Chapter 2

Regulatory framework and Guiding Principles

In recent years, much has been written about the positive and negative impact of business on human rights, and how, why and if the corporate sector should be more engaged in respecting and protecting rights. Beginning in earnest in the 1990s, the debate has now largely moved from 'if' business should be engaged with human rights to 'how'. But, as the role and influence of corporations has increased globally, so too has the confusion around what specifically is required of them, and what the best mechanisms are to encourage companies to engage more substantially with human rights.

This chapter provides an overview of the principal regulatory developments in this field; those developments encompass a broad array of tools including international and national laws, soft norms and stakeholder-led initiatives. A reference to 'regulating' corporate conduct will mean different things to different people. Regulation is used here in a broad sense to incorporate formal and informal and legal and non-legal mechanisms, designed to influence or at times press corporations to better respect and/or protect human rights. Indeed, the business and human rights field is remarkable for the diversity of techniques that have been employed to regulate corporate conduct along with the breadth of stakeholders involved in using varied strategies.

The contribution by Justine Nolan spans the breadth of this movement and reinforces the apt statement of the former Special Representative of Business and Human Rights, that 'there is no single silver bullet solution to the institutional misalignments in the business and human rights domain. Instead, all social actors – States, businesses, and civil society – must learn to do many things differently'.[1] The adoption by the UN Human Rights Council in 2011 of the Guiding Principles on Business and Human Rights (Guiding Principles) was a major development in the business and human rights field. Chip Pitts describes the Guiding Principles and their impact. John Ruggie discusses his foundational premises in the development of the Guiding Principles and what, in his view, are the crucial next steps to be addressed in the business and human rights field.

What is becoming increasingly apparent is that in striving for greater protection for human rights, a multiplicity of stakeholders (both state and non-state actors) must be involved. Some of the most powerful global actors today are companies, not governments. Logically, recourse to international or local laws and a system of

enforcement and judicial relief in the host countries where global corporations operate should be the primary option for ensuring greater protection for human rights. However, the reality is that in many countries this simply is not occurring. Laws are sometimes weak but enforcement is weaker still. Soft-law and stakeholder-led initiatives have an important role to play in engendering greater corporate respect for human rights and many of these mechanisms highlighted in this chapter must necessarily work in collaboration with each other.

Note

1 Human Rights Council, 'Protect, Respect and Remedy: a Framework for Business and Human Rights', Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, UN Doc. A/HRC/8/5 (7 April 2008), para. 7.

Section 2.1

Mapping the movement: the business and human rights regulatory framework

Justine Nolan

1 Introduction

Traditionally, responsibility for protecting and advancing respect for human rights has been assumed to be the duty of the state (national governments), with rules drawn predominantly from international treaties that might then be translated into national laws, such as health and safety or anti-discrimination legislation. It is only quite recently that discussion has expanded to focus on the human rights responsibilities of companies. In response to the evolution of the global business and human rights agenda in the last three to four decades, private (or public–private) regulation[1] has become a central means of driving consensus on how corporations can and should advance respect for (and sometimes protect) human rights. International law and its state-centric framework for protecting rights is proving inadequate to stem and redress corporate rights violations and has led to protection or governance gaps.

Writing in 2008, then United Nations (UN) Special Representative for Business and Human Rights (SRSG), John Ruggie noted that 'the root cause of the business and human rights predicament today lies in the governance gaps created by globalization – between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences'.[2] That is, corporations often operate in countries that do not have the capacity or will to protect the rights of those within their jurisdiction; as a result, their activities are difficult to monitor and regulate, and wrongs often remain without redress. All around the global marketplace, non-state actors such as non-government organizations (NGOs),

international institutions, unions, companies, multi-stakeholder groups and industry bodies, have stepped in to develop governance mechanisms that attempt to fill such gaps.[3]

The adoption by the UN Human Rights Council in 2011 of the Guiding Principles on Business and Human Rights[4] (Guiding Principles) signalled acceptance of the notion that corporate responsibility to respect human rights exists independently of, and as a complement to, states' duties to protect human rights. While the Guiding Principles provide a useful foundation for future action, many stakeholders were already involved in developing non-state-based regulatory initiatives – such as the Fair Labor Association or the Global Network Initiative – to develop industry standards, metrics and implementing procedures that give substantive content to corporate human rights responsibilities. This transfer or sharing of regulatory authority between states and non-state actors utilizes a combination of hard and soft laws[5] to establish relevant standards for corporate activity, including compliance mechanisms to monitor implementation of these standards.

This chapter provides an overview of the history of international, state and non-state efforts to regulate corporate compliance with human rights standards. It begins by highlighting the central obligations of states to protect human rights on the basis of international human rights and labour laws and national laws. The chapter then takes note of the corollary development of soft law (both from a top-down international institutional perspective and from a bottom-up stakeholder driven process) that has arisen in response to gaps in state protection mechanisms. What is becoming increasingly apparent is that for sustained improvements to occur, a multiplicity of stakeholders and mechanisms must be used to both prevent and redress the impact of business on human rights.

2 The human rights framework and its traditionally state-centric focus

The international human rights framework has been a touchstone for many seeking to attach human rights responsibilities to corporations. The relevance of human rights to business is now more generally accepted,[6] but the extent of corporate responsibilities (or perhaps even obligations) flowing from that symbiotic relationship is more contested. Understanding the human rights framework helps attach content to the rights themselves and gives a broader basis for understanding the independent but also interdependent responsibilities of both states and business in protecting and respecting these rights.

2.1 Universal Declaration of Human Rights

The Universal Declaration of Human Rights (UDHR) lists 30 substantive human rights that are promulgated as a common standard of achievement for all peoples and all nations: every 'individual and organ of society' shall strive by teaching and education to promote respect for these rights and by progressive measures secure their universal and effective recognition and observance.[7] Motivated by the experiences of the preceding world wars, the UDHR was the first time that countries

agreed on a comprehensive statement of inalienable human rights. The UDHR is expressed entirely in terms of entitlements for individuals and peoples rather than obligations on states or other entities. As a declaration of the UN General Assembly, it does not create legal obligations of itself. Nevertheless, the UDHR is frequently cited as the source of human rights obligations that corporations are urged to follow.

The expression 'every individual' in the UDHR can be taken to include juridical persons. Thus 'every individual and organ of society' excludes no one, including corporations.[8] Furthermore, the phrase 'every organ of society' indicates that the human rights in the UDHR are to be respected, protected and promoted not only by states but also by all social entities capable of affecting the enjoyment of human rights, including corporations.[9]

Extending the moral, if not legal, authority of the UDHR to corporations relies on art. 29, which acknowledges that 'everyone' has 'duties' to the community, and art. 30, which prohibits any 'group' from engaging in any activity or performing any act aimed at destroying any of the rights and freedoms in the UDHR. Ultimately, however, the UDHR's provisions arguably express no more than a desire that corporations might 'strive' to promote respect for human rights rather than directly imposing any binding legal obligations on these non-state entities.[10]

2.2 International human rights treaties

While the UDHR identifies human rights entitlements rather than explicit legal obligations, international human rights treaties transform those rights into binding legal obligations upon states. The International Covenant on Civil and Political Rights (ICCPR)[11] and the International Covenant on Economic, Social and Cultural Rights (ICESCR)[12] make all the rights in the UDHR, other than the right to property, obligations of states party to them. Human rights obligations are also contained in subject-specific treaties including conventions of the International Labour Organization (ILO),[13] agreements concerning slavery[14] and racial discrimination[15] and the rights of particular groups including women,[16] children[17] and migrant workers.[18]

The state-centric framework of international human rights law emphasizes the primary responsibility of governments to protect human rights while remaining partially blind to the opportunity to speak more directly to influential non-state actors including corporations. The size, revenues and global reach of some corporations now means that their potential power to impact communities is commensurate with those of states; yet they are not directly bound by international human rights laws.[19] More recent treaties, and occasionally treaty bodies, have begun to refer more directly to the role of states in specifically preventing human rights abuses by corporations.[20] It is commonly assumed that these treaties do not themselves create direct obligations for corporations[21] but instead require states to regulate and adjudicate the acts of corporations in order to fulfil their duty to protect human rights as outlined in the treaties. Thus, a state failure to ensure compliance by private employers with basic international (or comparable national) labour standards could amount to a violation of the right to work or to just and favourable working conditions. However, the fact that a treaty imposes an obligation on a state to protect private persons from the actions of another does not automatically enable an individual to seek legal recourse from another private actor (such as a company) for violating his or her

rights. Without direct obligations for companies, any allegation of a violation of human rights needs to be framed in terms of the responsibility of the state to protect human rights from violations by private actors.

2.2.1 A business and human rights treaty?

The resolution adopted by the UN Human Rights Council in 2014[22] to explore the development of a business and human rights treaty raises anew the issue of whether the international human rights law framework can accommodate corporate liability. Questions arise as to the necessity for a treaty, the potential effectiveness of a treaty and the theoretical and practical feasibility of establishing a framework to hold hundreds of thousands of corporations to account.[23] The current debate harks back to that which began in the 1970s (with respect to the development of a UN Draft Code to regulate transnational corporations) and perhaps illustrates how little has changed in certain respects. This issue is discussed in more detail in Sections 2.3, 2.4 and 2.5.

2.3 ILO conventions and guidelines

Core labour standards are a subset of fundamental human rights, some of which are expressly recognized in human rights treaties. However, it is a 'regrettable paradox that the human rights movement and the labor movement run on tracks that are sometimes parallel and rarely meet',[24] despite the substantial overlap between the two. The right to work has direct intersections with many other rights, including civil and political rights, such as the right to life and freedom of expression, and also economic, social and cultural rights, such as the rights to health and an adequate standard of living.

The ILO (the establishment of which pre-dates the UN by more than 25 years) liaises closely with UN charter-based and treaty-based bodies, and reports on issues such as child labour, discrimination, forced labour, migrant workers and freedom of association. Although the essence of both the UN and ILO compliance mechanisms is based on dialogue and persuasion, the systems of supervision (ILO) and monitoring (UN) differ. The ILO's unique tripartite structure aims to ensure the full participation of not only governments but also employer and employee representatives in the drafting and implementation of labour standards. Tripartite governance is not a panacea, however, and its effectiveness relies on the ability of each of the parties to negotiate as independent entities. In some regions of the world,

> industrial relations law and practice are closely bound up with industrialisation and development strategies that are generally accompanied by state control over labour unions in order to maintain the stability that national governments may feel is needed for rapid economic development.[25]

China is but one example of a country where the independence of the three delegate factions to the ILO is compromised.

International labour standards take the form of conventions (legally binding treaties) that may be ratified by member states, which are then monitored for compliance. Recommendations (non-binding guidelines) may supplement a particular convention or provide more general guidance on labour standards and their implementation. In the nearly 100 years since its creation, the ILO has drafted numerous

conventions and recommendations covering a diverse range of topics but it has been less effective in enforcing standards than creating them. The ILO has enunciated four 'core labour standards' – freedom of association and collective bargaining, elimination of discrimination, elimination of forced labour and elimination of child labour – which are linked to eight conventions, commonly referred to as the ILO's fundamental or core conventions.[26] Like international human rights treaties, ILO conventions legally and directly bind states, rather than business. However, in 1977 the ILO attempted to speak more directly to business and launched its Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy.[27] The Declaration aims to provide guidance concerning how corporations can positively contribute to economic and social progress. It encourages companies to implement labour rights but does not contain any enforcement mechanisms to ensure they do so.

Snapshot

The ILO and the Cambodian garment sector

Cambodia's Better Factories programme is illustrative of a departure from the ILO's traditional approach and highlights the potential value of involving a multiplicity of stakeholders and approaches (i.e. both 'carrot and stick') in improving working conditions.[28] The programme developed out of the 1999 US–Cambodia Bilateral Textile Trade Agreement, which provided Cambodia with increased access to the US market (via increased quotas) based upon tangible improvements in working conditions in Cambodia's garment factories.[29] The project, launched in 2001, monitors factory performance against international and national labour standards and was established by the ILO in cooperation with the US and Cambodian governments. It is not strictly a multi-stakeholder initiative in terms of its governance and structure but the participation of non-state actors (including business, NGOs and unions) in the programme is crucial.

Monitoring reports concerning the labour standards have been used by the US government to assess quota increases, as well as by global corporate buyers to determine where they should place their orders. Quotas were eliminated in 2005, but the ILO programme continues with the ongoing support of the Garment Manufacturers' Association in Cambodia, international buyers and unions; however, concerns have been raised about progress since 2005.[30] Key to the continuation of the programme are global buyers who are conscious of their own reputations and who, 'in the continuing absence of a [local] well-funded labor inspectorate … appear to be driving improved compliance with ILO labor standards'.[31]

While international standards, such as those found in ILO and human rights treaties, are the appropriate baselines against which to monitor corporate compliance, they have meaning only if effective remedies and enforcement mechanisms are put in place or if they are taken up by local governments. The Better Factories project has the potential to showcase a concrete example of how international standards, together with strong monitoring and trade incentives and encouragement (in the form of orders) by global buyers and the involvement of civil society and unions, could be combined to form a sustainable basis for improving working conditions. However, some dispute the continued improvements in Cambodian factories, in part due to the fact that with the elimination of

the quotas in 2005, the programme became 'non-binding and unenforceable'.[32] Some argue that 'by implementing non-binding programmes that offer carrots without wielding a stick, poverty wages and precarious work continue to be the norm in Cambodia's garment factories'.[33]

2.4 National laws

In most jurisdictions, national laws regulate specific corporate activities that affect human rights through provisions dealing with labour rights, anti-discrimination, environmental protection and crime. National laws can and do directly target corporations as subjects of law, although domestic legislation typically does not apply extraterritorially. Responsibilities of states as bounded by territorial limits do not match the transnational operations of the companies based or operating within their territory. The Guiding Principles adopted a rather modest approach to the prospect of states regulating corporate activities extraterritorially by noting only that '[s]tates must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises'.[34] The Commentary to Guiding Principle No. 2 elaborates on these territorial and jurisdictional limits by noting the possibilities open to states to broaden and deepen the scope of the duty to protect under international human rights treaties, but it does not go so far as to suggest that states are obliged to act in this regard.[35] However, in contrast, several UN bodies have taken a more expansive approach regarding who and what a state might regulate in the pursuit of protecting human rights.[36] The barriers to regulating corporate activity extraterritorially are more likely to be political than legal.[37]

Snapshot

US Foreign Corrupt Practices Act

When looking for examples of how a state might reasonably regulate corporate activities beyond its borders, one model of extraterritorial legislation that has had a widespread impact on the private sector is the US Foreign Corrupt Practices Act (FCPA).[38] Adopted in 1977,[39] the FCPA has influenced the way in which US businesses operate abroad, and has changed the global business environment more generally with respect to corruption. Setting a precedent for how a legislative model can reverberate globally, the FCPA was followed into operation by the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, and the UN Convention Against Corruption,[40] which established international standards for combating corruption. Companies have responded to these global anti-corruption laws by developing due diligence programmes to proactively identify potential risks. The global implementation of laws to combat corruption is a useful model for assessing how greater rigour could be brought to bear in applying international human rights standards to business, and the mandated due diligence requirements showcase how the Guiding Principles could be hardened into a national legislative model with extraterritorial reach.

Another way states can 'regulate' corporate activities that take place outside their territory is to mandate increased transparency in global business operations. For

example, s. 1502 of the US Dodd–Frank Act requires all listed companies to report on the sources of minerals used in their products that originate from the Democratic Republic of Congo (DRC) or adjoining countries.[41] The purpose of this provision is to provide greater transparency about how the trade in minerals is potentially fuelling and funding the armed struggle in the DRC; functionally, it relies on the adverse reputational impact of such disclosure rather than mandating penalties for actually sourcing minerals from conflict-afflicted regions.

Reporting requirements are a first step in linking transparency with accountability, but much depends on the quality of the reports and to what use the information is then put. A study of the first set of Conflict Minerals Reports submitted to the Securities Exchange Commission up to June 2014 argues that these reports exhibited a low level of compliance with due diligence requirements and identified several obstacles to achieving broader compliance, including that:

> (i) international norms on supply chain due diligence are in their infancy; (ii) the proliferation of certification standards and in-region sourcing initiatives are still evolving and often competing; and (iii) inadequate local security and weak governance inhibit the mapping of mineral trade and the tracing of minerals in the region.[42]

Ultimately, however, laws – whether national or international – are only as strong as their enforcement capacity. In many countries, labour laws, in particular, are hampered by the inability or unwillingness of the state to enforce them. For example, in 2013 the US 'federal Occupational Health and Safety Administration ha[d] just two thousand inspectors to monitor over eight million workplaces in the United States, meaning that it [could] inspect each workplace only once every 131 years'.[43] In 2013, the Bangladeshi government identified

> the need to hire 800 additional labor inspectors to conduct factory inspections. Almost two years later, the government had created 392 new positions (almost half of the target number of inspectors). However, as of October 2014, the government had only been able to fill 50 of these positions.[44]

Likewise, reporting regulations with no sanctions attached for non-compliance are likely to result in partial compliance.[45] Such regulatory enforcement gaps have led to increased reliance on tools developed by non-state actors to monitor and report on workplace conditions.

3 International institutional initiatives

There have been a variety of attempts, particularly since the mid-1970s, to use 'soft law' to regulate the impact of business practices on human rights, for instance, through multi-stakeholder guidelines, declarations or codes of conduct. The institutional initiatives highlighted below are examples of attempts by various international organizations to harness the power of business to positively impact human rights by providing broad frameworks that assist companies in understanding what constitutes responsible business conduct. The utility of these initiatives is not their ability to act

as a tool of legal accountability or as a means of providing sector-specific advice on how to respect and protect human rights; rather, the initiatives engage with companies to assist them to better understand the general contemporary responsibilities of business with respect to human rights and in promoting ethical leadership on human rights.

3.1 The UN Draft Code of Conduct on Transnational Corporations

In 1973 the UN Economic and Social Council charged a 'Group of Eminent Persons' with the task of advising on matters related to transnational corporations (TNCs) and their impact on the international development process. In 1974 the UN established the Centre on Transnational Corporations, which, by 1977, was coordinating the negotiation of the Draft Code of Conduct on Transnational Corporations (Draft Code). The text of the Draft Code contained duties for TNCs to respect host countries' development goals, observe their domestic laws, respect fundamental human rights and observe consumer and environmental protection objectives. The Draft Code was never officially adopted and its legal nature was never established. There were proponents of both a universally applicable, legally binding code and a voluntary code. If binding, the Draft Code would have served as a convention with both national and international mechanisms for implementation. If voluntary, it would have merely served as a set of broad guidelines to be observed by participating parties. That decades-old debate is now being reinvigorated with the 2014 resolution by the UN Human Rights Council to explore a treaty to regulate corporate activity.

3.2 The Organisation for Economic Co-operation and Development Guidelines for Multinational Enterprises[46]

The OECD Guidelines for Multinational Enterprises (OECD Guidelines) are 'recommendations addressed by governments to multinational enterprises operating in or from adhering countries'.[47] First launched in 1976 with only a passing reference to human rights, they were updated in 2011 to incorporate the tenets of the Guiding Principles. OECD members and adhering states are obliged to set up a National Contact Point (NCP) to promote the OECD Guidelines. The OECD Guidelines are voluntary in their application and multinational enterprises are invited to adopt the guidelines in their management systems and incorporate the OECD Guidelines into their corporate operations. In the 2000 update of the OECD Guidelines a new complaint procedure was introduced that allows NGOs and others to submit complaints concerning alleged breaches of the OECD Guidelines to a government's NCP.[48] To date, approximately 300 complaints have been addressed by NCPs but the extent of the remediation that has resulted from these complaints is unclear.[49] The OECD Guidelines have been widely criticized in part because of the inconsistent manner in which they have been applied by NCPs; nevertheless, the fact remains that the OECD Guidelines are one of the few institutional initiatives that includes a dispute resolution mechanism.[50]

Snapshot

United Kingdom (UK) National Contact Point and Gamma

Gamma International UK is part of the Gamma Group of companies that supplies and trains government agencies in the areas of communications monitoring, data recovery and forensics, and technical surveillance. In 2013 a complaint was lodged with the UK NCP by a number of NGOs (including Privacy International). It was alleged that Gamma supplied a spyware product (Finfisher) to agencies of the Bahrain government, which had used it to target pro-democracy activists in Bahrain. It was alleged that these activists were subsequently detained and in some cases tortured by the Bahrain security forces.[51] The complainants did not suggest that Gamma had a role in deciding who was targeted; rather, it was argued that the company should have made a judgement about the general risk that supplying Finfisher to Bahrain would lead to the product being used for internal repression.[52]

The UK NCP made a first assessment of the complaint in 2013 and offered the parties mediation but they were unable to reach agreement. In 2015 the UK NCP issued its findings[53] that Gamma's actions were not consistent with the general obligations in the Guidelines to respect human rights, that it had failed to develop a company policy on human rights and that it did not conduct appropriate due diligence.

The decision acts as a recommendation to the company and while it attracted media attention and was useful in 'naming and shaming' Gamma, the NCP does not have the power to ensure that Gamma's practices change in accordance with its recommendations. The NCP will issue a follow-up report one year after the release of its findings, which may again be useful in focusing public attention on the practices of one particular company.

3.3 UN Global Compact

In 2000 the UN established the Global Compact, which calls on companies to voluntarily 'embrace and enact' a set of 10 principles relating to human rights, labour rights, the environment and anti-corruption. By participating, companies agree to incorporate the principles in their day-to-day operations and issue an annual public Communication on Progress, which reports on the company's progress in implementing the principles. A failure to report could eventually lead to the expulsion of the company from the Global Compact.[54]

While the Global Compact has been successful in attracting a large number of participants, now estimated at more than 12,000 participants, including over 8,000 businesses,[55] its attempt to build a broad and inclusive tent has attracted some criticism, including with respect to the generality of its provisions, its participants' lack of commitment and the limited accountability that participation entails.[56] The Global Compact is not a vehicle to push companies beyond their comfort zone in confronting their human rights responsibilities; nor is it a tool for holding corporations to account for human rights violations. It is an educational initiative that raises awareness around business and human rights issues and, as such, can be a useful basis for peer learning. The Global Compact was significant for squarely placing human rights on the corporate agenda and welcoming business into the fold of the UN, but

arguably the Global Compact has never reached its full potential as a learning platform and legitimately attracts criticism that it has instead been captured by 'big business'.[57]

Snapshot

The Global Compact's principles

Human rights

- Principle 1: Businesses should support and respect the protection of internationally proclaimed human rights; and
- Principle 2: make sure that they are not complicit in human rights abuses.

Labour standards

- Principle 3: Businesses should uphold the freedom of association and the effective recognition of the right to collective bargaining;
- Principle 4: the elimination of all forms of forced and compulsory labour;
- Principle 5: the effective abolition of child labour; and
- Principle 6: the elimination of discrimination in respect of employment and occupation.

Environment

- Principle 7: Businesses should support a precautionary approach to environmental challenges;
- Principle 8: undertake initiatives to promote greater environmental responsibility; and
- Principle 9: encourage the development and diffusion of environmentally friendly technologies.

Anti-Corruption

- Principle 10: Businesses should work against corruption in all its forms, including extortion and bribery.

3.4 The UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights

In 1998 the UN Sub-Commission on the Promotion and Protection of Human Rights established a five-member Working Group to 'draft Norms … on the responsibilities of transnational corporations and other business enterprises with regard to human rights'.[58] The Group embarked on a series of consultations during which various versions of the Norms were circulated and commented on by a diverse group including representatives from governments, intergovernmental organizations, NGOs, business, the UN and other interested parties. In 2003 the Working Group presented to the Sub-Commission a set of draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights.[59] Although the Sub-Commission unanimously adopted the Norms,[60] the UN Commission on Human Rights in its 2004 session took note of the Norms, but resolved, much to the relief of many in the business community and many governments, that

the Norms had 'no legal standing'.[61] The Commission then, in its 2005 session, effectively curtailed any further debate about the Norms by requesting the UN Secretary-General to appoint a Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises (SRSG) to, among other things, clarify the standards of corporate responsibility.[62] The SRSG later described the Norms endeavour as a 'train wreck' and declared the Norms dead.[63]

The Norms identified specific human rights relevant to the activities of business, such as the right to equal opportunity and non-discrimination, the right to security of person, the rights of workers and the rights of particular groups such as indigenous peoples. The Norms were based on the concept that:

> [E]ven though States have the primary responsibility to promote, secure the fulfilment of, respect, ensure respect of, and protect human rights, transnational corporations and other business enterprises, as organs of society, are also responsible for promoting and securing the human rights set forth in the Universal Declaration of Human Rights.[64]

The Norms provoked heated debate between business, government, human rights organizations and international and corporate lawyers. A number of key business organizations objected to the Norms on a variety of fronts and lobbied strongly against any moves by the Commission to adopt the Norms.[65] In contrast, many NGOs stridently welcomed the Norms.[66]

The main objections to the Norms were documented in a 2005 report prepared by the UN Office of the High Commissioner on Human Rights.[67]

Critics of the Norms argued that: the legal responsibilities placed on business were more extensive than those placed on states; the Norms privatized the protection of human rights by shifting the responsibility from states to business; the implementation provisions were unworkable; some of the standards vague and duplicative of other initiatives; and the binding nature of the Norms could be counterproductive, potentially jeopardizing other voluntary efforts such as the UN Global Compact, which was established during the Norms' drafting process.

Proponents of the Norms argued that the Norms could: fill a regulatory gap where states were failing to legislate effectively or were unable to protect human rights; address the shortcomings of the various voluntary initiatives that were inconsistent in their treatment of human rights and insufficient to mitigate corporate violations of rights; and offer the possibility of a remedy to victims of human rights violations.

The introduction of the Norms altered the framework of the business and human rights/corporate social responsibility debate. Some of the more amorphous corporate social responsibility dialogues now had to accommodate a debate on the role and relevance of international human rights to business. The divisive fracas spurred by the Norms gave way in 2005 to the consensus-seeking approach of the SRSG as he sought to build bridges between the various stakeholders and forge a different framework for addressing business and human rights challenges.

3.5 UN 'Protect, Respect, Remedy' Framework and the Guiding Principles

In July 2005 the UN Secretary-General appointed Professor John Ruggie as the SRSG. In the following years, Ruggie undertook an extensive consultation process and in 2008 presented the UN Human Rights Council with a Framework to anchor the business and human rights debate. The Framework comprises three core pillars (or principles):

1 the state's duty to protect against human rights abuses by third parties, including business;
2 the corporate responsibility to respect human rights; and
3 the need for more effective access to remedies.

The 2011 Guiding Principles aim to provide guidance in operationalizing this Framework (and are discussed further in Section 2.2). In July 2011 the UN Human Rights Council endorsed the Guiding Principles and announced the formation of a Working Group 'to promote the effective and comprehensive dissemination and implementation of the Guiding Principles'.[68]

The Guiding Principles have quickly become a 'common reference point in the area of business and human rights'.[69] States, international institutions (such as the OECD), multi-stakeholder initiatives, companies and NGOs have used the Guiding Principles in different ways.[70] A 2014 survey by *The Economist* of 853 senior corporate executives found that 83 per cent of respondents agreed that human rights are a matter for business as well as governments;[71] it seems reasonable to infer that the work of the SRSG influenced this majority opinion. However, the same survey revealed that '[w]hile corporate attitudes are evolving fairly quickly, concrete steps to reform company policies and to communicate such changes externally are slower to follow'.[72] Of course, the survey was not concerned with the particular impact of the Guiding Principles. Nevertheless, it does capture the essence of some of the critiques of the Guiding Principles, which argue that the broadly framed principles encourage, but do not oblige, companies to respect human rights.[73] Other criticisms[74] of the Guiding Principles centre on the following issues:

- *Extraterritorial protection of human rights*. One of the key issues regarding state enforcement of human rights (pillar 1) is the potential to protect human rights extraterritorially (that is, outside a state's territory). The fact that states have a duty to protect from third-party violations is non-controversial. How far that obligation extends and whether it should be applied extraterritorially is far less settled. The Guiding Principles note that 'States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises'.[75] The Commentary to Guiding Principle No. 2 notes the possibilities open to states to broaden and deepen the scope of the duty to protect but does not go so far as to suggest states are obliged to act in this regard. This approach does not reflect increasing international recognition, including by UN treaty bodies,[76] of the legal obligation on states to take action to prevent abuses by their companies overseas.

- *Flexibility and ambiguity around the commitment for companies to respect human rights*. The Guiding Principles have been criticized for providing 'far too much wiggle room [and including] too many "should" in place of "shalls" '.[77] The language used in the Guiding Principles when framing the corporate responsibility to respect human rights (pillar 2) stems from a social expectation (not legal obligation) to respect human rights and this is reflected in the recommendatory nature of the language employed.[78] The flexibility of the language may be welcomed by some stakeholders to allow for specific idiosyncratic tailoring of responses at a corporate level; however, the looseness of the language may also invite inaction and a business-as-usual approach from companies that remain hesitant about their responsibility to act.
- *Access to remedy must be mandated*. The Guiding Principles provide valuable guidance for developing state and non-state based systems to provide access to remedy (pillar 3) for victims of corporate abuses. As the Guiding Principles note, the concept of access to remedy is multi-pronged and includes judicial and non-judicial mechanisms. However, as one commentator observed back in 1999, 'only a selected few among private corporations are likely to willingly submit to new responsibilities without being legally compelled to do so'.[79] More than a decade later, this comment still rings true, particularly with respect to the provision of reparations for victims of corporate abuse. While the number of corporations prepared to adopt human rights policies may have risen, the limited mechanisms for enforcing such policies remain largely embedded in soft law that, unless hardened, will have a very limited effect in preventing future violations of human rights by corporations.

The SRSG has often stated that 'there is no single silver bullet solution to the institutional misalignments in the business and human rights domain. Instead, all social actors – States, businesses, and civil society – must learn to do many things differently'.[80] The development of the Framework and the Guiding Principles was a deliberate attempt to break from the divisive discussion of the previous years and build a more consensual approach to involving all stakeholders, but particularly business, in building greater respect for human rights. The Guiding Principles reaffirm the relevance of all human rights to business but do not end the debate on how best to address and redress corporate violations of human rights. The Guiding Principles instead set the stage for further elaboration of industry-specific standards and mechanisms (both state and non-state based) to protect and respect human rights.

4 Stakeholder initiatives on human rights

Prior to the development of the Guiding Principles, many NGOs and companies were already involved in establishing or working within practically focused private or public–private regulatory initiatives to improve respect for human rights. This section provides an overview of some of these initiatives (which are discussed more extensively in Chapter 4) that were generally developed at the behest of NGOs, unions, companies and/or governments with the aim (in part) of filling the regulatory

lacuna that emerged from the inability or unwillingness of many states to protect human rights in the workplace.

One of the earliest initiatives was the Sullivan Principles, developed by Reverend Sullivan in 1977, which was a South African code of conduct aimed at ending discrimination against blacks in the workplace. The 1970s also saw a high-profile boycott campaign against the Swiss-based Nestlé corporation over concerns about its marketing campaign of breast milk substitutes in developing countries.[81]

Beginning in the 1990s, many companies began to adopt codes of conduct to guide responsible business practices and, perhaps, to pre-empt tactics such as those used against Nestlé. Initially, many of these codes were company-specific (and were often developed in-house without input from external stakeholders) or drafted exclusively by industry.[82] Over time, however, concerns around the content, legitimacy and accountability of such codes has seen a trend towards the development of 'multi-stakeholder' codes of conduct. Multi-stakeholder initiatives (MSIs) bring together a multiplicity of stakeholders to work together to achieve their goals collectively. MSIs may include representatives from groups as diverse as worker representatives, consumer groups, customers, investors, NGOs, business and governments.

Early MSIs in the corporate responsibility space were initially focused on environmental issues and include some that are still operating today, such as the Forest Stewardship Council (1993) and the Marine Stewardship Council (1997). Other MSIs soon emerged that targeted human rights more specifically and often focused on particular sectors (such as apparel or mining). Some of the earlier MSIs focused largely on apparel and footwear, including Social Accountability International (1997), the Fair Labor Association (1998) and the Ethical Trading Initiative (1998). Each of these was, in its own way, attempting to regulate what was seen as a (partially) unregulated market. Since 2000, a number of industry-specific MSIs have emerged, including the Voluntary Principles on Security and Human Rights (2000), the Kimberley Process Certification Scheme (2002), the Extractive Industries Transparency Initiative (2003), the Global Network Initiative (2008) and the nascent International Code of Conduct for Private Security Providers (2010). What these MSIs have in common is an attempt to forge consensus on a sector-specific set of standards. However, they differ vastly in terms of their structure, membership, governance, transparency, monitoring and reporting requirements.[83] While the proliferation of codes of conduct – whether company-specific or as part of an MSI – in the last two decades has meant that hundreds of companies have now publicly committed to upholding basic human rights, the challenge is to ensure that the standards espoused in codes or guidelines adopted by business are consistent, comprehensive and, most importantly, implemented.

Another response to the absence of effective regulation of international labour standards (particularly in supply chains) has been the development of international framework agreements (IFAs), which are agreements signed by global union federations (GUFs) and TNCs. The first IFA was signed by the French food multinational Danone in 1988 and by 2013 there were 88 IFAs operating globally.[84]

Like codes of conduct, IFAs can differ from company to company but they consistently reference the ILO core conventions. While some IFAs include monitoring mechanisms and some do not, their purpose is to provide a framework for labour negotiations to take place with a minimum floor. IFAs are generally distinguishable from other codes in the corporate responsibility field because they result from

negotiation with international workers' representatives. The focus of IFAs on labour rights mean that they represent a strong possibility for protecting the rights of workers in far-flung areas around the globe. However, they too can suffer from some of the same problems that beset codes of conduct, such as failures in implementation and a top-down approach that would be strengthened by greater connection to local organizing.[85]

It is arguable that the increasing reliance on codes of conduct and/or stakeholder initiatives to regulate human rights is linked to the lack of better mechanisms, such as an enforceable international agreement or stronger state protection of human rights, though their popularity may also be construed as a tactic for avoiding government regulation. More positively, the use of these initiatives can also be seen as a deliberate strategic choice to involve key participants (particularly business) in developing solutions to business and human rights challenges. The attraction of adopting a code of conduct can be easily understood if the standards are viewed as containing only aspirational goals that aim for the best possible scenario with limited accountability if such goals are not met. But the simple adoption of a code by a company is very different from a commitment to be involved in an MSI with rigorous monitoring and reporting requirements or signing an IFA with a global union. The reality is that, not unlike the global state-centric framework for enforcing international human rights law, such initiatives are only as strong as their participants choose to make them, and they do not apply to those that do not want to join them. However, stakeholder initiatives have emerged as an effective regulatory technique for addressing corporate impacts on human rights and are not only an important supplement to international and national laws but perhaps a more immediate and practicable mechanism for protecting human rights.

5 Conclusion

Multiple mechanisms and stakeholders have been involved in the decades-long struggle to improve corporate respect for human rights. The acceptance by many companies in recent years of the relevance of human rights to business has been driven in part by campaigns involving unions, NGOs, consumers, investors and workers themselves. This push from the 'ground up' has caught the attention of companies, many of which have been forced into the spotlight to defend or redress their practices. Such stakeholder initiatives often make reference to the international framework of human rights and labour laws that provide a 'top-down' set of standards that enunciate the rights that are to be respected and protected. National laws that reiterate such standards are also crucial to developing an environment and business culture that values human rights. Accepting that rights must be respected by corporations, wherever in the world they operate, is one thing, making it happen is quite another. Utilizing the involvement of multiple stakeholders and mechanisms in a co-regulatory manner does not absolve a state from protecting rights but rather recognizes that, at times, a joint regulatory effort may be more effective than simply relying solely on the traditional state-centric tactics of yesteryear.

Activities in the last 30 to 40 years have seen significant advances in both the legal and quasi-legal basis for holding corporations to account for human rights

violations. The steady evolution of a global social expectation that companies should respect international human rights standards, combined with the occasional foray by states in adopting an expansive extraterritorial approach to protecting rights, is changing the nature and possibility of developing a firmer basis for corporate legal accountability for human rights. The growth and depth of soft-law stakeholder-led initiatives that have developed around the theme of corporate responsibility have come about partly in recognition of the failure of legal regulation (both internationally and domestically) to hold corporations to account, but these soft-law initiatives have become and will continue to be an important tool in attempting to prevent and remedy corporate rights violations.

Notes

1 Regulation as referred to in this chapter incorporates formal and informal, legal and non-legal mechanisms designed to influence or at times coerce corporations to better respect and/or protect human rights.

2 Human Rights Council, 'Protect, Respect and Remedy: A Framework for Business and Human Rights', Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, UN Doc. A/HRC/8/5 (7 April 2008) para. 3.

3 L. Baccaro and V. Mele, 'For Lack of Anything Better? International Organizations and Global Corporate Codes' (2011) 89 *Public Administration* 451; R.M. Locke, *The Promise and Limits of Private Power* (New York: Cambridge, 2013); D. O'Rourke, 'Outsourcing Regulation: Analysing Nongovernmental Systems of Labour Standards and Monitoring' (2003) 31(1) *Policy Studies Journal* 1.

4 Human Rights Council, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework', Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, UN Doc. A/HRC/17/31 (21 March 2011).

5 Hard law refers to actual binding legal instruments and laws. By contrast,

> there is no entrenched definition of what constitutes soft law, in this context it might commonly include instruments as diverse as those internationally formulated (other than a treaty) that contain 'principles, norms, standards or other statements of expected behaviour' but also widely accepted codes of conduct that have been developed by a group of stakeholders as a mechanism to prevent corporate rights abuses.
>
> (J. Nolan, 'Refining the Rules of the Game: The Corporate Responsibility to Respect Human Rights' (2014) 30(78) *Utrecht Journal of International and European Law* 7, 9)

See also D. Shelton, 'Normative Hierarchy in International Law' (2006) 100(2) *American Journal of International Law* 291, 319; J. Ellis, 'Shades of Grey: Soft Law and the Validity of Public International Law' (2012) 25(2) *Leiden Journal of International Law* 313, 334; D. Vogel, 'Private Global Business Regulation' (2008) 11 *Annual Review of Political Science* 261, 262, who refers to civil regulation as soft law and defines it as 'socially focused voluntary global business regulations'.

6 The Economist Intelligence Unit, 'The Road from Principles to Practices: Today's Challenges for Business in Respecting Human Rights', *The Economist*, 16 March 2015.

7 Paris, 10 December 1948, GA Res. 217A (III), Preamble, Recital 8.

8 L. Henkin, 'The Universal Declaration at 50 and the Challenge of Global Markets' (1999) 25 *Brooklyn Journal of International Law* 17.

9 P. Muchlinski, 'The Development of Human Rights Responsibilities for Multinational Enterprises' in R. Sullivan (ed.), *Business and Human Rights: Dilemmas and Solutions* (Sheffield: Greenleaf Publishers, 2003) p. 39. See also UN General Assembly, Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, UN Doc. A/Res/53/144 (8 March 1999); Commission on Human Rights, 'Implementation of the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms', Report of the Secretary-General, UN Doc. E/CN.4/2000/95 (13 January 2000).

10 D. Kinley and J. Tadaki, 'From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law' (2004) 44(4) *Virginia Journal of International Law* 931, 948.

11 New York, 16 December 1966, in force 23 March 1976, 999 UNTS 171.

12 New York, 16 December 1966, in force 3 January 1976, 999 UNTS 3.

13 The core ILO Conventions are as follows: Convention Concerning Forced or Compulsory Labour (C29), Geneva, 28 June 1930, in force 1 May 1932; Convention Concerning Freedom of Association and Protection of the Right to Organise (C87), San Francisco, 9 July 1948, in force 4 July 1950; Convention Concerning the

Application of the Principles of the Right to Organise and to Bargain Collectively (C98), Geneva, 1 July 1949, in force 18 July 1951; Convention Concerning Equal Remuneration for Men and Women Workers for Work of Equal Value (C100), Geneva, 29 June 1951, in force 23 May 1953; Convention Concerning the Abolition of Forced Labour (C105), Geneva, 25 June 1957, in force 17 January 1959; Convention Concerning Discrimination in Respect of Employment and Occupation (C111), Geneva, 25 June 1958, in force 15 June 1960; Convention Concerning Minimum Age for Admission to Employment (C138), Geneva, 26 June 1973, in force 19 June 1976; Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (C182), Geneva, 16 June 1999, in force 19 November 2000.

14 Slavery Convention, Geneva, 25 September 1926, in force 9 March 1927, 60 LNTS 253.

15 International Convention on the Elimination of All Forms of Racial Discrimination, New York, 21 December 1965, in force 4 January 1969, 660 UNTS 195.

16 Convention on the Elimination of All Forms of Discrimination against Women, New York, 18 December 1979, in force 3 September 1981, 1249 UNTS 13.

17 Convention on the Rights of the Child, New York, 20 November 1989, in force 2 September 1990, 1577 UNTS 3. See further Committee on the Rights of the Child, 'Report on the Thirty-First Session', UN Doc. CRC/C/121 (11 December 2002), paras 630–53 (discussing Day of General Discussion, 'The Private Sector as a Service Provider and Its Role in Implementing Child Rights', 20 September 2002).

18 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, New York, 18 December 1990, in force 1 July 2003, 2220 UNTS 3.

19 V. Trivett, '25 US Mega Corporations: Where They Rank If They Were Countries', *Business Insider*, 27 June 2011, www.businessinsider.com/25-corporations-bigger-tan-countries-2011-6?op=1&IR=T.

20 For example, the Convention on the Rights of Persons with Disabilities provides that states parties have an obligation to take all appropriate measures to eliminate discrimination on the basis of disability by any person, organization or private enterprise: Convention on the Rights of Persons with Disabilities, New York, 13 December 2006, in force 3 May 2008, 2515 UNTS 3, art. 4(e). In 2004 the UN Human Rights Committee, commenting on the nature of a state's obligations under the ICCPR, affirmed that the obligation is only discharged if individuals are protected by the state, not just against human rights violations by its agents, but also against acts committed by private persons or entities: Human Rights Committee, 'General Comment 31, The Nature of the General Legal Obligation on States Parties to the Covenant', UN Doc. CCPR/C/21/Rev.1.Add.13 (29 March 2004), para. 8. Similarly, General Comments from the UN Committee on Economic, Social and Cultural Rights addressing the rights to work, health and water confirm the state's duty to protect against abuse by corporations in the context of economic, social and cultural rights: Committee on Economic, Social and Cultural Rights, 'General Comment 18, Article 6: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights', UN Doc. E/C.12/GC/18 (24 November 2005), para. 35; Committee on Economic, Social and Cultural Rights, 'General Comment 15, The Right to Water (Arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)', UN Doc. E/C.12/2002/11 (20 January 2003), para. 23; Committee on Economic, Social and Cultural Rights, 'General Comment 14, The Right to the Highest Attainable Standard of Health (Art. 12 of the International Covenant on Economic, Social and Cultural Rights)', UN Doc. E/C.12/2000/4 (11 August 2000), para. 35.

21 For an alternative view arguing that treaty obligations do apply directly to corporations, see D. Bilchitz, 'A Chasm between "Is" and "Ought"? A Critique of the Normative Foundations of the SRSG's Framework and the Guiding Principles' in S. Deva and D. Bilchitz (eds), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge: Cambridge University Press, 2013) p. 107.

22 Human Rights Council, 'Elaboration of an Internationally Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights', UN Doc. A/HRC/26/L.22/Rev.1 (25 June 2014).

23 J. Ruggie, 'Quo Vadis? Unsolicited Advice to Business and Human Rights Treaty Sponsors' (Institute for Human Rights and Business, 9 September 2014), www.ihrb.org/commentary/quo-vadis-unsolicited-advice-business.html. For broad commentary on the potential treaty, see http://business-humanrights.org/en/binding-treaty.

24 V.A. Leary, 'The Paradox of Workers' Rights as Human Rights' in L.A. Compa and S.F. Diamond (eds), *Human Rights, Labor Rights, and International Trade* (Philadelphia: University of Pennsylvania Press, 1996) p. 22 at 22.

25 W.R. Simpson, 'The ILO and Tripartism: Some Reflections' (September 1994) *Monthly Labor Review* 40.

26 See above n. 13.

27 International Labour Organization, 'Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy', Geneva, November 1977 (as amended at its 279th (November 2000) and 295th Session (March 2006)).

28 Better Factories Cambodia, http://betterfactories.org.

29 The US–Cambodia Bilateral Textile Trade Agreement was the first agreement of its kind to link increased access to US markets to improved working conditions in an exporting country: Agreement Relating to Trade in Cotton, Wool, Man-made Fiber, Non-Cotton Vegetable Fiber and Silk Blend Textiles and Textile Products between the Government of the United States of America and the Royal Government of Cambodia, Phnom Penh, 20 January 1999. Textile and garment quotas were eliminated in January 2005 with the end of the GATT Multi-Fiber Agreement (in force 1 January 1974).

30 P. Harpur, 'Better Work: Problems with Exporting the Better Factories Cambodia Project to Jordan, Lesotho, and Vietnam' (2011) 36(4) *Employee Relations Law Journal* 98; D. Arnold, 'Workers' Agency and Reworking Power Relations in Cambodia's Garment Industry' (Capturing the Gains Working Paper 24), www.capturingthegains.org/pdf/ctg-wp-2013-24.pdf.

31 Locke, *The Promise and Limits of Private Power*, p. 171.

32 D. Arnold, 'Better Work or "Ethical Fix"? Lessons from Cambodia's Apparel Industry', *Global Labour Column*, http://column.global-labour-university.org/2013/11/better-work-or-ethical-fix-lessons-from.html.
33 Ibid.
34 Guiding Principle No. 1.
35 The Commentary to Guiding Principle No. 2 states:

> At present States are not generally required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction. Nor are they generally prohibited from doing so, provided there is a recognized jurisdictional basis. Within these parameters some human rights treaty bodies recommend that home States take steps to prevent abuse abroad by business enterprises within their jurisdiction. There are strong policy reasons for home States to set out clearly the expectation that businesses respect human rights abroad, especially where the State itself is involved in or supports those businesses. The reasons include ensuring predictability for business enterprises by providing coherent and consistent messages, and preserving the State's own reputation.

36 See above n. 20.
37 D. Augenstein and D. Kinley, 'When Human Rights "Responsibilities" Become "Duties": The Extra-territorial Obligations of States That Bind Corporations' in Deva and Bilchitz, *Human Rights Obligations of Business*, p. 271.
38 (1977) 15 USC §§78dd-1 et seq.
39 A number of subsequent amendments have been made to the FCPA including those in the Omnibus Trade and Competitiveness Act 1988, which arguably weakened the FCPA by enacting

> a 'knowing' standard in order to find violations of the Act. This standard was intended to encompass 'conscious disregard' and 'willful blindness.' The amendments provided certain defenses against finding violations of the act, such as that the gift is lawful under the laws of the foreign country and that the gift is a bona fide and reasonable expenditure or for the performance or execution of a contract with the foreign government.
>
> (M.V. Seitzinger, *Foreign Corrupt Practices Act (FCPA): Congressional Interest and Executive Enforcement* (Congressional Research Service, 7 February 2012), www.fas.org/sgp/crs/misc/R41466.pdf)

40 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (21 November 1997); UN Convention against Corruption, 31 October 2003, in force 14 December 2005, 2349 UNTS 41.
41 Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010). In addition, s. 1504 of the Act addresses financial transparency by requiring all listed oil and mining companies to disclose the revenues they pay to governments worldwide. See further A.P. Ewing in this volume, 'Mandatory human rights reporting', p. 284.
42 G.A. Sarfaty, 'Shining Light on Global Supply Chains' (2015) 56 *Harvard International Law Journal* (forthcoming), citing US Government Accountability Office, *SEC Conflict Minerals Rule: Information on Responsible Sourcing and Companies Affected* (Report to Congressional Committees, July 2013) 21. In addition, there are those who argue that the costs of such transparency initiatives (including funding the reporting and due diligence requirements and potentially directing trade away from developing countries in need of foreign investment) outweigh any potential benefits. For a summary of the pros and cons of such arguments, see 'Transparency, Conflict Minerals and Natural Resources: What You Don't Know about Dodd–Frank', transcript of a discussion hosted by the Brookings Institution and Global Witness, 13 December 2011, www.brookings.edu/research/opinions/2011/12/20-debating-Dodd-Frank-kaufmann.
43 P.J. Spiro, 'Constraining Global Corporate Power: A Short Introduction' (2013) 46 *Vanderbilt Journal of Transnational Law* 1101, 1116, citing R. Rabinowitz, 'OSHA Has a Big Job, on a Tiny Budget', *New York Times*, 29 April 2013, www.nytimes.com/roomfordebate/2013/04/28/where-osha-falls-short-andwhy/osha-has-a-big-job-on-a-tiny-budget.
44 D. Baumann-Pauly, S. Labowitz and N. Banerjee, 'Closing Governance Gaps in Bangladesh's Garment Industry: The Power and Limitations of Private Governance Schemes' (SSRN Working Paper, 12 March 2015) p. 4, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2577535.
45 Amnesty International and Global Witness, *Digging for Transparency: How US Companies Are Only Scratching the Surface of Conflict Minerals Reporting* (April 2015), www.globalwitness.org/campaigns/democratic-republic-congo/digging-transparency.
46 OECD Guidelines for Multinational Enterprises (2011).
47 Ibid., para. 1.
48 See L.C. Backer, '*Rights and Accountability in Development ("RAID") v DAS Air* and *Global Witness v Afrimex: Small Steps towards an Autonomous Transnational Legal System for the Regulation of Multinational Corporations*' (2009) 10(1) *Melbourne Journal of International Law* 258. See further K. Genovese in this volume, 'Access to remedy: non-judicial grievance mechanisms', p. 266.
49 For a database of the complaints, see OECD Guidelines for Multinational Enterprises, Database of Specific Instances, http://mneguidelines.oecd.org/database.
50 See OECD Watch, www.oecdwatch.org.
51 United Kingdom Department for Business Innovations & Skills, 'Initial Assessment by the UK National Contact Point for the OECD Guidelines for Multinational Enterprises: Complaint by Privacy International and Others against Gamma International UK Ltd', June 2013, www.gov.uk/government/uploads/system/uploads/attachment_data/file/208112/bis-13-947-complaint-from-privacy-international-and-others-against-gamma-international-uk-ltd.pdf.

52 Ibid., para. 41.
53 UK National Contact Point for the OECD Guidelines for Multinational Enterprises, 'Privacy International & Gamma International UK Ltd: Final Statement after Examination of Complaint', December 2014, www.gov.uk/government/uploads/system/uploads/attachment_data/file/402462/BIS-15-93-Final_statement_after_examination_of_complaint_Privacy_International_and_Gamma_International_UK_Ltd.pdf.
54 J. Lee, 'UN Global Compact Expels Hundreds for Non-Compliance', Triple Pundit, 22 January 2015, www.triplepundit.com/2015/01/un-global-compact-expels-members-non-compliance (reporting that in 2014 the UN Global Compact expelled 657 companies for not submitting their Communication on Progress).
55 From UN Global Compact, Participants & Stakeholders, www.unglobalcompact.org/ParticipantsAndStakeholders/index.html © United Nations. Reprinted with the permission of the United Nations.
56 S. Deva, 'Global Compact: A Critique of UN's "Public–Private" Partnership for Promoting Corporate Citizenship' (2006) 34 *Syracuse Journal of International Law & Commerce* 107; J. Nolan, 'United Nations' Compact with Business: Hindering or Helping the Protection of Human Rights' (2005) 24(2) *University of Queensland Law Journal* 445.
57 A. Rasche, '"A Necessary Supplement": What the United Nations Global Compact Is and Is Not' (2009) 48(4) *Business & Society* 511.
58 Sub-Commission on the Prevention of Discrimination and Protection of Minorities, 'The Relationship between the Enjoyment of Economic, Social and Cultural Rights and the Right to Development, and the Working Methods and Activities of Transnational Corporations', UN Doc. E/CN.4/Sub.2/Res/1998/8 (20 August 1998), para. 4.
59 United Nations Sub-Commission on the Promotion and Protection of Human Rights, 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights', UN Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003).
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62 Commission on Human Rights, 'Human Rights and Transnational Corporations and Other Business Enterprises', Human Rights Resolution 2005/69, UN Doc. E/CN.4/RES/2005/69 (20 April 2005).
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64 Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, Preamble, 3rd Recital.
65 Commission on Human Rights, 'Joint Views of the IOE and ICC on the Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights', joint written statement submitted by the International Chamber of Commerce and the International Organization of Employers, non-governmental organizations in general consultative status, UN Doc. E/CN.4.Sub.2.2003/NGO/44 (29 July 2003), www.unhchr.ch/Huridocda/Huridoca.nsf/0/918bbd410b5a8d2cc1256d78002a535a?Opendocument. See also D. Kinley, J. Nolan and N. Zerial, 'Reflections on the United Nations Human Rights Norms for Corporations' (2007) 25(1) *Companies and Securities Law Journal* 30.
66 Amnesty International, *The United Nations Human Rights Norms for Business: Towards Legal Accountability* (2004). See also Human Rights Watch, *Nongovernmental Organizations Welcome the New UN Norms on Transnational Business* (2003).
67 Commission on Human Rights, 'Report of the United Nations High Commissioner on Human Rights on the Responsibilities of Transnational Corporations and Related Business Enterprises with Regard to Human Rights', UN Doc. E/CN.4/2005/91 (15 February 2005), paras 21–2.
68 Human Rights Council, 'Human Rights and Transnational Corporations and Other Business Enterprises', UN Doc. A/HRC/RES/17/4 (6 July 2011), para. 6(a).
69 D. Bilchitz and S. Deva, 'The Human Rights Obligations of Business: A Critical Framework for the Future' in Deva and Bilchitz, *Human Rights Obligations of Business*, p. 2.
70 R.C. Blitt, 'Beyond Ruggie's Guiding Principles on Business and Human Rights: Charting an Embracive Approach to Corporate Human Rights Compliance' (2012) 48(1) *Texas International Law Journal* 33.
71 The Economist Intelligence Unit, 'The Road from Principles to Practices', p. 4.
72 Ibid., p. 5.
73 Human Rights Watch, 'UN Human Rights Council: Weak Stance on Business Standards', 16 June 2011, www.hrw.org/news/2011/06/16/un-human-rights-council-weak-stance-business-standards.
74 See generally Deva and Bilchitz, *Human Rights Obligations of Business*.
75 Guiding Principle No. 1.
76 See above n. 20.
77 C. Jochnick, 'Making Headway on Business and Human Rights', Oxfam America, *The Politics of Poverty*, 11 February 2011, http://politicsofpoverty.oxfamamerica.org/2011/02/making-headway-on-business-and-human-rights.
78 For example, Guiding Principle No. 11 ('Business enterprises … *should address* adverse human rights impacts'); Guiding Principle No. 13 ('The responsibility to respect human rights requires that business

enterprises: … (b) *Seek to* prevent or mitigate adverse human rights impacts'); Guiding Principle No. 23 ('In all contexts, business enterprises *should*: … (b) *Seek* ways to honour the principles of internationally recognized human rights when faced with conflicting requirements'); or Guiding Principle No. 24 ('business enterprises *should first seek* to prevent') (emphasis added).

79 M.K. Addo, 'Human Rights and Transnational Corporations: An Introduction' in M.K. Addo (ed.), *Human Rights and Transnational Corporations* (The Hague: Kluwer Law International, 2001) p. 11.

80 Human Rights Council, 'Protect, Respect and Remedy: A Framework for Business and Human Rights', para. 7.

81 Some boycotts against Nestlé are still ongoing despite the fact that in 1981 the World Health Organization adopted a set of recommendations (partly due to the campaigning around the boycott) for member states to regulate the marketing of breast milk substitutes: World Health Organization, International Code of Marketing of Breast-milk Substitutes, Resolution WHA34.22, Annex., www.who.int/nutrition/publications/code_english.pdf.

82 See, e.g. Worldwide Responsible Accredited Production, www.wrapcompliance.org.

83 See S. Jerbi in this volume, 'Extractives and multi-stakeholder initiatives: the Voluntary Principles on Security and Human Rights; the Extractive Industries Transparency Initiative; the Kimberley Process Certification Scheme', p. 147.

84 M. Fichter and D. Stevis, *Global Framework Agreements in a Union-Hostile Environment: The Case of the USA* (Friedrich Ebert Stiftung, November 2013) p. 3, http://library.fes.de/pdf-files/id/10377.pdf.

85 M.P. Thomas, 'Global Industrial Relations? Framework Agreements and the Regulation of International Labor Standards' (2011) 36(2) *Labor Studies Journal* 269.

Section 2.2

The United Nations 'Protect, Respect, Remedy' Framework and Guiding Principles

Chip Pitts[1]

1 Introduction

The United Nations (UN) 'Protect, Respect, and Remedy' Framework (Framework)[2] and associated Guiding Principles on Business and Human Rights[3] (Guiding Principles) were developed by former Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations (SRSG), Harvard Professor John G. Ruggie. The Guiding Principles were developed with input from independent experts and multi-stakeholder consultation from 2005 to 2011. Constructed on the heels of an ultimately contentious effort by the UN to create new standards,[4] Professor Ruggie adopted a more focused approach that emphasized the responsibility of business to respect human rights. The endorsement by the UN Human Rights Council (HRC) of the Framework (in 2008) and the Guiding Principles (in 2011) achieved what prior efforts had failed to achieve: broad multi-stakeholder consensus[5] and an authoritative UN imprimatur on implementing minimum standards regarding state duties to protect and business responsibilities to respect human rights. After the endorsement of the Guiding Principles in 2011, the HRC established a five-member, regionally diverse Working Group to help oversee and guide the implementation of the Guiding Principles.

2 The UN Framework and the Guiding Principles

2.1 Overview

In 2008 the HRC unanimously welcomed the 'Protect, Respect, Remedy' Framework. These three pillars constitute its 'differentiated but complementary responsibilities':

1 the state duty to protect against human rights abuses by third parties, including business;
2 the corporate responsibility to respect human rights; and
3 the need for more effective access to remedies.[6]

This simplified description may mislead slightly,[7] perhaps suggesting that states merely have duties to protect[8] and that businesses merely have responsibilities to respect. In actuality, in situations involving state-owned, controlled or substantially supported enterprises,[9] privatizations, contracts when businesses stand in the shoes of states[10] or that involve contracted state functions,[11] businesses may also have other duties including to protect, fulfil or promote human rights.[12]

After the Framework was accepted by the HRC in 2008, the SRSG focused on 'operationalizing' the three-pronged Framework. This work culminated in the Guiding Principles, which were unanimously endorsed by the HRC in June 2011. The Guiding Principles have since become a common reference point in business and human rights.

The Guiding Principles apply to all states and to all (not only transnational) business enterprises, regardless of business size, sector, location, ownership or structure. Guiding Principle 1 provides that '[s]tates must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication'. The question of the jurisdictional and territorial reach of a state's duty to protect under the Guiding Principles is not definitively determined. The Commentary to Guiding Principle No. 2 notes:

> At present States are not generally required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction.[13] Nor are they generally prohibited from doing so, provided there is a recognized jurisdictional basis. Within these parameters some human rights treaty bodies recommend that home States take steps to prevent abuse abroad by business enterprises within their jurisdiction.
>
> There are strong policy reasons for home States to set out clearly the expectation that businesses respect human rights abroad, especially where the State itself is involved in or supports those businesses. The reasons include ensuring predictability for business enterprises by providing coherent and consistent messages, and preserving the State's own reputation.[14]

Guiding Principle No. 7 explicitly supports states taking greater extraterritorial steps in conflict-affected areas, where the risk of gross abuses is seen as especially high.

Guiding Principle No. 12 states that the responsibility to respect human rights 'refers to internationally recognized human rights', including, 'at a minimum', those expressed in the *International Bill of Human Rights*[15] and the International Labour Organization (ILO) *Declaration on Fundamental Principles and Rights at Work*,[16] but also other standards and instruments as circumstances require (as when rights of certain groups may be adversely affected).[17]

2.2 Meaning of 'respect'

The Framework's second pillar focuses on the business responsibility to *respect* human rights, which exists independently, over and above mere compliance with national laws and regardless of states ability or willingness to fulfil their own human rights obligations.[18] While primarily a negative responsibility – to refrain from harm – it also includes proactive, positive responsibilities: 'business enterprises should act with due diligence to avoid infringing on the rights of others and to address adverse impacts with which they are involved.'[19]

The Guiding Principles note that this responsibility applies not only to adverse impacts that are directly linked to business operations, products or services but also to linkages via '*their business relationships, even if they have not contributed to those impacts*'.[20] The UN Global Compact has developed a flowchart[21] summarizing actions to be taken given the Guiding Principles' distinctions between causing,

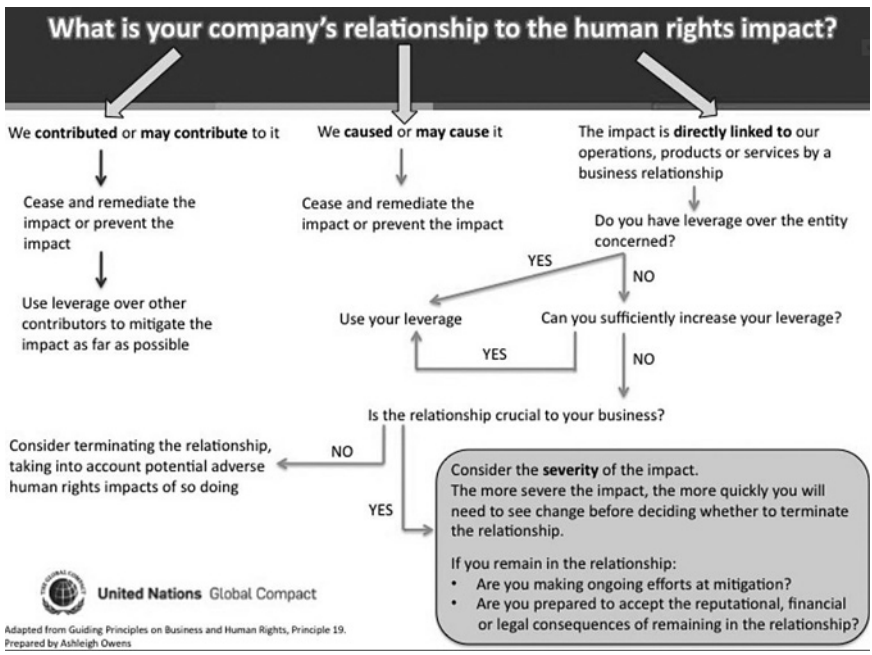

Figure 2.2.1 What is your company's relationship to the human rights impact? (source: UN Global Compact, www.unglobalcompact.org/docs/issues_doc/human_rights/Resources/Guiding_Principle_19_Flow_Chart.pdf (prepared by Ashleigh Owens))

contributing and being directly linked through relationships – all elaborations of the Guiding Principles' initial references to being 'involved' in adverse impacts:[22]

'Leverage' (the 'ability to effect change in the wrongful practices of an entity that causes harm'[23]) is a key factor in determining the appropriate action for the enterprise to take in preventing or mitigating harms beyond those it causes or may cause. Even when the business does not cause or contribute but is merely directly *linked to* adverse impacts through its operations, products or services by a business relationship, it should use its leverage to prevent or mitigate the harm.[24] Guiding Principle No. 19 notes that

> there are situations in which the enterprise lacks the leverage to prevent or mitigate adverse impacts and is unable to increase its leverage. Here, the enterprise should consider ending the relationship, taking into account credible assessments of potential adverse human rights impacts of doing so.[25]

The Framework and the Guiding Principles clarify and elevate to a state-endorsed agreement[26] the social expectations around businesses respecting human rights and provide guidance for them to do so. They thus complement, strengthen and provide further elaboration to the more general approach of the UN Global Compact, as well as the approaches of the ILO conventions, and a multitude of non-governmental organization (NGO), multi-stakeholder, academic and other initiatives[27] in harnessing increasingly powerful businesses to build rights-respecting business, governmental, political, legal[28] and social cultures.[29] The Guiding Principles are intended to develop greater normative clarity,[30] convergence and operationalization concerning the obligation to respect; in this way, the Guiding Principles create the potential for positive change. They reinforce minimum standards and serve as a valuable starting point for change-agents from business,[31] civil society[32] and various stakeholders. The Guiding Principles are being referenced in and influencing legislation,[33] agency regulations,[34] judicial[35] and quasi-judicial decisions,[36] and in some situations may help empower victims to achieve redress.

The Guiding Principles have also been used by treaty bodies,[37] special rapporteurs,[38] and mechanisms such as the Organisation for Economic Co-operation and Development's (OECD) National Contact Points and the International Finance Corporation's (IFC) Compliance Advisor Ombudsman. They have influenced other global norms forming part of the 'regulatory ecosystem',[39] including ISO's 26000 CSR standard, the OECD Guidelines for Multinationals and the IFC Performance Standards. Guiding Principle No. 23 expressly expects that businesses will treat the risk of gross human rights abuses 'as a legal compliance issue wherever they operate'. Some companies use the Guiding Principles as the basis for their 'compliance' programmes, although the ways they interpret and implement the Guiding Principles vary widely, and are usually not subject to independent external oversight.[40] Professor Ruggie has stated that the adoption of the Guiding Principles is the 'end of the beginning'[41] in the ongoing process of clarifying business and human rights norms.

3 Operationalization of the Guiding Principles by business

3.1 Organizational integration and due diligence

Guiding Principles No. 16–24 focus on internal company processes and the need to embed human rights and these principles into business practices throughout the extended enterprise (including business relationships). This begins with a publicly available policy 'approved at the most senior level of the enterprise'. The Guiding Principles also stress that these internal processes should be informed by stakeholder and internal as well as external expertise,[42] widely communicated internally and externally to 'all personnel, business partners and other relevant parties', clarifying 'lines and systems of accountability', and embedded enterprise-wide in operational policies and procedures.[43] Such integration is crucial, since otherwise the prevailing conflicts of interest between different business departments (e.g. between the corporate social responsibility (CSR) department and procurement) will continue to subvert the company's CSR objectives.

Guiding Principle No. 17 states that businesses should carry out human rights due diligence in order to identify, prevent, mitigate and account for how they address their adverse human rights impacts. The Guiding Principles expect ongoing human rights due diligence to identify and assess risks to rights-holders (and not merely the company)[44] to be completed 'as early as possible in the development of a new activity or relationship',[45] so that potential adverse impacts can be prevented or mitigated at early stages like contractual structuring or in due diligence for mergers or acquisitions.[46] There is now extensive guidance on this human rights impact assessment (HRIA) process.[47] While the Guiding Principles urge companies to assess and address all adverse impacts simultaneously, they acknowledge that prioritization based on severity may be necessary where simultaneous action is impossible as a practical matter.[48] For business enterprises with large, complex value chains where it is unreasonably difficult to conduct due diligence simultaneously across all adverse impacts, the Guiding Principles leave some room for flexibility:

> Where business enterprises have large numbers of entities in their value chains it may be unreasonably difficult to conduct due diligence for adverse human rights impacts across them all. If so, business enterprises should identify general areas where the risk of adverse human rights impacts is most significant.[49]

3.2 Tracking, reporting and publicly communicating on responses

The Guiding Principles call on companies to 'know and show'[50] whether the business has effectively addressed actual and potential adverse impacts, especially with respect to vulnerable individuals and groups. They ask businesses to track their responses using appropriate qualitative and quantitative indicators, integrated into reporting/disclosure processes.[51] A number of companies have begun Guiding Principles-compatible reporting.[52] An example of transparency is Nestlé's recent report on its due diligence and HRIA processes, describing seven HRIAs done with Nestlé subsidiaries in perceived high-risk countries (Angola, Colombia, Kazakhstan, Nigeria, Russia, Sri Lanka and Uzbekistan).

Snapshot

Nestlé's approach

Nestlé, a company with historical CSR troubles, especially regarding breast milk substitutes, adopted the Framework[53] in 2010 and, in the same year, conducted its first HRIA (with the assistance of the Danish Institute for Human Rights), focusing mainly on labour rights issues. The Guiding Principles have now been embedded into an integrated human rights due diligence (HRDD) system, beginning with Nestlé's Management and Leadership Principles (which, along with the Corporate Business Principles, have been described by Nestlé's CEO as the 'non-negotiable' principles 'we expect each and every one' of Nestlé's more than 340,000 employees 'to live by, every day, wherever they are in the world'[54]) and extending to 15 other key Nestlé policies/procedures.[55]

Nestlé's Human Rights Working Group meets every two months[56] to give sustained top-level management support to its one full-time human rights person. Major department heads participate (Compliance; Human Resources; Safety, Health and Environment; Legal; Public Affairs; Responsible Sourcing; Risk Management; Security).[57] Nestlé's HRDD[58] consists of eight interrelated, interdependent pillars: (i) mainstreaming operational policies; (ii) engaging with stakeholders; (iii) training; (iv) evaluating material risks; (v) assessing impacts; (vi) coordinating across other functions; (vii) working with external experts and partners; and (viii) monitoring and reporting.[59] Pillar (iv) identifies risks at five different levels: corporate; country operations; tier-one suppliers; upstream suppliers; and local communities.[60] Pillar (v), on HRIAs, focuses on eight different functional areas (Human Resources; Health and Safety; Security Arrangements; Business Integrity; Community Impacts; Procurement; Sourcing of Raw Materials; Product Quality/Marketing Practices).[61] Among lessons Nestlé learned are the advantages of open versus closed questions[62] and the importance of distinguishing more complex, comprehensive and functionally cross-cutting HRIAs from 'audits'.[63]

One may question Nestlé's HRDD approach – whether it is the correct prioritization strategy (beginning with labour rights and high-risk countries, as opposed to a more nuanced view of risks from the rights-holder's perspective), whether risks to rights-holders truly take precedence over risks to the business and whether this is fully understood to be a compliance issue beyond the headquarters' human rights function and other Nestlé Human Rights Working Group members. But such questions arise because the company has attempted to implement the Guiding Principles and has publicly shared the results.

3.3 Access to remedy

The third prong of the Framework and Guiding Principles is the need for access to effective remedies. This continues to remain elusive for most victims of business-related human rights violations. The state duty to provide effective remedies in the case of adverse impacts by business is paralleled by the responsibility of businesses to remedy impacts with which they are involved.[64] Yet states in reality often fail to implement their duty to provide effective remedy, because of lack of either resources or will. The business remedy responsibility strictly applies only to impacts that the

business 'caused' or to which it 'contributed', as opposed to those with which the business is merely linked or involved (although such fine distinctions are unlikely to be appreciated by victims, increasing risks for businesses that do not broadly attend to remedies). In addition to cooperating with judicial mechanisms,[65] businesses are expected to establish or participate in 'legitimate' (for example, accessible, fair, transparent)[66] operational-level non-judicial grievance mechanisms.[67] But to date, the adequacy of company grievance mechanisms remains hotly contested, with many NGOs and victims sceptical that these will ever be adequate.[68]

4 Current implementation of the UN Guiding Principles

4.1 Implementation by businesses

Implementation of the Guiding Principles by businesses remains at an early stage, although some initiatives have started in certain sectors (like the Thun Group of financial institutions)[69] and among major companies.[70] The Business & Human Rights Resource Center (BHRRC) listed fewer than 400 companies with a specific and elaborated human rights policy as of May 2015,[71] but relatively little is known about the quality of the implementation of such policies. This seems a small number, vis-à-vis the estimated 80,000 multinational corporations globally, including most of the world's 50 largest and most powerful corporations.[72] Thousands more companies have committed to human rights via the UN Global Compact, which asks companies to embrace and report on 10 principles relating to human rights, labour, the environment and anti-corruption but has limited evaluation of substantive implementation attached to the process.

Snapshot

Hitachi[73]

Hitachi, a Japanese company, found that it first had to 'translate' the Guiding Principles and 'human rights' themselves into Japanese and into its business awareness and culture as it conducted workshops to educate its senior executives at corporate headquarters and from its major subsidiaries. The company found that risk management offered the most motivational lens through which to emphasize the importance of respect for human rights, and that the classic management 'Plan, Do, Check, Act' process, which Hitachi uses, offered a familiar entry point to help executives and relevant employees to understand the Guiding Principles. Embedding its policy commitment into corporate governance, Hitachi clarified that human rights compliance was obligatory for each of its global businesses, which have been undergoing training in effective due diligence to address adverse impacts.

4.2 Implementation by states

While the Guiding Principles repeatedly exhort states to enhance 'policy coherence'[74] both 'vertically' (to have the laws, policies and processes to implement their

international human rights obligations) and 'horizontally' (among their different agencies and governmental levels and between their human rights obligations and their business-oriented trade and commerce policies), the impact of the Guiding Principles in this area appears to be limited to date. For example, state behaviour has changed very little when participating in international financial institutions (such as the World Trade Organization, World Bank or International Monetary Fund),[75] despite state obligations to protect human rights.[76]

Several states have developed or are developing National Action Plans (NAPs), as urged by the Working Group as a means of operationalizing the Guiding Principles.[77] NAPs are relevant not only for state implementation, but also to encourage business implementation.[78] Nevertheless, drafting progress has been slow, with quality varying widely. The current NAPs lack 'law and policy coherence' within states as there are tensions between the ministries handling commerce, trade, investment, sovereign wealth funds and government procurement, and those focused on human rights.

The BHRRC[79] currently identifies eight countries that have written and published NAPs: Colombia, Denmark, the United Kingdom, Finland, Lithuania, Norway, Sweden and the Netherlands. A number of other countries are currently developing NAPs, including Argentina, Azerbaijan, Belgium, Brazil, France, Germany, Greece, Indonesia, Ireland, Italy, Jordan, Latvia, Lithuania, Malaysia, Mauritius, Mexico, Morocco, Mozambique, Myanmar, Portugal, Slovenia, South Korea, Spain, Switzerland and the United States.[80]

To date, the NAPs have devoted relatively little attention to improving access to remedy as compared to preventive measures. The commitments and deadlines included in these reports are often vague or ambiguous, with little content that is concrete or measureable. Finally, the needs of vulnerable groups, such as indigenous people, are often overlooked.[81] While NAPs have the potential to foster progress, especially if used by mechanisms such as the HRC's universal periodic review, the UN treaty bodies, Special Rapporteurs and reviews by civil society, the media and others, developments to date have been limited.[82]

4.3 Working Group on business and human rights' role in implementation

To address the implementation challenges associated with the Framework and the Guiding Principles, the Working Group was established in 2011 to cooperate with treaty bodies and other HRC special procedures, and to recommend enhancements to domestic legislation, policies and access to remedy. Empowered to conduct country visits, the Working Group conducts regional forums as a source of information as well as education, and with the Office of the High Commissioner for Human Rights (OHCHR) guides the annual Forum on Business and Human Rights.

The Working Group has been criticized for focusing mostly on state action under Framework pillar 1 (the state duty), with too little attention given to pillars 2 and 3. The Working Group could do more to identify effective metrics for progress beyond anecdotal and small survey evidence, in addition to more effectively and publicly connecting the Framework/Guiding Principles to macro issues such as inequality, persistent poverty, tax avoidance, counterproductive business lobbying and corruption.

5 Assessment of the Guiding Principles

The Guiding Principles have generally been embraced by governments and global companies but have been criticized by a number of NGOs and academics, especially for their lack of specificity and inadequate ability to provide access to remedy.[83] The frequent critique[84] of the soft-law[85] Guiding Principles as merely 'non-legal' and/or 'voluntary' arguably neglects the legal nature of soft law, overlooks the complex hard- and soft-law interplay in this area[86] and misses the extent to which the Guiding Principles evolved under pressure to embrace existing and emerging hard as well as soft-law obligations.[87]

Some of the criticisms levied against the Guiding Principles are hard to reconcile with the plain language of the Guiding Principles' text, such as the claims that they apply only to (i) the narrowly bounded firm and not the extended enterprise including the firm's subsidiaries, affiliates or supply/value chain,[88] or (ii) some subset of firms or of internationally recognized universal human rights.[89] To the heftier criticism that victims were inadequately consulted,[90] the former SRSG argues that the consultations were extremely wide and legitimate.[91]

Other critiques expressed while the Guiding Principles were in draft form, including those from 125 civil society organizations and several experts,[92] argued that they did not adequately close the governance gaps identified and were in some ways regressive from the SRSG's own prior reports and existing international human rights law.[93] These criticisms were significantly addressed during the Guiding Principles' finalization (if not perfectly or to everyone's satisfaction).

Residual aspects of these long-standing concerns,[94] however, endure. What the SRSG said of prior standards is also true of the Framework and Guiding Principles: they still 'lack sufficient scale to truly move markets'.[95] Business implementation remains limited and often selective, although defenders of the Guiding Principles point out that progress takes time and that perfect compliance even with hard law is a fantasy. Victims still suffer tremendously from insufficient and ineffective remedies, so critics complain that the Guiding Principles have spurred insufficient progress. Better laws – and stronger monitoring, enforcement and implementation – are needed to ensure better compliance.[96]

In 2013, Human Rights Watch (HRW) noted that while the Guiding Principles 'provide some useful guidance to businesses interested in behaving responsibly they also represent a woefully inadequate approach to business and human rights issues'. In HRW's view:

> That is because without any mechanism to ensure compliance or to measure implementation, they cannot actually *require* companies to do anything at all. Companies can reject the principles altogether without consequence – or publicly embrace them while doing absolutely nothing to put them into practice.[97]

Similar concerns were reiterated very powerfully by Audrey Gaughran of Amnesty International in the closing session of the December 2014 UN Forum on Business and Human Rights, when she highlighted that the Guiding Principles will not change the reality that most victims of corporate abuses remain without effective remedy most of the time.[98]

As the SRSG has repeatedly noted, no 'single silver bullet'[99] will solve the problem of continued corporate abuse of human rights. While the Guiding Principles are a useful foundation for companies developing a framework to address human rights issues, their development does not bring business and human rights challenges to an end. What is required is a multi-pronged, multi-stakeholder approach – one that deploys all the major levers affecting corporate behaviour (including hard and soft law, incentives *and* values and corporate culture) – to effectively prevent and redress human rights violations.

Notes

1 Sung Gyu Yun of Yonsei University, South Korea, provided helpful research assistance.
2 Human Rights Council, 'Protect, Respect and Remedy: A Framework for Business and Human Rights', Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, UN Doc. A/HRC/8/5 (7 April 2008).
3 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect, Remedy" Framework', by United Nations Human Rights, Office of the High Commissioner, © 2011 United Nations. Reprinted with the permission of the United Nations.
4 See United Nations Sub-Commission on the Promotion and Protection of Human Rights, 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights', UN Doc. E/CN.4/Sub.2/2003/12/Rev.2 (26 August 2003). See also D. Kinley, J. Nolan and N. Zerial, 'The Politics of Corporate Social Responsibility: Reflections on the United Nations Human Rights Norms for Corporations' (2007) 25(1) *Company and Securities Law Journal* 30.
5 However, some commentators criticize the extent, quality and implications of what Deva has called a 'façade of consensus'; see S. Deva, 'Treating Human Rights Lightly: A Critique of the Consensus Rhetoric and the Language Employed by the Guiding Principles' in S. Deva and D. Bilchitz (eds), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect* (Cambridge: Cambridge University Press, 2013) pp. 79, 81.
6 Framework, para. 9.
7 See, e.g. Deva, 'Treating Human Rights Lightly'.
8 The Guiding Principles note at the outset that they are grounded in recognition of states' 'existing obligations to respect, protect and fulfil human rights and fundamental freedoms', p. 1.
9 Guiding Principle No. 4.
10 For example, the corporations established by the US Central Intelligence Agency to carry out extraordinary renditions. See, e.g. J. Mayer, 'Outsourcing Torture', *New Yorker*, 14 February 2005, www.newyorker.com/magazine/2005/02/14/outsourcing-torture.
11 For instance, involving private military contractors. For a discussion of this issue see A.-M. Buzatu in this volume, 'The emergence of the International Code of Conduct for Private Security Service Providers', p. 160.
12 See, e.g. F. Wettstein, 'CSR and the Debate on Business and Human Rights: Bridging the Great Divide' (2012) 22(4) *Business Ethics Quarterly* 739; O.F. Williams, *Corporate Social Responsibility: The Role of Business in Sustainable Development* (London and New York: Routledge, 2013) pp. 51–71 (arguing for additional moral duties of business).
13 This understates the status of current international law with respect to state-owned enterprises. See, e.g. D. Augenstein, *State Responsibilities to Regulate and Adjudicate Corporate Activities under the European Convention on Human Rights*, Submission to the Special Representative of the United Nations Secretary-General (SRSG) on the issue of Human Rights and Transnational Corporations and Other Business Enterprises (2011); C. Wee, *Regulating the Human Rights Impact of State-Owned Enterprises: Tendencies of Corporate Accountability and State Responsibility* (International Commission of Jurists, 2008).
14 In addition to the Guiding Principles' 'policy' reasons, there are perhaps legal reasons as well. See, e.g. D. Augenstein and D. Kinley, 'When Human Rights "Responsibilities" Become "Duties": The Extra-Territorial Obligations of States that Bind Corporations' in Deva and Bilchitz, *Human Rights Obligations of Business*, pp. 271, 283, 288. For further discussion on this point, see O. de Schutter, *Extraterritorial Jurisdiction as a Tool for Improving the Human Rights Accountability of Transnational Corporations* (Business & Human Rights Resource Centre, 2006). See also *Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights* (28 September 2011); O. de Schutter, A. Eide, A. Khalfan, M. Orellana, M. Salomon and I. Seiderman, 'Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights' (2012) 34 *Human Rights Quarterly* 1084.
15 The *International Bill of Rights* comprises the *Universal Declaration of Human Rights*, Paris, 10 December 1948, GA Res. 217A(III); the *International Covenant on Civil and Political Rights*, New York, 16 December 1966, in force 23 March 1976, 999 UNTS 171; and the *International Covenant on Economic, Social and Cultural Rights*, New York, 16 December 1966, in force 3 January 1976, 999 UNTS 3.
16 International Labour Conference, 86th sess., Geneva, 18 June 1998. The Declaration covers the core labour rights including free association and collective bargaining, forced and child labour, and non-discrimination.

17 Guiding Principle No. 12, Commentary.
18 Guiding Principle No. 11 and Commentary.
19 Guiding Principles, para. 6.
20 Guiding Principle No. 13 and Commentary (emphasis added). The Commentary clarifies that business relationships include 'business partners, entities in its value chain, and any other non-state or state entity directly linked to its businesses operations, products or services'.
21 UN Global Compact, 'What Is Your Company's Relationship to the Human Rights Impact?' (prepared by Ashleigh Owens), www.unglobalcompact.org/docs/issues_doc/human_rights/Resources/Guiding_Principle_19_Flow_Chart.pdf.
22 See Guiding Principle No. 11.
23 Ibid.
24 Ibid.
25 Guiding Principle No. 19.
26 J.G. Ruggie, *Just Business: Multinational Corporations and Human Rights* (New York: W.W. Norton & Co., 2013) p. 125.
27 Such as, among others, the Business & Human Rights Resource Centre (BHRCC), http://business-humanrights.org; the Institute for Human Rights and Business, www.ihrb.org; the Global Business Initiative, www.global-business-initiative.org; and the UN Principles for Responsible Management Education, www.unprme.org.
28 See, e.g. International Bar Association, 'IBA Publishes Business and Human Rights Guidance for Bar Associations and Lawyers', 23 October 2014, www.ibanet.org/Article/Detail.aspx?ArticleUid=c9bd50c6-c2b3-455b-b086-a7efbfe1f6a5.
29 Oliver Williams has lamented that the Framework and Guiding Principles, and Professor Ruggie, 'missed a teachable moment' by not more explicitly making the moral as well as the business case for such compliance: Williams, *Corporate Social Responsibility*, pp. 51–71.
30 Not all agree that this goal of greater normative clarity was achieved. See, e.g. D. Bilchitz, 'A Chasm between "Is" and "Ought"? A Critique of the Normative Foundations of the SRSG's Framework and the Guiding Principles' in Deva and Bilchitz, *Human Rights Obligations of Business*, p. 121.
31 See, e.g. China Chamber of Commerce of Metals, Minerals & Chemicals Importers & Exporters, 'Guidelines for Social Responsibility in Outbound Mining Investments', October 2014, www.srz.com/files/upload/Conflict_Minerals_Resource_Center/CCCMC_Guidelines_for_Social_Responsibility_in_Outbound_Mining_Operations_English_Version.pdf.
32 NGOs can use the Guiding Principles to evaluate gaps in state duties to protect, and in the broad spectrum of advocacy from confrontation to engagement with businesses. See, e.g. Oxfam, *Business and Human Rights: An Oxfam Perspective on the UN Guiding Principles* (June 2013), www.oxfam.org/sites/www.oxfam.org/files/tb-business-human-rights-oxfam-perspective-un-guiding-principles-130613-en.pdf; see also International Commission of Jurists – Danish Section and Reprieve, *Constructive Campaigning: Applying the UN Guiding Principles on Business and Human Rights to Civil Society Campaigning*, www.global-csr.com/fileadmin/Our_Approach/13_Constructive_Campaigning_NGOs_UNGPs.pdf.
33 For example, EU Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups, OJ 2014 No. L 330, in force 6 December 2014.
34 J.G. Ruggie, 'Closing Plenary Remarks', Third United Nations Forum on Business and Human Rights, Geneva, 3 December 2014, p. 3, www.ohchr.org/Documents/Issues/Business/ForumSession3/Submissions/JohnRuggie_SR_SG_BHR.pdf (referring to the establishment of the Peruvian Superintendency of Banks, Insurers and Private Pension Funds).
35 See, e.g. *Choc v Hudbay Minerals Inc*, 2013 ONSC 1414; *Adolfo Agustin Garcia et al. v Tahoe Resources Inc*, Notice of Civil Claim (filed 18 June 2014), http://business-humanrights.org/sites/default/files/documents/Notice_Civil_Claim.pdf.
36 See, e.g. UK National Contact Point, 'Final Statement by the UK National Contact Point for the OECD Guidelines for Multinational Enterprises: Afrimex (UK) Ltd', 28 August 2008, www.oecd.org/investment/mne/43750590.pdf.
37 See, e.g. Committee on the Rights of the Child, General Comment No. 16 (2013) on state obligations regarding the impact of the business sector on children's rights, UN Doc. CRC/C/GC/16 (17 April 2013), paras 7, 71.
38 See, e.g. J. Ezeilo, 'Report of the Special Rapporteur on Trafficking in Persons, Especially Women and Children', UN Doc A/67/261 (7 August 2012), paras 25–7, 50.
39 Ruggie, 'Closing Plenary Remarks', p. 2.
40 See, e.g. World Business Council for Sustainable Development (WBCSD), *Scaling up Action on Human Rights: Operationalizing the UN Guiding Principles on Business and Human Rights* (2014) pp. 16–18, www.wbcsd.org/Pages/EDocument/EDocumentDetails.aspx?ID=16382&NoSearchContextKey=true (referring to corporations such as Nestlé, Unilever, Heineken, DSM and ArcelorMittal treating the Guiding Principles as a compliance matter). See also D. Scheffer and C. Kaeb, 'The Five Levels of CSR Compliance: The Resiliency of Corporate Liability under the Alien Tort Statute and the Case for a Counterattack Strategy in Compliance Theory' (2011) 29(1) *Berkeley Journal of International Law* 334.
41 Ruggie, 'Closing Plenary Remarks', p. 1.
42 Guiding Principle No. 19, Commentary.
43 Guiding Principle No. 16 and Commentary.
44 Guiding Principle No. 17, Commentary.
45 Ibid.

46 Guiding Principle No. 17 and Commentary; Guiding Principle No. 18 – HRIAs should be undertaken prior to a new activity or relationship; prior to major decisions or changes in the operation (e.g. market entry, product launch, policy change, or wider changes to the business); in response to or anticipation of changes in the operating environment (e.g. rising social tensions); and periodically throughout the life of an activity or relationship.

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48 Guiding Principles Nos 17 and 24 and Commentaries.

49 Guiding Principle No. 17, Commentary.

50 Guiding Principle No. 15, Commentary.

51 Guiding Principles Nos 17 and 20 and Commentaries. See further A. Mehra and S. Blackwell in this volume, 'The rise of non-financial disclosure: reporting on respect for human rights', p. 276.

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57 WBCSD, *Scaling up Action on Human Rights*, p. 13.

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60 WBCSD, *Scaling up Action on Human Rights*, p. 15. The business obligation to respect is not restricted to first-tier suppliers, but extends to business relationships in the value chain: Guiding Principle No. 13 and Commentary.

61 Danish Institute for Human Rights and Nestlé, *Talking the Human Rights Walk*, pp. 7–8, 18–19.

62 Ibid., pp. 9, 20.

63 Ibid., pp. 14, 29. HRIAs should not be adversarial, and Nestlé's Yann Wyss confirms that Nestlé treats human rights as a compliance matter globally while also recognizing that unlike the simple binary process of audit compliance for other areas, more time and in-depth analysis may be required for complex human rights situations; private communication with Y. Wyss (February 2015).

64 Guiding Principle No. 11 and Commentary ('Addressing adverse human rights impacts requires taking adequate measures for their prevention, mitigation and, where appropriate, remediation'); Guiding Principle No. 15(c) (the responsibility to respect includes having in place 'processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute'); Guiding Principle No. 22 (obligation to provide or cooperate in remedies for adverse impacts the business caused or to which it contributed).

65 Guiding Principle No. 22, Commentary.

66 See the legitimacy criteria in Guiding Principle No. 31.

67 Guiding Principle No. 29.

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Section 2.3

Incorporating human rights: lessons learned, and next steps

John Gerard Ruggie

1 Introduction

In March 2015, the Economist Intelligence Unit published a report entitled 'The Road from Principles to Practice: Today's Challenges for Business in Respecting Human Rights'. It drew on a global survey of 853 senior executives. Among the headline findings was this:

> 83% of respondents agree (74% of whom do so strongly) that human rights are a matter for business as well as governments. Similarly, 71% say that their company's responsibility to respect these rights goes beyond simple obedience to local law.[1]

The report quotes Arvind Ganesan, who directs business and human rights at Human Rights Watch, as saying that as recently as the late 1990s 'there was no recognition that companies had human rights responsibilities'.[2] While many factors contributed to this shift, the 'watershed event', as the report puts it, was 'the UN Human Rights Council's endorsement in 2011 of the Guiding Principles on Business and Human Rights'[3] (Guiding Principles).

The Guiding Principles are the first official guidance the Council and its predecessor, the Commission on Human Rights, have issued for states and business enterprises on their respective obligations in relation to business and human rights. This marked the first time that either body 'endorsed' a normative text on *any* subject that governments did not negotiate themselves, and endorsement was unanimous. I developed the Guiding Principles over the course of a six-year mandate as Special Representative of the Secretary-General for Business and Human Rights, through nearly 50 international consultations, voluminous research reports and pilot projects.[4] UN High Commissioner for Human Rights, Zeid Ra'ad Al Hussein, describes the Guiding Principles as 'the global authoritative standard, providing a blueprint for the steps all states and businesses should take to uphold human rights'.[5] Compared with normative and policy developments in other highly complex and contested domains, like climate change, uptake of key elements of the Guiding Principles has been relatively swift: by other international standard-setting bodies, states, businesses, civil society and workers' organizations and bar associations.

Needless to say, much more needs to be done. When I presented the Guiding Principles to the Human Rights Council in 2011, I stated that 'I am under no illusion that the conclusion of my mandate will bring all business and human rights challenges to an end. But Council endorsement of the Guiding Principles will mark the end of the beginning'.[6] By this I meant that the Guiding Principles would provide an authoritative foundation on which to build. They were intended to trigger an evolution, not as the final word on the subject.

Our task now is to identify plausible paths ahead. But it is equally important to understand how we got here, why the Guiding Principles succeeded where previous such efforts failed. Critics believe it is because the Guiding Principles do not, in themselves, impose new legal obligations on states or businesses.[7] This is a partial and therefore misleading answer. More to the point is the recognition by John Tasioulas, Professor of Moral and Legal Philosophy at King's College London, that the Guiding Principles' success lies in breaking through certain conventional conceptual and doctrinal 'shackles'.[8] These contributed to past failures, and they would do so again if turned loose on future developments. Hence this chapter is divided into two parts: the premises underlying the Guiding Principles, and how to build on them.

2 Foundational logics

I drew the first premise from Harvard colleague and Nobel Laureate Amartya Sen: the need to rigorously distinguish human rights from human rights law. Sen maintains that treating human rights merely as the parents or progeny of law unduly constricts – he actually uses the term 'incarcerate' – the social logics and processes other than law that drive enduring public recognition of rights.[9] What were some practical implications of this premise?

The debate around the initiative preceding my mandate, the 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights',[10] was bogged down by doctrinal differences concerning whether international human rights law applies directly to business enterprises. Advocates and the Norms said yes; businesses and most states said no. The Commission (now Council) rejected the Norms and created my mandate instead. I saw no reason to replicate the debate. Instead, I adopted the position that companies should look to internationally recognized rights for an authoritative enumeration not of human rights *laws* that might apply to them, but of human *rights* they should respect.

This had three decisive consequences. It permitted a clear differentiation between state duties and corporate responsibilities, satisfying a demand by states and businesses alike. It shifted the debate from doctrine to the practical question of how businesses can know and show they respect rights, to which the Guiding Principles provided the answer: through the human rights due diligence process the Guiding Principles stipulate for business enterprises to avoid infringing on the rights of others and address adverse impacts with which they are involved. And it made it possible for states to endorse the Guiding Principles even if they had not ratified all of the core human rights conventions – importantly including China in relation to the civil and political covenant,[11] and the United States vis-à-vis the economic, social and cultural covenant.[12]

The second premise underlying the Guiding Principles reflects the growing fragmentation of international law into separate and autonomous spheres of law. Human rights discourse is infused with the assumption of a rights-based hierarchy – the idea that human rights trump not only in a moral sense but that they also do, or at least should, in terms of the law. Yet in an influential report to the UN General Assembly, the authoritative International Law Commission concluded that 'no homogenous

hierarchical meta-system is realistically available' within the international legal order to resolve the problem of incompatible provisions among different bodies of law, including when different tribunals that have overlapping jurisdictions address exactly the same set of facts and yet reach different conclusions.[13] In other words, resolution cannot be deduced from first principle. It has to be worked out in concrete realms of practice, where objectives are defined and can be aligned to achieve greater normative compatibility.[14] Thus, the Guiding Principles stress the importance of national policy coherence, of addressing cognate areas of policy and law that should be amended to provide greater space for human rights protection, and of states carrying that policy coherence with them when they participate in intergovernmental organizations.

Third, I observed that since the late 1990s the number of new multilateral treaties has dropped precipitously; not one has been deposited with the United Nations since 2010 and the most recent were targeted.[15] Earlier comprehensive treaties in complex and contested areas, such as the Kyoto Protocol,[16] have not fared well. Current indications are that Kyoto's top-down specification of emission cuts will be replaced by national pledges coupled with peer pressure – essentially an intergovernmental naming-and-shaming regime. Yet soft-law instruments and informal lawmaking are flourishing, as are many multi-stakeholder initiatives.[17] The causes are numerous, but among the main factors are the sheer complexity of transnational challenges, and global geopolitical/geo-economic shifts, generating a larger number and greater diversity of interests.

The inference I drew from this observation is that a trade-off exists between the 'comprehensiveness' of international instruments in complex and contested domains, and their 'binding-ness'. If you want comprehensiveness, go the soft-law route. If you aspire to binding-ness, take a targeted approach. I chose comprehensiveness in establishing a foundation, with follow-up binding instruments conceived as 'precision tools'.[18] In contrast, a non-governmental organization business and human rights 'treaty alliance' is demanding comprehensiveness (all rights and all businesses), binding-ness (a hard-law instrument) and universal jurisdiction.[19] This is so far beyond being feasible or reasonable as to constitute a purely symbolic gesture.

Fourth, the Guiding Principles rest on the recognition that global corporate conduct is shaped by three distinct governance systems. The first is the traditional system of public law and governance, domestic and international. Important as it is, by itself it has been unable to do all the heavy lifting on this and many other global challenges. The second is a system of civil governance involving stakeholders affected by business enterprises and their representatives, employing such social compliance mechanisms as advocacy campaigns, law suits and other forms of pressure, and also partnering with companies to induce positive change. The third is corporate governance, which internalizes elements of the other two as constraints, risks and opportunities. While the doctrine of separate legal personality between parent company and subsidiaries may govern the partitioning of assets and legal liability by multinational enterprises, risk management and identifying strategic opportunities typically are enterprise-wide functions.

Developing the Guiding Principles involved participants from each of these governance systems; it was an instance of polycentric governance. The intellectual and policy challenge was to construct a conceptual and normative platform whereby

the three governance systems become better aligned in relation to business and human rights, compensate for one another's shortcomings and play mutually reinforcing roles from which cumulative change can evolve over time.

To foster that alignment the Guiding Principles invoke the different discourses and rationales that reflect the different social roles these governance systems play in regulating corporate conduct. Thus, for states the emphasis is on their legal obligations under the international human rights regime to protect against human rights abuses by third parties, including business, as well as policy rationales that are consistent with, and supportive of, meeting those obligations. For businesses, beyond compliance with legal obligations, the Guiding Principles focus on the need to manage the risk of involvement in human rights abuses, which means that enterprises must act with due diligence to avoid infringing on the rights of others and address adverse impacts that occur. For affected individuals and communities, the Guiding Principles reinforce ways for their further empowerment to realize their right to remedy.

Finally, I sought to ensure that promoting implementation and building on the Guiding Principles would not be limited to the UN. Other actors have their own and often more powerful sources of leverage over business-related matters. Thus, I worked with individual governments and businesses, as well as civil society and workers' organizations. I also promoted uptake of the Guiding Principles with other international standard-setting bodies: the International Organization for Standardization (ISO); the Organisation for Economic Co-operation and Development (OECD); the International Finance Corporation; the European Union; the Association of South East Asian Nations; the African Union; and the Organization of American States. The result is implementation (highly variable, to be sure) through, and cascading effects beyond, these distributed networks, national and international, public and private – even as the expert working group that succeeded my mandate promotes the Guiding Principles from within the UN human rights machinery.

In sum, the answer to the question of why the Guiding Principles succeeded where other such initiatives have failed is far more complex than the dichotomy of voluntary vs mandatory measures that critics invoke. And if, going forward, these premises are ignored and the process reverts to prior conventional modalities, it could well revert to prior failures as well.

3 Next steps

Implementation of what is already on the table of course comes first. Let me illustrate how the dynamics of implementation unfold and should be reinforced in two areas in which the Guiding Principles have enjoyed rapid and widespread uptake: human rights due diligence and non-judicial grievance mechanisms. I then address three areas of law that should be prioritized.

Human rights due diligence is central to the corporate responsibility to respect human rights. Mark Taylor traced its path from my mandate into conflict minerals legislation even before the Guiding Principles were finalized.[20] Recently, the European Union adopted mandatory non-financial reporting requirements referencing the Guiding Principles,[21] and several governments and stock exchanges have moved in a

similar direction. But there was no reporting framework based specifically on the Guiding Principles. As noted elsewhere in this book,[22] Shift, the non-profit founded by former members of my UN team, has produced such a framework.[23] It helps companies take a deep dive into whether and how well they are aligning their due diligence practices with the Guiding Principles. The results, in turn, will provide information for sophisticated benchmarking.[24] Beyond that, governments requiring and companies conducting due diligence on their own accord are likely to find the need for more specific sectoral standards than exist in most industries. This is the focus of the NYU Stern Center for Business and Human Rights. The demand for assurance frameworks may come next. In short, due diligence has a built-in dynamic that should be reinforced because it helps reduce the incidence of corporate-related human rights harm.

The Guiding Principles also promote effective non-judicial grievance mechanisms, state-based and firm-level. Among the former, the National Contact Points (NCPs) under the OECD Guidelines for Multinational Enterprises have the greatest global reach. The Guidelines were updated in 2011 and now include the Guiding Principles' corporate responsibility to respect provisions. The number of human rights complaints has since spiked, and the fraction of such cases accepted for NCP consideration is higher than for other types of complaint.[25] But NCP findings against companies generally have had no material consequences. Canada recently adopted new corporate responsibility requirements to change that, referencing the Guiding Principles. Extractive companies listed in Canada that do not comply with the requirements now can lose government support through export credits and consular services.[26] Other governments should adopt comparable policies.

I turn next to three priority areas for further legal development. One is international investment law, contained in nearly 3,000 bilateral investment treaties and investment chapters of free trade agreements. These allow multinational corporations to sue states for damages, not only in cases of expropriation without prompt and adequate compensation, but also if the economic equilibrium that existed when the investment was made is upset through policy measures that an arbitration panel might construe as regulatory takings, which can include labour regulations, human rights standards and environmental requirements. Moreover, there is a far higher degree of speculative litigation under the investment regime – trying to push the boundaries in favour of investors – than in the World Trade Organization.[27] A priority for business and human rights should be to ensure that bona fide public interest considerations gain greater protection as investment agreements come up for renewal.

A second area is corporate law, particularly the interpretation it has been given in recent decades in the Anglo-American system: as requiring maximizing short-term shareholder value. This has raised the incentive for CEOs to manage to the share price, discounting other factors, including harm to people and planet. A broader social conception of the corporation is necessary if we are to meet these challenges. Towards that end, University of London Professor Peter Muchlinski has outlined how the Guiding Principles' due diligence requirements could lead towards a more robust corporate duty of care.[28]

My final point concerns judicial remedy for harm done. The current treaty proposal seeks a comprehensive and binding instrument coupled with extraterritorial jurisdiction.[29] This raises serious practical problems. First, given the complex and

contested nature of business and human rights, a comprehensive and legally binding instrument would have to be pitched at so high a level of generality that it would be of little use to real people in real places. Second, the proposal excludes national companies from its scope. This virtually guarantees opposition from multinational firms and their home states, thus polarizing the process and undermining the hard-won consensus that has been achieved. Consequently, 'success' at best would mean ending up with the functional equivalent of the UN migrant workers convention.[30] Adopted in 1990, it has yet to provide needed protection for migrant workers because, as expected, it has not been ratified by any country receiving significant numbers of migrant workers. Third, even that scenario may be overly optimistic because there is little indication that most *host* states of multinationals are prepared to accept home state judicial intrusion into their jurisdiction covering the entire range of internationally recognized rights, from extrajudicial killings to providing an adequate work/life balance.

Recognizing these constraints, I have advocated a 'precision tools' approach to further international legalization in this space. One obvious candidate is corporate involvement in 'gross abuses'.[31] This is because of the severity of the harms; because the underlying prohibitions in relation to natural persons already enjoy widespread consensus among states yet there remains considerable confusion about how they should be implemented in practice when it comes to legal persons; and because the knock-on effects for other aspects of the business and human rights agenda would be considerable, as was true of the US Alien Tort Statute before the Supreme Court gutted it.[32] To those who say this does not go far enough, Stanford Law Professor Jenny Martinez, who supports my proposal, provides a compelling response: 'a first step is better than no step at all'.[33] In effect, 'no step' would result from insisting on an 'all-in' treaty.

Notes

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15 See United Nations Treaty Collection, Multilateral Treaties Deposited with the Secretary-General, https://treaties.un.org/Pages/DB.aspx?path=DB/MTDSG/page1_en.xml.
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28 P. Muchlinski, 'Implementing the New UN Corporate Human Rights Framework: Implications for Corporate Law, Governance and Regulation' (2012) 22(1) *Business Ethics Quarterly* 145.
29 Human Rights Council, 'Elaboration of an International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights', UN Doc. A/HRC/26/L.22/Rev.1 (25 June 2014).
30 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, New York, 18 December 1990, in force 1 July 2003, 2220 UNTS 3.
31 See J.G. Ruggie, 'The Past as Prologue? A Moment of Truth for UN Business and Human Rights Treaty', Institute for Human Rights and Business, 8 July 2014, www.ihrb.org/commentary/past-as-prologue.html.
32 See W.S. Dodge in this volume, 'Business and human rights litigation in US courts before and after *Kiobel*', p. 244.
33 See J.S. Martinez, 'A First Step Is Better Than No Step at All', 3 February 2015, http://jamesgstewart.com/a--first-step-is-better-than-no-step-at-all.

Section 2.4

A business and human rights treaty

Justine Nolan

The push for a legally binding, comprehensive treaty on business and human rights began in the 1970s with an attempt at the United Nations (UN) to draft a code of conduct for transnational corporations. That push was revived in 2003 with the debate around the UN Norms on the Responsibilities of Transnational Corporations

and Other Business Enterprises with Regard to Human Rights.[1] The private sector[2] has adamantly resisted the creation of a treaty, as have many governments.

The acceptance by the UN Human Rights Council in June 2014 of a resolution to pursue a business and human rights treaty revived this prickly debate. The 2014 resolution was sponsored by Ecuador and South Africa, among others. It called for the establishment of an open-ended intergovernmental working group on a legally binding instrument on transnational corporations and other business enterprises with respect to human rights. The mandate of this working group is to 'elaborate an internationally legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises'.[3] This resolution was passed with what has been referred to as 'the thinnest of political mandates'.[4]

The adoption of the resolution immediately sparked strong and contrary views.[5] The International Organisation of Employers said in a statement that it

> deeply regrets that the adoption of the Ecuador initiative has broken the unanimous consensus on business and human rights achieved three years ago with the endorsement of the UN Guiding Principles on Business and Human Rights [and that it] is a genuine setback to the efforts underway to improve the human rights situation and access to remedy on the ground.[6]

A counter-movement was led by civil society organizations that favour such a treaty. A broad coalition of non-governmental organizations signed on to a joint statement supporting the development of a treaty because of 'the need to enhance the international legal framework to protect human rights in the context of business operations'.[7] The view presented by Arvind Ganesan,[8] below, is reflective of the general support among civil society advocates for a stronger legal framework; but he also expresses caution about the scope of the current resolution, which excludes national companies from scrutiny.[9]

Proponents of a treaty argue that the fundamental nature of human rights requires a binding instrument and that human rights need to be recognized on the same level as other obligations in the context of trade and investment.[10] As such, a treaty could recognize and clarify the legal obligations of business with respect to human rights. In addition, they argue that without legal compulsion corporate compliance with human rights is likely to be sporadic, inconsistent and largely dependent on the whims of business to ensure their operations are truly respectful of rights. The provision of a legal framework should not prevent the ongoing development of other national or soft-law mechanisms aimed at improving corporate respect for human rights.

Alternatively, critics point to the difficulty of drafting a treaty to cover the breadth of rights that apply in different industries. They also note that it is highly unlikely that a majority of governments will support such a treaty. Enforcement of a treaty (that aims to regulate the activities of tens of thousands of corporations) would also be a challenge because it would be predicated in part on the need to ensure that states exercise extraterritorial jurisdiction over their home country-based corporations that violate human rights. The current process for pursuing a business and human rights treaty is likely to take years to finish and it is unlikely that a majority of UN member states will endorse the final product. Some commentators note that

> the binding character of a treaty might be obtained only at the cost of diluted standards, as states awaken to some of the legal ramifications of a treaty entering into force; or a treaty might be 'strong' but fail to secure the participation of key states.[11]

But neither the length of the treaty drafting process nor the complexity of the process is a sufficient reason to derail the process at this stage. What is more important is to ensure that the process is carried out in collaboration with existing mechanisms such as the Guiding Principles, the OECD Guidelines, industry-focused standard-setting exercises and the development of multi-stakeholder initiatives, as well as other measures aimed at regulating the impact of corporate activities on human rights.[12]

A business and human rights treaty will never stand alone as a 'silver-bullet' solution to redressing corporate rights violations. In many ways, devotion to this mechanism harks back to an era before globalization gathered force and states were the pre-eminent enforcers of rights. The multi-stakeholder nature of the business and human rights landscape ensures that no single mechanism – whether an international or national legally binding instrument or voluntary initiatives – can act as a stand-alone device to hold corporations to account. However, the existence of an international legal framework could act in concert with and support the many other ongoing corporate responsibility initiatives that are currently in play around the world. The development of a business and human rights treaty should not be viewed as an either/or narrative[13] but rather as an additional mechanism that could help clarify the legal responsibilities of businesses, be used to encourage the development of consistent national laws and operate in conjunction with more practically focused industry-specific standards and metrics that are being developed from the ground up.

Notes

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

2 International Organisation of Employers and International Chamber of Commerce, 'Joint Views of the IOE and ICC on the Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights', UN Doc. E/CN.4/Sub.2/2003/NGO/44 (29 July 2003), www.unhchr.ch/Huridocda/Huridoca.nsf/0/918bbd410b5a8d2cc1256d78002a535a?Opendocument.

3 Human Rights Council, 'Elaboration of an Internationally Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights', UN Doc. A/HRC/26/L.22/Rev.1 (25 June 2014).

4 J. Ruggie, 'Quo Vadis? Unsolicited Advice to Business and Human Rights Treaty Sponsors', 9 September 2014, www.ihrb.org/commentary/quo-vadis-unsolicited-advice-business.html. The votes were: 20 in favour (Algeria, Benin, Burkina Faso, China, Congo, Côte d'Ivoire, Cuba, Ethiopia, India, Indonesia, Kazakhstan, Kenya, Morocco, Namibia, Pakistan, Philippines, Russia, South Africa, Venezuela, Vietnam); 14 against (Austria, Czech Republic, Estonia, France, Germany, Ireland, Italy, Japan, Macedonia, Montenegro, Romania, South Korea, UK, USA); and 13 abstentions (Argentina, Botswana, Brazil, Chile, Costa Rica, Gabon, Kuwait, Maldives, Mexico, Peru, Saudi Arabia, Sierra Leone, UAE). On 27 June 2014, the Council adopted by consensus a second resolution, sponsored by Norway, that requested a report considering, among other things, the benefits and limitations of legally binding instruments; see Human Rights Council, 'Human Rights and Transnational Corporations and Other Business Enterprises', GA Res. 26/3, UN Doc. A/HRC/26/L.1 (23 June 2014).

5 The Business & Human Rights Resource Centre's treaty page provides comprehensive coverage of statements and commentaries on the potential business and human rights treaty: http://business-humanrights.org/en/binding-treaty/statements-initiatives-commentaries.

6 International Organisation of Employers, 'Consensus on Business and Human Rights Is Broken with the Adoption of the Ecuador Initiative', 26 June 2014, www.ioe-emp.org/index.php?id=1238.

7 Treaty Alliance, 'Enhance the International Legal Framework to Protect Human Rights from Corporate Abuse', http://treatymovement.com/statement.

8 See A. Ganesan in this volume, 'Towards a business and human rights treaty?' p. 73.
9 A footnote to the Ecuador resolution defines 'other business enterprises' in a way that is intended to exclude national companies. It states: ' "Other business enterprises" denotes all business enterprises that have a transnational character in their operational activities, and does not apply to local businesses registered in terms of relevant domestic law.' Human Rights Council, 'Elaboration of an Internationally Legally Binding Instrument'.
10 D. Bilchitz, 'The Moral and Legal Necessity for a Business and Human Rights Treaty', Business & Human Rights Resource Centre, 10 February 2015, http://business-humanrights.org/en/treaty-on-business-human-rights-necessary-to-fill-gaps-in-intl-law-says-academic.
11 F. Megret, 'Would a Treaty Be All It Is Made up to Be?' 4 February 2015, http://jamesgstewart.com/would-a-treaty-be-all-it-is-made-up-to-be.
12 A. Mehra, 'The Caravan toward Business Respect for Human Rights', Institute for Business and Human Rights, 11 February 2015, www.ihrb.org/commentary/caravan-toward-business-respect-for-human-rights.html.
13 Ibid.

Section 2.5

Towards a business and human rights treaty?

Arvind Ganesan

In July 2014, the United Nations (UN) Human Rights Council stunned companies, some governments and many in civil society when they voted to start negotiations on a treaty to address corporate responsibility for human rights abuses. No one, including us at Human Rights Watch (HRW), thought that the Human Rights Council would authorize treaty negotiations concerning the liability of transnational corporations (TNCs). But, after a contentious and somewhat convoluted process, a resolution supporting the development of a treaty[1] emerged – as did a resolution to maintain the UN Working Group on Business and Human Rights.[2] In effect, the Human Rights Council chose to pursue two parallel paths towards corporate responsibility, or perhaps more accurately, two complementary paths.

Since the beginnings of the modern business and human rights movement in the 1990s, there has been a tension between voluntary initiatives that promote business adherence to human rights standards and expectations for mandatory rules requiring business compliance with human rights norms. Those tensions came to the forefront in 2003 when the now-defunct UN Sub-Commission on the Promotion and Protection of Human Rights released its Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, an expansive document that prescribed the human rights obligations of companies.[3] Civil society and others wanted strong standards while many business entities and governments objected to such rules. That disagreement led to a compromise arrangement: the creation of the mandate of the UN Special Representative on Business and Human Rights that would ultimately lead to the non-legally binding, but widely supported, UN Guiding Principles on Business and Human Rights[4] (Guiding Principles). While the Guiding Principles enshrined the idea that business has human rights responsibilities, they did not obviate the tension between voluntary and mandatory standards. In July 2014, that tension became apparent when the Human Rights Council established an intergovernmental working group to develop a legally binding instrument to regulate the activities of TNCs.

In reality, the two views are not in opposition, but reflect a steady evolution towards stronger standards. For example, HRW has long believed that legally binding norms are necessary to ensure that businesses respect human rights. For the last few years, voluntary and mandatory measures have been wrongly portrayed as mutually exclusive. In HRW's view, they are each evolutionary steps towards the same goal. Voluntary initiatives have often become the place where basic norms are developed and established. For example, the Voluntary Principles on Security and Human Rights[5] have established the basic norms on how human rights should be integrated into security arrangements; and the Global Network Initiative has provided the contours on how Internet and telecommunications companies should protect free expression and privacy. Such efforts also provide more detailed standards that specify how companies should comply with human rights norms and, in some cases, offer sophisticated monitoring mechanisms to help ensure compliance. The Guiding Principles provide broad guidance on the human rights responsibilities of business but do not provide detailed guidance for companies; nor do they attempt to monitor compliance. Rather, they set out the general roles and responsibilities of governments and business and provide guidance on how compliance can be achieved.

Both types of efforts are valuable, but fall short when it comes to enforcement or accountability when human rights problems occur. The Guiding Principles are not enforceable and, while multi-stakeholder initiatives offer some sanctions, the most serious often being expulsion from the initiative, such penalties may be inadequate in the face of serious human rights problems. Moreover, those rules only apply to the companies that are part of these efforts; for those that are not, there may be no accountability at all. Nonetheless, these efforts have been essential for establishing norms and creating new models of compliance. They are not, however, ideal for comprehensive enforcement of human rights standards.

For this reason, an evolution towards binding standards that involve laws and regulations requiring companies to respect human rights will be essential for meaningful accountability. But real regulation is far more polarizing and contentious than voluntary initiatives. This was evident at the Human Rights Council meeting concerning a treaty process, pitting many developing countries at the Council, led by Ecuador and South Africa, against the United States and the European Union. Critics warned that a treaty would face strong opposition from some of the world's largest companies and the governments where they are headquartered.[6] Western governments threatened to sit out the negotiations.

The Human Rights Council treaty meeting also exposed the problems caused by a narrow (and perhaps ideological) focus on TNCs, even though any company is capable of infringing human rights and most standards, including the Guiding Principles, do not draw this artificial distinction. The emphasis on TNCs occurred as a result of Ecuador's insistence, it being the lead sponsor of the treaty resolution. But this has created a situation where an international apparel company might be bound by human rights standards, while abusive local factories are not. A treaty with credibility must cover all businesses. This point does not excuse governments from enacting national laws to protect workers and others affected by miscreant business practices, or to allow victims to seek justice in national courts.

Despite the flaws in the Human Rights Council resolution, the reality is that a treaty negotiation process exists and now presents an opportunity to establish stronger human rights rules. Companies have been implicated in a litany of abuses

around the world and rarely pay a price for them, because governments fail to impose even basic regulations, such as requiring businesses to review and monitor rights risks. The reality is that those rules may be fairly modest because of how contentious new international rules will be. The intergovernmental group met again in July 2015 to begin setting out the contours of the negotiations.

The momentum within civil society to push for a treaty may be traced in part to the Human Rights Council's 2011 approval of the Guiding Principles. The fact that the Guiding Principles include no firm requirements and no monitoring of progress may be seen as a sacrificing of compliance with standards in favour of recognition of standards. In light of this approach, it is no surprise that implementation of the Guiding Principles has been woefully inadequate. Nor is it a surprise that the Guiding Principles did not dissipate the pressure for a stronger instrument, especially in the face of continued business-related abuses.

The treaty resolution also reflects a parallel development at the national level: slowly but surely national laws and regulations are incorporating modest elements of the business and human rights agenda. In the United States, there are new human rights disclosure rules for conflict minerals and investments in Myanmar, as well as contentious rules on transparency in the extractive industries.[7] Similar rules have developed in the European Union. And other countries, such as India, are starting to require some reporting on socially responsible practices.[8] These developments suggest a slow evolution towards binding standards, at least for reporting. While reporting requirements are not a substitute for laws and regulations that require human rights compliance and create accountability for violations, the move towards mandatory reporting may be the first step in a new body of rules that ultimately amount to a comprehensive regime to ensure business adherence to human rights rules.

In this context, the treaty process represents an opportunity to more effectively safeguard communities and individuals around the globe from abuses involving companies. Perhaps the best outcome would involve governments negotiating transparently and consulting widely with all stakeholders to constructively identify areas that might be amenable to new rules. The worst case would be a highly politicized and contentious process that yields nothing and makes it even more difficult to develop new norms. In the short term, treaty negotiations could lead to standards that incorporate elements of the Guiding Principles and existing good practices that are increasingly recognized as essential for businesses to fulfil their obligations to respect human rights, such as mandatory human rights due diligence, public reporting on human rights compliance and accountability for non-compliance with those standards. Whatever the outcome, and no matter how necessary a binding instrument is, it is certain that treaty negotiations will be contentious and new norms may take years to emerge.

Notes

1 Human Rights Council, 'Elaboration of an Internationally Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights', UN Doc. A/HRC/26/L.22/Rev.1 (25 June 2014). The resolution, sponsored by Ecuador and South Africa, garnered 20 votes in favour, 13 abstentions and 14 votes against it.

2 Human Rights Council, 'Human Rights and Transnational Corporations and Other Business Enterprises', UN Doc. A/HRC/26/L.1/ (23 June 2014).

3 United Nations Sub-Commission on the Promotion and Protection of Human Rights, 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights', U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (26 August 2003).
4 Human Rights Council, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework', Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, UN Doc. A/HRC/17/31 (21 March 2011).
5 Voluntary Principles on Security and Human Rights, www.voluntaryprinciples.org.
6 For further discussion on the development of a business and human treaty, see J. Ruggie, 'Quo Vadis? Unsolicited Advice to Business and Human Rights Treaty Sponsors', Institute for Human Rights and Business, 9 September 2014, www.ihrb.org/commentary/quo-vadis-unsolicited-advice-business.html; D. Bilchitz 'The Moral and Legal Necessity for a Business and Human Rights Treaty', http://business-humanrights.org/sites/default/files/documents/The%20Moral%20and%20Legal%20Necessity%20for%20a%20Business%20and%20Human%20Rights%20Treaty%20February%202015%20FINAL%20FINAL.pdf; P.J. Selvanathan, 'Treaty Me Right', submission to 'The Business and Human Rights Treaty Debate: Is Now the Time?', Duke Human Rights Center, 2014, http://business-humanrights.org/sites/default/files/documents/IsNowtheTime_TreatyDebate.pdf. See generally the Business & Human Rights Resource Centre, 'Binding Treaty', http://business-humanrights.org/en/binding-treaty.
7 See A.P. Ewing in this volume, 'Mandatory human rights reporting', p. 284.
8 Ibid.