

BUSINESS AND HUMAN RIGHTS INITIATIVES: FINDING THE RIGHT BALANCE BETWEEN SOFT AND HARD LAW

Abstract

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

Key words: *International Law, Business and Human Rights, Soft Law, Globalization, Supply Chains*

Word Count: 8,970 without footnotes.

BUSINESS AND HUMAN RIGHTS INITIATIVES: FINDING THE RIGHT BALANCE BETWEEN SOFT AND HARD LAW

INTRODUCTION

Today, business and human rights (BHR) issues permeate some of the most pressing problems faced both by governments and business. These range from economic inequality¹ to the protection of human rights in free trade deals² to supply chain matters.³ The importance of the need to protect BHR issues has also been highlighted in recent scandals such as the collapse of a garment factory in Bangladesh⁴ or the large number of employee suicides in one of Apple's largest suppliers in China.⁵ Indeed, the idea of business and human rights as encompassing two disparate systems that operate in isolation from one another is gradually being rejected by both governments and business. BHR issues are now viewed as a predicament that must be addressed.

Yet despite the growing recognition of the importance for business to address human rights issues, responsibilities for companies in this area are mainly situated at the voluntary level. Corporate BHR responsibilities are thus rarely framed in mandatory language and enforcement of these voluntary responsibilities also tends to be weak or non-existent. For that reason, BHR corporate responsibilities are likely best characterized as 'soft' law.

Recently, however, there have been attempts to 'harden' BHR responsibilities; that is moved in the direction of mandatory from voluntary. Several states are in the midst of negotiating a binding BHR treaty, which, upon completion, would impose legally binding

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

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

³ M. Mason et al., 'Shrimp sold by global supermarkets is peeled by slave labourers in Thailand' *The Guardian* (14 December 2015).

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

⁵ J. Chan et al., 'Dying for an iPhone: the lives of Chinese workers' *ChinaDialogue* (15 Apr 2016).

human rights obligations on multinational companies.⁶ Efforts have also been made at the domestic level to harden BHR responsibilities. While binding legal obligations certainly bring clarity and enforceability to business responsibilities in this area, businesses have frequently opposed such initiatives. In fact, predecessor efforts to impose mandatory BHR obligations on businesses met with such resistance that the initiatives had to be abandoned altogether.⁷

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

The article proceeds as follows. Part I begins by elaborating on the definition and differences between the notions of ‘soft’ and ‘hard’ law, finding that the concepts are not dichotomous but rather operate on a continuum. It then identifies the leading multilateral BHR initiatives and attempts to place them on the soft to hard law continuum. Having concluded that most BHR initiatives are located closer to the soft law end of the continuum, Part II discusses whether these initiatives need to become binding legal obligations, drawing from examples in other areas of the law. This Part concludes by finding utility in soft law initiatives that incorporate characteristics of hard law. Part III moves to examine how BHR soft law initiatives can be hardened, or moved closer from voluntary to mandatory, in order to better establish norms in this area and makes suggestions of how to do so. Finally, in Part IV, the

⁶ For an overview of this treaty process see B. Choudhury, ‘Spinning Straw into Gold: Incorporating the Business and Human Rights Agenda into International Investment Agreements’ (2017) 38:2 U. Penn. J. Int’l L. 101.

⁷ I. Bantekas, ‘Corporate Social Responsibility in International Law’ (2004) 22 B.U. Int’l L.J. 309, 319.

article examines the circumstances under which BHR issues require binding legal obligations in addition to hardened soft law initiatives. Drawing from legalized approaches both at the international and domestic levels, this part explores the scope and limits of designing future binding obligations in this area.

I. SOFT AND HARD LAW

A. *Distinguishing Between Soft and Hard Law*

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

The lack of a precise definition of soft law has led to speculation as to whether soft and hard law are dichotomies¹² or whether they simply represent two ends of a continuum, which

⁸ R. R. Baxter, ‘International Law in ‘Her Infinite Variety’’ (1980) 29 ICLQ 549.

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

¹⁰ D. Shelton, ‘Normative Hierarchy in International Law’ (2006) 100 AJIL 291, 319-320; Baxter, n 8 above, 549.

¹¹ T. Gammeltoft-Hansen et al., ‘Introduction: Tracing the Roles of Soft Law in Human Rights’ in S. Lagoutte et al. (eds) *Tracing the Roles of Soft Law in Human Rights* (Oxford: OUP, 2016), 3.

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

ranges from binding legal obligation on one end to “complete freedom of action” on the other.¹³ Positivists argue that an instrument is either law or not making the idea of soft law redundant.¹⁴

However, for others, soft law is thought of in terms of a continuum, reflecting variances in normativity and behaviour-influencing capacity. For these commentators, although the legal content of soft law can vary, it is still viewed as ‘law’ since the norms found in soft law are formulated as rules and are designed to guide behaviour.¹⁵ Yet their content remains ‘soft’ in terms of their preciseness, ability to be rendered more or less legal at the *ex ante* negotiation stage, enforceability, justiciability, normativity, or their binding nature.¹⁶

The multiplicity of forms soft law can take also support the idea of a soft-hard law continuum, rather than distinct categories. Soft law can be found in a breadth of instruments including treaties, codes of conduct, voluntary resolutions, joint declarations, ministerial conferences, tacit or oral agreements, final communiqués, and statements prepared by non-governmental organizations purporting to delineate international principles.¹⁷ However, it is not the form of an instrument that is determinative of its legal status.¹⁸ While treaties containing precise commitments and specificity of obligations undertaken or rights granted are more indicative of hard law,¹⁹ treaties that provide for the “gradual acquiring of standards or for

¹³ Shelton, n 10 above, 320; C.M. Chinkin, ‘Normative Development’ in D. Shelton (ed.), *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (Oxford: OUP, 2003), 37; I. A. Olsson, ‘Four competing approaches to international soft law’ (2013) 58 *Scandinavian Studies in Law* 177, 187.

¹⁴ d’Aspremont, n 12 above; J. Klabbers, ‘The Redundancy of Soft Law’ (1996) *Nordic Journal of International Law* 167; K. Raustiala, ‘Form and Substance in International Agreements’ (2005) 99 *AJIL* 586; J.L. Goldsmith and E.A. Posner, *The Limits of International Law* (Oxford: OUP, 2005), 81-82; Cerone, n 12 at 16.

¹⁵ Cerone, n 12 at 16.

¹⁶ d’Aspremont, n 12 above, 1081-87; J. d’Aspremont, ‘Softness in International Law: A Self-Serving Quest for New Legal Materials: A Rejoinder to Tony D’Amato’ (2009) 20 *EJIL* 911, 914; G.C. Schaffer and M.A. Pollack, ‘Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance’ (2010) 94 *Minnesota L. Rev.* 706, 716; W. M. Reisman, ‘A Hard Look at Soft Law’ (1988) 82 *ASIL Proceedings* 373; W. M. Reisman, ‘Soft Law and Law Jobs’ (2011) 2:1 *J. of Int’l. Dispute Settlement* 25.

¹⁷ C.M. Chinkin ‘The Challenge of Soft Law: Development and Change in International Law’ (1989) 38 *ICLQ* 850, 851; Klabbers, n 14 above, 168; Olsson, n 13 above, 180-185.

¹⁸ d’Amato and K. Engel (eds) *International Environmental Law Anthology* (Cincinnati: Anderson Publishing Company, 1996), 56-57.

¹⁹ Chinkin, n 17 above, 851; K.W. Abbott and D. Snidal, ‘Hard and Soft Law in International Governance’ (2000) 54(3) *Int’l. Org.* 421.

general goals and programmed action” are seen as soft and devoid of legal content.²⁰ In addition, delegation to a third party for interpretation of the instrument can define where on the continuum a particular instrument lies.²¹

Discerning whether an area is soft or hard law may also be facilitated by examining the legal consequences that must necessarily follow from performance or breach of that area. Where the legal consequences – of both performance and breach – can be ascertained with precision, only then can an area be considered to have hardened.²² Consequently, soft law norms are more likely to be characterized by vague or uncertain outcomes flowing from either the performance or breach of that norm.

Finally, the authority of the instrument drafter may play a role in determining its hard or soft law status. Signals of authority emanating from the drafters can clarify whether an instrument is law or whether it represents only “statements in the subjunctive mood”.²³ For example, resolutions emanating from the UN Security Council relating to the maintenance of peace are clearly an indicator of firm authority, whereas UN General Assembly handlings of matters not assigned to it are more indicative of soft authority.²⁴ In other words, soft law is more likely to be evident when the drafter of the instrument possesses little or no authority.

B. Characterizing BHR initiatives

Having distinguished between soft and hard law and delineated arguments in support of a continuum view of soft and hard law, this part moves to discuss how the leading international BHR initiatives can best be characterized. At the outset, it is important to note that these initiatives operate mainly in a patchwork formula. Thus, there are a number of different multilateral BHR initiatives, which aim to cover a broad range of issues and which cover issues

²⁰ Chinkin, n 17 above, 851.

²¹ Abbott and Snidal, n 19 above, 421.

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

²³ Reisman (1988), n 16 above, 373.

²⁴ *ibid.* 374.

already covered by different institutions in addition to a lesser number of issue-specific initiatives.²⁵ As a result, the area lacks an overarching governance framework.

1. *Leading Multilateral BHR Initiatives*

Initiatives to delineate BHR obligations began in the late 20th century as part of an effort by developing countries to control the actions of multinational corporations (MNCs).²⁶ Although these efforts were mainly in vain, they prompted OECD countries to promulgate their own initiative as a way to counter the actions of developing countries.²⁷ This led to a series of guidelines, which later became known as the OECD Guidelines for Multinational Enterprises.²⁸ The OECD Guidelines consisted of broad, non-binding standards and practices for corporations to make positive contributions to economic and social progress.²⁹

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

In 1988, the United Nations made a concerted effort to address business and human rights problems by constituting a working group to explore the activities of MNCs.³¹ These

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

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

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

²⁸ OECD Guidelines for Multinational Enterprises (2011).

²⁹ *ibid.* para. 2. and 8.

³⁰ International Labour Organization, *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy* (1978) 17 I.L.M. 422.

³¹ D. Weissbrodt and M. Kruger, 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard To Human Rights' (2003) 97 AJIL 901, 903-905.

efforts produced the *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights* (“UN Norms”), a draft code of conduct for regulating MNC conduct.³² The U.N. Norms became the first non-voluntary initiative to detail BHR obligations, although due in part to business opposition, they were ultimately not adopted.³³

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

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

After a further three years of examination, Ruggie elaborated on the three different pillars of responsibility and ultimately produced the *UNGPs on Business and Human Rights* (UNGPs).³⁸ In particular, in relation to the issue of corporate responsibility for human rights,

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

³³ Office of the High Commissioner for Human Rights, *Responsibilities of transnational corporations and related business enterprises with regard to human rights* (2004) (E/CN.4/DEC/2004/116)

³⁴ See A. Rasche, ‘A Necessary Supplement – What the United Nations Global Compact Is and Is Not’ (2009) 48:4 *Business Society* 511.

³⁵ *ibid.*

³⁶ UN Commission on Human Rights, *Human rights and transnational corporations and other business enterprises - Human Rights Resolution 2005/69* (2005) (E/CN.4/RES/2005/69), para. 1.

³⁷ U.N. Human Rights Council, *Protect, Respect and Remedy: a Framework for Business and Human Rights - Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie*, U.N. Doc. A/HRC/8/5 (Apr. 7, 2008).

³⁸ U.N. Human Rights Council, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, HR/PUB/11/04 (2011).

he concluded that corporations should refrain from infringing on the human rights of others as well as “address adverse human rights impacts with which they are involved”.³⁹ Moreover, he advised that corporations should not cause or contribute “to adverse human rights impacts through their own activities” and should “prevent or mitigate adverse human rights impacts that are directly linked to their operations” by engaging in a process of human rights due diligence.⁴⁰ Today the UNGPs reflect the latest international standard for corporate responsibility.

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

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

At first glance, it seems prudent to characterize the existing global governance framework for BHR issues as soft law given that all the leading international initiatives are voluntary and non-binding. However, the primary criteria used to distinguish soft from hard law – that is, whether obligations are binding, the degree of precision associated with the obligations and with the legal consequences of performance and breach, whether there has been a delegation of the interpretation of the obligations to a third party, and the level of authority of the drafter – suggests that at least some of these initiatives bear characteristics traditionally associated with hard law.

For example, despite the non-binding nature of the OECD Guidelines for Multinational Enterprises, they contain characteristics associated with hard law. In addition to having the authority of the OECD behind them – an international organization composed of 39 member

³⁹ *ibid.* at Guiding Principle 11.

⁴⁰ *ibid.* at Guiding Principle 13; UN Human Rights Council, n 37 above, para. 25 and para. 56-64.

states responsible for 80 percent of the world's trade and investment and specializing in the promotion of global economic and social well-being – the OECD Guidelines contain a degree of precision in detailing the standards of conduct corporations should bear. For instance, the Guidelines recommend that corporations 'provide for or co-operate through legitimate processes in the remediation of adverse human rights impacts' caused by the corporation, but they do not define 'legitimate process'.⁴¹ The OECD Guidelines also delegate their interpretation to third parties or reviewing bodies set up in individual countries known as National Contact Points and these bodies further delineate the consequences of breach of the OECD Guidelines as they are tasked with enforcement as well.⁴² However, the National Contact Points cannot impose any binding consequences on corporations for breach of the Guidelines and their overall efficacy as a reviewing or accountability body for the OECD Guidelines has been questioned by commentators.⁴³ Still, despite containing some hard law characteristics, the OECD Guidelines seemingly occupy a position away from pure soft law.

Similarly, the ILO Tripartite Declaration, another non-binding initiative, employs characteristics associated with hard law. Promulgated under the authority of the ILO – a long-standing UN agency with 187 member states that provides authoritative expertise on labour issues – the Tripartite Declaration details with precision the standards expected by corporations with regards to labour and employment issues. Thus, it details policies on employment promotion, child and forced labour, safety and health standards as well as policies on a host of other employment and labour issues. Moreover, the ILO delegates the interpretation of the ILO Tripartite Declaration to the Officers of the Committee on Multinational Enterprises⁴⁴ as

⁴¹OECD Guidelines, n 28 above, chap. IV(6) and Commentary, para. 46.

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

⁴³ J. L. Cernic, 'Corporate Responsibility for Human Rights: A Critical Analysis of the OECD Guidelines for Multinational Enterprises' (Sept 2008) 3:1 *Hanse LR* 71; O. de Schutter, *Transnational Corporations and Human Rights* (Oxford: Hart, 2006), 8-9.

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

well as imposes reporting obligations on governments.⁴⁵ However, the ILO Tripartite Declaration neither specifies the consequences of breach of its provisions nor specifies any type of enforcement vehicle.⁴⁶ Thus, it contains fewer characteristics associated with hard law than the OECD Guidelines, but still remains far from pure soft law due to the ILO Tripartite Declaration's precision of obligations and third-party delegation of its interpretation along with the ILO's considerable authority and expertise on employment and labour issues.

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

⁴⁵ For a full overview of the process see de Schutter, n 43 above, 6-8.

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

⁴⁷ D. Weissbrodt, 'Business and Human Rights' (2005) 74 *University of Cincinnati Law Review* 55, 66; S. Deva, 'Global Compact: A Critique of UN's Public-Private Partnership for Promoting Corporate Citizenship' (2006) 34 *Syracuse J. Int'l L. & Comm.* 107, 129.

⁴⁸ UN Global Compact, Principle 10.

⁴⁹ OECD Guidelines, n 28 above, 47-50.

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

Finally, characterizing the UNGPs, the most current, and arguably the most influential, BHR initiative as soft or hard law proves rather more difficult. This is primarily because the UNGPs were grounded deliberately by Ruggie in social, rather than legal, norms.⁵¹ Ruggie noted that business responsibility for human rights was soft-law oriented, in part, because it was derived from social norms or expectations.⁵² The UNGPs thus purposely frame the corporate responsibility to respect human rights as a ‘responsibility’, not as a legal obligation, and therefore not as hard law.⁵³ Consequently, characterizing the UNGPs necessarily begins at a point away from hard law in order to conform to their drafter’s intent.

Apart from their deliberate grounding in non-legal norms, the UNGPs also naturally position themselves away from hard law, despite the considerable authority of both the UN Human Rights Council and John Ruggie and the fact that the UNGPs were the first business and human rights instrument to be unanimously approved by the UN Human Rights Council.⁵⁴ One of the main reasons for the UNGPs tilt towards soft law is a result of its failure to specify the meaning of the “corporate responsibility to respect”. Compare, for instance, the UN Norms, which provided detailed and specific corporate obligations in relation to a variety of rights including human rights, the rights of workers, consumer protection and environmental protection.⁵⁵ While a subsequently drafted interpretive guide has later managed to elaborate somewhat on the corporate responsibility in the UNGPs, the notion is still far less precise than what is found in the UN Norms.⁵⁶

⁵¹ UN Commission on Human Rights, *Report of the United Nations High Commissioner on human rights on the responsibilities of transnational corporations and related business enterprises with regard to human rights—business and human rights: towards operationalizing the ‘protect, respect and remedy’ framework* (2009) (A/HRC/11/13), para. 46.

⁵² *ibid.* para. 46.

⁵³ *ibid.* para. 58 and para. 62.

⁵⁴ UN Human Rights Council Res. 17/4, U.N. DOC. A/HRC/17/L.17/Rev.1 (June 15, 2011).

⁵⁵ UN Norms, n 32 above, para. 2-14.

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

The UNGPs also do not specify the consequences of a breach of the corporate responsibility to respect or involve any third party oversight. Instead, they recommend that states take primary responsibility for adjudicating failures of corporate responsibility to respect or, alternatively, suggest that corporations or industry create mechanisms for adjudicating such failures.⁵⁷ The UNGPs even recognize that there are gaps or limitations in access to effective remedy mechanisms for victims of the failure of the corporate responsibility to respect human rights, but still do not provide a monitoring or enforcement mechanism which would oversee the espoused conduct in the UNGPs.⁵⁸ As a result, despite the considerable authority of the UN Human Rights Council, the relative lack of preciseness in both the content and enforcement of the UNGPs combined with its non-binding nature and its lack of third party oversight position the UNGPs much closer to soft law than hard law.

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

⁵⁷ UN Human Rights Council, n 38 above, para. 82-101.

⁵⁸ *ibid.* para. 103.

Nevertheless, none of these initiatives – not even those possessing several characteristics traditionally associated with hard law– could be confused with binding, legal obligations. However, as the OECD Guidelines, in particular, demonstrate, by adopting some characteristics traditionally associated with hard law BHR initiatives can gravitate closer to the hard law end of the continuum. As a result, if an argument exists that BHR initiatives should be ‘hardened’ or moved closer to mandatory obligations, the adoption of characteristics associated with hard law opens the possibility of strengthening BHR initiatives without adopting binding, legal obligations.

II. Hardening business and human right initiatives

As BHR initiatives occupy numerous different positions on a soft to hard law continuum, this section examines whether future BHR initiatives should move closer to the hard law end of the continuum. As the practice of the states attempting to draft a binding business and human rights treaty indicates, the ultimate objective of shifting BHR initiatives along the soft to hard law continuum is ‘the creation of direct international law obligations for corporations regarding their human rights accountability’.⁵⁹ The question thus arises whether establishing new norms for corporations vis-à-vis human rights is better achieved through soft or hard law.

A. Choosing between soft and hard law

Soft law bears a number of different advantages. For one, it is more flexible than hard law as it grants governments the room to manoeuvre and can make it easier for them to respond to

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

problems or changing circumstances on an as needed basis.⁶⁰ In particular, for areas which are developing or changing quickly, soft law instruments are particularly useful as they can be adopted rapidly and easily changed. Their utility is especially high for areas which are marked by a lack of consensus or for areas in which governments are reluctant to make binding commitments.⁶¹ Soft law can further be used to overcome inter-state deadlocks⁶² or act as a compromise between governments that cannot agree on the extent of regulatory control that a particular area warrants.⁶³

Soft law can also be advantageous in the sense that it is not law in its traditional sense – in that it is not subject to the normal processes that must be complied with to enact law – but it still may be able to influence conduct in a desired manner despite its non-legal status.⁶⁴ In this sense, soft law may be preferable to ‘no law’ or to a binding instrument with “diluted and vague provisions”.⁶⁵ Soft law is also a tool for coordination of behaviour between actors, which it does by fostering dominant norms.⁶⁶ Soft law serves to shape and share values as well as to create a standard of expectations. It can mould both the acts of governments and those of non-state actors, such as corporations, as well.⁶⁷

Soft law further lowers contracting costs. With non-soft law instruments, negotiation and drafting costs are increased as are the approval and ratification process.⁶⁸ The costs of

⁶⁰ Chinkin, n 17 above, 852; Shelton, n 10 above, 322; Abbott and Snidal, n 19 above, 423; A. Newman and D. Bach, ‘The European Union as Hardening Agent: Soft Law and the Diffusion of Global Financial Regulation’ (2014) 21:3 *Journal of European Public Policy* 430.

⁶¹ Shelton, n 10 above, 322; Abbott and Snidal, n 19 above, 423.

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

⁶³ Gold, n 62 above, 444.

⁶⁴ Shelton, n 10 above, 322; P. Weil, ‘Towards Relative Normativity in International Law’ (1983) 77 *AJIL* 413, 415.

⁶⁵ Chinkin, n 17 above, 861.

⁶⁶ Brummer, n 9 above, 132.

⁶⁷ Chinkin, n 17 above, 865; Shelton, n 10 above, 322; Weil, n 64 above, 415.

⁶⁸ Abbott and Snidal, n 19 above, 434.

acceding sovereignty in more legalized instruments also tend to be higher, particularly in multilateral instruments.⁶⁹

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

On the other hand, there are also many instances where legalization, or hard law, is preferable. Legalization enables states to signal the credibility of their commitments and this is particularly important when coordination or cooperation between states is necessary.⁷⁴ It can also address problems of incomplete contracting by creating mechanisms to interpret parties' commitments.⁷⁵ Hard law further prevents states from engaging in opportunistic behaviour or from reneging on its commitments, both of which serve to enhance the credibility of its commitments.⁷⁶ In addition, it can enhance the enforcement of a state's commitments, especially if interpretation of the law in question is delegated to a third party.⁷⁷ Delegation also prevents self-interpretation of the instrument, which again prevents opportunistic behaviour.⁷⁸

⁶⁹ *ibid.* 435-437.

⁷⁰ Lagoutte et al., n 11 above, 1; Shelton, n 10 above, 320-321; Ulrich Fastenracht, 'Relative Normativity in International Law' (1993) 4 EJIL 305; Abbott and Snidal, n 19 above, 423.

⁷¹ Shelton, n 10 above, 320; Newman and Bach, n 60 above; Lagoutte et al., n 11 above, 1.

⁷² Chinkin, n 17 above, 862. See also Abbott and Snidal, n 19 above, 456.

⁷³ Chinkin, n 17 above, 862.

⁷⁴ Schaffer and Pollack, n 16 above, 717; Abbott and Snidal, n 19 above, 426; C. Brummer, 'Why Soft Law Dominates International Finance' (2010) 13 J. Int'l Econ. L. 624, 625.

⁷⁵ Schaffer and Pollack, n 16 above, 718.

⁷⁶ Abbott and Snidal, n 19 above, 427.

⁷⁷ *ibid.*

⁷⁸ *ibid.*

Finally, hard law can enhance the legitimacy of an obligation, which, in turn, can act as a “compliance pull”.⁷⁹ Compliance may even be heightened because of the discourse that legalization requires: an emphasis of rules and facts over interests and precedents, which naturally constrains state action.⁸⁰

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

Conversely, soft law is preferable in areas where it is necessary to counter high contracting costs, particularly in relation to sovereignty costs, which are raised when external authority is exerted over issues of particular concern or interfere with state-citizen relations or when issues are new and complex.⁸⁶ Nevertheless, the continuum between soft and hard law is confirmed by the fact that relaxing one or more elements of legalization – the binding nature of the obligations, the precision of the obligations, or the delegation to external authorities – will result in soft law.⁸⁷

⁷⁹ T.M. Franck, ‘Legitimacy in the International System’ (1988) 82 AJIL 711, 712.

⁸⁰ Abbott and Snidal, n 19 above, 429.

⁸¹ *ibid.* 429, 433.

⁸² *ibid.*

⁸³ *ibid.* 422. See also Schaffer and Pollack, n 16 above, 718.

⁸⁴ Abbott and Snidal, n 19 above, 433.

⁸⁵ Brummer, n 9 above, 132.

⁸⁶ *ibid.* 427, 441.

⁸⁷ Abbott and Snidal, n 19 above, 423.

B. Should BHR initiatives be soft or hard?

From the review of the advantages of soft and hard law, it appears, at first glance, that BHR initiatives should be composed of mainly hard law obligations. Since legalization acts as a compliance pull and it is particularly useful in areas where violations from commitments can impose externalities on others or where non-compliance is difficult to detect, the very nature of BHR issues suggests a need for hard law. BHR involves a high risk of imposing severe externalities onto others, as both the Bhopal disaster⁸⁸ and the Rana Plaza disaster⁸⁹ demonstrate. It is also an area where non-compliance may be difficult to detect, particularly if victims fear the power of the offending corporation. Thus, it would benefit from mechanisms which induce compliance.

However, BHR is also an area which is developing and which faces potentially high sovereignty costs if international external authority were to be exercised over the issues. It is also an area notable for being one in which governments are reluctant to make binding commitments. Because of these factors, contracting costs in the area of BHR are very high.

Moreover, the BHR arena is generally reflective of an area plagued by a lack of consensus or political will. Corporations do not agree on the extent of their responsibilities on this issue and, accordingly, governments – which may be beholden to the interests of corporations – do not agree on the responsibility that should be imposed on these entities. This lack of consensus is further complicated by the uncertainty of the status of corporations under international law.⁹⁰ While states are considered subjects of international law, and therefore bear clear human rights obligations under international law, corporations are not necessarily

⁸⁸ BBC, ‘On this Day, December 3, 1984: Hundreds die in Bhopal chemical accident’ (3 Dec 1984).

⁸⁹ Manik and Yardley, n 4 above.

⁹⁰ J.E. Alvarez, ‘Are Corporations “Subjects” of International Law?’ (2011) 9 Santa Clara J. Int’l L. 1.

viewed as having the same status. This leaves open the question as to whether international law can impose human rights obligations on these entities.⁹¹

Given the lack of consensus between states on the extent of corporate responsibilities for human rights, it is likely that the law's uncertainty as to whether corporations should legally bear responsibilities for these issues will remain. This, combined with the potentially high sovereignty and contracting costs suggests that a soft law governance approach may be more appropriate.

In fact, relying on a soft law governance framework for BHR issues is supported by its pervasive use in other areas of the law. Ranging from environmental law⁹² to anti-bribery law⁹³ to nuclear non-proliferation⁹⁴ to multilateral arms control,⁹⁵ soft law is being increasingly relied upon as a source of norm guidance. In some areas, the increased usage of soft law results from its use as tool to act as a precursor to hard law with the ultimate goal being the conclusion of a binding international treaty.⁹⁶

However, in other areas, soft law is being used not as an ends to a mean but rather as a valuable tool in its own right. For instance, corporate governance in most states is now subject to soft law or voluntary standards. Indeed, not only are many of the corporate governance standards voluntary, but the standards themselves are also focused on the process rather than

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

⁹² P.M. Dupuy, 'Soft Law and the International Law of the Environment' (1991) 12 *Michigan J. Int'l L.* 420; J. Friedrich, *International Environmental "soft law" - The Functions and Limits of Nonbinding Instruments in International Environmental Governance and Law* (Heidelberg: Springer, 2013).

⁹³ C. Rose, *International Anti-Corruption Norms: Their Creation and Influence on Domestic Legal Systems* (Oxford: OUP, 2015); K. W. Abbott and D. Snidal, 'Values and Interests: International Legalization in the Fight Against Corruption' (2002) 31 *J. Legal Stud.* 141, 162.

⁹⁴ T. Meyer, 'Soft Law as Delegation' (2008) 32 *Fordham International Law Journal* 888.

⁹⁵ D. Shelton, 'Multilateral Arms Control' in D. Shelton, et al., eds. *Commitment and Compliance: The Role of Non-binding Norms in the International Legal System* (Oxford: OUP, 2000); R.L. Williamson, Jr., 'Hard Law, Soft Law, and Non-Law in Multilateral Arms Control: Some Compliance Hypotheses' (2003) 4 *Chicago J. Int'l L.* 59.

⁹⁶ See, e.g., A. Ramasastry, 'Closing the governance gap in the business and human rights arena: lessons from the anti-corruption movement' in S. Deva and D. Bilchitz, *Human Rights Obligations of Business Beyond the Corporate Responsibility to Respect?* (Cambridge, CUP, 2013) 162; J.E. Alvarez, *International Organizations as Law-makers* (New York: OUP, 2005) 232.

the issues.⁹⁷ Thus, governments do not regulate the gender composition of boards, they merely recommend that companies disclose the gender of board members.⁹⁸ Corporations are also not required to adhere to the recommended standards or processes and can, instead, ‘explain’ why they have chosen not to comply with the standard in question.⁹⁹

Similarly, soft law is being used in the area of international financial regulation as a valuable tool in and of itself.¹⁰⁰ For financial and securities regulation issues, soft law is even viewed as a superior solution because of the dynamism of this continually evolving issue area.¹⁰¹ In these areas, soft law is valued for both creating leeway for adaptability to individual circumstances and for limiting encroachment on sovereign authority.¹⁰² In international financial regulation, soft law is even viewed as essential because it facilitates low-cost collaboration, drives “a collective approach to international engagement” and allows governments to “tackle complex, quickly evolving global problems that cannot be addressed unilaterally”.¹⁰³

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

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

⁹⁸ See, e.g., see B. Choudhury, ‘New Rationales for Women on Boards’ (2014) 34 OJLS 511, 515.

⁹⁹ R.V. Aguilera R. V., et al. ‘Regulation and Comparative Corporate Governance’ in M. Wright et al. (eds) *The Oxford Handbook of Corporate Governance* (Oxford: OUP, 2013), 37.

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

¹⁰¹ Brummer, n 9 above, 132; R.S. Karmel and C.R. Kelly, ‘The Hardening of Soft Law in Securities Regulation’ (2009) 34:3 *Brooklyn J. Int’l. L.* 883; Ferran and Alexander, n 100 above.

¹⁰² Brummer, n 9 above, 6.

¹⁰³ *ibid.* 133.

III. Soft Law as a Regulatory Framework for BHR Initiatives

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

The author of the UNGPs, John Ruggie, seems to favour the latter view noting that the UNGPs represent a ‘common global platform for action’ and ‘a single, logically coherent and comprehensive template’ within which ‘the implications of existing standards and practices’ can be detailed.¹⁰⁷ Moreover, for Ruggie, who intended the UNGPs to represent the basis ‘from which thinking and action of all stakeholders...generate cumulative progress over time’,¹⁰⁸ the UNGPs, and similar soft law initiatives, encompass a broad remit of regulatory approaches, of which hard law might, but need not be an option. In other words, BHR soft law initiatives are being used as a coordination tool¹⁰⁹ by fostering dominant norms, creating a standard of expectations¹¹⁰ for both states and business as well as establishing a framework for the regulation of behaviour that has both informative and educative functions.¹¹¹

¹⁰⁴ Good, n 59 above, 261.

¹⁰⁵ *ibid.* 262.

¹⁰⁶ *ibid.*

¹⁰⁷ UNHRC, Report of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, ‘Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework’, A/HRC/17/31 (21 Mar 2011), para. 13.

¹⁰⁸ *ibid.*

¹⁰⁹ A. T. Guzman and T. L. Meyer, ‘International Soft Law’ (2010) 2 *J. of Legal Analysis* 171 at 188-89.

¹¹⁰ Chinkin, n 17 above, 865; Shelton, n 10 above, 322; Weil, n 64 above, 415

¹¹¹ Chinkin, n 17 above, 862.

Such standards of expectations can be understood through the transmission of the same ‘message’ through different international bodies.¹¹² Thus, the ‘baseline expectation’ that corporations should respect human rights and the corresponding responsibility to engage in human rights due diligence, espoused in the UNGPs, is replicated in the OECD Guidelines,¹¹³ the UN Global Compact,¹¹⁴ and the U.N. Committee on Economic, Social and Cultural Rights’ general comment,¹¹⁵ among other places. Changes to the understanding of the standards of expectations are similarly reflected through repetitions of the same message in different bodies. For example, the UNGPs establishment of the corporate responsibility to respect shifted the language of the OECD Guidelines from merely encouraging corporations to respect human rights¹¹⁶ to recommending that they ‘avoid causing or contributing to adverse human rights impacts’ and engage in human rights due diligence.¹¹⁷

Still ultimately, soft law, in whatever its form, is being used in the area of BHR to establish norms for corporations regarding their human rights accountability. However, by operating through a soft law approach it suffers from two principal risks. The first is non-compliance altogether and the second is that corporations may engage in symbolic compliance but fail to change their underlying approach to the issue at hand.¹¹⁸ Consequently, soft law’s effectiveness depends crucially on its enforcement.¹¹⁹

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

¹¹³ OECD Guidelines, n 28 above, 31-34.

¹¹⁴ UN Global Compact, Principle 1.

¹¹⁵ United Nations Economic and Social Council, General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, E/C.12/GC/24 (10 Aug 2017).

¹¹⁶ OECD Guidelines for Multinational Enterprises (2008), 39.

¹¹⁷ OECD Guidelines n 28 above, 31 and 34.

¹¹⁸ C. Parker, *The Open Corporation* (Cambridge: CUP, 2002), 145; J. Nolan, ‘The Corporate Responsibility to Respect Rights: Soft Law or Not Law?’ in S. Deva and D. Bilchitz (eds) *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge: CUP, 2013), 155.

¹¹⁹ Brummer, n 9 above, 5.

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

A. *‘Enforcing’ soft law*

One approach to enforcing soft law, such that it can be gradually moved from the voluntary to the mandatory is to increase the specificity of soft law commitments. For instance, in international financial regulation parties make specific commitments as to the behaviour they will or will not engage in and these commitments are elaborated upon in memorandums of understanding, codes of conducts or best practices.¹²² Regulators further make efforts to ensure commitments are affirmative rather than negative commitments, thereby requiring parties to engage rather than refrain from activity.¹²³ Similarly, in areas where regulation focuses only on processes, the standards for those processes need to be specified.¹²⁴

¹²⁰ S. Lagoutte, ‘The UN Guiding Principles on Business and Human Rights - A Confusing ‘Smart Mix’ of Soft and Hard International Human Rights Law’ in Lagoutte et al., n 11 above, 241.

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

¹²² *ibid.* 638.

¹²³ *ibid.* 143.

¹²⁴ Parker, n 118 above, 245-91.

More importantly, to be effective soft law instruments should be monitored and enforced, particularly by an entity outside the corporation.¹²⁵ Monitoring and enforcement can arise from several different, and often complementary, sources. For instance, international organizations, such as the IMF and World Bank, impose sanctions for failures to adhere to soft law in international financial regulation.¹²⁶ Similarly, lending institutions monitor social and environmental risk related to project finance under the Equator Principles.¹²⁷ Multi-stakeholder initiatives have also proved effective as monitors and enforcers on corporate conduct in a diverse range of industries ranging from forestry to food and beverage to apparel to marine fisheries.¹²⁸ In particular, these initiatives have often transformed the ‘greenwashing’ practices of corporate self-regulatory approaches by providing verification and independent monitoring.¹²⁹

Likely the most well-known monitor of corporate conduct, though, are NGOs. Not only do NGOs monitor corporate conduct but they may be instrumental in enforcing violations against them as well.¹³⁰ Tactics have involved ‘naming and shaming’ as well as enforcing codes of conduct or engaging in other forms of litigation.¹³¹ The practice of ‘naming and shaming’ as a form of enforcement is also practiced in the areas of international financial regulation by

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

¹²⁶ Brummer, n 74 above, 638-40; Ferran and Alexander, n 100 above, 5-6.

¹²⁷ J.M. Conley and C. A. Williams, ‘Global Banks as Global Sustainability Regulators?: The Equator Principles’ (2011) 33:4 *Law and Policy* 542.

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

¹²⁹ *ibid.* 7.

¹³⁰ G. Aldashev et al, ‘Watchdogs of the Invisible Hand: NGO Monitoring, Corporate Social Responsibility, and Industry Equilibrium’ (2014) *Universite de Namur Economic Working Paper 2014/04*; I. Nooruddin and S. Wilson Sokhey, ‘Credible certification of child labor free production’ in P. A. Gourevitch et al. eds., *The Credibility of Transnational NGOs: When Virtue is Not Enough* (Cambridge: CUP, 2012), 63.

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

the intergovernmental organization, the Financial Action Task Force.¹³² The Task Force identifies states and regulators that do not adhere to anti-money laundering policies and creates a public blacklist that is shared with the public and with domestic financial institutions. The aim is to shame states into compliance by heightening the “reputational consequences of non-observance”.¹³³

B. Shifting Soft Law BHR initiatives Along the Continuum

In order to use soft law to establish norms for corporations in this area—but ones that move closer to the mandatory than the voluntary realm—one approach would be to introduce some form of monitoring since independent monitoring produces a form of oversight that encourages accountability. Indeed one of the reasons for the creation of the UNGPs was because corporations often operate in states without human rights obligations or they fail to enforce them.¹³⁴ These lacunae created governance gaps within which corporations could engage in their activities – including human rights abuses – with impunity. Monitoring by independent third parties¹³⁵ would help close these governance gaps by ensuring that states enact and/or enforce human rights obligations that would prevent corporate misconduct.¹³⁶

Alternatively, monitoring could be accomplished through a Business and Human Rights Task Force, which operates in similar fashion to the Financial Action Task Force in international financial regulation. The BHR Task Force would be tasked with ‘shaming’ states who did not implement the UNGPs or other current BHR principles by blacklisting them on markets. This could be done by coordinating with national stock exchanges and either

¹³² Brummer, n 9 above, at 155-156.

¹³³ *ibid.* 155.

¹³⁴ See generally F. Wettstein, ‘Normativity, Ethics, and the UN Guiding Principles on Business and Human Rights: A Critical Assessment’ (2015) 14:2 J. of Human Rts. 162.

¹³⁵ Scott, n 125 above.

¹³⁶ P. Alston, ‘Facing Up to the Complexities of the ILO’s Core Labour Standards Agenda’ (2005) 16:3 EJIL 467.

informing the exchange of non-compliance or by conditioning listing on the exchange on a non-blacklisted status from the BHR Task Force. The Shenzhen Stock Exchange already requires corporations to establish a social responsibility mechanism and to disclose social responsibility matters as a listing condition, suggesting that some stock exchanges may be amenable to similar proposals.¹³⁷

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

Third, the enforceability of soft law initiatives could be improved by marrying them with provisions in treaties with enforceable obligations. For instance, international investment agreements are now increasingly incorporating BHR issues into their ambit. Thus the

¹³⁷ *Shenzhen Stock Exchange Social Responsibility Instructions to Listed Companies* (promulgated by the Shenzhen Stock Exch., Sept. 25, 2006, effective Sept. 01, 2010), CLI.6.88455(EN), art. 35-36.

¹³⁸ See, eg., J.L. Černič, ‘Fundamental Human Rights Obligations of Corporations’ in A. Hrast (ed.) (2009) *Collected Papers of the 4th IRDO International Conference, Social Responsibility and current challenges*, 59.

¹³⁹ Lagoutte, n 120 above, 247.

Morocco-Nigeria bilateral investment treaty (BIT) specifies that corporations ‘shall uphold human rights’ while the Brazil-Malawi BIT bilateral investment treaty requires investors to develop “best efforts” to, among other obligations, respect the human rights of those involved in the companies’ activities and apply effective self-regulatory practices and management systems that foster trust between companies and society.¹⁴⁰ Since international investment agreements generally allow for the enforcement of treaty obligations through binding arbitration, access to dispute resolution for investors could be conditioned on fulfilment of BHR treaty obligations.

Finally, the enforceability of soft law norms in this area could be improved by establishing legal consequences for breach of these norms, principally by providing remedies to victims. The United Nations Working Group on Access to Remedies has suggested that such remedies be available in a ‘diverse’ range of settings both at state and corporate levels.¹⁴¹ Corporations could thus be held accountable through judicial forums, both at the national or international level, or through non-judicial mechanisms such as by way of inter-state memorandums of understanding addressing such issues – such as the practice between Sweden and China – or by way of corporate grievance mechanisms.¹⁴² Providing adequate remedies in this area could further by detailing consequences for corporate breach the aim would be increase the enforceability of the soft law provisions.

¹⁴⁰ *Reciprocal Investment Promotion And Protection Agreement Between The Government Of The Kingdom Of Morocco and the Government Of the Federal Republic Of Nigeria* (2016), art. 18; *Investment Cooperation and Facilitation Agreement between the Federative Republic of Brazil and The Republic of Malawi* (2015), art. 9.

¹⁴¹ United Nations, *Human rights and transnational corporations and other business enterprises - Note by the Secretary-General*, A/72/162 (18 July 2017).

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

IV. SHIFTING TO HARD LAW

While the lack of political consensus in the area of BHR has confined it to essentially soft law instruments— albeit with the need for at least some characteristics of hard law – the predominance of soft law BHR instruments does not suggest that future initiatives should similarly be corralled into soft law instruments only. The difficulty in securing full corporate compliance for the respect or protection of human rights as well as the governance gaps within which corporations can operate with impunity support the necessity of binding legal obligations. Even John Ruggie, who advocated in favour of a soft law approach for the UNGPs, has supported the notion of a binding BHR instrument for areas where specific governance gaps exist and which are not touched by other means, such as in relation to gross human rights violations.¹⁴³ Thus, even if soft law initiatives with characteristics of hard law are successful, in at least some aspects of BHR, further legalized options are warranted.

This part examines ongoing efforts to conclude legalized BHR instruments, first at the international level and then at the domestic level, before moving to assess which approaches would be most fruitful for future BHR initiatives.

A. *International Initiatives*

Since June 2014 several states have begun the arduous task of concluding a binding BHR instrument.¹⁴⁴ The reasons for concluding such an instrument are myriad and include: covering governance gaps where states do not enact or do not enforce measures to protect human rights, acting as a central source within which the responsibilities of corporations can be outlined, transforming the UNGPs into binding obligations, ensuring that all corporations – regardless

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

¹⁴⁴ See Human Rights Council, *Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights*, U.N. Doc. A/HRC/26/L.22/Rev.1 (June 25, 2014)

of location – adhere to the same set of human rights standards and increasing access to effective remedies to human rights victims.¹⁴⁵ The working group currently heading the negotiations hopes to achieve these and many more outcomes, including specifying a wide range of human rights for which corporations would be responsible.¹⁴⁶

However, creating an overarching binding legal framework for BHR issues poses some risks. Notably, including a broad range of human rights in the instrument risks attenuating the rights in order to secure the necessary state approval.¹⁴⁷ Equally problematic is the lack of global support for the binding instrument. At present, several states, home to some of the largest multinational corporations, do not support the initiation of a BHR treaty and are therefore not participating in the negotiation of this instrument.¹⁴⁸ Without support from these states, many of the largest multinational corporations will not fall under the jurisdiction of the binding instrument perpetuating existing governance gaps. It is thus unclear whether pursuit of a binding BHR instrument without support from so many key states will significantly progress protection of human rights victims at the hands of corporations or whether the instrument will face the same fate as the *International Convention on the Protection of the Rights of All Migrant workers and their Families*,¹⁴⁹ which after 25 years has only been ratified by 48 states, most of which are migrant-sending states.¹⁵⁰

Conversely, a hardening of BHR obligations may be easier if the scope of the instrument is narrowed or is made more precise. John Ruggie has termed such binding instruments as ‘precision tools’ which focus only on specific issues.¹⁵¹ A good example of

¹⁴⁵ For elaboration of these benefits see Choudhury, n 6 above.

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

¹⁴⁷ C. Esdaile, ‘A step forward? A sceptical view on the need for a new business and human rights treaty’, *Open Democracy* (May 26, 2014).

¹⁴⁸ Business & Human Rights Resource Centre, ‘UN Human Rights Council sessions’ (2014).

¹⁴⁹ *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, opened for signature Dec. 18, 1990, 30 I.L.M. 1517 (entered into force July 1, 2003).

¹⁵⁰ See, UN Treaty Collection, ‘International Convention on the Protection of the Rights of All Migrant workers and their Families (2016).

¹⁵¹ Ruggie, n 143 above.

such a precise tool is the WHO Framework Convention on Tobacco Control (FWCTC), which codifies state obligations with the aim of addressing the causes of the globalization of the tobacco epidemic.¹⁵² Although the FWCTC is addressed to state parties, the treaty also regulates the conduct of tobacco companies through provisions regulating the contents, product disclosures, packaging and labelling, and advertising of tobacco products.¹⁵³ The FWCTC boasts an impressive 180 state parties, including several states which are opposed to the binding business and human rights instrument mentioned above.

The FWCTC was not initially conceived as a binding instrument. Instead, it was drafted as a framework designed to establish a general system of governance for tobacco products, but without specifying any detailed obligations.¹⁵⁴ Once the framework was established, protocols – or separate legally binding agreements – could then be adopted, either concurrently or subsequently, which would then detail the specific obligations needed to further the goals in the framework.¹⁵⁵ The purpose of such a two-step approach was to gather the necessary political consensus on the issue that a one-step jump to an international binding treaty might not be able to achieve.¹⁵⁶ However, the final version of the FWCTC emerged as much more than a general system of governance, containing a number of detailed obligations, a result which might have deterred parties from being a party to the framework if they had anticipated the final outcome.¹⁵⁷

While it is unclear whether the treaty has curbed the spread of tobacco usage, it has had a noticeable impact on corporate conduct. One study has revealed that the number of health warning labels on cigarette packages has increased from 8.42 to 22.33 percent since the treaty

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

¹⁵³ *ibid.* art. 9, 10, 11, and 13.

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

¹⁵⁵ Bodansky, n 154 above, 33.

¹⁵⁶ Taylor, n 154 above, 294.

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

was signed, meaning that companies have been required to change their product's packaging and labelling.¹⁵⁸ Moreover, in response to regulations required by the Convention, tobacco giant, Philip Morris, instigated two investment arbitrations, against the governments of Australia and Uruguay, challenging the domestic regulations.¹⁵⁹ While the arbitrations were both ultimately unsuccessful, the initiation of the arbitrations suggest that the FWCTC has had a significant enough effect on corporations such that the legislation it prompted in states was worth challenging.¹⁶⁰

The FWCTC process emerges as an interesting alternative to achieving hard law obligations for BHR issues. By focusing at the outset in only establishing a general governance framework for tobacco issues, the FWCTC was able to build up the necessary political will to ultimately achieve binding obligations. If BHR issues can be narrowed to a more limited set of issues – for instance, by focusing on establishing positive obligations for corporations for only the most salient human rights issues – the framework/protocol two-step procedure used by the FWCTC may be better able to garner the necessary state support for binding obligations than the one-step binding instrument currently being negotiated.

B. Domestic initiatives

Apart from the ongoing negotiations for the binding BHR instrument, efforts are also being made at the domestic level to further legalize BHR obligations. In several European states, for instance, governments have introduced mandatory reporting obligations for corporations to

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

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

¹⁶⁰ B. Mander, 'Uruguay defeats Philip Morris test case lawsuit' (8 July 2016) *Financial Times*; D. Hurst, 'Australia wins international legal battle with Philip Morris over plain packaging' (18 Dec 2015) *The Guardian*.

disclose human rights issues pursuant to an EU directive.¹⁶¹ Companies are thus required to disclose human rights policies, outcomes and risks as well as information on human rights due diligence processes implemented by the company.¹⁶² Similarly, in Denmark, corporations must adhere to both the EU directive requirements as well as expressly discuss their human rights reduction actions, regardless of whether they are already included in their CSR policies.¹⁶³ However, France, has progressed further than mere reporting obligations to introduce substantive due diligence obligations. The law, known as the duty of vigilance (“*le devoir de vigilance*”)¹⁶⁴ requires corporations to take reasonable care in identifying and preventing risks to human rights and fundamental freedoms, serious bodily injury or environmental damage or health risks resulting directly or indirectly from the operations of the company. The vigilance obligations extend to both the companies it controls as well as to the activities of subcontractors or suppliers.¹⁶⁵ Corporations will further be required to put into place vigilance plans (“*plans de vigilance*”) that will identify these risks and determine reasonable measures for addressing these risks. The law applies to corporations with more than 5000 employees with a registered office in France and corporations can face liability for breach of the duty of vigilance.¹⁶⁶

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

¹⁶¹ Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups (2014).

¹⁶² *ibid.* Art. 19A.

¹⁶³ *Act Amending the Danish Financial Statements Act* (2012).

¹⁶⁴ Assemblée Nationale, Proposition De Loi Relative Au Devoir De Vigilance Des Sociétés Mères Et Des Entreprises Donneuses D’ordre, adopted 21 Feb 2017 at <http://www.assemblee-nationale.fr/14/ta/ta0924.asp>.

¹⁶⁵ *ibid.* art. 1st.

¹⁶⁶ European Coalition for Corporate Justice, ‘Last hurdle overcome for landmark legislation: French Corporate duty of vigilance law gets green light from Constitutional Council’ (24 March 2017).

¹⁶⁷ Swiss Coalition for Corporate Justice, ‘The Initiative’ (2015).

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

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

However, unlike the French or Swiss approach, enforcement of the obligations found in the *Modern Slavery Act* is not through the judicial process. Instead the annual statements are required to be approved and signed by the board of directors and the statement must be

¹⁶⁸ *ibid.*

¹⁶⁹ *Modern Slavery Act* (2015).

¹⁷⁰ *ibid.* s. 54.

¹⁷¹ *ibid.* s. 54(5).

posted on the corporation's website's homepage.¹⁷² Moreover, the Secretary of State has the authority to bring an injunction against the corporation in cases of non-compliance.¹⁷³ While experts do not believe that the Secretary of State will exercise its option to bring an injunction, it is thought that the government expects stakeholders to pressure non-compliant businesses into compliance.¹⁷⁴

Compared to the approaches in France and Switzerland, the Modern Slavery Act is much narrower in its coverage and also closer to the soft law end of the continuum than the other two approaches. Although it specifies the outcomes of non-compliance, because it is commonly known that the most stringent enforcement mechanism will only be rarely used, one would expect a high degree of non-compliance by businesses. However, this has not been the case and recent studies have found that companies are making significant progress in addressing modern slavery.¹⁷⁵ Indeed, because the Modern Slavery Act requires directors to sign the annual statement it propels ownership of slavery and human trafficking issues to the highest level of the organization and it is likely this ownership by the directors of the issue, combined with the possibility of public attention for instances of non-compliance, that ensures corporate adherence to Modern Slavery Act standards.¹⁷⁶

At the same time, the French and Swiss approaches offer a much more legalized option to ensure corporate adherence to a broad range of human right responsibilities. They offer human rights victims a judicialized remedy for a wide range of corporate wrongs – encompassing both human rights and environmental issues – and in doing so, provide access to an effective remedy required by the third pillar of the UNGPs, a remedy that is rarely found

¹⁷² *ibid.* s. 54(6) and (7).

¹⁷³ *ibid.* s. 54(11).

¹⁷⁴ Eversheds, 'Disclosure time - Responding to the Modern Slavery Act; (2016), 3; PWC, 'The Modern Slavery Act How should businesses respond?' (November 2015), 3.

¹⁷⁵ Ethical Trading Initiative, 'Corporate Leadership on Modern Slavery' (Nov 2016); P. Carrier and J. Bardwell, 'How the UK Modern Slavery Act can find its bite' (24 Jan 2017) *Open Democracy*.

¹⁷⁶ Ethical Trading Initiative, n 175 above, 10.

in other jurisdictions. Moreover, by creating a direct cause of action the initiatives ameliorate *non forum conveniens* hurdles which have typically plagued human rights victims who have been harmed in jurisdictions without adequate legal recourse and who need to seek redress from better capitalized parent corporations.¹⁷⁷ Thus, the French and Swiss approaches offer a significantly rare and broad mechanism for legal enforcement of corporate responsibilities by human rights victims.

C. *Moving forward*

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

Conversely, at the international level, the framework/protocol approach used by the FWCTC offers a more pragmatic approach for achieving binding obligations than by directly forming an overarching treaty. Because the framework aims to generate general political consensus, it allows states to arrive at a consensus on a number of key issues. This gradual

¹⁷⁷ See, e.g. R. Meeran, ‘Tort Litigation against Multinational Corporations for Violation of Human Rights: An Overview of the Position Outside the United States’ (2011) 3 *City University of Hong Kong Law Review* 1; G. Skinner, ‘Rethinking Limited Liability of Parent Corporations for Foreign Subsidiaries’ Violations of International Human Rights Law’ (2015) 72 *Wash. & Lee L. Rev.* 1769.

acquiescence process is more likely to result in global commitments from a wide range of states than an approach which requires state commitment on a large breadth of issues at the outset. Moreover, by allowing political consensus to slowly build up, it also offers an opportunity for corporations to, similarly, gradually begin to internalize these issues as well. This can facilitate the necessary corporate acceptance that will ensure such commitments are made at the international level by states and not follow the failed path of the UN Norms.

Moreover, by enacting protocols after the conclusion of the framework, the path is set toward the eventual creation of binding obligations. As a result, the framework/protocol approach has the potential to further legalize BHR obligations more effectively than existing BHR initiatives have managed to do.

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

CONCLUSION

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

Still, because soft law BHR initiatives – even those accompanied by hard law elements – can lead to grave externalities on others when corporations or states deviate from their commitments, continued progress should be made towards adopting, at least, some binding legal obligations in the area. At the international level, the framework/protocol approach offers an interesting template in order to enable global political consensus to develop on key BHR issues. Although it represents a softer approach than the drafting of a binding overarching BHR treaty, the framework/protocol approach is likely to garner more widespread state support than the proposed treaty. This is essential to both closing governance gaps and protecting a wider range of human rights victims. At the same time, binding domestic initiatives with extraterritorial effect should also be encouraged, although such initiatives may need to be limited in scope in order to ensure their passage into law.

Ultimately, the appropriate governance strategy for BHR issues may need to draw from both soft and hard law initiatives in order to allow the necessary political consensus on aspects of this issue to build while still offering a robust vehicle for protection for victims of corporate

irresponsibility. The soft to hard law continuum thus offers an appropriate spectrum for such initiatives. However, since most existing initiatives tend to be grouped towards the soft law end, new initiatives must move farther along the spectrum in order to approximate the right mix of soft and hard law. This is because without at least some movement to the mandatory from the voluntary, corporate responsibility for human rights will continue to remain optional, a situation which simply cannot continue.