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BALANCING SOFT AND HARD LAW FOR BUSINESS AND HUMAN RIGHTS

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Abstract In the wake of increasing corporate disasters, there has been an urgent need to address the impact of business on human rights. Yet business responsibilities for human rights are mainly voluntary and best understood as 'soft law'. Recently, however, States have begun negotiations for an internationally binding treaty in this area, suggesting that there is a need to turn to 'hard law' to increase the efficacy of business and human rights (BHR) initiatives. This article argues that because soft and hard law concepts are not dichotomous, BHR governance need not become 'hard law' to be effective. Rather 'hardened' soft law instruments can be equally effective.

Keywords: Public International Law, human rights, business and human rights, globalization, soft law, supply chains.

INTRODUCTION

Business and human rights (BHR) issues permeate some of the most pressing problems faced both by governments and businesses. These range from economic inequality,[1] to the protection of human rights in free trade deals[2] and to supply chain matters.[3] Recently, the importance of protecting BHR issues has been highlighted by recent scandals such as the collapse of a garment factory in Bangladesh[4] and the large number of employee suicides in one of Apple's largest suppliers in China.[5] Indeed, the idea of BHR as encompassing two disparate systems that operate in isolation from one another is gradually being rejected by both governments and business. These issues are now understood as something which must be addressed.

Yet despite the growing recognition that it is important for business to address human rights issues, responsibilities for companies in this area are

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[1] T May, 'We can make Britain a country that works for everyone' (11 July 2016).

[2] United Nations, 'UN experts voice concern over adverse impact of free trade and investment agreements on human rights' (2 June 2015).

[3] M Mason *et al.*, 'Shrimp Sold by Global Supermarkets Is Peeled by Slave Labourers in Thailand' *The Guardian* (14 December 2015).

[4] JA Manik and J Yardley, 'Building Collapse in Bangladesh Leaves Scores Dead' *New York Times* (24 April 2013).

[5] J Chan *et al.*, 'Dying for an iPhone: The Lives of Chinese Workers' *ChinaDialogue* (15 April 2016).

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mainly voluntary. Corporate BHR responsibilities are rarely framed in mandatory language and enforcement of these voluntary responsibilities also tends to be weak or non-existent. For that reason, BHR corporate responsibilities are best characterized as 'soft' law.

Recently, however, there have been attempts to 'harden' BHR responsibilities by initiating a shift from voluntary to mandatory frameworks. States are in the midst of negotiating a binding BHR treaty, which, upon completion, would impose legally binding human rights obligations on multinational companies.[6] Efforts have also been made at the domestic level to harden BHR responsibilities. Whilst binding legal obligations certainly bring clarity and enforceability, businesses have frequently opposed such initiatives. In fact, previous efforts to impose mandatory BHR obligations on businesses met with such resistance that the initiatives had to be abandoned altogether.[7]

Against this background, this article questions whether initiatives setting out the responsibilities of business vis-à-vis human rights need to encompass binding legal obligations in order to be effective. If the goal of promoting such initiatives is to minimize corporate impacts on human rights, binding obligations may not be beneficial in an area where business acceptance of such initiatives is crucial to their success. Instead, this article argues that BHR initiatives that are essentially soft in nature but that are accompanied by characteristics of hard law can be equally effective at establishing norms for business responsibilities without becoming legal obligations.

The article proceeds as follows. Part I begins by considering the definition and differences between the notions of 'soft' and 'hard' law, suggesting that the concepts are not dichotomous but rather operate on a continuum. It then identifies the leading multilateral BHR initiatives and attempts to place them on the soft to hard law continuum. Having concluded that most BHR initiatives are located closer to the soft law end of the continuum, Part II discusses whether these initiatives need to become binding legal obligations, drawing on examples in other areas of law. This Part concludes by finding utility in soft law initiatives that incorporate characteristics of hard law. Part III examines how BHR soft law initiatives can be hardened, or moved closer from being voluntary to mandatory, in order to better establish norms in this area, and suggests how to do so. Finally, Part IV examines the circumstances under which BHR issues require binding legal obligations in addition to hardened soft law initiatives. Drawing from legalized approaches both at the international and domestic levels, this part explores the scope for and limits of designing future binding obligations.

[6] For an overview of this treaty process see B Choudhury, 'Spinning Straw into Gold: Incorporating the Business and Human Rights Agenda into International Investment Agreements' (2017) 38(2) UPennJIntlL101.

[7] I Bantekas, 'Corporate Social Responsibility in International Law' (2004) 22 BUIntlLJ 309, 319.

I. SOFT AND HARD LAW

A. Distinguishing between Soft and Hard Law

In assessing the nature of BHR initiatives, it is useful to begin with a definition of both soft and hard law. Whereas hard law is generally thought to consist of legally binding obligations that create enforceable rights and duties,[8] soft law does not have a universally accepted definition.[9] It may refer to 'principles, norms, standards or other statements of expected behaviour' that do not create enforceable rights and duties.[10] Alternatively, it may be defined in the negative; that is, as lacking one or more of the properties normally ascribed to law—normative content, formal legal status, and enforceability.[11]

The lack of a precise definition of soft law has led to speculation as to whether soft and hard law are dichotomies[12] or whether they simply represent two ends of a continuum, which ranges from binding legal obligation at one end to 'complete freedom of action' at the other.[13]

Positivists argue that an instrument is either law or not, making the idea of soft law redundant.[14] However, for others, soft law is thought of in terms of a continuum, reflecting variances in normativity and behaviour-influencing capacity. Although the legal content of soft law can vary, these commentators still view it as 'law' since the norms found in soft law are formulated as rules and are designed to guide behaviour.[15] Yet their content remains 'soft' in terms of their precision, ability to be rendered more or less legal at the *ex ante* negotiation stage, enforceability, justiciability, normativity, or their binding nature.[16]

[8] RR Baxter, 'International Law in 'Her Infinite Variety"' (1980) 29 ICLQ 549.

[9] J Gold, *Interpretation: The IMF and International Law* (Kluwer Law International 1996) 301; C Brummer, *Soft Law and the Global Financial System: Rule Making in the 21st Century* (Cambridge University Press 2011) 2.

[10] D Shelton, 'Normative Hierarchy in International Law' (2006) 100 AJIL 291, 319–20; Baxter (n 8) 549.

[11] T Gammeltoft-Hansen *et al.*, 'Introduction: Tracing the Roles of Soft Law in Human Rights' in S Lagoutte *et al.* (eds), *Tracing the Roles of Soft Law in Human Rights* (Oxford University Press 2016) 3.

[12] J d'Aspremont, 'Softness in International Law: A Self-Serving Quest for New Legal Materials' (2009) 19 EJIL 5; J Cerone, 'A Taxonomy of Soft Law: Stipulating a Definition' in Lagoutte *et al.* (n 11) 16–17.

[13] Shelton (n 10) 320; CM Chinkin, 'Normative Development' in D Shelton (ed), *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (Oxford University Press 2003) 37; IA Olsson, 'Four Competing Approaches to International Soft Law' (2013) 58 *Scandinavian Studies in Law* 177, 187.

[14] d'Aspremont (n 12); J Klabbers, 'The Redundancy of Soft Law' (1996) NordicJIntlL 167; K Raustiala, 'Form and Substance in International Agreements' (2005) 99 AJIL 586; JL Goldsmith and EA Posner, *The Limits of International Law* (Oxford University Press 2005) 81–2; Cerone (n 12) 16.

[15] Cerone (n 12) 16.

[16] d'Aspremont (n 12) 1081–7; J d'Aspremont, 'Softness in International Law: A Self-Serving Quest for New Legal Materials: A Rejoinder to Tony D'Amato' (2009) 20 EJIL 911, 914; GC Schaffer and MA Pollack, 'Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance' (2010) 94 MinnLRev 706, 716; WM Reisman, 'A Hard Look at Soft Law' (1988) 82 ASIL Proceedings 373; WM Reisman, 'Soft Law and Law Jobs' (2011) 2(1) JIDS 25.

The multiplicity of forms soft law can take also supports the idea of a soft–hard law continuum, rather than distinct categories. Soft law can be found in a breadth of instruments including treaties, codes of conduct, voluntary resolutions, joint declarations, ministerial conferences, tacit or oral agreements, final communiqués, and statements prepared by non-governmental organizations purporting to delineate international principles.[17] However, it is not the form of an instrument that is determinative of its legal status.[18] Whilst treaties containing precise commitments and specific obligations or rights are more indicative of hard law,[19] treaties that provide for the 'gradual acquiring of standards or for general goals and programmed action' are seen as soft and devoid of legal content.[20] In addition, delegating interpretation of the instrument to a third party can determine where on the continuum a particular instrument lies.[21]

Discerning whether an area is soft or hard law may also be facilitated by examining the legal consequences that flow from performance or breach. Only where the legal consequences—of both performance and breach—can be ascertained with precision can an area be considered to have hardened.[22] Consequently, soft law norms are more likely to be characterized by vague or uncertain outcomes flowing from either the performance or breach of that norm.

Finally, the authority of the drafter(s) of an instrument may play a role in determining its hard or soft law status. Signals of authority emanating from the drafters can clarify whether an instrument is law or whether it represents only 'statements in the subjunctive mood'.[23] For example, resolutions of the UN Security Council relating to the maintenance of peace are clearly an indicator of firm authority, whereas the UN General Assembly's handling of matters not clearly assigned to it under the UN Charter are more indicative of soft authority.[24]

B. Characterizing BHR Initiatives

Having distinguished between soft and hard law and outlined arguments in support of a continuum view of these concepts, this part aims to develop an appropriate characterization of the leading international BHR initiatives. At the outset, it is important to note that these initiatives operate without an overarching governance framework. Thus, there are various multilateral BHR initiatives which aim to cover a broad range of issues. In doing so, these

[17] CM Chinkin 'The Challenge of Soft Law: Development and Change in International Law' (1989) 38 ICLQ 850, 851; Klabbers (n 14) 168; Olsson (n 13) 180–5.

[18] A d'Amato and K Engel (eds), *International Environmental Law Anthology* (Anderson Publishing Company 1996) 56–7.

[19] Chinkin (n 17) 851; KW Abbott and D Snidal, 'Hard and Soft Law in International Governance' (2000) 54(3) IntlOrg 421.

[20] Chinkin (n 17) 851.

[21] Abbott and Snidal (n 19) 421.

[22] Chinkin (n 17) 859; Reisman (1988) (n 16) 373 (referring to this as control intention).

[23] Reisman (1988) (n 16) 373.

[24] ibid 374.

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initiatives also address topics that are already covered by different institutions in addition to a lesser number of issue-specific initiatives.[25]

1. Leading multilateral BHR initiatives

Initiatives to delineate BHR obligations began in the late twentieth century as part of an effort by developing countries to control the actions of multinational corporations (MNCs).[26] Although these efforts were mainly in vain, they prompted OECD countries to promulgate their own initiative as a way to counter the actions of developing countries.[27] This led to a series of guidelines, which later became known as the *OECD Guidelines for Multinational Enterprises*.[28] The OECD Guidelines consisted of broad, non-binding standards and practices for corporations to make positive contributions to economic and social progress.[29]

Efforts to impose constraints on corporate actions in the area of labour followed shortly after and in 1978 the International Labour Organization introduced the *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy*.[30] The Tripartite Declaration provided voluntary standards for corporate practices in relation to labour issues.

In 1988, the United Nations made a concerted effort to address BHR problems by establishing a working group to explore the activities of MNCs.[31] These efforts produced the *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights* ('UN Norms'), a draft code of conduct for regulating MNC.[32] The UN Norms became the first non-voluntary initiative to detail BHR obligations, although, due in part to business opposition, they were ultimately not adopted.[33]

[25] See eg United Nations, *Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices* GA Res 35/63, UN GAOR Supp (No 48) UN Doc A/35/48 (1980) 123; World Health Organization, *International Code of Marketing of Breast-milk Substitutes* (1981).

[26] H Keller, 'Codes of Conduct and their Implementation: The Question of Legitimacy' in R Wölfrum and V Röben (eds), *Legitimacy in International Law* (Springer-Verlag 2008) 223.

[27] This included attempts to draft the United Nations Draft Code of Conduct for Transnational Corporations and to foster a New International Economic Order, which emphasized the need to regulate MNCs.

[28] OECD Guidelines for Multinational Enterprises (2011).

[29] ibid paras 2 and 8.

[30] International Labour Organization, *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy* (1978) 17 ILM 422.

[31] D Weissbrodt and M Kruger, 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard To Human Rights' (2003) 97 AJIL 901, 903–5.

[32] UN Sub-Commission on the Promotion and Protection of Human Rights, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights* (2003) (E/CN.4/Sub.2/2003/12/Rev.2).

[33] Office of the High Commissioner for Human Rights, *Responsibilities of Transnational Corporations and Related Business Enterprises with Regard to Human Rights* (2004) (E/CN.4/DEC/2004/116).

Instead, the UN went on to adopt the *Global Compact*, a policy initiative that advocates good corporate practices in several areas, including human rights.[34] Unlike the UN Norms, the Global Compact was, and continues to be, widely accepted by business, although it lacks binding standards or a monitoring mechanism.[35]

In 2005, the UN Human Rights Council appointed a Special Representative, John Ruggie, to examine BHR issues in greater detail.[36] His findings established the 'Protect, Respect and Remedy' Framework and concluded that BHR responsibility rested on three differentiated but complementary pillars.[37] These included the State duty to protect against human rights abuses; the corporate responsibility to respect human rights; and the need for more effective access by victims to remedies.

After a further three years of examination, Ruggie elaborated on the three pillars of responsibility in the *United Nations Guiding Principles on Business and Human Rights* (UNGPs).[38] In particular, in relation to corporate responsibility for human rights, he concluded that corporations should refrain from infringing on the human rights of others as well as 'address adverse human rights impacts with which they are involved'.[39] Moreover, he advised that corporations should not cause or contribute 'to adverse human rights impacts through their own activities' and should 'prevent or mitigate adverse human rights impacts that are directly linked to their operations' by engaging in a process of human rights due diligence.[40] Today the UNGPs reflect the latest international standard for corporate responsibility.

Therefore, the current global governance framework for BHR consists primarily of four initiatives. These are the OECD Guidelines for Multinational Enterprises, the ILO Tripartite Declaration, the UN Global Compact, and the UNGPs.

2. *Locating BHR initiatives on the soft to hard law continuum*

At first glance, it seems appropriate to characterize the existing global governance framework for BHR as soft law since the leading international initiatives are voluntary and non-binding. However, the primary criteria used

[34] See A Rasche, "'A Necessary Supplement" – What the United Nations Global Compact Is and Is Not' (2009) 48(4) Business Society 511.

[35] ibid.

[36] UN Commission on Human Rights, *Human Rights and Transnational Corporations and Other Business Enterprises – Human Rights Resolution 2005/69* (2005) (E/CN.4/RES/2005/69) para 1.

[37] UN Human Rights Council, *Protect, Respect and Remedy: A Framework for Business and Human Rights – Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie*, UN Doc A/HRC/8/5 (7 April 2008).

[38] UN Human Rights Council, *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework*, HR/PUB/11/04 (2011).

[39] ibid Guiding Principle 11.

[40] ibid Guiding Principle 13; UN Human Rights Council (n 37) para 25 and paras 56–64.

to distinguish soft from hard law—that is, whether obligations are binding, the degree of precision associated with the obligations and the legal consequences of performance and breach, whether there has been a delegation of the interpretation of the obligations to a third party, and the level of authority of the drafter—suggests that some of these initiatives have characteristics traditionally associated with hard law.

For example, despite the non-binding nature of the OECD Guidelines for Multinational Enterprises, they contain characteristics associated with hard law. In addition to having the authority of the OECD behind them—an international organization composed of 39 member States responsible for 80 per cent of the world's trade and investment and specializing in the promotion of global economic and social well-being—the OECD Guidelines set out with some precision standards of conduct for corporations. The Guidelines recommend that corporations 'provide for or co-operate through legitimate processes in the remediation of adverse human rights impacts' caused by the corporation, without defining 'legitimate process'.[41] The OECD Guidelines further delegate their interpretation to third parties or reviewing bodies set up in individual countries known as National Contact Points, which are also tasked with enforcement.[42] However, the National Contact Points cannot impose any binding consequences on corporations for breach of the Guidelines and their overall efficacy as a reviewing or accountability body has been questioned by commentators.[43] Still, despite containing some hard law characteristics, the OECD Guidelines seem to be more than 'pure' soft law.

Similarly, the ILO Tripartite Declaration, another non-binding initiative, employs characteristics associated with hard law. Promulgated under the authority of the ILO—a long-standing UN agency with 187 member States that provides authoritative expertise on labour issues—the Tripartite Declaration sets out precise standards concerning labour and employment issues. Examples include detailed policies on employment promotion, child and forced labour, safety and health standards, and a host of other employment and labour issues. Moreover, the ILO delegates the interpretation of the ILO Tripartite Declaration to the Officers of the Committee on Multinational Enterprises[44] and imposes reporting obligations on governments.[45] However, the Declaration neither specifies the consequences of breach of its provisions nor provides for an enforcement

[41] OECD Guidelines (n 28) Ch IV(6) and Commentary, para 46.

[42] OECD, 'National Contact Points for the OECD Guidelines for Multinational Enterprises'.

[43] JL Cernic, 'Corporate Responsibility for Human Rights: A Critical Analysis of the OECD Guidelines for Multinational Enterprises' (September 2008) 3(1) Hanse Law Review 71; O de Schutter, *Transnational Corporations and Human Rights* (Hart 2006) 8–9.

[44] Governing Body of ILO, *Procedure for the Examination of Disputes Concerning the Application of the Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy by Means of Interpretation of Its Provisions* (March 1986).

[45] For a full overview of the process see de Schutter (n 43) 6–8.

mechanism.[46] While it therefore contains fewer hard law characteristics than the OECD Guidelines, it remains far from being purely soft law.

Conversely, the UN Global Compact is much closer to occupying a position of pure soft law. In addition to being voluntary in nature, the UN Global Compact delineates its standards for corporate conduct in only ten, vaguely worded principles.[47] For instance, it sums up anti-bribery and corruption responsibilities in one principle requiring businesses to 'work against corruption in all its forms, including extortion and bribery'.[48] In contrast, the OECD Guidelines prohibit bribery and corruption in seven detailed principles followed by a seven-paragraph commentary delineating those principles' scope.[49] The Global Compact also fails to specify the consequences of its breach and does not provide any third party oversight over its principles. Corporate members are, however, required to file annual communication on progress reports and in case of failure risk dismissal from the Global Compact.[50] Still, given the UN Global Compact's lack of precision in detailing corporate standards and consequences of breach; its lack of monitoring and or third party oversight; and its voluntary nature, this instrument is likely the most cogent example of pure soft law in the BHR arena.

Finally, characterizing the UNGPs—the most current and arguably most influential BHR initiative—as soft or hard law proves rather more difficult. This is primarily because the UNGPs were deliberately grounded in non-legal norms.[51] Ruggie expressly noted that business responsibility for human rights was soft-law oriented, in part because it was derived from social norms or expectations.[52] The UNGPs thus purposely frame respect for human rights BHR as a corporate 'responsibility' instead of a legal obligation.[53] Consequently, their drafters' intent supports characterizing the UNGPs at a point away from hard law.

Apart from their deliberate grounding in non-legal norms, the UNGPs also naturally differ from hard law, despite the considerable authority of both the UN Human Rights Council and John Ruggie and the fact that the UNGPs were the first business and human rights instrument unanimously approved by the UN Human Rights Council.[54] One of the main reasons for the UNGPs tilt towards soft law is a result of its failure to specify the meaning of the

[46] O Amao, *Corporate Social Responsibility, Human Rights and the Law: Multinational Corporations in Developing Countries* (Routledge 2011) 30.

[47] D Weissbrodt, 'Businesss and Human Rights' (2005) 74 UCinLRev 55, 66; S Deva, 'Global Compact: A Critique of UN's "Public-Private" Partnership for Promoting Corporate Citizenship' (2006) 34 SyracuseJIntlL&Com 107, 129.

[48] UN Global Compact, Principle 10.

[49] OECD Guidelines (n 28) 47–50.

[50] UN Global Compact, 'The Communication on Progress (COP) in Brief'.

[51] UN Commission on Human Rights, *Report of the United Nations High Commissioner on Human Rights on the Responsibilities of Transnational Corporations and Related Business Enterprises with Regard to Human Rights – Business and Human Rights: Towards Operationalizing the 'Protect, Respect and Remedy' Framework* (2009) (A/HRC/11/13) para 46.

[52] ibid para 46.

[53] ibid paras 58 and 62.

[54] UN Human Rights Council Res 17/4, UN Doc A/HRC/17/L.17/Rev.1 (15 June 2011).

'corporate responsibility to respect'. Compare, for instance, the UN Norms, which provided detailed and specific corporate obligations in relation to a variety of rights including human rights, the rights of workers, consumer protection and environmental protection.[55] While a subsequently drafted interpretative guide has later elaborated on the corporate responsibility in the UNGPs, the notion is still far less precise than what is found in the UN Norms.[56]

The UNGPs also do not specify the consequences of a breach of the corporate responsibility to respect or involve any third party oversight. Instead, they only recommend either that States should primarily adjudicate failures in this regard or that corporations or industry create adjudication mechanisms.[57] The UNGPs even recognize that there are gaps or limitations in access to effective remedy mechanisms for victims of corporations' failure to respect human rights, but still do not provide a monitoring or enforcement mechanism which would oversee the conduct espoused in the UNGPs.[58] As a result, the relative lack of precision in both the content and enforcement of the UNGPs, combined with its non-binding nature and its lack of third party oversight, position this instrument much closer to soft law than hard law.

Although they are all non-binding, the above-mentioned initiatives are not equivalent in terms of their soft law nature. Clearly, the UN Global Compact, without precise obligations or specification of the consequences of breach and lack of third party oversight, is softer than the OECD Guidelines, which possess harder variants of all of those characteristics. Meanwhile, the ILO Tripartite Declaration and the UNGPs lie somewhere between those two initiatives on a continuum between soft and hard law. By providing a type of third party oversight, the ILO Tripartite Declaration is positioned closer to the hard law end of the continuum, where the OECD Guidelines lie. Conversely, the UNGPs are located closer to the soft law end, which is anchored by the UN Global Compact. This is a result of the UNGPs' lack of consequences for breaches and lack of third party oversight, even though it contains infinite more elements of each of these elements of hard law than the UN Global Compact.

Nevertheless, none of these initiatives—not even those possessing several characteristics traditionally associated with hard law—could be confused with binding, legal obligations. However, as the OECD Guidelines in particular demonstrate, by adopting certain characteristics traditionally associated with hard law BHR initiatives can gravitate closer to the hard law end of the continuum. As a result, if an argument exists that BHR initiatives

[55] UN Norms (n 32) paras 2–14.

[56] OHCHR, *The Corporate Responsibility to Respect Human Rights: An Interpretive Guide* (United Nations 2012).

[57] UN Human Rights Council (n 38) paras 82–101.

[58] ibid para 103.

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should be 'hardened' or moved closer to mandatory obligations, it becomes clear that this is already possible without adopting binding, legal obligations.

II. HARDENING BUSINESS AND HUMAN RIGHT INITIATIVES

As current BHR efforts have resulted in tools that occupy numerous different positions on a soft to hard law continuum, this section examines whether future instruments should move still closer towards binding obligations. As the practice of the States attempting to draft a binding business and human rights treaty indicates, the ultimate objective of shifting towards hard law is 'the creation of direct international law obligations for corporations regarding their human rights accountability'.[59] The question thus arises whether establishing such norms is better achieved through soft or hard law.

A. Choosing between Soft and Hard Law

Soft law has a number of advantages. For one, it is more flexible than hard law as it grants governments the room to manoeuvre and can make it easier for them to respond to problems or changing circumstances on an as needed basis.[60] In areas which are developing or changing quickly, soft law instruments are particularly useful as they can be adopted rapidly and easily changed. Their utility is also especially high for areas marked by a lack of consensus or in which governments are reluctant to make binding commitments.[61] Soft law can further be used to overcome inter-State deadlock[62] or act as a means of achieving compromise between governments that cannot agree on the extent of regulatory control that a specific area warrants.[63]

Furthermore, soft law can be advantageous because it is not subject to the normal legal enactment processes and yet can still influence conduct in a desired manner despite its non-legal status.[64] In this sense, soft law may be preferable to 'no law' or to a binding instrument with 'diluted and vague provisions'.[65] By fostering dominant norms, soft law also acts as a behaviour-coordinating tool as between actors.[66] From this perspective, its

[59] C Good, 'Mission Creeps: The (Unintended) Re-enforcement of the Actor's Discussion in International Law through the Expansion of Soft Law Instruments in the Business and Human Rights Nexus' in Lagoutte *et al.* (n 11) 266.

[60] Chinkin (n 17) 852; Shelton (n 10) 322; Abbott and Snidal (n 19) 423; A Newman and D Bach, 'The European Union as Hardening Agent: Soft Law and the Diffusion of Global Financial Regulation' (2014) 21(3) JEPP 430.

[61] Shelton (n 10) 322; Abbott and Snidal (n 19) 423.

[62] J Gold, 'Strengthening the Soft International Law of Exchange Arrangements' (1983) 77 AJIL 443; JJ Kirton and MJ Trebilcock, 'Introduction: Hard Choices and Soft Law in Sustainable Global Governance' in JJ Kirton and MJ Trebilcock (eds), *Hard Choices and Soft Law Voluntary Standards in Global Trade, Environment and Social Governance* (Ashgate 2004) 5.

[63] Gold (n 62) 444.

[64] Shelton (n 10) 322; P Weil, 'Towards Relative Normativity in International Law' (1983) 77 AJIL 413, 415.

[65] Chinkin (n 17) 861.

[66] Brummer (n 9) 132.

function is to shape and share values and to create a standard of expectations. It can thus mould both the acts of governments and those of non-State actors, including corporations.[67]

Soft law further lowers contracting costs. With non-soft law instruments, negotiation and drafting costs are increased as are the approval and ratification process.[68] The costs of acceding sovereignty in more legalized instruments also tend to be higher, particularly in multilateral instruments.[69]

Finally, soft law can act as a complement to hard law. It is frequently used to help codify the norms in an area or to supplement existing hard law.[70] In this latter function, it can resolve ambiguities, provide detailed rules or technical standards necessary for interpretation, or fill voids.[71] In a wider sense, it can also help set a framework for the regulation of behaviour that assists with the negotiation of disputes.[72] Indeed, because soft law works towards creating a framework, it naturally has informative and educative purposes. Consequently it is well suited to guide self-regulation efforts of those whose behaviour it seeks to influence, particularly if monitoring bodies provide assistance for this role.[73]

Despite these advantages, there are also many instances where legalization, or hard law, is preferable. Legalization enables States to signal the credibility of their commitments, which is particularly important when coordination or cooperation between States is necessary.[74] It can also address problems of incomplete contracting by creating mechanisms to interpret parties' commitments.[75] Hard law further prevents States from engaging in opportunistic behaviour or from reneging on its commitments, which enhances credibility.[76] In addition, it can facilitate the enforcement of a State's commitments, especially if interpretation of the law in question is delegated to a third party.[77] Such delegation may be useful as it prevents self-interpretation of the instrument, which in turn prevents opportunistic behaviour.[78]

Finally, hard law can enhance the legitimacy of an obligation, enabling it to act as a 'compliance pull'.[79] Compliance may even be heightened because of the discourse that legalization requires: an emphasis of rules and facts over interests and precedents, which naturally constrains State action.[80]

[67] Chinkin (n 17) 865; Shelton (n 10) 322; Weil (n 64) 415.
[68] Abbott and Snidal (n 19) 434. [69] ibid 435–7.
[70] Lagoutte *et al.* (n 11) 1; Shelton (n 10) 320–1; U Fastenracht, 'Relative Normativity in International Law' (1993) 4 EJIL 305; Abbott and Snidal (n 19) 423.
[71] Shelton (n 10) 320; Newman and Bach (n 60); Lagoutte *et al.* (n 11) 1.
[72] Chinkin (n 17) 862. See also Abbott and Snidal (n 19) 456. [73] Chinkin (n 17) 862.
[74] Schaffer and Pollack (n 16) 717; Abbott and Snidal (n 19) 426; C Brummer, 'Why Soft Law Dominates International Finance' (2010) 13 JIEL 624, 625.
[75] Schaffer and Pollack (n 16) 718. [76] Abbott and Snidal (n 19) 427. [77] ibid.
[78] ibid.
[79] TM Franck, 'Legitimacy in the International System' (1988) 82 AJIL 711, 712.
[80] Abbott and Snidal (n 19) 429.

Based on these advantages, commentators recommend reliance on hard law when 'the benefits of cooperation are great but the potential for opportunism and its costs are high', including when violations from commitments can lead to externalities.[81] Hard law is also recommended when non-compliance is difficult to detect or to circumvent problems of incomplete contracting by delegating these issues to a third party tribunal to correct.[82] However, relying on hard law may result in significant costs in that it constrains State behaviour and sovereignty.[83] Hard law requires greater precision in outlining obligations. This can lead to excessive rigidity or the prevention of any consensus among the parties at all.[84] In areas where coordination or collaboration are needed, hard law is thought to be ineffective because its command and control approach hinders flexible, bottom-up governance.[85]

Conversely, soft law is preferable in areas where it is essential to counter high contracting costs. This is especially true in in relation to sovereignty costs, which are raised when external authority is exerted over issues of particular concern, in cases of interference with State-citizen relations, or when issues are new and complex.[86] Nevertheless, the existence of a continuum between soft and hard law is confirmed by the fact that relaxing one or more elements of legalization—the binding nature of the obligations, the precision of the obligations, or the delegation to external authorities –results in hybrid forms of soft–hard law.[87]

B. Should BHR Initiatives Be Soft or Hard?

The review of advantages of soft and hard law could lead us to conclude that BHR initiatives should be composed of mainly hard law obligations. Since legalization acts as a compliance pull and it is particularly useful in areas where violations from commitments can impose externalities on others or where non-compliance is difficult to detect, the very nature of BHR issues points toward hard law. BHR may involve severe externalities, as both the Bhopal disaster[88] and the Rana Plaza disaster[89] demonstrate. It is also an area where non-compliance tends to be difficult to detect, particularly if victims fear the power of offending corporations. Thus, from this viewpoint, mechanisms which induce compliance seem beneficial.

However, BHR is a developing area that faces potentially high sovereignty costs if international external authority were to be exercised over the issues. Additionally, it is a field where governments are reluctant to make binding commitments. Because of these factors, contracting costs in BHR are very high.

[81] ibid 429, 433. [82] ibid. [83] ibid 422. See also Schaffer and Pollack (n 16) 718.
[84] Abbott and Snidal (n 19) 433. [85] Brummer (n 9) 132. [86] ibid 427, 441.
[87] See Abbott and Snidal (n 19) 423.
[88] BBC, 'On This Day, December 3, 1984: Hundreds Die in Bhopal Chemical Accident' (3 December 1984). [89] Manik and Yardley (n 4).

Moreover, the BHR arena is generally plagued by a lack of consensus and political will. Corporations do not agree on the extent of their responsibilities on this issue and governments—which may be beholden to the interests of corporations—do not agree on the responsibility that should be imposed on these entities. This lack of consensus is further complicated by the uncertainty of the status of corporations under international law.[90] While States are considered subjects of international law and therefore bear clear human rights obligations that derive from it, corporations are not necessarily viewed as having the same status. This leaves open the question as to whether international law can impose human rights obligations on business entities.[91]

Given the lack of consensus between States on the extent of corporate responsibilities for human rights, it is likely that the law's uncertainty in this regard will remain. Combined with the potentially high sovereignty and contracting costs this suggests that a soft law governance approach may be more appropriate. In fact, relying on soft law for BHR issues is supported by its pervasive use in other areas of the law. Ranging from environmental[92] and anti-bribery law[93] to nuclear non-proliferation[94] to multilateral arms control,[95] soft law is being increasingly relied upon as a source of norm guidance. In some areas, the increased usage of soft law results from its ability to act as a precursor to hard law with the ultimate goal being the conclusion of a binding international treaty.[96]

In other areas, soft law is being used not as an ends to a mean but rather as a valuable tool due to its specific qualities. For instance, corporate governance in most States is now subject to soft law or voluntary standards. Indeed, not only are many corporate governance standards voluntary, but the standards

[90] JE Alvarez, 'Are Corporations "Subjects" of International Law?' (2011) 9 SantaClaraJIntlL 1.

[91] See, for example, the debate on this issue between James Crawford and Christopher Greenwood in *Presbyterian Church of Sudan v Talisman Energy Inc., Republic of Sudan*, 453 F Supp. 2d 633 (SDNY 2006).

[92] PM Dupuy, 'Soft Law and the International Law of the Environment' (1991) 12 MichJIntlL 420; J Friedrich, *International Environmental 'Soft Law': The Functions and Limits of Nonbinding Instruments in International Environmental Governance and Law* (Springer 2013).

[93] C Rose, *International Anti-Corruption Norms: Their Creation and Influence on Domestic Legal Systems* (Oxford University Press 2015); KW Abbott and D Snidal, 'Values and Interests: International Legalization in the Fight against Corruption' (2002) 31 JLS 141, 162.

[94] T Meyer, 'Soft Law as Delegation' (2008) 32 FordhamIntlLJ 888.

[95] D Shelton, 'Multilateral Arms Control' in D Shelton *et al.* (eds), *Commitment and Compliance: The Role of Non-binding Norms in the International Legal System* (Oxford University Press 2000); RL Williamson, Jr., 'Hard Law, Soft Law, and Non-Law in Multilateral Arms Control: Some Compliance Hypotheses' (2003) 4 ChicagoJIntlL 59.

[96] See eg A Ramasastry, 'Closing the Governance Gap in the Business and Human Rights Arena: Lessons from the Anti-Corruption Movement' in S Deva and D Bilchitz, *Human Rights Obligations of Business beyond the Corporate Responsibility to Respect?* (Cambridge University Press 2013) 162; JE Alvarez, *International Organizations as Law-makers* (Oxford University Press 2005) 232.

themselves are also focused on process rather than issues.[97] Thus, governments do not normally regulate the gender composition of boards, they merely recommend that companies disclose the gender of board members.[98] Additionally, corporations are not required to adhere to the recommended standards or processes but can, instead, 'explain' why they have chosen not to comply with the standard in question.[99]

Similarly, international financial regulation makes effective use of soft law.[100] Here, soft law is even viewed as a superior solution because of the dynamism of this continually evolving issue area.[101] In this context, soft law is valued for both creating leeway for adaptability to individual circumstances and for limiting encroachment on sovereign authority.[102] Indeed, soft law is seen as essential in international financial regulation as it facilitates low-cost collaboration, drives 'a collective approach to international engagement' and allows governments to 'tackle complex, quickly evolving global problems that cannot be addressed unilaterally'.[103]

As the examples from corporate governance and international financial regulation suggest, soft law can operate as an effective governance tool in its own right. Given the lack of political consensus in the BHR arena, soft law may therefore make a substantial contribution to designing the appropriate regulatory framework in this field.

III. SOFT LAW AS A REGULATORY FRAMEWORK FOR BHR INITIATIVES

While the UNGPs demonstrate the continued dominance of soft law in BHR, they also indicate the trajectories soft law may be taking. From one perspective, soft law BHR initiatives, and the UNGPs in particular, can be viewed as a precursor to a binding treaty. That is, soft law is being used as a preparatory step 'to the exclusively intergovernmental process of ''hardening'' norms' by way of an international treaty.[104] However, soft law may also help manage and optimize 'the existing regulative system'.[105] Under this approach, the ultimate goal is not necessarily a 'hard' norm, but rather a broad regulative framework which assumes 'a clear governance role'.[106]

The author of the UNGPs, John Ruggie, seems to favour the latter view, noting that the Guiding Principles represent a 'common global platform for

[97] B Morgan, *Social Citizenship in the Shadow of Competition: The Bureaucratic Politics of Regulatory Justification* (Ashgate 2003) 2.

[98] See eg B Choudhury, 'New Rationales for Women on Boards' (2014) 34 OJLS 511, 515.

[99] RV Aguilera *et al.*, 'Regulation and Comparative Corporate Governance' in M Wright *et al.* (eds), *The Oxford Handbook of Corporate Governance* (Oxford University Press 2013) 37.

[100] Brummer (n 9); E Ferran and K Alexander, 'Can Soft Law Bodies Be Effective? Soft Systemic Risk Oversight Bodies and the Special Case of the European Systemic Risk Board' (2011) University of Cambridge Legal Studies Research Paper No 36/2011.

[101] Brummer (n 9) 132; RS Karmel and R Kelly, 'The Hardening of Soft Law in Securities Regulation' (2009) 34(3) BrooklynJIntlL 883; Ferran and Alexander (n 100).

[102] Brummer (n 9) 6. [103] ibid 133. [104] Good (n 59) 261. [105] ibid 262. [106] ibid.

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action' and 'a single, logically coherent and comprehensive template' within which 'the implications of existing standards and practices' can be detailed.[107] Ruggie intended the UNGPs to represent the basis 'from which thinking and action of all stakeholders … generate cumulative progress over time'.[108] As such, the UNGPs and similar soft law initiatives encompass a broad remit of regulatory approaches, with hard law being an option but not a necessity. In other words, BHR soft law initiatives serve as a coordination tool[109] by fostering dominant norms, creating a standard of expectations[110] for States and business as well as establishing a framework for regulating behaviour with informative and educative functions.[111]

Such standards of expectations can be understood through the transmission of the same 'message' through different international bodies.[112] The 'baseline expectation' that corporations should respect human rights and the corresponding responsibility to engage in human rights due diligence, espoused in the UNGPs, is replicated in the OECD Guidelines,[113] the UN Global Compact,[114] and the UN Committee on Economic, Social and Cultural Rights' general comment,[115] among others. This also applies to changes in standards. For example, the UNGPs establishment of the corporate responsibility to respect shifted the OECD Guidelines' language from merely encouraging corporations to respect human rights[116] to recommending that they 'avoid causing or contributing to adverse human rights impacts' and engage in human rights due diligence.[117]

Ultimately, any form of soft law in BHR is used to establish corporate norms relating to human rights accountability. However, the operation via soft law approaches creates two principal risks. The first is non-compliance altogether and the second is that corporations may engage in symbolic compliance but fail to change their underlying approach to the issues at hand.[118] Consequently, soft law's effectiveness depends crucially on its enforcement.[119]

[107] UNHRC, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie*, *'Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework*, A/HRC/17/31 (21 March 2011) para 13. [108] ibid.

[109] AT Guzman and TL Meyer, 'International Soft Law' (2010) 2 JLegalAnal 171, 188–9.

[110] Chinkin (n 17) 865; Shelton (n 10) 322; Weil (n 64) 415 [111] Chinkin (n 17) 862.

[112] Dupuy (n 92) 424 ('Cross-references from one institution to another, the recalling of guidelines adopted by other apparently concurrent international authorities, recurrent invocation of the same rules formulated in one way or another at the universal, regional and more restricted levels, all tend progressively to develop and establish a common international understanding).

[113] OECD Guidelines (n 28) 31–4. [114] UN Global Compact, Principle 1.

[115] United Nations Economic and Social Council, *General Comment No. 24 (2017) on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities*, E/C.12/GC/24 (10 August 2017).

[116] OECD Guidelines for Multinational Enterprises (2008) 39.

[117] OECD Guidelines (n 28) 31 and 34.

[118] C Parker, *The Open Corporation* (Cambridge University Press 2002) 145; J Nolan, 'The Corporate Responsibility to Respect Rights: Soft Law or Not Law?' in Deva and Bilchitz (n 96) 155.

[119] Brummer (n 9) 5.

If soft law is used only as an interim step to developing a binding treaty or covenant, such risks are minimal as enforcement will ultimately be included within such an instrument. However, if—as the UNGPs seem to signal—soft law will be integral to a broader regulatory framework, such risks need to be minimized. This could be achieved among others by incorporating characteristics of hard law as a means of enforcing soft law. Principally this is because BHR initiatives do not represent any new obligations for businesses, but rather crystallize existing duties.[120] Thus, without enforcing soft law BHR initiatives, they only 'give the illusion' of moving business responsibilities beyond a voluntary standard, while in truth they remain strictly within the voluntary realm.[121]

A. 'Enforcing' Soft Law

One approach to enforcing soft law, such that it can be gradually moved from the voluntary to the mandatory, is to increase the specificity of its commitments. For instance, regulated parties in international finance make specific commitments as to the behaviour they will or will not engage in. These commitments are elaborated upon in memoranda of understanding, codes of conducts or best practices.[122] Regulators further make efforts to ensure commitments are affirmative rather than negative, thereby requiring parties to engage instead of refraining from activity.[123] Similarly, in areas where regulation focuses only on processes, the applicable standards also need to be specified.[124]

More importantly, to be effective soft law instruments should be monitored and enforced, particularly by an entity outside the corporation whose conduct is addressed.[125] Monitoring and enforcement can arise from several different, and often complementary, sources. For example, international organizations, such as the IMF and World Bank, impose sanctions for failures to adhere to soft law in international financial regulation.[126] Similarly, lending institutions monitor social and environmental risk related to project finance under the Equator Principles.[127] Multi-stakeholder initiatives have equally proved

[120] S Lagoutte, 'The UN Guiding Principles on Business and Human Rights: A Confusing "Smart Mix" of Soft and Hard International Human Rights Law' in Lagoutte *et al.* (n 11) 241.

[121] ibid 247; C Parker and J Howe, 'Ruggie's Diplomatic Project and Its Missing Regulatory Infrastructure' in R Mares (ed), *The UN Guiding Principles on Business and Human Rights – Foundations and Implementation* (Brill 2011) 278.

[122] ibid 638.

[123] ibid 143.

[124] Parker (n 118) 245–91.

[125] C Scott, 'Reflexive Governance, Meta-Regulation and Corporate Social Responsibility: The Heineken Effect' in N Boeger *et al.* (eds), *Perspectives on Corporate Social Responsibility: Corporations, Globalisation and the Law* (Edward Elgar Press 2008) 170; S Picciotto, 'Corporate Social Responsibility for International Business' in UNCTAD, *The Development Dimension of FDI: Policy and Rule-Making Perspectives* (United Nations Publications 2008) 151; Parker (n 118) 245–91.

[126] Brummer (n 74) 638–40; Ferran and Alexander (n 100) 5–6.

[127] JM Conley and CA Williams, 'Global Banks as Global Sustainability Regulators? The Equator Principles' (2011) 33(4) LandPoly 542.

effective as monitors and enforcers of corporate conduct in a diverse range of industries, including forestry, food and beverage, apparel, and marine fisheries.[128] In particular, these initiatives have often transformed the 'greenwashing' practices of corporate self-regulatory approaches by providing verification and independent monitoring.[129]

Probably the most well-known monitor of corporate conduct, though, are NGOs. Not only do NGOs monitor corporate conduct but they may be instrumental in enforcing violations as well.[130] Enforcement tactics have involved 'naming and shaming' and litigation to ensure compliance with codes of conduct.[131] 'Naming and shaming' as a form of enforcement is also practised in international financial regulation by the Financial Action Task Force.[132] The Task Force, an intergovernmental organization, identifies States and regulators that do not adhere to anti-money laundering policies and creates a public blacklist that is shared with the public and domestic financial institutions. The aim is to shame States into compliance by heightening the 'reputational consequences of non-observance'.[133]

B. Shifting Soft Law BHR Initiatives along the Continuum

One approach to using soft law to establish BHR norms for corporations—but which move closer to the mandatory than the voluntary realm—involves using independent monitoring as a form of oversight that encourages accountability. Indeed, one of the reasons for the creation of the UNGPs was because corporations often operate in States that are either not bound by relevant human rights obligations or fail to enforce them.[134] These lacunae created governance gaps within which corporations could engage in harmful activities—including human rights abuses—with impunity. Monitoring by independent third parties[135] would help close these governance gaps by ensuring that States enact and/or enforce human rights obligations vis-à-vis business.[136]

[128] P Utting, 'Regulating Business via Multi-stakeholder Initiatives: A Preliminary Assessment in UNISRD, *Voluntary Approaches to Corporate Responsibility: Readings and Resource Guide* (United Nations Non-Governmental Liaison Service 2002) [129] ibid 7.

[130] G Aldashev *et al.*, 'Watchdogs of the Invisible Hand: NGO Monitoring, Corporate Social Responsibility, and Industry Equilibrium' (2014) Université de Namur Economic Working Paper 2014/04; I Nooruddin and S Wilson Sokhey, 'Credible Certification of Child Labor Free Production' in PA Gourevitch *et al.* (eds), *The Credibility of Transnational NGOs: When Virtue Is Not Enough* (Cambridge University Press 2012) 63.

[131] Scott (n 125) 9; R Shamir, 'Corporate Social Responsibility: A Case of Hegemony and Counter-Hegemony' in B De Sousa Santos and CA Rodríguez-Garavito (eds), *Law and Globalisation from Below* (Cambridge University Press 2005) 98; Nolan (n 118) 19.

[132] Brummer (n 9) 155–6. [133] ibid 155.

[134] See generally F Wettstein, 'Normativity, Ethics, and the UN Guiding Principles on Business and Human Rights: A Critical Assessment' (2015) 14(2) Journal of Human Rights 162.

[135] Scott (n 125).

[136] P Alston, 'Facing up to the Complexities of the ILO's Core Labour Standards Agenda' (2005) 16(3) EJIL 467.

Alternatively, monitoring could be accomplished through a Business and Human Rights Task Force operating analogous to the Financial Action Task Force in international financial regulation. The BHR Task Force would be tasked with 'shaming' States who did not implement the UNGPs or other current BHR principles by blacklisting them on markets. This could be done by coordinating with national stock exchanges and either informing the exchange of non-compliance or by conditioning listing on the exchange on a non-blacklisted status with the BHR Task Force. The Shenzhen Stock Exchange already requires corporations to establish a social responsibility mechanism and to disclose social responsibility matters as a listing condition, suggesting that some exchanges may be amenable to similar proposals.[137]

Soft law BHR initiatives could also be enforced by supporting compliance, for instance, by clarifying the legal obligations that underlie corporate human rights responsibilities.[138] As these are unclear at the moment and tend to be rooted in social rather than legal norms, it makes it considerably more difficult to convince corporations of their responsibilities in this area when they appear only to be moral in nature. Indeed, as Lagoutte has observed, the UNGPs do not clarify 'the authoritative dimension of human rights in business' thereby distancing the notion of corporations actually bearing human rights obligations.[139] Clarification of such an authoritative dimension may therefore be critical. Similarly, provisions within existing BHR initiatives could also be clarified. The *UN Global Compact*, for instance, could elaborate on its ten principles and be more specific in terms of the desired corporate conduct while the UNGPs would benefit from greater precision both in terms of its substantive obligations and in terms of what precisely is expected when it comes to human rights due diligence.

Next, the enforceability of soft law initiatives could be improved by marrying them with provisions in treaties featuring enforceable obligations. For instance, international investment agreements are increasingly incorporating BHR issues into their ambit. The Morocco–Nigeria bilateral investment treaty (BIT) specifies that corporations 'shall uphold human rights' while the Brazil–Malawi BIT bilateral investment treaty requires investors to develop 'best efforts' to, among other obligations, respect the human rights of those involved in the companies' activities and apply effective self-regulatory practices and management systems that foster trust between companies and society.[140] Since international investment agreements generally allow for the enforcement of

[137] *Shenzhen Stock Exchange Social Responsibility Instructions to Listed Companies* (promulgated by the Shenzen Stock Exchange, 25 September 2006, effective 1 September 2010) CLI.6.88455(EN) arts 35–36.

[138] See eg JL Černič, 'Fundamental Human Rights Obligations of Corporations' in A Hrast (ed), *Collected Papers of the 4th IRDO International Conference, Social Responsibility and Current Challenges* (IRDO Institute for Development of Social Responsibility 2009) 59.

[139] Lagoutte (n 120) 247.

[140] *Reciprocal Investment Promotion and Protection Agreement between the Government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria* (2016) art 18;

treaty obligations through binding arbitration, access to dispute resolution for investors could be conditioned on fulfilment of BHR treaty obligations.

Finally, the enforceability of soft law norms could be improved by establishing in detail the legal consequences in cases of their breach, principally by providing remedies to victims. The United Nations Working Group on Access to Remedies has suggested that such remedies be available in a 'diverse' range of settings both at State and corporate levels.[141] Corporations could thus be held accountable through judicial forums, both at the national or international level, or through non-judicial mechanisms such as by way of inter-State memorandums of understanding that address such issues—such as the practice between Sweden and China—or by way of corporate grievance mechanisms.[142]

IV. SHIFTING TO HARD LAW

Since it is the lack of political consensus that has confined BHR to essentially soft law instruments—albeit with the need for certain hard law characteristics—soft law's current predominance does not mean that future initiatives should also take soft law forms. The difficulty in securing full corporate compliance for the respect and protection of human rights as well as the existing leeway for corporations to engage in misconduct support the necessity of binding legal obligations. Even John Ruggie, who defended the UNGPs' soft law approach, has supported the idea of a binding BHR instrument for areas where specific governance gaps exist and which are not addressed by other means, such as in relation to gross human rights violations.[143] Thus, even if soft law initiatives with characteristics of hard law are successful, in some areas of BHR further legalized options are warranted. This part examines ongoing efforts to conclude such legalized BHR instruments, first at the international level and then at the domestic level, before moving to assess the most promising approaches for future BHR initiatives.

A. International Initiatives

Since June 2014 several States have begun the arduous task of concluding a binding BHR instrument.[144] The motivations for concluding such an

Investment Cooperation and Facilitation Agreement between the Federative Republic of Brazil and The Republic of Malawi (2015) art 9.

[141] United Nations, *Human Rights and Transnational Corporations and Other Business Enterprises –Note by the Secretary-General*, A/72/162 (18 July 2017).

[142] Swedish Ministry of Foreign Affairs, *Action Plan for Business and Human Rights* (2015) 21.

[143] J Ruggie, 'The Past as Prologue? A Moment of Truth for UN Business and Human Rights Treaty' (8 July 2014).

[144] See Human Rights Council, *Elaboration of an International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights*, UN Doc A/HRC/26/L.22/Rev.1 (25 June 2014)

instrument are myriad and include: covering governance gaps where States do not enact or do not enforce human rights protections, acting as a central source for setting out the responsibilities of corporations, transforming the UNGPs into binding obligations, ensuring that all corporations—regardless of location—adhere to the same set of human rights standards and increasing access to effective remedies.[145] The working group currently heading the negotiations hopes to achieve these and many more outcomes, including specifying a wide range of human rights for which corporations would be responsible.[146]

However, creating an overarching binding legal framework for BHR issues poses risks. Notably, the inclusion of a broad range of human rights in the instrument risks attenuating their substance in order to secure the necessary State approval.[147] Equally problematic is the lack of global support for the binding instrument. At present, several States do not support the proposed treaty and are therefore not participating in the negotiations.[148] Without these States' backing, many of the largest multinational corporations would not fall under the treaty, something which would only perpetuate current governance gaps. It is, however, unclear whether the pursuit of a binding BHR instrument without the support of many key States will significantly progress protection of human rights victims at the hands of corporations. The instrument may well face the same fate as the International Convention on the Protection of the Rights of All Migrant workers and their Families,[149] which after 25 years has only been ratified by 48 States, most of which are migrant-sending States.[150]

Conversely, a hardening of BHR obligations may be easier if the scope of the instrument is narrowed or made more accurate. John Ruggie has in this context referred to 'precision tools' which focus only on specific issues.[151] A good example of such a precision tool is the WHO Framework Convention on Tobacco Control (FWCTC), which codifies State obligations with the aim of addressing the causes of the global problem of tobacco consumption.[152] Although the FWCTC is addressed to State parties, the treaty also regulates the conduct of tobacco companies through provisions on the contents, product disclosures, packaging and labelling, and advertising of tobacco products.[153] The FWCTC boasts an impressive 180 State parties, including

[145] For elaboration of these benefits see Choudhury (n 6).

[146] European Coalition for Corporate Justice, 'UN Treaty on Business & Human Rights Negotiations Day 2: EU Disengagement & Lack of Consensus on Scope' (8 July 2015) 4.

[147] C Esdaile, 'A Step Forward? A Sceptical View on the Need for a New Business and Human Rights Treaty' *Open Democracy* (26 May 2014).

[148] Business & Human Rights Resource Centre, 'UN Human Rights Council Sessions' (2014).

[149] *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, opened for signature 18 December 1990, 30 ILM 1517 (entered into force 1 July 2003).

[150] UN Treaty Collection, 'International Convention on the Protection of the Rights of All Migrant Workers and Their Families (2016).

[151] Ruggie (n 143).

[152] *WHO Framework Convention on Tobacco Control*, opened for signature 21 May 2003, 2302 UNTS 166.

[153] ibid, arts 9, 10, 11 and 13.

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several States which are opposed to the above mentioned binding business and human rights instrument.

The FWCTC was not initially conceived to be binding. Instead, it was designed as a framework for establishing a general system of governance for tobacco products, but without specifying any detailed obligations.[154] Once the framework was completed, protocols—in the form of separate legally binding agreements—could then be adopted, either concurrently or subsequently, in order to specify obligations needed to further the framework's goals.[155] The purpose of such a two-step approach was to gather the necessary political consensus on the issue, something that a one-step jump to an international binding treaty might be unable to achieve.[156] However, the final version of the FWCTC emerged as much more than a general system of governance, containing numerous detailed obligations, a result which might have deterred parties from joining the framework if they had anticipated the final outcome.[157]

While it is unclear whether the FWCTC has curbed the spread of tobacco usage, it has had a noticeable impact on corporate conduct. One study has revealed that the number of health warning labels on cigarette packages has increased from 8.42 to 22.33 per cent since the treaty entered into force meaning that companies had to change their products' packaging and labelling.[158] Moreover, in response to regulations required by the Convention, tobacco giant, Philip Morris, instigated two investment arbitrations, against the governments of Australia and Uruguay, challenging domestic regulations.[159] While the arbitrations were both ultimately unsuccessful, their initiation itself suggests that the FWCTC has had a significant effect on corporations.[160]

The FWCTC process offers an interesting alternative to achieving hard law obligations for BHR issues. By focusing at the outset on only establishing a general governance, the FWCTC was able to build up the necessary political will to ultimately achieve binding obligations. If BHR issues can be

[154] D Bodansky, 'The Framework Convention/Protocol Approach', WHO FCTC Technical Briefing Series (1999) WHO Doc WHO/NCD/TFI/99.1, 15; A Taylor, 'An International Regulatory Strategy for Global Tobacco Control' (1996) 21 YaleJIntlL 257.

[155] Bodansky (n 154) 33.

[156] Taylor (n 154) 294.

[157] J Liberman, 'The Power of the WHO FCTC: Understanding Its Legal Status and Weight' in A Mitchell and T Voon (eds), *The Global Tobacco Epidemic and the Law* (Edward Elgar 2014) 52.

[158] AN Sanders-Jackson *et al.*, 'Effect of the Framework Convention on Tobacco Control and Voluntary Industry Health Warning Labels on Passage of Mandated Cigarette Warning Labels from 1965 to 2012: Transition Probability and Event History Analyses' (2013) 103(11) American Journal of Public Health 2041.

[159] *Philip Morris Brands Sàrl v Oriental Republic of Uru*, ICSID Case No ARB/10/7 (25 March 2010); *Philip Morris Asia Ltd. v The Commonwealth of Australia*, UNCITRAL PCA Case No 2012–12 (2011).

[160] B Mander, 'Uruguay Defeats Philip Morris Test Case Lawsuit' *Financial Times* (8 July 2016); D Hurst, 'Australia Wins International Legal Battle with Philip Morris over Plain Packaging' *The Guardian* (18 December 2015).

narrowed to a more limited set of issues—such as by focusing on creating positive obligations for corporations for the most salient human rights issues—a framework/protocol two-step procedure may be better able to garner the necessary State support for binding obligations than the one-step binding instrument currently being negotiated.

B. Domestic Initiatives

Apart from the ongoing negotiations for the binding BHR instrument, efforts are also being made at the domestic level to further legalize BHR obligations. In several European States, for instance, governments have introduced mandatory corporate reporting on human rights issues arising from an EU directive.[161] Companies are thus required to disclose human rights policies, outcomes and risks as well as information on their human rights due diligence processes.[162] Additionally, in Denmark, corporations must also expressly discuss their actions on reducing human rights impacts, regardless of whether they are already included in their human rights policies.[163] France has progressed beyond mere reporting obligations to introduce substantive due diligence obligations. A law known as the duty of vigilance ('*le devoir de vigilance*')[164] requires corporations to take reasonable care in identifying and preventing risks to human rights and fundamental freedoms, serious bodily injury or environmental damage or health risks resulting directly or indirectly from their operations. The vigilance obligations extend to a corporation's 'controlled' companies as well as to the activities of subcontractors or suppliers.[165] Corporations will further be required to put into place vigilance plans ('*plans de vigilance*') that identify and determine reasonable measures for addressing these risks. The law applies to corporations with more than 5000 employees with a registered office in France and corporations can face liability for breach of the duty of vigilance.[166]

Similar to France's duty of vigilance, a popular initiative has been introduced in Switzerland, known as the Swiss Responsible Business Initiative.[167] The initiative imposes a due diligence obligation on Swiss companies to respect human rights and environmental standards by obliging companies to identify real and potential impacts on internationally recognized human rights and the

[161] Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as Regards Disclosure of Non-Financial and Diversity Information by Certain Large Undertakings and Groups (2014). [162] ibid, art 19A.

[163] Act Amending the Danish Financial Statements Act (2012).

[164] Assemblée Nationale, Proposition De Loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre, adopted 21 February 2017 at <http://www.assemblee-nationale.fr/14/ta/ta0924.asp>. [165] ibid art 1st.

[166] European Coalition for Corporate Justice, 'Last Hurdle Overcome for Landmark Legislation: French Corporate Duty of Vigilance Law Gets Green Light from Constitutional Council' (24 March 2017). [167] Swiss Coalition for Corporate Justice, 'The Initiative' (2015) <http://konzern-initiative.ch/?lang=en>.

environment; take appropriate measures to prevent violation of these standards, and account for the actions taken. The obligation extends to both the parent company as well as any companies it controls—even if located outside Switzerland. The Swiss Initiative takes a broad definition of control, encompassing traditional legal definitions of control as well as the exercise of power in business relationships.[168] Like the French law, the Swiss Initiative holds companies liable for failure to adhere to the delineated obligations unless the company can demonstrate that it took due care, for which it bears the onus of proof. Initiated by the people of Switzerland, the initiative was officially validated by the government in November 2016 and will likely come to a popular vote in 2018 or 2019.

In the UK, efforts to harden business and human rights law have also been undertaken but in a significantly different manner than what we have seen in France or Switzerland or even in the proposed binding BHR instrument. In 2015, the UK government introduced the Modern Slavery Act,[169] which seeks to combat slavery and human trafficking by requiring corporations to prepare annual statements.[170] In these statements, a corporation must declare the steps it has taken to ensure that slavery and human trafficking are not taking place in any of its supply chains or any part of its own business. Corporations are encouraged to reveal, as part of the statement, the nature of their supply chains, their policies on slavery and human trafficking, the nature of the due diligence processes they engage in to ascertain this information, which aspects of its business and supply chains are at risk of slavery or human trafficking and how these risks have been mitigated.[171]

However, unlike the French or Swiss approach, enforcement of the obligations found in the Modern Slavery Act is not through the judicial process. Instead, the annual statements have to be approved and signed by the board of directors and they must be posted on the corporation's website.[172] Moreover, the Secretary of State has the authority to bring an injunction against the corporation in cases of non-compliance.[173] Experts do not believe that the Secretary of State will exercise their option to exercise this power, but it is thought that the government relies on stakeholders to pressure businesses into compliance.[174]

Compared to the developments in France and Switzerland, the Modern Slavery Act is narrow in its coverage and closer to the soft law end of the continuum. Although it specifies the outcomes of non-compliance, because it is commonly known that the most stringent enforcement mechanism will only be rarely used, one would expect a high degree of non-compliance. Yet, this has not been the case and recent studies have found that companies are

[168] ibid. [169] Modern Slavery Act (2015). [170] ibid section 54. [171] ibid section 54(5).
[172] ibid section 54(6) and (7). [173] ibid section 54(11).
[174] Eversheds Sutherland, 'Disclosure Time: Responding to the Modern Slavery Act (2016) 3; PwC, 'The Modern Slavery Act: How Should Businesses Respond?' (November 2015) 3.

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making significant progress in addressing modern slavery.[175] Indeed, the Modern Slavery Act's requirement that directors sign the annual statement propels ownership of slavery and human trafficking issues to the highest level of the organization. It is likely this feature, combined with the possibility of public attention for instances of non-compliance, that ensures corporate adherence to Modern Slavery Act standards.[176]

At the same time, the French and Swiss approaches offer a much more legalized option to ensure corporate adherence to a broad range of human right responsibilities. They offer human rights victims a judicial remedy for a wide range of corporate wrongs—encompassing both human rights and the environment—and provide access to an effective remedy required by the third pillar of the UNGPs, which is rarely found in other jurisdictions. Moreover, by creating a direct cause of action the French and Swiss initiatives ameliorate *forum non conveniens* hurdles which have typically plagued human rights victims who suffered harm in jurisdictions without adequate legal recourse and/or seek redress from parent corporations.[177] Thus, the French and Swiss approaches offer a significantly rare and broad mechanism for victims of corporate human rights abuses.

C. Moving Forward

Introducing binding BHR obligations remains an important goal, but as the experience with the proposed BHR treaty and the Swiss and French initiatives indicates, hard law approaches require a deft touch. Without political consensus and the support of business, binding obligations—even if implemented—are unlikely to make the necessary normative changes that will truly address BHR problems. A strong global treaty that is not ratified by a large preponderance of States or broad-reaching domestic obligations that are repeatedly defeated at the legislative level not only leave the possibility of governance gaps, but they also fail to engage State or corporate ownership of BHR issues. Without this type of ownership, hard law approaches are destined to fail.

At the international level, the framework/protocol approach used by the FWCTC offers a more pragmatic means of achieving binding obligations than directly attempting an overarching treaty. Because the goal is to generate general political consensus, this approach provides a path for States to arrive at a consensus on a number of key issues. This process of gradual acquiescence is

[175] Ethical Trading Initiative, 'Corporate Leadership on Modern Slavery' (November 2016); P Carrier and J Bardwell, 'How the UK Modern Slavery Act Can Find Its Bite' (24 January 2017) *Open Democracy*.
[176] Ethical Trading Initiative (n 175) 10.
[177] See eg R Meeran, 'Tort Litigation against Multinational Corporations for Violation of Human Rights: An Overview of the Position outside the United States' (2011) 3 City University of Hong Kong Law Review 1; G Skinner, 'Rethinking Limited Liability of Parent Corporations for Foreign Subsidiaries' Violations of International Human Rights Law' (2015) 72 Wash&LeeLRev 1769.

more likely to result in global commitments from a wide range of States than an approach which forces commitments on a large number of issues at the outset. Moreover, by allowing political consensus to slowly build up, there is an opportunity for corporations to, similarly, gradually internalize these issues. This can facilitate the necessary corporate acceptance that will ensure such commitments are made at the international level by States. Moreover, by enacting protocols after the conclusion of the framework, the path is set toward the eventual creation of binding obligations. As a result, the framework/protocol approach has the potential to legalize BHR obligations more effectively than existing BHR initiatives have managed to do.

At the same time, domestic initiatives, particularly those with an extraterritorial effect, should also be encouraged as an added means to close governance gaps. Yet again, a gradual approach may be preferable. By introducing a narrow range of non-stringent obligations, the UK's Modern Slavery Act may be more successful in the long run than the more forceful approach adopted by the Swiss and French. This is because, first, it requires BHR issues to be considered at board level, and, second, because its requirements are narrow in scope, businesses may see it as a more achievable task. The combined effect is likely to generate more business 'buy-in' than focusing on broader, more stringent obligations. In doing so, this nuanced approach can facilitate business respect for at least some BHR issues, and in the long run, may further prompt normative changes at the board level leading to greater recognition of other BHR issues.

CONCLUSION

A soft law label for BHR initiatives is both accurate and misleading at the same time. Even when these initiatives are non-binding in nature, they can contain elements of hard law, suggesting that they are far from creatures of pure soft law. More importantly, to safeguard their efficacy, BHR initiatives *should* incorporate elements of 'hardness', particularly by ensuring they are accompanied by monitoring and enforcement tools. However, in doing so, the advantages of soft law initiatives need not be compromised. As the example of international finance has demonstrated, effectively structured soft law BHR initiatives can be valuable tools in and of themselves.

Nevertheless, because soft law BHR tools—even if accompanied by hard law elements—still cannot address some of the grave consequences which occur when corporations or States depart from their commitments, continued progress should be made towards adopting at least some binding legal obligations in the area. At the international level, the framework/protocol approach offers an interesting template for enabling global political consensus to develop on key BHR issues. Although it represents a softer approach than the drafting of a binding overarching BHR treaty, the framework/protocol approach is likely to garner more widespread State support than the proposed treaty. This

is essential to both closing governance gaps and protecting a wider range of human rights victims. At the same time, binding domestic initiatives with extraterritorial effect should also be encouraged, although they may need to be limited in scope in order to ensure their passage into law.

Ultimately, the appropriate governance strategy for BHR issues needs to draw from both soft and hard law initiatives in order to foster the necessary political consensus while still offering a robust vehicle for protection for victims of corporate irresponsibility. Use of the soft to hard law continuum thus offers an appropriate solution in this area. However, since most existing initiatives tend to be grouped towards the soft law end, new initiatives must move farther along the spectrum in order to achieve the right mix of soft and hard law. This is because without at least some movement towards the mandatory from the voluntary, corporate responsibility for human rights will continue to remain optional and largely ineffective, a situation which simply cannot continue.