

THREE ARGUMENTS TO SUPPORT INTERNATIONAL BINDING TREATY ON BUSINESS AND HUMAN RIGHTS

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ABSTRACT

The development of the promotion and protection of human rights, in general, has been gladdening. However, in instances where human rights are affected by business activity, efforts to uphold them meet certain obstacles. This is exacerbated when the business activity involves a complex and international dimension in it—i.e., in the case of multinational enterprises. This paper provides three arguments to support the establishment of international binding treaty on business and human rights. It examines the current Corporate Social Responsibility platform, state responsibility to protect human rights, and also the importance and benefits of legally binding treaty. This research found that the implementation of the current CSR platform fails to prevent business harm to human rights. Therefore, state responsibility is fundamental in this matter and should be enhanced by the duty to establish an international treaty. A legally binding treaty is important to protect human rights from irresponsible business activity and can be beneficial and relevant to the interest of parties involved in business and human rights.

Keywords: *business; human right; treaty; state responsibility; corporate social responsibility.*

INTRODUCTION

The Intergovernmental Working Group (IWG)¹ on transnational corporations and other business enterprises concerning human rights is on the process of establishing a multilateral agreement on the field of business and human rights.² The open-ended discussion attracts many attentions throughout the world. Despite the process has become crystal into the formation of establishing an international binding treaty, arguments in response to this effort are split up between the side who supports and the side that opposes. Some argue that today is not the right time to uphold an internationally binding treaty given that the UN

Guiding Principle itself is barely new and still evolving in its application.³ It is believed that that the voluntary basis is ample to urge corporation to fulfil human rights considering no ‘one size fits all’ policy.⁴ Meanwhile, supporters of binding treaty

1 IWG session's details available at Office of The Commissioner of Human Rights' website <http://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Pages/IGWGOntNC.aspx> (Last visited on 9 May 2022).

2 UN General Assembly. The 26th session of Human Rights Council on 14 July 2014. 26/9 Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights. p. 2.

3 See John Gerard Ruggie, “Business and Human Rights: The Evolving International Agenda,” *SSRN Electronic Journal* (December 28, 2011); John Gerard Ruggie and Harvard Kennedy School, *The Social Construction of the UN Guiding Principles on Business & Human Rights Faculty Research Working Paper Series*, 2017, www.hks.harvard.edu. p. 2.

4 The UNGP soft law itself is not to be apprehended as a static norm, but can encourage to the development of Human Rights fulfilment. For example, through the OECD Guidelines for Multinational Enterprises (GLS); ISO26000, a guidance on social responsibility that developed by the International Organization for Standardization; The International Finance Corporation (IFC), the private sector arm of the World Bank ; The European Union; US and EU law, even; FIFA, the governing body of international football. See *Ibid.* p. 18-21. Ruggie believes that the UNGP soft law is still the best option so far and can continue its work affecting organization worldwide to respect Human Rights. See also Barnali Choudhury, “BALANCING

believe there is an exigency to establish a legally binding toward human rights protection on doing business.⁵ Moreover, the legal binding supporters resist that soft law regulation, UNGP for example, provides an excellent control mechanism but means nothing if there is no compulsory enforcement on hard law. Thereby, they attempt to endorse a set of stricter and tighter rules to ensure the legal enforcement of human rights` protection against business practice. Despite those two mainstream sides, ones also discuss how soft law and hard law shall be balanced in this matter.⁶

Out of the IWG context, human rights are continuously under threat in front of the mammoth of a business kingdom if its activities left unsupervised without clear and direct obligation to protect human rights.⁷ The collapse of Rana Plaza in Dhaka, Bangladesh, in 2013 which killed more than 1.135 people was one of noticeable cases in the last decade to show how business can be reckless to the life of people.⁸ The world, unfortunately, has been a witness of how related-

business' misbehaviour inflicted a remarkable loss for human and environment. Just to recall some of them, from Bhopal Tragedy in 1984,⁹ Parmalat and Enron scandals from 1990's to the early of 21st century¹⁰ until one of the latest issues in the last decade which involved big players like Volkswagen and Exxon.¹¹ These continuing cases point out that any set of rules and regulation we have until today is, in general, still insufficient to prevent the damage of malicious or irresponsible business. Something terrifying will remain happening if nothing is changing and business is not adequately regulated and given incentives needed to prevent harm to human. In stricter words, the current idea of voluntary compliance on soft law framework seems not to be in the right path and insufficient to be followed—let alone to expect a full compliance of business towards human rights.¹²

As a response to this shortcoming, there has been an effort to establish a legally binding treaty for business and human rights in recent years. However, the task to deliver the presence of legally binding treaty itself inevitably encounters inherent issues related to the establishment of a treaty, that is, a required consensus between

SOFT AND HARD LAW FOR BUSINESS AND HUMAN RIGHTS,” *International and Comparative Law Quarterly* 67, no. 4 (October 9, 2018): 961–986, accessed May 31, 2022, https://www.cambridge.org/core/product/identifier/S0020589318000155/type/journal_article.

- 5 See David Bilchitz, *THE NECESSITY FOR A BUSINESS AND HUMAN RIGHTS TREATY*, n.d., <http://www.ihrb.org/commentary/quo-vadis-unsolicited-advice-business.html>; Nadia Bernaz and Irene Pietropaoli, “Developing a Business and Human Rights Treaty: Lessons from the Deep Seabed Mining Regime under the United Nations Convention on the Law of the Sea,” *Business and Human Rights Journal* 5, no. 2 (2020): 200–220; Markus Krajewski, “A Nightmare or a Noble Dream? Establishing Investor Obligations Through Treaty-Making and Treaty-Application,” *Business and Human Rights Journal* 5, no. 1 (January 1, 2020): 105–129.
- 6 Choudhury, “BALANCING SOFT AND HARD LAW FOR BUSINESS AND HUMAN RIGHTS.”
- 7 See also a discussion on human rights concept Carolus Boromeus Kusmaryanto, “Hak Asasi Manusia Atau Hak Manusiawi?,” *Jurnal HAM* 12, no. 3 (December 31, 2021): 521.
- 8 The Guardian; Reuters in Dhaka. 2016. *Rana Plaza Collapse: 38 Charged with Murder Over Garment Factory Disaster*. Available at <https://www.theguardian.com/world/2016/jul/18/rana-plaza-collapse-murder-charges-garment-factory>. (Last visited on 10 May 2022).

- 9 Sunita Narain and Chandra Busan. 2014. 30 Years of Bhopal Gas Tragedy: A Continuing Disaster. Accessed online at <http://www.downtoearth.org.in/coverage/30-years-of-bhopal-gas-tragedy-a-continuing-disaster-47634> (Last visited on 10 May 2022).
- 10 Roger Adams. 2014. Enron to Parmalat: Now Europe Needs to Declare War on Fraud. Accessed online at (<http://www.nytimes.com/2004/01/14/opinion/enron-to-parmalat-now-europe-needs-to-declare-war-on-fraud.html?mcubz=0>) (Last visited on 10 May 2022).
- 11 The Guardian; Pavan Sukhdev. 2015. VW and Exxon: Indicative of a Polluted Corporate Culture that Must Change. Accessed online at (<https://www.theguardian.com/sustainable-business/2015/dec/31/vw-exxon-scandal-polluted-corporate-culture-emissions-climate-change>), (Last visited on 10 May 2022).
- 12 There are three pillars of UNGPs which are “Protect, Respect and Remedy” framework where (1) states carry a *duty to protect* human rights from abuses by third parties, including business; (2) business has *responsibility to respect* human rights and; (3) *access to effective remedy*. See Ruggie and School, *The Social Construction of the UN Guiding Principles on Business & Human Rights Faculty Research Working Paper Series*. p. 1.

states. Moreover, the level of difficulty in making a multilateral agreement arises when we also consider that business relationship with states itself is compelling due to various reasons, particularly the way that they are interdependent on each other. Many developed or industrialized countries in the world also seemed reluctant to conclude the agreement during the discussion and development period of IWG.¹³ This hesitance states behaviour is also bolstered by the assumption that Multi National Enterprises (MNEs) tend to have interest to stay-out from restrictive regulation and direct obligation to human rights that potentially impart shortcomings instead of benefits to their business.¹⁴

Based on the previous reasons, it is clear that the establishment of international binding treaty on business and human rights faces some challenges and hurdles. Solid arguments must be provided to support this common effort so that it can be realized and implemented in the future. Previous studies have showed the arguments to support the establishment of international binding treaty on business and human rights. For example, David has introduced four agreements weighed in the effect of bindingness of the treaty and its

access for remedy.¹⁵ Another study by Olivier has also provided his own four considerations for binding treaty with the highlight of business direct obligation in international law.¹⁶ While these previous studies has provided significant idea on the importance of binding treaty, they did not discuss thoroughly the interconnection of three pillars to support the establishment of international binding treaty which are current system's failure, state responsibility to fix it and the benefits to be achieved for all. The purpose of this study is to strengthen the argument in supporting the realization and application of current work by discussing three pillars mentioned earlier. It highlights the importance and benefit of legally binding treaty to states, enterprises and the affected people.

RESEARCH METHOD

According to J. Vredenberg, social research can be divided into three categories based on its purpose, namely: exploratory, descriptive, and explanatory research.¹⁷ This research will be based on the latter one by employing normative juridical study by examining secondary material.¹⁸ Data were collected by analysing available secondary library data. Collected data were analysed by performing examination on primary, secondary and tertiary legal documents and legislation materials which are in force regarding the legal system, both in the form of soft law and hard law. Arguments in this study also build upon relevant case-laws related to business and human rights.

The collected legal materials were analysed qualitatively to provide explanation on the development of legal concepts in business and

13 Brigitte Hamm, "The Struggle for Legitimacy in Business and Human Rights Regulation—a Consideration of the Processes Leading to the UN Guiding Principles and an International Treaty," *Human Rights Review* 23, no. 1 (March 1, 2022): 103–125. , p. 16. See also Steven R. Ratner, "Introduction to the Symposium on Soft and Hard Law on Business and Human Rights," in *AJIL Unbound*, vol. 114 (Cambridge University Press, 2020), 163–167. , p. 165. The 26th session of Human Rights Council's voting on 14 July 2014 was as follows; *In favour*: Algeria, Benin, Burkina Faso, China, Congo, Côte d'Ivoire, Cuba, Ethiopia, India, Indonesia, Kazakhstan, Philippines, Russian Federation, Venezuela (Bolivarian Republic of), Viet Nam, Kenya, Morocco, Namibia, Pakistan, , South Africa. *Against*: Austria, Czech Republic, Estonia, France, Germany, Ireland, Italy, Japan, Montenegro, Republic of Korea, Romania, the former Yugoslav Republic of Macedonia, United Kingdom of Great Britain and Northern Ireland, United States of America.

14 Steven Ratner, *The Yale Law Journal Company, Inc. Corporations and Human Rights: A Theory of Legal Responsibility Articles Corporations and Human Rights: A Theory of Legal Responsibility, Source: The Yale Law Journal*, vol. 111 (The Yale Law Journal Company, Inc, 2001). p. 531.

15 David BILCHITZ, "The Necessity for a Business and Human Rights Treaty," *Business and Human Rights Journal* 1, no. 2 (2016): 203–227.

16 Olivier DE SCHUTTER, "Towards a New Treaty on Business and Human Rights," *Business and Human Rights Journal* 1, no. 1 (2016): 41–67.

17 J. Vradenberg, *Metode Dan Teknik Penelitian Masyarakat* (Jakarta: Gramedia, 1981).

18 Soerdjono Soekanto and Sri Mamudji, *Penelitian Hukum Normatif: Suatu Tinjauan Singkat* (Jakarta: Raja Grafindo Persada, 1994).

human rights field. Analysis on the effectiveness of current legal framework were brought to seek the answer of better regulation to promote and protect human rights in tune with business world. Expected conclusion is reached by employing a deductive research method that commences from observing general arrangements to the specific ones.¹⁹ For that reason, the analysis begins with observing current legal framework, examining its application and then endorsing the potential and importance of available possible regulation for business and human rights in the future through an international binding treaty. In addition, relevant theories and principles in international law were also responsible in finding conclusions in this matter by using legal analysis and legal logic.²⁰

To assist in fulfilling its purpose, the structure of this paper will be divided into three main sub-discussion. The first part focuses on the examination of current business and human rights framework by analysing the implementation of the current Corporate Social Responsibility (CSR) platform and the way it fails to prevent business harm toward human rights. The second part addresses states' position concerning their responsibility toward the activity of multinational enterprises and how this position should be enhanced by the duty to establish an international treaty. Finally, the last part will provide some considerations regarding the benefit of a legally binding treaty that is relevant to the interest of parties involved on business and human rights.

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- 19 Deductive research method is also related with how the law is finally determined. In Continental European model (Civil Law), the judge's verdict is deductive (from general to specific) because the judge is bound by general written rules and generates his decisions with a tendency of characteristics of subsumption and syllogistic (where objective cases can be subjective in the making). See Abraham Amos, *Legal Opinion, Aktualisasi Teoritis Dan Empirisme* (Jakarta: Raja Grafindo Persada, 2004).
- 20 Hanson argues that the study of law is critical in nature from logic, legal reasoning, and legal argumentation. Finding law from this perspective search to find, uncover, understand and justify assumptions or hidden meanings in existing rules by utilizing human reason. See Urbanus Ura Weruin, "Logika, Penalaran, Dan Argumentasi Hukum," *Jurnal Konstitusi* 14, no. 2 (2017): 374-395. p. 375.

DISCUSSION

A. CSR Framework's Limitation

CSR is an important form of soft law on business and human rights issue. Compared to many decades ago, there is a vast improvement on the development of Corporate Social Responsibility (CSR) both in its concept and legal framework. While in the past, CSR is perceived as merely social interaction by business based on the voluntary act. Today, CSR is understood as the responsibility of enterprises to its social impact.²¹ This relatively new insight is strengthened by a set of soft law regulations such as OECD Guidelines for Multinational Enterprises, the United Nations Guiding Principles on Business and Human Rights, the Ten Principles of the United Nations Global Compact, the ILO Tripartite on the Declaration of Principles Concerning Multinational Enterprises and Social Policy, and the ISO 26000 Guidance Standard on Social Responsibility.²² To date, a number of large enterprises, which have a huge impact on the environment and society, have raised their awareness for sustainable business and have exerted available guidelines to promote their CSR policy.

Despite its promising evolvement, CSR framework receives critics toward various issues

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- 21 European Commission, *A Renewed EU Strategy 2011-14 for Corporate Social Responsibility* (Brussels: European Commission Office, 2011).
- 22 OECD, *OECD Guidelines for Multinational Enterprises* (Organisation for Economic Co-operation and Development, 2011). can be retrieved online at <https://www.oecd.org/corporate/mne/>. United Nations, *GuidinG PrinciPles on Business and Human RiGHts Implementing the United Nations "Protect, Respect and Remedy" Framework* (New York and Geneva: United Nations, 2011). can be retrieved online at <https://www.ohchr.org/en/business-and-human-rights>, the Ten Principles of the United Nations Global Compact can be retrieved online at <https://www.unglobalcompact.org/what-is-gc/mission/principles>, ILO, *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy*, 5th ed. (Geneva: ILO Publications, 2017), www.ilo.org/publns. can be retrieved online at <https://www.ilo.org/empent/areas/mne-declaration/lang--en/index.htm>, ISO 26000 Guidance Standard on Social Responsibility can be retrieved online at <https://www.iso.org/standard/42546.html>.

which can be viewed from two major standpoints; the concept of the *business case* and the lack of its implementation. Corporations are not a philanthropic institution notwithstanding the fact that in some circumstances they purport to serve public interest.²³ The original purpose of corporations is to maximize profits. It means that investing capital into social interest may harm its benefits despite in the process it may also profit the firm.²⁴ Business main orientation is profit. The wit behind the emerge of a company by its founder is to obtain profit by doing business. Shareholders are interested to invest their money because they project a significant benefit in the result.²⁵ In similar mind, manager is hired to utilize his ability to run the company for achieving the greater profit. Subsequently, the 'how' corporation performs its business activity may be viewed as a representation of its profit-oriented orientation. This can be true even when the corporation are virtually engaged in its CSR policy.²⁶

Ones may argue that companies can be doing well by doing good.²⁷ This insight is particularly being endorsed to supplement the

merely voluntary basis that available today for the compliance of CSR guideline. By repeating and injecting this notion in successive time there is an expectation in persuading businessman for doing their business in a balance rut; being profitable and at the same time be able to socially responsible. However, in practice, it is arduous to establish the concept of doing well by doing good especially by fathoming how it is nearly impossible to pursue a social interest without sacrificing profits. If there is a case that business can be in line with social responsibility, the *business case* concept may prevail.²⁸ As suggested earlier, the purpose of making business is profit. For instance, a company that produces a fuel-efficient car is apprehended as a green company which injects social responsibility into its activities. The company can earn its profits while at the same time being socially responsible. However, in the business world, not every company will gain a huge profit and be able to secure a high margin of profit continuously. There is a possibility that a business is not profitable anymore, and when the calculation of capital invested in environmental project is not suited with the profit they gain, there is a chance the CSR concept to be neglected. In another scenario, a company may also be accused of modifying environmental project, like in the case of Volkswagen. Or they even ignore the environmental issue, despite being noticed in the first place, and continuously disregard the problem and act as nothing ever happened as in the case of Exxon.²⁹ Eventually, it is ultimately about profit maximization, not a stand-alone commitment to being socially responsible.³⁰

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- 23 I. Bantekas, "Corporate Social Responsibility in International Law," *BU Int'l LJ* 22, no. 309 (2004). p. 340.
- 24 Amir Barnea and Amir Rubin, *Corporate Social Responsibility as a Conflict between Owners*, 2005. , p.2.
- 25 Ibid. , p.1.
- 26 CSR has been alleged as ineffective to perform its purpose. See Florian Wettstein, *The History of "Business and Human Rights" and Its Relationship with "Corporate Social Responsibility" The Swiss Commodity Sector as a Matter-of-Public-Concern: Inquiring Processes of Contestation, Justification and Change View Project*, n.d., <https://www.researchgate.net/publication/341164048>. , p. 35-36.
- 27 Alexander Chernev and Sean Blair, "Doing Well by Doing Good: The Benevolent Halo of Corporate Social Responsibility," *Journal of Consumer Research* 41, no. 6 (January 21, 2015): 1412–1425; Gaurav Talan and Gagan Deep Sharma, "Doing Well by Doing Good: A Systematic Review and Research Agenda for Sustainable Investment," *Sustainability (Switzerland)* (MDPI, January 11, 2019). Oliver Falck and Stephan Heblich, "Corporate Social Responsibility: Doing Well by Doing Good," *Business Horizons* 50, no. 3 (May 2007): 247–254. , Beate Sjøfjell, "How Company Law Has Failed Human Rights - And What to Do about It," *Business and Human Rights Journal* 5, no. 2 (2020): 179–199. , p. 197.

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- 28 See also Janne Mende, "Norm Convergence and Collision in Regime Overlaps. Business and Human Rights in the UN and the EU," *Globalizations* (2021). , p. 733.
- 29 The Guardian; [Pavan Sukhdev](#). VW and Exxon.
- 30 A. Karnani, "The Case against Corporate Social Responsibility," *Wall Street Journal* 23 (2010): 1–5. , p.2. Furthermore, there are two types of shareholder in a company. First is insider which consist of managers, block holders who are not involved in daily business management and director who is not the part of the first two. They are affiliated with the firm and the business basis. The next type of shareholder is others

The argument of *business case* in CSR can be controversial among legal scholars. It may be used as a solid ground to show the insufficiency of current legal framework on the venture of international binding treaty establishment. To the others, it can be regarded merely as severe pessimistic opinion. Instead of focussing on the negativity of CSR policy, it might be better to enhance the practice and compliance of current legal regime. This can be done by giving an opportunity for available soft regulations to evolve in its guidelines and practices.

However, as noted before, self-voluntary compliance on current legal regime for business and human rights has taken its time. The history told us that corporations are capable of doing damage to human and environment if they are not attributed with clear and direct obligations on doing their business. Every business in the world tends to apply business case before anything else. Therefore, providing a prospect for companies to omit their *business case* identity to comply law with voluntary approach seems to be ineffective.

Besides of its voluntary-based nature, the lack of CSR implementation is also donated by its incompetent actors. There are several distinguished drivers in current CSR Framework with their particular role in engaging with CSR, namely corporation, community activist, Non-Governmental Organization (NGO), and government.

First actor in this discussion is corporation with its self-regulation mechanism. Self-

who are on the outside of the firm such as an institution or small individual investor, see A., & Rubin, A. Barnea, "Corporate Social Responsibility as a Conflict between Shareholders," *Journal of business ethics*, 97, no. 1 (2010): 71–86. , p. 5. With this complicated structure of a company, it is difficult to establish the balance of being highly profitable and being socially responsible. This condition leads to disparity and CSR is apprehended as the source of conflict amongst shareholders in a company, see *Ibid.* , p. 22. However, this kind of conflict is irrelevant with an own private company because there is no shareholder to control them running the business. Consequently, they are free to determine to be a philanthropic-based company, see A. Karnani, "The Case against Corporate Social Responsibility." , p. 3.

regulation, or the so-called Code of Conduct, is widely used nowadays by companies throughout the world due to its uniqueness and it offers specific business term.³¹ Code of Conduct is used for organisational and reference model, although without any legal obligations. With this regulation, a company strives in promoting its long-term goal to achieve sustainable development which includes the sustainability of business and being socially responsible at the same time. Nevertheless, business goal is always the prominent notion and may prevail over other things including social responsibility. Thereby, human right protection cannot rely on self-regulation if a conflict between business and human rights occurs. A good example for this is how Parmalat, before its scandal revealed in 2003, consciously neglected the application on Preda Code³² to protect its interest in earning the profit.³³ The Preda Code para. 3.2, 10.1 and 10.2 recommend a corporation to have independent directors and internal control committee, to which Parmalat failed to comply.³⁴ Another example is in *dieselgate* case involving Volkswagen, a large car producer based in Germany. Volkswagen has been accused for violating its own Code of Conduct where they should comply its *Environmental Protection* provision.³⁵ Instead, the emission test has been manipulated to enjoy a high reputation on CSR for gaining more profit.³⁶ Relying on business practitioners to wholly comply with the

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- 31 S. R. Ratner, "Corporations and Human Rights: A Theory of Legal Responsibility," *The Yale Law Journal* 111, no. 3 (2001): 443–545. , p. 531.
- 32 Preda Code is a code of conduct for listed companies in Italy. See Preda Code (1999, 2002) Codice di Autodisciplina. Retrieved from http://www.ecgi.org/codes/documents/code_of_conduct.pdf
- 33 Andrea Melis, *Corporate Governance. Corporate Governance Failures: To What Extent Is Parmalat a Particularly Italian Case?* (Oxford: Blackwell Publishing, 2015).
- 34 *Ibid.* , p. 486.
- 35 See the Volkswagen Group; Code of Conduct. p. 19. Retrieved from http://sustainabilityreport2015.volkswagenag.com/fileadmin/15_NB/pdf_en/The_Volkswagen_Group_Code_of_Conduct.pdf
- 36 BBC News; Russel Hotten. 2015. Volkswagen: The scandal Explained. Accessed online at <https://www.bbc.com/news/business-34324772> (Last visited on 12 May 2022).

guidance and the rule then will not be a wise thing to do at the moment and in the future. Meanwhile, the presence of multinational enterprises (MNEs) as superpower bodies create a *governance gap* which means that enterprises immensely benefit in international economic perspective but they lack of identity in international law standpoint.³⁷ By doing so, to invoke MNEs' responsibility for human rights violation appears like punching a moving target. The possibility for a successful claim of human rights violation against MNEs is unclear since they are not attributed with direct and clear obligations and responsibilities in international law.

Second actor is community activist and NGO. These players can play a crucial role in CSR framework by doing monitoring and mitigation assistance.³⁸ They can represent the population and community that have been injured by malicious or irresponsible action of corporations. However, these actors possibly have limited access to obtain accurate information of companies' confidential data. This condition can be exacerbated if the company fails to deliver excellent transparency, or worse, manipulates its original information to be presented in front of public. We can spot at British Petroleum (BP) and Wal-Mart Stores Inc cases. Both companies had solid examples how to present a well-organized transparency on their annual report and online image to cover the fact that there were actually some serious problems on their CSR policies and activities.³⁹

Third, the government has a role as regulator who represents its population to establish welfare and security in their nation.⁴⁰ The given mandate

of the government includes them with power to provide and ensure protection of its people, not only from threats from outside of the state but also from the inside.⁴¹ Furthermore, citizens of a country are relying their security on its

37 Choudhury, "BALANCING SOFT AND HARD LAW FOR BUSINESS AND HUMAN RIGHTS." p. 18.
38 S. R. Ratner, "Corporations and Human Rights: A Theory of Legal Responsibility." , p. 533.
39 Larry Cata Backer, "Transparency Between Norm, Technique and Property in International Law and Governance: The Example of Corporate Disclosure Regimes and Environmental Impacts," *Minn. J. Int'l L.* (2013). , p. 41-49.
40 See some discussions that address the various responsibilities of the state to its people Moch Marsa, Taufiqurrohman ; Dilla, and Restu Jayanti, "Farmers' Regeneration Policy in the Context of

Food Security: An Effort and Guarantee for the Protection of the Rights to the Food" (n.d.), <http://dx.doi.org/10.30641/ham.2022.13.29-44>; Lefri Mikhael, "TANGGUNG JAWAB NEGARA DALAM PEMENUHAN HAK ATAS KESEHATAN JIWA DIHUBUNGAN DENGAN HAK ASASI MANUSIA (State Responsibility in the Fulfillment of the Right to Mental Health Related to Human Rights)" (n.d.), <http://dx.doi.org/10.30641/ham.2022.13.151-166>; Wahyu Saefudin et al., "RESTORATIVE JUSTICE IN CHILD RAPE PERPETRATORS: A CASE STUDY ON PERPETRATORS WITH INTELLECTUAL DISABILITY," *Jurnal Penelitian Hukum De Jure* 22 (2022), <http://dx.doi.org/10.30641/dejure.2022.V22.049-062>; Jody Imam et al., "LEGAL PROTECTION OF KID INFLUENCERS FROM CHILD EXPLOITATION," *Jurnal Penelitian Hukum De Jure* 22 (2022), <http://dx.doi.org/10.30641/dejure.2022.V22.093-104>; Penny Naluria Utami and Yuliana Primawardani, "Upaya Pemenuhan Hak Atas Lingkungan Hidup Terhadap Kebakaran Hutan Bagi Masyarakat Riau," *Jurnal HAM* 12, no. 3 (December 31, 2021): 367; Fuzi Narin Drani, "Legal Protection for Minors as Victims of Sexual Harassment in Indonesia," *Jurnal Penelitian Hukum De Jure* 21, no. 4 (December 31, 2021): 525; Rifa' Rosyaadah and Rahayu Rahayu, "Perlindungan HakAsasi Manusia Perempuan Terhadap Kasus Kekerasan Dalam Rumah Tangga Di Indonesia Dalam Perspektif Hukum Internasional," *Jurnal HAM* 12, no. 2 (August 26, 2021): 261; Muhar Junef, Moh Husain, and Badan RI Penelitian dan Pengembangan Hukum dan HAM Kementerian Hukum dan HAM, "PEMBENTUKAN PENGADILAN KHUSUS LINGKUNGAN SEBAGAI WUJUD TANGGUNG JAWAB NEGARA PADA UPAYA KEADILAN EKOLOGIS (Establishment of Environmental Specific Jurisdiction as a State Responsibility for Ecological Justice Efforts)," *Jurnal Penelitian Hukum De Jure* 21, no. 1 (2021), <http://dx.doi.org/10.30641/dejure.2021.V21.059-074>; Muhaimin Muhaimin, "Reconstruction of The Juvenile Criminal Justice System and The Giving of Diversion," *Jurnal Penelitian Hukum De Jure* 21, no. 2 (June 24, 2021): 253; Mikho Ardinata, "Tanggung Jawab Negara Terhadap Jaminan Kesehatan Dalam Perspektif Hak Asasi Manusia (HAM)," *Jurnal HAM* 11, no. 2 (August 28, 2020): 319.,
41 See for example new threat that arises from digital age Muhamad Hasan Rumlus and Hanif Hartadi, "Kebijakan Penanggulangan Pencurian Data Pribadi Dalam Media Elektronik," *Jurnal HAM* 11, no. 2 (August 28, 2020): 285; Nevey Varida Ariani, "Enforcement of Law of Copyright Infringement and Forgery with the Rise of the Digital Music Industry," *Jurnal Penelitian Hukum De Jure* 21, no. 2 (June 24, 2021): 223.

government to protect them from malicious activity, including from disreputable business. However, the government itself has some issues with its duty to protect human rights from a wicked or irresponsible business activity. The policymaker possibly may encounter insufficiency of human resources to engage in CSR policy. They are also vulnerable of being influenced by Multinational Enterprises that have power across the world through their subsidiary companies to set CSR policy in the favour of business especially during economic transition.⁴² Both central and local authority can contribute at certain degree of CSR failure. For instance, in the case of Rana Plaza, the owner only received permission to build a five-story building. Instead, he built additional three stories and that illegal extension act has been neglected by the authority due to its connection with the industry.⁴³ In fact, a report from Transparency International estimated around ten percent of the country's parliament members involved in garment industry in Bangladesh.⁴⁴ This example shows us that policy is not pure from the interference of business interest. Consequently, this actor is not fully reliable to be left alone in order to protect human rights.⁴⁵

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- 42 Shiwei Xu et al., "Regional Anti-Corruption and CSR Disclosure in a Transition Economy: The Contingent Effects of Ownership and Political Connection," *Sustainability (Switzerland)* 11, no. 9 (May 1, 2019). p. 2.
- 43 William Gomes. (2013). Reason and Responsibility: The Rana Plaza Collapse. www.opendemocracy.net. p. 8. Retrieved from <https://www.opendemocracy.net/opensecurity/william-gomes/reason-and-responsibility-rana-plaza-collapse>. (last visited on 14 May 2022).
- 44 Joe Westby. (2014). Rana Plaza Disaster: The Unholy Alliance of Business and Government in Bangladesh, and Around the World. www.amnesty.org. p. 7. Retrieved from <https://www.amnesty.org/en/latest/campaigns/2014/04/rana-plaza-disaster-the-unholy-alliance-of-business-and-government-in-bangladesh-and-around-the-world/> (last visited on 14 May 2022).
- 45 See also a discussion on where corporations can be a crime perpetrator Evi Djuniarti, "The Criminal Liability of Corporations as Crime Perpetrators," *Jurnal Penelitian Hukum De Jure* 21, no. 3 (September 28, 2021): 311.

B. State Responsibility

The aforementioned vulnerable position of government has a link with the tendency to embrace corporations as a tool and partner to develop the national economy.⁴⁶ Industrialized countries play their essential role to assist their corporations in winning business contract in the overseas market. Lobbying, formal or informal, is part of the strategy that have been used by enterprises and states to influence policy.⁴⁷ When states enter into this international action, it means that states are obliged to be liable to its state-registered company or corporate national's activity beyond state's border. This form embodies state as a responsible actor under international law⁴⁸ and contributes to answer the question of who is responsible for Multinational Enterprises activity due to its transnational business activity.⁴⁹

Furthermore, entering the public international law concept, responsibility can be

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- 46 See the work of Ye Zhu and Ming gui Sun, "How to Improve the Government-Enterprise Relationships to Retain Enterprise?," *Economic Research-Ekonomiska Istrazivanja* (2022).
- 47 Dongya ; Huang, Minglu ; Chen, and Thomas Heberer, *From "State Control" to "Business Lobbying": The Institutional Origin of Private Entrepreneurs' Policy Influence in China*, 2017, www.econstor.eu.
- 48 States already being recognized to be responsible concerning Human Rights such as from the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR). However, until today, no international treaty that regulates state to be responsible for business. See Ruggie, "Business and Human Rights: The Evolving International Agenda." , p. 14.
- 49 This understanding is necessary partly because the complexity of a Multinational Enterprise's legal position which being national in one country as a parent company and also being national in several states in which its subsidiary companies are operated. See Bilchitz, *THE NECESSITY FOR A BUSINESS AND HUMAN RIGHTS TREATY.* , p. 7. See Patricia Rinwigati Waagstein, "Justifying Extraterritorial Regulations of Home Country on Business And Human Rights," *Indonesian Journal of International Law* 16, no. 3 (April 30, 2019). See also the work of Bernaz and Pietropaoli, "Developing a Business and Human Rights Treaty: Lessons from the Deep Seabed Mining Regime under the United Nations Convention on the Law of the Sea."

attributed to a state by the action of its non-state actors, including by this term is corporations.⁵⁰ For instance, an international responsibility arises when an international obligation is breached such as under a recognized human right treaty.⁵¹ In other words, a state must conduct a due diligence by, *inter alia*, regulating and monitoring the activity of corporation whether in the home state or host state in which a bilateral investment treaty is ratified between them. When states fail to exercise those obligations, human rights violation by their enterprises can trigger an international responsibility toward state.⁵² This essence of state responsibility concept is crucial for encouraging states to take actions needed to generate international binding treaty on business and human rights.

It is also useful to spot that corporation tends to be reluctant to be obliged with legal binding. A corporation is a profit oriented body and perceives itself exclude from public regulation. This way, businesses may push the state to represent their value and be as free as possible in doing their business while only engaged themselves into private law and doing public obligation on a voluntary principle. It is not surprising that in the beginning, most of the non-supporters of international binding treaty come from western countries where their corporate nationals are around the globe. On this basis, the *business case* may come forward.

It is possible that states behaviour in this matter is influenced by its consciousness to secure

their interest, which is to protect the interest of their corporate nationals and national economy.⁵³ From economic supremacy standpoint, everything is calculated based on cost and benefits. Woefully, this could lead to conquer the interest to protect human rights.

Despite MNE has been recognized as separated subject of international law, its position under international law somewhat is still unclear. Another question also emerges whether they can fully be trusted to carry international rights and obligations. Enterprise's goal is business and profit oriented. They are, naturally, not imposed to create prosperity and safety of people. Those liabilities are part of state responsibility. In fact, state must encourage and drive MNE to achieve that goal.

States must protect their people by taking the example of how past experiences showed that irresponsible business could harm people and state as a whole. Life, environment, the future of young generation and money spent to recover the damage caused by those tragedies are massive. They also absorbed other fund allocations like fund for education, health insurance and other social incentives for community. These disadvantages must be avoid in the future.

When it comes into the business world, human rights notion shall be addressed properly to find the balance between these two fields. Thereby, at this point, states must be urged to play their noble role to create a harmonized international binding treaty on business and human rights. State's primary function is to safeguard human dignity that should prevail over or, at least, balance the economic purpose. Furthermore, the harmonization between business and human rights ought to be certain and strict to avoid any

50 R. McCorquodale and P. Simons, "Responsibility beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law.," *The Modern Law Review* 70, no. 4 (2007): 598–625., p. 624.

51 Ruggie, "Business and Human Rights: The Evolving International Agenda.," p. 16.

52 R. McCorquodale and P. Simons, "Responsibility beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law." p. 624. This state responsibility also applies to the ICESCR. States which ratify the ICESCR hold an extraterritorial obligation to regulate its corporate nationals to ensure there will be no violation of human rights under its control on the international subject bodies, see also *Ibid.*, p. 619.

53 This is a part of type and source of interest for compliance a treaty which is identified by Oona A. Hathaway. The author named an "institutionalism; compliance as a strategy" to outline states behavior to comply with certain treaty merely based on a winning for the long-term strategy to obtain self-interest ends, furthermore see Oona A Hathaway', "Articles Do Human Rights Treaties Make a Difference?," *Yale L.J.* 111 (2001): 1935–2042., p. 1947.

deviation and lack of its application. Moreover, due to the nature of business and human rights implicates many interests of state around the world, an internationally binding treaty should be the ideal method to be enforced.

States' action as the main subject of international law are fundamental in the configuration, creation and application of treaty. When states enter into the project to generate a multilateral treaty-making, they establish an international norm. Agreement between states provide a binding commitment throughout the world, including enterprises among them. Agreed commitment on business and human rights may finally set a desirable boundary between states themselves and enterprises toward human rights. However, this can only be achieved if the current work in establishing international binding treaty amounts to the level of a multilateral treaty-making. Therefore, common participation on this effort is extremely vital.

C. The Urgency and benefits of an Internationally Binding Treaty

Current CSR Framework with its inherent soft law application in so far is unable to solve the complexity of CSR matter. Corporations seem to have two positions regard to its compliance with CSR; the company can comply CSR, but still vulnerable with its large part of supply chains which possibly one of them fail to fulfil CSR's requirement, or from the company itself merely pretend to comply CSR (fake CSR compliance). Accordingly, it is arduous to control the complex supply chain and rely on soft law application. The soft law itself is not a "real law" which has the sanction or binding effect. In fact, there is no such thing deemed as soft law in law terminology.⁵⁴ The binding force of soft law is to define between hard law and no law. Law is solely deemed as "real law" if it has the full binding force. In this instance, if any hard law does not have the full binding force, it constitutes as soft law or possibly becomes no

law. By noticing this, soft law regulation is not a coherent concept of law; nor it conforms with state practice, including in CSR field.⁵⁵

In the context of CSR, soft law application can be seen by spotting, for example, solving problem in the issue of supply chain. When a company is doing well on its business but fails to maintain the responsibility of its supply chain, then its practice is against the principle 13 of UNGP (UN Guiding Principle on Business and Human Rights), saying that a company should conduct human rights due diligence. This must be done to the extent that the company is fully informed about the actual and potential adverse human rights impacts either through its own activities or as a result of its business relationships in supply chain. Furthermore, pursuant to principle 17-18 of UNGP, the responsibility of the companies includes preventing or mitigating adverse human rights impacts that are linked to their business operations, products or services by their suppliers, even if they do not contribute directly to those results. If a breach of human rights has already taken place in their supply chain and soon be discovered, an immediate termination of the relationship with the company is not in accordance with the UNGP regulation. In fact, leverage should be exercised beforehand to solve the impact of human rights violations. Principle 19 of UNGP states that:

"...Where a business enterprise contributes or may contribute to an adverse human rights impact, it should take the necessary steps to cease or prevent its contribution and use its leverage to mitigate any remaining impact to the greatest extent possible..."

The fundamental question is, what if the company breaches or neglects those UNGP provisions? Then the problem arises from this onward. Despite there is a bunch of provisions in the UNGP, nothing in the regulation stipulates

54 Kal Raustiala, "Form and Substance in International Agreements," *American Journal of International Law* 99, no. 3 (2005): 581-614. , p. 586.

55 *Ibid.*, p. 587. Soft law shows the deficiency in accuracy or enforcement measure. It comes from a lack of commitment to apply, not from the content nor substance. It also derives from the vague or heavily qualified provision in the treatment of legal binding.

sanction, since the purpose of this soft law is only to provide guidelines for business to voluntarily respect human rights. The affected people, in this instance employees in a supply chain, could only attempt to rely on the third-party beneficiary claim and/or negligent undertaking tort claim. Based on the reasoning of *Doe v. Walmart* case, the chances for success in this matter seemed slim. In *Doe v. Walmart*, the U.S. Court of Appeals Ninth Circuit rejected plaintiff's third party beneficiary violation of contract claim because Wal-Mart itself did not employ a contractual obligation to do inspection on supplier factories.⁵⁶ When company has a mere contractual right, and not an obligation to inspect supplier factories, the claims against violation of human rights will most likely fail.

It is evident that by scrutinizing this scenario, there is no obvious route for the human rights victims to find justice as the current CSR soft law like UNGP only has regulation but no real consequence. As Ruggie implied, in the practice UNGP and other soft law regulations are able to encourage and force the application of human rights in international sphere, but their scope are undeniably limited.⁵⁷

In the face of these shortcomings of the current CSR application, states, as the main actor of business and human rights field, are also criticized because of their reluctance to engage. To certain degree, industrialized countries hold back the business case priority to secure its self-interest retaining their economy supremacy. Meanwhile, many governments from developing countries failed to be a good regulator and human rights protector because they were unable to deal with CSR policy in an appropriate manner and handily being controlled or at least being influenced by third parties, especially from MNEs. Company law, in this instance, shall play a vital role to regulate business activities in a state, but it is argued that company law also has failed human

rights.⁵⁸

Business and human rights nexus are more than just a private activity which can be regulated by soft regulation measure with a voluntary approach. When it comes to human rights (public issue), business is not a private matter alone anymore. Furthermore, a private action is no longer independent as private when it has a connection with public matter, and thus the private law is expanding into public law.

We ought to understand the nature of business in economic basic principle is to gain the maximum profit with the lowest cost by using reasonable economic decision.⁵⁹ This principle can be misconceived by irresponsible person in charge of business to abuse its employees or others in order to maximize profit. The Rana Plaza tragedy described a behavior where the garment manager seemed more interested to force its employee to work under the danger of construction building to keep the money roll on rather than concerning people safety. The similar pattern has also been showed in Nike's supply chain cases. Nike was enjoying huge profit when selling high price products in developed countries by, allegedly, exploiting the lower-wage labor in several developing countries, such as Vietnam, Pakistan, and Indonesia. In Indonesia, the allegation of human rights abuse by Nike already occurred since the early of 1990 when a study of bad working condition for Nike's footwear has been published.⁶⁰ In its initial defence, Nike argued that they are just designer and marketer so they rejected to bear the responsibility of its subcontractor.⁶¹

This condition shows us that in a global market with large supply chain involved, the necessity of private law to be perceived by a broader perspective of public law is fundamental.

56 Case detail is available at http://www.wlf.org/litigating/case_detail.asp?id=427 (Last Visited on 14 May 2022).

57 Ruggie and School, *The Social Construction of the UN Guiding Principles on Business & Human Rights Faculty Research Working Paper Series.*, p. 2.

58 See Sjøfjell, "How Company Law Has Failed Human Rights - And What to Do about It."

59 See , p. 2-4. See also

60 Richard M Locke, *The Promise and Perils of Globalization: The Case of Nike*, MIT Working Paper IPC-02-007, 2002. , p. 10.

61 Ibid. , p. 11

The original private concern, that is to do business to gain profit, becomes public concern because it deals with many people as its consumers. Consequently, the law to regulate the nexus between business and human rights should be a hard law which has a mandatory obligation and vigorous enforcement to protect the interest of public. Within the hard law concept, business and human rights must be regulated by the government, and because in this globalization era the scope of trade is internationalized, there must be an internationally binding treaty to be agreed by states.

The presence of international binding treaty on business and human rights is not, by any means, to deprive nor to place corporations and industrialized countries into the weaker side. Nothing in these efforts shall be apprehended as to assign “human rights defenders” as the sole winner. The remaining question left in the effort of establishing a multilateral treaty concerning business and human rights is in what capacity this treaty will be able to provide benefit to all. When concluding a multilateral treaty, there should be a common view for each stakeholder to be able to see themselves as the beneficiaries. Eventually, the agreement must be regarded as a comprehensive winning solution for all actors to establish a better world, to create the balance between prosperity and peace on the earth.

State position in public international law is unique. Each of them has the same rights and obligations to protect its national interest and especially its citizens. Therefore, a state has reciprocal rights and obligation against another state. For example, a state can prosecute another state for being malicious to its corporation, while the indicted state is also able to demand the responsibility of the prosecutor state for the damage brought by the company. The problem can be deteriorated considering that both sides have the different legal regime. If there is no adequate regulation to encounter this matter, it will create the battle of a claim that can jeopardize the security of the region. An international binding

treaty provides a common language and judicial precision.⁶² These concepts are vital to set the same language and narrow the disparity which can set a limited room for debate of disagreement in the certain issue prior judicial.

As every state is equal in international law, the binding treaty also has an important feature by signals the “perceived will” of international community.⁶³ This message is particularly crucial for the weaker or smaller countries, which have the large portion in the world, to encounter stronger countries in the court. Another significant benefit for states whether they are small or big countries is the protection provided by international binding treaty. Without a precise regulation before the treaty, the state always can be blamed, at least morally, for every damage action by its corporations notwithstanding they have done an adequate due diligence. With a treaty, a state may exempt at particular case from the blame when they have complied every provision that is attributed to its obligation.

On the other side, the affected people from business activity are obtaining two benefits by the presence of an international binding treaty. First, they will receive a particular protection driven by state’s due diligence. As states are the subject of the international treaty, they have a burden to comply its obligation to respect human rights. When states assign their commitment by signing and ratifying a treaty, particularly a multilateral one, it is likely they will have no intention to breach it by legally or morally.⁶⁴ Second, the affected people also gain benefit from the careful and cautious business activity. Companies ought to exercise circumspection because there is an explicit and binding sanction will expect them if they fail to

62 John F. Steiner and George Albert Steiner, *Business, Government, and Society : A Managerial Perspective : Text and Cases* (McGraw-Hill Irwin, 2012). , p. 183.

63 Douglass Cassel, *Does International Human Rights Law Make a Difference*, *Chicago Journal of International Law*, vol. 2, n.d. , p. 126-129.

64 Although in practical situation, it is possible that even with a ratification, state could also breach its obligations. See Hathaway’, “Articles Do Human Rights Treaties Make a Difference?” , p. 1979 – 1981.

fulfil. Since the treaty will expressly stipulate the status, obligations and rights of enterprises, there will be no issue relating to governance gap in business and human rights. As a legal subject, enterprises will be on their own in the terms on their act and consequence. Furthermore, in practice, the affected people can reinforce the universality of human rights that available in the treaty by utilizing it to strive a legitimate claim. It means that they are in a solid position to claim human rights compliance if state or companies fail to deliver their obligation under the treaty. This circumstance increases the expectation for human rights implementation around the world.

Meanwhile, one question possibly emerges whether enterprises likewise can obtain benefit from the binding treaty on business and human rights or not. The subsequent question may also arise then, what is the benefit of complying an internationally binding treaty where it may create a limitation to perform business because a public law is involved. To tackle the argument would be the fact that business extremely requires certainty including assurance of undertaking business, has evident rights, obligations and then seek for precise dispute settlement mechanism if such conflict evokes. With a treaty, all such things will be vivid and obvious. In contrast, non-binding regulation like soft law provides less certainty. Companies are still possible facing damage claim from people around the world despite they assume they have tried to comply the soft law. They have limited defence because a soft law is merely guidance and regulation without clear sanction which also means there will be no vigorous evidence on their compliance on particular obligation. This can happen because compliance on the certain regulation of soft law might not mean compliance of desired standard of international law). In that way, the binding treaty is much better as it provides more certainty and avoids moral relativism. Corporations can excavate their rights and obligations, and if they can abide by the law, they will be exempt from any mistaken claim. When corporations are familiar with the rule and

conscientiously respect it, they can nurture their money from the massive compensation of doing damage to society. By complying regulations that set-out by an internationally binding treaty on business and human rights, corporations embody a shield to their business instead of being vulnerable most of the time by uncertain regulation. The cost of adopting and complying regulation into business should be cheaper rather than be disobeying rules and then acquiring remarkable loss to cover the damage when such a violation arises, as far as being acknowledged the only thing that virtually matter in business is profit.⁶⁵

CONCLUSION

Human rights abuses toward business activity are continuing to take place in our world. Many human rights defenders believe that current CSR framework is unable to dismiss the misadventure, and thus they strive to promote a more binding framework that can be enforced across the globe. This paper has provided three reasons and arguments to support the completion of international binding treaty on business and human rights. First, it showed the lack of implementation on current CSR framework due to its voluntary approach and soft law enforcement. Second, the duty and responsibility to protect human rights are pinned to state as the main subject of international law. Finally, it is believed that legally binding treaty can cover the weakness of soft law to protect human from irresponsible business throughout the world.

65 The loss brought by the disaster involves human and environment also a problem for MNEs because they have to pay a large sum of money. For example, British Petroleum has to pay compensation around \$ 20.8 billion for the next years to come for the financial and natural resources loss after the oil spill out in Gulf of Mexico in 2010, see <http://www.independent.co.uk/news/business/news/bp-pays-175m-to-settle-claims-it-hid-size-of-gulf-of-mexico-spill-a7063066.html> and UCC & UCIL has to pay at least 1.1 billion following the Bhopal Tragedy which the number demanded for compensation is still increasing due to severe damage it has been caused, see <http://www.bbc.com/news/world-asia-india-30205140>.

The presence of an internationally binding treaty should not be perceived as an anti-current CSR framework or set down MNEs` and industrialized states` position. In fact, it provides a better regulation to impart power to the current CSR framework by giving more binding instrument. Business and human rights nexus are complex, and thus an international treaty approach must be introduced to fill the gap and halt the seizure towards human rights. The fundamental foundation is to establish the equal balance between prosperity and peace. In a broader perspective, major parties that engaged to the impact of business activity, such as states, the affected people, and enterprises can take on the advantage of the application of an international treaty for business and human rights.

SUGGESTION

This paper still leaves the blank on how to deal with the compromise duty between most of the wealthy countries (non-supporters) and most of the developing countries (supporters). If both sides fathom the philosophy of this business and human rights` treaty, it should be a problem that can be overcome in the upcoming meetings before we will see an universal acceptance of this effort. This paper also misses the discussion on how to synchronize the existing soft law regulation, such as UNGP and OECD guideline, into the hard law rule, and therefore it has to be stipulated wisely if the notion of balancing between soft law and hard law can be accepted. The last thing should be considered later is how to deal with ratifying procedure. There is a possibility that one, or several countries dismiss the projection of bringing themselves into this treaty due to one or several reasons. The legal drafter should pay attention to opt out clause as well because that relates to freedom of choice while at the same time human rights compliance in the transnational area is a must.

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