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ANALOGY AND NORMATIVE DEVELOPMENT: ASSESSING THE FEASIBILITY OF A BUSINESS AND HUMAN RIGHTS TREATY

Lee McConnell*

Abstract: In light of a recent shift in dialogue to hard law standards in the domain of business and human rights, this article provides an in-depth examination of the viability of a business and human rights treaty. It seeks to advance a valid theoretical model for a treaty that directly addresses non-State actors, explores the allocation of responsibility among multiple duty-bearers, and contemplates the scope, content, and enforcement of the potential obligations. By supplementing this analysis with analogies drawn from existing treaty regimes, the article aims to contribute positively to the normative development of international law in the field.

Keywords: Non-State Actors, Business and Human Rights, International Human Rights, International Law-making, Legal Theory, Pure Theory of Law, Formalism, Legal Analogy

I. INTRODUCTION

The transnational operations of business actors often give rise to adverse human rights impacts. In light of international phenomena such as economic globalization, the privatization of warfare and other traditionally governmental functions, non-State actors now exert significant influence on public affairs. By contrast, State power has dramatically declined over the course of the last century, leading to a position of relative corporate impunity. Many developing States are incapable of effectively safeguarding the human rights of their populations due to weak governmental and judicial infrastructures or corruption. Such States may also demonstrate an unwillingness to ensure adherence to human rights at the domestic level due to fears that such activity might stem the flow of foreign direct investment (FDI). Western States, which may be capable of providing procedurally fairer avenues to domestic redress for victims of corporate negligence, have proven reluctant to hear cases concerning extraterritorial conduct, and the complex corporate structures established by many business actors often hinder the success of domestic litigation.

Nonetheless, States remain the primary addressees of international human rights obligations. The dominant method of advancing the business and human rights agenda at the international level has been via non-judicially enforceable soft-law initiatives such as the UN Guiding Principles on Business

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and Human Rights 2011 (UNGPs), the efficacy of which have been called into doubt.¹ Given the failings of regulatory regimes at both the international and domestic levels, the question has arisen as to whether non-State actors ought to be directly subject to international human rights standards.² This matter has been subject to significant debate among scholars³ and States alike, stimulated in part by the submissions of Ecuador at the 24th session of the Human Rights Council in 2013, when a directly binding business and human rights treaty was first tabled.⁴ This was followed in June 2014 by the adoption of a resolution establishing the need for further elaboration of a legally binding treaty directly addressing business actors,⁵ and the establishment of a dedicated Open-Ended Intergovernmental Working Group that met for the first time in July 2015.⁶

¹ UN Guiding Principles on Business and Human Rights (2011) HR/PUB/11/04; S Little & L Snider, 'Examining the Ruggie Report: Can Voluntary Guidelines Tame Global Capitalism?' (2013) 21 Crit Crim 177-92.

² P Simons, 'International Law's Invisible Hand and the Future of Corporate Accountability for Violations of Human Rights' (2012) 3 J Hum Rts & Environ 5-43; S Joseph, 'Taming the Leviathans: Multinational Enterprises and Human Rights' (1999) 46 Neth Int'l L Rev 174; O De Schutter, 'The Challenge of Imposing Human Rights on Corporate Actors' in O De Schutter (ed), *Transnational Corporations and Human Rights* (Hart Publishing, 2006) 17-22; A Clapham, *Human Rights Obligations of Non-State Actors* (OUP, 2006) 83; M Karavias, *Corporate Obligations Under International Law* (OUP, 2013); A Clapham, 'Human Rights Obligations of Non-State Actors in Conflict Situations' (2006) 88 Int'l Rev Red Cross 523; M Noortmann & C Ryngaert (eds) *Non-State Actor Dynamics in International Law: From Law-Takers to Law-Makers* (Ashgate, 2010); Y Ronon, 'Human Rights Obligations of Territorial Non-State Actors' (2013) 46 Cornell Int'l LJ 22-5.

³ O De Schutter, 'Towards a New Treaty on Business and Human Rights' (2015) 1 Business & Hum Rts J 41; D Bilchitz, 'The Necessity for a Business and Human Rights Treaty' (30 November 2014) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2562760> accessed 21 April 2016; F Mégret, 'Would a Treaty be all it is made up to be?' (4 February 2015)

<<http://jamesgstewart.com/would-a-treaty-be-all-it-is-made-up-to-be/>> accessed 21 April 2016; J Ruggie, 'Get Real or We'll Get Nothing: Reflections on the First Session of the Intergovernmental Working Group on a Business and Human Rights Treaty' <<http://business-humanrights.org/en/get-real-or-well-get-nothing-reflections-on-the-first-session-of-the-intergovernmental-working-group-on-a-business-and-human-rights-treaty>> accessed 21 April 2016; OHCHR, 'UN Expert calls for binding Human Rights Treaty for Corporations' (18 June 2015) <<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16097>> accessed 21 April 2016; S Deva, 'Scope of the Legally Binding Instrument to Address Human Rights Violations Related to Business Activities' (ESCR-Net & FIDH Treaty Initiative) <https://www.escr-net.org/sites/default/files/scope_of_treaty.pdf> accessed 21 April 2016.

⁴ Human Rights Council 'Republic of Ecuador: Statement on behalf of a Group of Countries at the 24rd Session of the HRC, Transnational Corporations and Human Rights' (Geneva, September 2013) <<http://business-humanrights.org/media/documents/statement-unhrc-legally-binding.pdf>> accessed 21 April 2016.

⁵ The resolution was adopted by 20 votes in favour, 13 abstentions and 14 against: Human Rights Council, 'Elaboration of an International Legally Binding Instrument on Transnational Corporations and other Business Enterprises with Respect to Human Rights' 26th Session (25th June 2014) UN Doc A/HRC/26/L.22/Rev.1.

⁶ Human Rights Council, 'Report of the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights' (10 July 2015) <<http://www.ohchr.org/Documents/HRBodies/HRCouncil/HRCouncil/WGTransCorp/Session1/Draftreport.pdf>> accessed 21 April 2016.

It was the experiences of the State of Ecuador in its turbulent litigation against Chevron that prompted this shift back towards hard law standards.⁷ In addition to the investment arbitration mounted against Ecuador by Chevron, several Ecuadorian villagers have initiated domestic legal challenges against the corporation. These civil actions accused Texaco (later acquired by Chevron) of contaminating an oil field between 1964 and 1992, giving rise to widespread environmental damage affecting the health and livelihoods of the local population. In November 2013 the Ecuadorian Supreme Court ordered the corporation to pay \$9.5 billion USD in compensation.⁸ Having initially argued on the basis of the doctrine of *forum non conveniens* that the Ecuadorian courts were better suited to hear the action, Chevron subsequently claimed that the case should be heard in the US. Consequently, since 2011, there has been additional protracted litigation in US courts,⁹ and a 2015 ruling by the Supreme Court of Canada permitting the claimants to pursue enforcement of the Ecuadorian award of damages under Canadian jurisdiction.¹⁰ The legal challenges surrounding this complex case continue, and the final outcome remains uncertain.¹¹

This context notwithstanding, the aim of this article is not to argue the merits or demerits of a business and human rights treaty. Rather, it will respond in detail to four key factors that call into question the project's feasibility. In particular, it will address: (i) the theoretical basis for the extension of direct international obligations to non-State actors; (ii) the determination of relevant duty-bearers and the allocation of responsibility; (iii) the scope and limits of the obligations; and (iv) remedies and enforcement mechanisms. Over the course of this discussion, the potential utility of analogies drawn from existing domestic and international law in surmounting these significant doctrinal impediments

⁷ N Cely, 'Balancing Profit and Environmental Sustainability in Ecuador: Lessons Learned From the Chevron Case' (2014) 24 Duke Environ L & Policy Forum 353; CA Whytock, 'Chevron-Ecuador Case: Three Dimensions of Complexity in Transnational Dispute Resolution' (2012) 106 ASIL Proc 425.

⁸ *Aguinda v Chevron-Texaco*, Case No 11-1150 (3 January 2012) (Appellate Panel, Ecuador) <<http://chevrontoxico.com/assets/docs/2012-01-03-appeal-decision-english.pdf>> accessed 21 April 2016; For Chevron's successful bi-lateral investment arbitration, see: *Chevron Corporation and Texaco Petroleum Corporation v Republic of Ecuador*, (First Interim Award, 25 January 2012) PCA Case No 2009-23 (UNCITRAL Rules) 16-17; The subsequent 2013 decision upheld the ruling, but lowered the damages payable: A Valencia, 'Ecuador high court upholds Chevron Verdict, halves fine' (Reuters, 13 November 2013) <<http://ca.reuters.com/article/businessNews/idCABRE9AC0YY20131113>> accessed 21 April 2016.

⁹ *Chevron Corporation and Texaco Petroleum Corporation v Republic of Ecuador*, (Order of the US District Court in the Republic of Ecuador v Stratus Consulting Inc, 29 May 2013) PCA Case No 2009-23 (UNCITRAL Rules); For US case documentation: International Treaty Arbitration <<http://www.italaw.com/cases/257>> accessed 21 April 2016.

¹⁰ *Chevron Corp v Yaiguaje* (2015) SCC 42.

¹¹ MD Goldhaber, 'The Global Lawyer: Will Chevron Lose in the Second Circuit?' (The AmLaw Litigation Daily, 23 April 2015) <<http://www.litigationdaily.com/id=1202724404971/The-Global-Lawyer-Will-Chevron-Lose-in-the-Second-Circuit?slreturn=20150729103702>> accessed 21 April 2016.

will be demonstrated.¹² In providing a thorough examination of these challenges, it is hoped that the study will advance the burgeoning dialogue on the topic of direct non-State actor regulation, and contribute positively to the debate surrounding the future normative development of international human rights law.

II. LAYING THE THEORETICAL FOUNDATIONS FOR THE TREATY

The first hurdle to the establishment of a business and human rights treaty is conceptual. It demands a robust explanation of the theoretical validity of a treaty that is concluded between States but whose addressees include non-State actors. Classically, international law has been perceived as a system governing inter-State relations. Dominant positivist scholarship exhibits a general reluctance to include non-State entities as subjects (as opposed to objects) of regulation,¹³ despite the increasing public influence of these entities,¹⁴ and the substantial decline in State power.¹⁵ One of the core reasons for this hesitance stems from received theoretical bases of international law.¹⁶ In line with recent scholarship, this section argues that a formalist reading of international legal personality may liberate international law from its classical constraints,¹⁷ providing a more logical basis for the development of a system of law that is open to the direct regulation of non-State actors. In doing so, it lays the groundwork for the formulation of a human rights treaty that directly addresses transnational corporations and other business actors.

¹² JE Noyes & BD Smith, 'State Responsibility and the Principle of Joint and Several Liability' (1988) 13 *Yale J Int'l L* 250.

¹³ R McCorquodale, 'Beyond State Sovereignty: The International Legal System and Non-State Participants' (2006) 8 *Int'l L Rev Colomb* 122; R McCorquodale, 'An Inclusive International Legal System' (2004) 17 *Leiden JIL* 447; Clapham, *Human Rights Obligations* (n 2) 61; R Higgins, *Problems and Process: International Law and How We Use It* (Clarendon Press, 1994) 49.

¹⁴ JE Nijman 'Non-State Actors and the International Rule of Law: Revisiting the Realist Theory of International Legal Personality' in Noortmann & Ryngaert (n 2) 93; Clapham, *Human Rights Obligations* (n 2) 3.

¹⁵ R Domingo, 'The Crisis of International Law' (2009) 42 *Vand J Transnat'l L* 1551; G Acquaviva, 'Subjects of International Law: A Power-based Analysis' (2008) 38 *Vand J Transnat'l L* 345; M van Creveld, *The Rise and Decline of the State* (CUP, 1999) 336-414.

¹⁶ D Kennedy, 'International Law and the Nineteenth Century: History of an Illusion' (1998) 17 *QLR* 99.

¹⁷ R Portmann, *Legal Personality in International Law* (CUP, 2010) 271; J Kyriakakis 'International Legal Personality, Collective Entities and International Crimes' in N Gal-Or, C Ryngaert & M Noortmann (eds) *Responsibilities of the Non-State Actor in Armed Conflict and the Market Place: Theoretical and Empirical Findings* (Brill 2015) 83; J Kammerhofer, 'Non-State Actors from the Perspective of the Pure Theory of Law' in J d'Aspremont (ed), *Multiple Perspectives on Non-State Actors in International Law* (Routledge, 2011) 54; J Kammerhofer, 'The Benefits of the Pure Theory of Law for International Lawyers, or: What use is Kelsenian Theory' (2006) 12 *Int'l Theory* 5; J Kammerhofer, *Uncertainty in International Law: A Kelsenian Perspective* (Routledge, 2011); J d'Aspremont, *Formalism and the Sources of International Law: A Theory of the Ascertainment of Legal Rules* (OUP, 2012); J d'Aspremont & J Kammerhofer (eds) *International Legal Positivism in a Post-Modern World* (CUP, 2015).

Sensitivities on the part of States and legal scholars underscore the reticence to extend international legal personality to non-State actors. Their concerns stem from the political and legal effects perceived to result from the recognition of non-State actors as subjects of international law. The situation is exacerbated by the unhelpful binary divide maintained between 'State' and 'non-State' entities,¹⁸ which prompts the concern that if one non-State actor is 'imbued' with legal personality, the same will necessarily follow for other entities.¹⁹ These anxieties regarding the political legitimization of non-State actors are directly related to questions of legal legitimacy,²⁰ and in particular, theoretical justifications relating to the validity or binding quality of international law. Each is rooted in the underlying contractarian rationale in which dominant positivist scholarship remains entrenched.²¹ The origins of this view are readily apparent in the post-Vattel scholarship²² of late-nineteenth and early-twentieth century German²³ and Italian scholars,²⁴ who came to view the State as factually, socially and historically constituted, possessing pseudo-psychological traits such as a sovereign 'will'.²⁵ The State was treated as an *a priori* concept; it preceded the existence of international law, contributed to its formulation, and validated it via its consensual will.²⁶

Thus, the primacy of States in the international legal system was codified, despite the notable absence of a workable definition of their constituent

¹⁸ P Alston, 'The "Not-a-Cat" Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?' in P Alston (ed), *Non State Actors and Human Rights* (OUP, 2005) 6; A Peters, L Koechlin, T Förster & Others (eds), *Non-State Actors as Standard Setters* (CUP 2009) 14; D Josselin & W Wallace (eds), *Non-State Actors in World Politics* (Palgrave Macmillan, 2001) 3-4; ME O'Connell, 'Enhancing the Status of Non-State Actors through a Global War on Terror?' (2005) 43 Colum J Transnat'l L 437.

¹⁹ D Steinhoff, 'Talking to the Enemy: State Legitimacy Concerns with Engaging Non-State Armed Groups' (2010) 45 Tex Int'l LJ 308; S Rondeau, 'Participation of Armed Groups in the Development of the Law Applicable to Armed Conflicts' (2011) 93 Int'l Rev Red Cross 658.

²⁰ Legitimacy is defined as a feature of rules which induce compliance from their addressees: T Franck, *The Power of Legitimacy Among Nations* (OUP, 1990) 24; D Bodansky, 'The Concept of Legitimacy in International Law' in R Wolfrum & V Röben (eds), *Legitimacy in International Law* (Springer, 2008) 313-15.

²¹ M Koskenniemi, *The Gentle Civiliser of Nations: The Rise and Fall of International Law 1870-1960* (CUP, 2002) 204; T Franck, *Fairness in International Law and Institutions* (OUP, 1998) 28; *The Case of the SS "Lotus" (France v Turkey)* (1927) PCIJ (ser. A) No 10, 18.

²² P Allott, *Health of Nations: Society and Law Beyond the State* (CUP, 2002) 406; A Orakhelashvili, 'The Origins of Consensual Positivism - Pufendorf, Wolff, and Vattel' in A Orakhelashvili (ed), *Research Handbook on the Theory and History of International Law* (Edward Elgar Publishing, 2011) 93-4; R Domingo, 'Gaius, Vattel, and the New Global Law Paradigm' (2011) 22 EJIL 627.

²³ J von Bernstorff, *The Public International Law Theory of Hans Kelsen* (CUP, 2010) 15-43; JE Nijman, *The Concept of International Legal Personality: An Inquiry into the History and Theory of International Law* (TMC Asser Press, 2004) 110-15; JEK Murkens, *From Empire to Union: Conceptions of German Constitutional Law since 1871* (OUP, 2013) 19; Koskenniemi (n 21) 441-2; RY Paz, *A Gateway Between a Distant God and a Cruel World: The Contribution of Jewish German-Speaking Scholars to International Law* (Martinus Nijhoff, 2012) 144-5.

²⁴ Portmann (n 17) 49-50; G Gaja, 'Positivism and Dualism in Dionisio Anzilotti' (1992) 3 EJIL 127.

²⁵ Nijman, *International Legal Personality* (n 23) 113.

²⁶ Portmann (n 17) 70.

empirical features.²⁷ The terms 'subject', 'creator', 'validator' and 'enforcer' became effectively synonymous. As a result, dominant scholarship conflates the creators of international legal rules with the subjects or addressees of those rules. These roles were perceived as the natural competences of States, stemming from their uncontested social and historical prestige. The nexus between the explanations of legal validity implicit within classical international legal doctrine and the political sensitivities surrounding the international legal personality of non-State actors may be traced to this doctrinal position. It has led to the view that if non-State actors are the direct addressees of international rules, whatever their content, this will place them on par with States politically. As a corollary, it has given rise to the claim that in order for non-State actors to be legitimately bound by international rules, they must consent to those rules, and thus, participate in their formulation.²⁸ While it has been suggested that such objections are unsustainable because they confuse 'personality with legitimacy',²⁹ it is argued that this conflation is a direct consequence of the dominant theoretical conception of international law. As such, traditional scholarship erroneously produces politically contentious, practically unworkable results that have stayed progress in the field of non-State actor regulation.

Recent scholarship has begun to recognise that a formalist approach to international legal personality has the potential to establish the theoretical foundations for the direct regulation of non-State actors, free from undesirable presumptions relating to political status and law-making capacity.³⁰ The positive effects of such an approach is apparent in the formalist conception of the international legal order advanced by Kelsen's Pure Theory of Law. The theory is premised on a strict methodological separation between 'is' and 'ought'.³¹ It defines legal orders as hierarchal systems of 'norms'.³² A norm describes a behaviour that *ought* to occur, as entirely distinct from the actual existence or fulfilment of the act prescribed.³³ Thus, while a legal rule might provide that 'all murderers are to be punished', this rule says nothing about whether all

²⁷ TD Grant, 'Defining Statehood: The Montevideo Convention and its Discontents' (1999) 37 *Colum J Transnat'l L* 413.

²⁸ C Ryngaert, 'Imposing International Duties on Non-State Actors and the Legitimacy of International Law' in Noortmann & Ryngaert (n 2) 69-70; S Wheatley, 'Democratic Governance Beyond the State: The Legitimacy of Non-State Actors as Standard Setters' in Peters, Koechlin & Förster (n 18) 215-40; R McCorquodale, 'Non-State Actors and International Human Rights Law' in S Joseph & A McBeth (eds), *Research Handbook on International Human Rights Law* (Edward Elgar Publishing, 2010) 114.

²⁹ JK Kleffner 'The Applicability of International Humanitarian Law to Organised Armed Groups' (2011) 93 *Int'l Rev Red Cross* 455.

³⁰ For a significantly expanded argument on this topic see: LJ McConnell, *Extracting Accountability from Non-State Actors in International Law* (Routledge, 2016).

³¹ Allott (n 22) 83 para 3.26; D Hume, *A Treatise of Human Nature* (first published 1738, Allman, 1817) Vol II, Bk III, Pt I, 154-172; I Kant, *The Critique of Pure Reason* (first published 1781, NK Smith tr, Macmillan, 1963) 313.

³² H Kelsen, *General Theory of Law and State* (first published 1945, A Wedberg tr, Harvard University Press, 1949) 123-124.

³³ H Kelsen, *The Pure Theory of Law* (M Knight tr, 2nd edn, University of California Press, 1970) 6.

murderers are actually caught, convicted, and sanctioned. Legal norms are simply prescriptive statements; their validity is not contingent upon facts.³⁴ As is already apparent, this method distinguishes itself from the contractarian explanations of validity advanced in dominant positivist scholarship. Such an approach would violate the *is/ought* dichotomy by utilising an *is* (the factually conceived State) to explain the validity of an *ought* (legal norms). Instead, the State is viewed entirely in juristic terms. A State is not an area of territory, a government, a permanent population, or an amalgam of these physical properties. It is the *rule* defining a State's territory that is relevant to the study of law rather than the *actual* territory.³⁵ According to this view, States are like all legal persons; they are personified bundles of rights and duties ultimately addressing individuals.³⁶

This conception proves enlightening with respect to the definition of international legal personality provided by the International Court of Justice's (ICJ) *Reparation* Advisory Opinion.³⁷ That an entity is perceived as an international legal person to the extent that it is so-defined by positive law³⁸ is not problematic under formalist logic.³⁹ That different entities might be the addressees of varying rights and obligations⁴⁰ need not be expressed in terms such as 'full' or 'limited' personality. Legal persons are merely devices employed to describe legal phenomena, in particular, the referral or imputation of norms regulating human behaviour to an 'order' or 'corporation'.⁴¹ This includes, but is not necessarily limited to, States.⁴² The consequences of this view in the context of non-State actors are clear; international personality is an entirely open and neutral concept.⁴³ It entails no presumptions as to the political status of the entity, or as to which rights and capacities a 'subject' of international law naturally 'possesses'.⁴⁴ Rather, the law-making capacity of States is prescribed by a higher norm, or more specifically, such a competence is assigned by the law to an individual, in their capacity as an agent, and then imputed to the State legal order. Thus, the conflation between addressee and law-maker is completely dissolved on this formalist view. Law-creating competence may be imputed to *any* entity, but it is not *necessary* to establish the validity of an obligation.

³⁴ Kelsen, *General Theory* (n 32) 45.

³⁵ *ibid.* 189.

³⁶ *ibid.* 95-6.

³⁷ *Reparation for injuries suffered in the service of the United Nations* (Advisory Opinion) ICJ Reports [1949] (hereafter *Reparation*).

³⁸ *ibid.* 179.

³⁹ Kammerhofer, 'Benefits' (n 17) 36.

⁴⁰ 'The subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights'. *Reparation* (n 37) 178.

⁴¹ SL Paulson, 'Hans Kelsen's Doctrine of Imputation' (2001) 14 *Ratio Juris* 47.

⁴² H Kelsen, *Principles of International Law* (Rinehart & Co, 1952) 98.

⁴³ Portmann (n 17) 175.

⁴⁴ J d'Aspremont, 'The Doctrine of Fundamental Rights of States and the Functions of Anthropomorphic Thinking in International Law' (2015) 4 *CJICL* (forthcoming); Portmann (n 17) 177; Kelsen, *Principles* (n 42) 148-9.

Kelsen's model assuages traditional contractarian anxieties in international law concerning the attribution of responsibility to third parties in relation to primary obligations to which they have not themselves expressly consented.⁴⁵ Binding quality is not derived from the consent or natural status of the addressee but from the legal order itself, which ultimately finds its basis in the *Grundnorm* or basic norm.⁴⁶ While the controversy surrounding this concept cannot be denied, it is suggested that this stems from its mischaracterization as a form of validation akin to that espoused by naturalist jurisprudence.⁴⁷ Kelsen's explanation of legal validity ultimately rests on a basic norm that cannot be positively determined. As such, the *Grundnorm* may be taken to be equivalent to a command emanating from the divine. In Kelsen's words:

[T]he theory of the basic norm may be considered a natural law doctrine in keeping with Kant's transcendental logic. There still remains the enormous difference which separates, and forever must separate, the transcendental conditions of all empirical knowledge and consequently the laws prevailing in nature on the one side from the transcendent metaphysics beyond all experience on the other.⁴⁸

Thus, while the basic norm may serve the same *validating* function, and while its existence also lies beyond positivist determination, its purpose is entirely different and its content is entirely empty.⁴⁹ The content of all legal norms is always positively determined.⁵⁰ The basic norm simply makes the cognition of legal norms possible: it is a prism through which norms are discernible. The basis of Pure Theory is a value-free presumption of legal validity necessary for the cognition of a positively-defined legal order as a system of norms, and not a theological ideal with substantive moral content.⁵¹ Just as the notion of cause and effect in natural science (*is*) must be prevented from infinite regress via the presumption of a 'first cause', the *Grundnorm* serves the same function in the realm of norms (*ought*).⁵² The *Grundnorm* is the Pure Theory's 'big bang'.

While the strength of this justification in the context of neo-Kantian philosophy has also been subject to cogent criticism,⁵³ undermining the *necessity*

⁴⁵ M Jackson, *Complicity in International Law* (OUP, 2015) 13.

⁴⁶ Kelsen, *Principles* (n 42) 314.

⁴⁷ S Hall, 'The Persistent Spectre: Natural Law, International Order and the Limits of Legal Positivism' (2001) 12 EJIL 300; D Lloyd, *The Idea of Law* (Revised edn, Penguin, 1981) 194.

⁴⁸ Kelsen, *Principles* (n 42) 437-8.

⁴⁹ Bernstorff (n 23) 115-16.

⁵⁰ Kammerhofer, *Uncertainty* (n 17) 219.

⁵¹ R Tur, 'The Kelsenian Enterprise' in R Tur & W Twining (eds), *Essays on Kelsen*, (Clarendon Press, 1986) 155; W Ebenstein, *The Pure Theory of Law* (AM Kelley, 1969) 32.

⁵² Tur (n 51) 169.

⁵³ SL Paulson, 'The Neo-Kantian Dimension of Kelsen's Pure Theory of Law' (1992) 12 Ox J Leg Stud 322-32; U Bindreiter, *Why Grundnorm?: A Treatise on the Implications of Kelsen's Doctrine* (Springer, 2002) 24-8; H Kelsen, 'Causality and Imputation' (1950) 61 Ethics 1.

of a strictly normative view of law, this is not fatal to the theory.⁵⁴ Rather, its claim to uniqueness in solving the antinomy between natural and positive law is undermined, and the theory simply ‘takes its place alongside other normativist legal theories... perhaps best understood as offering *a legal point of view*.’⁵⁵ In the context of non-State actor regulation, it is clear that the strictly normative view advanced has utility both as a critical methodology which exposes the weakness of traditional doctrine, and in the construction of a potential theoretical foundation that is receptive to the direct regulation of business actors. This basis having been established, the precise form and content of a binding business and human rights treaty raises three other important questions, which are addressed in the remaining subsections below.

III. IDENTIFYING DUTY-BEARERS, ALLOCATING RESPONSIBILITY

Hart famously distinguished between primary and secondary rules.⁵⁶ The former define the behaviours which addressees ought to engage in or refrain from, and the latter are ‘in a sense parasitic upon or secondary to the first’,⁵⁷ determining the manner in which primary rules may be created/modified, or controlling the manner in which primary rules operate in adjudication. A longstanding issue concerning the establishment of liability for the adverse effects produced by the cumulative acts of State and non-State actors is the lack of primary rules governing the conduct of non-State actors. After all, ‘if there are no primary obligations to begin with, a regime of responsibility simply cannot apply’.⁵⁸ However, as primary rules such as those posited by the proposed treaty emerge, and multiple actors with human rights obligations are implicated in the same harmful outcomes, questions surrounding the secondary rules governing the apportionment of responsibility naturally arise.⁵⁹ Even in relation to States, ‘international law has not developed sophisticated rules and procedures for adjudicating and apportioning responsibility between States in the position of multiple tortfeasors’.⁶⁰ Naturally, the situation regarding non-State actors is even less developed. Presently, the only manner of holding private actors to account in

⁵⁴ Paulson, ‘The Neo-Kantian Dimension’ (n 53); S Hammer, ‘A Neo-Kantian Theory of Knowledge in Kelsen’s Pure Theory of Law’ in SL Paulson & B Litschewski-Paulson (eds), *Normativity and Norms: Critical Perspectives on Kelsenian Themes* (OUP, 1999) 177-94.

⁵⁵ Paulson, ‘The Neo-Kantian Dimension’ (n 53) 332; On Kelsen and the ‘legal point of view’: J Raz, *The Authority of Law* (first published 1979, 2nd edn, OUP, 2009) 140-5.

⁵⁶ HLA Hart, *The Concept of Law* (2nd edn, Clarendon Press 1961) 81.

⁵⁷ *ibid.*

⁵⁸ J d’Aspremont, A Nollkaemper, I Plakokefalos & C Ryngaert, ‘Sharing Responsibility Between Non-State Actors and States in International Law: Introduction’ (2015) 62 *Neth Int Law Rev* 49, 61; Jackson (n 45) 127.

⁵⁹ W Vandenhoele, ‘Shared Responsibility of Non-State Actors: A Human Rights Perspective’ in Gal-Or, Ryngaert & Noortmann (n 17) 56.

⁶⁰ P Okowa, *State Responsibility for Transboundary Air Pollution in International Law* (OUP, 2000) 195.

international law is via attribution of the offending conduct to a State.⁶¹ It has been demonstrated above that the theoretical impediments to the establishment of obligations addressing non-State actors have perhaps been overstated. The clear scope provided by alternative theoretical approaches and the political will evident in the Ecuadorian initiative notwithstanding, the exact shape of the rules governing the allocation of responsibility for wrongs perpetrated by multiple actors remains uncertain. The exploration of these questions has gained significant traction in recent years in the pioneering work of Nollkaemper and Jacobs,⁶² among others,⁶³ into the notion of shared responsibility in international law. Drawing on this literature, this section unpacks some of the methods posited to date, and assesses their utility in relation to the proposed treaty.

The identification of duty-bearers and the allocation of responsibility constitute pressing issues in the practical realization of the proposed treaty. Should delegates proceed to identify States as the sole duty-bearers in the proposed treaty, the instrument may prove to be redundant before it is drafted. If this were the case, the instrument may simply restate the principles of State responsibility for private actors already articulated in widely ratified human rights treaties.⁶⁴ The factors that inhibit the efficacy of these existing obligations rest on the unwillingness or incapacity of many host States to give effect to their international obligations, in light of widespread corruption,⁶⁵ fragile governmental infrastructures⁶⁶ and the quest for capital via FDI.⁶⁷ This article argues that a regime addressing both States *and* non-State actors is required to ensure effective engagement with fundamental human rights standards. This section identifies four interrelated methods by which shared responsibility might be allocated between these actors in the context of a business and human rights treaty. The approach adopted is holistic, recognising and incorporating

⁶¹ M Karavias, 'Shared Responsibility and Multinational Enterprises' (2015) 62 *Neth Int Law Rev* 96.

⁶² A Nollkaemper & D Jacobs, 'Shared Responsibility in International Law: A Conceptual Framework' (2013) 34 *Mich J Int'l L* 359.

⁶³ A Nollkaemper & I Plakokefalos (eds) *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (Cambridge University Press, 2014); Karavias, 'Shared Responsibility' (n 61) 91; V Bílková, 'Armed Opposition Groups and Shared Responsibility' (2015) 62 *Neth Int Law Rev* 69; S MacLeod, 'Private Security Companies and Shared Responsibility: The Turn to Multistakeholder Standard-Setting and Monitoring through Self-Regulation-Plus' (2015) 62 *Neth Int Law Rev* 119; KN Trapp, 'Shared Responsibility and Non-State Terrorist Actors' (2015) 62 *Neth Int Law Rev* 141.

⁶⁴ Convention on the Elimination of All Forms of Discrimination Against Women (18 December 1979) 1249 UNTS 13, art 2(e); Convention on the Rights of Persons with Disabilities (24 January 2007) A/RES/61/106, art 4(e); International Convention on the Elimination of All Forms of Racial Discrimination (21 December 1965) 660 UNTS 195, art 2(1)(d); Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (18 December 1990) A/RES/45/158, art 16(2); JA Zerk, *Multinationals and Corporate Social Responsibility: Limitations and Opportunities in International Law* (CUP, 2006) 81-3.

⁶⁵ O Oluduro, *Oil Exploitation and Human Rights Violations in Nigeria's Oil Producing Communities* (Intersentia, 2014) 353.

⁶⁶ P Muchlinski, *Multinational Enterprises and the Law* (2nd edn, OUP, 2007) 104-9.

⁶⁷ A McBeth, *International Economic Actors and Human Rights* (Routledge, 2010) 2.

existing responsibility regimes that are external to the proposed treaty, and drawing analogies from existing international law in framing the particular rules within the instrument itself. Each tier responds to a different level of culpability, demonstrating how a rule structure might be utilized to provide a nuanced division of responsibility that is responsive to common scenarios and weaknesses within the existing legal framework.

A. *Attribution to the State*

The first method of allocating responsibility can be derived from the International Law Commission's (ILC) Articles on State Responsibility for Internationally Wrongful Acts (ASRIWA). To date, these provisions have had limited practical utility in establishing State responsibility for the conduct of business actors. Nevertheless, they provide a workable model for the attribution of responsibility where a State has played an instrumental role in the adverse human rights impacts of a private actor, and thus will likely play some role in the application of a business and human rights treaty.

The ASRIWA detail specific instances in which the conduct of private entities may be directly attributed to a State.⁶⁸ This approach to non-State actor accountability is wholly dependent on the factual connection between the non-State entity and the responsible State.⁶⁹ Any claim in this regard is actionable solely as a result of the attribution of the wrongful act to the State. There is no secondary or joint responsibility assigned to the non-State actor, and given that this form of responsibility is already articulated by the ASRIWA, it would likely not need to feature in the proposed treaty. States may be held accountable for violations of their international obligations committed vicariously through private actors.⁷⁰ The fact that States will be responsible for the abusive acts of their organs and agents,⁷¹ even when acting beyond their official capacity,⁷² is fairly non-contentious.⁷³ There are four key circumstances in which private behaviour will be considered attributable to the State, each of which hinges on

⁶⁸ On the historical development of the ASRIWA: J Crawford, 'The ILC's Articles on the Responsibility of States for Internationally Wrongful Acts: A Retrospect' (2002) 96 AJIL 874; A Pellet, 'The ILC's Articles on State Responsibility for Internationally Wrongful Acts and Related Texts' in J Crawford, A Pellet & Others (eds), *The Law of International Responsibility* (OUP 2010) 75-94.

⁶⁹ G Cronogue, 'Rebels, Negligent Support, and State Accountability: Holding States Accountable for the Human Rights Violations of Non-State Actors' (2013) 23 Duke J Comp & Int'l L 365.

⁷⁰ ILC, Articles on Responsibility of States for Internationally Wrongful Acts (2001) UN Doc A/56/49(Vol. I)/Corr.4, art 2 (hereafter ASRIWA); A State may not 'absolve itself from responsibility by delegating its obligations to private bodies.' *Costello-Roberts v United Kingdom*, Application No 13134/87 (ECtHR, 1993) [27].

⁷¹ *ibid.* arts 4, 5 & 6.

⁷² *ibid.* art 7.

⁷³ *Ilaşcu & Others v Moldova and Russia*, Application No 48787/99 (ECtHR 2004) [319].

the actor's relationship with the State government.⁷⁴ First, while the conduct of private entities is not *prima facie* attributable to the State,⁷⁵ even when the corporation is wholly owned by the State, or the State possesses a controlling interest in it,⁷⁶ the conduct of entities *exercising elements of governmental authority* may be imputed to the State.⁷⁷ The relevant conduct must relate to governmental activity and not to other private or commercial operations, though the ILC has not provided precise definitions in this regard.⁷⁸ This provision is particularly pertinent given the international trend toward the privatization of governmental functions.⁷⁹

The three remaining scenarios are articulated in articles 8-11. Pursuant to these provisions, certain conduct that does not result directly from the actions of the State, its organs or agents is nonetheless imputed to the State. The least contentious is article 11, which provides that conduct will be attributable where a 'State acknowledges and adopts the conduct in question as its own.'⁸⁰ More problematically, conduct is attributable to the State where an entity operates under its direction or control.⁸¹ Such conduct will rise to this level 'only if it directed or controlled the specific operation and the conduct complained of was an integral part of that operation.'⁸² In its *Nicaragua* decision, the ICJ considered whether the conduct of a group of insurgent forces termed the 'Contras' was attributable to the US on the basis of the financial support provided by the State. It held that 'despite the heavy subsidies and other support provided to them by the United States, there is no clear evidence of the United States having

⁷⁴ I Tófaló, 'Overt and Hidden Accomplices: Transnational Corporations' Range of Complicity for Human Rights Violations' in De Schutter, *Transnational Corporations* (n 2) 336-9; Arts 16-18, which deal with relations between two States have also been used by analogy vis-à-vis States and private entities: S Ratner, 'Corporations and Human Rights: A Theory of Legal Responsibility' (2001) 111 Yale LJ 500-6.

⁷⁵ R McCorquodale & P Simons, 'Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law' (2007) 70 MLR 606.

⁷⁶ 'The fact that an entity can be classified as public or private... the existence of a greater or lesser State participation... in the ownership of its assets, the fact that it is not subject to executive control—these are not decisive criteria for the purpose of attribution of the entity's conduct to the State.' ILC, 'Report of the Commission to the General Assembly on the Work of its Fifty-Third Session' (23 April - 1 June and 2 July - 10 August 2001) YB Int'l L Comm, Vol II, UN Doc A/CN.4/SER.A/2001/Add.1 (2001) 43, 48.

⁷⁷ ASRIWA (n 70) art 5.

⁷⁸ The ASRIWA do 'not attempt to identify precisely the scope of "governmental" ... what is regarded as "governmental" depends on the particular society, its history and traditions.' ILC, 'Report on the Work of its Fifty-Third Session' (n 76) 43.

⁷⁹ Clapham, *Human Rights Obligations* (n 2) 3; Zerk (n 64) 77-8; N Rosemann, 'The Privatisation of Human Rights Violations - Business' Impunity or Corporate Responsibility? The Case of Human Rights Abuses and Torture in Iraq' (2005) 5 Non-State Actors & Int'l L 77.

⁸⁰ ASRIWA (n 70) art 11.

⁸¹ *ibid.* art 8.

⁸² ILC, 'Report on the Work of its Fifty-Third Session' (n 76) 47.

exercised such a degree of control in all fields as to justify the Contras as acting on its behalf.⁸³

The approach in *Nicaragua* has been criticized in subsequent international jurisprudence,⁸⁴ and it is generally accepted that the threshold will be determined on a case-by-case basis.⁸⁵ However, it has been suggested that such a relationship will only be established in a small category of cases.⁸⁶ Thus, while this constitutes an accepted method of achieving redress for non-State actor activity under the proposed treaty regime, it is unlikely to aid the majority of victims.⁸⁷ Furthermore, Ratner suggests that there may be instances in which ‘the company is effectively the superior and the State is the agent’.⁸⁸ While such instances are possible in light of the economic power wielded by many business actors, the ASRIWA do not cater for this inverse scenario. States alone bear the obligations, and are treated as ‘commander’ in their relations with private actors, irrespective of the facts.

Whereas the conduct contemplated by the ASRIWA is contingent on the close proximity between private entity and State, and accusations of complicity and impunity are leveraged at weak governance States with some regularity,⁸⁹ violations are also likely to result from the basic incapacity or unwillingness of the State to effectively regulate its domestic affairs.⁹⁰ In this context, purely State-based approaches to non-State actor regulation truly fall apart. The conception of State regulation through municipal law is justified ‘on the basis that the State has, at least in theory, the constitutional authority to legislate and regulate such actions to ensure their compliance with its international obligations.’⁹¹ Yet in many States, such regulation is entirely unrealistic. The traditional treatment of non-State actors is staunchly Western and fails to account for the realities of life in weak governance States.⁹² The existence, will

⁸³ *Military and Paramilitary Activities (Nicaragua v United States of America)* ICJ Reports [1986] [109].

⁸⁴ In *Tadić*, the acts of an armed group were attributable where it ‘has a role in organizing, coordinating, or planning the military actions,’ rather than controlling particular operations: *Prosecutor v Tadić*, (Appeals Chamber) IT-94-1-A, (15 July 1999) 1541 [117], [137]; cf *Bosnian Genocide* (Bosnia and Herzegovina v Serbia and Montenegro) ICJ Reports [2007] [392] (hereafter, *Bosnian Genocide*).

⁸⁵ ILC, ‘Report on the Work of its Fifty-Third Session’ (n 76) 48.

⁸⁶ Ratner (n 74) 500.

⁸⁷ Cronogue (n 69) 365-88.

⁸⁸ Ratner (n 74) 493-4.

⁸⁹ *Doe v Unocal Corp*, 395 F. 3d 932 (9th Cir 2002); W Kaleck & M Saage-Maaß, ‘Corporate Accountability for Human Rights Violations Amounting to International Crimes’ (2010) 8 JICJ 704; Tófaló (n 74) 339-48.

⁹⁰ E De Brabandere, ‘Human Rights Obligations and Transnational Corporations: The Limits of Direct Corporate Responsibility’ (2010) 4 Hum Rts & Int’l Legal Discourse 77.

⁹¹ D Kinley & J Tadaki, ‘From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law’ (2004) 44 Va J Int’l L 948.

⁹² D Neubert, ‘Local and Regional Non-State Actors on the Margins of Public Policy in Africa’ in Peters, Koechlin & Förster (n 18) 36.

and capacity of the State as a regulator is simply assumed.⁹³ Thus, the attribution regime will need to be supplemented with other categories of responsibility in order to ensure the regulatory gap is adequately filled.

B. *Complicity*

Given that a treaty could impose direct international human rights obligations on both State *and* non-State actors, a scenario could arise in which the non-State entity served as the principal actor in the perpetuation of human rights abuses. The role of the State would therefore be secondary. Similarly, a non-State actor could facilitate human rights abuses propagated by a State without its actions rising to the level of attribution described above. The question arises as to whether a complicity rule which *derives* responsibility from the principal actor's wrongful conduct, rather than *attributing* the wrongful conduct to a secondary actor, may hold utility. The key to complicity of this kind lies in the distinction between primary and secondary rules introduced above. An analogy may be drawn with the ASRIWA, article 16 of which has proven difficult to categorize:

A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: (a) That State does so with knowledge of the circumstances of the internationally wrongful act; and (b) The act would be internationally wrongful if committed by that State.⁹⁴

Although the ILC's mandate was to produce guidance on the operation of secondary rules of responsibility,⁹⁵ it has been convincingly argued that this provision constitutes a separate, albeit atypical,⁹⁶ primary rule of obligation.⁹⁷ Indeed, the Special Rapporteur for State Responsibility, Roberto Ago, stated that 'the Commission should not hesitate to leap that barrier [between primary and

⁹³ R McCorquodale, 'Overlegalising Silences: Human Rights and Non-State Actors' (2002) 96 ASIL Proc 384.

⁹⁴ ASRIWA (n 70) art 16.

⁹⁵ D Bodansky & JR Crook, 'Symposium: The ILC's State Responsibility Articles - Introduction and Overview' (2002) 96 AJIL 777-8; B Graefrath, 'Complicity in the Law of International Responsibility' (1996) 2 Revue Belge De Droit International 372; CJ Tams, 'All's Well That Ends Well - Comments on the ILC's Articles on State Responsibility' (2002) 62 ZaöRV 764.

⁹⁶ 'Primary rules on complicity... inform their addressees that assistance to a given violation of another obligation is prohibited. Accordingly, they provide for a derivative obligation which differs from other primary obligations which just set forth a rather clear command'. HP Aust, *Complicity and the Law of State Responsibility* (Cambridge University Press, 2011) 188; G Nolte & HP Aust, 'Equivocal Helpers - Complicit States, Mixed Messages and International Law' (2009) 58 ICLQ 8.

⁹⁷ Jackson (n 45) 148-50; Tams (n 95) 764-5; Graefrath (n 95) 371; U Linderfalk, 'State Responsibility and the Primary-Secondary Rules Terminology -The Role of Language for an Understanding of the International Legal System' (2009) 78 Nordic J Int'l L 58-72; Bodansky & Crook (n 95) 779-91.

secondary rules] whenever necessary'.⁹⁸ Categorizing the rule in this way lends itself to the discussion of shared responsibility between two duty-bearers in a binding business and human rights treaty. This is because where a non-State actor, serving as the principal wrongdoer, engages in a direct breach of an obligation, a State's conduct which assists the non-State actor's substantive breach via positive act or omission could be said to breach a *second* primary obligation to refrain from complicit conduct. On this view, it may be possible to circumvent the problematic issue of attributing concurrent responsibility to multiple actors for the breach of a single primary rule,⁹⁹ giving rise to a single wrongful act.¹⁰⁰ There may be, in fact, two separate obligations; two separate breaches, giving rise to separate responsibilities, the derivative nature of the complicity rule notwithstanding.

Whether or not one agrees with this categorization of the *general* complicity rule provided in article 16 ASRIWA, examples of *specific* complicity provisions framed as primary rules are observable in international practice.¹⁰¹ An existing rule of this kind was identified during the ICJ's *Bosnian Genocide* decision.¹⁰² Article 1 of the Genocide Convention provides: 'Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and punish'.¹⁰³ The ICJ recognised that the obligation to prevent genocide implies a primary rule that States ought not to engage in activity constituting complicity in the crime of genocide.¹⁰⁴ While this teleological reading¹⁰⁵ of the treaty by the ICJ has been subject to criticism,¹⁰⁶ the express articulation of a rule analogous to article 16 ASRIWA in the proposed business and human rights treaty would likely mitigate concerns stemming from this method of treaty interpretation.¹⁰⁷

⁹⁸ R Ago, Summary Record of the 1519th Meeting, UN Doc A/CN.4/SR1519 reprinted in [1978] 1 YB Int'l L Comm 1, 240; Similarly, the ILC stated: 'aid or assistance in the commission of a wrongful act by another remains in international law, like complicity in internal law, an act separate from such commission, an act that is classified differently and that does not necessarily produce the same legal consequences.' Report of the International Law Commission on the Work of its Thirteenth Session, 8 May-28 July 1978, UN Doc A/33/10 reprinted in [1978] 2 YB Int'l L Comm 2, 103 para 16; V Lanovoy, 'Complicity in an Internationally Wrongful Act' in Nollkaemper & Plakokefalos (n 63) 139-40.

⁹⁹ This situation is captured under ASRIWA (n 70) art 47.

¹⁰⁰ Nollkaemper & Jacobs (n 62) 396-397; Vandenhole, 'Shared Responsibility' (n 59) 60-1; JD Fry, 'Attribution of Responsibility' in Nollkaemper & Plakokefalos (n 63) 99.

¹⁰¹ Nolte & Aust (n 97) 7-8; Crawford, 'The ILC's Articles' (n 68) 879.

¹⁰² *Bosnian Genocide* (n 84); Jackson (n 45) 202-3.

¹⁰³ Convention on the Prevention and Punishment of the Crime of Genocide (9 December 1948) 78 UNTS 277, art 1.

¹⁰⁴ *Bosnian Genocide* (n 84) [167]; The approach was extended to art 3 of the Genocide Convention, which lists other punishable acts such as conspiracy, direct and public incitement, and attempt to commit genocide: Jackson (n 45) 203.

¹⁰⁵ P Gaeta, *The UN Genocide Convention: A Commentary* (OUP, 2009) 33.

¹⁰⁶ P Gaeta, 'On What Conditions Can a State Be Held Responsible for Genocide?' (2007) 18 EJIL 633.

¹⁰⁷ Jackson (n 45) 214.

Some questions that will require greater consideration concern the scope of such a complicity obligation; what knowledge or intent is required on the part of the complicit party to engage the provision? Is the rule limited to positive action, or might it be extended to omission, influence, toleration and wilful blindness? This is perhaps where the analogy to ASRIWA might depart; classically, there has been concern surrounding the allocation of responsibility for 'influence' in instances of internationally wrongful acts involving two States, due to sensitivities regarding the doctrines of sovereignty and non-intervention.¹⁰⁸ Jackson highlights the existing recognition of the capacity of States to influence non-State actors, and to foment or incite armed activities, and suggests that international law is not concerned with the influence of States on the conduct of non-State actors.

As international law develops to recognise increased possibilities of principal wrongdoing by non-State actors, so the ways in which States might participate in that wrongdoing should be adequately sanctioned. This would include not simply the provision of assistance... but also complicit influence.¹⁰⁹

However, sovereignty concerns are likely to reappear in relation to the inverse scenario, where the economic influence of a non-State actor induces a State to engage in wrongful conduct, or to simply turn a blind eye to the wrongful acts of the corporation. As such, it is not clear whether a single primary rule precluding complicit conduct could be applied uniformly.

The level of contribution required to engage such a provision poses substantial questions.¹¹⁰ For Aust, '[i]t is theoretically conceivable that "aid or assistance" comprises every act (or omission) which facilitates the commission of an internationally wrongful act.'¹¹¹ The commentary to article 16 ASRIWA is itself silent on the nexus between principal and accomplice, providing: '[t]here is no requirement that the aid or assistance should have been essential to the performance of the internationally wrongful act; it is sufficient if it contributed significantly'.¹¹² While this provision seems to demand that the conduct materially facilitates the commission of the wrongful act,¹¹³ the commentary acknowledges that conduct may constitute assistance where it is 'only an

¹⁰⁸ R Ago, 'Seventh report on State Responsibility' 29 March, 17 April & 4 July 1978, UN Doc A/CN.4/307 1 YB Int'l L Comm 1, 55 para 63.

¹⁰⁹ Jackson (n 45) 210.

¹¹⁰ M Gibney, 'Litigating Transnational Human Rights Abuses' in W Vandenhoe (ed) *Challenging Territoriality in Human Rights Law: Building Blocks for a Plural and Diverse Duty-Bear Regime* (Routledge, 2015) 93.

¹¹¹ Aust (n 97) 195.

¹¹² ILC, 'Report on the Work of its Fifty-Third Session' (n 76) 66 para 5.

¹¹³ V Lowe, 'Responsibility for the Conduct of other States' (2002) 101 Japanese J Int'l L 1, 11-12; Nolte & Aust (n 97) 10.

incidental factor in the commission of the primary act'.¹¹⁴ Lowe provides a useful illustration, contemplating the situation in which a State provides financial backing for overseas investments by a company incorporated within its territory. He concludes '[t]here is no reason why State responsibility should not be engaged by the provision of the investment guarantee.'¹¹⁵ Thus, a complicity provision in a binding business and human rights treaty might produce consequences for home States, as well as host States.¹¹⁶ Yet, the precise standard is not clear. In the case of specific complicity rules contained in other multilateral treaties, it appears that a material contribution test is favoured by most States.¹¹⁷ Indeed, Jackson suggests that the material contribution standard should be preferred since 'it serves the interests of international cooperation to require a nexus beyond incidental contribution... [and] exclud[es] the incidental relationships that arise from virtually every State interaction'.¹¹⁸ The same is likely to apply to relationships between State and non-State actors. However, it is interesting to note the inconsistent approaches adopted by States in this regard. For instance, the United Kingdom endorsed a very liberal interpretation of an analogous complicity provision in the 1997 Ottawa Convention,¹¹⁹ only to later adopt a restrictive stance in relation to the 2005 Cluster Munitions Convention,¹²⁰ advocating the deletion of an 'aid or assistance' clause.¹²¹

The fine lines between governmental incapacity, wilful blindness and complicit omission are likely to cause significant practical issues in the categorization of State conduct, and demand careful consideration in light of the forgoing context regarding the transnational operations of business actors. The ICJ in *Bosnian Genocide* expressly stated that 'complicity always requires some positive action... while complicity results from commission, violation of the obligation to prevent results from omission'.¹²² Similarly, Ago's Seventh Report on State Responsibility provides:

¹¹⁴ ILC, 'Report on the Work of its Fifty-Third Session' (n 76) 67 para 10.

¹¹⁵ Lowe (n 113) 6; On the conduct of international organizations such as the IMF: A Reinisch, 'Aid or Assistance and Direction and Control between States and International Organizations in the Commission of Internationally Wrongful Acts' (2010) 7 IOLR 67-73.

¹¹⁶ For a detailed model engaging home State responsibility, see: P Simons & A Macklin, *The Governance Gap: Extractive Industries, Human Rights, and the Home State Advantage* (Routledge, 2014) 272-355.

¹¹⁷ For the UK, assistance would include 'planning with others... training others... agreeing Rules of Engagement [and] operational plans permitting the use of APM [anti-personnel landmines]... requests to non-State actors to use APM; and providing security or transport for APM.' United Kingdom Intervention on Article 1, Statement in the Standing Committee of 16 May 2003, <http://www.apminebanconvention.org/fileadmin/APMBC/IWP/SC_may03/speeches_gs/UK_Art_1.pdf> accessed 21 April 2016.

¹¹⁸ Jackson (n 45) 158; Nolte & Aust (n 97) 12.

¹¹⁹ Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (Ottawa Convention) (18 September 1997) 2056 UNTS 211, art 1(1)(c).

¹²⁰ Cluster Munitions Convention (30 May 2008) 2688 UNTS 39, art 1(c).

¹²¹ Proposal by the United Kingdom for the Amendment of Article 1, CCM/14 (19 May 2008) <http://www.clusterconvention.org/files/2013/01/CCM14_001.pdf> accessed 21 April 2016.

¹²² *Bosnian Genocide* (n 84) [432].

[A] case of “participation” in the internationally wrongful act of another cannot be found in the [sole fact] that a State failed to take preventative or repressive measures required of it... This does not mean that in specific cases there may not also be participation... But there is an additional element, a separate breach besides the mere failure to prevent and punish.¹²³

Jackson suggests that complicity via omission is doctrinally and normatively supported in municipal and international criminal law, though he recognises that ‘[m]any more omissions will violate the obligation to prevent genocide than constitute complicity... But in some circumstances, a particularly culpable proximate omission, where both mens rea and nexus requirements are met, should be seen to constitute complicity.’¹²⁴ Clearly then, not all omissions will give rise to the complicit responsibility of a secondary actor, unless the omission substantially contributed to the principal wrong and the actor possessed sufficient knowledge. Indeed, the conduct of States falling outside of these instances of complicity may be captured under the due diligence obligations held by States under extant human rights treaties.¹²⁵

It is clear that ‘aid or assistance’ is a ‘normative and case-specific concept, meaning that its content will always have to be determined in the specific situation, with a view to the relation between the supportive conduct to the neighbouring normative environment and the enabling function it played to the case at hand.’¹²⁶ This exercise will also need to take into account a second factor that will determine the engagement of a complicity rule: the subjective element. The manner in which causal act and mens rea interact will require careful articulation should a complicity provision be adopted in the proposed treaty, and will need to weigh considerations relating to global economic cooperation with the need to safeguard fundamental human rights.

With regard to the mens rea standard, while some form of knowledge on behalf of the complicit party is necessary,¹²⁷ there is presently no agreement among scholars as to the level required to engage article 16 ASRIWA.¹²⁸ Suggested standards include constructive knowledge (expected in the exercise of reasonable care);¹²⁹ direct knowledge (based on the particular

¹²³ Ago, ‘Seventh report on State Responsibility’ (n 108) 53 para 57.

¹²⁴ Jackson (n 45) 211; Aust (n 97) 230.

¹²⁵ ‘An illegal act which violates human rights and which is initially not directly imputable to a State... can lead to the international responsibility of the State... because of the lack of due diligence to prevent or respond to it’. *Velasquez Rodriguez v Honduras*, Inter-American Court of Human Rights Series C No 4 (29 July 1988) [166]-[174]; RP Barnidge, ‘The Due Diligence Principle Under International Law’ (2006) 8 Int’l C L Rev 81.

¹²⁶ Aust (n 97) 230; *Bosnian Genocide* (n 84) [430].

¹²⁷ Aust (n 97) 231.

¹²⁸ Jackson (n 45) 160.

¹²⁹ Lanovoy (n 98) 140.

circumstances);¹³⁰ wrongful intent (stemming from a reading of the ILC's Commentary);¹³¹ and wilful blindness.¹³² In the case of wrongful intent, most host States engage in bilateral agreements with business actors under the auspices of economic development,¹³³ making it difficult to establish intent to facilitate any human rights violations resulting from the arrangement.¹³⁴ Crawford has acknowledged that 'different primary rules of international law impose different standards ranging from "due diligence" to strict liability'.¹³⁵ Thus, while analogy may take us part way, a complicity provision in a binding business and human rights treaty need not necessarily duplicate the level of contribution nor the subjective element adopted in the application of article 16.¹³⁶

[D]ue to its generality, it covers aid or assistance furnished to violations of the most diverse kind of rules. It therefore cannot be expected that a clear-cut general rule on "the" intent standard with respect to complicity in international law will be deducible.¹³⁷

As such, there is no reason as to why a more specific standard may be adopted in the treaty as *lex specialis*.

Aust even suggests that 'a modification of the intent standard may be called for due to differing standards in human rights law'.¹³⁸ Such was the approach of the Inter-American Court on Human Rights (IACtHR) when adopting a due diligence standard in *Velásquez Rodríguez*¹³⁹ mandating the State to organise the government in such a way as to guarantee rights recognised in the Convention¹⁴⁰ and thus to safeguard its population against the abusive acts of

¹³⁰ A Bolvin, 'Complicity and Beyond: International Law and the Transfer of Small Arms and Light Weapons' 87 (2005) Int'l Rev Red Cross 471.

¹³¹ A State is only responsible if 'the relevant State organ intended, by the aid or assistance given, to facilitate the occurrence of the wrongful conduct'. J Crawford, *The International Law Commissions Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge University Press, 2002) 149 para 5; Nolte & Aust (n 97) 13-15; *ibid*.

¹³² For Lowe, it is 'unlikely that a tribunal would permit a State to avoid responsibility by deliberately holding back from inquiring into clear indications that its aid would probably be employed in an unlawful manner'. Lowe (n 113) 10; Lanovoy (n 98) 153; Gibney, 'Litigating Transnational Human Rights' (n 110) 98.

¹³³ See generally: R Suda, 'The Effect of Bilateral Investment Treaties on Human Rights Enforcement and Realisation' in De Schutter, *Transnational Corporations* (n 2) 73.

¹³⁴ Bolvin (n 130) 471-2.

¹³⁵ Crawford, *The ILC's Article on State Responsibility* (n 131) 13.

¹³⁶ It is interesting to note the variance between standards within the ASRIW, art 41(2) providing a similar aid or assistance provision in relation to serious breaches of peremptory norms, without the requirement of intent or knowledge of the principal wrong: ASRIWA (n 70) art 41(2); E Wyler & L Castellanos-Jankiewicz, 'Serious Breaches of Peremptory Norms' in Nollkaemper & Plakocefalos (n 63) 284-311.

¹³⁷ Aust (n 97) 232.

¹³⁸ *ibid*. 246.

¹³⁹ *Velásquez Rodríguez* (n 125).

¹⁴⁰ *ibid*. [166].

non-State entities conducted with the acquiescence of the host State.¹⁴¹ This obliges the State to take positive measures to prevent, investigate and punish human rights violations that are not attributable to the State. Yet, the manner in which the IACtHR has implemented a *lex specialis* test in case law where a State has supported a non-State actor in violating human rights has proven problematic. In *Riofrío Massacre*¹⁴² and *Mapiripán Massacre*,¹⁴³ the Inter-American Court and Commission both expressly asserted that *support* or *toleration* by State officials of human rights abuses by private actors is sufficient to *attribute* those acts to the State. Yet, attribution is arguably superfluous, and characteristic of agency rather than complicity. Complicity is a form of secondary responsibility, *derivative* from a principal wrong; it does not entail imputing the principal wrong to the secondary actor.

[R]esponsibility under the Convention may be engaged by the State's failure to ensure the full and free exercise of rights where those rights are violated by private parties. There is no need to find that the acts of the private party are attributable to the State – the relevant State's failure to act is the attributable act.¹⁴⁴

A better solution would be to recognise the existing due diligence obligations incumbent upon States to secure the relevant rights for all within their jurisdiction, rather than to loosen the test for attribution.¹⁴⁵

It is beyond the scope of this article to provide a detailed enumeration of the approaches to mens rea in specific and general complicity provisions.¹⁴⁶ However, it is suggested that setting too low a standard might have overly detrimental effects on weak governance States which are incapable of giving effect to their international obligations, and may deter FDI and development – factors which are of significant concern to many host States in the Global South. While Gibney criticises the ICJ's interpretation of complicity in *Bosnian Genocide*¹⁴⁷ as setting '(nearly) impossible standards',¹⁴⁸ it is arguably unnecessary to incorporate the lower due diligence standard he endorses into human rights complicity, given that there are myriad due diligence obligations

¹⁴¹ Aust (n 97) 246.

¹⁴² '[I]t must be ascertained whether the acts of the individuals implicated in the incident in violating such fundamental rights... are attributable to the State... [I]t is sufficient to show that the infringement... has been supported or tolerate by the government.' *Riofrío Massacre*, Inter-American Commission on Human Rights Report No 62/01 (6 April 2001) [48].

¹⁴³ '[T]he acts of private individuals involved in said acts can be attributed to the State... for which it is sufficient to prove that there has been support or tolerance by the public authorities in the breach of the rights embodied in the Convention'. *Mapiripán Massacre* (Columbia) Inter-American Court of Human Rights Series C No 134 (15 September 2005) [98a].

¹⁴⁴ Jackson (n 45) 195.

¹⁴⁵ *ibid.* 196.

¹⁴⁶ For extensive discussion: Aust (n 97) 230-249; *ibid.* 159-62.

¹⁴⁷ M Gibney, 'Genocide and State Responsibility' (2007) 7 Hum Rts L Rev 760.

¹⁴⁸ Gibney, 'Litigating Transnational Human Rights' (n 110) 110.

relating to the activities of private actors already incumbent upon States. The nature of these duties will be explored below. What is clear is that in addition to *attributional* rules enshrined in ASRIWA, some form of primary complicity rule may have a place in the rule structure of the proposed business and human rights treaty.

C. *Due Diligence State Responsibility*

Separate to the attribution of a non-State actor's conduct to a State, and to the substantive complicity rules detailed above, are the due diligence obligations mandating States to protect their populations from the adverse effects produced by private actors. For instance, article 2(1) of the International Covenant on Civil and Political Rights (ICCPR) requires State parties to 'respect and ensure to all individuals within [their] territory and subject to [their] jurisdiction the rights recognised in the present Covenant without distinction of any kind'.¹⁴⁹ The Human Rights Committee (HRC) has expressly stated that States will only discharge their positive obligations if due diligence¹⁵⁰ is exercised in the protection of individuals, 'not just against violations of the Covenant rights by its agents, but also against acts committed by private persons or entities'.¹⁵¹

Similarly, with regard to individual complaints under the Optional Protocol to the ICCPR, the HRC has attributed breaches to State parties that have failed to protect their population from private actors.¹⁵² In *Lubicon Lake Band v Canada*,¹⁵³ the complainants alleged that their land had been expropriated for commercial development including oil and gas extraction. The HRC found a breach of article 27 ICCPR by the State of Canada. *SERAC v Nigeria*¹⁵⁴ concerned a communication to the African Commission for Human and Peoples' Rights regarding environmental degradation resulting from the conduct of a State oil company, which serves as majority shareholder in a joint venture with Shell Petroleum, among others. While recognising the 'widespread violations

¹⁴⁹ International Covenant on Civil and Political Rights (16 December 1966) 999 UNTS 171, art 2(1).

¹⁵⁰ 'An illegal act which violates human rights and which is initially not directly imputable to a State... can lead to the international responsibility of the State... because of the lack of due diligence to prevent or respond to it'. *Velásquez Rodríguez* (n 139) at [166]-[174]; RP Barnidge, 'The Due Diligence Principle under International Law' (2006) 8 Int'l Community L Rev 81.

¹⁵¹ UN Human Rights Commission, 'General Comment No 31 [80] - The Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (26 May 2004) UN Doc CCPR/C/21/Rev.1/Add.13 para 8.

¹⁵² *Hopu and Bessert v France*, Communication 549/1993, UN Doc CCPR/C/60/D/549/1993/Rev.1 (1997); *Love et al v Australia*, Communication 983/2001, UN Doc CCPR/C/77/983/2001 (2003); *Ilmari Lämsmäen et al v Finland*, Communication 511/1992, UN Doc CCPR/C/52/D/511/1992 (1994).

¹⁵³ *Chief Bernard Ominayak and the Lubicon Lake Band v Canada*, Communication 167/1984, UN Doc CCPR/C/38/D/167/1984 (1990).

¹⁵⁴ *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria*, African Commission on Human and Peoples' Rights, Communication 155/96 (2001).

perpetrated by the Government of Nigeria and by private actors (be it following its clear blessing or not)',¹⁵⁵ the Commission ultimately affirmed the sole responsibility of the Nigerian State.¹⁵⁶ Similarly, the responsibility of States to protect their citizens from the activities of non-State armed groups are said to arise only 'upon the State's own failure to act'.¹⁵⁷ Thus, these treaty obligations address non-State actors only indirectly, as a consequence of the express consent of the State in which they are domiciled. Yet, to call these obligations 'indirect' at all is problematic. "The phrase "indirect obligation" actually refers to typical obligations binding on States according to the traditional doctrine of international law.'¹⁵⁸

In the context of a business and human rights treaty, a regime of shared responsibility is conceivable in which non-State actors bear direct obligations, for instance, not to engage in activity which violates the right to life, in addition to a separate general obligation on States to act with diligence in protecting their populations from the abusive conduct of private parties. It is arguable whether the instrument need even provide a restatement of the State obligation, given that it is already widely represented in other treaties. This may provide another means of drawing a conceptual distinction between wrongful acts, thereby circumventing the doctrinal complexities of allocating responsibility between multiple actors for the breach of a single primary obligation. Instead, a State's responsibility might be drawn from the ICCPR, while the non-State actor's responsibility is drawn from the breach of a primary obligation contained within a business and human rights treaty. Such a division of responsibility would potentially fill the void between complicit State conduct, and the wilful blindness of a State to the conduct of non-State actors operating within their territory.

D. *Joint and Several Liability*

This final approach is supplementary to the holistic responsibility framework outlined above. In the vein of Lauterpacht,¹⁵⁹ it draws an analogy from the private law notion of joint and several liability, where a State might incur full legal responsibility for human rights abuses perpetuated by a non-State actor on its territory, and would then bear the onus to seek remediation from the private actor in question.¹⁶⁰ For Vandenhoe, the private law analogy in human rights is a surprisingly good fit, since 'the notion of injury to individuals is key to human rights responsibility and accountability... [and] the objective of human rights law

¹⁵⁵ *ibid.* at [67].

¹⁵⁶ Karavias, *Corporate Obligations* (n 2) 49-52.

¹⁵⁷ L Zegveld, *Accountability of Armed Opposition Groups in International Law* (CUP, 2002) 182.

¹⁵⁸ Karavias, *Corporate Obligations* (n 2) 12.

¹⁵⁹ H Lauterpacht, *Private Law Analogies in International Law* (1926).

¹⁶⁰ Gibney, 'Litigating Transnational Human Rights' (n 110) 96-7.

is to offer reparation to the victim'.¹⁶¹ This enumeration arguably oversimplifies the human rights project, which is not premised purely on ex post facto redress, but also entails ex ante obligations. Emphasising the public law character of international law, Brownlie reminds us that '[t]he duty to pay compensation is a normal consequence of responsibility, but is not conterminous with it.'¹⁶² That said, the manner in which human rights redress has been managed at the domestic level, particularly in relation to business actors, demonstrates the significant utility of private law, and thus it should not be written off. Vandenhoe's assertion as to the mixed nature of the international law of responsibility finds support in the work of Crawford¹⁶³ and Nollkaemper.¹⁶⁴ Further, Noyes and Smith, in their prescient 1988 article, provided that 'an examination of the limited body of decisions, State practice, municipal analogies and accepted principles of the international legal system leads to the conclusion that significant support exists for the principle of joint and several liability in international law'.¹⁶⁵ Alford has also echoed the view of Bruno Simma in the ICJ's *Oil Platforms* decision¹⁶⁶ that a joint and several liability rule can be derived from domestic legal systems¹⁶⁷ as a general principle of law within the meaning of article 38(1)(c) of the ICJ Statute.¹⁶⁸

The notion of joint and several liability is visible at the international level in the 1972 Convention on International Liability for Damage Caused by Space Objects.¹⁶⁹ States jointly participating in the launch of a space object are to be held 'jointly and severally liable for the damage caused.'¹⁷⁰ Interestingly, a similar provision contemplates wrongdoers acting *independently*.¹⁷¹ Thus, a party injured as a result of the collision of two space objects may claim compensation from all or any of the launching States involved. There is no

¹⁶¹ Vandenhoe, 'Shared Responsibility' (n 59) 68-9; 'It is a principle of international law that the breach of an engagement involves an obligation to make reparation in adequate form.' *Chorzów Factory Case* (Claim for Indemnity; jurisdiction) (Germany v Poland), 1927 PCIJ (Ser. A) No 9, 21.

¹⁶² I Brownlie, *Principles of Public International Law* (OUP, 2008) 436; Wyler & Castellanos-Jankiewicz (n 136) 303.

¹⁶³ "'Public" and "Private" are indistinguishable; the treaty is an undifferentiated instrument, and so is the law of responsibility.' Crawford, 'The ILC's Articles' (n 68) 878.

¹⁶⁴ Nollkaemper & Jacobs (n 62) 398-9.

¹⁶⁵ Noyes & Smith (n 12) 226.

¹⁶⁶ RP Alford, 'Apportioning Responsibility Among Joint Tortfeasors for International Law Violations' (2011) 38 Pepp L Rev 233, 240-246; *Oil Platforms* (Iran v US) (Separate opinion of Judge Simma) ICJ Reports [2003] 197-201 at [65]-[76].

¹⁶⁷ While Brownlie disputed the relevance of this principle in international law, scholars have provided detailed accounts of its prevalence in Western common law and civil jurisdictions, Eastern jurisdictions and Islamic law: I Brownlie, *System of the Law of Nations: State Responsibility* (Clarendon Press 1983) 189; Noyes & Smith (n 12) 249-58; R Verheyen, *Climate Change Damage and International Law: Prevention Duties and State Responsibility* (Martinus Nijhoff 2005) 270-2.

¹⁶⁸ Statute of the International Court of Justice, as annexed to Charter of the United Nations (26 June 1945) 1 UNTS XVI, art 38(1)(c); Noyes & Smith (n 12) 250.

¹⁶⁹ Convention on International Liability for Damage Caused by Space Objects (29 March 1972) 961 UNTS 187.

¹⁷⁰ *ibid.* art 5.

¹⁷¹ *ibid.* art 4.

requirement that they act in concert. In determining how responsibility for damages will be allocated, article 4(2) provides that the burden 'shall be apportioned between the first two States in accordance to the extent they were at fault; if the extent of the fault... cannot be established... compensation shall be apportioned equally between them'.¹⁷² This approach is advocated by Noyes & Smith in advancing a general notion of joint and several liability in international law.¹⁷³ Indeed, international practice has indicated that the liability of States may be adjusted to reflect the intervening conduct of non-State actors.¹⁷⁴

While the Space Liability Convention provides an example of the principle in operation in international law, this regime only operates between States. A more compelling analogy may be drawn from the Convention on the Law of the Sea (UNCLOS), where supervisory obligations are split between sponsoring States, and the International Seabed Authority (ISA),¹⁷⁵ and private sponsored entities are bound by the provisions of internationalised contracts concluded with the ISA.¹⁷⁶ Particularly interesting is article 139, which provides that 'States Parties or international organizations acting together shall bear joint and several liability' for damage resulting from their failure to carry out their responsibilities.¹⁷⁷ The International Tribunal for the Law of the Sea (ITLOS) Seabed Disputes Chamber has confirmed the application of this principle, stating that it 'arises where different entities have contributed to the same damage so that full reparation can be claimed from all or any of them.'¹⁷⁸ It is interesting to note the 'same damage' criterion adopted in article 139 UNCLOS, which departs from the 'common wrongful act' stipulation in article 47 ASRIWA.¹⁷⁹ Indeed, the Seabed Chamber has confirmed that sponsoring states and international organizations need not act in concert;¹⁸⁰ they need only contribute to the same outcome, a rarity in international law.¹⁸¹

¹⁷² *ibid.* art 4(2).

¹⁷³ Noyes & Smith (n 12) 259.

¹⁷⁴ In *Martini*, a State's compensation payment was vastly reduced to reflect the independent acts of revolutionaries during the Venezuelan civil war which contributed significantly to the injury incurred: *Martini Case* (Italy v Venezuela) 10 R Int'l Arb Awards (1930) 664, 666-68.

¹⁷⁵ I Plakoefalos, 'Shared Responsibility Aspects of the Dispute Settlement Procedures in the Law of the Sea Convention' (2013) 4 J Int'l Dispute Settlement 396.

¹⁷⁶ Karavias, *Corporate Obligations* (n 2) 157-63; SL Seck, 'ITLOS Case No 17 and the Evolving Principles for Corporate Accountability under International Law' in Gal-Or, Ryngaert & Noortmann (n 17) 243-5.

¹⁷⁷ Convention on the Law of the Sea (10 December 1982) 1833 UNTS 3, art 139(2) (hereafter, UNCLOS).

¹⁷⁸ *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area* (No 17) (Advisory Opinion of 01 February 2011) 11 ITLOS Rep 2011 10, 201 (hereafter, *ITLOS Case No 17*).

¹⁷⁹ ASRIWA (n 70) art 47; While this provision may appear to mirror the concept of joint and several liability in the ASRIWA, the ILC advises to make such an analogy 'with care': ILC, 'Report on the Work of its Fifty-Third Session' (n 76) 124 para 3; Verheyen (n 167) 268-276.

¹⁸⁰ *ITLOS Case No 17* (n 178) at [192].

¹⁸¹ Plakoefalos (n 175) 397-8.

Still, the apportionment of responsibility remains problematic.¹⁸² Under UNCLOS, States and the ISA are burdened with supervisory obligations, while private contractors will often carry out the harmful act in question.¹⁸³ The Seabed Chamber has recently concluded that the obligations giving rise to joint and several liability between States and the ISA, and the contractual obligations of a private actor with the ISA, exist in parallel.¹⁸⁴ Thus, under UNCLOS, 'no regime of joint and several liability of a sponsoring State and a private contractor was said to exist'¹⁸⁵ where a State had taken all measures necessary to ensure effective compliance.¹⁸⁶ Instead, the liability of the contractor will need to be pursued at the domestic level, or brought to the Seabed Chamber by the ISA for breach of contract. Yet, Nollkaemper has suggested that there may be interpretive room to read in a form of joint and several liability between States and non-State actors.¹⁸⁷ Though the types of obligations incumbent on each entity are arguably distinct, article 22 of annex 3 provides that contractors can be liable for 'any damage arising out of wrongful acts in the conduct of its operations',¹⁸⁸ appearing to refer to liability in international law.¹⁸⁹

This possibility notwithstanding, Nollkaemper is keen to caution that the decentralised nature of the international legal system will pose procedural issues, as will the paucity of courts of compulsory jurisdiction.¹⁹⁰ In the absence of an expansive reading of article 139, the lack of the joint and several liability of the private contractor might also lead to procedural fragmentation, with claims against States and the ISA being dealt with at international tribunals, and breach of contract claims against private actors being dealt with either at the domestic level, or referred to the Seabed Chamber by the ISA.¹⁹¹ Given that sponsoring States and the ISA bear the supervisory obligations within UNCLOS, and private actors may be held responsible only in relation to claims of breach of contract, it is possible that a contractor will be absent from proceedings against a State and/or the ISA, despite being vital in determining a causal link between a breach of UNCLOS and the ensuing damage.¹⁹² Furthermore, exactly how a party which has paid reparations to the victim will bring actions against other responsible

¹⁸² Fry (n 100) 128-133.

¹⁸³ Plakoefalos (n 175) 397.

¹⁸⁴ *ITLOS Case No 17* (n 178) at [204].

¹⁸⁵ Vandenhole, 'Shared Responsibility' (n 59) 70.

¹⁸⁶ UNCLOS (n 177) art 139(2).

¹⁸⁷ A Nollkaemper, 'The Seabed Disputes Chamber' (SHARES Project, 25 November 2011) <<http://www.sharesproject.nl/the-seabed-disputes-chamber-clarified-the-meaning-of-joint-and-several-liability-but-also-raised-new-questions/>> accessed 21 April 2016.

¹⁸⁸ UNCLOS (n 177) art 22 Annexe 3.

¹⁸⁹ Nollkaemper, 'The Seabed Disputes Chamber' (n 187); ED Brown, *Sea-Bed Energy and Minerals: The International Legal Regime* (Martinus Nijhoff, 2001) 144.

¹⁹⁰ Noyes & Smith (n 12) 234-5, 258-9; Note the compulsory dispute settlement regime under UNCLOS (n 177) art 287.

¹⁹¹ Plakoefalos (n 175) 404.

¹⁹² *ibid.* 401.

parties is not clear,¹⁹³ and as such, the possibility of such an action ‘remains merely theoretical, casting doubt on the principle’s relevance in international law.’¹⁹⁴ Thus, while this regime provides a glimpse at how a system of joint and several liability might operate at the international level, questions remain as to its precise operation.

IV. DELIMITING THE SCOPE AND CONTENT OF NON-STATE ACTOR HUMAN RIGHTS OBLIGATIONS

The potential framing of the proposed treaty’s obligations having been examined above, questions remain as to their precise content and scope. In this regard, John Ruggie’s response to the Ecuadorian initiative has been mixed, having pragmatically highlighted the diverse legal issues related to the sphere of business and human rights.

[T]he category of business and human rights is not so discrete an issue-area as to lend itself to a single set of detailed treaty obligations. It includes complex clusters of different bodies of national and international law... any attempt to aggregate them into a general business and human rights treaty would have to be pitched at such a high level of abstraction that it is hard to imagine it providing a basis for meaningful legal action.¹⁹⁵

Ruggie has also previously expressed concern that a treaty might set too low a ceiling.¹⁹⁶ Scholars such as Ramasatry, largely echoing Ruggie’s apprehensions, have drawn analogy from the anti-corruption/bribery movement and instead advocated a number of narrower treaties establishing corporate liability for specific conduct, particularly in the fields of mineral extraction and illegal logging.¹⁹⁷ While this middle ground may go some way toward addressing

¹⁹³ Okowa (n 60) 196-7; States have ‘diplomatic and other legal means as a substitute’ in the absence of an express regime in international law for joint tortfeasors to recover damages: Verheyen (n 167) 277.

¹⁹⁴ Nollkaemper & Jacobs (n 62) 423.

¹⁹⁵ JG Ruggie, ‘A UN Business and Human Rights Treaty?’ (Harvard Kennedy School, 28 January 2014) 3 <<https://www.hks.harvard.edu/m-rcbg/CSRI/UNBusinessandHumanRightsTreaty.pdf>> accessed 21 April 2016; M Addo, UN Working Group on Business and Human Rights, ‘Human Rights and Transnational Corporations: Paving the Way for a Legally Binding Instrument’ (Geneva, 11-12 March 2014) 4 <<http://www.ohchr.org/Documents/Issues/Business/WGStatementEcuadorWorkshop12Mar2014.pdf>> accessed 21 April 2016.

¹⁹⁶ JG Ruggie, *Just Business: Multinational Corporations and Human Rights* (WW Norton & Co, 2013) 64.

¹⁹⁷ A Ramasatry, ‘Closing the Governance Gap in the Business and Human Rights Arena: Lessons from the Anti-Corruption Movement’ in S Deva & D Bilchitz (eds), *Human Rights Obligations of Businesses: Beyond the Corporate Responsibility to Protect* (CUP, 2013) 162-89; TL Kirkebo, ‘Closing the Gap. A Human Rights Approach to Regulating Corporations’ (2015) PluriCourts

Ruggie's concerns, the present Anti-Corruption Convention, while emphasising the liability of legal persons,¹⁹⁸ is still framed entirely in terms of State responsibility.¹⁹⁹

It is unlikely that the form and content of international human rights obligations directly addressing business actors could simply mirror those presently addressed to States.²⁰⁰ Whereas broadly negative obligations to respect human rights may easily lend themselves to application in the corporate context,²⁰¹ obligations demanding positive action to protect or fulfil the realization of human rights may prove more problematic. While scholars have cautioned that baseline obligations to respect human rights by refraining from various types of activity do not imply as a corollary obligations to *advance* human rights standards,²⁰² the binary separation between positive and negative obligations is not particularly helpful in light of the privatization of governmental functions.²⁰³

The obligation to respect may encompass a duty to act: in the case of private prisons, a duty to guarantee the minimum standards regarding conditions of detention... This obligation is conceptually different, independent from, and concurrent with the obligation of the State to protect the rights of inmates by establishing an effective regulatory system regarding the privatization of prisons and guaranteeing judicial remedies for human rights violations.²⁰⁴

The same may be said with regard to economic social and cultural rights such as the rights to health, food and water, which are often impacted by the disastrous environmental effects of corporate operations.²⁰⁵ While these rights have classically been framed as positive duties on States demanding their progressive realization via the allocation of appropriate funding and infrastructure, the dichotomy between positive and negative rights has been exposed as excessively

Research Paper No 15-16 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2642254> accessed 21 April 2016.

¹⁹⁸ United Nations Convention against Corruption (31 October 2003) UN Doc A/58/422, art 26.

¹⁹⁹ 'Each *State Party* shall adopt such measures as may be necessary... to establish the liability of legal persons' (emphasis added) *ibid*.

²⁰⁰ A Nollkaemper, 'Responsibility of Transnational Corporations in International Environmental Law: Three Perspectives' in G Winter (ed), *Multilevel Governance of Global Environmental Change – Perspectives from Science, Sociology and Law* (CUP, 2006) 196.

²⁰¹ Ratner (n 74) 517.

²⁰² A Clapham, *Human Rights in the Private Sphere* (OUP, 1993) 205; *ibid*.

²⁰³ Clapham, *Human Rights Obligations* (n 2) 8-12.

²⁰⁴ Karavias, *Corporate Obligations* (n 2) 170.

²⁰⁵ S Kirsch, 'Mining and Environmental Human Rights in Papua New Guinea' in S Pegg & JG Frynas (eds), *Transnational Corporations and Human Rights* (Palgrave Macmillan, 2003) 118-22; B Dinham & S Sarangi, 'The Bhopal Gas Tragedy 1984 to...? The Evasion of Corporate Responsibility' (2002) 14 *Environment & Urbanisation* 89; L Wong, 'Revisiting Rights and Responsibility: The Case of Bhopal' (2008) 4 *Soc Resp J* 144.

reductive.²⁰⁶ These same rights could be represented within a business and human rights treaty in a manner that respects the differential scope of the duties of States and non-State actors. For instance, an obligation to *refrain* from the use of land and resources in a manner that is detrimental to the health, environmental, land and cultural rights of populations would tailor the content of these rights to the corporate context. While such an obligation may imply a *positive* duty to carry out appropriate risk assessments, such demands are hardly unduly restrictive, and are already codified within existing soft-law regimes.²⁰⁷

A second factor that must be contended with is that of scope. The responsibility of a State to respect, protect and fulfil existing human rights standards is delineated by a spatial dimension, that of its jurisdiction.²⁰⁸ The notion of jurisdiction in international human rights law has classically been conceived as primarily territorial in nature.²⁰⁹ Since business actors do not possess permanent sovereignty or territorial control in the same manner as a State, or even a non-State armed group,²¹⁰ some other factor will be required in order to determine the limits of corporate responsibility.

At one end is the approach that tends towards an abstract test, independent of the particular act or omission in question, like the overall or effective control tests... or sphere of influence or proximity tests. At the other end is a contextual and inductive approach that... [focuses] on actual or potential use of power or activity, and its *effects* or *impact* on rights-holders.²¹¹

The first matter that must be considered is the nature of the obligation. This is linked to the forgoing discussion of primary and secondary rules, which identified that there is scope to establish two sets of primary obligations within the proposed treaty: one which deems a principal violation wrongful, and a

²⁰⁶ B Saul, D Kinley & J Mowbray, *The International Covenant on Economic, Social and Cultural Rights: Cases, Materials, and Commentary* (OUP, 2014) 1-2; C Puta-Chekwe & N Flood, 'From Division to Integration: Economic Social and Cultural Rights as Basic Human Rights' in I Merali & V Oosterveld (eds) *Giving Meaning to Economic, Social, and Cultural Rights* (University of Pennsylvania Press, 2001) 39; R Gavison 'On the Relationships Between Civil and Political Rights and Social and Economic Rights' in JM Coicaud, MW Doyle & AM Gardner (eds), *The Globalisation of Human Rights* (UN University Press, 2003) 23.

²⁰⁷ 'Because human rights situations are dynamic, assessments of human rights impacts should be undertaken at regular intervals'. UNGPs (n 1) Commentary to Principle 18.

²⁰⁸ 'The exercise of jurisdiction is a necessary condition for a Contracting State to be able to be held responsible for acts or omissions imputable to it which would give rise to an allegation of the infringement of rights and freedoms set forth in the Convention.' *Al-Skeini and Others v United Kingdom*, Application No 55721/07 (ECtHR 2011) at [130] (hereafter, *Al-Skeini*); Karavias, *Corporate Obligations* (n 2) 85-9.

²⁰⁹ AL Parrish, 'Rehabilitating Territoriality in Human Rights' (2011) 32 *Cardozo L Rev* 1100-10; W Vandenhole, 'Extraterritorial Human Rights Obligations: Taking Stock, Looking Forward' (2013) 5 *EJIL* 808.

²¹⁰ Ronon (n 2) 21.

²¹¹ W Vandenhole, 'Obligations and Responsibility in a Plural and Diverse Duty-Bearer Human Rights Regime' in Vandenhole (n 110) 121.

second which deems *complicity* in that principal wrong to engage an actor's responsibility. Ratner has suggested that where a corporation breaches a complicity obligation 'the factor of the nexus to the affected populations drops out'.²¹² In effect, the delimitation of the obligation is derived from the breach of the principal wrong by a State actor. While this enumeration does not account for a scenario in which a corporation is deemed to be the principal wrongdoer with the aid or assistance of a State, it could be argued that in most scenarios the State's responsibility would be captured under its general due diligence obligations. Ratner continues:

Second is a set of duties on the corporation not to infringe directly on the human rights of those with whom it enjoys certain ties, with the possibility of greater duties depending upon the scope of those links... These connections may, for example, emanate from legal ties (as with employees), physical proximity, or possession of de facto control over a piece of territory.²¹³

While such an approach seems reasonable, the precise shape of these tests remains unclear. Proximity may imply political or economic ties, or may be circumscribed by geography, a notion which Ruggie describes as 'misleading... [companies] can equally affect the rights of people far away from the source'.²¹⁴ While 'legal ties' with employees seems to be the simplest measure, given the sprawling corporate structures exhibited by many multinational enterprises,²¹⁵ the question is how far 'legal ties' will go. Will they stretch down the entire supply chain to reach contractors and sub-contractors of subsidiary corporations? It would seem unlikely in light of domestic tort litigation, a Dutch Court having recently held that

proximity between [a] parent company and the employees of its subsidiary that operates in the same country cannot be unreservedly equated with the proximity between the parent of an international group of oil companies and the [population] in the vicinity... of its [foreign] subsidiaries.²¹⁶

²¹² Ratner (n 74) 525.

²¹³ *ibid.* 525-6.

²¹⁴ Human Rights Council, 'Clarifying the Concepts of "Sphere of influence" and "Complicity"', Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, John Ruggie, UN Doc A/HRC/8/16, 6 para 15.

²¹⁵ A McBeth, 'Crushed by an Anvil: A Case Study on Responsibility for Human Rights in the Extractive Industry' (2008) 11 Yale Hum Rts & Dev LJ 130; LA Mitnick, 'Multinationals Fight Back with the Doctrine of *Forum Non Conveniens*' (1989) 56 Defence Counsel J 400.

²¹⁶ *Akpan v Royal Dutch Shell & SPDC* (30 January 2013) District Court of the Hague, LJN BY9854, C/09/337050/HAZA 09-1580 para 4.29 <milieudefensie.nl/publicaties/bezwaren-uitspraken/final-judgment-akpan-vs-shell-oil-spill-ikot-ada-udo> accessed 21 April 2016; LJ

It was on this basis that the Dutch Court distinguished the case before it from the landmark *Chandler v Cape* judgment, which recognised that, in limited circumstances, parents may be held responsible for the overseas operations of their subsidiaries.²¹⁷ While an appeal is pending before the Dutch Courts following a ruling that company documents previously denied to the plaintiffs should be disclosed, the final outcome of the case remains uncertain.²¹⁸ ‘Procedural defences’ of this kind are often invoked by business actors in domestic litigation in order to avoid liability, and might also factor into the enforcement of international obligations.²¹⁹ Whether parent companies alone, where the majority of a business’s assets lies, ought to be targeted primarily for their lack of oversight, or other entities further down the supply chain should be indicted, is another question feeding into the debate as to the scope of the treaty. Should the instrument target only companies operating transnationally, or should it be broader in scope?²²⁰

The principle of ‘due diligence’ is another delimiting standard that is key to operationalizing the UNGPs.²²¹ Principle 17(a) advises that the concept covers ‘adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships’.²²² The commentary to this principle provides that ‘[w]here business enterprises have large numbers of entities in their value chains it may be unreasonably difficult to conduct due diligence for adverse human rights impacts across them all.’²²³ If adopted by the proposed treaty, such a loose delimitation of the scope of the obligations would arguably give rise to procedural issues in establishing a breach in situations involving multinational conglomerates. Others have emphasised the responsibility of actors for human rights to the extent that they fall within their

McConnell ‘Establishing Liability for Multinational Corporations – Lessons from Akpan (2014) 56 Int’l J L & Management 88.

²¹⁷ A duty of care may be imposed on a parent provided: i) the business of parent/subsidiary is largely identical; ii) the parent company has more knowledge of health and safety in the industry than the subsidiary; iii) the parent knows of unsatisfactory conditions at its subsidiary; and iv) the parent knows that its subsidiary or employees are reliant on the parent company for protection: *Chandler v Cape* [2012] EWCA Civ 525 at [80].

²¹⁸ Friends of the Earth, ‘Outcome appeal against Shell’ (18 December 2015)

<<http://www.foei.org/news/outcome-appeal-shell-victory-environment-nigerian-people-friends-earth-netherlands#>> accessed 21 April 2016.

²¹⁹ JG Frynas, ‘Political Instability and Business: Locus on Shell in Nigeria’ (1998) 19 Third World Q 465; JG Frynas, ‘Legal Change in Africa: Evidence from Oil-Related Litigation in Nigeria’ (1999) 43 J Afr L 121; DJ Dorward, ‘Forum Non Conveniens Doctrine and the Judicial Protection of Multinational Corporations from Forum Shopping Plaintiffs’ (1998) 19 U Pa J Int’l Econ L 141; Oluduro (n 65) 139.

²²⁰ S Deva, ‘Scope of the Legally Binding Instrument’ (n 3).

²²¹ Karavias, ‘Shared Responsibility’ (n 61) 113.

²²² UNGPs (n 1) Principle 17(a); S Michalowski, ‘Due Diligence and Complicity: A Relationship in Need of Clarification’ in Deva & Bilchitz (n 197) 218-42; S Deva, ‘Treating Human Rights Lightly: A Critique of the Consensus Rhetoric and Language Employed by the Guiding Principles’ in Deva & Bilchitz (n 197) 98-101.

²²³ UNGPs (n 1) Commentary to Principle 17.

'sphere of influence', a notion that gained traction during the drafting of the ultimately abandoned 2003 Draft Norms on Transnational Corporations. The concept has been described as a 'set of concentric circles, mapping stakeholders in a company's value chain'.²²⁴ Ruggie has been critical of the treatment of this term as 'functionally equivalent to a State's jurisdiction', warning against the ambiguity of the term, which might invite manipulation from States seeking to avoid their own human rights responsibility.²²⁵

Karavias has also cautioned against the adoption of this standard in determining the scope of human rights obligations.

Irrespective of whether we term it "jurisdiction" or "sphere of influence", the root of human rights obligations is the existence of a factual situation, namely control... Corporations, unlike States, do not in principle exercise control over territory... Still, corporations may exercise functional control over persons.²²⁶

It has been suggested that the control standard is essentially 'a short hand for something that looks surprisingly like sovereignty.'²²⁷ The approach has been elaborated by the jurisprudence of the European Court of Human Rights dealing with the exercise of extraterritorial jurisdiction in cases arising from the 2003 Iraq conflict.²²⁸ The Court has recognised that jurisdiction may be established by States exercising control over persons, premises, territory or vessels.²²⁹ Interestingly, it has not limited the notion of personal jurisdiction to individuals detained in physical custody, and has recognised that the use of force may, in some circumstances, amount to an assertion of jurisdiction.²³⁰ That said, the Court has been notoriously inconsistent in its justifications for the establishment of extraterritorial jurisdiction,²³¹ and as such may not be the best indicator of

²²⁴ Human Rights Council, 'Clarifying the Concepts' (n 214) 4.

²²⁵ *ibid.* 6 paras 10-13.

²²⁶ Karavias, *Corporate Obligations* (n 2) 173.

²²⁷ F Mégret & F Hofmann, 'The UN as a Human Rights Violator? Some Reflections on the United Nations Changing Human Rights Responsibilities' (2003) 25 Hum Rts Q 323.

²²⁸ D Augenstein & D Kinley, 'When Human Rights "Responsibilities" Become "Duties": The Extra-Territorial Obligations of States that Bind Corporations' in Deva & Bilchitz (n 197) 285-6.

²²⁹ *Al-Saadoon & Mufdhi v United Kingdom*, Application No 61498/08 (ECtHR 2009); *Al-Skeini* (n 208); *Medvedyev and Others v France*, Application No 3394/03 (ECtHR 2010).

²³⁰ 'The Court does not consider that jurisdiction... arose solely from the control exercised by the contracting state over the buildings, aircraft or ship in which the individuals were held. What is decisive in such cases is the exercise of physical power and *control over the person* in question.' *Al-Skeini* (n 208) at [136] (emphasis added); *Andreou v Turkey*, Application No 45653/99 (ECtHR 2009) at [25].

²³¹ In *Jamaa* the 'custody' requirement was effectively resurrected: *Jamaa and Others v Italy*, Application No 22765/09 (ECtHR 2012) at [73]; In *Jaloud*, jurisdiction was established on the basis of the use of force by State agents, but Dutch control of the checkpoint at which the acts occurred was also critical: *Jaloud v The Netherlands*, Application No 47708/08 (ECtHR 2015) at [152].

accepted doctrine.²³² Precisely what constitutes ‘control’ or ‘force’, and whether such principles would cover conduct giving rise to widespread environmental devastation is perhaps open to question. The exact scope of the causal link required will demand further analysis. While mere corporate presence in a State in which human rights abuses take place is probably not sufficient to establish a link, ‘where a State perpetrates human rights violations with a view to luring corporate investment, one may argue that corporate investors retain some sort of “indirect” control over the aggrieved individuals’.²³³ Given that this form of jurisdictional link has not yet crystallized in relation to the conduct of States and their agents, no firm conclusions can be drawn on this matter. Yet, in the context of the alternatives explored above, the control criterion advocated by scholars such as Ratner and Karavias is perhaps the most pragmatic.

V. REMEDIES AND ENFORCEMENT MECHANISMS

The nature of the adjudication and enforcement of the proposed treaty regime presents a complex set of questions, the answers to which are conditional upon the type of remedy pursued. Ex ante measures embedded within human rights treaty regimes are ‘forward-looking’, in that they seek the prevention and management of harm arising from adverse human rights impacts.²³⁴ This type of mechanism is pre-emptive, seeking to deter non-compliance through periodic monitoring and engagement with relevant duty-bearers. The question arises as to whether a treaty monitoring body tasked with ex ante duties in monitoring periodic reports from relevant duty-holders might play a part in the proposed regime. Ruggie has suggested that difficulties would be faced were such a mechanism to be established, given that many vulnerable weak governance States may be incapable of meaningfully engaging with reporting requirements. On the other hand, ‘if reporting was to be done by companies directly, then presumably States would have to enforce the obligation upon them... How a treaty body would cope with the incalculably large universe of businesses... is unclear’.²³⁵ Some treaty monitoring bodies also perform quasi-judicial roles in the consideration of individual complaints brought against signatory States, permitting further interpretation of human rights standards and the rendering of recommendations to State parties regarding ex post facto remedies. The benefits

²³² M Schaefer, ‘Al-Skeini and the Elusive Parameters of Extraterritorial Jurisdiction’ (2011) 5 Eur Hum Rts L Rev 566; Gibney, ‘Litigating Transnational Human Rights’ (n 110) 98-100.

²³³ Karavias, *Corporate Obligations* (n 2) 174.

²³⁴ LA Kornhauser, ‘Incentives, Compensation and Irreparable Harm’ in A Nollkaemper & D Jacobs, *Distribution of Responsibilities in International Law* (CUP, 2015) 121; It is acknowledged that the roles of international investment treaty tribunals may have the reverse effect: M Hirsh, ‘Investment Tribunals and Human Rights: Divergent Paths’ in PM Dupuy, EU Petersmann & F Francioni (eds), *Human Rights in International Investment Law and Arbitration* (OUP, 2009) 98-115.

²³⁵ Ruggie, *Just Business* (n 196) 64.

of these types of decision in the further codification of human rights standards notwithstanding, their non-binding status and the poor record of State implementation and enforcement of these decisions does not lend confidence to their efficacy in compensating the harms suffered by victims.²³⁶ Other treaty regimes demand regular visits to relevant sites by independent bodies in order to monitor the implementation of human rights standards.²³⁷ Clearly, ex ante enforcement mechanisms and ex post facto remedies are complementary in the field of human rights, and the proposed regime would ideally need to tailor both to the business and human rights context. Whether this could be achieved solely by the establishment of a treaty monitoring body is doubtful, though it may be the most pragmatic, in that it might permit individual complaints against States and non-State actors, leading to recommendations that States pursue binding domestic litigation against business actors to ensure remediation for victims.

The weakness of international enforcement mechanisms more generally remains an oft-cited criticism of the international legal system, and the dialogue surrounding the establishment of a business and human rights treaty exacerbates such concerns. At present, international courts do not possess jurisdiction over business actors, the involvement of non-State actors in adjudicative procedures having been largely constrained to the submission of *amicus curiae* briefs.²³⁸ It is clear in the statement submitted by Ecuador that avenues for redress ought to be provided under the binding regulatory framework proposed. Ruggie has also stressed the need for elaboration as to whether such enforcement would take place at the domestic level, where it would be vulnerable to many procedural flaws experienced in weak governance States, or whether an ‘international court for corporations’ should be established.²³⁹ It is worth briefly considering how such a court might function.

²³⁶ C Heyns & F Viljoen, ‘The Impact of the United Nations Human Rights Treaties on the Domestic Level’ (2001) 23 Hum Rts Q 488; Open Society Justice, *From Judgment to Justice: Implementing International and Regional Human Rights Decisions* (2010) 119-20.

²³⁷ Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 18 December 2002) 2375 UNTS 237, art 11.

²³⁸ A Dolidze, ‘The Arctic Sunrise and NGOs in International Judicial Proceedings’ (American Society of International Law Insight, 2014)

<<http://www.asil.org/insights/volume/18/issue/1/arctic-sunrise-and-ngos-international-judicial-proceedings>> accessed 21 April 2016; *International Status of South West Africa* (Advisory Opinion, Pleadings) ICJ Reports [1949] 324 is the sole instance in which the ICJ has permitted an *amicus* brief from an NGO (the International League for Human Rights); GI Hernández, ‘Non-State Actors from the Perspective of the International Court of Justice’ in d’Aspremont, *Multiple Perspectives* (n 17) 140-63; S Tully, *Corporations and International Lawmaking* (Martinus Nijhoff, 2007) 242-5.

²³⁹ Ruggie, ‘A UN Business and Human Rights Treaty?’ (n 195); P Muchlinski, ‘Beyond the Guiding Principles? Examining New Calls for a Legally Binding Instrument on Business and Human Rights’ (Institute for Business and Human Rights, 15 October 2013)

<<http://www.ihrb.org/commentary/guest/beyond-the-guiding-principles.html>> accessed 21 April 2016.

Scholars advocating the international criminal responsibility of non-State entities²⁴⁰ have highlighted the recourse made to juridical persons during the drafting of the Statute of Rome 1998.²⁴¹ While one draft expressly provided the International Criminal Court (ICC) with the competence to render a judgment over legal persons ‘when the crimes committed were committed on behalf of such legal persons or by their agencies’, the provision was ultimately omitted.²⁴² Nonetheless, Clapham has emphasised that this resulted from a lack of time during the late stages of the drafting process, rather than objections from representatives.²⁴³ While commentators have suggested that jurisdiction over legal persons could be affirmed in the future,²⁴⁴ the ICC has not pursued such measures. Indeed, the expansion of the ICC’s mandate in this manner could create even more political opposition to the Court’s very existence.²⁴⁵ Other objections have emphasised the need for complementarity between national and international spheres,²⁴⁶ and the inherent difficulties in establishing the *actus reus*²⁴⁷ and *mens rea* of corporate entities.²⁴⁸

While the first ICC prosecutor was likely correct when he remarked, ‘[f]ollow the trail of the money and you will find the criminals’,²⁴⁹ given the complex corporate structures boasted by many business actors, the difficulty in pinpointing specific individuals to bear criminal responsibility will be significant. It has been suggested that ‘command responsibility,’ which applies to crimes committed by subordinates operating under the effective control of a superior,²⁵⁰ offers an avenue to expose company directors to international criminal liability.²⁵¹ While most often utilized to establish responsibility in

²⁴⁰ A Kassam, ‘Spain’s campaigning judge seeks change in law to prosecute global corporations’, (The Guardian, 20 August 2015) <<http://www.theguardian.com/world/2015/aug/20/spain-judge-baltasar-garzon-prosecute-global-corporations>> accessed 21 April 2016.

²⁴¹ Clapham, *Human Rights Obligations* (n 2) 245-7; C Chiomenti, ‘Corporations and the International Criminal Court’ in De Schutter, *Transnational Corporations* (n 2) 306-7.

²⁴² Draft Statute for the International Criminal Court and Draft Final Act, UN Doc A/CONF.183/2/Add.1, arts 23, 49 para 5.

²⁴³ Clapham, *Human Rights Obligations* (n 2) 246.

²⁴⁴ O De Schutter, ‘The Accountability of Multinationals for Human Rights Violations in European Law’ in Alston, *Non-State Actors* (n 18) 232.

²⁴⁵ A De Jong, ‘Transnational Corporations and International Law: Bringing TNCs out of the Accountability Vacuum’ (2011) 7 *Critical Perspectives on Int’l Business* 78.

²⁴⁶ cf A Voiculescu, ‘Human Rights and the New Corporate Accountability: Learning from Recent Developments in Corporate Criminal Responsibility’ (2009) 87 *J Business Ethics* 426-7; Karavias, *Corporate Obligations* (n 2) 103; Chiomenti (n 241) 294; J Kyriakakis, ‘Corporations and the International Criminal Court: The Complementarity Objection Stripped Bare’ (2008) 19 *Crim L Forum* 115.

²⁴⁷ Karavias, *Corporate Obligations* (n 2) 114.

²⁴⁸ Chiomenti (n 241) 292.

²⁴⁹ Former ICC Chief Prosecutor Ocampo, reported in BBC News, ‘Firms Face Blood Diamond Probe’ (23 September 2003) <<http://news.bbc.co.uk/1/hi/business/3133108.stm>> accessed 21 April 2016; J Podgers, ‘Corporations in the Line Of Fire: International Prosecutor Says Corporate Officials Could Face War Crimes Charges’ (2004) 90 *American Bar Association J* 13.

²⁵⁰ Rome Statute of the International Criminal Court (17 July 1998) UN Doc A/CONF.183/9, art 28(b) (hereafter, ICC Statute)

²⁵¹ McBeth (n 67) 308; *ibid.* art 28(b).

military command chains, the jurisprudence of the ICTR reflects the conviction of company directors for the crimes of genocide and crimes against humanity on this basis.²⁵² Yet, such avenues are not appropriate to fill the accountability gap with regard to business actors, in that *ex post facto* redress is not the only purpose of the human rights regime. Moreover, only a limited range of offences fall within the jurisdiction of the ICC. Any suggestion that its competences could be expanded in the future²⁵³ is countered by the limitation of its jurisdiction to 'the most serious crimes of concern to the international community'.²⁵⁴ As Chiamenti suggests, '[i]t is difficult to imagine that, except in extreme circumstances... a corporation ordinarily operating in the industrial, commercial, or services sector, will act as the principal author to commit any of the crimes falling under the jurisdiction of the ICC'.²⁵⁵

A draft statute for a World Court of Human Rights possessing jurisdiction over non-State actors has been developed by Nowak and Kozma.²⁵⁶ Practitioners such as Cronstedt have also discussed the potential structure of an International Tribunal on Business and Human Rights.²⁵⁷ Such an institution would not issue legally binding decisions, but would rely entirely on the concern of business actors regarding their corporate image.²⁵⁸ Unfortunately, these drafts make the standing of non-State actors before the proposed arbitral bodies contingent upon a declaration of their consent,²⁵⁹ a factor which is rendered entirely unnecessary from the formalist theoretical perspective advanced above. Indeed, an analogy might be drawn from the Seabed Disputes Chamber that has jurisdiction over States, the ISA, as well as natural and juridical persons, 'a significant departure from the general regime that confines jurisdiction *rationae personae* to States and international organizations'.²⁶⁰ However, scholars such as Boyle and Harrison have been reticent concerning the idea of a specialised international

²⁵² *Prosecutor v Musema* (Trial Chamber) ICTR-96-13-A (27 January 2000) at [247].

²⁵³ P Sharp, 'Prospects for Environmental Liability in the International Criminal Court' (1999) 18 *Victoria L J* 217.

²⁵⁴ ICC Statute (n 250) art 5.

²⁵⁵ Chiamenti (n 241) 299.

²⁵⁶ M Nowak & J Kozma, 'Research Project on a World Human Rights Court' (University of Vienna, June 2009)

<http://bim.lbg.ac.at/files/sites/bim/World%20Court%20of%20Human%20Rights_BIM_0.pdf> accessed 21 April 2016; M Nowak, 'The Need for a World Court of Human Rights' (2007) 7

Hum Rts L Rev 251; M Nowak, 'Eight Reasons Why We Need a World Court of Human Rights' in G Alfredsson, J Grimheden & Others (eds), *International Human Rights Monitoring Mechanisms, Essays in Honour of Jakob Th. Möller* (2nd Revised edn, Martinus Nijhoff, 2009) 697; M Scheinin, 'International Organizations and Transnational Corporations at a World Court of Human Rights' (2012) 3 *Global Policy* 488.

²⁵⁷ C Cronstedt & D Ronnegard, 'International Tribunal on Business & Human Rights – Reshaping the Judiciary' (September 2013) <<http://www.l4bb.org/news/tribunal.pdf>> accessed 21 April 2016.

²⁵⁸ *ibid.*

²⁵⁹ 'Any inter-governmental and non-governmental organization, including any business corporation, which has made a specific declaration in accordance with article 37, shall fully cooperate with the Court in any proceedings.' Nowak & Kozma (n 256) art 33.

²⁶⁰ Plakoefalos (n 175) 398.

environmental court, on the basis of the sheer variety of laws relevant to environmental disputes. The judges of such a court would require a wide-ranging grasp of international law, rendering them no different, in effect, to those at the ICJ.²⁶¹ Given the strong parallels between environmental degradation and the operations of multinational enterprises, similar practical concerns could be expressed in relation to a World Court on Business and Human Rights.

Assuming it is possible to establish a judicial body capable of hearing claims against States and non-State actors, its task in apportioning responsibility for fulfilment of the remedial damages among multiple perpetrators would doubtless prove highly complex. Consider the event that separate primary obligations for both direct and complicit breaches were drafted, in line with the approach considered above in Section III. Drawing an analogy from the scheme underpinning reparations in ASRIWA, it must first be established that the wrongful acts in question each have a direct causal connection to the victim's injury.²⁶² Once satisfied, at least 2 distinct situations are possible. The conduct of multiple actors either gives rise to: i) separate wrongful acts contributing to a *single injury*; or ii) separate wrongful acts contributing to *multiple separate injuries*. In the first situation, a business actor might breach an international obligation by engaging in torture, and a State may breach a second obligation by engaging in complicit conduct. Thus, two distinct but nonetheless complementary breaches are inseparably linked to the victim's injury. D'Argent suggests that there are two ways to deal with reparations in such a situation; either one wrongful act is identified and isolated as the decisive cause, and a single party is held liable for the entire sum of damages, or *all parties* are held to be jointly and severally liable for full reparation.²⁶³ This analysis demonstrates the interrelationship between the tiers of the rule structure proposed above. While the approach of joint and several liability seems preferable from the victim's perspective, it raises the question of how responsible actors might seek redress for contributions to the harmful outcome by their co-perpetrators. Whether claims could play out between States and non-State actors domestically is questionable, given the unwillingness or incapacity of many States to give domestic effect to their international human rights obligations in the first place.

The position is arguably more straightforward in the second situation, where *separate* breaches give rise to *separate* (though potentially related) injuries. Consider the scenario in which a State and a business actor separately engage in torture. D'Argent suggests that in this situation, 'the responsibility of each wrongdoer can be separately invoked to the extent of the causal importance

²⁶¹ A Boyle & J Harrison, 'Judicial Settlement of International Environmental Disputes: Current Problems' (2013) 4 J Int'l Disp Settlement 274-5.

²⁶² ASRIWA (n 70) art 31.

²⁶³ P d'Argent, 'Reparation, Cessation, Assurances and Guarantees of Non-Repetition' in Nollkaemper & Plakokefalos (n 63) 229.

of its own wrongful act in relation to the [overall] injury'.²⁶⁴ The simplification arising from the distinct nature of the injuries notwithstanding, 'the apportionment of the obligation to make reparation in situations of complementary causal wrongful acts is far from being so... such a solution can only be implemented on a case by case basis'.²⁶⁵ In addition, there are necessarily shades of grey that arise between these two extremes, further exacerbating hurdles to the achievement of an adequate remedy for victims.

A final procedural matter relates to the enforcement of the remedy once a ruling has been issued. While it may be argued that there is *some* value in the rendering of a judgment by a court or quasi-judicial body even in the absence of power to enforce the implementation of decisions, the assurance of actual compliance is also desirable. Given that the decisions rendered by a 'World Court' are likely to refer to corporate activity occurring within the territory of 'host' States, the adoption of appropriate domestic responses will likely fall to the very weak governance States that are unwilling or unable to provide initial safeguards. Poor compliance may also arise in light of the desires of more economically powerful States to protect their corporate nationals.²⁶⁶ Significant cooperation would be required on the part of developing 'host' States and Western 'home' States in order to curtail corporate abuses,²⁶⁷ a position that is undeniably optimistic.²⁶⁸ Thus, while the formalist theoretical approach advanced above permits States to realise a binding treaty and accord 'supranational competences to an overarching body... the growth of international cooperation is a slow process because States would generally be hesitant to reduce the legal freedoms they enjoy.'²⁶⁹ These are important realist factors that hamper the implementation of the proposed treaty regime. While there is nothing theoretically preventing the extension of rights and duties to non-State actors in theory, the *willingness* of States, who remain the primary legislators and are substantially economically dependent on multinationals for employment and capital, is not guaranteed. Yet, it is useful to bear in mind Paine's optimistic retort:

True, we need to be cognizant that the powerful will retain the ability to act contrary to existing law, but... legal validity... can offer a useful medium for critiquing the actions of the powerful and should not be given

²⁶⁴ *ibid.* 224.

²⁶⁵ *ibid.* 227.

²⁶⁶ Simons & Macklin (n 116) 290.

²⁶⁷ H Kelsen, *Peace Through Law* (University of North Carolina Press, 1944) 66.

²⁶⁸ D Zolo, 'Hans Kelsen: International Peace through International Law' (1998) 9 *EJIL* 321.

²⁶⁹ H Suganami, 'Understanding Sovereignty through Kelsen/Schmitt' (2007) 33 *Rev Int'l Stud* 527.

up too quickly, even when confronted with the ability of the powerful to displace existing law.²⁷⁰

It is submitted that the manner in which the issue of non-State actor regulation is framed theoretically may have profound consequences on its practical operation. This much is evident in the subsisting State-centric operation of public international law. As such, it is argued that there is significant utility in establishing more robust theoretical foundations, even in the absence of an effective enforcement mechanism, since this may provide the groundwork for future normative development.

VI. CONCLUSIONS

The forgoing analysis demonstrates the doctrinal complexities that must be contended with in order to advance public international law in the direction of direct non-State actor regulation. While there are no simple answers in assessing the feasibility of a business and human rights treaty, some preliminary conclusions may be drawn in at least two of the four substantive areas addressed. It has been demonstrated that some shift is required in the manner in which international obligations are theoretically conceptualized in order to build a convincing case that business actors serve as direct addressees. Classical State-centric scholarship has relied on a contractarian underpinning that has proven to be methodologically flawed, incapable of responding to shifting power dynamics, and has sustained specious sensitivities in political and legal doctrine. This article has argued that the adoption of a formalist understanding of international legal personality can circumvent many of these anxieties, and instead advance a more logical foundation that is receptive to direct non-State actor regulation.

A second observation that can be drawn concerns the identification of duty-bearers, and the allocation of responsibility. Given the traditionally bilateral scope of international responsibility, its apportionment between multiple parties for their contributions to the same harmful outcome has given rise to significant debate over the last decade. If the proposed treaty is to move beyond the imposition of State-centric obligations, then the attribution model of State responsibility falls short of establishing a robust system of allocation. The model advanced above suggests that the attribution of offending conduct to States would need to be supplemented by complicity and due diligence provisions in order that responsibility might be assigned to multiple actors, in appropriate proportions. By viewing complicity provisions as a form of primary rule, it is possible to circumvent the hurdles that would be encountered in attempting to

²⁷⁰ J Paine, 'Review Essay: Kelsen, Normativity and Formal Justice in International Relations' (2013) 26 LJIL 1048.

allocate responsibility for a single wrongful act. State conduct that does not meet the complicity threshold could also be captured by due diligence obligations within existing treaties. In adopting a holistic approach of this kind that incorporates extant international responsibility regimes, it is possible to draw a conceptual distinction between the distinct wrongful acts of multiple perpetrators. This in turn might aid assessments of the causal contributions of multiple actors in the implementation of a system of remediation framed in terms of joint and several liability. These virtues notwithstanding, whether this model would prove too complex to secure practical implementation remains a concern.

The path becomes more obscure in relation to the final two sections of the article, which addressed the delimitation of international obligations addressing business actors, and modes of enforcement. While an analogy may be drawn with principles such as 'due diligence', the corporate 'sphere of influence' in established soft-law initiatives, or the notion of 'control' that has gained traction in jurisprudence relating to the extraterritorial obligations of States, the precise way forward is unclear. While the latter approach appears to be the most pragmatic, practice has not settled in relation to States, let alone non-State entities. This is clearly a matter of fundamental importance to the success of a treaty addressing business actors, and must be subjected to further scrutiny. It has been suggested that the determination of the scope of obligations is as much to do with policy as legal doctrine, and as such, arguments relating to the ideology of the free-market are likely to curtail efforts to formulate duties owed by corporations to all individuals their activities touch and concern.

With regard to the grant of remedies and their enforcement, it is unlikely that the domestic courts of weak governance States could provide the procedural guarantees required to administer decisions, and short of an amendment to their constituent documents, existing international courts are presently incapable of accommodating claims relating to corporate non-State actors. While a court or tribunal with compulsory jurisdiction and the competence to hear joint and several liability claims concerning contributions to the 'same damage' is perhaps the preferred option, the complex nature of the multi-party disputes, which are likely to engage numerous treaties, will doubtless prove to be a major impediment. Thus, while there is little that cannot be overcome in terms of legal theory and doctrine given the requisite political will, it is the practical realization of a binding business and human rights regime that will likely prove to be the complicating factor. History dictates that the establishment of treaty regimes can crystallise over time into highly advanced institutionalized systems, evidenced by the extant State-centric human rights framework. It is submitted that there is inherent value in attempting to solve doctrinal dilemmas surrounding the proposed treaty in the short term, in that this process will fortify legal scholarship as a vehicle for the immanent critique of the abusive acts of both State and non-State actors. As we stand at the foothills of a legally binding

framework addressing business actors, the task is to keep asking the difficult questions, and to resist dejection by the terrain which impedes the summit.