www.fairlabor.org/sites/default/files/documents/reports/2017_fla_apr.pdf (last visited Dec. 13, 2018).
[114] *See id.* at 16.
[115] *See* MARTJE THEUWS & PAULINE OVEREEM, THE MYANMAR DILEMMA: CAN THE GARMENT INDUSTRY DELIVER DECENT JOBS FOR WORKERS IN MYANMAR? 2, 10-11, 66-82 (SOMO & ALR & LRDP, Aug. 2017) *available at* https://www.somo.nl/wp-content/uploads/2017/02/170731-The-Myanmar-Dilemma-update-web-1.pdf.
[117] *See* Richard Meeran, *The "Zero Draft": Access to judicial remedy for victims of multinationals' ("MNCs") abuse*, BHRRC 15, at 16 (Oct. 2018), https://www.business-humanrights.org/sites/default/files/documents/Zero%20Draft%20Blog%20Compilation_Final_0.pdf .

list provides ample room to demonstrate that adopting the term "harm caused by a human rights violation" as though it is unproblematic and clearly defined merely obfuscates the core content of the treaty.[119] The key issue is to define "violation" clearly enough so that scope is understood for all rights and to strike a balance between the needs of rights holders and to what states would feasibly agree.

C. Who is a Victim and What are their Rights?

Article 4.1 defines the meaning of a "victim" within the Zero Draft Victims are ensured certain rights, including access to justice and to remedy.[121] Yet the definition of victim is far more expansive than the definition of liability in Article 10.[122] Article 4.1 states:

> "Victims" shall mean 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. Where appropriate, and in accordance with domestic law, the term "victim" also includes 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.[123]

Article 8.1 states that "[v]ictims shall have the right to fair, effective and prompt access to justice and remedies in accordance with international law."[124] First, it is worth noting the forms of harm: "physical or mental injury, emotional suffering, economic loss or substantial impairment of their human rights, including environmental rights."[125] This framing means that forms of harm with no connection to human rights are included.[126] Second, the potentially more stringent language of "violation" is not used: rather, the cause must be "acts or omissions in the context of business activities of a transnational character."[127] This is vague and highly

[119] *See* Zero Draft, *supra* note 1, art. 10.6.
[121] *See* Zero Draft, *supra* 1. art. 8.
[122] *See* Zero Draft, *supra* 1, art. 10.
[123] *See* Zero Draft, *supra* 1, art. 4.1.
[124] *See* Zero Draft, *supra* 1, art. 8.1.
[125] *See* Zero Draft, *supra* 1, art. 4.1.
[126] *See* Zero Draft, *supra* 1, art. 4.
[127] *See id.*

expansive. According to this wording, an investor could sue for economic loss caused by a business act that reduced the share price. This may be an overly literal reading, but both critics looking to attack the treaty, and, if signed, others looking to use the treaty for their own ends, will be happy to take such an approach. Despite this being a human rights-based treaty, it is only the human rights element that is limited. While any "economic loss" is covered, human rights must suffer "substantial impairment."[130]

As stated above, in 10.6 this definition is forgotten: "All persons with business activities of a transnational character shall be liable for harm *caused by violations of human rights* arising in the context of their business activities."[131] Thus the "substantial impairment" criterion is replaced by "violation," and "violation" becomes a required cause of the harm suffered.[132] There are therefore two conflicting descriptions of harm establishing liability in the treaty. It is probably fair to surmise that any "harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their human rights, including environmental rights" is covered if it is caused by a human rights violation.[133] Presumably this was chosen to make clear the links between the violation and tortious liability and therefore individuals who suffer economic losses unrelated to human rights are not covered. The definition of "victim" should be redrafted to align with Article 10.[135]

Article 8 may go beyond Article 10 in places to include remedial options beyond criminal and civil liability, such as through the phrase "domestic judicial and other competent authorities"[136] and including remedies such as "ecological restoration."[137] Nonetheless, there is no precision or elaboration of how extra-judicial concepts may operate, nor their link to

[130] *See* Zero Draft, *supra* 1, art. 4.1.
[131] *See* Zero Draft, *supra* 1, art. 10.6
[132] *See* Zero Draft, *supra* 1, art. 4.1 &10.6.
[133] Zero Draft Treaty, *supra* note 1, at art. 4.1.
[135] Zero Draft Treaty, *supra* note 1, at art. 4.1.
[136] Zero Draft Treaty, *supra* note 1, art. 8.1.
[137] Zero Draft Treaty, *supra* note 1, art. 8.1(b).

Article 10. Victims have a range of further rights. Victims shall not be required to reimburse the legal expenses of the other parties and "the Convention may require . . . [the] reversal of the burden of proof."[138] Each of these will be controversial to states and businesses on the grounds of encouraging frivolous lawsuits. The reversal of the burden of proof would also go against the presumption of innocence in criminal cases.[139]

IV. DUTY-BEARERS: CORPORATIONS, LIABILITIES, JURISDICTION, LAW, AND DUE DILIGENCE

A. What is a "Transnational Activity?"

Having covered the scope in relation to rights-holders, I now move onto the scope in relation to duty-bearers, including both business and states. The delimitation to only "transnational" corporations has been the most controversial question since the mandate was announced.[140] The initial mandate covered "transnational corporations and other business enterprises," with a footnote stating that: "'Other business enterprises' denotes all business enterprises that have a transnational character in their operational activities, and does not apply to local businesses registered in terms of relevant domestic law."[141] Ecuador, the main sponsor, insisted on this provision, which Arvind Ganesan of Human Rights Watch has described as a "fundamental flaw."[142] All businesses are capable of abusing human rights and the corporate form of the abuser should be irrelevant. The language in the Zero Draft has evolved into "[b]usiness activities of a transnational character," which "shall mean any for-profit economic activity, including but not limited to productive or commercial activity, undertaken by a natural or legal

[138] Zero Draft Treaty, *supra* note 1, art. 8.5(d), 10.4.
[139] Fourth Session, *supra* note2, at para. 67.
[140] *U.N. Treaty on Business & Human Rights "Zero Draft" Negotiations Day 2* (Oct. 2, 2017), EUR. COALITION FOR CORP. JUST., http://corporatejustice.org/news/9818-un-treaty-on-business-human-rights-zero-draft-negotiations-day-2.
[141] Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights, A/HRC/RES/26/9, July 14, 2014.
[142] Arvind Ganesan, *Dispatches: A Treaty to End Corporate Abuses*, (July 1, 2014), http://www.hrw.org/news/07/01/dispatches-treaty-end-corporate-abuses.

person, including activities undertaken by electronic means, that take place or involve actions, persons or impact in two or more national jurisdictions."[143]

This, as Carrillo-Santarelli notes, leaves open the possibility that a corporation could commit crimes against humanity and not be held liable if the act was fully contained in a single jurisdiction.[144] Cassel argues that if read with a sympathetic eye just about every possible wrongdoing could be said to "involve actions" in multiple jurisdictions.[145] If this is the aim, the language should be tightened. If lesser liability for small, local firms particularly in developing countries is the aim, it might be advisable to extend the room for exemptions on small and medium-sized businesses conducting due diligence in Article 9.5 more widely.[146]

The issue invokes the scope questions that plagues much of the treaty. How are we to judge whether the "activities undertaken . . . take place or involve actions, persons or impact in two or more national jurisdictions?"[147] As per Cassel's reading, an act may be considered transnational if it involves suppliers or goods purchased abroad, financing from abroad, or even global communications platforms. Ultimately all acts have some transnational links, if we accept any such link as establishing the transnational element. But there is no necessary reason to think domestic courts will apply this logic, and indeed a reading that in practice denied non-transnational business existed may go against the spirit of the Article. The clause can be read as either apology or utopia, and the difficult questions again appear to have been avoided.

B. Business Liability

[143] *See* Zero Draft, *supra* note 1, art. 4.2.
[144] *See* Nicolás Carrillo-Santarelli, *Some Observations and Opinions on the "Zero" Version of the Draft Treaty on Business and Human Rights (Part I)*, OPINIOJURIS, (Sept. 24, 2018), http://opiniojuris.org/2018/09/24/some-observations-and-opinions-on-the-zero-version-of-the-draft-treaty-on-business-and-human-rights-part-i/.
[145] *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.
[146] *See* Zero Draft, *supra* note 1, art. 9.5.
[147] *See* Zero Draft, *supra* 1, art. 4.2.

The scope of business liability relates to how close a causal connection between the actor and the harm caused is necessary to attribute responsibility. The UNGPs adopt the caused, contributed, linked to framework.[151] Article 10.6 of the Zero Draft delineates the understanding of causation in the treaty, stating that:

> All persons with business activities of a transnational character shall be liable for harm caused by violations of human rights arising in the context of their business activities, including throughout their operations: a. to the extent it exercises control over the operations, or b. to the extent it exhibits a sufficiently close relation with its subsidiary or entity in its supply chain and where there is strong and direct connection between its conduct and the wrong suffered by the victim, or c. to the extent risk have been foreseen or should have been foreseen of human rights violations within its chain of economic activity.[152]

Liability is established where a firm "exercises control" over an operation that causes harm, or there exists "a sufficiently close relation" and "a strong and direct connection" between it and the harm suffered, or where the harm should have been foreseen within its chain of economic activity.[153] Point (a) would appear to establish responsibility for a firm's own activities, point (b) establishes both parent company liability and liability over "entit[ies] in its supply chain" where there is "a strong and direct connection between its conduct and the wrong suffered", while (c) covers foreseeable risks of violations within the chain of economic activity.[154]

As Cassel notes, point (b) may conflict with corporate veil rules in common law countries.[155] However, this may be the intention. Parent company liability is crucial to a meaningful binding treaty, because corporate veil rules are an effective shield against liability.[156] Liability for conduct connected to the company is important, particularly where, for example, suppliers may be under extreme pressure to produce goods quickly and therefore

[151] *See* UNGPs, *supra* note 52, art. 13.
[152] *See* Zero Draft, *supra* note 1, art. 10.6.
[153] *See* Zero Draft, *supra* note 1, art. 10.6.
[154] *See* Zero Draft, *supra* note 1, art. 10.6.
[155] Cassel, Treaty, *supra* note 145.
[156] Anil Yilmaz Vastardis & Rachel Chambers, *Overcoming the Corporate Veil Challenge: Could Investment Law Inspire the Proposed Business and Human Rights Treaty?* 67.2 Int'l & Comp. L.Q. 389 (2018).

violate workers' rights.[157] The UNGPs guidance lists one contributory impact as "[c]hanging product requirements for suppliers at the eleventh hour without adjusting production deadlines and prices, thus pushing suppliers to breach labour standards in order to deliver."[158] This an important form of practical responsibility that causes real harm, as the Fair Wear Foundation (FWF) also describe and regulate.[159] The treaty should not exclude such liability completely, but will have to develop a nuanced approach around violations and forms of harm in order to make it practicable.

Point (c) is even more ambitious. The term "chain of economic activity" relates to the notion of the value chain but is not defined in legal or social science literature.[160] Its limits are therefore not defined. Perhaps it includes all suppliers and all buyers, and some tertiary actors such financiers. In some instances, all consumers or end users would seem to require human rights protection, such as online firms and privacy violations. "Foreseeability" is a necessary limit, whereby, for example, a company selling weapons to a despotic regime should be able to foresee that harm might occur, but a company selling (legal) items to wide consumer audiences would not be responsible for harmful uses of those items.[163] This would allow us to keep a broadly defined proximity related to the scope of the chain of economic activity. It seems reasonable to say that if a company can foresee a violation within its chain of economic activity it should do what it can to prevent it. A similar "likelihood" element also underlies the ATT.[165]

[157] Ruggie, *Comments*, *supra* note 50.
[158] *The Corporate Responsibility to Respect Human Rights - An Interpretative Guide*, U.N. Office of the High Commissioner HR/PUB/12/02 (2012).
[159] *Brand Performance Check 2018*, Fair Wear Foundation, 42-43(2017) available at https://www.fairwear.org/wp-content/uploads/2017/09/brand-performance-check-guide-2018.pdf
[160] *See* Zero Draft, *supra* note 1, art. 10.6.
[163] As has been proposed, but consistently rejected, around US firearms manufacturers. See Allen Rostron, *Lawyers, Guns, & Money: The Rise and Fall of Tort Litigation Against the Firearms Industry*, 46.2 SNT. CLR. LR. 46.2 (2006) 481.
[165] *See* Karimova, *supra* note 67, at 5.

Foreseeability relates to due diligence, which I discuss below.[166] Unlike the UNGPs, in some situations provably effective due diligence can provide for exculpation from liability.[167] This should provide an incentive to undertake meaningful due diligence, as otherwise the violations "should have been foreseen."[168] It would be important to clarify some substantive and procedural requirements so that the incentives were firmly toward effective due diligence. However, foreseeability is not a sufficient limit. A human rights violation occurring in one's chain of economic activity does not necessarily meet the "ought implies can" test.[169] Some violations may be foreseeable, but the firm may have no way to prevent them. Under the UNGPs firms have a responsibility to use their leverage over the third party, to bring to the fore the relevant issue of power over that actor.[170] The treaty denies this relevance, and as such suggests that firms could be held liable for violations to which they have no causal connection, nor ability to prevent.

The most contentious question regarding the scope of liability is that of complicity: would complicity in state violations be covered as foreseeable risks within the chain of economic activity?[172] The term "complicity" does not appear in the Zero Draft. It is stated that: "criminal liability for human rights violations that amount to a criminal offence, shall apply to principals, accomplices and accessories, as may be defined by domestic law."[173] No form of complicity for civil liability is mentioned.[174] Lopez noted this, stating that "many of the abuses that are usually reported involve private business and State complicity. Regrettably the draft treaty

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[166] *See* Zero Draft *supra* note 1, at art. 9.
[167] *See* Jonathan Bonnitcha & Robert McCorquodale, *The Concept of 'Due Diligence' in the U.N. Guiding Principles on Business and Human Rights*, 28 EUR. J. INT'L L. 899, 912 (2017). *But see* John Ruggie & John F. Sherman III, *The Concept of 'Due Diligence' in the U.N. Guiding Principles on Business and Human Rights: A Reply to Jonathan Bonnitcha and Robert McCorquodale*, 28 EUR. J. INT'L L. 921, 922 (2017).
[168] *See* Zero Draft *supra* note 1, at art. 10 ¶ 6(c).
[169] David Widerker, *Frankfurt on 'ought implies can' and alternative possibilities*, 51.4 *Analysis* (1991), 222.
[170] *See* Report of the Special Rapporteur on the issue of human rights obligations relating to the environment of safe, clean, healthy and sustainable environment, *supra* note53, at ¶ 19.
[172] *See* Andrew Clapham & Scott Jerbi, *Categories of Corporate Complicity in Human Rights Abuses*, 24 *Hastings Int'l & Comp. L. Rev*. 339, 340 (2000).
[173] *See* Zero Draft, *supra* note 1, art. 10.8.
[174] *See* Zero Draft, *supra* note 1, art. 10.6.

pays scant attention to the role of the State and the need for accountability and remedy in that context."[176] This marginalizes some of the major BHR cases such as Shell in Nigeria and complicity in oppressive government surveillance programmes.[177] The refusal to explicitly accept or reject the term "complicity," which also was not mentioned at the fourth plenary discussing the Zero Draft,[178] again leaves too much in the hands of judicial interpreters. If complicity is not included then many business-related violations will be excluded, and businesses will be permitted to profit from harm. If complicity is included without restriction then an enormous range of government policy will be de facto prohibited by the treaty.

According to the current wording, complicity in state violations can plausibly be encompassed within a firm's "chain of economic activity."[179] There too many possible varieties to cover exhaustively, but supplying a product, service, or data to a state would seem to be part of the "chain of economic activity," as would policies of private prisons, immigration facilities such as those on Australia's Manus Island, or online media firms colluding in censorship.[180] This would have advantages over the high bar set for complicity in international law, defined by the OHCHR as "knowingly providing practical assistance or encouragement that has a substantial effect on the commission of a crime."[181] The UNGPs supplement the criminal definition of complicity with a "non-legal" conceptualization, wherein businesses should take responsibility where it is seen to benefit from the abuses of others, or where abuse is linked to its operations.[182] It is possible that the "chain of economic activity" approach is

[176] *See* Carlos Lopez, *Towards an International Convention on Business and Human Rights (Part I)*, OPINIO JURIS (July 20, 2018), http://opiniojuris.org/2018/07/23/towards-an-international-convention-on-business-and-human-rights-part-i/ (Blurb).
[177] *See* Ruggie, Comments, *supra* note 50. (Include blurb); Sigrun Skogly, *Complexities in human rights protection: Actors and rights involved in the Ogoni conflict in Nigeria* 15.1 NETHERLANDS QUARTERLY OF HUMAN RIGHTS (1997) 47.
[178] *See* Fourth Session, *supra* note 2. (Include blurb).
[179] *See* Zero Draft, *supra* note 1, art. 10.6.
[180] Gabrielle Holly, *Transnational Tort and Access to Remedy under the UN Guiding Principles on Business and Human Rights: Kamasaee v Commonwealth.* 19 MELB. J. INT'L L. (2018), 52.
[181] *See* OHCHR, Respect, *supra* note 29 pp. 57, 5 (Include blurb)
[182] *See* Zero Draft, Commentaries *supra* note 5 pp# (Blurb); OHCHR, Respect, *supra* note 29 pp. 57, 5

designed to offer potential civil liability for this wider range of complicit acts.[183] The problem is that the terminology may be too encompassing, as a great many state violations involve business in some way.

For example, China has not ratified the ICCPR and is therefore not bound by the right to free expression. Other states cannot compel China to respect the right,[186] and China has its own view on such rights and the relationship with social harmony.[187] Nonetheless, China is undoubtedly violating the right to free expression according to human rights norms, including prosecuting individuals, such as Falun Gong practitioners, for online speech.[188] Min Jiang lists a number of tactics designed by the state and implemented by private companies that "have seriously limited Chinese netizens' right to speech . . . [and that] have turned private firms into part of the Party's censorship apparatus."[189] These include:

> [R]eal name registration asked users to register their real identities with Chinese microblogging services linked to their national ID cards, mobile phones, or other identifications; reporters were barred from releasing information on social media without permission; outspoken Weibo celebrities were nudged to 'behave'; and state 'anti-rumour' campaigns carried stiff penalties for posting 'rumors'. Official mouthpiece *People's Daily*'s online outlet People's Net (2015) even openly warned Sina that it would face suspension if failing to manage 'public complaints'.[190]

Companies, both Chinese and foreign, are intimately involved and can foresee the violations that occur in their chain of economic activity. In some cases they implement and therefore possibly "control" the violative operation as per section (a).[192] These acts are

[183] *See* Zero Draft, *supra* note 1, art. 10.6.
[186] Soft options such as 'reputational sanctions' are discussed in: *See* Andrew Guzman, *A compliance-based theory of international law*, 90CAL. L. REV. 1823 (2002) https://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1391&context=californialawreview (Include blurb).
[187] *See* Zhou Qi, *Conflicts over Human Rights between China and the US*, 27 HUM. RTS. Q. 105 (2005). *See generally* Guobin Zhu, *Prosecuting Evil Cults: A Critical Examination of Law Regarding Freedom of Religious Belief in Mainland China*, 32 HUM. RTS. Q. 471 (2010). For more information on religious freedom. *Id.*
[188] *See Falun Gong still worries China, despite efforts to crush the sect*, ECONOMIST, Aug. 30, 2018 https://www.economist.com/china/2018/08/30/falun-gong-still-worries-china-despite-efforts-to-crush-the-sect.
[189] *See* Min Jiang, *Chinese Internet Business and Human Rights*, 1. BUS. HUM. RTS J 139, 141 (2016).
[190] *See id.* at 141-42.
[192] *See* Zero Draft, *supra* note 1, art. 10.6.

probably transnational by the broad definition invoked in the Zero Draft,[193] and as many firms have "substantial business interests" abroad, foreign courts would be compelled to hear cases.[194] The treaty in its current form therefore seems to establish liability for Chinese internet firms in foreign courts. While many activists might support this, the purpose of the treaty is not to enforce all human rights everywhere by the backdoor. No matter what, China will continue to police speech online and prosecute individuals for their speech, and domestic companies will remain complicit in this.[196] The US and many other major nations would be just as likely to fall foul of a comprehensive inclusion of complicity based on chains of economic activity, and it would therefore lead to the widespread rejection of the treaty.

Reservations could be one means by which to evade differences in domestic policy without denying all complicit liabilities. The Zero Draft states that "Reservations incompatible with the object and purpose of the present Convention shall not be permitted."[197] This is based on Article 19(3) of the Vienna Convention on the Law of Treaties.[198] A General comment on the ICCPR states that "[r]eservations that offend peremptory norms would not be compatible with the object and purpose of the Covenant."[199] The purpose of the zero draft is stated as:

> a. To strengthen the respect, promotion, protection and fulfilment of human rights in the context of business activities of transnational character; b. 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; c. To advance international cooperation with a view towards fulfilling States' obligations under international human rights law.[200]

[193] Defined as: "[b]usiness activities of a transnational character," which "shall mean 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." Zero Draft *supra note* 1 at Art. 4.2.
[194] *See* Zero Draft, *supra* note 1, Art. 5.2(c).
[196] One possible externality of the treaty, once practice determines definitions, could be the creation of non-transnational firms as a means by which to evade the standards.
[197] *See* Zero Draft, *supra* note 1, Art. 15.14-.15.
[198] Vienna Convention on the Law of Treaties art. 19, May 23, 1969, 1155 U.N.T.S. 331.
[199] UN Human Rights Committee, CCPR General Comment No. 24: Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under Article 41 of the Covenant, ¶ 8, CCPR/C/21/Rev.1/Add.6 (Nov. 4, 1994).
[200] *See* supra note 1 at art. 2

Point (c) is addressed in Article 12 on international cooperation, and Article 11 addresses the related concept of "mutual legal assistance," including a wide range of forms such as evidence gathering and recovery of assets.[201] Article 12 includes capacity-building, sharing good practices and cooperation in research.[202] There is no discussion of how state practice toward human rights should be altered other than in the context of business, and therefore point (c) may best be read as "fulfilling States' obligations under international human rights law [with regard to business activity]".[203] As such the core purpose can be defined as at least covering the prevention of, and accountability for, human rights violations by businesses.

If this reading is accurate, it might be sensible to permit a fairly wide range of reservations by states, with the exception of jus cogens norms, and to clarify that these reservations would inform the standards applied in cases decided extraterritorially. This would be an imperfect solution hemming closely to the apology line because states would be permitted to protect their engrained rights-violative policies. But the alternative is utopian idealism of the sort that would force many states to avoid the treaty. Unless greater precision is elaborated, taking into account the specifics of each right and each form of connection in light of complicity, significant reservations ring-fencing rights violations may be the only way forward. A complementary tactic could be to also adopt the "margin of appreciation" doctrine as developed by the European Court of Human Rights (ECtHR).[206] This aims to strike "a just balance between the protection of the general interest of the community and the respect due to fundamental human rights."[207] States are permitted some leeway in how they interpret rights, including taking a more restricted view of the right, in light of their own specific situations and cultural norms. Such a doctrine could be useful for the treaty, though it too would need its scope elaborated.

[201] *See* Zero Draft, *supra* 1, art. 11.
[202] *See* Zero Draft, *supra* 1, art. 12.
[203] *See* Zero Draft, *supra* 1, art. 2.
[206] Yuval Shany, *Toward a general margin of appreciation doctrine in international law?* 16.5 EUR. J. INT. L. (2005), 907.
[207] Belgium Linguistics Case (No.2) 1968 (1) EHRR 252, 5b.

C. What would be the Effect of the Jurisdictional Scope?

> Jurisdiction, with respect to actions brought by an individual or group of individuals, independently of their nationality or place of domicile, arising from acts or omissions that result in violations of human rights covered under this Convention, shall vest in the court of the State where: a. such acts or omissions occurred or; b. the Court of the State where the natural or legal person or association of natural or legal persons alleged to have committed the acts or omissions are domiciled. 2. A legal person or association of natural or legal persons is considered domiciled at the place where it has its: a. statutory seat, or b. central administration, or c. substantial business interest, or d. subsidiary, agency, instrumentality, branch, representative office or the like.[209]

The Zero Draft encompasses a wide-ranging set of jurisdictional options, as elaborated in Article 5. The Zero Draft adopts both home and host state jurisdiction.[210] Claimants are free to use the legal system where the act or omission occurred, or where the individual or business is domiciled.[211] Domiciled has a very broad definition, including 'substantial business interest' or even a "representative office."[212] This broad definition is designed to override the doctrine of forum non conveniens in common law—though not in use in the U.K. under E.U. law.[213] Given the significant restrictions on access to justice that doctrine has caused, it is positive that the treaty has taken steps to broaden access.

It also carries risks, however, countries like the United States, United Kingdom, or Switzerland, home to numerous "representative offices" and in which many firms have "substantial business interests," and with respected legal systems, would have responsibility to hear an enormous range of cases.[214] This risks imposing an undue burden on certain legal systems. There is something of an unspoken assumption that "home" states are wealthy and have the capacity to hear and investigate cases that traditional "host" states may not. But in

[209] *See* Zero Draft, *supra* note 1, art. 5
[210] *See* Zero Draft, *supra* note 1, art. 5
[211] *See* Zero Draft, *supra* note 1, art. 5
[212] *See* Zero Draft, *supra* note 1, art. 5
[213] Don Mayer and Kyle Sable, *Yes! We have no bananas: Forum non conveniens and corporate evasion*, 130 INT'L BUS. L. R. 131 (2004).
[214] *See* Zero Draft, *supra* note 1, art. 5

the United Kingdom legal aid has been cut dramatically since 2010,[215] and the threat of an overwhelming caseload may incentivize rejection of the treaty. It is a reasonable concern for states to have and should be addressed by the drafters.

1. Applicable Law

> 7.1. Subject to the following paragraph, all matters of substance or procedure regarding claims before the competent court which are not specifically regulated in the Convention shall be governed by the law of that court, including any rules of such law relating to conflict of laws.
>
> 7.2. At the request of victims, all matters of substance regarding human rights law relevant to claims before the competent court may be governed by the law of another Party where the involved person with business activities of a transnational character is domiciled. The competent court may request for mutual legal assistance as referred to under Article 11 of this Convention.[216]

Given that terms like "human rights violation" are not defined, they may be considered "not specifically regulated in the Convention," at least for the more marginal cases.[217] Therefore, as mentioned above, domestic law may be useful in interpreting the precise content of this term. However, this only adds to the confusion. Domestic law rarely lists human rights violations. For example, the U.K. Modern Slavery Act does not use the term "human rights violation," rather various "offences" are adopted under criminal law.[218] Constitutions, or regional Conventions like the European Convention on Human Rights (ECHR),[219] lists certain rights and relevant courts interpret them. From this a list of violations could be produced. However, as in the ECHR, these documents are often more limited than "all internationally recognized human rights."[220] The ECHR, for example, includes the right to education, but not to housing.[221] Each E.U. state regulates housing, but it is not clear which of these regulations

[215] Andrew Burridge and Nick Gill, *Conveyor-Belt Justice: Precarity, Access to Justice, and Uneven Geographies of Legal Aid in UK Asylum Appeals*, 49.1 ANTIPODE 23 (2017).
[216] *See* Zero Draft, *supra* note 1, art. 7.
[217] *id.*
[218] UK Modern Slavery Act, e.g. 1(1).
[219] *See*, Eur. Consult. Ass., *European Convention on Human Rights*, 11th. Sess., Doc. No. 194 (1953). [BLURB].
[220] *See id.*
[221] *See id.*

would amount to a violation of the right to housing when breached. Leaving the question for states may lead to minimalistic or uneven standards globally.

The second problem is that there are enormous differences between national interpretations of rights. The second amendment—the right to bear arms—to the U.S. constitution can clearly not be applied extraterritorially.[223] While this could be easily resolved through reservations, how should the United States interpret the first amendment in light of this treaty? The expansive reading of free speech may be cherished domestically, but it conflicts with other jurisdictions, such as the German prohibition on Holocaust denial, and numerous idiosyncratic cases globally. Article 7.2 redoubles this problem by allowing the victim to choose the law to be applied.[225] It would appear that a French company obeying the law in Germany could be sued in Germany for acting over Holocaust denial under the U.S. constitutional right to free speech. This is an absurd position. Far more precision is needed around the intention of Article 7, and its relation to other articles.[226] Again, the treaty drafters have failed to take a coherent position, and in so doing have obfuscated between apology and utopia.

2. Due Diligence

A further set of questions are raised in the Articles on "Prevention," which primarily relate to due diligence. States parties are obligated to implement binding due diligence laws,[229] though the requirements move away from the four-stage process of the UNGPs.[230] Human rights impacts should be "monitored"[231] while human rights violations should be "prevented," including in firms linked to business operations.[232] As Ruggie notes, a legal obligation to "prevent" human rights violations through due diligence makes it a standard of outcome, which

[223] *See* U.S. CONST. amend. II. [BLURB]
[225] *See* Zero Draft, *supra* note 1, art. 7.2.
[226] *See* Zero Draft, *supra* note 1, art. 7.
[229] *See id* at Art. 9.1 [BLURB]
[230] UNGPs, *supra* note 52, Principle 17.
[231]*See id* at Art. 9.2 (a) [BLURB]
[232] *See id* at Art. 9.2 (c) [BLURB]

"is an extremely tall order for any due diligence requirement."[233] Due diligence in the UNGPs is designed to help a business "understand its specific human rights risks."[234] It cannot be realistically expected to "prevent" all violations of those linked to a firms operations. However, given that firms have criminal and civil liability under Article 10 regardless, this may not be relevant.[235] Article 10.6 offers three distinct means, any of which establishes liability: where the firm "controls," or has a "close relation with," or should have foreseen the risk in its chain of economic activity.[236] Due diligence appears to be relevant only to Article 10.6(c) in assisting corporations foreseeing possible violations.[237] Here, good due diligence could assist in a legal defence that the violation was not reasonably foreseeable. This is a sensible standard as it incentivizes due diligence. Failure to undertake due diligence would add weight to allegations that the harm "should have been foreseen" and therefore incentivizes meaningful due diligence.[238] The relationship between due diligence and foreseeability should nonetheless be clarified.

Other have made different readings. Meeran adopts a minimalistic "apology" reading where liability *requires* inadequate due diligence.[239] This is inaccurate, I believe, because the wording in 10.6 is clear: firms are liable for harm caused by human rights violations in the three situations described above.[240] This is a strict liability not dependant on due diligence other than in relation to the foreseeability element of part (c).[241] Strict liability at least for harm caused is a reasonable standard. To require inadequate due diligence as a condition of liability

[233] *See* Ruggie, *supra* note 26. [BLURB]
[234] *See*, OHCHR, *supra* note.29. [BLURB]
[235] *See* Zero Draft, *supra* note 1, art. 10.
[236] *See* Zero Draft, *supra* note 1, art. 10.6.
[237] *See* Zero Draft, *supra* note 1, art. 10.6.
[238] Discussed critically in relation to the UNGPs in Surya Deva, *Guiding principles on business and human rights: implications for companies*, 9.2 EUR. CO. LAW 9.2 (2012), 101, 107-8.
[239] *See*, Meeran, *supra* note 117. [BLURB]. Meeran writes, "Articles 9 and 10.6 signal the prospect of civil liability for foreseeable harm arising from due diligence failures by an MNC in respect of operations over which the MNC had control or was sufficiently closely related."
[240] *See* Zero Draft, *supra* note 1, art. 10.6.
[241] *See* Zero Draft, *supra* note 1, art. 10.6 (c).

unnecessarily restricts the treaty and could lead to interminable legal battles. One final interesting point is that due diligence itself, including the entire range of specific obligations, such as stakeholder consultation and human rights impact assessments,[242] appears to be a binding obligation with legal sanction regardless of whether harm ensues. Article 9.4 states that "[f]ailure to comply with due diligence duties under this article shall result in commensurate liability and compensation in accordance with the articles of this Convention."[243] How this would work in practice is unclear, and it may be that this clause gathers dust for some years. Nonetheless it is a useful option to have as due diligence evolves.

V. CONCLUSION: CLARIFYING THE PROBLEM AND POSSIBLE SOLUTIONS

The treaty's language and clarity can certainly be improved, but the preceding analysis suggests significant problems stemming from the nature of the BHR field. Human rights violations by businesses are endemic.[244] Businesses are at the vanguard of environmental destruction and often play major roles in implementing violative state practices. At best, firms using marginalized workers attempt to toe on the right side of the labour rights line as cheaply as possible.[247] Every right and numerous state and industry practices raise entire sets of questions. This is both an issue of problem diversity and of sheer quantity. It is worth recalling a critique of Ruggie's from the early days of the treaty negotiations:

> [BHR] encompasses too many complex areas of national and international law for a single treaty instrument to resolve across the full range of human rights. Any attempt to do so would have to be pitched at such a high level of abstraction that it would be devoid of substance, of little practical use to real people in real places, and with high potential for generating serious backlash . . . .[248]

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[242] *See*, Eur. Consult. Ass., *European Convention on Human Rights* at Art. 9.2(g)(e). [BLURB].
[243] *See* Zero Draft, *supra* note 1, art. 9.4.
[244] See generally on the scope of business wrongdoing: David Birchall, *The Consequentialism of the UN Guiding Principles on Business and Human Rights: Towards the Fulfilment of 'Do No Harm'* 24.1 E. J. BUS. ETH. AND ORG. STDS. (2019), 28, 34-36.
[247] *See* Mark Anner, *Labor control regimes and worker resistance in global supply chains*, 56 LAB. HIST. 92 (2015) *available at* https://www.tandfonline.com/doi/full/10.1080/0023656X.2015.1042771.
[248] *See* John Ruggie, *The Past as Prologue? A Moment of Truth for UN Business and Human Rights Treaty, IHRB* (Jul. 8, 2014), https://www.ihrb.org/other/treaty-on-business-human-rights/the-past-as-prologue-a-moment-of-truth-for-un-business-and-human-rights-tre.

The Zero Draft suggests Ruggie may have been correct. The treaty is abstract through its indeterminacies. However, it's grounding in legal liability means that it is not an abstract document. It will create real court cases that will have real winners and losers. States will not sign unless they are clear on what they will and will not be asked to do under the treaty. It is an obligation of the drafters to provide this clarity. This will involve making hard choices. Failure to make these choices leaves the treaty hovering between apology and utopia and does rights-holders a great disservice. Those, such as Khoury and White, who focus on hard legal sanctions and lament the "obvious inadequacy of [the UNGPs] system based on corporate voluntarism and the lack of effective regulatory mechanisms,"[250] would do well to think about the human rights impacts that would go ignored by any remotely acceptable version of a binding treaty, and to acknowledge, as Kirkebø and Langford write, that ambition in one area is inevitably minimalism in another.[251]

Three flawed resolutions are possible: the utopian option is a binding treaty that defines the term violation, and other terms, inclusively, in so doing radically transforming numerous areas of business and state practice. This is unlikely to be supported by states as it would impinge on numerous areas of state and business practice, including culturally-sensitive areas. Second, the treaty could define the term violations narrowly, perhaps limited to a narrow conception of direct interference. This would exclude many plausible duties, victims and de facto many entire rights, from the scope. Third, the treaty could rely on domestic norms. This would allow some ambition to be retained without compelling states beyond their own level of comfort. It would mean state practice would go unaffected and complicity would at least be very limited, standards would vary and may lead to a race to the bottom to retain investment levels and

[250] *See* Stefanie Khoury and David Whyte, *The UN Still Won't Prioritize Human Rights Above the Rights of Corporations*, POLITICAL QUARTERLY BLOG, *(*Aug. 31, 2018), https://braveneweurope.com/stefanie-khoury-and-david-whyte-the-un-human-rights-councils-draft-zero-still-wont-prioritise-human-rights-above-the-rights-of-corporations.

[251] Tori Loven Kirkebø and Malcolm Langford, *The Commitment Curve: Global Regulation of Business and Human Rights*, 3.2 BUS. HUM. RTS. J. 157, 160 (2018).

prevent overwhelming caseloads. It could also become a tool of power politics, with companies harassed for political reasons.

The best solution may lie in greater detail. The OEIGWG must conduct research into the precise requirements of each right in relation to business, and the extent of business liability as regards each right and in a variety of situations. This approach is similar to the proposal to adopt specifically-targeted treaties,[255] following, for example, the Framework Convention on Tobacco Control.[256] However, that approach is a laborious means to binding obligations that would mean many rights would go ignored for decades. The idea proposed here is to provide an annex detailing the obligations of corporations for each right, including around issues such as privatization and complicity, thus aligning the holism of the treaty with, to some extent, the specificity of the targeted approach. This would not require detailed description and should rely on extant human rights obligations derived from General Comments and other sources. It should at least provide guidance of the areas that form corporate liabilities. For example, which of the seven criteria underlying the right to housing will be covered,[257] and what general principles should guide courts in considering "harm caused by violations of the right to housing"?[258] The OEIGWG presumably intend this work to be conducted by the Committee over time.[259] While the Committee should refine and evolve the OEIGWG's standards—and therefore some flexibility must be built-in—far more clarity is needed at the outset because rights-holders will be looking to rely on this treaty from day one, numerous special interests will look to use it and real cases will have to be decided on it. This research would force the drafters to confront the hard questions they have so far put aside. It would undoubtedly result

[255] *See* John Ruggie, *A Business and Human Rights Treaty? International legalisation as precision tools*, IHRB, (Jun. 13, 2014), https://www.ihrb.org/other/treaty-on-business-human-rights/a-business-and-human-rights-treaty-international-legalisation-as-precision/.
[256] The World Health Organization Framework Convention on Tobacco Control, adopted by the 56th World Health Assembly, 21 May 2003.
[257] General Comment No. 4: The Right to Adequate Housing, *supra* note 83, para. 8.
[258] *See* Zero Draft, *supra* note 1, art. 10.6.
[259] *See* Zero Draft, *supra* note 1, art. 14.

in some unpopular conclusions, but the treaty requires such choices to be made. This would be labour intensive for the OEIGWG, but given the importance of the mandate, which is after all "open-ended," it should be possible.

In sum, the current draft is an ambitious starting point, but it obfuscates over the hard questions at almost every turn. Once these hard questions start being answered, the treaty will have made a choice between apology and utopia. There are surely some clever technocratic solutions out there, but there is probably no way to satisfy both states and civil society while retaining clarity in the treaty. The treaty has tried to toe a line between the preferences of diverse groups, but its chosen method may end up satisfying no one.