Developing a Business and Human Rights Treaty: Lessons from the Deep Seabed Mining Regime under the United Nations Convention on the Law of the Sea

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Abstract

This article delves into the deep seabed mining regime under the United Nations Convention on the Law of the Sea (UNCLOS) with a view to inform the negotiating process of the proposed business and human rights (BHR) treaty. It highlights points of convergence and divergence between the two regulatory regimes and explores how the BHR treaty negotiations could draw from the deep seabed mining regime with regard to the responsibility and liability of states and corporations. In particular, it suggests that a BHR treaty could incorporate some of the arrangements of UNCLOS to address state obligations and direct corporate human rights obligations, both of a general and specific nature, including the obligation to carry out human rights due diligence. The article also proposes a mechanism of responsibility and liability of states and corporations under the future BHR treaty going beyond UNCLOS and embracing residual liability for home and/or host states.

Keywords: business and human rights treaty, direct obligations, human rights due diligence, liability, UNCLOS

I. Introduction

In June 2014, as a result of an initiative by Ecuador and South Africa, the United Nations (UN) Human Rights Council established an open-ended intergovernmental working group with the mandate to 'elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises'.[1] In July 2015, the intergovernmental working group held

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[1] UN Human Rights Council (UN HRC), 'Elaboration of an International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises With Respect to Human Rights', UN Doc A/HRC/RES/26/9 (2014), para 1.

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its first session in Geneva, officially launching the negotiations at the UN towards a business and human rights (BHR) treaty. The fourth session, in October 2018, marked the beginning of substantive negotiations on the text.[2]

Treaty supporters argue that a BHR treaty is necessary to address businesses' significant and often adverse impact on human rights.[3] Serious human rights violations involving companies keep occurring despite international standards such as the Organisation for Economic Co-operation and Development (OECD) Guidelines on Multinational Enterprises,[4] and the UN Guiding Principles on Business and Human Rights (UNGPs).[5] There is growing frustration over the slow pace of implementation of the UNGPs and over the apparent inaction of most governments and companies.[6] Companies often operate with impunity, and victims continue to lack access to effective remedy. Therefore, a stronger, legally binding instrument is needed to force companies and states into action.[7] In particular, a BHR treaty could provide clarity on issues of mutual legal assistance, which are especially relevant for cross-border violations; set up common standards for mandatory human rights due diligence legislation; and redress the imbalance between legally enforceable rights enjoyed by companies, for example, in the area of investment law, and the corporate responsibility to respect human rights under the UNGPs, which has no legal basis. 'Not only is a business and human rights treaty needed, it is doable at this point of time in history', says Surya Deva, a legal academic and member of the UN Working Group on the issue of human rights and transnational corporations and other business enterprises.[8] He refers to the 'springboard' of the UNGPs and the growing realization that neither voluntary initiatives alone nor measures merely at national level will ever be adequate to regulate corporate activities.[9] A BHR treaty would not fix all the existing regulatory gaps or end the current state of corporate impunity, it is argued, but it would provide an additional regulatory tool to ensure that businesses comply with human rights norms.[10]

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[2] UN HRC, 'Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises With Respect to Human Rights', http://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Pages/IGWGOnTNC.aspx (accessed 14 March 2020).

[3] In this article, the terms companies, corporations and businesses are used interchangeably.

[4] OECD, OECD Guidelines for Multinational Enterprises (OECD, 2011).

[5] UN HRC, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework', A/HRC/17/31 (21 March 2011).

[6] See, e.g., 'Joint Civil Society Statement on the Draft Guiding Principles on Business and Human Rights' (2011), http://www.fidh.org/IMG/pdf/Joint_CSO_Statement_on_GPs.pdf (accessed 18 March 2020); Salil Shetty, 'Corporations Have Rights. Now We Need a Global Treaty on their Responsibility', *The Guardian* (21 January 2015), https://www.theguardian.com/global-development-professionals-network/2015/jan/21/corporations-abuse-rights-international-law (accessed 18 March 2020). See also Nadia Bernaz and Irene Pietropaoli, 'The Role of Non-Governmental Organisations in the Business and Human Rights Treaty Negotiations' (2017) 9:2 *Journal of Human Rights Practice* 287.

[7] David Bilchitz, 'The Necessity for a Business and Human Rights Treaty' (2016) 1:2 *Business and Human Rights Journal* 203, 209: 'It seems fundamentally unfair that the primary agent which is responsible for a harm is not capable of being held to account: only a treaty has the authority to shift this situation within international fora by recognizing expressly the fact that corporations are bound by international law in this regard'.

[8] Surya Deva, 'The Zero Draft of the Proposed Business and Human Rights Treaty, Part I: The Beginning of an End?', https://www.business-humanrights.org/en/the-zero-draft-of-the-proposed-business-and-human-rights-treaty-part-i-the-beginning-of-an-end (accessed 18 March 2020).

[9] Ibid.

[10] Ibid.

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Business and human rights as a field raises questions about the respective areas of responsibility under international law for states and non-state actors. The UNGPs, implementing the 'protect, respect and remedy' framework, rest on the idea that only states have obligations under international law. Companies, by contrast, have a 'responsibility to respect human rights' in the sense that they are socially expected to do no harm.[11] Many supporters of the BHR treaty process believe the treaty must create binding obligations on corporations so as to overcome what they view as the UNGPs' deficiencies on this point.[12] Commentators have debated whether it is a good idea and whether it is even feasible.[13] The Zero Draft of the proposed treaty released by Ecuador in July 2018, which has provided the basis for discussions, does not include direct obligations for companies.[14] The 2019 Revised Draft does not include such obligations either, although the preamble highlights that business enterprises 'have the responsibility to respect all human rights', thus mirroring the language of the UNGPs.[15] Despite the language of the Revised Draft, this question, together with many others, remains unsettled. As further argued below, the current treaty-making process represents a once-in-a-generation opportunity to set up human rights obligations of companies under international law. This opportunity should not be wasted.

This article provides a fresh perspective on the debate around human rights obligations of corporations and their liability by looking at the deep seabed mining regime under the UN Convention on the Law of the Sea (UNCLOS).[16] UNCLOS organizes the activities of states and private companies in 'the Area', which refers to 'the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction'.[17] The deep seabed mining regime includes obligations of both states and corporations in relation to the prevention and remediation of environmental impacts, which bear similarities to human rights impacts, and combines state and corporate responsibility and liability in an original way. In many ways, negotiating a BHR treaty entails exploring new ground and embracing innovative approaches. In this spirit, this article delves into the deep seabed mining regime under UNCLOS with the view to inform the BHR treaty negotiating process. It highlights points of convergence and divergence between the two areas and aims to ascertain the extent to which the proposed BHR treaty could draw from the deep seabed mining regime with regard to the respective responsibility and liability of states

[11] The commentary of Principle 11 of the UNGPs states that '[t]he responsibility to respect human rights is a global standard of expected conduct' that 'exists over and above compliance with national laws and regulations protecting human rights'.

[12] Bilchitz (2016), note 7, 207.

[13] See, e.g., Lee McConnell, 'Assessing the Feasibility of a Business and Human Rights Treaty' (2017) 66 *International and Comparative Law Quarterly* 143.

[14] UN Office of the High Commissioner for Human Rights (OHCHR), 'Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises, Zero Draft' (16 July 2018), https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/DraftLBI.pdf (accessed 18 March 2020) (Zero Draft).

[15] OHCHR, 'Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises, Revised Draft' (16 July 2019), https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/OEIGWG_RevisedDraft_LBI.pdf (accessed 18 March 2020) (Revised Draft).

[16] UN Convention on the Law of the Sea, 1833 *UNTS* 3 (10 December 1982) (UNCLOS).

[17] Ibid, art 1.

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and companies. This article argues that, at a minimum, the treaty should establish direct general obligations for corporations, as the language of the UNGPs, now included in the Revised Draft's preamble, is not enough. The chance to set up human rights standards for global corporate activity should not be missed, and UNCLOS demonstrates it is possible to set up broad standards directly applicable to the private sector. UNCLOS may also inspire the drafting of other important provisions of the BHR treaty regarding human rights due diligence and liability regimes.

Section II of this article presents key UNCLOS provisions on the deep seabed mining regime and introduces the rationale for a comparison between this regime and the one that a future BHR treaty may establish. Section III then introduces the debate on the human rights obligations of corporations and explores how the BHR treaty could incorporate some of the arrangements of UNCLOS to address state and corporate human rights obligations, both of a general and specific nature. Section IV looks at provisions of UNCLOS that could inform responsibility and liability of states and corporations under the future BHR treaty and proposes that the treaty move beyond UNCLOS in this respect. Section V provides a brief conclusion.

II. The Deep Seabed Mining Regime under UNCLOS

UNCLOS, adopted in 1982, is one of the most important treaties ever drafted.[18] Dubbed a 'Constitution for the oceans', it covers 'every aspect of the uses and resources of the sea'.[19] At the time of writing, UNCLOS has 168 state parties, including key maritime states such as Greece, Japan, China and Singapore, but not the United States.[20] Part XI of UNCLOS, entitled 'the Area', governs activities in the Area, defined as 'the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction'.[21] The Area lies under the high seas, a part of sea that no state can validly claim as their own,[22] and where states enjoy freedom of navigation.[23] The Area is part of the 'common heritage of mankind'[24] and as such states cannot claim sovereignty over it or over the resources it contains.[25] The reason why the Area was granted a special status under UNCLOS is that it is rich in minerals, the exploitation of which could become profitable provided technological challenges are solved. Those challenges arise regarding both the

[18] Shigeru Oda, *Fifty Years of the Law of the Sea* (The Hague: Kluwer Law International, 2003); Jill Barrett and Richard Barnes (eds.), *Law of the Sea: UNCLOS as a Living Treaty* (London: British Institute of International and Comparative Law, 2016).

[19] 'A Constitution for the Ocean', remarks by Tommy TB Koh, President of the Third United Nations on the Law of the Sea, https://www.un.org/depts/los/convention_agreements/texts/koh_english.pdf (accessed 18 March 2020).

[20] Chronological lists of ratifications of, accessions and successions to the Convention and the related Agreements, http://www.un.org/depts/los/reference_files/chronological_lists_of_ratifications.htm (accessed 18 March 2020).

[21] UNCLOS, note 16, art 1(1).

[22] Ibid, art 189.

[23] Ibid, art 87.

[24] Ibid, art 136.

[25] Ibid, art 137(1). Under Article 133 (Part XI), '(a) "resources" means all solid, liquid or gaseous mineral resources in situ in the Area at or beneath the seabed, including polymetallic nodules; (b) resources, when recovered from the Area, are referred to as "minerals"'.

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recovery and the extraction of minerals. Minerals are contained in 'potato-sized manganese nodules' (a type of metal), which lie on the ocean floor.[26] Recovering those nodules will have to 'take place at a depth of more than fifteen thousand feet of open-ocean, thousands of miles from land'.[27] Once the nodules have been brought out of the ocean, the minerals need to be extracted using either heat or chemicals. With recent technological advances and growing demand for minerals used in emerging and high technology,[28] deep sea mining appears poised to become the next frontier in resource extraction,[29] and has been hailed as the 'new global gold rush'.[30]

Part XI of UNCLOS attempts to reconcile the idea of the Area as common heritage of mankind and as a place where mining operations may be carried out. UNCLOS establishes the International Seabed Authority ('the Authority'),[31] whose purpose is to administer the Area 'on behalf of mankind as a whole'.[32] The Authority is based in Kingston, Jamaica, and has three principal organs: the Assembly, the Council and the Secretariat. UNCLOS also refers to an additional organ, the Enterprise. The Enterprise was meant to be an international organization-owned company through which the Authority was to directly explore and exploit the Area alongside state-owned and private companies, but at the time of writing it still has not been set up.[33]

Immediately after the adoption of UNCLOS, it became clear that Part XI constituted a problem. A number of industrialized states viewed Part XI as a product of the New International Economic Order.[34] They disagreed with some of its provisions. In particular, the United States, under President Reagan's administration, was concerned that Part XI would impose artificial limitations, onerous regulations and financial burdens on industrialized countries' seabed mineral production, and that private deep seabed miners would be subject to a mandatory requirement for the transfer of technology to the Enterprise and to developing countries.[35] The United States and other industrialized

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[26] UN Division for Ocean Affairs and the Law of the Sea, 'The United Nations Convention on the Law of the Sea (A Historical Perspective)', http://www.un.org/depts/los/convention_agreements/convention_historical_perspective.htm (accessed 18 March 2020).

[27] Ibid. See also Kathryn Miller et al, 'An Overview of Seabed Mining Including the Current State of Development, Environmental Impacts, and Knowledge Gaps' (2018) 4:418 *Frontiers Marine Science* 1.

[28] Miller (2018), note 27. See also James R Hein et al, 'Deep-Ocean Mineral Deposits as a Source of Critical Metals for High- and Green-Technology Applications: Comparison with Land-based Resources' (2013) 51 *Ore Geology Reviews* 1, 8–9.

[29] Julie Hunter, Pradeep Singh and Julian Aguon, 'Broadening Common Heritage: Addressing Gaps in the Deep Sea Mining Regulatory Regime' (2018) *Harvard Law Development*, https://harvardelr.com/2018/04/16/broadening-common-heritage/ (accessed 18 March 2020).

[30] See, e.g., Brian Clark Howard, 'The Ocean Could Be the New Gold Rush', *National Geographic* (13 July 2016), https://perma.cc/JW9A-DJEZ (accessed 18 March 2020); Rebecca Trager, 'Countries Poised to Roll Out Deep Sea Mining in New "Gold Rush"', *Chemistry World* (7 March 2017), https://perma.cc/UM66-7TA6 (accessed 18 March 2020).

[31] UNCLOS, note 16, art 156.

[32] Ibid, art 153.

[33] Ibid, arts 158 and 170.

[34] Euripides Evriviades, 'The Third World's Approach to the Deep Seabed' (1982) 11 *Ocean Development & International Law* 201, 215. See also Centre for Oceans Law and Policy, University of Virginia, *United Nations on the Law of the Sea 1982: A Commentary* (The Hague: Martinus Nijhoff, 1985) vol I, xxviii.

[35] White House Factsheet, 'US Policy and the Law of the Sea' (1982) 82 *Department of State Bulletin* 54–55.

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countries deemed Part XI of UNCLOS 'anti-market'[36] and decided either not to sign the Convention or to delay ratification.[37] In order to solve the issue, the UN Secretary-General held talks between 1990 and 1994. They led to an Agreement Relating to the Implementation of Part XI of the Convention ('1994 Agreement').[38] The Agreement modifies Part XI and is to be applied and interpreted together with Part XI.[39] Substantial changes were introduced to make the regime more acceptable to industrialized states (for example, regarding transfer of technology), thus prompting their ratification of UNCLOS.[40] Despite those changes, the core aims of Part XI remain. The Area is part of the common heritage of mankind and deep seabed mining cannot be freely undertaken.

Deep seabed mining as a project, and its legal framework, have been discussed since the 1960s, but it has only become economically viable within the past decade. In anticipation of this hour, governments and companies have scrambled to obtain exploration licenses for vast tracts of both national and international seabed.[41] In 2011, the government of Papua New Guinea granted the world's first deep-sea mining lease within their Exclusive Economic Zone ('an area beyond and adjacent to the territorial sea'[42]) to Canadian company Nautilus Minerals.[43] Solwara 1, operated by Nautilus in a joint partnership with the Papua New Guinea government, was scheduled to begin production in 2019.[44] The project met with legal challenges, funding problems and strong community resistance.[45] In September 2019, Nautilus filed for bankruptcy, with major creditors seeking to recover hundreds of millions and spurring calls, notably by Fiji President Frank Bainimarama, for a decade-long moratorium on seabed mining in the Pacific.[46] In August 2017, Japan became the first country to successfully mine its own seabed, tapping into a deposit of mineral resources 1,600 metres below the ocean's surface off the coast of Okinawa.[47] With the support of the European Union (EU) and

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[36] Edwin D Williamson, 'The Controversial Part XI' (2008) 12 *Texas Review of Law and Policy* 443. See also Louis B Sohn, 'The Law of the Sea Crisis' (1984) 58 *St John's Law Review* 2; Clyde Sanger, *Ordering the Oceans: The Making of the Law of the Sea* (Toronto: University of Toronto Press, 1987).

[37] Wolfgang Graf Vitzthum, 'Sea-Bed and Subsoil' (2000) IV *Encyclopedia of Public International Law* 334.

[38] Agreement relating to the Implementation of Part XI of the United Nations Convention of the Law of the Sea of 10 December 1982 (28 July 1994), 1836 *UNTS* 3 (1994 Agreement).

[39] See Keneth Rattray, 'Resolution and Agreement Relating to the Implementation of Part XI of the UN Convention on the Law of the Sea: A General Assessment – Comment' (1995) 55 *Eitschrift Fur Auslandisches Offentliches Recht Und Völkerrecht* 303.

[40] For example, France, the United Kingdom, Japan, Italy, Germany, the Netherlands, Ireland, Norway and Spain. Ibid, 306.

[41] Hunter, Singh and Aguon (2018), note 29.

[42] UNCLOS, note 16, arts 55 and 57.

[43] Stace Beaulieu, TE Graedel and Mark D Hannington, 'Should We Mine the Deep Sea Floor?' (2017) 5 *Earth's Future* 655, https://perma.cc/56LS-DPZ2 (accessed 18 March 2020).

[44] Nautilus Minerals Inc., 'Management's Discussion and Analysis of Financial Condition and Results of Operations' (2017) 10, https://perma.cc/M2LK-MN2Y (accessed 18 March 2020); Nasdaq GlobeNewswire, 'Nautilus Provides Project Update' (12 October 2017), https://perma.cc/7ACK-XCCM (accessed 18 March 2020).

[45] Ben Doerthy, 'Collapse of PNG Deep-Sea Mining Venture Sparks Calls for Moratorium', *The Guardian* (15 September 2019), https://www.theguardian.com/world/2019/sep/16/collapse-of-png-deep-sea-mining-venture-sparks-calls-for-moratorium (accessed 18 March 2020).

[46] Ibid.

[47] 'Japan Successfully Undertakes Large-Scale Deep-Sea Mineral Extraction', *Japan Times* (26 September 2017), https://perma.cc/9JRK-EEUZ (accessed 18 March 2020); 'Japan Just Mined the Ocean Floor and People Want Answers', *CBC Radio* (14 October 2017), https://perma.cc/B6PP-SLAM (accessed 18 March 2020).

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other government actors, multinational mining companies have been actively prospecting in the Exclusive Economic Zones of Pacific Island countries.[48]

Under UNCLOS, exploration for and exploitation of seabed minerals in the Area may only be carried out under a contract with the International Seabed Authority. At the time of writing, the International Seabed Authority has issued 29 exploration licences for the Area,[49] amid controversy over the environmental impact of such operations.[50] Contracts may be issued to both public and private mining enterprises. Before being able to mine in the Area, companies must possess the nationality of a state party or be effectively controlled by a state party or its nationals, and be sponsored by a state party.[51] As explained in the next section, a number of UNCLOS provisions regarding the Area place obligations on such sponsored companies.

Shared responsibility between states and companies for activities in the Area is the starting point for a comparison between the deep seabed mining regime and the future BHR treaty. Shared responsibility is not the norm in treaties governing activities undertaken by the private sector in locations outside the jurisdiction of any state. Under the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, non-governmental entities must be authorized by a State Party in order to operate in outer space.[52] This is not unlike the sponsorship mechanism described in UNCLOS for private operations in the Area. Unlike in UNCLOS, however, States Parties bear international responsibility for their activities in outer space 'whether such activities are carried on by governmental agencies or by non-governmental entities'[53] such as private companies. The state is the only entity that may be held internationally responsible. The Agreement Governing the Activities of States on the Moon and Other Celestial Bodies contains similar provisions.[54] Moreover, when it comes to liability, the Convention on

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[48] See, e.g., Secretariat of the Pacific Community, 'Pacific-ACP States Regional Legislative and Regulatory Framework for Deep Sea Minerals Exploration and Exploitation' (2012), https://perma.cc/G594-VAAN (accessed 18 March 2020); Secretariat of the Pacific Community, 'Achievements of the SPC-EU Deep Sea Minerals Project: Strengthening the Management of Deep Sea Minerals in the Pacific' (2014), 1–2, https://perma.cc/6LTE-77B9 (accessed 18 March 2020); Secretariat of the Pacific Community, 'SPC-EU Deep Sea Minerals Project Response to the ISA Stakeholder Engagement Survey on Developing a Regulatory Framework for Mineral Exploitation in the Area' (16 May 2014) 1, https://perma.cc/EH6B-V6PA (accessed 18 March 2020).

[49] Cecilia Jamasmie, 'World's First Seabed Gold, Copper, Silver Mine to Begin Production in 2019', *Mining.com* (24 March 2017), http://www.mining.com/worlds-first-seabed-mine-to-begin-production-in-2019/ (accessed 18 March 2020).

[50] Damian Carrington, 'Is Deep Sea Mining Vital for a Greener Future – Even if it Destroys Ecosystems', *The Observer* (4 June 2017); Hunter, Singh and Aguon (2018), note 29; Ben Doherty, 'Deep-Sea Mining Possibly as Damaging as Land Mining, Lawyers Says', *The Guardian* (18 April 2018); Matthew Taylor, 'Deep-Sea Mining to Turn Oceans into "New Industrial Frontier"', *The Guardian* (3 July 2019), https://www.theguardian.com/environment/2019/jul/03/deep-sea-mining-to-turn-oceans-into-new-industrial-frontier (accessed 18 March 2020); Greenpeace International, *In Deep Water* (3 July 2019), https://www.greenpeace.org/international/publication/22578/deep-sea-mining-in-deep-water/ (accessed 18 March 2020); Deep Sea Mining Campaign, London Mining Network, Mining Watch Canada, 'Why the Rush? Seabed Mining in the Pacific Ocean' (July 2019), http://www.deepseaminingoutofourdepth.org/wp-content/uploads/Why-the-Rush.pdf (accessed 18 March 2020).

[51] UNCLOS, note 16, art 153(2)(b).

[52] Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, 610 *UNTS* 205 (27 January 1967), art VI.

[53] Ibid.

[54] Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, 1363 *UNTS* 21 (11 July 1984), art 14.

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International Liability for Damage Caused by Space Objects, the launching state is 'absolutely liable to pay compensation for damage caused by its space object on the surface of the Earth or to aircraft in flight.'[55]

Before exploring the responsibility and liability regimes of UNCLOS in detail, two points deserve preliminary attention. First, UNCLOS is not the only treaty providing for corporate liability. Many environmental treaties contain provisions to that effect. For example, the 1969 Convention on Civil Liability for Oil Pollution Damage provides that the owner of a ship, which may be a legal person such as a corporation, shall be liable for any pollution damage caused by it.[56] What makes Part XI special is the mechanism for shared responsibility and liability set up in Articles 137 and 139, analysed in the next section. Second, there is an inherent limitation to the comparison between Part XI of UNCLOS and the proposed BHR treaty. Part XI of UNCLOS regulates a special part of our planet, the Area. The Area is both part of the common heritage of mankind and a source of mineral wealth. Deep seabed mining in the Area involves clearly identified state-sponsored companies who will carry out technically complex operations, but under a straightforward legal framework, and under contract. By contrast, the ambition of the BHR treaty is to provide an international legal framework on the protection of human rights for all types of corporate activities around the world, particularly but not only those that may span across different jurisdictions.[57] This covers hundreds of thousands of actors. The context, therefore, is quite different. Beyond these differences, however, Part XI of UNCLOS is used here to support a simple idea: that introducing direct human rights obligations for corporations in the proposed BHR treaty does not constitute a radical move. As explained in the next section, Part XI of UNCLOS shows that it was accepted as early as 1982 that companies must act to prevent damaging the environment and human life in areas in which they conduct their business. The next section introduces the debate about human rights obligations of companies under international law and analyses some key provisions of UNCLOS related to corporate obligations that could provide a model for a future BHR treaty.

III. Obligations of States and Corporations: Drawing Inspiration from UNCLOS

This section first argues that the proposed BHR treaty could imitate some of the arrangements of Part XI of UNCLOS on shared state and corporate general obligations. Second, it compares the corporate obligation to conduct environmental impact assessments under Part XI of UNCLOS and a proposed obligation to conduct human rights due diligence under the BHR treaty.

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[55] Convention on International Liability for Damage Caused by Space Objects, 961 *UNTS* 187 (1 September 1972), art II.

[56] Convention on Civil Liability for Oil Pollution Damage, 973 *UNTS* 3 (1 November 2003), art III.

[57] Revised Draft, note 15, art 3.

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A. General Obligations of States and Corporations

Under a traditional reading of international law, states are the only full-fledged subjects of international law.[58] The Vienna Convention on the Law of Treaties makes clear that treaties may bind states, without mentioning non-state actors such as private corporations.[59] A vast literature discusses whether corporations are also subjected to international obligations in the area of human rights.[60] While some authors have convincingly argued that companies already have some obligations under international human rights law, most authors consider it is not yet the case.[61] In February 2020, the Canadian Supreme Court held in *Nevsun Resources Ltd v Araya* that Canadian corporations were subject to customary international law. However, the Court reached this conclusion because it reasoned that customary international law was part of Canadian law and that, as such, it directly bound Canadian corporations.[62] Critics against the very idea of direct human rights obligations for corporations consider the move to hold corporations directly liable under international law for their human rights abuses would be unprecedented – it would contravene the traditional approach of international law to hold only states accountable for human rights violations, including those committed by corporations in their territory.[63] They also argue that states will use the treaty to excuse their own refusal to protect human rights. John Ruggie, for example, pointed out that the treaty co-sponsors (Ecuador, South Africa, Bolivia, Cuba and Venezuela) have thus far done 'little if anything' to act on the UNGPs.[64] Others argue

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[58] Christian Walter, 'Subjects of International Law' in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (Oxford: Oxford University Press, 2007), 6.

[59] Vienna Convention on the Law of the Treaties, 1155 *UNTS* 331 (27 January 1980), art 2(1)(g) and 26.

[60] This vast literature includes: Nicola Jägers, *Corporate Human Rights Obligations: In Search of Accountability* (Antwerp: Intersentia, 2002); Jennifer Zerk, *Multinationals and Corporate Social Responsibility: Limitations and Opportunities in International Law* (Cambridge: Cambridge University Press, 2006); Philip Alston (ed), *Non-State Actors and Human Rights* (Oxford: Oxford University Press, 2005); Andrew Clapham, *Human Rights Obligations of Non State Actors* (Oxford: Oxford University Press, 2006); Doreen Mcbarnet, Aurora Voiculescu and Tom Campbell (eds), *The New Corporate Accountability, Corporate Social Responsibility and the Law* (Cambridge: Cambridge University Press, 2007); David Kinley (ed), *Human Rights and Corporations* (London: Taylor & Francis Press, 2009); Jernej Letnar Černič, *Human Rights Law and Business: Corporate Responsibility for Fundamental Human Rights* (Groningen: Europa Law Publishing, 2010); Marie-Jose Van Der Heijden, *Transnational Corporations and Human Rights Liabilities* (Antwerp, Oxford, New York: Intersentia, 2012); Surya Deva, *Regulating Corporate Human Rights Violations: Humanizing Business* (London: Routledge, 2012); Jernej Letnar Černič and Tara Van Ho (eds), *Human Rights and Business: Direct Corporate Accountability for Human Rights* (Nijmegen: Wolf Legal Publishing, 2015); Nadia Bernaz, *Business and Human Rights. History, Law and Policy. Bridging the Accountability Gap* (London, New York: Routledge, 2017).

[61] Contrast, for example, Nigel Rodley, 'Non-State Actors and Human Rights' in Scott Sheeran and Nigel Rodley (eds), *Routledge Handbook of International Human Rights Law* (New York: Routledge, 2013), 523, 540 with Clapham (2006), note 60. See also Nicolas Carrillo-Santarelli, 'Corporate Human Rights Obligations: Controversial but Necessary', business-humanrights.org/en/corporate-human-rights-obligations-controversial-but-necessary (accessed 18 March 2020); Bilchitz (2016), note 7, 205–210; Andrés Felipe López Latorre, 'In Defence of Direct Obligations for Businesses Under International Human Rights Law' (2020) 1:28 *Business and Human Rights Journal* 1.

[62] *Nevsun Resources Ltd v Araya* 2020 SCC 5 (28 February 2020). The Court noted that it is not plain and obvious that corporations today enjoy a blanket exclusion under customary international law from direct liability for violations of obligatory, definable and universal norms of international law, and that Canada has long followed the conventional path of automatically incorporating customary international law into domestic law via the doctrine of adoption.

[63] Sara McBrearty, 'The Proposed Business and Human Rights Treaty: Four Challenges and an Opportunity' (2016) 57 Online Symposium *Harvard International Law Journal* 11, 12.

[64] John G Ruggie, 'The Past as Prologue? A Moment of Truth for UN Business and Human Rights Treaty' (8 July 2014) 10, http://www.hks.harvard.edu/m-rcbg/CSRI/Treaty_Final.pdf (accessed 18 March 2020).

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that asking businesses to implement elaborate human rights policies could also pose impossible practical difficulties, given the complicated, partly unpredictable and sometimes contradictory implications business activities can have on human rights. According to Danny Bradlow, 'it would be imprudent to establish binding rules on how businesses should manage human rights issues before we fully understand how to draft such rules without causing unintended consequences... [Human rights law] has not yet worked out how to deal with human rights situations that require making trade-offs, setting priorities, and managing risk. These are standard in business.'[65]

Drawing parallels with UNCLOS, this article argues, instead, that including direct human rights obligations for corporations in a future BHR treaty is not an unprecedented move and is in fact crucial for two reasons. First, many corporations have more power, influence and revenue than a number of states. An article published in 2018 in *The Conversation* put 71 corporations in the top 100 revenue generators for the year 2016. In this context, revenues of states are mainly taxes, which means that admittedly the comparison rests on shaky grounds. Still, it is telling that Walmart, for example, generated more revenue than Spain, Australia and the Netherlands.[66] International human rights law mechanisms, with their almost exclusive focus on state responsibility, do not adequately capture this reality. To remain relevant, international human rights law must evolve and include corporate accountability.[67] This symbolic but important development could have implications beyond human rights legal instruments as such, for example, in the area of investment arbitration. Under investment law, corporate investors often successfully bring claims against states, which argue that the impugned measures were adopted to comply with such states' human rights obligations.[68] Arbitrators interpret binding investment treaties that create a number of rights for companies, without corresponding binding human rights obligations. It is argued here that a BHR treaty clearly setting up corporate human rights obligations under international law would even things out, and lead to better human rights protection. A number of civil society organisations (CSOs) campaign for a BHR treaty because they view the process as an opportunity to create binding human rights obligations for corporations.[69] In this context, a treaty imposing obligations on states only and dodging the question of direct human rights obligations of businesses would be disappointing.[70]

The second reason why including direct human rights obligations for corporations in the future treaty is crucial is that the current treaty-making process is a once-in-a-generation

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[65] Danny Bradlow, 'Why We Need to Tread Carefully in Drawing Up Human Rights Rules for Business', *The Conversation* (29 July 2015), https://theconversation.com/why-we-need-to-tread-carefully-in-drawing-up-human-rights-rules-for-business-45179 (accessed 18 March 2020).

[66] 'Who is More powerful? States or Corporations?', *The Conversation* (10 July 2018), https://theconversation.com/who-is-more-powerful-states-or-corporations-99616 (accessed 18 March 2020).

[67] Surya Deva, 'Multinationals, Human Rights and International Law: Time to Move Beyond the "State-Centric" Conception' in Jernej Letnar Černič and Tara Van Ho (eds), *Human Rights and Business: Direct Corporate Accountability for Human Rights* (Oisterwijk: Wolf Legal Publishers, 2015), 27.

[68] Johannes H Fahner and Matthew Happold, 'The Human Rights Defence in International Investment Arbitration: Exploring the Limits of Systemic Integration' (2019) 68 *International and Comparative Law Quarterly* 741.

[69] See Bernaz and Pietropaoli (2017), note 6.

[70] See Olivier De Schutter, 'Towards a New Treaty on Business and Human Rights' (2015) 1 *Business and Human Rights Journal* 41, 44.

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opportunity to move forward on this question. If the treaty is adopted without a clear stand on this question, it is unlikely to be revisited. The preamble of the 2018 Zero Draft and 2019 Revised Draft make explicit that the 'primary responsibility' for human rights (including protecting people from abuses by business) remains with states. The Revised Draft underlines, following the language of the UNGPs, that business enterprises 'have the responsibility to respect all human rights'[71], but this is not repeated in the core part of the text. Thus, the Revised Draft does not create direct obligations for business enterprises for two reasons. First, it follows the UNGPs by distinguishing between state obligations and non-binding corporate responsibility. Second, the language is found in the Revised Draft's preamble. While there is some debate about this among international lawyers, it is generally believed that only the core part of a treaty is legally binding, while the preamble is not.[72] The preamble may only be used to provide context in treaty interpretation as per Article 31(2) of the Vienna Convention on the Law of Treaties.[73] This is the only mention in the Revised Draft of something resembling corporate human rights obligations under international law. The Revised Draft, and before that the Zero Draft, have dropped the proposals made in the 'Elements' of the treaty – a document Ecuador had released in 2017 – of direct imposition of international law obligations on business and of international mechanisms for suing and prosecuting companies.[74] The decision to only cover state obligations was made presumably in a bid to secure more support as some states are reluctant to the idea of a treaty setting up direct corporate obligations in the area of human rights. Negotiations, however, are still in the early stages, and the Revised Draft is, as the name suggests, a document that can be modified. In this respect, it will be interesting to see what position the EU will adopt in the next round of negotiations. In October 2019, the EU delegation announced they could not participate to the negotiations because they did not yet have a mandate from the new EU Commission. In short, the current draft can be revisited and including direct human rights obligations in the treaty is still possible.

Here, the deep seabed mining regime under UNCLOS offers an interesting point of comparison. As shown below, a picture of corporate accountability under international law emerges when looking at certain provisions of Part XI, together with official documents from the Authority. The first relevant provision is Article 137. Article 137 creates a general obligation for states not 'to claim or exercise sovereignty or sovereign rights over any part of the Area or its resources'. Under this article, 'juridical persons', such as corporations, are prohibited from 'appropriat[ing] any part thereof'.[75] States and juridical persons alike are also prohibited to 'claim, acquire or exercise rights

[71] Revised Draft, note 15, preamble.

[72] Max H Hulme, 'Preambles in Treaty Interpretation' (2016) 164 *University of Pennsylvania Law Review* 1281, 1285–1287.

[73] Vienna Convention on the Law of Treaties, note 59.

[74] Elements for the Draft Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights, Chairmanship of the OEIGWG established by UN HRC Res A/HRC/RES/26/9 (29/09/2017). See also Doug Cassel, 'At Last: A Draft UN Treaty on Business and Human Rights' (2 August 2018), *Letters Blogatory*, https://lettersblogatory.com/2018/08/02/at-last-a-draft-un-treaty-on-business-and-human-rights/#more-27105 (accessed 18 March 2020).

[75] UNCLOS, note 16, art 137.

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with respect to the minerals recovered from the Area except in accordance with this Part'.[76] Thus, without ambiguity, UNCLOS creates direct obligations for non-state actors, as well as rights, albeit negatively phrased.[77] This obligation not to appropriate any part of the Area, however, is relatively narrow. Still, a future BHR treaty could draw from Article 137 of UNCLOS and create a general obligation for states and corporations alike to respect (i.e., not to violate) human rights in the conduct of business activities. With regard to state obligations, this would essentially involve grounding Pillar I of the UNGPs in binding treaty law. With regard to corporate obligations, it would provide much-needed clarification and embed the core element of Pillar II of the UNGPs, the corporate responsibility to respect human rights, into treaty law. Following UNCLOS precedent, and specifically Articles 145, 146 and 149 read in conjunction with the Authority's official documents, as discussed in the next section, the treaty could also go further, and consider setting up a corporate obligation to carry out human rights due diligence.

B. Obligation to Conduct Environmental Impact Assessments and Corporate Human Rights Due Diligence Obligation

This section shows that Part XI of UNCLOS can be interpreted as establishing direct obligations for corporations not only of a general nature (Article 137), but also more detailed obligations, particularly the obligation to conduct environmental impact assessments in the Area. It is argued that the obligation to conduct environmental impact assessments in the Area shares similarities with the obligation to carry out human rights due diligence, and creates an interesting model from which to draw inspiration for the BHR treaty.

Obligations of corporate entities first arise from Article 145 of UNCLOS on the protection of the marine environment. This article states that '[n]ecessary measures shall be taken in accordance with this Convention with respect to activities in the Area to ensure effective protection for the marine environment from harmful effects which may arise from such activities'. This provision specifically empowers the Authority to take such measures, but the reference to measures being taken 'in accordance with' the Convention acknowledges that states may also act. Moreover, the 1994 Agreement modified Annex III of UNCLOS, on the basic conditions of prospecting, exploration and exploitation, to include the obligation for contractors to submit 'an assessment of the potential environmental impacts of the proposed activities and … a description of a programme for oceanographic and baseline environmental studies' at the same time as their application for approval of a plan of work.[78] This assessment must be conducted in accordance with the regulations to be adopted by the Authority.[79] In 2000, the Authority adopted the Regulations on Prospecting and Exploration for Polymetallic Nodules in the

[76] Ibid.

[77] See Irini Papanicolopulu, 'The Law of the Sea Convention: No Place for Persons' (2012) 27 *International Journal of Marine and Coastal Law* 867, 869.

[78] 1994 Agreement, note 28, Annex, section 1, para 7.

[79] UNCLOS, note 16, Annex III, arts 6 and 7. See A Commentary, note 34, vol VI, 198.

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Area (Regulations), as part of the Mining Code.[80] Regulation 31(3) requires contractors 'in accordance with Article 145 of the Convention' to take necessary measures 'to prevent, reduce and control pollution and other hazards to the marine environment arising from its activities in the Area'. Regulation 33(5) in both the 2010 Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area and the 2012 Regulations on Prospecting and Exploration for Cobalt-rich Ferromanganese Crusts in the Area contain a similar requirement, and a reference to Article 145.[81] Thus, although the text of Article 145 does not explicitly mention corporate obligations, subsequent developments lead to the interpretation of Article 145 as imposing obligations on non-state actors – at least the obligation to conduct an environmental impact assessment.[82]

The next relevant provision is Article 146. Article 146, titled 'Protection of human life', declares that 'necessary measures shall be taken to ensure effective protection of human life' in the Area. Like Article 145, Article 146 empowers the Authority to take such measures. Arguably, Article 146 imposes obligations on contractors, although this is less clear than for Article 145. The Standard Clauses for Exploration Contracts, contained in Annex 4 of the Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area, require contractors to 'comply with the generally accepted international rules and standards established by competent international organizations or general diplomatic conferences concerning the safety of life at sea'. There is no mention of Article 146 as the source of the obligation but, as noted in the Commentary of UNCLOS, 'this provision appears fully consistent with the spirit of article 146'.[83]

Finally, Article 149, on 'archaeological and historical objects' asserts that '[a]ll objects of an archaeological and historical nature found in the Area shall be preserved or disposed of for the benefit of mankind as a whole'. This provision does not place such obligation upon any particular entity, whether states or non-state actors, nor does it provide details as to how this obligation must be discharged.[84] Regulation 34 (in the Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area), however, requires contractors to 'immediately notify the Secretary-General in writing of any finding in the exploration area of an object of an archaeological or historical nature and its location' and to 'take all reasonable measures to avoid disturbing such object'. Again, the adoption of this provision supports the interpretation that Article 149 of UNCLOS imposes obligations on corporations.

Taken together, Articles 137, 145, 146 and 149 create an international legal regime in which corporations have obligations regarding their impact on the environment, human life and archaeological and historic objects. Corporations are required to minimize this

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[80] Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area, ISBA/6/A/18, Annex (13 July 2000).

[81] Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area, ISBA/16/A/12/Rev 1, Annex (15 November 2010); Regulations on Prospecting and Exploration for Cobalt-rich Ferromanganese Crusts in the Area, ISBA/18/A/11, Annex (22 October 2012).

[82] On the issue of corporate obligations under international law in relation to environmental protection, see also Stephen Turner, *A Global Environmental Right* (London: Routledge, 2014), who argues for a 'corporate environmental duty' under a 'Draft Global Environmental Right' instrument, 70–100.

[83] A Commentary, note 34, vol VI, 205.

[84] See Moritaka Hayashi, 'Archaeological and Historical Objects Under the United Nations Convention on the Law of the Sea' (1996) 20 *Marine Policy* 291, 293.

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impact, in other words to 'do no harm'. Thus, as a concept, corporate responsibility in Part XI of UNCLOS is closely related to corporate responsibility for human rights. Corporate responsibility in UNCLOS naturally covers fewer issues, but it is similar in nature to corporate responsibility for human rights.

A future BHR treaty could establish an obligation for states to establish mandatory human rights due diligence regulations. Some countries are already doing so.[85] France's Duty of Vigilance Law,[86] enacted in March 2017, mandates certain large French companies to publish and implement a vigilance plan to prevent human rights and environmental violations; the Swiss Responsible Business Initiative,[87] launched in April 2015, aims at adding an article to the Swiss Constitution that would entail a mandatory due diligence provision for corporations and a liability provision.[88] The 2019 Dutch Child Labour Due Diligence Law requires companies selling goods or services to Dutch consumers to identify and prevent child labour in their supply chain.[89]

Following the model of Part XI of UNCLOS, which arguably imposes the obligation on non-state actors to at least conduct an environmental impact assessment, the proposed BHR treaty could also explicitly impose direct due diligence obligations on corporations. The Revised Draft currently only envisages such obligations for states. Under draft Article 5, states 'shall adopt measures necessary to ensure that all persons conducting business activities ... undertake human rights due diligence'.[90] Broadly consistent with the UNGPs, draft Article 5 defines due diligence as identifying, assessing, preventing, monitoring and communicating on the human rights impacts that may arise from their own business activities or from their contractual relationships.[91] A future BHR treaty could include both obligations for states to establish mandatory human rights due diligence regulations, and direct obligations for company to carry out human rights due diligence. These two obligations are not mutually exclusive: companies would

[85] Business and Human Rights Resource Centre, 'Mandatory Human Rights Due Diligence', https://www.business-humanrights.org/en/mandatory-due-diligence (accessed 18 March 2020). See also Phil Bloomer and Irene Pietropaoli, 'Governments Can Help Make Business More Responsible on Human Rights', https://www.business-humanrights.org/en/governments-can-help-make-business-more-diligent-on-human-rights (accessed 18 March 2020).

[86] LOI no 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre (1).

[87] Swiss Coalition for Corporate Justice, 'The Responsible Business Initiative', https://corporatejustice.ch/ (accessed 18 March 2020).

[88] Following a series of debates in Parliament, there were two parliamentary counter-proposals to the RBI. The first retained the key elements of the RBI but included several restrictions; the second eliminates the liability provision and requires only a non-financial reporting duty and due diligence limited to child labour risks and conflict minerals. On 18 December 2019, the Swiss Council of States adopted the second counter-proposal. The matter will now go back to the National Council, which could accept the second counter-proposal or propose further changes. If the second counter-proposal is adopted by Parliament in its current form, the RBI Committee is not going to withdraw the initiative, which would go instead to the popular vote.

[89] Wet Zorgplicht Kinderarbeid (14 May 2019).

[90] Revised Draft, note 15, art 5(2). According to article 9(2), due diligence includes (a) monitoring human rights impacts; (b) identifying and assessing human rights violations; (c) preventing human rights violations; (d) reporting on non-financial matters, including at a minimum environmental and human rights matters; (e) undertaking environmental and human rights impact assessments; and (f) carrying out meaningful consultations with affected groups and relevant stakeholders.

[91] Article 1(3) of the Revised Draft defines 'contractual relationships' as 'any relationship between natural or legal persons to conduct business activities, including but not limited to, those activities conducted through affiliates, subsidiaries, agents, suppliers, any business partnership or association, joint venture, beneficial proprietorship, or any other structure or contractual relationship as provided under the domestic law of the State'. Revised Draft, note 15.

have the obligations to carry out human rights due diligence independently from whether a State Party has fulfilled its obligations under the treaty. Including direct corporate obligations of this nature would further strengthen the international human rights legal framework applicable to corporations. It would constitute a clear departure from the state-centred model and a step towards addressing, in law, the imbalance between corporate power and corporate accountability for human rights in the global economy. In practice, it is likely that companies would carry out human rights due diligence primarily under the domestic law of a given state party. However, in doing so they would also abide by their international obligation. In the next section, we explore the consequences of this approach on corporate responsibility and liability.

IV. Responsibility and Liability of States and Corporations: Moving Beyond UNCLOS

Part XI of UNCLOS sets up an intricate system of responsibility and liability of states and corporations in the Area. No other international legal regime has looked at these issues in such detail. Not only is the text itself creating a mechanism of shared liability between the two entities (states and corporations) but the International Tribunal on the Law of Sea (ITLOS) also had the opportunity to elaborate further on this mechanism in its 2011 Advisory Opinion.[92] This is particularly important in light of the fact that international law in general is ill-equipped to deal with situations of shared responsibility, even between states, let alone between states and non-state actors such as corporations.[93] Part XI of UNCLOS, therefore, allows us to anchor the discussion on a BHR treaty to an existing regime, rather than in the abstract. This section proposes that the BHR treaty move beyond Part XI to embrace a mechanism of residual liability and explains why it should do so.

Article 139 of UNCLOS is titled 'Responsibility to ensure compliance and liability for damage'. Article 139(1) reads as follows:

> States Parties shall have the responsibility to ensure that activities in the Area, whether carried out by States Parties, or state enterprises or natural or juridical persons which possess the nationality of States Parties or are effectively controlled by them or their nationals, shall be carried out in conformity with this Part.

In its 2011 Advisory Opinion on the 'responsibilities and obligations of States with respect to activities in the Area', the ITLOS clarified the meaning of the phrase

[92] *Responsibilities and Obligations of States Sponsoring Persons and Activities with Respect to Activities in the Area, Case No 17, Advisory Opinion* (1 February 2011), 2011 *ITLOS Reports* 10, paras 145, 147–148, https://perma.cc/8SJJ-5MGT (accessed 18 March 2020).

[93] On this, see Andre Nollkaemper and Dov Jacobs, 'Shared Responsibility in International Law: A Conceptual Framework' (2013) 34 *Michigan Journal of International Law* 359. They argue: 'Current international law is largely based on the notion of independent international responsibility (mainly of states and international organizations). This notion does not always provide the conceptual or normative tools for allocating responsibility between a plurality of actors in situations where contributions to harmful outcomes cannot be attributed based on individual causation of each actor'. Ibid, 364.

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'responsibility to ensure'.[94] It concluded that this provision creates an obligation of due diligence – in other words an obligation of conduct and not of result.[95]

Under Article 139(2), a failure by a state to carry out its responsibilities shall entail liability. Hence Article 139 'imposes a responsibility on state parties to ensure that activities are carried out in conformity with the Convention and holds them liable for damage caused by their failure to discharge this responsibility'.[96] However, if the state has taken 'all necessary and appropriate measures to secure effective compliance', it will not be held liable for damage caused by a failure to comply by a person, for example, a company that the state has sponsored.[97] In other words, if, despite the state's efforts, a company has failed to comply with the provisions of the Convention, the company, and not the state, will be liable. Although in international law both terms are often used interchangeably,[98] Article 139 differentiates between responsibility and liability. In the 2011 Advisory Opinion, the ITLOS confirmed this, and stated that under Article 139 'the term "responsibility" refers to the primary obligation whereas the term "liability" refers to the secondary obligation, namely, the consequences of a breach of the primary obligation'.[99]

Article 139(2) applies '[w]ithout prejudice to the rules of international law and Annex III, article 22' of UNCLOS, which is titled 'responsibility' and reads as follows:

> The contractor shall have responsibility or liability for any damage arising out of wrongful acts in the conduct of its operations, account being taken of contributory acts or omissions by the Authority … Liability … shall be for the actual amount of damage.

Hence, Article 139 of UNCLOS, read in combination with Article 22 of Annex III, set up a system whereby 'the contractor is, *prima facie*, liable for damage'.[100] This regime raised questions about the scope and potential overlap of state and corporate liability, a key issue also in the area of business and human rights. In the 2011 Advisory Opinion, the ITLOS provided clarification by stating that

> [t]he liability of the sponsoring State and the liability of the sponsored contractor exist in parallel. The liability of the sponsoring State arises from its own failure to comply with its responsibilities under the Convention and related instruments. The liability of the

94 *Advisory Opinion*, note 92, para 110.

95 Ibid.

96 Edward D Brown, *Sea-Bed Energy and Minerals: The International Legal Regime* (Dordrecht: Springer, 2001), vol II, 75.

97 Article 4(4) Annex III provides examples of such measures. It reads as follows: 'The sponsoring State or States shall, pursuant to article 139, have the responsibility to ensure, within their legal systems, that a contractor so sponsored shall carry out activities in the Area in conformity with the terms of its contract and its obligations under this Convention. A sponsoring State shall not, however, be liable for damage caused by any failure of a contractor sponsored by it to comply with its obligations if that State Party has adopted laws and regulations and taken administrative measures which are, within the framework of its legal system, reasonably appropriate for securing compliance by persons under its jurisdiction.', UNCLOS, note 16, Annex III.

98 Mohammed Bedjaoui, 'Responsibility of States: Fault and Strict Liability' in Rudolf Bernhardt (ed), *Encyclopaedia of Public International Law* (Amsterdam: Elsevier), vol IV, 212.

99 *Advisory Opinion*, note 92, para 66.

100 A Commentary, note 34, vol VI, 127.

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> sponsored contractor arises from its failure to comply with its obligations under its contract and its undertakings thereunder.[101]

Under Part XI of UNCLOS, the two mechanisms for liability are thus separate. This leads to two conclusions. First, the state and the corporation do not bear joint and several liability. Joint and several liability is a form of liability under which each entity that has contributed to a damage is liable for full reparation. Instead, they are each separately liable.[102] Second, and more importantly for the purposes of this article, there could be situations where no entity can be held liable. To avoid this possibility, 'some have argued that the sponsoring State has a residual liability, that is, the liability to cover the damage not covered by the sponsored contractor although the conditions for a liability of the sponsoring State under article 139, paragraph 2, of the Convention are not met'.[103] The ITLOS rejected the idea of residual liability. In doing so, it acknowledged the possibility of liability gaps under UNCLOS.[104] Thus, under Part XI of UNCLOS, state liability and corporate liability are both established but they exist in parallel, with no residual liability, and liability gaps are possible. Because deep seabed mining has not started yet in the Area, the discussion about the respective liability of states and corporations under Part XI remains hypothetical. However, even if no concrete issue has arisen yet from this liability gap, the situation is clearly suboptimal. As Greenpeace and the World Wide Fund for Nature (WWF) noted in the memorial they presented to the ITLOS during the Advisory Opinion proceedings, 'an appropriate liability regime … requires that the true costs of new activities are internalized, so that irresponsible risk-taking is discouraged, and it is not humanity as a whole and our shared environment that will foot the bill if devastating damages result.'[105] The lesson to draw from Part XI of UNCLOS is to avoid setting up modes of liability for states and corporations in the BHR treaty that allow similar liability gaps.

This is important because the lack of effective remedies for victims of corporate human rights abuse is one of the key problems in the area of business and human rights. At the moment, there is no corporate liability mechanism under international law.[106] Relying on domestic corporate liability mechanisms leads to various jurisdictional hurdles as well as practical access to justice issues, whether cases are litigated in the state where the harm occurred or in the state of incorporation of the parent company.[107] In this context, closing liability gaps so as to ensure better remedies appears to be one of

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[101] *Advisory Opinion*, note 92, para 204.

[102] Nollkaemper and Jacobs (2013), note 93, 422.

[103] *Advisory Opinion*, note 92, para 203.

[104] Ibid, para 205.

[105] Statement of Stichting Greenpeace Council (Greenpeace International) and the World Wide Fund for Nature, International Tribunal for the Law of the Sea (13 August 2010), 3, https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_17/Statement_Greenpeace_WWF.pdf (accessed 18 March 2020).

[106] The OECD National Contact Points provide opportunities for corporate accountability, but their scope is geographically limited and this mechanism falls shorts of liability.

[107] Lucas Roorda, Jurisdiction over Foreign Direct Liability Claims against Transnational Corporations in EU Member States (PhD thesis, Utrecht University, 2019) 43–45.

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the future BHR treaty's objectives.[108] The Revised Draft covers corporate liability to be defined and enforced under domestic law only. It requires states parties to provide, through their domestic law, for criminal, civil and administrative liability for violations of human rights and for effective criminal and non-criminal sanctions.[109] This is a step towards more accountability for corporations, but these provisions will not be game changers given the power imbalance and the range of obstacles faced by victims of corporate human rights abuse. Moreover, these provisions fall short of corporate liability under international law. This is in line with the approach adopted in the Revised Draft. This text does not create direct human rights obligations for corporations, so naturally there is no international form of liability either. However, the current approach is not set in stone and, as discussed above, it could be modified during future negotiations.

In this context, the remainder of this section explores the possible inclusion of a mechanism of residual liability in the future BHR treaty and how this would benefit rights-holders. Two options that would allow for residual liability are possible, but only one is politically feasible. First, as explained in section III of this article, the treaty could follow the approach enshrined in Part XI of UNCLOS and set up direct human rights obligations for corporations. In addition, the proposed treaty could create a mechanism for corporate liability at the international level. This would go much further than Part XI of UNCLOS because, under this legal regime, corporations are liable but their liability seems to only arise from their contractual obligations, and not from their more general obligations regarding appropriation, the protection of the environment and human life, and archaeological objects. In practice, even if future contracts for exploitation of minerals in the Area were going to include corporate obligations with regard to these issues, liability would arise out of the contract alone. The ITLOS made clear in its 2011 Advisory Opinion that 'the liability of the sponsored contractor arises from its failure to comply with its obligations under its contract and its undertakings thereunder.'[110]

Clearly, the future BHR treaty is meant to set up a very different regime in which corporations are not contractors but have general obligations to at least respect human rights throughout their operations. Thus, setting up a proper liability regime under the treaty would entail the creation of an international mechanism to hold corporations liable under international law. In a paper published in 2019, Marco Fasciglione explores three possible models for such liability: (1) creating a specialized Chamber of the International Court of Justice; (2) reorganizing regional human rights courts; and (3) amending the International Criminal Court statute. However, none of these models seems politically feasible.[111] In this context, it is premature to discuss the possibility of a residual liability mechanism.

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[108] Revised Draft, note 15, art 2(1)(b).

[109] Ibid, art 6(4).

[110] *Advisory Opinion*, note 92, para 204.

[111] Marco Fasciglione, 'An International Mechanism of Accountability for Adjudicating Corporate Violations of Human Rights? Problems and Perspectives' in Paulo Pinto de Albuquerque and Krzyszof Wojtyczek (eds), *Judicial Power in a Globalized World* (Cham, Switzerland: Springer, 2019).

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The second option, which appears more feasible, would be for the BHR treaty to follow Part XI's approach and set up direct human rights obligations for corporations, but to then rely on states to establish corporate liability under domestic law. This is close to what is already in the Revised Draft, except that this text does not create direct human rights obligations for corporations but, rather, follows the UNGPs in adopting the notion of corporate responsibility to respect human rights, which has no legal basis by virtue of the UNGPs. Assuming a future draft embraces the model proposed in this article—that is, creating direct human rights obligations for corporations, and requiring states to set up corporate liability mechanisms under domestic law – the added-value of residual liability comes forward. It is possible to imagine a system whereby if a corporation is not held liable under domestic law, because of various jurisdictional and practical obstacles, or is simply insolvent, then the state of nationality of the corporation and/or the state where the damage occurred becomes residually liable under international law. Importantly, this residual liability would be additional to a much broader state responsibility to protect human rights against corporate abuse.

This proposed system would constitute an important departure from the current state of international law on the question of residual state liability. In a commentary of the ITLOS Advisory Opinion mentioned above, one author noted that residual liability is not yet 'a regular feature' of international treaty law, but also highlighted developments showing that things are 'moving in this direction'.[112] One of these developments is the adoption in 2006 of the International Law Commission's Principles on the Allocation of Loss in the Case of Transboundary Harm Arising out of Hazardous Activities.[113] Although the phrase 'residual liability' is not mentioned, draft Principle 4(5) provides that in case compensation has not been provided by private operators, 'the State of origin should also ensure that additional financial resources are made available'.[114] The author of the commentary noted that this provision is arguably more an example of progressive development of international law, rather than codification.[115]

A future BHR treaty draft could consider a mechanism of residual liability, which in practice is not that far removed from the mechanism currently proposed in the Revised Draft. The Revised Draft sets up a mechanism of international oversight, in the form of a treaty body, of how states parties abide by their obligations under the treaty. The Draft Optional Protocol, released in 2018, sets up a right for individuals or groups of individuals to bring claims before the treaty body against state parties 'with regards to human rights violations in the context of business activities ... under the jurisdiction of a State Party to the present Protocol.'[116] Presumably, these claims are going to include situations where

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[112] Donald K Anton, 'The Principle of Residual Liability in the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea: The Advisory Opinion on Responsibility and Liability for International Seabed Mining (ITLOS Case No. 17)' (2012) 7 *McGill International Journal of Sustainable Development Law & Policy* 241, 249, citing article 15 of Basel Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and Their Disposal.

[113] International Law Commission, 'Principles on the Allocation of Loss in the Case of Transboundary Harm Arising out of Hazardous Activities', GA Res 61/36 (2006).

[114] Ibid, Principle 4(5).

[115] Anton (2012), note 112, 254.

[116] OHCHR, 'Draft Optional Protocol to the Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises' (6 September 2018), art 8(1).

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victims have tried to obtain compensation from corporate actors before domestic courts, but failed to secure it. That a state party can be deemed internationally responsible for having failed to ensure victims' access to a proper remedy is a logical consequence of the state's due diligence obligation. That an international quasi-judicial body could establish such responsibility is important, even though the Protocol is a separate instrument that will require separate signatures and ratifications. Such a system, however, falls short of an ideal system of residual liability for several reasons. First, it seems difficult to entrust a treaty body with the task to hold states liable to pay damages. An international judicial body, such as a court or an arbitral tribunal, would be better suited to do so. Yet, a treaty body could still be able to make a non-binding ruling establishing responsibility and asking the state to compensate victims when domestic corporate liability mechanisms have failed to grant such compensation. Second, the proposed mechanism would allow victims to bring claims against states 'with regards to human rights violations in the context of business activities ... under the jurisdiction of a State Party to the present Protocol'.[117] The Draft Optional Protocol does not explicitly mention the possibility of a state compensating victims when the corporation has not done so. Setting up a mechanism of residual liability would therefore require substantial modification of the text. It would also put further emphasis on victims by ensuring their losses are compensated.[118]

V. Conclusion

The deep seabed mining regime under UNCLOS creates direct obligations for corporate contractors in the area of environmental protection, and protection of human life. This treaty was adopted in 1982 and has 168 State Parties, including most Asian, African and Latin American countries, as well as the Russian Federation, the EU, Canada, Australia and most EU member states. At the very least, the wide acceptance of the idea that international treaty law may establish direct obligations for corporations to minimize their impact on the environment and on human life, albeit only in the Area and when they are contractors, could be used to advocate in favour of direct human rights obligations under the future BHR treaty. As discussed in this article, this has been an unnecessarily polarizing issue, and many have argued that including direct human rights obligations in the treaty would constitute a radical move. This article has shown such inclusion would not be ground-breaking as the principle is already accepted by those states who have ratified UNCLOS. It has also highlighted the importance of this issue, and how the BHR treaty process provides a once-in-a-generation opportunity to acknowledge that corporate actors have the means and influence to violate human rights and actually do so, and to adapt international law to better reflect this reality. As negotiations are still under way, the Revised Draft is work in progress and it is not too late to move in this direction.

This article has also explored what the BHR treaty process can learn from another aspect of Part XI of UNCLOS, namely, its mechanism for shared responsibility between

[117] Ibid.

[118] The Revised Draft already includes a detailed article on 'rights of victims'. Revised Draft, note 15, art 4.

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states and corporations when operating in the Area. In its 2011 Advisory Opinion, the ITLOS conducted an analysis of the text of the Convention in this respect, and concluded that residual liability could not be read into its relevant provisions. CSOs intervening in the procedure before the ITLOS had advocated for residual liability in the name of better environmental protection. Without residual liability, Part XI of UNCLOS creates liability gaps. The future BHR treaty is meant to address poor access to remedies for business and human rights victims who face various obstacles in accessing justice and also in receiving compensation for the harm they have suffered. In this context, residual liability for the home and/or host state deserves closer attention as one possible avenue to maximize the impact of the future treaty.

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