**Moving Beyond the Primacy of State Obligations and a Treaty on Business and Human Rights**

**David Bilchitz[[1]](#footnote-1)**

Thank you to the chair of the working group, Ambassador Espinosa and the Ecuadorian mission for the opportunity to present to you. I start with a concrete case which deeply affected me and will illustrate the points I wish to make today.

Last year, I met a woman, let me call her Sandra, of deep integrity who told me the story of her community. She came from an island, in which her community had lived for centuries off the land, plucking from the riches of nature the wonderful tropical fruits and utilizing the river as a mode of transport and to fish. Her community was not totally untouched: she had trained as a teacher and was assisting the children to learn: she told me how they loved trying out mathematical problems and being absorbed in a good story. All communities, of course, have some conflicts but they were largely peaceful.

Her world was to be fundamentally changed when a large deposit of copper was discovered on the island. Very soon, a large mining company bought the rights to mine on the land. The mining was supposed to be conducted in an environmentally friendly manner: but, it wasn’t. Mine poisoned the entire length of river upon which people had depended. Food was in short supply, people began to get sick, and babies were born with birth defects. Animals which had been a feature of their life for centuries were no longer to found and some went extinct. And with all this destruction, the people only received a tiny portion of the profits.

All these changes led to great tensions within the community and between the community and the mine: some supported the mining to continue; others did not. As outrage grew, some members of the community took up arms. Others retaliated. The government intervened and the whole island became militarized. 20000 people were eventually killed. And she told me how the saddest part was seeing the shattering of innocence of the children she taught. Their faces were no longer naïve: many had lost fathers, mothers, siblings. And her deepest wish was to restore some hope, some semblance of what had been lost to this traumatized generation.

I start with this true story because it helps to understand in a concrete way the importance and gravity of the matters we are talking about. I have deliberately not identified the place or parties as the point is not to name and shame. And this story has been replicated many times in Africa, in Asia, in Latin America and all around the world. We have often heard opposition to the treaty initiative, even in this room, but the question is whether any of that opposition is really based in an attempt to solve the legal gaps faced by Sandra and her community and the many people like them.

The central question on everyone’s minds is why a treaty on business and human rights? I have written articles on this question and do not have time to go through the answers now.[[2]](#footnote-2) Sandra’s story, however, illustrates some of the key reasons. Simply put, the harms caused to Sandra and her community were caused primarily by irresponsible practices by a mining company. Those harms involve violations of the most fundamental of rights, protected under international law: the right to food, the right to health and the right to life itself. The simple question is: should international law place an obligation on the company not to violate the rights of Sandra and her community? And, should international law ensure there are consequences for companies that do so?

Answering these question in the affirmative is often said to be difficult because international law is a system created by states. As a result, some have been of the view that only states can have obligations under international law. As a result, in Sandra’s circumstances, it is the state that can be held liable for not protecting individuals from the harms caused by the mining company. It is the state’s obligation to create laws and policies to ensure people are not harmed by companies. And it is the state’s obligation to enforce these laws and policies. Where rights violations ensue, the remedy of Sandra lies against the state and its failure to protect her and her community from the harm.

It should immediately be clear what is wrong with what I term the ‘state primacy’ paradigm. The primary violator of rights in Sandra’s case was, at least initially, the company. Why should it then not have obligations directly towards her and be able to be held to account?

A very important idea to understand is that fundamental rights protect the individual who has those rights and is derived from the idea, mentioned in many human rights treaties such as the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, of the value or dignity of the individual. That value means that others cannot treat one individual in ways that disrespect that individual. The idea of rights, however, is not fundamentally tied to any particular agent. If I have a right to life, it means that every individual in this room has an obligation not to throttle me, even though you may not like what I say. The notion and idea of a fundamental right and its rootedness in human dignity means that it is not essentially tied to the state as an agent. Instead, any individual or institution that has the capacity to harm my rights, is obliged not to do so. This idea is connected to the logic of fundamental rights that have been accepted by the international community since the second world war.

Indeed, there is something strange about saying that the state has a duty to protect individuals against harm by companies, but the company has no legal obligations to avoid that harm (as is the position, for instance, outlined in the United Nations Guiding Principles). Indeed, presumably, there is some reason why the state has an obligation to prevent the harm by a third party. That reason must lie in the fact that there is something wrong about the private party being able to cause the harm. But, if that is the case, it is unclear why that is not sufficient reason to recognize that private parties may not cause the harm themselves and why the focus shifts to the state.

This ‘state primacy paradigm’ has a number of further undesirable implications, all illustrated by Sandra’s story. First, we may ask, what happens if the state – in Sandra’s story – fails to implement a legal framework that places obligations on companies? The inference must be that the corporations within the state lack any obligations in relation to fundamental rights. There are many parts of the world today in which states are weak or otherwise fail adequately to give effect to their duty to protect. In these parts of the world, it would seem that powerful actors are under no obligations in relation to the fundamental rights of individuals. Without any international treaty on the matter, there will be no liability before national or international tribunals for violations of fundamental rights by private actors in jurisdictions that failed to impose fundamental rights obligations. Why?

Once again, this relates to a fundamental lacuna in the Guiding Principles which are simply not adequate to address the accountability gap in international law. The Guiding Principles speak eloquently of the need for an access to a legal remedy for victims of human rights violations. Yet, they fail to recognize legally binding obligations upon corporations. In the case just mentioned of a weak or recalcitrant state, there is no possibility of gaining a remedy against a corporation that violates rights as they lack any legal obligations. The only possibility of doing so will lie if there are extra-territorial obligations imposed by other states or, if there is international law that governs the case. To avoid a situation in which states start crafting different forms of extra-territorial obligation (which in themselves can create problems for state sovereignty), it is of importance to have clearly applicable fundamental rights standards in international law. In Sandra’s case, and utilizing existing frameworks of international law, it would be quite possible to find violations of the right to an adequate standard of living, the right to the highest attainable standard of health, and the right to life.

Placing obligations on states to determine their own frameworks can also undermine the universality of fundamental rights. States could, for instance, create different legal frameworks that impose different obligations on private actors: that would lead to a situation in which corporations would have certain fundamental rights obligations in some states and not others. In some cases, corporations would lack important obligations, placing rights in jeopardy. Indeed, we know that with globalization, there is the continued worry of a ‘race to the bottom’ with corporations shifting to countries with lesser rights protections in order to maximize their profits. Accepting fundamental rights means recognizing that states should not be competing on how bad their protections can be for individuals. There is a need for a universal common standard which all agree to implement and places obligations upon corporations even if states fail to enact domestic laws in that regard.

The state duty to protect has also been conceptualized as a duty of due diligence: ultimately, state liability only ensues if they have failed to take reasonable measures to ensure third parties do not violate the rights of individuals. States liability is thus not absolute. The possibility, however, exists that a corporation will violate rights in new and unexpected ways, despite the reasonable behavior of the state in developing a legal framework to regulate corporate behavior. In such a scenario, victims of rights violations may not be able to show that the state has been unreasonable in its actions and attain a remedy against the state. If corporate behavior has not been proscribed, then the corporation will also lack any liability. Once again, we have a state of impunity even though rights have been violated.

In conclusion, I have not tried to deny in this presentation the importance of state sovereignty and state action in international law. Yet, I have tried to show that states have accepted into the edifice of international law a notion – human rights- whose very logic requires us to recognize that all agents – whether state or non-state actors - can be bound by the obligations they impose. I have tried to show both theoretically and practically the importance of recognizing this point and that, for many people today, there is a legal vacuum.

Where does this take us? In my view, in any treaty, we need to move away from simple assertions about the primacy of the state in relation to fundamental rights obligations. This notion fails to capture the multiple ways in which non-state actors impact upon fundamental rights and also suggests that the obligations of corporations are lesser in import. Instead, we need to take a progressive step forward in recognizing that corporations themselves too have obligations under international law and, in so doing, we will help close several lacunae and address a number of the problems raised. The quest for a treaty which accomplishes this, is important not just for the sake of theoretical and moral coherence but because it will help create a world in which I do not need to tell the tragic story of Sandra and her island community.

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2. The arguments in this paper are based upon two articles I have written: D Bilchitz ‘Corporations and the Limits of State-based Models for Protecting Fundamental Rights in International Law’ (2016) 23 *Indian Journal on Global Legal Studies* 143-170; and D Bilchitz ‘The Necessity for a Business and Human Rights Treaty’ (2016) 1 *Business and Human Rights Journal* 203-227. [↑](#footnote-ref-2)