

**“Band-Aids Don’t Fix Bullet Holes:”¹ In Defense of a Traditional State-Centric Approach to the Treaty
Tara L. Van Ho**

1. “So It’s Gonna Be Forever or It’s Gonna Go Down in Flames”²

While international obligations do, and can, exist for non-state actors, international human rights law (“IHRL”) has traditionally been framed through a state-centered lens, with states as duty-bearers and individuals as rights-holders.³ As this Chapter explains, this approach requires the state to regulate the relationship between non-state actors and to ensure adequate remediation for victims whose human rights have been impacted by other non-state actors.⁴ Some scholars, including others in this volume, argue that this state-centered approach fails victims by expecting weaker states to attempt to regulate corporations that are stronger economically. While a legitimate criticism and concern, the solution may not rest in direct obligations for corporations but instead in retaining the state focus and expanding the jurisdiction states are expected to use when regulating and providing remedies against business for the protection of human rights. In its second meeting, the open-ended intergovernmental working group (“IGWG”) on transnational corporations and other business enterprises with respect to human rights continued to debate whether to ascribe direct human rights obligations to corporations.⁵ Focusing the treaty on direct IHRL obligations for corporations, however, may be providing a solution for the wrong problem. In this Chapter, I suggest the issue is not who has the obligations but how those are enforced that needs to be addressed. I further examine how current language from state-centric treaties can be modified to close the gaps in accessible and effective remedies. I suggest that the current, state-centric approach to IHRL can be used to address the needs of victims and weaker states. It is unlikely a state-centric treaty will provide strong remedial mechanisms for human rights victims, but I argue this is not the result of a state-centric approach rather states’ unwillingness to grant human rights victims’ strong enforcement protections, a reality unlikely to change simply because the defendant does.

In this chapter I suggest the issue that needs to be addressed is not who has the obligations but how the obligations are enforced. I further examine how current language from state-centric treaties can be modified to close the gaps in accessible and effective remedies. Readers will note that throughout the

¹ T SWIFT, et al., ‘Bad Blood,’ on T SWIFT, 1989 (2014). This piece benefitted from comments from participants at the Madrid workshop, Anil Yilmaz, Jena Martin, Sheldon Leader, Adrian Traylor, and Timothy Shoffner. Financial support for research on this piece came from INTRAlaw, University of Aarhus, Department of Law.

² T SWIFT, et al., ‘Blank Space,’ on T SWIFT, 1989 (2014).

³ N RODLEY, ‘Non-state Actors and Human Rights,’ in S SHEERAN and N RODLEY (eds), *Routledge Handbook of International Human Rights Law*, Routledge, New York 2013, pp 523-524, 526. See also: Andrew Clapham, *Human Rights Obligations of Non-State Actors*, Oxford, Oxford 2006, pp 25, 33-35, 39. Clapham criticizes this approach – as well as the approach of this book chapter – throughout his piece.

⁴ N Rodley, above n 3, p 527.

⁵ Human Rights Council, ‘Draft Report of the Second Session of the Open-Ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights (version of 28 October 2016)’, 7, 16-18, <http://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session2/Pages/Session2.aspx> (accessed January 2017), (“IGWG, Draft Report”).

piece, I use lyrics from Taylor Swift songs to convey the specific themes of both the chapter as a whole and the particular section in which a lyric is being employed; sometimes the lyrics are explained within the section, while other times I assume the lyric's theme is self-explanatory. This is done with the hope that the lessons of the chapter are easily remembered, and the primary lesson is that of the title of this chapter: 'Band-Aids don't fix bullet holes', meaning that an easy solution to a complicated issue is perhaps not a solution at all. If the proposed treaty on business and human rights undermines the state-centric approach to IHRL, it may ultimately undermine the means by which victims can force accountability and obtain remedies. Instead, I suggest that the current, state-centric approach to IHRL may best address the needs of victims and weaker states in part because the weaknesses are not the result of a state-centric approach rather states' unwillingness to grant human rights victims strong enforcement protections, a reality unlikely to change simply because the defendant does. This means that while a state-centric treaty is unlikely to provide strong remedial mechanisms for human rights victims, a focus on direct obligations for businesses is both unlikely to provide a strong remedial mechanism and is likely to undermine the clarity of obligations and authority the current approach provides.

There are few underpinning assumptions to this piece. The first is that the purpose of the treaty must be aimed at increasing adequate remedies for victims. A treaty that fails to accomplish this has little worth and even less purpose.⁶ The international community has documented its awareness of the impact of businesses on human rights since the 1960s.⁷ It is no longer sufficient to document, assess, analyse or contemplate how businesses impact human rights; it is time to ensure effective protections for victims. An additional assumption is that the treaty should not be used to create new rights, only to clarify obligations and relationships around fuller protection and enforcement of rights already recognized in IHRL.

The third assumption is that this treaty is a one-shot opportunity; it will, as the title of this section suggests, last or it will go down in flames. Human rights treaties are rarely amended after adoption, in part because doing so effectively requires greater consensus than even an initial treaty negotiation.⁸ A state can often be pressured and persuaded into acceding to a human rights treaty it had no intention of agreeing to, and still has no intention of fully implementing, if ratification offers economic, diplomatic, or other advantages.⁹ Altering a treaty so that it applies to all the states parties, however, requires that all existing states parties – including those who acceded only as a result of significant pressure and who have little intention of following through on their commitments – agree to the new provisions.¹⁰ Instead, optional protocols are often developed to address particular needs or failings of a core treaty.¹¹ Optional protocols adopted through the United Nations' ("UN") have never reached the same number of ratifications as the

⁶ Jeffrey Sachs made a similar point at the second session of the IGWG. See, *ibid*, p 4.

⁷ See: K BUHMANN, 'Navigating the 'Train Wreck' to being 'Welcomed': Negotiation Strategies and Argumentative Patterns in the Development of the UN Framework,' in S DEVA and D BILCHITZ (eds), *Beyond the Corporate Responsibility to Respect?* Cambridge, Cambridge 2013, pp 29, 30.

⁸ Vienna Convention on the Law of Treaties (1969), 1155 U.N.T.S. 331, article 40 ("VCLT").

⁹ See: OA HATHAWAY, 'Why Do Countries Commit to Human Rights Treaties,' (2007) 51 *Journal of Conflict Resolution* 588, 595.

¹⁰ VCLT, above n 8, article 40.

¹¹ See, e.g.: Optional Protocol to the International Covenant on Civil and Political Rights (1966), 999 U.N.T.S. 171.

original, or core, treaty.¹² The human rights community must therefore be prepared to accept the long-term consequences of the treaty and choose its path cautiously.

This leads to the final, perhaps the most central, underlying assumption of this chapter: if we are to navigate away from a traditional approach to one that embraces direct human rights obligations on corporations, it should be because both (1) the current state-centric approach to human rights law does not offer the tools necessary for tackling the issue of corporate accountability, and (2) the alternative suggestion *clearly* offers a better course of action. Moving from a known understanding of IHRL to an unknown and less clear approach can be justified, in my opinion, only if these two conditions are met. Otherwise, we are hoping for outcomes rather than planning for them. I suggest through this Chapter that the first condition is not met as the current state-centric approach to IHRL offers important tools that can ensure the treaty has an effective impact on combatting business impacts on human rights.

The question for this chapter is not whether a treaty *could* assign IHRL obligations to corporations – for me, there is no doubt that is an acceptable legal position¹³ – but rather whether doing so is the best approach for victims. This chapter focuses on the need of victims to access effective remedies, the barrier to this posed by the doctrine of separate corporate personalities, and the means for addressing victims' needs through the traditional, state-centric approach. I leave the issue of corporate criminal accountability to other authors¹⁴ and focus only on establishing means for civil liability. I suggest that the key to closing the gaps in accountability comes from expanding the jurisdiction of states to provide concurrent jurisdiction in multiple venues. The remainder of the Chapter is divided into five parts. In Part 2, I assess the need for a treaty, including the path to the UN Guiding Principles on Business and Human Rights (“Guiding Principles” or “UNGP”),¹⁵ currently the most authoritative statement on responsibilities in the area of business and human rights,¹⁶ and the potential for the new treaty to provide a robust enforcement mechanism. In Part 3, I examine the current state-centric approach to horizontal human rights impacts and consider how the doctrine of separate corporate personalities can lead to difficulties for victims seeking to enforce their human rights responsibilities. In Part 4, I invoke the UN conventions against torture and corruption to consider how current treaty language can be modified to expand the jurisdictional obligations of states to hear civil claims and provide greater access to remedies. Finally, in Part 5, I conclude that there is little reason to shift away from a traditionalist approach in the business and human rights treaty.

2. “You Gave me Everything and Nothing:”¹⁷ The Need for a Treaty

¹² See: Office of the High Commissioner for Human Rights, ‘Status of Ratification Interactive Dashboard,’ <http://indicators.ohchr.org/> (accessed January 2016).

¹³ For more on this issue, see, e.g.: A CLAPHAM, above n 3; D MURRAY, *Human Rights Obligations of Non-State Armed Groups*, Hart, Oxford 2016.

¹⁴ See the chapter by N BERNAZ in this volume.

¹⁵ ‘Guiding Principles on Business and Human Rights: Implementing the United Nations’ “Protect, Respect and Remedy” Framework,’ UN Doc. A/HRC/17/31 (21 March 2011) (“UNGP”).

¹⁶ See, e.g.: A SHERBERG, ‘New Global Standards for Business and Human Rights,’ (2012) 13 *Business Law International* 27, 27-28.

¹⁷ T SWIFT, et al., ‘I Wish You Would,’ on 1989 (2014).

It is worth briefly recalling the path to the treaty and examining why it is needed, which has developed partly in response to what many see as limitations in the UNGP. This section explains that the UNGP have offered little in terms of effective incorporation and implementation of their standards, and that significant issues remain unaddressed (or under-addressed).

A. Getting to the UNGP

The impact corporations have on human rights has been debated at the UN since the 1960s.¹⁸ The UN Human Rights Council's 2011 universal endorsement of the UN Guiding Principles seemed to suggest the international community had finally coalesced around an answer: states have an obligation to regulate corporate impacts on their own territory; businesses have a responsibility to respect human rights in their operations; and both are expected to ensure adequate remedies and reparations to victims.¹⁹ Initially, states and businesses agreed with the model, while some civil society and academics expressed doubts about the long-term viability of the proposal.²⁰ John Ruggie, the UN Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, drafted what many scholars considered to be a minimalist approach.²¹ Ruggie retreated from an earlier proposition at the UN that businesses have direct international obligations to respect, protect and fulfil human rights.²² The proposition was rejected by the Commission on Human Rights (the predecessor to the Human Rights Council),²³ but some criticized Ruggie for following the Commission's lead rather than sticking to the higher standard.²⁴ Additionally, he eschewed some of the more difficult questions in human rights law, such as whether and to what extent there was an extraterritorial obligation on corporate home states to regulate their nationals' actions abroad.²⁵ Finally, the Guiding Principles as a non-binding "soft law" instrument lacked any enforcement mechanism or accountability for either states or corporations, suggesting limited practical impact for victims.²⁶

Some of the concerns have been borne out as states have done little to further the regulation of corporations for the purpose of human rights. States' national action plans ("NAPs") – when they are developed – are supposed to outline concrete steps the state recognizes it must take to further

¹⁸ See: K BUHMANN, above n 7, p 30.

¹⁹ UNGP, above n 15.

²⁰ See, e.g., generally: S DEVA, 'Treating Human Rights Lightly: A Critique of the Consensus Rhetoric and the Language Employed by the Guiding Principles,' in S DEVA and D BILCHITZ, above n 7, p 78; Carlos López, 'The 'Ruggie Process': From Legal Obligations to Corporate Social Responsibility?,' in S DEVA and D BILCHITZ, above n 7, p 58.

²¹ See: Deva, above n 20, p 80.

²² See: 'Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights,' UN Doc. E/CN.4/Sub.2/2003/12 (2003).

²³ UN Doc. E/CN.4/2004/116.

²⁴ See, e.g.: D BILCHITZ, 'A Chasm between 'Is' and 'Ought'? A Critique of the Normative Foundations of the SRSG's Framework and the Guiding Principles,' in S DEVA and D BILCHITZ, above n 7, pp 107, 115-118.

²⁵ D AUGENSTEIN and D KINLEY, 'When Human Rights 'Responsibilities' become 'Duties': the Extra-territorial Obligations of States that Bind Corporations,' in S DEVA and D BILCHITZ, above n 7, p 274.

²⁶ See, J LETNAR ČERNIČ, 'An Elephant in a Room of Porcelain: Establishing Corporate Responsibility for Human Rights,' in J LETNAR ČERNIČ and T VAN HO (eds), *Human Rights and Business*, Wolf, Oisterwijk 2015, pp 131, 155.

compliance with its obligations towards regulation and providing remedies.²⁷ At the time of editing, there are twelve NAPs in effect following late 2016 releases by Colombia, Switzerland, the United States (“US”), and Germany’s baseline study²⁸ With the exception of the US and Colombia, all existing NAPS come from European states,²⁹ and the NAPs collectively have offered limited reflection on the need for reform.³⁰ The treatment of remedies in NAPs gives a clear indication of their limitations. Of the first two NAPs, the UK government would only “commit[] to keeping the UK provision of remedies under review, but [did] not propose any change to existing judicial remedy options.”³¹ In the Dutch NAP, “the actions planned” to address the ineffectiveness of the current remedial system “are minimal,” even though there was a detailed analysis of the topic.³² Newer NAPs do not fare much better. Because they have not yet been published in English and were released after this book was accepted for publication, I was unable to review the Colombian and German NAPs. Of the other existing NAPs, only Lithuania,³³ Switzerland³⁴ and Italy³⁵ discuss directly or indirectly the barriers they place to effective remedies. Instead, states often explain how their remedial processes work, but do not reflect seriously on existing structural barriers. The US NAP notes that states are “responsible” for providing mechanisms for an effective remedy – which under IHRL is an obligation³⁶ – but rather than focusing on barriers to remedies within the US, the NAP quickly pivots to recognize that “not all countries have such mechanisms in place.”³⁷ It commits to using and protecting its own non-judicial remedial processes and to “seek to strengthen judicial systems in other countries

²⁷ See, generally: D DE FELICE and A GRAF, ‘The Potential of National Action Plans to Implement Human Rights Norms: An Early Assessment with Respect to the UN Guiding Principles on Business and Human Rights,’ (2015) 7 *Journal of Human Rights Practice* 40.

²⁸ Updated lists of the national action plans can be seen at: Office of the High Commissioner for Human Rights, ‘State National Action Plans,’ <http://www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx> (accessed January 2017); Business & Human Rights Resource Centre, ‘National Action Plans,’ <https://business-humanrights.org/en/un-guiding-principles/implementation-tools-examples/implementation-by-governments/by-type-of-initiative/national-action-plans> (accessed January 2017).

²⁹ Ibid.

³⁰ See: D DE FELICE and A GRAF, above n 27, p 58-59.

³¹ Ibid, p 60.

³² Ibid.

³³ See: ‘Lithuania’s Action Plan on the Implementation of the United Nations Guiding Principles on Business and Human Rights,’ (2015), 8-11, http://www.ohchr.org/Documents/Issues/Business/NationalPlans/Lithuania_NationalPlanBHR.pdf (accessed January 2017).

³⁴ ‘Rapport sur la stratégie de la Suisse visant à mettre en œuvre les Principes directeurs des Nations Unies relatifs aux entreprises et aux droits de l’homme,’ (2016), 38-43 (available in French only) <https://www.news.admin.ch/newsd/message/attachments/46602.pdf> (accessed January 2017).

³⁵ ‘Italian National Action Plan on Business and Human Rights, 2016-2021,’ 26-27, <http://www.cidu.esteri.it/NR/rdonlyres/82FBB9B-EBA5-4056-A45C-281F0D2C9398/49117/NAPBHRENGFINALEDEC152017.pdf> (accessed January 2017).

³⁶ See, e.g.: D SHELTON, *Remedies in International Human Rights Law*, 3rd ed. Oxford, Oxford 2015, p 13.

³⁷ See: ‘Responsible Business Conduct: First National Action Plan for the United States of America,’ (16 December 2016), 23, <https://www.state.gov/documents/organization/265918.pdf> (accessed January 2017).

through its foreign assistance programs.”³⁸ Denmark,³⁹ Sweden,⁴⁰ Finland,⁴¹ and Norway⁴² similarly fail to identify any internal steps necessary to improve access to judicial remedies. This sits in contradiction to the findings of, at least, the Human Rights Committee, which has identified limitations to effective remedies in each of these states ranging in severity from limited legal aid making access to effective remedies financially inaccessible, to limited knowledge of human rights by lawyers and the judiciary, to broad grants of immunity that impact the ability to seek civil redress even against private actors, and discrimination that can impact equal access in areas of the judiciary.⁴³ Increased protection cannot begin if states do not adequately account for any limitations, including difficulty accessing legal counsel or difficulty in accessing relevant evidence, including information about a corporation’s structure.⁴⁴

Businesses have not done much better than the states. While corporate entities have started to use a “human rights reporting framework,” developed and promoted by the organization Shift, corporate reports still offer little clarity on businesses’ actual human rights impacts and the effectiveness of their remedial processes. For example, manufacturing giant Unilever’s 2015 human rights report focused on work the company did to ensure women in India had jobs with adequate health, safety, and wages.⁴⁵ The company admitted that “[i]n India, we found incidents of poor health and safety practices and a lack of proper process of wage payment at a salt pan.”⁴⁶ It failed, however, to discuss a lawsuit it was still

³⁸ Ibid.

³⁹ See: ‘Danish National Action Plan – Implementation of the UN Guiding Principles on Business and Human Rights,’ (March 2014), 20-21, http://www.ohchr.org/Documents/Issues/Business/NationalPlans/Denmark_NationalPlanBHR.pdf (“Danish NAP”) (accessed January 2017).

⁴⁰ Government Offices of Sweden, ‘Action Plan for Business and Human Rights,’ (2015), 15, <http://www.government.se/4a84f5/contentassets/822dc47952124734b60daf1865e39343/action-plan-for-business-and-human-rights.pdf> (accessed January 2017).

⁴¹ Finnish Ministry of Employment and the Economy ‘National Action Plan for the Implementation of the UN Guiding Principles on Business and Human Rights,’ (2014), 30, <http://tem.fi/documents/1410877/3084000/National%20action%20plan%20for%20the%20implementation%20of%20the%20UN%20guiding%20principles%20on%20business%20and%20human%20rights/1bc35feb-d35a-438f-af56-aec16adfcbae> (accessed January 2017).

⁴² Norwegian Ministry of Foreign Affairs, ‘Business and Human Rights: National Action Plan for the Implementation of the UN Guiding Principles,’ https://www.regjeringen.no/globalassets/departementene/ud/vedlegg/mr/business_hr_b.pdf at 40.

⁴³ See: Concluding Observations: Norway, UN Doc. CCPR/C/NOR/CO/6 (18 November 2011), paras 5-6; Concluding Observations: Finland, UN Doc. CCPR/C/FIN/CO/6 (21 August 2013), para 5; Concluding Observations: United States of America, UN Doc. CCPR/C/USA/CO/4 (22 April 2014), paras 12, 20; Concluding Observations: Sweden, UN Doc. CPR/C/SWE/CO/7 (30 March 2016), paras 5, 12, 14.

⁴⁴ See: Part 2, below.

⁴⁵ Unilever, ‘Enhancing Livelihoods, Advancing Human Rights: Human Rights Report 2015,’ 30, https://www.unilever.com/Images/slp-unilever-human-rights-report-2015_tcm244-437226_1_en.pdf (accessed January 2017).

⁴⁶ Ibid, p 23, 30.

fighting against Indian workers who claimed the company's failure to provide them with adequate protective gear led to mercury poisoning.⁴⁷ The company settled that case several months later.⁴⁸

The response to the Guiding Principles by both states and corporations could have remained unchanged but for claims by corporations using international investment arbitration to challenge actions Ecuador and South Africa took in furtherance of human rights.⁴⁹ Provisions in South Africa's post-apartheid black economic empowerment act were challenged by European investors who alleged that the provisions constituted an expropriation of their mining rights.⁵⁰ Ecuador is still fighting a complex investment arbitration claim arising from a court order made against oil company Chevron for environmental damage in the Amazon.⁵¹ The two states' woes led to a change in the discourse over the Guiding Principles. Now, the interest of several members of the Global South was in ensuring a hard-law approach to regulating transnational corporations to protect human rights in weaker states. Bolivia, Cuba, and Venezuela joined South Africa and Ecuador in proposing the treaty, finding that the Guiding Principles were simply not enough.⁵²

The treaty is an effort to close governance gaps and ensure businesses are regulated and victims have access to effective remedies, even in states with weak governance or limited power. Some appear to believe giving businesses direct obligations is a means of securing these two goals. That assumption should be questioned. The next subsection considers how international law provides remedies to IHRL victims and the likelihood for this to change with a treaty focused on business impacts on human rights. This discussion informs the question of whether direct obligations are necessary.

B. The Likelihood of Improved Remedial Processes

IHRL has limited enforcement generally. At the UN level, decisions of treaty bodies, even through individual complaints, are non-binding.⁵³ In the regional human rights systems, compliance with what are supposed to be binding court judgments is limited, even in the oft-touted European system.⁵⁴ The weakness in human rights protection stems from the refusal of states to accept effective oversight of

⁴⁷ See: 'Unilever settles dispute over mercury poisoning in India,' *The Guardian* (9 March 2016), available at <http://www.theguardian.com/environment/2016/mar/09/unilever-settles-dispute-over-mercury-poisoning-in-india> (accessed March 2016).

⁴⁸ *Ibid.*

⁴⁹ D BILCHITZ, 'The Necessity for a Business and Human Rights Treaty,' (2016) 1 *Business and Human Rights Journal* 203, 204.

⁵⁰ *Piero Foresti, et al., v. South Africa*, ICSID Case No. ARB(AF)/07/01, Award (2010).

⁵¹ See, e.g.: *Republic of Ecuador v. Chevron, et al.*, Case No. C/09/477457 / HA ZA 14-1291 (Judgment, 20 January 2016), available at <http://www.italaw.com/sites/default/files/case-documents/italaw7104.pdf>.

⁵² See: 'Elaboration of an International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises to Human Rights,' UN Doc. A/HRC/26.L/22/Rev.1 (25 June 2014).

⁵³ M NOWAK, 'The Need for a World Court of Human Rights,' (2007) 7 *Human Rights Law Review* 251, 252. For more problems on the current system, see: D CASSELL and A RAMASTRY, 'White Paper: Options for a Treaty on Business and Human Rights,' (2016) *Notre Dame Journal of International & Comparative Law*, Article 4, 30-31, <http://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=1044&context=ndjicl> (accessed January 2016).

⁵⁴ D SHELTON, above n 36, pp 384-385, 387-388; D HAWKINS and W JACOBY, 'Partial Compliance: A Comparison of the European and Inter-American Courts of Human Rights,' (2010-2011) 6 *Journal of International Law and International Relations* 35, 43-44.

human rights by treaty bodies and regional courts. While some might hope for a binding, enforceable, and strong judicial mechanism aimed at securing victims' rights against corporations, nothing to date suggests this is likely to happen. Expanding the remedial system is not the natural result of attaching direct international obligations. Stronger mechanisms have been discussed before the IGWG, but there appears to be greater support for replicating the existing UN treaty bodies.⁵⁵

There are additional reasons to doubt stronger mechanisms would ever be adopted, even with a shift to direct obligations on business. States tend to be particularly protective of their own ability to control economic activity both within, and that directly affects, their territory.⁵⁶ Katz Cogan has suggested that "courts are accorded independence on the condition that there are sufficient effective controls in place."⁵⁷ A strong international human rights tribunal would necessarily limit the controls states can exercise over the tribunal's work and its impact. "States generally lack the ability to correct interpretive errors made by" international tribunals and "are unable to direct judges to decide cases in certain ways or otherwise control the substance of judicial decisions."⁵⁸ States therefore seem hesitant about creating, much less subjecting themselves to, any robust IHRL mechanisms. This general skepticism seems likely to increase when the state's economy is subject to review. Scott explains that "the dominant view [is] that economic policy belongs in some more intrinsic way to the very idea of sovereignty" as opposed to other areas of IHRL, such as torture.⁵⁹ Since decisions relating to the business and human rights treaty are likely to have economic impacts and affect relationships between business and states, it seems highly unlikely that the new business and human rights treaty would provide a stronger mechanism for oversight than that which is currently employed under existing IHRL treaties.

While states may be hesitant to cede control to a robust treaty mechanism, they may be more willing to expand their own jurisdiction so as to ensure authority over their corporate actors when they operate abroad.⁶⁰ Before considering how this can be done, it is necessary to consider whether there is a significant benefit to having direct international obligations without a stronger international mechanism. The call for direct obligations without a clear, international means of effectively enforcing those obligations, seems justified only when placed in the context of the debate over the US's Alien Tort Statute ("ATS"), a law that allowed foreigners to institute civil suits for violations of customary international law.⁶¹ Only a few of the cases against corporations have been truly successful, yet the ATS was routinely used for business and

⁵⁵ See, IGWG, Draft Report, 11, 13, 19, 30; but see, also: *ibid*, 29.

⁵⁶ C SCOTT, 'Translating Torture into Transnational Tort: Conceptual Divides in the Debate on Corporate Accountability for Human Rights Harms,' in C SCOTT (ed) *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation*, Hart, Oxford 2001, pp 45, 53; see also: S SECK, 'Home State Responsibility and Local Communities: The Case of Global Mining,' (2008) 11 *Yale Human Rights and Development Journal* 177, 193.

⁵⁷ JK COGAN, 'Competition and Control in International Adjudication,' (2008) 48 *Virginia Journal of International Law* 411, 415.

⁵⁸ *Ibid*.

⁵⁹ C SCOTT, above n 56, p 53.

⁶⁰ Seck argues that the economic factors are still significant in cases where concurrent jurisdiction already exists. S SECK, above n 56, p 193.

⁶¹ 28 U.S.C. § 1350; see also: TL VAN HO, 'Transnational Civil and Criminal Litigation,' in S MICHALOWSKI (ed), *Corporate Accountability in the Context of Transitional Justice*, Routledge, Florence 2013, p 52.

human rights claims until a 2013 Supreme Court decision limited the statute's usefulness for overseas victims.⁶² Before the Supreme Court's decision, the US Court of Appeals for the Second Circuit concluded that corporations were not subject to suit under the ATS because they did not have direct obligations under IHRL and therefore could not violate customary IHRL.⁶³ On appeal to the US Supreme Court, defendant Royal Dutch Petroleum (the oil company commonly known as Shell) used this reasoning and pointed to the UNGP to support the position that corporate defendants owed no obligations under IHRL, which applied only to states and in certain circumstances natural persons.⁶⁴ Ruggie was shocked at the use of his findings⁶⁵ (although more jaded members of the business and human rights community were not). The Supreme Court did not address this argument – constraining jurisdiction under the statute narrowly to cases that “touch and concern” the US and dismissing the case against Shell for not meeting this standard – but the Second Circuit's reasoning meant the lack of direct international obligations posed a serious threat to one of the few tools being actively used to ensure business and human rights victims access to remedies.

Transnational litigation has evolved, however, and more cases are being filed against transnational corporations in European home states.⁶⁶ ATS claims against businesses also continue in the US in jurisdictions other than the Second Circuit.⁶⁷ Expanding obligations to new actors makes sense only if it is likely to increase the protection or enforcement of human rights. Without a robust international mechanism, and with some advance in domestic enforcements, the need to prove direct obligations is not as necessary as it once seemed. Asserting direct obligations for the purpose of securing a particular form of remedy in one state, rather than focusing on the obligation of all states to ensure adequate and effective remedies, will not secure the significant or long-term changes necessary for victims. Efforts at expanding domestic enforcement of IHRL may be a more viable, long-term approach.

As explained above, a treaty seems necessary to secure effective enforcement of existing IHRL standards against businesses. Constructing a “creative” treaty that expands the responsible parties may, however,

⁶² See, e.g.: Letnar Černič, above n 26, p 141.

⁶³ *Kiobel v. Royal Dutch Petroleum*, 621 F.3d 111 (2nd Circuit Court of Appeals, 2010). For the background to this argument, see: JG KU, ‘The Curious Case of Corporate Liability under the Alien Tort Statute: A Flawed System of Judicial Lawmaking,’ (2011) 51 *Virginia Journal of International Law* 352.

⁶⁴ See: JG RUGGIE, ‘Kiobel and Corporate Social Responsibility,’ Harvard Kennedy School of Government (4 September 2012), <http://business-humanrights.org/sites/default/files/media/documents/ruggie-kiobel-and-corp-social-resonsibility-sep-2012.pdf> (accessed January 2016).

⁶⁵ See: *ibid.*

⁶⁶ See, e.g.: *Vereniging Milieudefensie, et al., v. Royal Dutch Shell, Plc*, Case No. 330891 / HA ZA 09-579, Judgment in Motion Contesting Jurisdiction of 30 December 2009 (Court of The Hague); European Center for Constitutional and Human Rights, ‘Case Report: Pakistan – Cheap Clothes, Perilous Conditions,’ available at https://www.ecchr.eu/en/our_work/business-and-human-rights/working-conditions-in-south-asia.html (accessed January 2017); Sherpa, ‘French Company Lafarge Sued for Financing ISIS and Complicity in War Crimes and Crimes Against Humanity,’ (15 November 2016), <https://www.asso-sherpa.org/french-company-lafarge-sued-for-financing-isis-and-complicity-in-war-crimes-and-crimes-against-humanity-in-syria> (accessed January 2017); see also, N JÄGERS, et al., ‘The Future of Corporate Liability for Extraterritorial Human Rights Abuses: The Dutch Case Against Shell,’ (2014) *AJIL Unbound: Agora: Reflections on Kiobel* 36, 37.

⁶⁷ See, e.g.: *Al-Zuba'e v. CACI Premier Technology, Inc.*, No. 15-1831 (4th Cir. Ct. of Appeals); *Penaloza v. Drummond Co., Inc.*, No. 16-10921 (11th Cir. Ct. of Appeals).

be unnecessary. The next section considers the current approach to horizontal human rights impacts, suggesting this approach provides a strong foundation for the new treaty. It then explains how the doctrine of separate corporate personalities undermines the strength of the state-centric approach and represents a significant barrier to victims' attempts to secure remedies against corporate actors.

3. "Cause We Never Go Out of Style:"⁶⁸ Horizontal Human Rights in a State-Centric Approach

While the UNGP explain the relationship between state duties and business responsibilities in the area of business and human rights, the state's obligations stem not from the Guiding Principles but from existing treaty obligations.⁶⁹ The familiar typology that recognizes each human right requires three connected state obligations – respect, protect, and fulfil⁷⁰ – sets the framework for addressing horizontal human rights impacts. The protect obligation requires states to adopt regulations aimed at likely or known impacts by third party, non-state actors, and ensure horizontal impacts are remedied.⁷¹ Notably the Human Rights Committee, the Committee on Economic, Social and Cultural Rights ("CESCR"), and every regional system have addressed the state's duty to regulate and to provide adequate remedies in regards to business and human rights claims.⁷² An exhaustive discussion of the jurisprudence is unnecessary, but this section outlines how these claims are treated and the question as to whether these obligations exist extraterritorially. This section then turns to considering how the doctrine of separate corporate personalities creates an impediment to the effective operation of this system.

A. Addressing Horizontal Impacts

Under this traditional approach, IHRL obligations attach only directly to the state but are passed down to the business through domestic laws and regulations.⁷³ By viewing horizontal IHRL impacts through the lens of state conduct, there is a centrality of responsibility: the state is accountable for its actions or failure to act, either in advance or after the violation occurs and regardless of how many other actors are involved, their nationality, and their economic or political power. Human rights impacts by non-state actors are not immediately internationally wrongful acts but can be imputed to the state and "can lead to international responsibility of the State, not because of the act itself, but because of the lack of due

⁶⁸ Lyrics from 'Style' by T SWIFT, *on T SWIFT, 1989* (2014).

⁶⁹ See: K BUHMANN, above 7, p 52.

⁷⁰ See, F MÉGRET, 'Nature of Obligations,' in D MOECKLI, et al., (eds), *International Human Rights Law*, 2nd Ed, Oxford, Oxford 2010, pp 95, 101-102.

⁷¹ Ibid, p 101-102.

⁷² See, e.g.: *Yanomami Community v Brazil*, Inter-American Commission on Human Rights, Case No. 7615, Resolution No. 12/85; *Case of the Saramaka People v. Suriname*, Inter-American Court of Human Rights, Preliminary Objections, Merits, Reparations, and Costs (28 November 2007); *Lopez Ostra v. Spain*, European Court of Human Rights, Application no. 16798/90 (1994); *Social and Economic Rights Action Center v Nigeria*, African Commission on Human and Peoples Rights, Communication 155/96, 15th ACHPR AAR Annex V (2000-2001); Human Rights Committee, 'General Comment 27,' UN Doc. CCPR/C/21/Rev.1/Add.9 (1999), para 7; Committee on Economic, Social, and Cultural Rights ("CESCR"), 'General Comment No. 14,' UN Doc. E/C.12/2000/4 (2000), para 51.

⁷³ See: N RODLEY, above 3, 526.

diligence to prevent the violation or to respond to it.”⁷⁴ Consequently, a traditional approach evaluates business impacts on human rights by asking two distinct questions: first, did the company negatively impact human rights; second, did the state act with due diligence in advance to regulate the corporation’s impacts and/or did it respond with due diligence to complaints once they arose? If the state failed to exercise due diligence in the regulating to prevent a violation, it can incur responsibility. If the state regulates adequately but the company still violates the law, the state incurs international responsibility only if victims are unable to access adequate and effective remedies.

This is not to suggest the current system is perfect in addressing horizontal impacts. The current approach has benefits and detriments for victims. On the benefit side, victims can easily identify the internationally responsible party (the state); on the detrimental side, the internationally wrongful act is evaluated not in terms of the impact on victims, but in terms of the state’s response to that harm. Some might fear that this approach would leave victims vulnerable but the duality of the state’s obligations to regulate and remedy make it difficult to imagine a factual scenario in which the state would not be internationally responsible if a business negatively impacted human rights but was able to escape responsibility. Consequently, it is not the construct of the law but the lack of effective and binding international remedies that undermines victims’ rights.

Once thought to be only the responsibility of a host state, recent decisions suggest that the obligation to protect is also, concurrently, the responsibility of a corporation’s home state. Both the Human Rights Committee’s and CESCR’s most recent Concluding Observations on Canada expressed concern about the impact of Canadian corporations on human rights abroad.⁷⁵ Both Committees recommended the state provide greater oversight of its corporate nationals’ human rights impacts abroad, including through the state’s remedial systems.⁷⁶ CESCR recommended, *inter alia*, that the state (1) “strengthen its legislation governing the conduct of” its corporate citizens, “including by requiring those corporations to conduct human rights impact assessments prior to making investment decisions,”⁷⁷ and (2) adopt “effective mechanisms to investigate complaints filed against” its corporate nationals, and “to facilitate access to justice before domestic courts.”⁷⁸ CESCR has made similar recommendations in its conclusions on China⁷⁹ and the UK,⁸⁰ and called on France to “expedite the adoption of a law which would impose a binding obligation on” its corporate nationals “to fulfill their duty of care” to conduct due diligence throughout their operations.⁸¹ The Human Rights Committee recently praised Germany for undertaking “to provide remedies against German companies acting abroad allegedly in contravention of relevant human rights

⁷⁴ *Velasquez Rodriguez v Honduras (Judgment)*, IACtHR Series C No 4 (29 July 1988), at para 172. See also: *Lopez Ostra v. Spain*, paras 56-58; *Social and Economic Rights Actions Center v Nigeria*, Communication, para 8; CESCR, General Comment No. 14, para 51; Human Rights Committee, General Comment 27, para 7.

⁷⁵ See: Human Rights Committee, Concluding Observations: Canada, UN Doc. CCPR/C/CAN/CO6 (2015), para 6; CESCR, Concluding Observations: Canada, UN Doc. E/C.12/CAN/CO/6 (23 March 2016), para 16.

⁷⁶ See: *ibid.*

⁷⁷ CESCR, Concluding Observations: Canada, para 16.

⁷⁸ *Ibid.*

⁷⁹ CESCR, Concluding Observations: China, UN Doc. E/C.12/CHN/CO/2 (13 June 2014), para 13.

⁸⁰ CESCR, Concluding Observations: United Kingdom of Great Britain and Northern Ireland, UN Doc. (13 June 2014), para 11.

⁸¹ CESCR, Concluding Observations: France, UN Doc. E/C.12/FRA/CO/4 (13 July 2006), para 13.

standards.”⁸² Since “such remedies may not be sufficient in all cases,” the Committee recommended that the state “set out clearly the expectation that all business enterprises domiciled in its territory and/or its jurisdiction respect human rights standards” and “take appropriate measures to strengthen the remedies provided” for victims of German entities operating abroad.⁸³

While the Committees found the duty to protect has some extraterritorial application, home states themselves have been less accepting of this proposition. In response to the List of Issues by the Human Rights Committee, Canada wrote that it:

wish[ed] to emphasize the clear territorial and jurisdictional limits to its obligations under the Covenant. As per Article 2(1), Canada’s obligations are to ensure the Covenant rights with respect to individuals who are within Canada’s territory and subject to its jurisdiction. It must be noted that the individuals who can be affected by the activities of Canadian companies operating abroad are not, generally speaking, within Canada’s territory and subject to its jurisdiction.⁸⁴

A dispute therefore exists as to which states owe victims the obligations to protect and to remedy in the context of business and human rights. The treaty provides an opportunity to clarify this relationship, and in doing so to potentially close gaps that allow business to escape responsibility.

While states may be hesitant to find an existing obligation to exercise extraterritorial jurisdiction, they may be willing to adopt, through a treaty, expanded jurisdictional obligations. It appears that at least some home states hope the treaty will clarify their obligations. While the Danish NAP failed to discuss domestic limitations to accessible remedies, the NAP did suggest that the issue of access to judicial remedies “is an extremely difficult issue that is best handled at an international level.”⁸⁵ As Denmark can easily address any domestic failings it has, this position makes sense only if Denmark recognizes that there needs to be international clarity and agreement on home state responsibility. As will be discussed in Part 3, below, there is also relevant precedence for expanding a state’s jurisdiction through an IHRL treaty. Before turning to that precedence, however, it is important to understand that the need for expanded jurisdiction is, at least in part, the result of complex corporate structures and the doctrine of separate corporate personalities, which collectively can create an effective barrier for victims. The next section explains the barriers created, which illustrates the need for clarifying the home state’s responsibility to protect.

B. The Impact of Separate Corporate Personalities

Multinational corporations often escape liability precisely because they are powerful enough to ignore the judgments of developing state courts and their corporate structures allow them to evade effective

⁸² Human Rights Committee, Concluding Observations: Germany, UN Doc. CCPR/C/DEU/CO6 (2012), para 16.

⁸³ Ibid.

⁸⁴ Human Rights Committee, ‘List of Issues in Relation to the Sixth Periodic Report of Canada,’ UN Doc. CCPR/C/CAN/Q/6/Add.1, para 14.

⁸⁵ Danish NAP, above n 39, p 20.

oversight by their home states.⁸⁶ The doctrine of separate corporate legal personalities, sometimes called the corporate veil, was designed to encourage economic investment by limiting the liability of owners.⁸⁷ Shareholders – including parent corporations – are excused from liability for the actions taken by the corporation or on the corporation’s behalf.⁸⁸ Multinational corporations routinely incorporate each new venture as a distinct corporation, meaning that each company in the group is generally responsible only for its own actions and conduct and the parent companies do not incur responsibility for the actions or liabilities of the subsidiaries.⁸⁹ The doctrine also generally means that victims can only sue each member of the corporate group in those states that have jurisdiction over the company.⁹⁰ If a parent and subsidiary are incorporated and operate exclusively in separate jurisdictions, it is likely that neither the home nor host state has jurisdiction that covers both parts of the corporate group.⁹¹ Corporations have often avoided liability for human rights impacts by their overseas subsidiaries by relying on the separate corporate personality to dismiss claims in a parent company’s home state for lack of personal jurisdiction over the subsidiary.⁹² While there are exceptions to doctrine of separate personalities, means of “piercing the corporate veil,” doing so has proven difficult because of “vague and oftentimes inconsistent application” of tests states have developed to shield parent corporations from liability.⁹³

The Guiding Principles call on corporations to work to “prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.”⁹⁴ This implies that parent corporations are expected to undertake due diligence and work to mitigate the impact of their subsidiaries.⁹⁵ Yet, the doctrine on separate personalities has been used by multinational corporations to effectively avoid judicial oversight for impacts on victims in developing states.⁹⁶ Litigation in the Netherlands against oil giant Royal Dutch Petroleum (“Shell”) and its Nigerian subsidiary, Shell Petroleum Development Company of Nigeria (“SPDC”), for environmental and property damage caused by leaking oil pipelines provides a good example of how separate corporate personalities can be used as a barrier to effective remedies for victims.⁹⁷ The

⁸⁶ See, e.g.: G SKINNER, ‘Rethinking Limited Liability of Parent Corporations for Foreign Subsidiaries Violations of International Human Rights Law,’ (2015) 72 *Washington and Lee Law Review* 1769, 1802-1805; see also: D CAMBOU, ‘The Dutch Shell Case: Foreign Direct Liability Claims as an Avenue for Holding Multinational Corporations Accountable for Human Rights Violations,’ in J LETNAR ČERNIČ and T VAN HO, above n 26, p 347; G SKINNER, *The Third Pillar: Access to Judicial Remedies for Human Rights Violations by transnational Business*, The International Corporate Accountability Roundtable (2013), 21, et seq., available at <http://corporate-responsibility.org/wp-content/uploads/2014/02/The-Third-Pillar-FINAL.pdf> (accessed January 2016).

⁸⁷ G SKINNER, above n, pp 86, 1796.

⁸⁸ Ibid, p 1773.

⁸⁹ Ibid, p 1772.

⁹⁰ See, e.g.: ibid, pp 1802-1805.

⁹¹ See: *Daimler AG v. Bauman*, 134 S.Ct. 746, 749 (2014) (US Supreme Court).

⁹² See generally: T VAN HO, above n 61; see also: *Bigio v. Coca-Cola*, 675 F.3d 163, 170-171 (2nd Circuit Court of Appeals, USA) (2012); *William v. AES Corp*, 28 F.3d 553, 51-563 (Eastern District of Virginia, USA) (2014).

⁹³ G SKINNER, above n 86, 1796.

⁹⁴ UNGP, above n 15, Principle 13.

⁹⁵ N JÄGERS, ‘UN Guiding Principles on Business and Human Rights: Making Headway towards Real Corporate Accountability?’, (2011) 29 *Netherlands Quarterly of Human Rights* 159, 162.

⁹⁶ G SKINNER, above n 86, 1777.

⁹⁷ See: *Vereniging Milieudefensie*, para 2.2.

case was brought by Nigerian claimants and followed a pattern in Nigeria in which SPDC would often spend years vehemently defending claims related to oil spills.⁹⁸ Because Shell did not operate on the territory of Nigeria, claimants would have had difficulty establishing jurisdiction over the parent. When SPDC was ordered to pay damages or to undertake cleanup and restoration efforts, the Nigerian government did not take direct action to ensure compliance⁹⁹ and SPDC allegedly failed to follow the orders itself or did so in an incomplete manner.¹⁰⁰ In light of the difficulties with getting SPDC to comply with judgments or to respond quickly to allegations, claimants felt it was necessary to seek judicial protection overseas, notably in dual cases filed in both the UK¹⁰¹ and the Netherlands.¹⁰²

In the Dutch litigation, SPDC argued that the court did not have jurisdiction over the claims against it because it was a Nigerian company with operations only in Nigeria.¹⁰³ It claimed that the plaintiffs were “abusing procedural law by initiating claims against RDS on a patently inadequate basis for the sole purpose of creating jurisdiction with regard to SPDC.”¹⁰⁴ The Dutch civil code would allow for jurisdiction if the claims against the two corporations were connected.¹⁰⁵ To establish jurisdiction over SPDC, the victims needed to demonstrate that the claims against Shell and SPDC were substantively “connected to such an extent that reasons of efficiency justify a joint hearing.”¹⁰⁶ This would not “pierce the veil” – claimants had to attempt to separately prove their claims against both SPDC and Shell – but it would allow the Dutch courts to exceptionally exercise jurisdiction against the Nigerian company despite the fact that it did not operate on the territory of the Netherlands.¹⁰⁷ To do this, the plaintiffs argued that while SPDC was directly responsible for the oil spill, Shell was responsible for failing to take steps necessary to prevent the spill and to ensure its proper clean-up.¹⁰⁸ Shell’s 2011 Sustainability Report claimed that

“[i]n the event that a spill occurs, we have in place a number of recovery measures to minimise the impact. Our major installations have plans to respond to a spill. We are able

⁹⁸ See: S LEADER, et al., ‘Corporate Liability in a New Setting: Shell and the Changing Legal Landscape for the Multinational Oil Industry in the Niger Delta,’ Essex Business and Human Rights Project, 68-70, <http://www.essex.ac.uk/ebhr/documents/niger-delta-report.pdf> (accessed January 2016) (“EBHR”).

⁹⁹ Ibid.

¹⁰⁰ See: ibid; HO YUSUF and K OMOTESO, ‘Combating Environmental Irresponsibility of Transnational Corporations in Africa: An Empirical Analysis,’ (2015) 21 *Local Environment: The International Journal of Justice and Sustainability*, 1372, 1380-13822; J KAUFMAN, ‘Stop Oil Companies from Denying, Delaying, and Derailing Local Justice,’ EarthRights International (13 July 2010), <https://www.earthrights.org/blog/stop-oil-companies-denying-delaying-and-derailing-local-justice> (accessed January 2016).

¹⁰¹ *Bodo Community, et al., v. Shell Petroleum Development Company of Nigeria, Ltd.*, [2014] EWHC 1973.

¹⁰² *Fidelis Ayoro Oguru*, Subpoena.

¹⁰³ *Vereniging Milieudefensie*, para 2.4.

¹⁰⁴ Ibid.

¹⁰⁵ Ibid, para 3.4.

¹⁰⁶ Ibid, at para 3.4.

¹⁰⁷ See: Jägers, et al., above n 66, pp 39-40.

¹⁰⁸ *Fidelis Ayoro Oguru and Alai Efanga and Royal Dutch Shell plc and Shell Petroleum Development Company of Nigeria, Ltd.*, Subpoena (2009), para 130, <https://milieudefensie.nl/publicaties/bezwaren-uitspraken/subpoena-oruma/> (accessed January 2016).

to call upon significant resources such as containment booms, collection vessels and aircraft. We conduct regular response exercises to ensure these plans remain effective.”¹⁰⁹

The report further claimed that the corporate “Group strategy is aligned with the interest of the Parent Companies,” and that the group “define[s] who is responsible for applying” environmental and social standards while “we monitor performance.”¹¹⁰ Yet, before the court, the parent company argued that it could not be liable for what occurred in Nigeria or by its Nigerian subsidiary.¹¹¹ Shell submitted that it was “not directly involved in operations of its operating companies” and that it “could not be expected to interfere in the clean-up and remedial work of the oil spill in dispute” without violating the corporate veil.¹¹²

Shell also argued that the parent company named in the suit, Royal Dutch Shell, did not exist at the time of the actions.¹¹³ This defense also relates to the doctrine of separate corporate personalities and demonstrates the difficulty victims face in pursuing claim against corporate groups. Shell indicated a corporate restructuring, which occurred after the spill, led to the creation of Royal Dutch Shell as the parent to two companies that previously served as the group’s parent companies.¹¹⁴ Neither of the original parent companies dissolved; they simply fell down in the corporate chain.¹¹⁵ According to Shell, this meant that any responsibility for the original parent companies’ actions or inaction during the spill remained with the other corporations, although it did not identify which company would have been the responsible party.¹¹⁶ As others have pointed out, victims often identify a corporation based on its logo and the common understanding of its identity.¹¹⁷ In the Netherlands case, Shell used this confusion and uncertainty as the basis of its defense: if the claimants could not identify the “right” corporate entity, then the claim should be dismissed. When the corporate structure can be used specifically to hide the responsible party’s identity then the nature of the separate corporate personality becomes an effective barrier to the protection and remediation of human rights.

While these defenses were ultimately unsuccessful – the court allowed the case to proceed before later finding the plaintiffs did not prove Shell was responsible for the damages,¹¹⁸ – the defenses in the case are emblematic of larger issues in business and human rights. Neither the Dutch nor Nigerian courts could easily and clearly have jurisdiction over both the parent and the company. Shell claimants sought access to remedies against the parent company when the host state (the victim’s home state) proved either unwilling and/or unable to both regulate and enforce remediation measures. By creating a legal entity within Nigeria that was subject only to Nigeria’s local courts, the group was able to effectively ignore court

¹⁰⁹ Royal Dutch Shell Plc, ‘Annual Report and Form 20-F for the Year Ended December 31 2010,’ (2011), 51.

¹¹⁰ See: EBHR, above n 98, p 21.

¹¹¹ *Ibid.*

¹¹² *Ibid.*

¹¹³ *Ibid.*, p 47.

¹¹⁴ *Ibid.*

¹¹⁵ *Ibid.*, p 48.

¹¹⁶ See: *ibid.*, pp 48, 98.

¹¹⁷ See: G SKINNER, above n 86, p 1802.

¹¹⁸ *Fidelis Ayoro Oguru*, 2013.

orders in the host state. This benefit to SPDC was ultimately passed onto Shell, the parent company.¹¹⁹ Yet, Shell attempted to avoid any responsibility for what the subsidiary did by using the corporate veil and a complex, non-public corporate structure. Shell's response suggests that by limiting liability for parent corporations, the corporate veil encourages parents to disengage from issues of human rights.

The discussion in this Chapter might lead one to believe that the problem is not corporate personality but Shell's corporate personality (pun intended). That assumption would be inaccurate. While Shell has utilized the corporate veil to its advantage, the law itself allows corporate groups to structure themselves in such a way as to avoid effective regulation, oversight, and remedies. Corporations can divide their operations in a way that generally precludes any one state from overseeing the string of decisions and operations that lead to a negative human rights impact. For a treaty on business and human rights to be effective, it needs to ensure effective cooperation between states, and expand jurisdiction so that individual states may be able to oversee the totality of a group's operations, which in turn should incentivize parent corporations to intervene when their subsidiaries are failing to address serious human rights claims. As will be demonstrated in the next section, a treaty could accomplish this even while using a state-centric approach.

4. "Are we Out of the Woods Yet?:"¹²⁰ Assessing and Modifying the Current Tools

A traditionalist state-centric approach can provide clarity and certainty while significantly increasing the protection for human rights. The conventions on torture and corruption each provide relevant paths for the business and human rights treaty to follow. This section first examines how those treaties responded to issues of impunity and the second section considers how some of the provisions in those treaties can be adopted for the proposed business and human rights treaty.

A. Expanded Jurisdiction and Cooperation in the Conventions against Torture and Corruption

Both the Convention against Torture ("UNCAT")¹²¹ and the Convention against Corruption¹²² use the traditionalist state-centric approach but each contains specific clauses aimed at providing concurrent and overlapping responsibilities as well as effective cooperation between states.¹²³ UNCAT provides for an expansion of traditional jurisdictional approaches¹²⁴ while the Convention against Corruption includes provisions requiring states to assist one another in gaining relevant information for criminal investigations and in developing procedures to allow other states to initiate civil actions.¹²⁵ These provisions could be

¹¹⁹ On how this works generally, see: G SKINNER, above n 86, 1775, 1807, *et seq.*

¹²⁰ T SWIFT and J ANTONOFF, 'Out of the Woods,' *on T SWIFT*, 1989 (2014).

¹²¹ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 39/46, annex, U.N. Doc. A/39/51, *entered into force* 26 June 1987 ("UNCAT").

¹²² Convention against Corruption, G.A. res. 58/4, U.N. Doc. A/58/422, *entered into force* 14 December 2015.

¹²³ As Doug Cassell and Anita Ramasastry point out, this is not exclusive to the Conventions against Torture and the Conventions against Corruption. CASSELL and RAMASTRY, above n 53, pp 25-30. These conventions are used in this chapter as illustrative examples.

¹²⁴ UNCAT, articles 4-5.

¹²⁵ E.g.: Convention against Corruption, articles 26, 46, 51, 53.

modified to allow for states to exercise an expanded jurisdiction that could be used to address business impacts on human rights. These provisions are briefly explained in turn.

UNCAT requires states to establish as crimes specific acts related to torture and to establish jurisdiction over them.¹²⁶ Article 4 requires states to “ensure that all acts of torture are offences under its criminal law,”¹²⁷ while Article 5 provides an obligation to establish jurisdiction over offences committed on their territory (including on ships or aircraft registered in the territory) or by their nationals.¹²⁸ States parties were encouraged to establish passive personality jurisdiction, meaning jurisdiction over crimes in which their nationals were the victims.¹²⁹ Finally, states were to establish universal jurisdiction, “tak[ing] such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him” to another state where he can face prosecution.¹³⁰ The extradite or prosecute standard is intended to ensure that those who torture cannot enjoy impunity by creating “a single conventional mechanism aimed at preventing suspects from escaping the consequences of their criminal responsibility, if proven.”¹³¹ The articles provide potentially overlapping jurisdiction so that multiple states may simultaneously have a responsibility to prosecute.¹³²

In *Questions Relating to the Obligation to Prosecute or Extradite*, the International Court of Justice (“ICJ”) determined that the object and purpose of UNCAT is to “make more effective the struggle against torture,”¹³³ and that the extradite or prosecute standard is a requirement of both means and outcome.¹³⁴ According to the Court, Senegal was required to “exercise its jurisdiction over any act of torture” by undertaking a serious investigation of the facts and pursuing prosecution where appropriate.¹³⁵ States can choose between extradition or prosecution, but the ICJ was clear that this “does not mean that the two alternatives are to be given the same weight. Extradition is an option offered to the State by the Convention, whereas prosecution is an international obligation under the Convention, the violation of which is a wrongful act.”¹³⁶ It follows that the state may extradite to another party when necessary, relying on international cooperation to prevent impunity, but that the obligation to prosecute is the primary obligation.

The Convention against Corruption requires states to establish criminal jurisdiction over corruption-related crimes arising from conduct on their territory or by their nationals.¹³⁷ States also must adopt

¹²⁶ UNCAT, articles 4-5.

¹²⁷ *Ibid*, article 4.

¹²⁸ *Ibid*, article 5(1)(a)-(b).

¹²⁹ *Ibid*, article 5(1)(c).

¹³⁰ *Ibid*, article 5(2).

¹³¹ *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, ICJ Reports 2012, 422, para 91.

¹³² UNCAT, article 5(2).

¹³³ *Belgium v. Senegal*, 2012, para 86.

¹³⁴ *Ibid*, para 84.

¹³⁵ *Ibid*, para 85.

¹³⁶ *Ibid*, para 95.

¹³⁷ Convention against Corruption, articles 46, 51.

criminal, civil and/or administrative standards to facilitate the liability of legal persons.¹³⁸ States parties agree to both regulate for the prevention of corruption and “where appropriate, provide effective, proportionate and dissuasive civil, administrative or criminal penalties for failure to comply with such measures.”¹³⁹

The Convention also requires states to “afford one another the widest measure of mutual legal assistance.”¹⁴⁰ In criminal matters, states must assist one another in a variety of ways, including by interviewing witnesses, executing searches and seizures, and providing expert evaluations, evidence, and relevant financial, corporate or business documents, all for the benefit of another state’s investigation and prosecution.¹⁴¹ While the strongest measures in the Convention relate to criminal enforcement, States parties agree to take necessary measures to allow “another State Party to initiate civil action in its courts” in order to recover stolen assets and property.¹⁴² It is also recommended that states do assist one another in civil and administrative proceedings “[w]here appropriate and consistent with their domestic legal system.”¹⁴³ Through the expanded and clarified jurisdiction and cooperation provisions, the parties aimed to attack the financial benefits that would normally accrue from corruption and make it more difficult for individuals and legal entities to escape liability.

B. Adapting Language for the Business and Human Rights Treaty

Given that the Conventions against torture and corruption were designed in a manner so as to facilitate state efforts at combatting impunity for unacceptable conduct, it is possible to adapt these provisions to help close the accountability gap that currently exists in business and human rights. This section considers how the treaty language in the conventions against torture and corruption can be modified for the needs of the business and human rights treaty. While the provisions employed often relate to criminal liability, they can also be adapted to ensure that victims have access to effective civil remedies. I propose particular language here, and where necessary use the footnotes to indicate where the original provision comes from.

First, the Convention against Corruption works to establish the liability of legal persons.¹⁴⁴ It does this without excusing the possibility of concurrent responsibility for natural persons.¹⁴⁵ The Convention against Torture meanwhile requires states to adopt “legislative, administrative, judicial or other measures” necessary to effectively prevent torture.¹⁴⁶ Combining aspects of each of these, the business and human rights treaty could reflect concerns about the impact of the doctrine of separate corporate personalities.

¹³⁸ Ibid, article 26.

¹³⁹ Ibid, article 12(1).

¹⁴⁰ Ibid, articles 46, 51.

¹⁴¹ Ibid, article 46.

¹⁴² Ibid, article 53(1).

¹⁴³ Ibid, article 43.

¹⁴⁴ Convention against Corruption, article 26.

¹⁴⁵ Ibid, article 26(2).

¹⁴⁶ UNCAT, article 2(1).

1. *Each State Party shall take effective legislative, administrative, judicial or other measures to prevent their corporations from having a negative impact on the realization of human rights throughout their operations.*¹⁴⁷
2. *Each State Party shall adopt such measures as may be necessary, consistent with its legal principles, to establish the liability of businesses and other legal persons for impacts on human rights.*¹⁴⁸
3. *Subject to the legal principles of the State Party, the liability of businesses will be civil and administrative. [If the state otherwise establishes criminal liability for legal persons, the state shall also provide criminal liability for business entities for criminal violations of human rights.]*¹⁴⁹
4. *Such liability shall be without prejudice to the criminal liability of the natural persons who have committed the offences.*
5. *With regards to the obligations in subparagraphs 1, 2 and 3 of this article, where a corporate group exists, the State Party in which the ultimate parent corporation resides or is registered shall, consistent with its legal principles, take effective legislative, administrative, judicial or other measures as may be necessary to establish jurisdiction for the entirety of the corporate group based on the presence of the ultimate parent company.*

This language would allow for the establishment of group-based liability, meaning that the corporate veil would not act as an effective impediment to adequate and accessible remedies. One issue not addressed by this language, however, is how states should define “impacts on human rights.” That part of the first paragraph states in the original: “established in accordance with this Convention.”¹⁵⁰ Replicating that language is unlikely to make sense in the business and human rights treaty.

Second, the Convention against Torture establishes specific jurisdictional bases for prosecuting criminal acts of torture.¹⁵¹ Modifying that language, while staying focused on civil claims and assuming universal civil jurisdiction is not yet appropriate,¹⁵² could result in the treaty using language such as:

Each State Party shall take such measures as may be necessary to establish its civil jurisdiction over the corporations accused of human rights impacts in the following cases:

- (a) *When the impacts occur in the territory under its jurisdiction or on board a ship or aircraft that is registered in that State;*
- (b) *When the alleged offender or the ultimate parent company is a national of that State; and*
- (c) *Where the victim is a national of that State if that State considers it appropriate.*¹⁵³

¹⁴⁷ Adapted from: UNCAT, article 2(1).

¹⁴⁸ Adapted from: UNCAT, article 5(2).

¹⁴⁹ The language in this bracket is simply to demonstrate the potential for including corporate criminal responsibility in the treaty.

¹⁵⁰ Convention against Corruption, article 26(1).

¹⁵¹ UNCAT, at Article 5.

¹⁵² I realize this is a controversial position, but I have yet to be persuaded that individuals – even legal entities – should be subject to the civil laws of a state that is neither the state in which she is present or her home state.

¹⁵³ Adapted from: UNCAT, article 5.

Finally, the Shell defense in The Netherlands demonstrates the importance of ensuring victims can access necessary information, including information relating to the relevant corporate entities and their relationships. It is therefore necessary to include specific language about mutual assistance and cooperation in the conduct of activities. The Convention against Corruption includes relevant language that could be easily modified into the following.

1. *States Parties shall afford one another the widest measure of mutual legal assistance in investigations and judicial proceedings related to the human rights impacts of businesses operating on their territory or incorporated, registered or headquartered in their territory.*
2. *Mutual legal assistance shall be afforded to the fullest extent possible under relevant laws, treaties, agreements and arrangements of the requested State Party with respect to investigations and judicial proceedings in relation to corporate impacts on human rights for which a legal person may be held liable in the requesting State Party.*
3. *Mutual legal assistance to be afforded in accordance with this article may be requested for any of the following purposes:*
 - a. *Taking evidence or statements from persons;*
 - b. *Effecting service of judicial documents;*
 - c. *Executing searches and seizures, and attaching or freezing profits or income appropriate for the protection of the right of victims to full reparation;*
 - d. *Examining objects and sites;*
 - e. *Providing information, evidentiary items and expert evaluations;*
 - f. *Providing originals or certified copies of relevant documents and records, including government, bank, financial, corporate or business records;*
 - g. *Identifying or tracing proceeds of crime, property, instrumentalities or other things for evidentiary purposes;*
 - h. *Facilitating the voluntary appearance of persons in the requesting State Party;*
 - i. *Any other type of assistance that is not contrary to the domestic law of the requested State Party.*
4. *The provisions of this article shall not affect the obligations under any other treaty, bilateral or multilateral, that governs or will govern, in whole or in part, mutual legal assistance.*¹⁵⁴

This language intentionally excludes provisions relevant only to criminal proceedings solely to demonstrate the potential for using a traditional approach to the treaty to create avenues for victims to pursue full remediation and compensation.

These provisions indicate that a traditional approach to international law can be used in formulating the business and human rights treaty so as to increase protection and victims' access to adequate and effective remedies and remediation. Crafting an effective treaty does not require the alteration of international human rights law so as to provide corporations with direct international obligations. In fact, simply attaching direct obligations to corporations does little to alleviate the real issue outlined in Parts 1 and 2 regarding the availability of adequate remedies for victims. As noted in Part 3, states have been

¹⁵⁴ Adapted from: Convention against Corruption, article 46.

reluctant to give international bodies effective control over to enforce human rights. Simply changing the duty holder is unlikely to change that. But, as the Conventions against torture and corruption indicate, states are willing to increase their own responsibility and the jurisdictional reach of their own courts to address serious issues of general control.

5. “Remember what We’re Fighting For:”¹⁵⁵ Conclusions on the Traditionalist Approach

Without a treaty, it appears the international community will make little progress in the protection of human rights from corporate impacts. On this, I agree with the other scholars in this book. This Chapter began with the premise that we should only abandon the state-centric approach to international law if we are certain that (1) the current state-centric system will not adequately address victims’ needs, *and* (2) the alternative will provide a better solution. This Chapter suggests that the first part of that test is not met when it comes to the business and human rights treaty as a traditionalist approach can allow us to increase protection for victims, and establish means by which to measure and strengthen a state’s human rights compliance. The impediment victims face is not in the design of IHRL as a state-centric approach but rather in securing adequate remedial structures.

While a state-centric approach may be complemented by direct obligations on corporations – a path that seems to emerge at times in the IGWG sessions – human rights scholars and advocates should be concerned with the implications of expanding the law to new actors without further developing the remedial systems. If the law as it exists in a state-centric approach provides a means of adequately addressing the problems caused by business impacts on human rights, then the focus may more appropriately be on ensuring enforcement of that law rather than on changing the nature of the law in a way that may not give greater effect to the needs of victims.

This Chapter has argued that by modifying language in existing treaties, a traditionalist approach can provide victims with greater access to effective remedies. As discussed in Part 2, there is a significant need to tackle the impact separate corporate personalities have on the availability of information to victims, and the ability of victims, particularly in developing states, to access a clear means of redress. Using a traditionalist approach can also streamline the process for victims, allowing them to seek the corporate parent rather than to try to find information about the entire corporate group.

The provisions outlined in this chapter are not guaranteed to address all the hurdles victims currently face when trying to access remedies against businesses. That would require drafting an entire treaty, which is well beyond the scope of a book chapter. But even if one is not convinced by the particulars of the provisions in this Chapter, those calling for direct obligations on corporations bear the burden of demonstrating that this approach provides a better avenue for victims than the traditional state-centric one. It is easy to argue that the current system is failing and needs to be replaced with *something* but unless that *something* is actually effective at filling existing gaps, then it will simply be – as the title to this section suggests – a band-aid on a bullet hole, a pretty intervention that might mask the pain while doing little to alleviate it.

¹⁵⁵ T SWIFT, et al., ‘I Wish You Would,’ *on* T SWIFT, 1989 (2014).

DRAFT