

## Concept Paper on Facilitating Specification of the Duty to Protect

Prepared by John H. Knox for Special Representative John G. Ruggie\*  
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The duties of governments under international law to protect human rights from violation by corporations may be given specific content through four avenues: treaties; declarations; tribunals and treaty bodies; and state practice. This paper suggests and briefly evaluates ways that each approach to specification might be facilitated so that specification takes place more quickly. The paper concludes that:

**Treaties** offer a clear, legally binding approach to specification, but they have two important drawbacks: (a) they depend on governments' willingness to spend the time and effort required to negotiate them, and governments have not appeared to be highly motivated to negotiate treaties that specify the entire range of duties to protect human rights against corporate abuses; and (b) even if governments were interested in doing so, the process of negotiating and ratifying human rights treaties is lengthy. Nevertheless, treaties have been an important source of specific duties in particular contexts, especially with respect to labor rights. The experience of the International Labour Organization (ILO) suggests that one way to facilitate the adoption of treaties specifying duties to protect would be to focus on particular issues or sectors.

Like treaties, **declarations** have the drawbacks of depending on political will and taking time to negotiate and adopt. They have the additional drawback of not being

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\* John H. Knox is Professor of International Law at Wake Forest University. As an attorney-adviser at the U.S. Department of State from 1988 to 1994, Professor Knox represented the United States before international organizations and tribunals, advised State Department officials on international law, and participated in the negotiation of claims settlement agreements with the Soviet Union and Germany, human rights instruments (including the Declaration on the Elimination of Violence Against Women and the Declaration on the Rights of Human Rights Defenders), and the labor and environmental side agreements to the North American Free Trade Agreement.

legally binding. Nevertheless, they often serve as a precursor to a binding treaty and can, under certain conditions, themselves provide evidence of international law. Again, recent experience suggests that declarations focused on specifying duties to protect in particular areas would be easier to negotiate than declarations that try to address the entire range of duties to protect against corporate abuses.

**International institutions** such as treaty bodies and regional tribunals have been the most productive method of specifying duties to protect. Faced with a stream of cases and situations that require application of the rights set out in the treaties the institutions are called upon to apply, regional tribunals may develop jurisprudence that specifies duties to protect with respect to particular rights. While treaty bodies do not have the authority to issue binding decisions, their responses to communications may help states better understand how their duties may relate to particular types of corporate conduct. However, there are only limited ways to facilitate these institutions' development of relevant decisions, since their ability to elaborate the law depends largely on the submission of cases by individuals and groups. An exception is the treaty bodies' review of reports from state parties on their compliance with the treaties. Further, to help the state parties understand their obligations, each treaty body periodically issues interpretations of various treaty provisions, usually referred to as General Comments or Recommendations. Although the interpretations are not binding, they have persuasive authority and set interpretative points around which state practice may cohere. Through these interpretations, the treaty bodies have specified some aspects of the duty to protect, as the Special Representative has described in previous reports, but they could do so in a

more consistent and detailed way, either on their own initiative or as the result of requests by states or civil society.

**State practice** can be a source of legally binding elaborations of the duty to protect in two ways: (a) by providing evidence of customary international law; and (b) by providing evidence of a practice in the application of a treaty that establishes the agreement of the parties regarding its interpretation. The main difficulty is that state practice is often diffuse. Because states know little about the practice of other states, state practices may be more likely to diverge. And, to the degree that the practice is similar, unawareness may undercut claims that the practice shows a shared understanding of international law. An important way to facilitate specification of duties to protect through state practice is to increase reciprocal awareness among states of the ways that they are implementing those duties. One possibility would be to compile evidence of state practice; another would be for the Human Rights Council's Universal Periodic Review mechanism and its other supervisory machinery to examine state practice in carrying out obligations to protect human rights, including from corporate abuses. In addition to encouraging greater attention to these issues, the result would be to contribute to a shared understanding of what states are doing to implement their obligations to protect human rights from corporate abuses.

The following sections describe these conclusions in more detail.

## **I. Treaties**

Many human rights treaties contemplate that state parties will regulate and adjudicate private behavior that interferes with human rights, but they typically do not specify these obligations – that is, they do not set out in any detail how they require state parties to protect particular human rights from interference by private parties, including

corporations. As the Special Representative has previously described, the seven core UN human rights treaties contain few specific obligations elaborating on the duty to protect, and even fewer obligations that expressly refer to corporations.<sup>1</sup> Governments could decide to negotiate new treaties or protocols to existing treaties that specify the duty to protect in more detail. At the moment, however, governments have not shown great interest in doing so. Recent human rights treaties may reflect increased attention to corporations insofar as their provisions refer explicitly to “legal persons” and “private enterprises,”<sup>2</sup> where earlier treaties refer more generally to “organizations.”<sup>3</sup> But recent treaties do not include more detailed obligations concerning these private actors.

Perhaps the current attention to the relationship between corporations and human rights indicates that governments may be receptive to the idea of drafting new legal instruments to address in more detail their duties under human rights law with respect to corporations. Even so, the development of these instruments would probably be a very lengthy process. Negotiation of a new treaty is often preceded by negotiation of a declaration, which itself may take years; and even after a human rights treaty is adopted, many more years may pass before it is ratified by a significant number of states.<sup>4</sup>

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<sup>1</sup> See “State responsibilities to regulate and adjudicate corporate activities under the United Nations’ core human rights treaties: an overview of treaty body commentaries,” A/HRC/4/35/Add.1.

<sup>2</sup> See, e.g., Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, adopted in 2000, art. 3(4) (“each State Party shall take measures, where appropriate, to establish the liability of legal persons” for particular offenses, including child prostitution and pornography); Convention on the Rights of Persons with Disabilities, adopted in 2006, art. 4(1)(e) (each party shall “take all appropriate measures to eliminate discrimination on the basis of disability by any person, organization or private enterprise”).

<sup>3</sup> See, e.g., International Convention on the Elimination of Racial Discrimination, adopted in 1965, art. 2(1)(d) (“Each State Party shall prohibit and bring to an end . . . racial discrimination by any persons, group or organization.”); Convention on the Elimination of All Forms of Discrimination Against Women, adopted in 1979, art. 2(e) (obligating parties to “take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise”).

<sup>4</sup> The two most important human rights treaties, the covenants on civil and political rights and on economic, social and cultural rights, took nearly two decades to negotiate and another decade to attract enough parties to enter into force. More recent instruments have taken from five to eleven years to negotiate. The two most recent treaties, on disabilities and disappearances, were both adopted in 2006 after about five years of negotiation. A protocol to the Convention Against Torture was adopted in 2002 after a decade of negotiation; the protocol to the Convention on the Rights of the Child (CRC) referred to above was adopted in 2000 after about six years of negotiation. The CRC itself took eleven years to negotiate before its adoption in 1989, as did the Convention on the Rights of Migrant Workers before its adoption in

Regional institutions such as the Council of Europe, the Organization of American States, and the African Union have fewer members and more shared interests. As a result, they often develop human rights treaties on topics before the United Nations does.<sup>5</sup> But regional bodies have not been faster to adopt treaties imposing more specific obligations on states in relation to protecting against abuse by private actors. Moreover, a treaty addressing corporate abuses would seem to require participation from both the home and the host states of multinational corporations in order to be effective, which may cast doubt on a regional approach.

In contrast to the United Nations and the regional bodies, the International Labour Organization stands out for its specification of state duties to protect rights from corporate violation. It has adopted nearly 200 conventions on labor standards, many of which include specific obligations on states parties to regulate employers, including corporations. Some of the conventions set general standards that apply to the treatment of all workers;<sup>6</sup> others focus on particular industries.<sup>7</sup>

Three factors may have contributed to the relative success of the ILO. First, labor rights call for the specification of private duties because they are particularly susceptible to private interference. To be meaningful, labor protections must address the duties of private employers as well as governments. Second, the ILO is dedicated to a particular

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1990. The period for adopted treaties to enter into force varies enormously. Of the above instruments, the CRC took only one year to enter into force and now has 193 parties, both records. The Migrant Workers Convention illustrates the other extreme: it entered into force in 2003, thirteen years after its adoption, and today, 28 years after its negotiation began, has only 37 parties.

<sup>5</sup> The OAS adopted treaties on disappearances and disabilities in 1994 and 1999, respectively, before the United Nations adopted its conventions on those topics in 2006. The Council of Europe adopted a convention providing for a system of visits to prisons to forestall torture in 1987, fifteen years before the United Nations adopted an optional protocol to the Convention Against Torture on the same topic.

<sup>6</sup> *E.g.*, ILO Convention No. 98 (adopted 1949) (requiring parties to safeguard rights to organize and bargain collectively); ILO Convention No. 105 (1957) (requiring parties to abolish forced labor); ILO Convention No. 138 (1973) (requiring parties to set a minimum age for employment); ILO Convention No. 155 (1981) (requiring parties to regulate occupational safety and health); ILO Convention No. 182 (1999) (requiring parties to ban the worst forms of child labor).

<sup>7</sup> *E.g.*, ILO Convention No. 152 (1979) (safety and health in dock work); ILO Convention No. 167 (1988) (safety and health in construction); ILO Convention No. 172 (1991) (working conditions in hotels and restaurants); ILO Convention No. 176 (1995) (safety and health in mines).

field and has proved particularly well-designed to produce standards relevant to that field. Its unique tripartite structure, in which representatives of corporate and labor groups participate alongside government representatives, allows a broad range of those most concerned with the issues to be heard in their resolution. Third, its ability to produce new conventions that set out detailed obligations relies largely on the body of law it has built over decades. It adopted its first conventions in 1919, and many of its most important (including on forced labor, freedom of association, and non-discrimination) before 1960.

These characteristics suggest that an institution will be more likely to replicate the ILO's success at specifying states' duties to regulate corporate activities if it focuses on particular rights or industries that are particularly susceptible to abuse, and if it facilitates input from those most affected, not just governments. (Even so, it should be borne in mind that the ILO has developed over many decades; there is no reason to suppose that it would be easy to quickly produce a large body of law pertaining to corporate conduct.) Moreover, the ILO experience suggests that to address a particular sector or problem, the UN human rights bodies are not the only or necessarily best forum. It may be preferable to use an existing institution with expertise in the subject of the treaty.

## **II. Declarations**

Declarations have traditionally been another way to specify obligations under human rights law. Declarations have often been the precursors to treaties, from the Universal Declaration of Human Rights to the present. Declarations can also be evidence of international law, in two ways. First, they may provide evidence of customary international law, which requires both state practice and *opinio juris*, a belief that the practice is legally required. A declaration may provide a point around which state practice coalesces, and (depending on its language) may also indicate that states believe that the practice is legally required. The Universal Declaration, for example, is now generally considered to be evidence of customary international law. Whether and how a particular declaration contributes to the formation of customary international law is often

highly controversial, however, becoming clear only after many years. Second, a declaration may be a “subsequent agreement of the parties regarding the interpretation of [a] treaty or the application of its provisions,” which the law of treaties requires to be taken into account in interpreting a treaty.<sup>8</sup> Not all declarations qualify as such subsequent agreements, but those that address a particular treaty and are adopted by votes that include all of the parties to that treaty may qualify.

The weakness of declarations – that they are not legally binding – has also been a strength, in that governments have often been willing to negotiate a declaration when they are not willing to negotiate a binding treaty. The ease of negotiating a declaration should not be overestimated, however. Because governments recognize that declarations can be rough drafts of treaties or evidence of international law, they take them very seriously. As a result, states may be reluctant to begin<sup>9</sup> and, having begun, may take a long time to complete a negotiation.<sup>10</sup> As with treaties, it may be easier to negotiate a declaration if it is limited to a particular topic and undertaken by an institution with previous experience and expertise. For example, the 1993 Declaration on the Elimination of Violence Against Women was negotiated in a single one-week session, in large part because it addressed a limited, pressing issue and was negotiated not under the auspices of the Human Rights Commission, but rather by a working group of the UN Commission on the Status of Women.<sup>11</sup>

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<sup>8</sup> Vienna Convention on the Law of Treaties (1969), art. 31(3)(a). The provisions of the Vienna Convention on treaty interpretation are generally regarded as reflecting customary international law.

<sup>9</sup> For example, governments have never pursued negotiation of a declaration on human rights and the environment, despite the presentation to the United Nations of a draft declaration by a special rapporteur in 1994.

<sup>10</sup> The most recent declaration adopted by the General Assembly, the 2007 Declaration on the Rights of Indigenous Peoples, took more than twenty years to negotiate. In 2006, the General Assembly adopted principles and guidelines on the right to a remedy and reparation that were the result of over a decade of work. Negotiation of a declaration on human rights defenders, adopted in 1998, had begun in 1984.

<sup>11</sup> The declaration is particularly relevant in this context because it specifies one aspect of the duty to protect women from discrimination. It is arguably an example of a subsequent agreement regarding the interpretation of CEDAW; alternatively, a declaration such as this one provides a framework for subsequent practice, which itself shall be taken into account to the extent that it establishes the agreement of the parties to the treaty regarding its interpretation. Vienna Convention, *supra*, art. 31(3)(b).

Declarations and other non-binding instruments may be adopted by governments outside the United Nations. An important recent example is the 2002 Interlaken Declaration adopting the Kimberley Process Certification Scheme, aimed at stemming trade in conflict diamonds. The declaration is not legally binding but it has quasi-legal effect because of the seriousness with which the participants have implemented its terms and the status accorded it by the Security Council and General Assembly (which have urged countries to participate) and the World Trade Organization (which has issued a waiver for measures taken to implement it). The Kimberley Process was negotiated by a group of governments with particular interest in the problem, which met outside the auspices of the UN or WTO. The discussions included non-governmental actors, including NGOs and corporations, and progressed relatively quickly, reaching a conclusion in about two years.

The experience of the Kimberley Process and the Declaration on Violence Against Women, as well as of the ILO, suggests that to facilitate relatively rapid negotiation and adoption of a legal or quasi-legal instrument specifying a duty to protect, the instrument should address a particular problem, should be negotiated by an institution with expertise and experience on the topic *or* by the governments most concerned, and should include meaningful participation by interested non-governmental actors, including representatives of civil society and the corporations directly affected.

### **III. Tribunals and Treaty Bodies**

With respect to human rights treaties that contemplate but do not specify state duties to protect human rights from private interference, binding decisions of international bodies, or non-binding decisions that inform subsequent agreement and practice, may give greater content and specificity to the duties. Regional tribunals such as the European Court of Human Rights, the Inter-American Court of Human Rights, and the new African Court of Human and Peoples' Rights issue decisions that bind the parties

to the underlying treaties.<sup>12</sup> The most active of these tribunals is the European Court, the only one that allows individuals direct access to it. Over time, these tribunals are creating a body of law that specifies a range of duties to protect. But this process can be slow and haphazard, depending as it does on the number and nature of cases brought to the tribunals. In addition, the decisions are necessarily limited to some degree to the facts each case presents. This is less of a problem with respect to the European Court, which now hears so many cases that it is building up a fairly detailed jurisprudence (although it is now working to catch up with a large backlog of cases). Moreover, while its decisions and those of the other regional courts are limited to states party to the regional treaties they interpret, they may indirectly affect other states by persuading other institutions, including the treaty bodies described below, to follow their reasoning.

To the extent that the regional tribunals' jurisprudence depends on individual submissions, it is difficult to facilitate its more rapid development, except through steps that would result in a greater number of decisions across the board. (Such steps could include allowing individuals direct access to the Inter-American and African Courts, or adopting mechanisms to decide cases more quickly, as the Council of Europe has recently attempted.) The Inter-American or African Court could, however, be requested to issue an advisory opinion on the duty to protect.<sup>13</sup> Any party to the American Convention on Human Rights and any OAS organ may seek an advisory opinion from the Inter-American Court.<sup>14</sup> The equivalent entities may request an advisory opinion from the African Court, as may any "African organization" recognized by the African Union.<sup>15</sup>

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<sup>12</sup> Each decision binds only the state directly concerned, but other states have a strong incentive to bring themselves into compliance with the interpretation expressed in the decision, in order to avoid follow-on cases seeking to apply the precedent to them.

<sup>13</sup> The European Court may issue advisory opinions at the request of a majority of ministers, but the opinions may not address human rights or any issue that might be presented in a contentious proceeding. European Convention on Human Rights, art. 47.

<sup>14</sup> American Convention on Human Rights, art. 64(1). Although the opinion is not legally binding on the parties as is a decision in a contentious case, the Court has noted that it has "undeniable legal effects." Advisory Opinion OC-15/97, para. 26. The Court may decline the request if, among other reasons, the opinion "could produce . . . a determination of contentious matters not

The UN human rights treaties do not create courts with binding authority, but they do establish treaty bodies, composed of independent experts, tasked with issuing interpretations of the treaties. Several treaty bodies may receive communications from individuals alleging violations of their human rights by states parties and, issue decisions on the admissibility and merits of allegations. This has led to a helpful body of decisions from some of the treaty bodies providing guidance as to when the treaty body may consider a state to have violated its treaty obligations. Like the regional tribunals, however, the growth of this guidance is constrained by the communications brought to the treaty bodies' attention, and to that degree it may be difficult or impossible to facilitate its development in the direction of more specific duties to protect.

Each treaty body also has a mandate to review reports from the state parties on their compliance with their obligations under the treaty. At the close of their review, the treaty bodies issue concluding observations, which may state whether and how the parties are complying. To assist the states to understand their obligations in this context, the treaty bodies adopt formal interpretations of particular treaty provisions, often called general comments. Like the decisions on communications and the concluding observations, the general comments are not legally binding in themselves. They can have persuasive effect, however, setting out interpretive positions around which state practice may coalesce. As the Special Representative has described in a series of reports on seven core human rights treaties, through these avenues the treaty bodies have addressed duties to protect, although often not in detail. Encouraging the treaty bodies to elaborate on this work is an important way to speed up the specification of duties to protect. It would also encourage states to report on the measures they are taking to implement those duties, which would in turn lead them to consider the links between their obligations under

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yet referred to the Court, without providing the victims with the opportunity to participate in the proceedings.” Advisory Opinion OC-12/91, para. 28.

<sup>15</sup> Protocol to the African Charter on the Establishment of an African Court, art. 4(1).

human rights law and their existing and potential regulation and adjudication of corporate activities that might affect human rights. That would contribute to the development of state practice, discussed below.

#### **IV. State Practice**

State practice can be a source of legally binding elaborations of the duty to protect in two ways: (a) by providing evidence of customary international law; and (b) by providing evidence of a practice in the application of a treaty that establishes the agreement of the parties regarding its interpretation.<sup>16</sup> States undoubtedly have taken steps to implement their duties to protect human rights from abuse by private actors, including corporations. But these steps are often taken without attention to the measures adopted by other states. The lack of reciprocal awareness by states of other states' implementation of their obligations may make unnecessary divergence in state practice more likely, and may also preclude the shared understanding of the legal obligations necessary for the practice to inform either customary international law or the agreement of the parties necessary to influence the interpretation of human rights treaties.

As a result, an important way to facilitate specification of duties to protect through state practice is to increase the reciprocal awareness among states of the ways that they are implementing those duties. This increased awareness would also enable states to connect their ongoing regulation and adjudication of private actions with their duties to protect under human rights treaties. One way to increase knowledge of state practice would be to invest greater effort in compiling reports of states' implementation of their duties to protect against corporate abuse, including their implementation of regional human rights treaties and sectoral treaties such as labor conventions.<sup>17</sup> Another would be for the Human Rights Council's Universal Periodic Review mechanism and its

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<sup>16</sup> Vienna Convention on the Law of Treaties, art. 31(3)(b).

<sup>17</sup> The Brief on Corporations and Human Rights in the Asia-Pacific Region, prepared for the Special Representative, is an example of how such a review could be conducted.

other supervisory machinery to examine state practice in carrying out obligations to protect human rights, including from corporate abuses. The result would be two-fold: (a) it would contribute to the compilation of state practice in this area; and (b) by encouraging states to report on their implementation of their duties to protect, it would encourage them to draw connections between their domestic regulation of corporations and their obligations to protect human rights from abuses by corporations.