



## A Review of International Laws and Principles Governing Business and Human Rights

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**Abstract:** *Human rights are closely interlinked with business, and this relationship has extensively been of fundamental emphasis to international law. Multinational corporations (hereinafter, MNCs) and business enterprises, due to their influential nature, often escape weak domestic regulations. This article examines international law governing BHR and explores the reasons for the convergence from voluntary measures to binding law. It elaborates on the role of the International Bill of Rights in addressing human rights protection in the context of business activities. It then delves into UN non-binding measures that have been endorsed in the past, highlighting their significant standards and the ongoing relevant debate. Furthermore, the article examines the progression towards a binding treaty. While acknowledging that a binding treaty may not completely solve the complex issue of BHR violations, it argues that it can encourage states to align their national legislations and strengthen existing non-binding instruments such as 'National Action Plans'.*

**Key Words:** Human Rights, International Law, Human Rights and Business

### Introduction

There is too much regulation at the international level and the degree of their enforceability also varies, which may cause conflicting obligations with no harmonious understanding of the concepts; hence the disintegrated regulation has often led to a misunderstanding of the clear and diverse meanings and even obligations of the MNCs and business entities around the globe concerning human rights respect fixing the responsibility in case of violations.

In this context, this study endeavours to explore and review the most important international instruments, other soft law initiatives and relevant provisions on the subject. This research also elaborates responsibilities, mechanisms, and impacts enshrined therein. It is also an attempt to highlight the reasons for attempts of convergence from soft law to hard law. The purpose is to examine the common factors in these various measures to find the obligations of the relevant role players. The present attempts and negotiations for

a possible treaty on BHR along with its content and scope are critically reviewed as well.

### The Universal Declaration of Human Rights (UDHR)

Before discussing the UDHR in the context of business, it is worth mentioning that human rights in this perspective refer to internationally recognized and expressed provisions outlined in the main human rights instruments. The most prominent and the mother of all human rights amongst them is the UDHR, which all member states endorsed in 1948. It is the basic document that influences the international regulative sphere as well as domestic legislative and regulative processes. The UDHR comprises thirty articles and insists that the rights covered therein are universal, indivisible, and inalienable (*UNDHR* 1948, Preamble). This important declaration is the backdrop to all other human rights documents laying down a common set of standards to achieve human rights for

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all, irrespective of their ethnicity or origin, and urges all “to permanently consider this declaration and strive to advance and advocate human rights and freedoms, through education and teaching, while permanently considering this aim of the declaration. There shall be constant domestic and international efforts for progressive measures directed towards securing their universal recognition and observance among people living inside the member states and those living under their jurisdiction”. (UNDHR, Art 1). The declaration offers theoretical obligations by and for states, corporations, and non-state actors as the term “organs of society” includes all actors including companies in its applicability (J Dhooze, 2015), thus many have explained the role of business concerning these human rights. In this context, states are unable to confine human rights to their mutual relations and individual(s), rather private actors are also a necessary part of that. The UDHR may possibly be viewed to impose an obligation on companies to not intervene with listed rights therein (Bottomley & Kinley, 2002). Similarly, states are commanded to make sure that the non-state actors do not commit human rights violations as well (Alston 2005).

The following lines (UNDHR Art, 1-4 & 22-24) illustrate some of the rights listed in the declaration are implicitly affected by many of the existing business operations, the corresponding function of the business, and the duty of the state. The right to equality and freedom from discrimination requires the promotion of employees, solely based on their competencies, to ensure non-discrimination in selection and justice in the promotion. The right to justice and favourable work demands that all workers must be provided with an environment not harmful to their health. It signifies that health and safety measures must be ensured in companies to ensure the protection and respect of these rights. Similarly, joining trade unions and freedom from slavery, including modern all forms of slavery demand from suppliers and contractors of the companies to strictly follow the globally recognized labour standards on child labour, forced labour and working hours. Apart from that, the right to social security and the right to an adequate standard of living urge to focus on adequate benefits of employees and also restrain from investments of pension funds in companies involved or accomplice in abuses such as cluster bombs and other lethal arms manufacturers.

The obligations arising from UDHR, by and for states also include: respect, which signifies nonintervention in the exercise of a right, to protect which means to guarantee others do not intervene in these rights of individuals, to fulfil the duty of

promoting rights, expedite access to rights and deliver to those incapable of providing for themselves (Amnesty International USA, “Demand Dignity,” 2009, Chapter 3). Thus, by ratifying the UDHR and other human rights agreements, states have a basic duty to protect human rights which are abused or posed to risk by business organizations. Companies also need to show their support for UDHR principles in their policies (FG500, UN-SRGS, 2006).

In a nutshell, human rights have made their place in business schema through important concepts including, environmental protection, due diligence, sustainability, and corporate social responsibility (hereinafter, CSR). The standards generally used for the social component of these concepts are labour rights, employee engagement, charitable assistance and environmental protection.

### **International Covenant on Civil and Political Rights (ICCPR)**

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The UN General Assembly adopted the International Covenant on Civil and Political Rights (hereinafter, ICCPR) that entered into force on 23<sup>rd</sup> March 1976 as an international human rights treaty which contains a preamble, six parts and fifty-three articles (ICCPR, 1966). The Covenant obligates state parties to respect and protect the articulated rights equally, without any discrimination and ensure that all subjects falling under their jurisdiction enjoy these rights. Although the articles of this Covenant do not address MNCs and other business enterprises directly, states have to protect them through domestic legislation, hence corporations also have a responsibility to respect these human rights. The articles of ICCPR in the context of business are of vital importance as this document is a source of human rights that companies need to observe, respect and avoid posing them at risk in their activities.

Self-determination is a right of primary significance to the Covenant (ICCPR, 1966, Art 1), and there may be a negative impact on this right, for instance, if a company constructs a facility on the land that carries traditional importance for the residents. Similarly, a company should also facilitate the enjoyment of this right by consulting the inhabitants and obtaining their consent, while disposing of their natural wealth or resources. Similarly, state parties are duty bound to facilitate and ensure this right is realized and respected by people (UN Human Rights Committee, 2004, para.6). Provided, that measures taken in this regard are in compliance with the principle of non-intervention as prescribed by the UN Charter and customary international. Law. There are

main principles enunciated in articles 2 to 5 that have relevance both for states and companies but cannot be applied separately, but rather in conjunction with other specific rights listed in the ICCPR. Article 2 comprises broad obligations for states to respect and ensure the enjoyment of the Covenant rights by all equally and to offer effective remedies in case of infringement. States have to ensure the protection of rights between private actors by all means and measures under this covenant. This responsibility includes the protection against abuses committed by private actors—persons or entities— and states can be held accountable under the ICCPR, in case they permitted or failed to take appropriate steps, or to prevent abuses, punish culprits, investigate and redress the harms caused by such acts of private actors’ (HRC, 2004, para. 80). Article 2 (1) is set out on the foundation of “the relationship of individual and State with respect to an infringement of any right provided for in the Covenant, wherever that occurs” (López Burgos v Uruguay, 1981, para.12.2). There should be a legitimate cross-border jurisdictional connection between the state and a person—be legal or natural—, so that state may be held responsible for extraterritorial corporate human rights abuse.

The Covenant also addresses the issue of ‘discrimination’, hence, its Article 3 demands from states ensure equal treatment with respect to all rights; hence gender discrimination is discouraged both in government and private sectors (CCPR General Comment No. 28, 2000, para. 4). Article 4 addresses the situations in which ‘derogation’, of rights is possible. However ‘non-derogable rights’ can never be taken away in any situation including an emergency. Under Article 26, states should reduce and eliminate discrimination in all sectors, by both government and non-government agencies (CCPR, General Comment No 28, 2000, para. 31). The HRC comment number 17 urges child rights in the context of the labour market, urging that children should not be subjected to discrimination (HRC, 1989, para 3). The HRC further explains that “every possible economic and social measure should be taken to prevent children from being subjected to acts of violence and cruel and inhuman treatment or from being exploited by means of forced labour or by any other means”. (HRC, 1989, para. 144).

Article 27 recognizes the rights of all minorities in terms of enjoyment of their cultural, linguistic, religious and other related rights which the company may facilitate by providing job opportunities to minorities, allowing employees to avail religious holidays and wear traditional clothing. The HRC also relates it to states’

duty that states must take all measures to protect minority rights from being violated by acts of states and other non-state parties within its jurisdiction (HRC, 1994, para. 6.1). The right to ‘freedom of movement’ (ICCPR, 1966, Article 12) is impacted by the acts of the company in situations, for example, if a particular community is relocated due to operations of company and such operation restricts from choosing place of living of its choice. However, lawful development-related resettlement, achieved through notice, after consultation and consent from affectees is allowed. The HRC also comments on this right and urges States to protect this right from being interfered with by public and private actors (CCPR General Comment No. 27, 1999, para. 6).

Article 17 discussed the ‘right to privacy’ and companies may infringe on this right by way of complicity in abuses. For example, when IT or telecom companies unlawfully give customers’ data to authorities without permission. Similarly, when companies release gases into an inhabited area, hence, may harm this right of inhabitants of that area (Lopez-Ostra v Spain, 1994, 20 EHHR 227). It’s the duty of the state to prohibit violations of privacy rights, be those by state authorities or other individuals and corporations (HRC, 1988, para.1).

The Covenant also outlines protection from degrading, cruel, inhumane treatment and torture (ICCPR, 1966, Article 14). Henceforth, if companies subject employees to harassment and unsafe working conditions as is the case of pharmaceutical companies where staff members are subjected to medical or scientific experiments without their free consent. Companies may be complicit in violations by third parties when apartheid regimes or others use their products in committing acts of torture. The HRC views that States are also obligated to stop violation of Article 17 by State authorities and other natural or legal persons, hence preventive and punitive mechanisms include submission of a periodic report containing legislative measures, and administrative and judicial steps as well (HRC, 1992, para.2). This Covenant also bans slavery, servitude and forced labour (ICCPR, Article 8), henceforth, indirectly prohibits bonded labour, forced prison labour by private companies, slavery, human trafficking for prostitution, servitude or any of the aforementioned purpose by companies and their complicity in such abuses and acts as well.

The Covenant also articulates the ‘right to family protection and marriage (ICCPR, Art, 23), with the related right of child protection (ICCPR, Art, 24). These rights are applicable to businesses where work conditions may risk or enhance the capacity to assume

healthy work, balanced life with family. Companies should avoid sexual and economic exploitation of children, hazardous and unpaid child labour, long working hours, harsh treatment, child trafficking, use of sexualized photos of children in mass marketing, child pornography and cyberbullying

The ICCPR obligates States to ensure enjoyment of the aforementioned recognized rights and protect them by taking legislative, administrative and enforcement measures while the role of companies may vary in different in different jurisdictions, depending on the context of each State and nation. However, broadly speaking, the ICCPR suggests duties upon businesses not to infringe the Covenant rights in their employment practices and relations with all the stakeholders.

### **The International Covenant on Economic, Social and Cultural Rights (ICESCR)**

This Covenant (hereinafter, ICESCR) is a significant human rights document and part of the International Bill of Rights which entered into force on 3 January 1976 pursuant to Article 27. State parties that ratify the Covenant commit to granting socioeconomic and cultural rights to all individuals residing within their territorial jurisdiction or control.

The Covenant articles contain principles which establish obligations for states to guarantee the enjoyment of Covenant rights by all individuals and persons. Articles 2 to 5 outline overarching principles related to the general obligations of states to ensure equal enjoyment of Covenant rights (ICESCR 1966, Art 2). The Covenant includes a 'saving clause' that prevents governments and other entities, such as corporations, from misusing its provisions to infringe on the rights of others or use it as a defence to lower domestic principles (ICESCR, 1966, Art 3).

The Covenant also protects the rights to work, enjoy just and favourable conditions of work, form or join trade unions and engage in strikes (ICESCR, 1966, Art 6, 7, 8). Companies, as key players in the job market, are expected to help secure the fulfilment of the right to work. However, businesses, regardless of their size and location may adversely impact this right through arbitrary or unfair dismissal of workers. Unprejudiced, fair and suitable working conditions, including health and safety measures, appropriate remuneration, and minimum wages, are also the responsibility of companies. International Labour Organization conventions provide additional details and standards for interpreting these articles (ILO

Conventions, 131, 94, 95, 01, 30, 47, 132, 14, 106, 155, 161, and 81).

Article 8 of the Covenant requires companies to facilitate union members and activities and avoid complicity in restricting the rights of employees to form and join trade unions. However, the exercise of the right to strike is subject to limitations such as national security, public order, the freedom rights of others, and national laws (ILO Conventions 87, 1948 and 98, 1949).

The 'social security' and 'social insurance' rights (ICESCR, Art, 9) have been interlinked with BHR as well. States are required to adopt social protection floors (ILO Recommendation 202, 2012) that aim to alleviate poverty, social exclusion, and vulnerability, and ensure the availability of health facilities, education, sanitation, family-focused social work and other necessary services. Companies have a responsibility to contribute to the social security system as mandated by law and to provide other benefits, including income, maternity, and injury benefits to their employees. States also have the duty to ensure through employment laws that companies provide other benefits including income, maternity, and injury benefits to their employees.

The Covenant also safeguards family life and requires maximum protection and assistance to families, young persons, and children (ICESCR, Art, 7). It gives special preference to protecting mothers during childbirth and requires states to prohibit hazardous child labour, and children's social and economic exploitation, and set a minimum age for paid work (ICESCR, Art, 10). Companies may adversely impact child rights if they employ child labourers below the minimum age for hazardous work.

The right to an 'adequate standard of living' is significant as well (ICESCR, Art 11), which comprises the right to have adequate food, clean water, health facilities, housing, and continued improvement in living conditions. States are obligated to ensure the realization of this right and minimize adverse impacts by companies offering housing or undertaking development projects. Forced evacuation of local inhabitants for development or resource exploration projects infringes on this right and requires comprehensive assessment, consultation, and just compensation.

The Covenant also recognizes the importance of health, for which States parties must take necessary steps to improve hygiene, prevent and treat diseases, and improve environmental and manufacturing conditions (ICESCR, Art 12 (b) (c)). Businesses should

avoid adversely impacting the health of workers, consumers, and local populations by complying with health, safety, consumer, and environmental protection legislation.

The right to education, which is aimed at developing a person's personality and dignity is of the central focus (ICESCR, Art 13, Art, 14). States parties are required to ensure free and compulsory primary education and provide educational facilities at all levels in accordance with societal needs. Companies should promote and facilitate education, avoid child labour, and not limit access to educational institutions or damage educational facilities.

Taking part in cultural and artistic life and benefiting from scientific advancement is also vital (ICESCR, Art, 15). States are responsible for implementing this right and regulating the responsibilities of non-state parties, including corporations, to respect this right. In this context, companies play a role when they share the outcomes of scientific growth and respect intellectual property rights. (UN CESCR, 2009, para. 1(a).

The Committee on Economic, Social and Cultural Rights (CESCR) defends and promotes the rights outlined in the Covenant by monitoring the obligations of States under this Covenant and requires states to submit reports every five years for examination. The CESCR also spreads awareness about the achievement of governments regarding socio-economic and cultural rights through 'General Comments'. Additionally, the CESCR allows for the submission of reports by the public, which it reviews. The CESCR members are human rights experts elected by the UN Economic and Social Council (ECOSOC).

## The United Nations Global Compact

This instrument was introduced in 2000 as a voluntary document, grounded in the idea of the then UN Secretary-General, Kofi Annan, and aimed at promoting ethical attitudes and human rights in the corporate world. The Global Compact is considered the largest global voluntary business citizenship initiative, and participating companies commit to respect and honour its ten outlined principles, without intervention from states or other governing and regulative bodies (Weilert, [2010](#)).

The ten principles set out in this instrument discuss human rights, labour, corruption and environmental aspects which are basically rooted in different treaties and declarations, and their respect is obligatory. It also addresses the supply chains of the companies in the principles, hence human rights as

well as the rest of the principles should be enforced in all activities and plans of corporations (Global Compact Office, 2007). This denotes the importance of human rights protection both as an external and internal goal in the operations of companies and overall strategies.

The issue of complicity and disregard has been directly addressed in two principles; "companies should care and respect the universally recognized rights, and ensure that there is no complicity on their part in human rights violations". (UN Global Compact 2000). The instrument has given much importance to these two standards in terms of practical relevance while dealing with business and human rights (Wynhoven, 2011, p. 87). Businesses have been given a chance for self-regulation, implementation of the principles, responsibility and the choice of how to honour human rights in ways allowing them to be observed internally in their activities. Complicity may be 'direct complicity', 'beneficial complicity' and 'silent complicity'. It is sufficient for complicity when a company indirectly causes the abuse by benefiting from, encouraging and tolerating such action. (UN, Global Compact 2004, 13). Companies are complicit, when they participate or assist in human rights violations committed by a state, a rebellion group or other corporation or person. (UN, Global Compact 2004, 19) Silent complicity means the silence of the company despite witnessing the occurrence of human rights abuses, whereas in 'beneficial complicity', direct benefits of the company from the abuse involved.

There are four principles concerning labour which are clearly linked with human rights as they address all practices of forced and child labour and obliges eradication of discrimination in hiring and choosing a profession. (UN, Global Compact 2000, 6-7).

The Compact also refers to the "sphere of influence" which means the political, contractual, commercial or geographic relations of a company with different individuals, entities and groups (UN, Global Compact 2004, 17). It can be elaborated as a series of circles and the central smallest circles is about the business operations directly interconnected to the company's activities. This circle comprises, for example, employees, with another circle 'covering the supply chains; hence, the control of the company in this domain is weaker as compared to that in the middle. The third sphere in this series consists of society's interaction with companies, and social and public welfare activities. The last 'influence circle' is the involvement of the company in public policy discussion and advocacy (UN, Global Compact 2004, 13). The process of involvement commences with the



submission of written statements from companies, followed by the endorsement of their respective board of directors or other competent bodies (Wynhoven, 2011). Multinationals Corporations are required to submit annual progress reports regularly. Communication on Progress is open communication to stakeholders (UN, Global Compact 2004 19), aimed at indicating the company's contribution to the implementation of the principles to the general public.

The 'remediation' is also an important aspect of the Global Compact, requiring companies to address direct or indirect human rights abuses and come up with internal mechanisms that are the way out to ensure that workers, staff, contractors, local public and others have redress and remedial forum (UN Global Compact, 2000, 1). Another important step is motivating awareness and action from businesses support to realize and materialize the Sustainable Development Goals (from here SDGs) by 2030 requiring companies and businesses to achieve transformation through these SDGs. All UN member states have adopted a plan for attaining a better life for all, laying out a strategy for the upcoming 15 years to eradicate poverty, fight discrimination, injustice and focus on climate change to safeguard the planet. Companies and stakeholders are guided towards 'action-oriented platforms and tools' in order to achieve the goal of implementation. These SDGs manifest to be a milestone in the global development plan. Moreover, they assign an important role to companies and businesses in sustainable development and many MNCs and business enterprises have accepted this challenge (Zagelmeyer and Sinkovics, 2019). The SDGs clearly identify the destiny by 2030, for creating a sustainable world and highlight new marketplaces and prospects for companies across the globe. The Global Compact seems to be a principal catalyst of change, ensuring all countries and companies inside their jurisdictions participate.

The effectiveness of the Global Compact in the business world has been the subject of debate. While many view it as a successful initiative and a global soft law movement for a sustainable corporate world, its effectiveness and influence on business practices have been questioned (Sethi and Schepers, 2014). Critics argue that it lacks binding regulatory mechanisms and can be counterproductive to efforts for the global accountability of corporations. Nevertheless, this initiative has played a noteworthy role in the broader discussion of business and human rights, signalling the UN's engagement with corporations and highlighting the importance of human rights beyond employment and labour affairs (Wettstein, 2012).

Overall, the United Nations Global Compact has become a tool and strategy to promote responsible business practices and has had a notable impact on the corporate social responsibility landscape. Its principles and voluntary nature have encouraged companies to integrate ethical reflections concerning human rights into their decision-making processes, business operations and supply chains.

### **UN Norms Concerning Responsibility of Transnational Corporations and Other Business Enterprises**

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El Hadji drafted a working paper on BHR for the UN Sub-Commission in the year 1997, to draw attention regarding the lack of global regulation. Eventually, the Sub-Commission established a Working Group, aimed at reviewing a justifiable geographical distribution, with a view to examining the operational methods of the MNCs (Weissbrodt and Kruger, 2003).

This Sub-Commission drafted Norms concerning the responsibility of TNCs and other business enterprises with regard to human rights (hereinafter, UN Norms), a step similar to the Global Compact with respect to expectations and ideals, but the overall structure was different in the ways of promoting them. The Global Compact partially proved to be an insufficient voluntary tool and its effectiveness had not been seen as extensive. Hence, with the advancement of the process, it was agreed, that the UN Norms would be more effective if presented with voluntary nature (Hillemans, 2003). In this context, another Working Group led by Professor David Weissbrodt, a professor of law at the University of Minnesota, closely worked on Draft Norms aimed to be the foundation for the future binding framework concerning BHR responsibility after consensus (Weissbrodt and Kruger, 2003). The Working Group circulated the 2002 report on the revised draft and the sub-commission adopted the Draft UN Norms in 2003. The commentary on these Norms is viewed to be a valuable explanation and elaboration of the principles (UN Draft Norms, 2003), hence; altogether, they form a comprehensive business ethics guide addressing human rights. However, they are different from other initiatives in terms of their focus and nature as Professor David highlighted its aim to be a starting point for convergence from soft law towards mandatory nature after the agreement, but were not to become immediately and automatically binding (Weissbrodt and Kruger, 2003).

The preamble discusses State's obligation to safeguard human rights and elaborates 'organs of the society' which include corporations as highlighted in

the UDHR (UN Draft Norms, 2003). States were required to implement these Norms through domestic legislation, however, some considered this not to be mandatory, due to the language (Kinley, 2006).

The UN Norms contained twenty-three articles articulated in treaty form (Ruggie, 2007), primarily “obligating states to promote, respect, protect, and ensure observance of respect and protection of internationally and nationally recognized human rights. States were also required to ensure respect, promote, and protect all those recognized human rights, including the rights and interests of the indigenous and vulnerable people, from and by MNCs and other business enterprises within their circles of influence and activity”. (UN Draft Norms, 2003). They were supposed to be read and understood in the context of the overall responsibilities of the States, which feared their importance, hence were directly addressed in the UN Norms that; “the human rights duties of States will not be adversely affected, lessened and restricted by these Norms”. (UN Draft Norms, 2003). Basically, the aim was to justify a secondary responsibility of MNCs and other business enterprises, linked with UDHR, extending the human rights promotion, respect and protection level to other organs, not limiting the overall human rights responsibilities and obligations.

The UN Norms were also applicable to ‘other business enterprises’, with downward extended application to their ‘supply chains’, and ‘sphere of influence’. The Commentary on these Norms urges companies to keep an eye on their supply chains as much as possible. Similarly, companies were also obligated in the Norms and the Commentary, to use due diligence (Commentary on the UN Norms 5(c), A.I. (b)). The aim was to ensure human rights respect within the operations circles and in case of failure or not using due diligence, some liability was also suggested in the commentary (Backer, 2006).

The Norms also included positive obligations concerning the influence ‘to support respect for human rights’ and contribute to ‘sustainable development’ which was seen as an inclusive regulative step urging companies to move beyond their requisite obligations. TNCs have to respect international laws as well as domestic laws, regulations, public interest, development, socio-economic and cultural policies (UN Draft Norms, 2003). Since, this inclusion of communal development was something new, extending the concept of rights to socio-economic and cultural rights (Deva, 2004).

The Norms also enlisted specific rights which MNCs could affect and therefore did not mention the

efficient impact of companies’ activities on all rights in different ways. Hence, everyone did not accept the inclusion of consumer protection rights, rights related to corruption and environments (Kinley, 2006).

The scheme of implementation within their activities was left to companies and if executed, periodic reports would have been submitted to designated UN organs; hence the monitoring was directed solely towards states (Kinley 2006). Governments were required to implement, look after the compliance progress with the Norms and legislate accordingly, following them as a model. The Norms did not structure remedy organs but insisted on setting up ways to offer remedies to employees and workers (Commentary on the UN Draft Norms 16(b) and 17 (a)). In case of failure, the penalty of reparation, compensation or rehabilitation to victims would have been imposed.

Perhaps, drafting the UN Norms was the first innovative and comprehensive move in the BHR movement globally. The Global Compact gave centre importance to broader human rights, aimed to be an initiative in the essence of Corporate Social Responsibility- with non-binding nature and broader scope-, while the Norms were framed to focus on the human rights responsibility of corporations in an extensive manner with the backing of international law. This comparison between the two initiatives within United Nations can be understood as exemplary of how the discussion on BHR evolved over the years till now. It demonstrated the swaying between legally binding and non-binding mechanisms and highlighted the proponents and opponents of each initiative.

### UN Guiding Principles on Business and Human Rights (UNGPs)

When the UN Norms failed and stakeholders started to further the BHR discussion in a different way. This time, the mission was to identify and elaborate the principles of corporate responsibility concerning human rights and to elaborate important concepts such as “complicity” and “sphere of influence”. Therefore, the Human Rights Commission appointed John Ruggie in 2005, as Special Representative to the UN Secretary-General (hereinafter, SRSG). He outlined, guiding principles for states and corporations which enshrined their responsibilities regarding human rights and the Protect, Respect and Remedy Framework.

The mandate of UN SRSG witnessed the failure of UN Norms since they failed to be a binding instrument for BHR governance, hence the mandate does not

mention them (Bilchitz, 2014). The UN needed a totally new mechanism which was the reason for mandating UN SRSG and he opined differently from UN Norms on BHR (Bilchitz, 2014).

In June 2011, the Council approved the Guiding Principles (hereinafter UNGPs), which are basically based on the three pillars framework of 2008, and comprise thirty-one principles outlining the 'Duty of States to Protect Human Rights', 'The Corporate Responsibility to Respect Human Rights' and 'Access to Remedy' explained in different parts. Each section divides the principles into "Foundational Principles" and "Operational Principles" and collectively they along with commentary offer interlinked standards applicable to all businesses across the globe. They apply to business enterprises of 'all sizes, sectors, operational contexts, ownership and structure' (UNGPs, 2011). The principles also offer reporting framework aimed at guidance regarding incorporating these standards into policies and plans.

The Guiding Principles pay regard to the domestic legal system of states and permit MNCs and business enterprises to show a sense of responsibility in this regard. They are not legally binding international obligations and do not change the present form of international law. They seem to be voluntary in nature as the SRSG noted as well (Ruggie, 2011). The Guiding Principles elaborate difference between the duty of the State and the responsibility of companies, which have gained wide endorsement from governments, international organizations and the business world (Ruggie, 2011).

Despite the widespread consensus, these principles were also criticized for safeguarding business interests to a great extent, not presenting any legally binding framework for corporations and enforcement mechanisms thus ignoring the pleas of victims adversely affected by the corporate activity (Deva and Bilchitz, 2013). While civil society groups and human rights advocates raised their hopes, consequently, corporations and states endorsed these principles. Thus, more challenging and motivated efforts to improve the international and domestic accountability mechanisms for the human rights approach of businesses and states were launched.

### Due Diligence in the Context

The interest of this research also includes an elaboration of the very important principle namely 'due diligence' (hereinafter HRDD), which is the backbone of IHRL and is also enshrined in the UNGPs. The duty of the State 'to protect' is linked with 'due

diligence' which signifies offering adequate preventive and remedy mechanisms to the victims of abuses and is also significant to different human rights instruments (Kulesza, 2016). States must ensure to have taken all essential steps and adopted ways which can rationally be expected for human rights protection between non-state actors as well. The Human Rights Council stresses that "the duty to protect includes the protection of persons against abuses committed by private persons and or businesses, hence State parties can be labelled to have violated the provisions of ICCPR if they permitted or failed to take adequate steps or to use 'due diligence' to prevent, punish, investigate or redress the injury caused by the acts of private organs". (HRC, 2004). The principle of 'due diligence' also requires States to take all essential steps to safeguard human rights both by persons and entities including corporations.

Like the other human rights instruments and guidelines, HRDD is equally important to UNGPs as well. States' duties include protecting human rights in enterprises owned or controlled by them, and if needed, by obligating them to exercise HRDD (UN Guiding Principles, 2011). The principles consider 'due diligence' as a tool for corporations to fulfil their due responsibility of respecting human rights. This is an "ongoing process to identify, prevent, mitigate and account for how they address their impacts on human rights". (UN Guiding Principles, 2011). The Principles discuss HRDD and mention corporate responsibility to avoid human rights abuses and undertake activities due diligently. The responsibility stated in the UNGPs is largely based on the principle of HRDD (Fasciglione, 2016). HRDD includes "steps a company must take to become aware of, preventing and addressing adverse human rights impacts". (Ruggie, 2008). The Principles also require business enterprises to ensure in exercising HRDD "that actual and potential human rights impacts, integration and action upon results, tracking of responses, and communication of the ways to address impacts are included in the HRDD processes". (UNGPs, 2011). Obviously, parent companies are also obligated to conduct 'due diligence' towards their subsidiaries in compliance with 'business relationships' as the UNGPs require as well (Cassel, 2016). HRDD is not merely the name of assessing impacts, but the prevention and mitigation of those impacts are also its essential components (Lindsay, R et al, 2017).

The HRRD requirement from businesses to fulfil their human rights responsibilities signifies that human rights issues and their relevance for business enterprises become noticeable and manageable



through a model, which should be well-known to the management (McCorquodale, 2009).

It denotes that HRDD is not only an ethical imperative but also a strategic practice. By incorporating human rights considerations into business operations, States and businesses can create positive social and global impacts, enhance their reputation, and foster sustainable and responsible growth.

### The Three Pillars Framework

In 2008, the report by John Ruggie—the then SRSG—came up with the ‘protect, respect and remedy framework’ which was sanctioned by the Human Rights Council unanimously and enforced in 2011. This framework was aimed to highlight three cohesive, complementary to each other and interlinked ‘protect, respect and remedy’ responsibilities. (Ruggie, 2008). The report noted down that: ‘each principle is a compulsory element of the framework’ because “the state duty to protect is the core of international human rights law, the corporate responsibility to respect is hoped by the society from business and access to remedy is important as the most serious efforts cannot prevent all human right abuses, since access to judicial forums is mostly problematic, and non-judicial redress is limited in many aspects”. (Ruggie, 2008). The Guiding Principles and the Framework keep the duty of state and corporate responsibility separate from each other. According to John Ruggie, this distinction aims to highlight that independent corporate responsibility has not been obligated under IHRL. Accordingly, Business enterprises are handled with regard to human rights within the jurisdiction of the concerned States and not beyond, however, they are allowed to address home-based businesses for cross-border violations.

The Council extended the mandate of Ruggie till 2011 to operationalize the framework. This time, the mandate was to promote the Framework and find ways to strengthen the standards and principles outlined therein. The ‘access to remedy’ includes international mechanisms, national legal systems, quasi-judicial systems, and grievance mechanisms of companies. It is known that national grievance and remedial mechanisms are the first instance forums regarding BHR violations, however, little option is available with international organizations for motivating States about ways to “facilitate access to effective non-state grievance mechanisms dealing with business-related human rights harms”. (UNGPs, 2011). However, the Framework seems to have

advanced interdisciplinary discussion on BHR but with its narrowed focus.

### The OECD Guidelines for Multinational Corporations

The OECD Guidelines for MNCs which were issued in 1976 and are voluntary in nature, aimed at addressing states instead of businesses directly, since then, they have been revised multiple times but most importantly a broader statement concerning human rights was included in the year 2000. In the year 2011, reformed guidelines were issued setting more demanding standards on corporations.

Some have seen these Guidelines as a pre-emptive step by the OECD member countries. Around that time, drafting UN Norms was negotiated and discussed at the UN level which would have been more forcing and mandating than these guidelines (Ruggie and Nelson, 2015). A long paragraph in these Guidelines addresses the human rights obligations of the companies which later on aligned with UNGPs after 2011 (Ruggie, 2011) The OECD Guidelines were not legally binding and contained a mechanism grounded in the so-called National Contact Points (NCPs). They enshrined an intergovernmental approach in regulating MNCs and gained importance in the accountability struggle enshrined in the present-day BHR movement.

The OECD Guidelines are one of the significant BHR instruments, endorsed and adopted by the participant States (Hedley, 1999 and Letnar Cernic, 2008). They commit to implementing the Guidelines concerning all business enterprises that operate within or from their jurisdiction. In many countries, the implementation has also been linked to financial support and export credits (Schliemann 2012), hence, they need to incorporate them in the cross-border operations of the companies as well.

There are three bodies that implement and promote the OECD Guidelines namely; The National Contact Points (NCPs), the Investment Committee and the Working Party on Responsible Business Conduct of the Committee. The OECD Guidelines expect the participating states to establish the NCPs inside their jurisdiction, and aimed at promoting the Guidelines, reply to queries about the Guidelines, and address complaints concerning non-compliance of business actors in their specific processes.

From a critiquing mindset, it can be said that the OECD Guidelines only offer recommendations as they are voluntary in nature and non-justiciable with regard to companies. They address the participating States

only, where the NCPs exist either due to membership of the state or their voluntary implementation of the OECD Guidelines. NCP plays a mediatory role since it does not act as a judicial body for victims of abuse.

### Efforts for a Binding Treaty

This time the pendulum swung back again with a move for binding regulative mechanisms addressing the corporate conduct concerning human rights. Alongside the full implementation stage of UNGPs, the Ecuadorian and South African governments launched a new attempt in the UN, to discuss a possible binding treaty with regard to BHR in June 2014. They tabled a resolution, which the Human Rights Council passed; thus an open-ended inter-states working group was constituted; soon after discussions on the proposed treaty started in 2015 and continued. Another resolution was tabled by Norway on 12<sup>th</sup> June and updated the same on 17<sup>th</sup> and 23<sup>rd</sup> June. In its proposal, Norway requested the Working Group to come up with its report for a binding treaty built rooted in the UNGPs (HRC, 2014). This proposal was less invasive as compared to that of Ecuador and South Africa since only twenty-two States favoured it.

The first draft of the treaty was released in 2018 that was revised a year later in 2019. In August 2020, the second revised draft was released. The inter-governmental working group (IGWG) published the third revised draft of the proposed treaty in August 2021 which encompasses a preamble and twenty-four articles divided into three sections. The preamble focuses on recalling all the core human rights instruments, the ILO Convention on Rights at Work and Tripartite Declaration on MNEs, the duty of the state concerning internationally recognized human rights, an obligation of enterprises to respect these rights, avoid causing or assisting in human rights abuses as they occur, and take necessary steps to mitigate abuses directly linked with their activities, products and or services of their sphere of influence'. The draft prescribes its purpose in Article 2 stating 'the aforementioned aims, highlighting the enforceability and monitoring mechanisms, access to remedy for victims, along with strengthening international cooperation and mutual legal assistance.' (OEIGWG Third Revised Draft, 2021).

Some have seen the treaty negotiations as a competition between the UNGPs and the future treaty and opine that even some states may stop implementing the Guiding Principles (Blackwell and Vander Meulen, 2016). These efforts may cause adversely on the already established framework

Enshrined in the UNGPs with global and stakeholders' consensus (O'Brien et al, 2016). In contrast, some view that the proposed treaty and UNGPs should complement each other in forming consensus and standards for business and human rights worldwide (Bilchitz, 2016).

After closely examining the journey, it can be said that the resolution for a proposed legally binding treaty was a reaction to human rights abuses by MNCs and difficulty in access to effective remedies and justice. The present draft seems to be centralized around States to fulfil their duty to protect and also obliges the global economy to protect, respect and promote human rights. Although, the binding treaty may not completely cure the complex problem of human rights harms in the business context but can offer a sense of responsibility to states to harmonize their national legislations and to strengthen their existing non-binding instruments such as National Action Plans.

### Conclusion

The core human rights law establishes universally recognized rights in the context of business. The UDHR sets common standards for human rights realization, urging member states, and corporations, vis-à-vis other non-state actors to fulfil their commitments. The UDHR's significance has grown over time, potentially attaining a juridical role and customary international law status, imposing primary obligations on States and theoretical duties on other stakeholders, including corporations.

It is worth noting that international treaties and instruments primarily target States but also impose theoretical obligations on private actors. The UDHR, the ICCPR, and the ICESCR urge and mandate States to promote, observe and ensure respect for civil, political, socio-economic and cultural rights respectively. MNCs and other corporations play a crucial role in their promotion and implementation as well.

There are various other soft law measures such as the Global Compact, UNGPs, and the OECD Guidelines which emerged to promote business responsibility for human rights. Though lacking binding obligations, these initiatives encouraged advocacy and good practices, offering ways for companies to incorporate human rights standards into their operations. The UN Norms, supported by NGOs, aimed to regulate corporate behaviour more comprehensively through international law. However, the business community perceived them as redundant, since states already assumed these liabilities.

The UN Guiding Principles also encompass a very important principle of human rights due diligence as a fundamental requirement discussed in many other human rights instruments and guidelines such as ICCPR, OECD Guidelines and UNGPs as well. The 'due diligence' entails that companies should conduct human rights impact assessment and address such adverse impacts. It is not merely the name of knowledge of impacts or the ways business activities may adversely impact the human rights of companies' stakeholders, rather HRDD asks business enterprises to address these adverse impacts and redress the harms adequately and effectively.

In the wake of the 'Three Pillars Framework' and UNGPs, more meaningful and significant regional and domestic level developments are taking place and materializing the BHR discussion more effectively,

hence many countries have released their 'National Action Plans on Business and Human Rights', whereas many other are processing or have taken steps in that journey, which is evident of the importance of BHR in policy-making of the governments.

Despite these global efforts, the efficacy is a question mark, which led to negotiations for a legally binding treaty, driven by concerns over human rights abuses by businesses and calls for accessible remedies. The present draft for a future treaty stresses States to due diligently protect human rights in the business context, obliging the international economy to uphold and promote universally recognized rights. The convergence of regional and domestic developments, along with the potential for a binding treaty, signifies the growing importance of BHR governance globally.

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