CHAPTER 36

Business and Human Rights

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I. Introduction

Nation States are defined and recognized by the territory they control or administer, with clear borders outlining where one State ends and another begins. The laws of one State do not usually apply across the border. But ever since the first caravan of camels set off with goods to trade and the first sailing ships set off in search of new frontiers, business has sought to exploit economic opportunities that lay across borders.

Borders interfere with market efficiencies, preventing goods, people, services,[2] and ideas from flowing freely, and many analysts have called for a borderless world.[3] Such exchange has reaped huge benefits and spread prosperity by making goods and services accessible to more people, increasing the incomes of many, and spreading ideas and technology that have solved many problems. Jobs are created in many parts of the world, and when companies pay taxes, governments get the revenue to finance development projects.[4] Economic exchange can be a force for good, and trade economists from David Ricardo, who articulated the theory of comparative advantage,[5] onward have spoken of the mutual benefit to two countries when goods and services are exchanged. But, as many economists[6] have also pointed out, such trade should be rules-based, fair, and not exploitative. The World Trade Organization, too recognizes the development agenda of trade.[7]

1 **Authors' Note:** The views expressed in this chapter reflect the authors' personal opinions and not those of their former, current, or future employers. The same is true for those who were interviewed for this chapter. This chapter is a tribute to John Ruggie. It was originally meant to be written by John Ruggie, whose untimely death in 2021 prevented that from happening. We are honored and humbled to be asked to author this chapter and have presented the narrative objectively, considering a broad range of diverse views from leading business and human rights experts, as he would have expected.

2 Nayan Chanda, *Bound Together: How Traders, Preachers, Adventurers, and Warriors Shaped Globalization* (New Haven: Yale University Press, 2007) (provides a balanced overview).

3 Kenichi Ohmae, *The Borderless World: Power and Strategy in the Interlinked Economy* (New York: Harper Business, rev. ed. 1999).

4 Jagdish Bhagwati, *In Defense of Globalization* (New York: Oxford University Press, 2007).

5 "Comparative Advantage," *Britannica Money*, https://www.britannica.com/money/comparative-advantage.

6 *See e.g.*, Dani Rodrik, *The Global Governance of Trade as if Development Really Mattered* (UNDP, Jul. 2001), https://drodrik.scholar.harvard.edu/publications/global-governance-trade-if-development-really-mattered.

7 Pascal Lamy, *Address at Jubilee Conference of National Committee for International Co-operation and Development of the Netherlands*, Feb. 4, 2012, https://www.wto.org/english/news_e/sppl_e/sppl215_e.htm.

But critics point to harms of trade and investment without regulatory oversight: for example, corporations violate human rights by driving down wages, providing inadequate compensation to those who have suffered due to corporate actions, tolerating unsafe working conditions, discharging harmful environmental pollutants, exploiting natural resources, and ignoring the rule of law. The poor in particular, who often lack access to resources, are disproportionately burdened by corporate abuse.

Indeed, several authors have shown how trade can disrupt lives, devastate traditional societies, and colonize countries.[8] The history of colonialism shows how traders and merchants who came to buy raw materials cheaply ended up impoverishing and enslaving countries for prolonged periods, stunting those societies, and causing widespread human rights abuses. The circle has not always been virtuous.

The key challenge then becomes how to regulate corporate behavior, so that it adheres to international standards and protects human dignity—particularly when corporations increasingly play a central role in everyday life[9] and the government's role has decreased due to privatized services and liberalized economies.

John Ruggie, the Harvard professor and former Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises (SRSG), understood this incongruence. As a believer in principled pragmatism and a reputed scholar of international relations, including the role of multilateral norms and how those develop into laws and treaties, he articulated the vision of business and human rights through the United Nations (UN) Guiding Principles on Business and Human Rights (UNGPs),[10] which emphasized shared responsibility between the State and the business sector: where the State has the duty to *protect* human rights, business has the responsibility to *respect* human rights, and where harms are identified, there is a joint responsibility to enable access to effective *remedy* (which is particularly important in instances in which there is a protection gap, that is, where the State is unable or unwilling to provide remedy and the company does not think it has a responsibility to do so).

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History offers several emblematic cases of human rights harms and abuses due to corporate misconduct that have shaped the global discourse on business and human rights, where companies have operated in jurisdictions that are less effective at regulating corporate

[8] Frantz Fanon, *Black Skin, White Masks* (New York: Grove Press, 2008) (translated by Richard Philcox); Thomas Pakenham, *The Scramble for Africa: White Man's Conquest of the Dark Continent from 1876 to 1912* (New York: Random House, 1991; New York: Perennial, 2003); William Dalrymple, *The Anarchy: The East India Company, Corporate Violence, and the Pillage of an Empire* (London: Bloomsbury Publishing, 2019); Shashi Tharoor, *Inglorious Empire: What the British Did to India* (Brunswick and London: Scribe Publications, 2017); Caroline Elkins, *Legacy of Violence: A History of the British Empire* (New York: Alfred A. Knopf, 2022).

[9] Throughout his mandate, John Ruggie frequently cited estimates about the vast number of companies around the world, which has arguably since increased. *See, e.g.*, John Ruggie, "The Corporate Responsibility to Respect Human Rights," *Harvard Law School Forum on Corporate Governance*, May 15, 2010, https://corpgov.law.harvard.edu/2010/05/15/the-corporate-responsibility-to-respect-human-rights/ ("[We live] in a world of 80,000 multinational corporations, ten times as many subsidiaries and countless national firms, many of which are small-and-medium-sized enterprises.").

[10] *Guiding Principles on Business and Human Rights*, U.N. Doc. HR/PUB/11/04, Office of the High Commissioner (New York and Geneva: United Nations, 2011), https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf.

activity than their home States, or where inadequate protection and enforcement have caused human rights violations. Prominent examples include:

- The 1984 Bhopal gas disaster[11] in India, in which a cloud of poisonous methyl isocyanate leaked from the fertilizer plant of the United States (U.S.)-owned Union Carbide Corp one night. By some estimates, between 2,000 and 3,000 people living in the vicinity of the plant died within hours, and over the years, up to 20,000 people died.[12] A tortuous saga followed. U.S. lawyers attempted to represent Indian clients but were not allowed to do so by the Indian Government; the Indian Government arrested, and soon released, the chief executive of Union Carbide when he visited India soon after the tragedy. The US district court ruled that India was the appropriate forum for the case and had the jurisdiction and capability to try Union Carbide in India. The Indian Government settled the case with the company. Subsequently, as Union Carbide was acquired by Dow Chemical, its Indian unit was sold to an Indian Government–owned company, which reduced the likelihood of Dow Chemical inheriting any potential liabilities the Indian plant might have in future. Victims' organizations and human rights groups have continued to campaign for remedy, justice, and compensation.[13]
- Oil was discovered in the Niger Delta in 1956,[14] and oil companies operated despite the Biafran War and domestic opposition, in particular from the Ogoni people.[15] Ogoni activists accused Shell of adverse environmental impacts, and the Nigerian Government responded by having security forces ruthlessly suppress protests. State-owned company Nigerian National Petroleum Corp was a partner in the joint venture with Shell. International human rights groups accused Nigeria of committing massive abuses.[16] In 1993, the noted environmentalist and writer Ken Saro-Wiwa and eight other Ogoni leaders who campaigned against Shell were arrested on dubious charges, and in 1995, they were executed after a trial widely condemned as unfair.[17] That incident galvanized global public opinion about the role of companies in the developing world.[18]

[11] Clarence J. Dias, "That They Shall Not Have Died in Vain," *Journal of the Indian Law Institute* 28, no. 1 (Jan.–Mar. 1986): 53–71, https://www.jstor.org/stable/43950980; Michael A. Hiltzik, "U.S. Judge Returning Bhopal Case to India: Moves to Dismiss 145 Lawsuits Against Carbide Stemming from '84 Tragedy That Killed 2,000," *Los Angeles Times*, May 13, 1986, https://www.latimes.com/archives/la-xpm-1986-05-13-mn-5877-story.html.

[12] "Bhopal Disaster," *Britannica*, https://www.britannica.com/event/Bhopal-disaster.

[13] Amnesty International, *Clouds of Injustice: Bhopal Disaster 20 Years On* (London: Amnesty International, 2004), https://www.amnesty.ch/de/themen/wirtschaft-und-menschenrechte/fallbeispiele/bhopal/30-jahre-bhopal/clouds_of_injustice_2004.pdf.

[14] Amnesty International, *In the Dock: Shell's Complicity in the Arbitrary Execution of the Ogoni Nine* (London: Amnesty International, 2017), https://www.amnesty.org/en/documents/afr44/6604/2017/en/; *see also* A. Yusuf Raji and T. Samuel Abejide, "Shell D'arcy Exploration & the Discovery of Oil as Important Foreign Exchange Earnings in Ijawland of Niger Delta, C. 1940s–1970," *Arabian Journal of Business and Management Review (OMAN Chapter)* 2, no. 11 (Jun. 2013), https://www.arabianjbmr.com/pdfs/OM_VOL_2_(11)/4.pdf.

[15] Human Rights Watch, *The Price of Oil: Corporate Responsibility and Human Rights Violations in Nigeria's Oil Producing Communities* (New York: Human Rights Watch, 1999), https://www.hrw.org/reports/1999/nigeria/nigeria0199.pdf.

[16] *Id.*, at 9–10.

[17] Amnesty International, *Nigeria: Amnesty International Condemns Execution of Ken Saro-Wiwa and Eight Others* (Nov. 10, 1995), https://www.amnesty.org/en/documents/afr44/031/1995/en/.

[18] Ledum Mitee, Noo Saro-Wiwa, and Austin Onuoha, Interview by Salil Tripathi, *Voices—Conversations on Business and Human Rights from Around the World*, Institute for Human Rights

Other oil, mining, and gas companies operating in difficult environments were often accused of complicity with government or paramilitary forces, in countries as far apart as Colombia, Indonesia, and other parts of Africa.

- In the 1970s, the Ford Pinto was the focus of a major controversy when it was revealed that the car's design allowed its fuel tank to explode in the event of a rear-end collision—resulting in many injuries and deaths to drivers. Research indicated that Ford executives were aware of this design flaw, but they refused to pay the minimal expense for a redesign—believing it was cheaper to settle lawsuits.[19] Separately, concerned consumers began questioning the labor practices of multinational companies producing garments and apparel in developing countries. While such outsourcing of supply chains made clothing affordable and created jobs in developing countries, the conditions in the factories were often abysmal. Few factories permitted trade unions, and sexual harassment of female workers was widespread. Some local contractors were accused of hiring under-age workers.[20] Brands such as Gap,[21] Nike,[22] Gloria Vanderbilt,[23] and many others were accused of tolerating poor practices, although the companies pleaded that they were not direct employers of the workers. In the years since, many of the companies have made significant efforts to improve conditions in their supply chains.
- In 2013, in Dhaka, Bangladesh, a building called Rana Plaza[24] collapsed, leading to more than 1,100 workers' deaths. These workers were employed by dozens of factories operating in the building. In 2012, more than 100 people died in a fire at another factory[25] in Dhaka. There have been similar tragedies in Pakistan[26] and China[27] in recent years, and

and Business, Nov. 11, 2020, at 17:32, 57:26, 1:05:26, https://voices.ihrb.org/episodes/on-the-life-and-legacy-of-ken-saro-wiwa-i.

[19] *See, e.g.*, Mark Dowie, "Pinto Madness," *Mother Jones*, Sep./Oct. 1977, https://www.motherjones.com/politics/1977/09/pinto-madness/.

[20] *See, e.g.*, Linda Myers, "Anti-Sweatshop Crusader Charles Kernaghan Is Cornell ILR Speaker Sept. 2," *Cornell Chronicle*, Aug. 26, 1999, https://news.cornell.edu/stories/1999/08/anti-sweatshop-crusader-charles-kernaghan-ilr-speaker-sept-2.

[21] See, *e.g.* Dan McDougall, 'Child Sweatshop Shame Threatens Gap's Ethical Image' *The Guardian*, Oct 28, 2007 https://www.theguardian.com/business/2007/oct/28/ethicalbusiness.india

[22] See, *e.g.* Burhan Wazir 'Nike Accused of Tolerating Sweatshops' *The Guardian*, May 19 2001 https://www.theguardian.com/world/2001/may/20/burhanwazir.theobserver

[23] See *e.g.* Kristen Gillespie, 'Jordan Accused of Harboring Sweatshop Factories' *National Public Radio*, June 26, 2006. https://www.npr.org/2006/06/26/5510902/jordan-accused-of-harboring-sweatshop-factories#:~:text=One%20hundred%20ten%20factories%20there,are%20tantamount%20to%20human%20slavery.

[24] "The Rana Plaza Accident and Its Aftermath," *International Labour Organization*, https://www.ilo.org/media/397876/download; Motoko Aizawa and Salil Tripathi, "Beyond Rana Plaza: Next Steps for the Global Garment Industry and Bangladeshi Manufacturers," *Business and Human Rights Journal* 1, no. 1 (Jan. 2016): 145–151, https://www.cambridge.org/core/journals/business-and-human-rights-journal/article/beyond-rana-plaza-next-steps-for-the-global-garment-industry-and-bangladeshi-manufacturers/B362D6DB2E0A46EFAB81361E7F4201C1.

[25] Vikas Bajaj, "Fatal Fire in Bangladesh Highlights the Dangers Facing Garment Workers," *New York Times*, Nov. 25, 2012, https://www.nytimes.com/2012/11/26/world/asia/bangladesh-fire-kills-more-than-100-and-injures-many.html.

[26] "WRC Factory Investigation: Ali Enterprises," *Worker Rights Consortium*, 2012, https://www.workersrights.org/factory-investigation/ali-enterprises/#:~:text=Case%20Summary,to%20the%20vast%20death%20toll.

[27] "Guangdong Factory Fire Kills 14," *The Guardian*, Dec. 5, 2012, https://www.theguardian.com/world/2012/dec/05/guangdong-factory-fire-kills-14.

> international brands, which manufacture their garments in developing countries, are under increasing pressure to act responsibly.

Regardless of where the responsibility lay—with the multinational or local company, or the home or host government—it was clear that two gaps existed: protection and regulation. It became necessary to understand the relationship between business and human rights and explore what standards applied and who would enforce them.

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Companies that have expanded overseas have followed the logic of the market, but in doing so, they have often attracted justified criticism,[28] if not outright suspicion,[29] about their intent and impacts. Large corporations have used economic clout and political influence to deepen and strengthen their own interests, including colonizing States,[30] while often ignoring the broader interests of the society in which they operate and sometimes even undermining human rights. Nobel Laureate Milton C. Friedman famously argued in 1970 that the social responsibility of business is to make profits by operating within the law and without committing deception or fraud.[31] Critics have argued that the focus on earning returns for shareholders has undermined human rights and other societal interests, which has contributed to widespread suspicion of business.

The problem is not unique to big business or multinational firms. Adverse impacts on human rights can be traced back to all kinds of companies and firms—multinational and local, large and small, State-owned and private—regardless of where they are located, whether in a democratic or authoritarian, or developed or developing, country.

Campaigning groups have questioned the prevailing economic model[32] and sought greater regulation, including UN oversight. Economic globalization has created jobs, but has also created a perception of widening inequality.[33] Investment-hungry governments are accused of lowering regulation by dismantling barriers. As Ruggie astutely noted in his reports and speeches, economic globalization is moving at a pace far faster than governments can develop mechanisms to regulate it and ensure that development is equitable.[34] This indicates a need for a new paradigm, which can include an appropriate regulatory mechanism or rules.

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[28] Noreena Hertz, *The Silent Takeover: Global Capitalism and the Death of Democracy* (Heinemann, 2001; New York: The Free Press, 2002).

[29] Naomi Klein, *No Logo* (New York: Picador, 10th anniv. ed. 2009).

[30] William Dalrymple, *The Anarchy: The East India Company, Corporate Violence, and the Pillage of an Empire* (London: Bloomsbury Publishing, 2019); Shashi Tharoor, *Inglorious Empire: What the British Did to India* (Brunswick and London: Scribe Publications, 2017); Nick Robins, *The Corporation That Changed the World: How the East India Company Shaped the Modern Multinational* (London: Pluto Press, 2nd ed. 2012).

[31] Milton Friedman, "A Friedman Doctrine—The Social Responsibility of Business is to Increase Its Profits," *New York Times*, Sep. 13, 1970, https://www.nytimes.com/1970/09/13/archives/a-friedman-doctrine-the-social-responsibility-of-business-is-to.html.

[32] Daniel Litvin, *Empires of Profit: Commerce, Conquest and Corporate Responsibility* (New York: Texere, 2003).

[33] Joseph E. Stiglitz, *Globalization and Its Discontents* (New York: W.W. Norton & Company, 2002).

[34] John Ruggie, "Making Economic Globalization Work for All: Achieving Socially Sustainable Supply Chains" (Feb. 15, 2017), https://shiftproject.org/making-economic-globalization-work-for-all-achieving-socially-sustainable-supply-chains/.

This chapter traces chronologically the UN's engagement with business and human rights. It first covers foundational elements that led to the UNGPs, and thereafter covers the UNGPs themselves and what has since occurred.

II. Foundational Precursors to the UNGPs

A. The Centre for Transnational Corporations

In 1975, at the height of the Cold War, the UN set up the Centre for Transnational Corporations[35] to act as the focal point to address all matters pertaining transnational corporations and was meant to establish a code of conduct for such companies.[36] It was intended to apply to all countries, regardless of their political or social systems. The intent of the Centre was to encourage companies to align their activities with national development goals and to boost the negotiating capacity of host States so that they could mitigate or eliminate adverse impacts. Its premise rested on the perceived imbalance in power between large multinational companies and small States. The Centre was intended to remedy this imbalance. The Centre prepared a code of conduct for transnational corporations,[37] but it remained contentious and in draft form. The debates the Centre sought to solve remained mired in the East-West politics of the Cold War era, with non-aligned and Soviet bloc States suspicious of multinational companies, which were seen as standard-bearers of free market capitalism.

The end of the Cold War, the fall of the Berlin Wall in 1989, and the dissolution of the former Soviet Union changed the debate's tenor. Transformed international relations reduced the polemic, and the Centre's appeal diminished until it was dissolved in 1992. But in the years that followed, the concern that economic globalization was outpacing social protections was heightened. This culminated in protests in 1999 in Seattle at the World Trade Organization's ministerial meeting.[38] The summit failed in its trade liberalization objectives,[39] and civil society groups renewed their campaigns against big business.[40]

[35] Khalil Hamdani and Lorraine Ruffing, *United Nations Centre on Transnational Corporations: Corporate Conduct and the Public Interest* (New York: Routledge, 2015), at ch. 1.

[36] Commission on Transnational Corporations, *Draft United Nations Code of Conduct on Transnational Corporations*, U.N. Doc. E/1983/17/Rev. 1 at Annex II, 1983, https://digitallibrary.un.org/record/204950/files/E_1983_17_Rev-1-EN.pdf.

[37] *Code of Conduct on Transnational Corporations*, Economic and Social Council, Res. 1987/57, U.N. Doc. E/RES/1987/57, *adopted* May 28, 1987.

[38] *See*, *e.g.*, "World Trade Organization Protests in Seattle," *Seattle Municipal Archives*, https://www.seattle.gov/cityarchives/exhibits-and-education/digital-document-libraries/world-trade-organization-protests-in-seattle.

[39] Jagdish Bhagwati, *The Wind of the Hundred Days: How Washington Mismanaged Globalization* (Cambridge: MIT Press, 2000).

[40] As noted earlier, global civil society resistance to corporate power had been brewing. Civil society resolve had been strengthened by incidents such as the disastrous leak of methyl isocyanate gas from the Union Carbide plant in Bhopal, India, in December 1984, which killed some 3,000 people instantly, and perhaps another 12,000 over the decades that followed; the 1995 execution by the Nigerian Government of nine Ogoni activists, including the writer Ken Saro-Wiwa, after a trial most observers concluded to have been unfair; and allegations that companies in the extractive (BP, Occidental Petroleum, etc.) and agricultural (e.g., Chiquita) sectors were working with military or paramilitary forces and armed opposition groups in Colombia, leading to widespread abuses. Apparel manufacturers like Nike, Reebok, Gap, and Adidas had also faced criticism for the treatment of labor in factories. Annan's speech came after the campaigns had already been vocal and he was prescient in noting the emerging backlash against market-led globalization.

B. The Drive Toward Global Corporate Responsibility and Accountability: The UN Global Compact

A few months before the Seattle summit, UN Secretary-General Kofi Annan presciently proposed a "new global compact" in a speech at the World Economic Forum in Davos in January 1999. Such a compact would uphold international standards on human rights, labor, and the environment. Specifically, Annan said:

> Globalization is a fact of life. But I believe we have underestimated its fragility . . . . The spread of markets outpaces the ability of societies and their political systems to adjust to them, let alone to guide the course they take. History teaches us that such an imbalance between the economic, social and political realms can never be sustained for very long . . . .
>
> Our challenge today is to devise a . . . compact on the global scale, to underpin the new global economy. If we succeed in that, we would lay the foundation for an age of global prosperity, comparable to that enjoyed by the industrialized countries in the decades after the Second World War . . . . I call on you—individually through your firms, and collectively through your business associations—to embrace, support and enact a set of core values in the areas of human rights, labour standards, and environmental practices.[41]

At the first Global Compact Summit in 2000, there were some 50 companies. Today, it has become the world's largest voluntary corporate social responsibility initiative, including over 15,000 companies and other organizations, the majority not from the Organization for Economic Cooperation and Development (OECD), and many of them small and medium enterprises (SMEs). There are local networks in 160 countries.[42] The Global Compact is not a regulatory instrument, and it has no mandate from governments. It is open to any company in the world, except those in the tobacco and controversial weapons industry or who otherwise are on a UN sanctions list.[43] It is a learning forum and network; it is not a standard-setter and does not evaluate corporate conduct.[44] Nor is the Global Compact designed to hold participating companies accountable, although participants are now required to communicate annually on their progress, and a number have been delisted in recent years for failing to do so.[45]

Many analysts see considerable value in the Global Compact. According to Jonathan Drimmer, partner at Steptoe, who was a partner at Paul Hastings when the authors interviewed him, said:

> The Global Compact has had a great influence, and it doesn't get the credit it deserves. The UNGPs [discussed later in this chapter] would not exist without the Global Compact. It put responsible business concepts forward to companies but did so in a way that was gentle yet defined the parameters; it was critical for moving from antagonism (where companies were being sued and subject to NGO campaigns) to an alternative approach that was easier for

[41] Kofi Annan, *Address to World Economic Forum in Davos*, Feb. 1, 1999, https://press.un.org/en/1999/19990201.sgsm6881.html.

[42] *Home Page*, United Nations Global Compact, https://www.unglobalcompact.org/.

[43] *About the UN Global Compact: Frequently Asked Questions*, United Nations Global Compact, https://www.unglobalcompact.org/about/faq.

[44] John Ruggie, *Just Business: Multinational Corporations and Human Rights* (New York: W.W. Norton & Company, 2013), at xxvii.

[45] *Delisted Participants*, United Nations Global Compact, https://unglobalcompact.org/participation/report/cop/expelled.

> companies to absorb. It helped greatly to define for business how to be responsible by sector, giving a clear internal skeleton for how to act; and it served as an entry point for putting companies into an ecosystem of what it means to respect human rights. In addition, many of its case studies were helpful and some were ahead of its time. The Global Compact was and remains critical.[46]

Gare Smith who chairs the Global Business and Human Rights Practice at the law firm Foley Hoag LLP and previously served as Principal Deputy Assistant Secretary at the U.S. State Department, cautiously notes:

> The Global Compact was an important leadership initiative and thousands of companies affiliated themselves with it. Because there is no monitoring or other form of accountability built into the Global Compact, though, it presented a free rider challenge. Virtually any company could participate and put a gold star by its name, which over time diminished the halo associated with participation. Yet, despite this challenge, it continues to articulate fundamental standards to which companies should adhere.[47]

In stressing self-evident principles on human rights, labor, and environment (and later corruption), the Global Compact established a useful floor. But civil society organizations wanted to move beyond. Irit Tamir, Senior Director of Oxfam America's Private Sector Department, believes:

> [The Global Compact] has outlived its usefulness because voluntary measures will not get us to where we need to go. We need accountability mechanisms for companies . . . but the Global Compact was not set up for this purpose. It has tried to expel companies that do not follow its principles. But, at its core, the [initiative] is about collaborative efforts. And the challenge with such initiatives is that they are looking at issues in a vacuum without understanding issues as a whole. Business and human rights issues exist because of the economic model that we have created, and the way business is structured. Until that is fixed, namely, unions being a real power force and government regulation that is meaningful and enforced, the world will continue to play "whack-a-mole"—and all these collaborative platforms do just that.[48]

C. The Draft Norms

Meanwhile, the now-defunct UN Sub-Commission on the Promotion and Protection of Human Rights—a group of experts appointed by the intergovernmental Commission on Human Rights (Commission)—adopted the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises (Norms) in 2003 and presented them in August 2004.[49] The Norms were based on a draft code of conduct prepared by law school professor and University of Minnesota legal scholar David Weissbrodt.[50] Written in the

[46] Jonathan Drimmer, Interview by Chris Fletcher, Feb. 7, 2022 (online).

[47] Gare Smith, Interview by Chris Fletcher, Mar. 4, 2022 (online).

[48] Irit Tamir, Interview by Chris Fletcher and Salil Tripathi, Mar. 21, 2022 (online).

[49] *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises With Regard to Human Rights*, 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, *adopted* Aug. 13, 2003.

[50] David Weissbrodt and Muria Kruger, "Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights," *American Journal of*

format of UN declarations, which are often considered "soft law," the Norms drew on all major international human rights instruments and called for the international community to take note of the Norms and respect them. Consisting of eight parts, the Norms noted general obligations to respect human rights; emphasized non-discrimination, security of person, workers' rights, respect for sovereignty, and consumer protection; and made a series of recommendations, including the need for reparations and compensation in proven instances of abuse, as well as periodic monitoring and verification by the UN.

If approved, the Norms would have imposed on companies within their "respective spheres of activity and influence," the same human rights obligations that States have accepted for themselves under treaties they have ratified: "[T]o promote, secure the fulfilment of, respect, ensure respect of and protect human rights."[51] Drafters of the Norms grounded their approach in the Universal Declaration of Human Rights, which calls on "every organ of society" to play its part.[52] Because corporations have power, they should also have responsibility—and the Norms asserted the aspirational view that international law provides a common basis on which to impose human rights obligations to companies.[53] (It does, in a few, rare cases, but not as a general rule.) As Bennett Freeman, former U.S. Assistant Secretary of State for Democracy, Labor, and Human Rights, who is widely credited with leading the development of the Voluntary Principles on Security and Human Rights and who has remained in the business and human rights arena across sectors (companies, investor, and non-governmental organization (NGOs)),[54] put it from his perspective at the time the Norms process emerged: "Although well-intentioned, the Norms were doomed to fail because companies were not ready and governments like the US would not support binding norms being placed on companies for fear of them being sued extraterritorially."[55] Some advocates of a binding treaty for business and human rights (which is discussed later) argue for the extension of home State jurisdiction to host State territories to regulate the conduct of corporations registered in the home State, so that egregious actions overseas can be supervised and controlled. Companies have argued against cases filed in jurisdictions that they do not consider appropriate under the doctrine of *forum non conveniens*,[56] but an international treaty, presumably with a judicial system empowered to rule on cases from different jurisdictions and with different procedures, would clash with that doctrine. The defendants would want the case to be heard in a forum most convenient

International Law 97, no. 4 (Oct. 2003): 904, https://scholarship.law.umn.edu/cgi/viewcontent.cgi?article=1247&context=faculty_articles.

[51] *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises With Regard to Human Rights*, 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, *adopted* Aug. 13, 2003, at ¶ 1.

[52] Universal Declaration of Human Rights, G.A. Res. 217 A (III), U.N. Doc. A/810, *adopted* Dec. 10, 1948, at Preamble.

[53] John Ruggie, *Just Business: Multinational Corporations and Human Rights* (New York: W.W. Norton & Company, 2013), at 48.

[54] *The Principles*, Voluntary Principles on Security and Human Rights, https://www.voluntaryprinciples.org/the-principles/.

[55] Bennett Freeman, Interview by Chris Fletcher and Salil Tripathi, May 3, 2022 (online).

[56] "Forum Non Conveniens," *Oxford Reference*, https://www.oxfordreference.com/view/10.1093/oi/authority.20110803095830144 (defining *forum non conveniens* as "[a] doctrine that permits a court to decline to accept jurisdiction over a case, so that the case may be tried in an alternative forum (i.e. a foreign court).").

to them; the plaintiffs would prefer the one that is likeliest to provide a remedy. Whether an international court can evaluate competing claims remains an unexamined question. The *forum* argument has hobbled many lawsuits. These lawsuits consist of cases U.S. courts have not taken up, including those under the Alien Tort Statute and, earlier, the Union Carbide case in India.

While the Sub-Commission accepted the Norms, following backlash from governments and businesses, the Commission instructed the Sub-Commission that its work had useful ideas but no legal standing.[57] Governments were reluctant to create a situation where there was any transfer of State obligations to non-state actors without a legal basis; companies had concerns because they did not want to accept obligations for human rights when they may not or did not have control over the activities of third parties (such as State security forces) or outcomes (which may have occurred due to a variety of factors). Many human rights organizations, frustrated by years of lack of progress on corporate accountability, supported the Norms. Meanwhile, critics asserted the Norms were developed without sufficient consultation with affected parties, in particular the private sector. But the Norms process did have consultations in Geneva at which businesses, NGOs, and governments were invited. One group of companies, called the Business Leaders Initiative on Human Rights, even tested the implementation of the Norms, publishing a guide on how to implement human rights principles for businesses, drawing on the Norms and other relevant standards.[58]

But most business organizations and governments resisted the Norms, and some did so fiercely. The Norms created an incredibly divisive debate between human rights organizations and the business community. Human rights organizations strongly supported the Norms precisely because companies would be directly subject to international law. The business community strongly opposed this approach, believing that such obligations belonged to States, not companies.[59]

Yet governments, civil society organizations, and business all felt the need to address the subject of business and human rights. Civil society had been pushing the issue for years. And having to deal with advocacy campaigns and lawsuits, some businesses, too, felt the need for greater clarity regarding their human rights responsibilities from an objective and authoritative source. However, the governments realized that an intergovernmental process was unlikely to make much progress without first finding some common ground on which to move forward, given how new, complex, and politically charged the topic was.[60]

[57] Pini Pavel Miretski and Sascha-Dominik Bachmann, "The UN 'Norms on the Responsibility of Transnational Corporations and other Business Enterprises with Regard to Human Rights': A Requiem," *Deakin Law Review* 17, no. 1 (Oct. 2012): 9 n.15, doi: 10.21153/dlr2012vol17no1art68 ("The Commission decided that the *Norms* contained 'useful elements and ideas' but added that it had not requested them and that, as a draft proposal, they had no legal standing. The determination of several major industrialised countries to deal with the relationship between business and human rights ultimately resulted in the appointment of Ruggie to the post of special representative to the UN Secretary General, although with a significantly narrower mandate . . . .").

[58] Business Leaders Initiative on Human Rights et al., *A Guide for Integrating Human Rights into Business Management* (2006), https://www.ohchr.org/sites/default/files/Documents/Publications/GuideHRBusinessen.pdf.

[59] John Ruggie, *Just Business: Multinational Corporations and Human Rights* (New York: W.W. Norton & Company, 2013), at xvii, 37–39, 48.

[60] *Id.*, at xvii–xviii.

D. Multi-Stakeholder Initiatives

Beyond the UN, the past two decades have also seen the rise of multi-stakeholder initiatives (MSIs), where companies come together either with their competitors or with other businesses and civil society groups, and in some cases home and host governments, to address specific concerns and issues. Many of these initiatives have played a useful role. These initiatives depend on mutual trust and goodwill to operate effectively in non-competitive ways. Civil society and human rights groups are critical of such initiatives because they are not-legally-binding.

One of the earliest such initiatives was the Fair Labor Association.[61] Launched in 1999, it includes companies, universities, and civil society organizations seeking to improve working conditions in factories around the world. A year later, the Voluntary Principles for Security and Human Rights[62] was established—which now includes 30 companies representing extractive industries, 10 governments, and 12 civil society groups who work collectively toward promoting a climate where extractive industries can operate while protecting their people and assets and respecting the human rights of others who are at risk. The Extractive Industry Transparency Initiative,[63] launched in 2002, aims to bring transparency in revenue sharing between companies and host governments. It includes 56 countries, and its board includes representatives from supporting countries, industry associations, and civil society. The Kimberley Process Certification Scheme[64] was born after the UN Security Council imposed sanctions on diamonds traded from rebel-held territories in conflict-affected West African States and passed a resolution in 2000 calling for a certification scheme. The scheme was negotiated in the early 2000s and launched in 2003, targeting diamonds sourced from rebel-held conflict zones, which in recent times have included Angola, Côte d'Ivoire, Liberia, the Democratic Republic of Congo, and Sierra Leone. The Scheme today includes 59 members, including the entire European Union (EU), which serves as one collective member.

In the last five years, there have been more initiatives, including the Global Network Initiative,[65] which includes 16 companies from the information and communication technology sector and other participants, including financial institutions, civil society groups, and university departments. The initiative brings together these participants to collaborate to provide guidance and direction to the industry to advance users' rights to freedom of expression and privacy. The Better Sugarcane Initiative[66] includes many companies and organizations and seeks to improve conditions on sugarcane farms and promote sustainable practices. Many other such initiatives currently exist around the world dealing with other commodities, including coal and aluminum.

[61] *About the Fair Labor Association*, FAIR LABOR ASSOCIATION, https://www.fairlabor.org/about-us/.

[62] *The Principles*, VOLUNTARY PRINCIPLES ON SECURITY AND HUMAN RIGHTS, https://www.voluntaryprinciples.org/the-principles/.

[63] *Our Mission*, EXTRACTIVE INDUSTRIES TRANSPARENCY INITIATIVE, https://eiti.org/our-mission.

[64] *What Is the Kimberly Process?*, KIMBERLEY PROCESS, https://www.kimberleyprocess.com/en/what-kp.

[65] *About GNI*, GLOBAL NETWORK INITIATIVE, https://globalnetworkinitiative.org/about-gni/.

[66] Now known as Bonsucro. *About Bonsucro*, BONSUCRO, https://bonsucro.com/what-is-bonsucro/.

III. The UNGPs and Their Aftermath

A. The UNGPs

Noting these developments, the Commission created a mandate after a long-drawn process, which included highly political negotiations that brought together leading States from the five UN regions—Russia, Argentina, Nigeria, India, and the United Kingdom (UK). The UK brought together a smaller group of key stakeholders to identify optimal approaches, and the idea emerged of getting a Special Representative of the Secretary-General (as opposed to the usual route of appointing a special rapporteur), requiring considerable diplomacy across various regional groups and interests. It was far from certain that such a mandate would be feasible, given the past record of UN engagement with business, which often led to North-South debates about the role of business and economic globalization, but the UK persevered. Eventually, the mandate's goal was to signal concern for the topic of business and human rights while remaining modest in scope: to identify and clarify existing standards and best practices for businesses, clarify the role of States in regulating business in relation to human rights, and research and clarify the meaning of hotly debated topics such as "corporate complicity" vis-à-vis human rights abuses and corporate "sphere of influence" within which companies might be expected to have human rights responsibilities.[67] To give more visibility to the mandate on the international stage, the Commission requested that the UN Secretary-General appoint the mandate holder as his "Special Representative." Thus, in July 2005, Annan appointed Ruggie to the mandate.[68] Ruggie had worked closely with Annan—previously, he had played a leading role in conceptualizing the development of the Global Compact, as well as the UN Millennium Development Goals, a global set of poverty reduction benchmarks that served as the precursor to the Sustainable Development Goals. Annan also reached out to businesses to meet other development challenges.[69]

While business involvement in development efforts should be welcomed, civil society groups and critics have noted that viewing such action in isolation of potential and actual adverse impacts is counterproductive. Investing in development without paying attention to potentially harmful impacts on human rights could lead to money being spent poorly,

[67] John Ruggie, *Just Business: Multinational Corporations and Human Rights* (New York: W.W. Norton & Company, 2013), at xviii. For a full description of the mandate, *see Special Representative of the Secretary-General on Human Rights and Transnational Corporations and Other Business Enterprises*, Office of the High Commissioner for Human Rights, https://www.ohchr.org/en/special-procedures/wg-business/special-representative-secretary-general-human-rights-and-transnational-corporations-and-other.

[68] John Ruggie, *Just Business: Multinational Corporations and Human Rights* (New York: W.W. Norton & Company, 2013), at xviii.

[69] In 2003, Annan launched a new partnership with the global private sector aimed at achieving targets set at the 2000 Millennium Summit to halve extreme poverty, halt the spread of HIV/AIDS, and provide universal primary education by 2015. Stating that "[w]e cannot reach these goals without support from the private sector," Annan called upon the private sector to join governments and international organizations in the effort. Annan named former President Ernesto Zedillo of Mexico and former Finance Minister Paul Martin of Canada as co-chairs of the Commission on the Private Sector and Development. Business engagement with what are now known as Sustainable Development Goals continues. *See Secretary-General Calls on Newly Launched Commission on Private Sector and Development to Foster Millennium Development Goals*, United Nations, Jul. 25, 2003, https://press.un.org/en/2003/sgsm8793.doc.htm.

infrastructure built where not needed, some communities being favored over others, or benefits provided to communities without paying attention to what the communities actually need.

At the outset, Ruggie was not favorably inclined toward the Norms because he saw the Norms as raising challenges that defied easy solutions. First, which rights were companies expected to be concerned with? The Norms put forth rights that were not yet internationally recognized, such as a living wage. The Norms also accepted that not all of the mentioned rights were relevant to business; yet the Norms did not provide any clarity as to which were relevant and which were not. This meant business would have to figure out how to act without authoritative guidance.[70] Second, Ruggie was concerned with the concept of the "sphere of influence," which he addressed at length in an early report during his mandate.[71] He believed the concept was "too broad and ambiguous . . . to define the scope of due diligence" for companies and that it "is not a fixed sphere, nor is it based on influence. Rather, it depends on the potential and actual human rights impacts resulting from a company's business activities and the relationships connected to those activities."[72] To move beyond the decades-old stalemate of mandatory versus voluntary, Ruggie said it was necessary to devise a smart mix, which would reinforce policy measures that over time would generate cumulative change and large-scale success, including in the law.[73]

This was the path Ruggie laid down and followed—what he would come to call "Principled Pragmatism," or as he described it, "an unflinching commitment to the principle of strengthening the promotion and protection of human rights as it relates to business, coupled with a pragmatic attachment to what works best in creating change where it matters most—in the daily lives of people."[74] He did so because he did not want his mandate to suffer the same fate of prior, unsuccessful efforts. Nor did he wish to issue statements that may provide genuine emotional relief to the victims, assuage civil society, and possibly displease businesses, but that would bring about little material change to the lives of affected people. His goal was to produce something that would be viewed as politically authoritative, but that was not a legally binding instrument—believing that surgical legal developments would subsequently follow, especially where there was international consensus.[75]

[70] John Ruggie, *Just Business: Multinational Corporations and Human Rights* (New York: W.W. Norton & Company, 2013), at 48–49.

[71] John Ruggie, Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Clarifying the Concepts of "Sphere of Influence" and "Complicity,"* U.N. Doc. A/HRC/8/16, May 15, 2008, at ¶¶ 5–25.

[72] *Id*., at ¶ 25; *see also* John Ruggie, *Just Business: Multinational Corporations and Human Rights* (New York: W.W. Norton & Company, 2013), at 50–51.

[73] John Ruggie, *Just Business: Multinational Corporations and Human Rights* (New York: W.W. Norton & Company, 2013), at xxiii.

[74] John Ruggie, Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Interim Report*, U.N. Doc. E/CN.4/2006/97, Feb. 22, 2006, at ¶ 81. A complete collection of Ruggie's mandate materials can be found at: *Special Representative of the Secretary-General on Human Rights and Transnational Corporations and Other Business Enterprises*, Office of the High Commissioner for Human Rights, https://www.ohchr.org/en/special-procedures/wg-business/special-representative-secretary-general-human-rights-and-transnational-corporations-and-other.

[75] John Ruggie, *Just Business: Multinational Corporations and Human Rights* (New York: W.W. Norton & Company, 2013), at xlv–xlvi.

Many civil society groups looked at this approach with deep suspicion[76] because they feared Ruggie was undoing their decades-long campaigns toward greater corporate accountability. However, trade unions (in particular global confederations), with nearly a century of experience of working on binding treaties and acting in tripartite settings, saw the value and played a positive, constructive role in supporting the work. Businesses felt they could live with Ruggie. While civil society groups were initially skeptical, critical, and in some instances, hostile to the approach the mandate was taking,[77] some later found value in the development of UNGPs,[78] and they subsequently began using the UNGPs as a tool of advocacy in their campaigning work.

Margaret Jungk, former member of the UN Working Group for Business and Human Rights, agreed with Ruggie's approach.[79] In her view, the Norms ultimately went too far by saying that companies not only had to respect, but also fulfill and promote, rights that were the responsibilities of governments.

Initially, Ruggie's mandate was to identify what international human rights standards currently regulate corporate conduct, apart from those standards that regulate States and individuals, and to clarify the roles of States and businesses in safeguarding these rights.[80] The UK led the initial creation of the mandate[81] and played a sustained role in building coalitions and consensus with key partner countries to make the mandate a reality, despite some inertia and at times skepticism from other players. Five countries worked on advancing and managing it through the Human Rights Council: Argentina, India, Nigeria, Norway, and Russia, with Norway replacing the UK later, playing a major role in the process.[82] The business sector was initially skeptical, but over time it trusted the process, and from the business side the mandate benefited from the support of the International Chamber of Commerce, the International Organization of Employers, the Business and Industry Advisory Committee (BIAC), and the OECD. Key civil society organizations that took part in the consultations included Global Witness and Oxfam, among others. Ruggie's mandate was also supported through the extensive help of more than two dozen law firms around the world, including major corporate law firms, that provided pro bono research support.[83]

[76] Anonymous, Interview by Salil Tripathi, Sep. and Nov. 2021 (online) (discussing viewpoints from civil society representatives from South Africa and India).

[77] For a general overview of NGO criticism during Ruggie's mandate, *see* "Critiques of Guiding Principles by Amnesty Intl., Human Rights Watch, Fidh, Others—Debate with Ruggie," *Business & Human Rights Resource Centre*, https://www.business-humanrights.org/en/latest-news/critiques-of-guiding-principles-by-amnesty-intl-human-rights-watch-fidh-others-debate-with-ruggie/.

[78] For example, Amnesty International and Human Rights Watch, which participated in the UNGP process but had remained critical, have cited the UNGPs with increasing frequency in their recent reports. *See, e.g.*, Amnesty International, *Trading at Any Cost: Dutch Government Puts Economic Interests Before Protecting Human Rights* (London: Amnesty International, 2023), at 5, https://www.amnesty.org/en/documents/eur35/6462/2023/en/; Human Rights Watch, *In Sheep's Clothing: United States' Poorly Regulated Nonprofit Hospitals Undermine Health Care Access* (New York: Human Rights Watch, 2023), at 60–61, https://www.hrw.org/sites/default/files/media_2023/06/us_hospital0623web.pdf.

[79] Margaret Jungk, Interview by Chris Fletcher, Feb. 18, 2022 (online).

[80] John Ruggie, *Just Business: Multinational Corporations and Human Rights* (New York: W.W. Norton & Company, 2013), at xi.

[81] *Id.*, at xlvii.

[82] *Id.*, at xiii.

[83] *Id.*, at xiii, 150.

The spectrum of issues was broad: sweatshop conditions in factories supplying famous global brands; Indigenous Peoples being displaced from their land without consent or compensation; child labor on farms; security forces subject to accusations of shooting and sometimes committing sexual violence against women or killing trespassers; and Internet service providers and information technology companies turning over user information to government agencies that then used such information to track political dissidents and imprison them or engage in government censorship.[84] How can corporate conduct be regulated to prevent or mitigate such negative impacts to people? How can companies implicated in or that carry out these abuses be held to account? And how should this be done, given that globally operating companies are not regulated globally, but rather nationally—and in many cases, countries that have laws and regulating mechanisms are failing to implement them?[85] The core challenge was to find a way to close the governance gaps that have allowed for situations and environments in which wrongful acts by companies can occur, even if such acts are unintended, and when such actions have not resulted in penalty to the company, nor remedy to the victim.[86]

These questions have been central to the corporate accountability debate, largely driven by individuals and communities that had been adversely impacted by corporate globalization. They have then used the language of human rights to express their grievances. The UN had been the body tasked with addressing these questions, but had failed in doing so, including via a code of conduct to regulate transnational corporations.[87]

Once Ruggie began his work, the old polarization returned. Human rights organizations emphasized the importance of the Norms and called for their adoption, but business organizations argued the exact opposite. Businesses wanted the mandate to focus on identifying and promoting best practices and to provide companies with tools to address voluntarily the business and human rights challenges they were experiencing. Governments, for their part, simply wanted the SRSG to avoid another contentious stalemate between the stakeholder groups.[88]

Stressing the need for markets to be underpinned by rules, Ruggie, in his report to the Human Rights Council in April 2008, observed:

> Business is the major source of investment and job creation, and markets can be highly efficient means for allocating scarce resources. They constitute powerful forces capable of generating economic growth, reducing poverty, and increasing demand for the rule of law, thereby contributing to the realization of a broad spectrum of human rights. But markets work optimally only if they are embedded within rules, customs and institutions . . . . Indeed, history teaches us that markets pose the greatest risks—to society and business itself—when their scope and power far exceed the reach of the institutional underpinnings that allow them to function smoothly and ensure their political sustainability. This is such a time and escalating charges of corporate-related human rights abuses are the canary in the coal mine, signalling that all is not well.[89]

[84] *Id.*, at xv–xvi, 2–19.
[85] *Id.*, at xvi.
[86] *Id.*, at 81.
[87] *Id.*, at xvi–xvii.
[88] *Id.*, at xix–xx.
[89] John Ruggie, Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Protect, Respect and Remedy: A Framework for Business and Human Rights*, U.N. Doc. A/HRC/8/5, Apr. 7, 2008, ¶ 2.

Observers acknowledge that one key ingredient of Ruggie's success was his ability to convince many stakeholder groups to move beyond the comfort zones from which they previously operated and had not achieved much progress. Human rights organizations have traditionally favored the international treaty route or what they refer to as the "mandatory" approach. The business community, on the other hand, has traditionally favored a combination of compliance with national laws where companies operate, combined with the use of voluntary initiatives and promotion of best practices, believing that the market will then drive solutions. And governments have been caught in between. Host States that are keen to attract multinationals for investments are competing with one another, offering better tax regimes and terms for investment (which NGOs say lowers labor and environmental standards), while home States are reluctant to extend the reach of their laws in other jurisdictions because they do not want other jurisdictions to encroach on their own sovereignty.[90]

Ruggie understood that developing binding international standards in the form of a treaty, or waiting for customary international law to develop, would take years and perhaps decades to come to fruition.[91] Treaties can also suffer from implementation and enforcement gaps and thus may not always be effective.[92] But relying on market-based solutions is not sufficient either. Pure self-regulation by business lacks human rights credibility and is viewed by human rights stakeholders as "bluewashing,"[93] akin to letting examinees grade themselves: while some might be honest, others may not be. Further, Ruggie knew that simply identifying corporate best practices would not get markets to change unless the mandate put forth some authoritative way of determining what constitutes "best." So while there were some examples of the private sector taking the lead on human rights issues (e.g., the Voluntary Principles on Security and Human Rights), Ruggie believed that these alone would not be sufficient to tackle the underlying challenge.[94]

Ruggie's mandate was comprised of three phases, only the first of which was envisioned at the outset. The goal from 2005 to 2007 was to identify and clarify the issues at stake and to formulate recommendations for a pathway forward. In 2008, the Human Rights Council welcomed the framework.[95] The Council also extended the mandate by another three years, tasking Ruggie with finding ways to operationalize the framework. In 2011, his mandate concluded with his presentation of the UNGPs to the Council, which on June 16, 2011, unanimously endorsed[96] them—marking the first time the Human Rights Council (or its predecessor the Human Rights Commission) had endorsed a normative document that governments themselves did not negotiate.[97]

[90] John Ruggie, *Just Business: Multinational Corporations and Human Rights* (New York: W.W. Norton & Company, 2013), at xxii.

[91] *Id.*, at xxxv.

[92] *Id.*, at 55–64.

[93] *Id.*, at 38.

[94] *Id.*, at 68–78.

[95] The framework, described later, divided the business and human rights inter-relationship into three pillars: the State duty to *protect* rights; the corporate responsibility to *respect* rights; and the need for an effective *remedy* to address gaps in protection when adverse impacts are due to business conduct.

[96] *Human Rights and Transnational Corporations and Other Business Enterprises*, Human Rights Council, Res. 17/4, U.N. Doc. A/HRC/RES/17/4, *adopted* Jun. 16, 2011.

[97] John Ruggie, *Just Business: Multinational Corporations and Human Rights* (New York: W.W. Norton & Company, 2013), at xx.

As noted earlier, the UNGPs comprise of three core pillars: (1) the State's duty to *protect* against human rights abuses by third parties, including business, through appropriate laws and regulations; (2) the corporate responsibility to *respect* human rights by acting with due diligence to avoid infringing on the rights of others and addressing adverse impacts with which they are involved; (3) and when adverse impacts arise due to business conduct, ensuring that victims have access to effective *remedies* from the companies and governments. The three pillars form a complementary whole in which each pillar supports the others in achieving sustainable progress.[98]

Ruggie had narrowed the discussion to focus on the need for businesses to "respect" rights, an idea that most businesses engaged with the process were comfortable with. Embedded within the idea of "respect" was the expectation that business would use their "leverage" when harms occurred that were connected to business via business partners, to mitigate or eliminate the harms. It meant business did not have an expansive responsibility for protection and promotion of all human rights regardless of context (as it applies to State duties), but a more limited responsibility based on business impacts. While other initiatives did place companies at the front and center, they left governments to the side, as if they were absolved from their responsibility to respect, protect, and fulfill human rights. Ruggie, by contrast, focused on the responsibilities of both actors by keeping human rights protection the primary obligation of the State, but elaborating on the need for business to respect rights as well. To do this, Ruggie felt it necessary to hit the reset button on the Norms.

"The brilliance of the UNGPs is in their framing and simplicity, and in connecting the dots in a clear and coherent way," according to Freeman.[99] Most stakeholders welcomed the UNGPs,[100] and endorsements increased.[101] Business associations, standard-setting bodies, international finance institutions (e.g., the OECD Guidelines for Multinational Enterprises and the International Finance Corporation's (IFC's) sustainability policy),[102] most governments, and many civil society groups began examining the UNGPs and considering innovative ways of applying them to their work. Some companies revised their policies and created internal governance structures to align with the UNGPs. Twenty-six governments developed national action plans; three incorporated business and human rights in their national human rights plans; 20 are in the process of developing National Action Plans (NAPs); and in six countries, the national human rights institution or civil society is developing a plan.[103] The EU is introducing legislation to make corporate human rights due diligence mandatory,[104] and civil society groups have creatively used the UNGPs to demand better

[98] Office of the High Commissioner for Human Rights, *Guiding Principles on Business and Human Rights*, U.N. Doc. HR/PUB/11/04 (New York and Geneva: United Nations, 2011), https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf. To understand the broader context, *see UN Guiding Principles 101*, Shift Project, https://shiftproject.org/resources/ungps101/.

[99] Bennett Freeman, Interview by Chris Fletcher and Salil Tripathi, May 3, 2022 (online).

[100] John Ruggie, *Just Business: Multinational Corporations and Human Rights* (New York: W.W. Norton & Company, 2013), at 104–106.

[101] *Id.*, at 120.

[102] *Id.*, at 121–22.

[103] *National Action Plans on Business and Human Rights*, Office of the High Commissioner for Human Rights, https://www.ohchr.org/en/special-procedures/wg-business/national-action-plans-business-and-human-rights.

[104] "Just and Sustainable Economy: Commission Lays Down Rules for Companies to Respect Human Rights and Environment in Global Value Chains," *European Commission*, Feb. 23, 2022, https://ec.europa.eu/commission/presscorner/detail/en/ip_22_1145.

compliance from the State and business community. At the same time, some human rights groups and governments are exploring ways to draft a binding treaty for business and human rights (discussed below).[105]

In assessing his success, Ruggie pointed to six interrelated factors that accounted for the relatively frictionless process leading to the adoption of the UNGPs. These were as follows.

1. Devising a Common Knowledge Base that Allowed a Shared Conversation to Occur

Prior to Ruggie's mandate, there was little empirical research regarding business and human rights outside of well-publicized cases that drove NGO activism, a body of anecdotal evidence, and a few court cases. Few UN Special Procedures had examined the issue. However, during his mandate, Ruggie was able to unearth key data sets more systematically to map out some of the salient issues. He looked at corporate securities law, the impact of international investment agreements, the financial cost of not respecting human rights, and the challenge posed by the lack of extraterritorial jurisdiction. This helped unpack key areas needing attention to advance the common understanding of business and human rights.[106] Lawyers have described his process as "inclusive,"[107] which enabled business and NGOs to "co-create"[108] the standards.

2. Ensuring the Mandate Was Viewed as Legitimate

Ruggie was keenly aware that even if the substance of what he put forward was sound, it would not matter if the process was not considered legitimate. To legitimize his work, he focused on inclusivity and transparency. He held 47 consultations throughout the world to ensure geographical balance. He was more effective in bringing business to the table than the Norms process was—so much so that some civil society groups remain critical of UNGPs for being too accommodating to the business community. Ruggie, however, believed that while civil society groups are important as advocates, the process simply would not succeed without taking into account the viewpoints of business. Ruggie also felt that anchoring the efforts in transparency would aid in giving the process legitimacy. He therefore posted virtually all materials from his mandate on an external website,[109] which also carried critical views about the mandate and his response to the criticism—something Ruggie asserted had not been done before by a UN-mandate holder. And he sought support from strategically significant advisers, including academics and human rights lawyers.[110] Freeman, however, contends that Ruggie did not fully engage with the experts responsible for creating the Norms and that therefore, in his view, Ruggie may have missed useful lessons learned for why the Norms process had failed; these lessons could have helped Ruggie engage productively

[105] John Ruggie, *Just Business: Multinational Corporations and Human Rights* (New York: W.W. Norton & Company, 2013), at 121.

[106] *Id.*, at 129–141.

[107] Jonathan Drimmer, Interview by Chris Fletcher, Feb. 7, 2022 (online).

[108] Gare Smith, Interview by Chris Fletcher, Mar. 4, 2022 (online).

[109] The Business and Human Rights Resource Centre hosted the website, which is now archived at https://drive.google.com/drive/folders/1quskhasksBlzMWmd9cGheNwozaKoXcRJ. However, all relevant materials are now hosted by the UN: *Special Representative of the Secretary-General on Human Rights and Transnational Corporations and Other Business Enterprises*, Office of the High Commissioner for Human Rights, https://www.ohchr.org/en/special-procedures/wg-business/special-representative-secretary-general-human-rights-and-transnational-corporations-and-other.

[110] John Ruggie, *Just Business: Multinational Corporations and Human Rights* (New York: W.W. Norton & Company, 2013), at 141–148.

with mainstream NGOs, which distrusted voluntary, non-binding standards. Nonetheless, the tension between most of these NGOs and Ruggie was ultimately overcome.

3. Being More Inclusive by Widening the Stakeholder Groups that Were Part of the Conversation

Traditionally, UN human rights mandate holders engage with a similar set of actors—primarily rights holders, governmental bodies, NGOs, and human rights lawyers. These are valid and important groups with which to engage. However, Ruggie believed that given his mandate, in addition to these groups, he would need to consult other actors who impact and influence human rights but are not traditionally engaged in human rights work. This included the business sector, investors, and corporate legal community, as well as two prominent bodies focused on international trade: the UN Commission on International Trade Law and the International Centre for Settlement of Investment Disputes at the World Bank. Engaging with these actors helped give the mandate more visibility and support than would otherwise have been the case, particularly among the corporate legal community.[111] Vanessa Zimmerman is CEO of Pillar Two, a specialist advisory firm supporting business to respect human rights using a principled, integrated, and pragmatic approach. Zimmerman was part of Ruggie's core drafting team for the UNGPs. She described the changes that took place over the course of the mandate in the willingness of the business and NGO communities to engage meaningfully with each other: "Ruggie was successful because he worked to build consensus," she said, by moving those with different views towards common ground.[112] This required numerous consultations with different groups across continents and industry sectors with a focus on multi-stakeholder dialogue.[113]

4. Testing the Core Principles to Ensure They Were Feasible

Ruggie anticipated critiques and concerns that the UNGPs would not be feasible. To preempt these criticisms, he proactively gathered evidence by undertaking several pilot projects with companies in various sectors to test the core elements of the UNGPs, focusing on human rights due diligence and grievance mechanisms. The projects showed that the key concepts that would become part of the UNGPs did work in specific contexts, thus allowing Ruggie to demonstrate that the UNGPs were not a theoretical framework but a pragmatic toolkit that business and other actors could use.[114]

5. Getting Political Endorsement

Without strong backing from the Human Rights Council, the UNGPs would not have come to fruition. Ruggie knew that getting such an endorsement required other actors to show their approval, especially the business community, NGOs, and governments. He therefore worked with each sector to gather such support. Even though the NGOs were not fully onboard because some of them wanted a legally binding instrument, they did acknowledge the utility of the UNGPs.[115] Besides, global trade union confederations were supportive, which influenced the thinking of some NGOs. Similarly, while Ecuador initially withheld support because the UNGPs were not legally binding, it eventually endorsed the UNGPs.[116]

[111] *Id.*, at 148–151.

[112] Vanessa Zimmerman, Interview by Chris Fletcher, Mar. 9, 2022 (online).

[113] *Id.*

[114] John Ruggie, *Just Business: Multinational Corporations and Human Rights* (New York: W.W. Norton & Company, 2013), at 151–157.

[115] *Id.*, at 121, 158.

[116] *Id.*, at 157–159.

6. Getting Convergence from Standard-Setting Bodies to Promote Wider Uptake of the UNGPs

Ruggie was aware that support from the Human Rights Council was only the first step.[117] It was important that the UNGPs were taken up by other bodies and incorporated into existing standards. Thus, during his mandate, Ruggie spent time actively engaging with standard-setting bodies,[118] particularly the OECD, International Finance Corporation (IFC), and ISO. This had the ancillary benefit of reducing competing standards and thus providing more predictability and clarity to business and other stakeholders, as well as allowing for easier implementation. Thus, as noted earlier, Ruggie's attention focused on engagement with the OECD and the IFC, which eventually incorporated the UNGPs to some degree.[119]

Caroline Rees is a former British diplomat who was a lead adviser of the team Ruggie had assembled and led the drafting with Lene Wendland of the Office of the High Commissioner for Human Rights (OHCHR) and Gerald Pachoud, a Swiss diplomat seconded to the team. She now runs a non-profit that works with companies, financial institutions, and standard-setters on implementation of the UNGPs, of which Ruggie was Board Chair until his death. According to her, the UNGPs were unique in being normative standards that were not developed by States.

> Because they weren't negotiated by States, this allowed the process to be more organic, ambitious, and internally coherent, whereas State-negotiated documents often contain inconsistencies and gaps due to the push and pull of negotiations. Nobody told Ruggie to go away and create a normative standard, but his second three-year mandate gave him the scope to do so. If that had been the focus at the time his first mandate was negotiated, it would likely have ended up as an inter-governmental process, without the same latitude for research and consultation, and likely with slower and weaker results. In this regard, the way things developed was fundamentally different than how most normative standards come into being.[120]

Zimmerman believes that a significant benefit was Ruggie and other team members' understanding of the UN system.[121] Ruggie had written extensively on the norms-building processes and elaborated on the "polycentric approach."[122] The UNGPs were intended to create a regulatory dynamic to build a better international regime. The quick spread of the UNGPs by various actors citing them or including them as part of their policies or laws and

[117] *Id.*, at 129.
[118] *Id.*, at 173–182.
[119] *Id.*, at 159–166.
[120] Caroline Rees, Interview by Chris Fletcher and Salil Tripathi, Mar. 24, 2022 (online).
[121] Vanessa Zimmerman, Interview by Chris Fletcher, Mar. 9, 2022 (online).
[122] Elaborating on this approach Ruggie notes: "The debate that pitted 'mandatory' approaches against 'voluntary' ones had induced policy stalemate at the international level. Yet neither was capable by itself of narrowing global governance gaps in business and human rights anytime soon. Now I had an official invitation to identify a path forward. The overriding lesson I drew from the assessment of the two approaches was that a new regulatory dynamic was required under which public and private governance systems—corporate as well as civil—each come to add distinct value, compensate for one another's weaknesses, and play mutually reinforcing roles—out of which a more comprehensive and effective global regime might evolve, including specific legal measures. International relations scholars call this 'polycentric governance.' But practical guidance, not merely a new concept, was needed to persuade governments, the business community, and other stakeholders to move in this direction." *See* John Ruggie, *Just Business: Multinational Corporations and Human Rights* (New York: W.W. Norton & Company, 2013), at 78.

regulations shows how such processes can evolve. Zimmerman said: "Professor Ruggie understood the value of developing a common framework that would make it easier for all stakeholders to move forward—he was very adept at seeing the larger picture."[123] Ruggie reassured governments that the UNGPs restated existing obligations for them; after all, the treaty bodies had for years told governments that they had to protect against business and human rights abuses. Similarly, he showed business that the UNGPs were robust but also pragmatic.[124]

Ultimately, the Guiding Principles became the standard for a range of reasons. Many governments were concerned about the role of companies registered in their jurisdiction when they operated overseas. Governments found it to be a matter of concern that companies were increasingly able to set global rules. Companies themselves were reassured that the UNGPs kept the government at the center. Some, such as companies that became part of the Business Leaders' Initiative on Human Rights, and later, the Global Business Leaders' Initiative on Human Rights, genuinely wanted tools to improve their performance, and some wanted to demonstrate to stakeholders that they did intend to respect human rights,[125] by publishing detailed reports of their human rights impacts. These reports were not comprehensive enough to satisfy all stakeholders but went some way in making corporate conduct more transparent. Some companies were also troubled by shareholder resolutions and alarmed by the spate of litigation they faced in certain jurisdictions,[126] even though few such cases were successful—in almost no instance did a company official go to jail over human rights abuses, nor were companies fined, except for health and safety violations where their responsibility was direct or as settlements without admitting wrongdoing. For their part, NGOs saw the UNGPs as an incremental step in a long campaign to bring about corporate accountability. There were some governments that were less interested in promoting them or participating in the process, but some of those governments also faced criticism over their human rights record. There was a risk of some companies becoming "free riders." And indeed, there were NGOs that were profoundly dissatisfied by the slow pace of change and the continuation of what, to them, felt like the status quo. Even so, Ruggie's process was largely successful. Peter Nestor, Head of Human Rights at Novartis,[127] appreciates that some people may have found the pace slow, but notes that it was a consequence of broad stakeholder engagement, the "secret sauce" that made the UNGP process unique.

While Ruggie deserves credit for bringing diverse groups of stakeholders together, he was not the first to do so. Sector-specific initiatives like the Extractive Industry Transparency Initiative, Kimberley Process Certification Scheme, and the Voluntary Principles for Security and Human Rights for the Extractive sector have all shown that engagement between companies and NGOs was not unheard of before Ruggie began his work. And critics have noted weaknesses. As Oxfam's Tamir puts it, Ruggie was able to get the business community to rally, but rights holders still have not been able to hold companies to account using the UNGPs.[128] Until States take up the UNGPs as part of their regulatory process, the UNGPs will not have the impact that is expected, she said. "Companies have only moved from check the audit box to check the human rights impact assessment box," she added.

123 Vanessa Zimmerman, Interview by Chris Fletcher, Mar. 9, 2022 (online).
124 Caroline Rees, Interview by Chris Fletcher and Salil Tripathi, Mar. 24, 2022 (online).
125 Gare Smith, Interview by Chris Fletcher, Mar. 4, 2022 (online).
126 *Id.*
127 Peter Nestor, Interview by Chris Fletcher, Mar. 1, 2022 (online).
128 Irit Tamir, Interview by Chris Fletcher and Salil Tripathi, Mar. 21, 2022 (online).

Civil society frustration is understandable. Many human rights groups have raised flags on human rights challenges for a long time and have been frustrated by the difficulties in holding companies to account. They have legitimate expectations that if the UN steps in, it could create an authoritative, law-enforcing mechanism to bridge the gaps, and the UNGPs do not do that. That gap—between companies operating in multiple jurisdictions but States only able to enforce their laws domestically—has only widened, according to several NGOs, adding to their frustration. Many NGOs wanted a multilateral legal instrument that they felt would address the frequent lack of recourse for remedy and felt let down that that the UNGPs were not that legal text. "We have pinned hopes on a process and felt let down," according to one civil society advocate.[129]

In demanding less from companies than what they had feared, but in requiring them to conduct due diligence that needs expertise, resources, and commitment, the UNGPs offered a mixed gift to companies. Drimmer considers[130] the UNGPs groundbreaking because they are drafted in concrete terms that business can understand: how to view human rights as part of a management system, and how to focus on risks to the people, not just to the company. The UNGPs use business-friendly language that allows for a common set of understandings that are consistent, coherent, and authoritative because they arose from the UN. And Nestor contends that the UNGPs struck a balance between providing a process for companies that they understood—developing policies and a due diligence mechanism—and saving some of the complicated questions until later, such as the meaning of "cause, contribute, or linkage" to harm.[131] Had the UNGPs been overprescriptive, corporate support would have been less; if they were drafted at a more academic level, they would have had little practical use. By making them apply to all companies—State or private, large or small, from the Global North or Global South—and by making them apply to all sectors, the UNGPs were intended to assure critics and supporters that they were meant for universal use.[132]

Freeman has called the UNGPs "the floor, not the ceiling," a phrase that is attractive and has found many supporters among NGOs as a metaphor to signal that there was now an established floor of commitment to be nailed down but no ceiling of aspiration that could later be raised.[133] Zimmerman notes that the principles do set a baseline, although she also recognizes that it is important to understand how all types of companies, not just some of the larger, more advanced companies, might view the UNGPs, including SMEs and what resources they might need to implement them. She notes that while efforts were made to consult with a wide range of businesses from different jurisdictions and of different sizes during the mandate, there is still a lot to be done to understand how the UNGPs may be robustly implemented by all companies.[134] In that vein, many observers believe the current challenge is to extend the UNGPs' reach to include SMEs.[135] Rees points out that the businesses and

[129] Anonymous, Interview by Salil Tripathi, Sep. 2021 (online).

[130] Jonathan Drimmer, Interview by Chris Fletcher, Feb. 7, 2022 (online).

[131] Peter Nestor, Interview by Chris Fletcher, Mar. 1, 2022 (online). *See* Principle 13 for a description of cause, contribution, and linked: Office of the High Commissioner for Human Rights, *Guiding Principles on Business and Human Rights*, U.N. Doc. HR/PUB/11/04 (New York and Geneva: United Nations, 2011), https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf.

[132] Peter Nestor, Interview by Chris Fletcher, Mar. 1, 2022 (online).

[133] Bennett Freeman, Interview by Chris Fletcher and Salil Tripathi, May 3, 2022 (online).

[134] Vanessa Zimmerman, Interview by Chris Fletcher, Mar. 9, 2022 (online).

[135] Francis West, "On Mandatory Due Diligence, SMEs Don't Need a Free Pass; They Need Flexibility," *Shift Project*, Nov. 2020, https://shiftproject.org/smes-mhrdd/.

business organizations that engaged most closely with the mandate tended to be those with the resources, time, and interest to do so.[136] So larger companies were a greater presence in consultations.[137] That said, based on the range of business inputs provided, the UNGPs reflect differences in what their implementation might look like for smaller companies.[138]

Rees also reflected that while it was difficult to tap into the full array of civil society perspectives given their sheer global diversity, international trade union representatives were generally supportive of the process, and local trade union, NGO, and community-based representatives were involved in regional research and consultations, as well as larger NGOs in global business meetings and expert exchanges.[139] Ruggie was motivated by the kinds of abuses experienced by workers and communities and understood NGO concerns with current business practice and the lack of remedy for harms, albeit he sometimes pushed for more creative thinking about the best ways to bring about practical change.[140]

The consultations cost significant resources, and while the mandate did manage to raise substantive, unprecedented amounts of money, those donors were Northern governments.[141] Some have suggested that this meant that Southern governments and organizations were underrepresented in the process.[142] Rees recognized that donor funding determined the location of certain consultations in the Global North, but also that these funds enabled most of the visits and consultations undertaken in other regions, which were guided by Ruggie's own priorities.[143]

It is also worth noting that the polycentric approach Ruggie relied on is occurring in specific jurisdictions and contexts—namely, domestic legislation—leading to greater calls for consistency from many players, including business, with the aspiration and intent of making it a part of progressive dynamic leading to an agreement at an international level.[144] And although treaty negotiations began in 2014, there is no clear agreement among governments or civil society advocates about what the treaty should aim to achieve, its ambition, or its scope, and it will be a long process.

Another question several NGO representatives have raised is the absence of a monitoring mechanism in the UNGPs: How are the UNGPs implemented and interpreted, and who gets to decide or rank performance? And what remedial steps can be implemented when things go wrong? Leaving measurement in the hands of companies or consultancies is itself challenging because of conflicts of interest and lack of clarity about what it means when a company says it has undertaken specific measures.[145]

[136] Caroline Rees, Interview by Chris Fletcher and Salil Tripathi, Mar. 24, 2022 (online).

[137] *Id.*

[138] *Id.*

[139] *Id.*

[140] *Id.*

[141] *Id.*

[142] *Id.*

[143] *Id.*

[144] A host of laws on specific human rights topics in specific countries have since arisen—e.g., Australia, Canada, and the UK all have laws aimed on combating modern slavery by business. However, no law yet exists that is consistent with the UNGPs that requires *all* companies to look at *all* human rights to which they are connected *and across their entire value chains*. Though the EU is getting closer to passing a mandatory human rights and environmental due diligence law for companies (the so-called CSDDD, which is in draft form at the time of this chapter), and which appears to be the strongest effort thus far to turn the UNGPs into hard law.

[145] Anonymous, Interview by Salil Tripathi, Sep. 2021 (online).

However, according to some observers, the outwardly slow pace does not necessarily show any lack of will; rather, it shows that companies understand and appreciate that this is hard work and they are learning by doing.[146] Besides, there are legitimate questions without clear answers, such as how far down the supply chain should a company go? Where is the difference between *contributing* to a harm and being *linked* to a harm?[147] Several experts believe the UN needs to take the lead on answering these questions, because as the truly global body, it alone can set standards and provide further clarity by adopting definitive interpretations of challenging concepts.

Ruggie saw the unanimous endorsement of the UNGPs as only the "end of the beginning."[148] To bring the UNGPs to life, several things were needed. First and foremost, implementation, which was to be led at the UN by a new Special Procedure of the Human Rights Council, the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises,[149] in conjunction with the OHCHR.

Ruggie also saw the need to embed the UNGPs in bilateral investment treaties (BITs) and corporate law.[150] Civil society groups had argued, and some policymakers had agreed, that BITs and their arbitration procedures could restrain governments that sought to pursue legitimate public interest measures by imposing punitive fines in favor of investors who complained of increased costs.[151] For example, implementing new health and safety standards or raising the minimum wage could have a materially adverse impact on a company's balance sheet, but they would enhance public welfare.[152] Furthermore, complex corporate structures under corporate law often prevent a multinational from taking responsibility to respect human rights for the actions of its entire corporate group, instead letting each component act on its own.[153] Such interlocking corporate ownership structures may indeed be designed precisely to avoid specific responsibilities, as some critics have alleged.[154] Ruggie believed both areas needed reform.[155]

Ruggie noted that a remaining challenge lay in applying international law that prohibits gross human rights violations, some of which may be international crimes, to businesses.[156]

146 Gare Smith, Interview by Chris Fletcher, Mar. 4, 2022 (online).

147 For many practitioners (including this chapter's co-authors) that work directly with business and corporate executives to improve human rights performance, the concept of a company's "direct linkage" to harm needs further elaboration and clarification, as it informs the approach to human rights due diligence and remedy for harms found. While the UN has offered some guidance on this topic, it is not yet sufficient for companies to understand with certainty in every instance—thus pointing to the need for the UN to clarify further.

148 John Ruggie, Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, U.N. Doc. A/HRC/17/31, Mar. 21, 2011, at ¶ 13.

149 *Working Group on Business and Human Rights*, Office of the High Commissioner for Human Rights, https://www.ohchr.org/en/special-procedures/wg-business.

150 John Ruggie, *Just Business: Multinational Corporations and Human Rights* (New York: W.W. Norton & Company, 2013), at 182, 192.

151 *Id.*

152 *Id.*

153 *Id.*

154 *Id.*

155 *Id.*

156 John Ruggie, Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Recommendations on Follow-up to the Mandate*, Feb. 11, 2011, at 4, https://harvardhumanrights.files.wordpress.com/2011/02/mandate-follow-up-final.pdf.

States have approached the issue differently. While the U.S. has one law that deals with aspects of this issue, the law addresses it only partially; and the law's scope, too, has been narrowed by the U.S. Supreme Court over the years.[157] Ruggie also noted that some countries object to having domestic laws dealing with human rights abuses apply extraterritorially for fear of making the playing field uneven. But he countered, saying that the UN Convention Against Corruption provides a model, agreed by States, to enforce certain norms against business on an extraterritorial basis, and that this model might be leveraged in a similar approach to business and gross human rights abuses.[158]

B. The UN Working Group

The successor to Ruggie's mandate as the SRSG is the UN Working Group for Business and Human Rights (UNWG), a Special Procedure the Human Rights Council created following Ruggie's mandate. Its wide mandate focuses on the implementation of the UNGPs[159] by:

- Promoting dissemination and implementation of the UNGPs
- Implementing the "Protect, Respect, Remedy" framework
- Identifying good practices and lessons learned from all sources
- Building capacity and providing advice on domestic legislation when requested to do so
- Visiting specific countries
- Enhancing access to remedy by exploring options, including in conflict areas
- Integrating the gender perspective
- Working with other Special Procedures of the Human Rights Council
- Developing a regular dialogue with appropriate bodies
- Guiding the annual forum on business and human rights held in Geneva
- Reporting annually to appropriate UN bodies
- Implementing the UNGPs in the context of the 2030 Agenda for Sustainable Development.

The UNWG has five independent volunteer experts drawn from the major regions of the world, and a rotating Chair. By 2023, 14 individuals had been members of the UNWG—the five incumbent members and nine more whose term had ended.[160] The UNWG has focused

[157] That law is the Alien Tort Statute (ATS; also known as the Alien Tort Claims Act), 28 U.S.C. § 1350. It grants jurisdiction to U.S. federal district courts "of all causes where an alien sues for a tort only in violation of the law of nation or of a treaty of the United States." Stephen P. Mulligan, *The Alien Tort Statute: A Primer* (Washington, D.C.: Congressional Research Service, Jan. 11, 2022), at n.1. Note that the law had been used by human rights lawyers seeking to hold corporations accountable for alleged harm to foreign plaintiffs. Yet through a series of rulings in the past two decades, the U.S. Supreme Court has so effectively winnowed the law that a plaintiff can only prevail in the narrowest of circumstances, which many believe has resulted in a gutting of the law and making it nearly impossible for victims to use this law to obtain justice. For more background on the statute and related case law, *see id*.

[158] John Ruggie, *Just Business: Multinational Corporations and Human Rights* (New York: W.W. Norton & Company, 2013), at 192–201.

[159] *About the Mandate: Working Group on Business and Human Rights*, Office of the High Commissioner for Human Rights, https://www.ohchr.org/en/special-procedures/wg-business/about-mandate.

[160] *Id.*

on country visits, produced thematic reports, and coordinating the UN Forum on Business and Human Rights, which the OHCHR organizes. The Annual Forum is the world's largest annual gathering on business and human rights, with over 2,000 participants from government, business, and civil society.[161] To date, the UNWG has visited 13 countries[162] and issued over 50 reports on the visits and other thematic issues, including topics such as human rights defenders, NAPs, applying a gender lens, access to remedy, and more.[163]

Over the years, the UNWG has developed its own identity—steering itself away from being an instrument recommended to the Human Rights Council by the SRSG when the mandate ended[164]—through its involvement in the Annual Forum. (His other recommendations included a multilateral legal instrument on gross human rights abuses, as discussed above.) Member States then adopted a resolution that included both of these, and thereby "created" the UN Forum. The Annual Forum brings together hundreds of individuals and groups committed to making business more accountable and growing respect for human rights. As with other human rights events, attendees include a large number of civil society groups, governments, other stakeholders, and companies from specific sectors exposed to human rights challenges, but not the wider corporate world. Such dialogues and conversations are essential in building and maintaining momentum. The UNWG's focus on NAPs has also injected a sense of urgency among governments.[165] The UNWG has also been coordinating its work, statements, and initiatives with other Special Procedures, and some special rapporteurs have cited the UNGPs in their recommendations and reports.[166]

Moving forward, the UNWG will have to not only manage the geographic balancing act but also master the art of triangulating between the competing demands of business and civil society. Leaning too close toward one will antagonize the other, but perfect neutrality would not satisfy either party. Some UNWG members have been more active than others,

[161] *United Nations Forum on Business and Human Rights*, Office of the High Commissioner for Human Rights, https://www.ohchr.org/en/hrc-subsidiary-bodies/united-nations-forum-business-and-human-rights.

[162] Those countries in chronological order are: Mongolia, Ghana, United States of America, Azerbaijan, Brazil, Mexico, Republic of Korea, Peru, Canada, Kenya, Thailand, Honduras, and Georgia. *See Country Visits: Working Group on Business and Human Rights*, Office of the High Commissioner for Human Rights, https://www.ohchr.org/en/special-procedures/wg-business/country-visits.

[163] *Reports: Working Group on Business and Human Rights*, Office of the High Commissioner for Human Rights, https://www.ohchr.org/en/special-procedures/wg-business/reports-and-other-documents.

[164] Upon the conclusion of his mandate, Ruggie made a set of recommendations to the Human Rights Council on the pathway forward, including among others, the need for a multilateral legal instrument on gross human rights abuses (section III(B)(6)), and an annual international gathering of all stakeholders to bring diverse voices together. Member States then adopted a resolution that included both of these and thereby created the UN Annual Forum.

[165] In 2011, there were no business and human rights NAPs; by the end of 2020, there were 25. *See* Claire Methven O'Brien, John Ferguson, and Marisa McVey, "National Action Plans on Business and Human Rights: An Experimentalist Governance Analysis," *Human Rights Review* 23 (Sep. 8, 2021): 77–79, doi: 10.1007/s12142-021-00637-x.

[166] *See, e.g.*, *Time to Act: Protect Defenders Who Speak Up Against Business Impact on People and Planet*, Office of the High Commissioner for Human Rights, Dec. 10, 2019, https://www.ohchr.org/en/press-releases/2019/12/time-act-protect-defenders-who-speak-against-business-impact-people-and; International Service for Human Rights, *Human Rights Defenders and Corporate Accountability* (Geneva/New York: International Service for Human Rights, Dec. 2014), at 3, https://ishr.ch/sites/default/files/documents/pdf_english_final-no-hyperlinks.pdf.

but as with other Special Procedures, the group is constrained by the resources at its disposal and the fact that its five members act in a voluntary capacity, which inevitably means some issues and some regions get less attention than they deserve. Frequent rotation of Chairs is not conducive to long term planning; the Chair rotates every six months.[167]

The list of worthy projects stakeholders would like from the UNWG is formidable. It includes developing effectiveness criteria for long-standing initiatives (such as the Voluntary Principles Initiative),[168] aligning the methodology of MSIs with the UNGPs,[169] providing more detailed guidance on "cause-contribute-linkage"[170] than is currently available through the UN's interpretive guides and responses, and creating tools to help SMEs embed human rights in their operations.[171] The UNWG can also opine on sectoral frameworks to align them with the UNGPs. For example, the Equator Principles were revised in 2020 when they incorporated the UNGPs,[172] but the Principles' implementation guidance documents dealing with Indigenous Peoples[173] falls short of respecting their rights.[174] Closer interaction with the

[167] Caroline Rees, Interview by Chris Fletcher and Salil Tripathi, Mar. 24, 2022 (online).

[168] Jonathan Drimmer, Interview by Chris Fletcher, Feb. 7, 2022 (online).

[169] *See, e.g.*, *Implementation of the Voluntary Principles*, Voluntary Principles on Security and Human Rights, https://www.voluntaryprinciples.org/implementation/; Mora Johnson, *The Voluntary Principles on Security and Human Rights*, at 6, https://www.voluntaryprinciples.org/wp-content/uploads/2021/01/Introduction-to-the-VPSHR_January-2021-1.pdf.

[170] Gare Smith, Interview by Chris Fletcher, Mar. 4, 2022 (online). Note, "contribute/linkage" is a contentious issue partly because of alternative interpretations. It also goes to the heart of the issue of corporate complicity in human rights abuses. In some instances, the company runs the risk of being complicit with State abuses, and in other instances the government is complicit with a company's actions. The issue is contested and defined differently in different jurisdictions. The Indian human rights defender Nityanand Jayaraman said in a podcast: "Things have gotten worse in India given the complicity of the State and corporate sector in violating human rights. Protection of human rights and the environment has been chipped away at, at the behest of the corporate sector. The rights of the companies far outweigh the rights of people and the environment." In his view, the UNGPs haven't helped. Nityanand Jayaraman, Interview by Salil Tripathi, *Voices—Conversations on Business and Human Rights from Around the World*, Institute for Human Rights and Business, Jun. 16, 2016, at 15:43, https://voices.ihrb.org/episodes/podcast-nityanand-jayaraman.

[171] Jonathan Drimmer, Interview by Chris Fletcher, Feb. 7, 2022 (online).

[172] Equator Principles, *Equator Principles: EP4* (Equator Principles Association, Jul. 2020), https://equator-principles.com/app/uploads/The-Equator-Principles_EP4_July2020.pdf.

[173] Equator Principles, *Guidance Note: Evaluating Projects with Affected Indigenous Peoples* (Equator Principles Association, 2020), https://equator-principles.com/app/uploads/Affected_Indigenous_People_Sep2020.pdf.

[174] Although the guidance document references Free, Prior, and Informed Consent (a right that uniquely belongs to Indigenous Peoples) and the need to focus on it where projects impact Indigenous Peoples, the document provides an escape hatch for banks to finance projects even where FPIC has not been met if the bank deems it to be within their risk tolerance. Thus, it gives rise to circumstances in which the rights of Indigenous Peoples are not respected, which is inconsistent with the UNGPs. *See* Equator Principles, *Guidance Note: Evaluating Projects with Affected Indigenous Peoples* (Equator Principles Association, 2020), at 2–3, https://equator-principles.com/app/uploads/Affected_Indigenous_People_Sep2020.pdf ("Where the requirement for FPIC applies but it is unclear if agreement has been achieved, the EPFI [Equator Principles Financial Institution] will determine if this qualifies as a justified deviation from the requirements of IFC PS7 and whether the client should pursue additional corrective actions to meet IFC PS7's objectives. The determination will be made with supporting advice from a qualified independent consultant. As stated in EP4, this may be the independent Environmental and Social Consultant or could be another qualified independent consultant, including legal advisors. *Such determinations will, ultimately, be made by the EPFI in line with its risk tolerance*.") (emphasis added).

OECD's national contact points (NCPs) to ensure more coherent interpretations is also desirable.[175] Another practical suggestion is to coincide MSI plenaries with the annual forum, allowing for more productive use of time[176] and reducing the carbon footprint.

However, saddling the UNWG with more tasks should be balanced with the recognition that the UNWG members are volunteers, have their own professional duties,[177] and unless the group receives sustained funds (which, by necessity, cannot come from business), their work would have only limited reach. As a result, the UNWG can take up only a limited number of cases and issues that may have a larger impact for the field.[178]

C. Broader UN Efforts

These limitations on the UNWG necessitate a greater role for other UN bodies, primarily the OHCHR, which has focused on providing guidance on implementing the UNGPs by sharing advice and tools, building capacity, and acting as the UNWG's secretariat. Its current projects focus on accountability and remedy, business and human rights in the technology sector including the developments in artificial intelligence, responsible business conduct in Latin America and the Caribbean, and a peer learning project for companies on how to implement the UNGPs in different national and regional contexts.[179] While the OHCHR enables the working group to operate and plays a less visible role, it has gained prominence through its interpretive guidance of the UNGPs: for instance, in how to think about application of the UNGPs to the banking sector[180] and technology.[181] The UN Development Programme (UNDP) has also contributed, for example, by hosting regular conclaves such as the Asian forum on business and human rights.[182] However, it recently announced a more ambitious agenda to work in 17 countries throughout the world[183] and led efforts on applying the gender lens[184] to the UNGPs as well as clarifying the notion of heightened due diligence in conflict-affected contexts.[185]

[175] Jonathan Drimmer, Interview by Chris Fletcher, Feb. 7, 2022 (online).

[176] Peter Nestor, Interview by Chris Fletcher, Mar. 1, 2022, (online).

[177] Margaret Jungk, Interview by Chris Fletcher, Feb. 18, 2022 (online).

[178] *Id.*

[179] *OHCHR and Business and Human Rights*, Office of the High Commissioner for Human Rights, https://www.ohchr.org/en/business.

[180] *OHCHR Response to Request from BankTrack for Advice Regarding the Application of the UN Guiding Principles on Business and Human Rights in the Context of the Banking Sector*, Office of the High Commissioner for Human Rights, Jun. 12, 2017, https://www.ohchr.org/sites/default/files/Documents/Issues/Business/InterpretationGuidingPrinciples.pdf.

[181] *B-Tech Project*, Office of the High Commissioner for Human Rights, https://www.ohchr.org/en/business-and-human-rights/b-tech-project.

[182] *UN South Asia Forum on Business and Human Rights*, Business and Human Rights in Asia, https://www.safbhr.com/

[183] *UNDP Promotes Responsible Business by Strengthening Human Rights Standards Across 17 Countries, with Support from Japan*, United Nations Development Programme, Apr. 4, 2022, https://www.undp.org/press-releases/undp-promotes-responsible-business-strengthening-human-rights-standards-across-17-countries-support-japan.

[184] *Gender Dimensions of the Guiding Principles on Business and Human Rights*, UNDP, Nov. 22, 2019, https://www.undp.org/publications/gender-dimensions-guiding-principles-business-and-human-rights.

[185] *Heightened Human Rights Due Diligence for Business in Conflict-Affected Contexts*, UNDP, Jun. 16, 2022, https://www.undp.org/publications/heightened-human-rights-due-diligence-business-conflict-affected-contexts-guide.

D. The Business and Human Rights Treaty

Three years after the UNGPs were adopted, the Human Rights Council adopted a resolution drafted by Ecuador and South Africa, which sought "to establish an open-ended intergovernmental working group on a legally binding instrument on transnational corporations and other business enterprises with respect to human rights," with a mandate to "elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises."[186] An Intergovernmental Working Group[187] has been working on the project. In 2017, the Group issued elements for drafting such a treaty, followed by a "Zero Draft" in 2018, a "Revised Draft" in 2019, a "Second Revised Draft" in 2020, and a "Third Revised Draft" in 2021, which was the most recent one issued at the time this chapter was drafted.

The key difference between the treaty process and the Norms and the UNGPs is that, this time, governments are leading the treaty process. Stakeholders representing governments, business, and civil society have been at the table. And yet, given its binding nature and different sets of expectations, there appears to be less consensus regarding the approach to developing a treaty, as well as what the proposed content should be. NGOs insist on a "binding" instrument, given their long-standing skepticism of voluntary mechanisms. They assert that a binding instrument with effective remedies is the only way to address the adverse human rights impacts of business in order to promote justice and accountability. Academic Doug Cassel believes[188] that pillar three of the "Protect, Respect, Remedy" framework has been "a resounding failure," which is why NGOs are so keen on a binding treaty. He acknowledges that "solving" the problem may be impossible, but the situation calls for improvement, which is where prevention comes in, since remedy itself may not be sufficient, and prevention is better than cure.[189]

Business groups want greater clarity about permissible conduct and what they are legally required to do, especially in areas where legal interpretations vary. Some lawyers wonder whether there should be an international court for business and human rights disputes.[190] Companies that participate in the process want such a treaty to apply to all actors, including State-owned companies, local companies, and SMEs. And governments appear to be split; those leading the process, namely Ecuador, are moving forward, while others, like the U.S.,

[186] *Elaboration of an International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises With Respect to Human Rights: Draft Resolution*, U.N. Doc. A/HRC/26/L.22/Rev.1, Jun. 25, 2014; *see also Elaboration of an International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises With Respect to Human Rights*, Human Rights Council, Res. 26/9, U.N. Doc. A/HRC/RES/26/9, *adopted* Jun. 26, 2014.

[187] For a general timeline and overview of events and documents, *see* "Binding Treaty," *Business & Human Rights Resource Centre*, https://www.business-humanrights.org/en/big-issues/binding-treaty/; *Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises With Respect to Human Rights*, Human Rights Council, https://www.ohchr.org/en/hrbodies/hrc/wgtranscorp/pages/igwgontnc.aspx.

[188] Doug Cassel, Interview by Salil Tripathi, *Voices—Conversations on Business and Human Rights from Around the World*, Institute for Human Rights and Business, Dec. 10, 2017, at 16:02, https://voices.ihrb.org/episodes/podcast-doug-cassel.

[189] *Id.*

[190] Peter Nestor, Interview by Chris Fletcher, Mar. 1, 2022 (online).

voice concern at the lack of governmental consensus and are even calling for an alternative approach to a treaty.[191]

There are several key unresolved questions about the treaty: the scope (what types of companies, what types of human rights harms, what types of business activity?); jurisdiction (whether courts would have extraterritorial powers); due diligence (whether such diligence should be aligned to the UNGPs, the extent to which climate change impacts would be incorporated, and what business reporting should entail); liability (what sanctions and penalties should look like, what defenses could be offered, and which party would have the burden of proof?); and oversight and monitoring (how States should monitor implementation, the degree to which they should provide assistance in evidence gathering and during litigation, and how States would provide judicial cooperation with each other). These are not easy questions, and it is far from certain that there can be common understanding on all these questions. It is worth noting that several existing treaties took decades before they were signed or ratified; when that happens, the final result may not resemble what was originally intended by the proponents. Some stakeholders are losing faith in the process.[192] Ruggie was conscious of such challenges and had warned of the dangers of a treaty process that was overly broad in content and impractical in application and implementation, arguing instead for precision tools focused on the role of business in gross human rights abuses.[193] While he believed that legalization of the UNGPs was inevitable, he also felt that having a single treaty that covered all business and human rights issues would simply not be practical.[194]

While some companies take seriously their responsibility to conduct human rights due diligence and issue disclosure statements on topics like modern slavery, businesses appear to have been less engaged in discussions around a binding treaty, perhaps because it seems to be a longer-term prospect. Some lawyers who follow the treaty are concerned about broad interpretations of terms like "liability," the meaning of which is contested by civil society and businesses.[195] Companies argue that it is difficult for them to agree to something aspirational and not rooted in law. While the business sector cannot block the treaty (it has no vote at the UN), it can lobby governments effectively to water down the more ambitious proposals from NGOs.

Some NGO representatives acknowledge that several proposals may not offer the ultimate panacea. For example, mandatory due diligence and even reporting may not necessarily prevent human rights abuses—these are necessary tools, but not sufficient. Without evidence governments are taking the process more seriously, companies are unlikely to do so either. Tamir acknowledges that without State support, the treaty process will not move forward, "and the companies will not have the political will until they see there is a need, which

[191] For a range of views from various stakeholder groups, *see Report on the Seventh Session of the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights*, Human Rights Council, U.N. Doc. A/HRC/49/65, Dec. 29, 2021; *Report on the Sixth Session of the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises With Respect to Human Rights*, Human Rights Council, U.N. Doc. A/HRC/46/73, Jan. 14, 2021.

[192] *Id.*

[193] John Ruggie, *A UN Business and Human Rights Treaty?* (Boston: Harvard Kennedy School, 2014), https://media.business-humanrights.org/media/documents/files/media/documents/ruggie-on-un-business-human-rights-treaty-jan-2014.pdf.

[194] John Ruggie, Interview by Salil Tripathi, *Voices—Conversations on Business and Human Rights from Around the World*, Institute for Human Rights and Business, Jun. 16, 2016, at 14:42, https://voices.ihrb.org/episodes/podcast-john-ruggie.

[195] Jonathan Drimmer, Interview by Chris Fletcher, Feb. 7, 2022 (online).

may start happening once they see emerging legislation (e.g., the European draft mandatory human rights/environmental due diligence law)."[196] At this juncture, it is far from clear what a final treaty might look like and when it would come into force, nor can it be predicted what effect a treaty would have in practical terms for people on the ground.

IV. Final Observations

Since the 1970s, the UN has played a significant role in shaping the field of business and human rights, with mixed results. How, where, and when the UN chooses to engage will be influential. It should be noted that the UN was created to establish peace after a global conflict, to prevent harm, and for peaceful development. Its efforts have focused on getting States to agree to standards and getting them to abide by those standards to reduce harm. But with non-state actors like businesses having such wide influence and impacts on human rights, the UN cannot simply wait for States to act.

This is not to suggest that all corporations are more powerful than States—in many instances, States are unwilling to act even when they are able to do so. The UN needs creative ways to engage with non-state actors that impact human life. But NGOs have been understandably wary, for historical reasons, to give unaccountable and unelected bodies like companies a seat at the table, even though not all governments representing sovereign States are necessarily legitimately elected either. Companies are not designed to be democratic institutions; they are not built to promote human rights and are not considered to be "duty bearers" under human rights laws, except in limited contexts and circumstances. If companies are treated as States, "we are in big trouble. Let us not anoint them by giving them the status of statehood," says Tamir.[197] And if non-state actors like companies are to have a role and a voice, so should many more rights holders and their representatives, beyond the relatively better-resourced international CSOs.

Toward that end, boosting the capacity of the Special Procedures is crucial. Coordination among the various mandate holders is essential to ensure that their interventions are strategic, and any engagement with companies should include a plan for follow-up. Such engagement should focus on any type of human rights violation covered by the Special Procedures—whether companies adversely impact the rights of their employees, customers, community members, or human rights defenders. A current challenge is that impacts on civil and political rights (e.g., forced labor) are often more visible and thus deemed by society as being more serious, and so in need of more attention, compared to impacts on economic, social, and cultural rights. The reality, however, is that companies can negatively impact the entire spectrum of rights, and all such impacts are deserving of attention and remedy.[198]

Applying the UNGPs in places where there are egregious violations is also a major challenge.[199] In recent years, companies have proactively intervened to promote human rights issues (such as the Black Lives Matter movement in the U.S., or supporting same-sex marriage through amicus briefs at the U.S. Supreme Court), advocated for environmental issues (many companies have openly supported the Paris Climate Accords), or withdrawn from

[196] Irit Tamir, Interview by Chris Fletcher and Salil Tripathi, Mar. 21, 2022 (online).

[197] *Id.*

[198] Ed O'Donovan, Interview by Chris Fletcher, Feb. 25, 2022 (online).

[199] Chris Bennett, Interview by Salil Tripathi, *Voices—Conversations on Business and Human Rights from Around the World*, Institute for Human Rights and Business, Jun. 16, 2016, at 12:59, https://voices.ihrb.org/episodes/podcast-chris-bennett.

conflict zones (such as Ukraine and Russia) out of human rights concerns, besides other strategic considerations.

Recent reported cases of corporate misconduct in Syria, Myanmar, and China, and earlier instances in Sudan, Argentina, and elsewhere, highlight the need for clearer rules, better understanding of complicity risks, and greater support for prosecutors to take cases involving corporations.[200] As Ruggie noted,[201] the Rome Statute does not apply to companies, and the Alien Tort Statute has extremely limited applicability. The sheer number of companies in the world, the diversity of their activities, the differences in the jurisdictions under which they are registered (with different approaches to compliance with the law), the wide variety of ownership structures, and the wide range of industries and geographies in which businesses operate, make regulating corporate conduct highly complex, if not impossible, for a single body like the UN.

The UN's engagement therefore must be strategic on crucial issues of critical significance. The UN, through the UNWG and other bodies, can help build bridges by offering space to various stakeholders to have a dialogue and build the capacity of each stakeholder to understand the other. It can also help draft model clauses or laws that offer a template for governments to regulate business conduct regarding human rights. For example, one necessary act could be extending protections for whistle-blowers, internal within the company or external stakeholders, to cover any adverse human rights impact a company might have that human rights defenders (HRDs) might raise—whether such HRDs sit within or outside a company. This is needed because HRDs are subject to harassment and retaliation by non-state actors and companies or their security forces or associates, as well as prosecution from some States. .

In the last decade, the UNGPs provided a clear paradigm for business and human rights, and the field has developed accordingly. However, this is starting to shift, and as Freeman has argued, there are growing pressures pointing toward the emergence of a new paradigm in which companies will be compelled to act as advocates to support the shared space (rule of law, accountable governance, and civic freedoms) that should bind business and civil society and in specific circumstances to take action to protect human rights defenders.[202]

The UNGPs have come at a pivotal time. There is an acute awareness of growing inequality and deep distrust of economic globalization, which has fueled xenophobia and some nativist politicians wish to undermine the global order. Companies continue to move into new markets in many developing economies, and in many instances, they have no option but to invest where resources, labor, or potential customers exist, and sometimes, they invest in jurisdictions with more relaxed controls, to bring down costs as well as to remain viable businesses.[203] We live in a world where no State has a perfect record in protecting human

[200] Independent Commission of Experts, *The Corporate Crimes Principles: Advancing Investigations and Prosecutions in Human Rights Cases* (2016), https://www.commercecrimehumanrights.org/wp-content/uploads/2016/10/CCHR-0929-Final.pdf.

[201] John Ruggie, *Just Business: Multinational Corporations and Human Rights* (New York: W.W. Norton & Company, 2013), at 44.

[202] *See* Bennett Freeman et al., *Shared Space Under Pressure: Business Support for Civic Freedoms and Human Rights Defenders* (Business & Human Rights Resource Centre and International Service for Human Rights, 2018), https://media.business-humanrights.org/media/documents/fdfe07e3d812cfcfed4235fbbf820a3d77599b13.pdf; *SDG 16 Business Framework: A Blueprint for Transformational Governance*, United Nations Global Compact, https://sdg16.unglobalcompact.org/.

[203] As Bangladeshi lawyer Rizwana Hasan notes, "[c]ompanies choose countries with weak governance as places where companies can experiment." Rizwana Hasan, Interview by Salil Tripathi, *Voices—Conversations on Business and Human Rights from Around the World*, Institute for Human Rights and Business, Jun. 16, 2016, at 19:29, https://voices.ihrb.org/episodes/podcast-syeda-rizwana-hasan.

rights. Not all States have resources to fulfill rights, nor do all States protect human rights with equal vigor. Indeed, in many parts of the world where companies operate, the State is weak or non-existent, either because the location where business operates is remote from the capital city, the State lacks resources to administer all parts of the country, or the State lacks the political will to protect human rights. As a result, in some of the most important and rapidly growing markets today, States are struggling to meet their obligation to protect human rights. In many cases, this happens because States lack sufficient regulatory, institutional, and administrative capacity; in others, States are engaged in armed conflict; and in some places, natural disasters have reduced States' ability to fulfill their obligations.

A. Toward Greater Individual Corporate Action and Responsibility

Companies are understandably reluctant to assume responsibility for human rights in areas beyond their control. The "Protect, Respect, Remedy" framework specifies that companies have a responsibility to respect human rights across their operations and via their business relationships.[204]

While many companies have taken their own steps to implement their responsibility to respect, there are areas where collective action to the same end is clearly useful. Collective action need not only be undertaken by several companies together but can also include the participation of NGOs, and in some cases, home and host governments such as the MSIs noted earlier.

With more companies making affirmative statements supporting the Universal Declaration of Human Rights, how can such commitments be made more meaningful?

Ruggie outlined the importance of human rights due diligence[205] as the baseline, distinguishing respect for human rights from corporate philanthropy:

[204] Office of the High Commissioner for Human Rights, *Guiding Principles on Business and Human Rights*, U.N. Doc. HR/PUB/11/04 (New York and Geneva: United Nations, 2011), at Principle 13, https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf.

[205] UNGP 17 describes key components of due diligence as "assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed." Office of the High Commissioner for Human Rights, *Guiding Principles on Business and Human Rights*, U.N. Doc. HR/PUB/11/04 (New York and Geneva: United Nations, 2011), at Principle 17, https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf. John Ruggie and John Sherman elaborated on the principle in a response to a critical article in the *European Journal of Law*. *See* John Gerard Ruggie and John F. Sherman III, "The Concept of 'Due Diligence' in the UN Guiding Principles on Business and Human Rights: A Reply to Jonathan Bonnitcha and Robert McCorquodale," *European Journal of International Law* 28, no. 3 (Aug. 2017): 921–928, doi: 10.1093/ejil/chx047. In addition, in its note on corporate human rights due diligence, the UN Working Group has explained the concept as "a way for enterprises to proactively manage potential and actual adverse human rights impacts with which they are involved," involving four components: "(a) *Identifying and assessing actual or potential adverse human rights impacts* that the enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships; (b) *Integrating findings from impact assessments across relevant company processes* and taking appropriate action according to its involvement in the impact; (c) *Tracking the effectiveness of measures* and processes to address adverse human rights impacts in order to know if they are working; and (d) *Communicating on how impacts are being addressed* and showing stakeholders—in particular affected stakeholders—that there are adequate policies and processes in place. Enterprises should identify and assess risks by geographic context, sector and business relationships throughout own activities (both HQ and subsidiaries)

> Companies may undertake additional human rights commitments for philanthropic reasons, or to protect and promote their brand, or to develop new business opportunities. Operational conditions may dictate additional responsibilities in specific circumstances, while contracts with public authorities for particular projects may require them. In other instances, such as natural disasters or public health emergencies, there may be compelling reasons for any social actor with capacity to contribute temporarily.[206]

However, he also warned:

> A large and profitable company operating in a small and poor country could soon find itself called upon to perform ever-expanding social and even governance functions—lacking democratic legitimacy, diminishing the State's incentive to build sustainable capacity and undermining the company's own economic role and possibly its commercial viability.[207]

The key point is that if corporations engage in voluntary, philanthropic acts under the rubric of promotion of human rights, this work may be important and have a beneficial impact, but it can also create an expectation from the beneficiary communities, which could view such beneficiary actions as their right, or an entitlement. Clearly, companies may not be able to continue to meet expectations (which may even rise over time) and their philanthropic priorities might change. In addition, companies' philanthropic activities can sometimes unwittingly lead to harms. For example, when a company provides schools or health clinics in an area, the government sometimes steps aside, creating a vacuum that the company must continually fill, or else the population goes without schools or clinics.[208] In either instance, this can rapidly develop into confrontation, and such conflicts, unless anticipated properly and managed well, can turn adversarial, and could lead to negative human rights impacts.

The fulfillment of human rights is ultimately a State obligation, and it is for the State to create the enabling environment in which companies comply with rules, with the State enacting regulations to ensure that all human rights are realized. Toward that end, there is a clear case for companies to be part of the solution. They can do so by applying a human rights approach to their operations. That means, first, that companies should respect human rights by undertaking a rigorous due diligence process that identifies and mitigates risk, and by complying with laws that protect human rights and working to change those that do not. Using that awareness of human rights risks can help companies anticipate and mitigate adverse outcomes. Second, companies should be responsive to external stakeholders who increasingly demand that companies demonstrate respect for fundamental rights as a key part of being a responsible corporate citizen. Third, by respecting human rights, companies can create social value and new opportunities for themselves and the broader society. And fourth, and perhaps most importantly, companies should take human rights seriously because it is the right thing to do.

and the value chain." *Corporate Human Rights Due Diligence—Identifying and Leveraging Emerging Practices*, OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, https://www.ohchr.org/en/special-procedures/wg-business/corporate-human-rights-due-diligence-identifying-and-leveraging-emerging-practices.

206 John Ruggie, Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Business and Human Rights: Further Steps Toward the Operationalization of the "Protect, Respect and Remedy" Framework*, U.N. Doc. A/HRC/14/27, Apr. 9, 2010, at ¶¶ 63–64.

207 *Id*.

208 Margaret Jungk, Interview by Chris Fletcher, Feb. 18, 2022 (online).

However, getting from where the world is at, to where the world needs to be, and ensuring that the abuses of the past are not repeated and victims of abuses have effective remedies, will not be an easy journey unless the UN steps in more effectively and strongly. It is important to recall that the UN was created to protect people from government harms.[209] Its efforts have always been geared primarily toward creating a set of rules for States, countering State actions, and enabling States to meet their obligations.[210] But society has changed, and other actors, namely businesses, are playing a much bigger role than they previously had.[211] If this role is not regulated properly, it will adversely affect human rights in significant ways and at multiple levels. The UN must therefore respond with more vigor and take the lead in shaping this moment to ensure business respects human rights.[212] There is no other truly global and authoritative body with the ability to do so. And more than ever, the world needs its continued leadership to continue tackling this monumental challenge.

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209 *Id.*
210 *Id.*
211 *Id.*
212 *Id.*

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