



Building a Movement

Reflections on the
History and Future of
Business and Human Rights



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About this paper: This report examines the history of the business and human rights agenda, focusing not only on significant developments over the past two decades but also on an emerging global movement seeking corporate responsibility and accountability around the world.

IHRB wishes to thank all those who participated in the online survey and volunteered their time to be interviewed to inform the direction and scope of this report. Inputs were received from stakeholders across all continents representing civil society, business, government, intergovernmental bodies, investors, academia, consultancies and the legal profession.

Attribution: Lucy Amis (IHRB Research Fellow) prepared this report with inputs from IHRB team members.

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1 Introduction



Introduction

The past thirty years have witnessed the birth of what might be called a “business and human rights movement”, which has made in-roads into law, business practice and government policy. There are successes to be celebrated but perhaps an even greater weight of unmet potential and responsibility remains. The sentiment that the global economy benefits the few and not the many is now widespread all over the world. If human rights are, in essence, about addressing part of the power imbalance between individuals and the state – an equation into which we have increasingly inserted business – then perhaps the movement is failing.

Where was the force of the human rights message in 2008 during the financial crisis, the aftermath of which continues to shape politics in many countries? We need to ask ourselves tough questions about the decade ahead if the business and human rights agenda is to achieve both scale and impact. This means greater integration of business and human rights principles and approaches into the systems of global, regional, national and local governance, while also achieving much greater penetration into the existing power relationships that have created or allowed the systemic abuse of human rights to continue around the world unchecked. If it were easy, it would have been done by now. Can we build sufficient leverage over the decade ahead to give ourselves a fighting chance?

As the Institute for Human Rights and Business (IHRB) marks its 10th anniversary in 2019, it is a fitting moment to look back, both at what has been achieved, and what remains to be done in making respect for human rights an integral part of everyday business practice. Against a backdrop of rising populism, nationalism, and protectionism, challenges to the post-World War II multilateral system, and the undermining of the international human rights architecture that has been built up for over 70 years, this report not only reflects on the past, but also looks ahead.

The following chapters trace decisive stepping stones in the business and human rights journey, highlighting the work of influential figures and initiatives. Recent developments and the current state of play are also examined, as are potential priorities as new opportunities and threats become clear. We hope these ideas will encourage further dialogue and new ideas for action.



**PAST:
Foundations
& Milestones**

Past: Foundations and Milestones

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Origins

The interface of business and human rights is not a new idea. Certainly from the period in the 18th Century when the East India Company transformed itself from a spice trading company into the military force that took Bengal, destroyed local industries and built an empire on murder and torture, laying the groundwork for the colonisation of India, we can trace devastating human costs linked to commercial activity. Other corporate entities paved the way for the colonisation of Africa, the Americas and Asia. As with the transatlantic slave trade, in every case these histories are reminders that for centuries the relationship between big business and human rights has often been one of systematic exploitation and abuse.

Repeatedly through human history, social movements have risen up to check the worst excesses of those in positions of authority and power, demanding more accountable government and more equitable economic systems that improve living standards for all. From the Enlightenment (including the 'citizens rights' established after the French Revolution and the US War of Independence), abolitionism (the fight to end the transatlantic slave trade), decolonisation in Asia, Africa and Latin America and the Suffragette movement, to the struggles for civil rights, gay liberation and the overthrow of Apartheid, these movements remind us of our common human dignity and shared values, and that policies, laws, and societies can change for the better.

If the building blocks of business and human rights pre-date World War II, how do we start to explain why an ongoing phenomenon of corporate-linked human rights harms and an intermittent pattern of government and public action and acquiescence eventually became the field of business and human rights we know today? The sheer volume of adverse business impacts and responses in recent times is surely a factor. So too the transformation in global communications that has allowed what might have been otherwise unknown human rights abuses and campaigns in far-flung corners of the world to have global currency. Globalisation also squarely comes into the equation and its effects are discussed further below. Social movement theory may provide a lens through which to better understand both the history of business and human rights and to consider its next moves.

A Social Movement Paradigm

There is no single definition of what constitutes a social movement. Sociologists have variously described them as:

- "A voluntary association of people engaged in concerted efforts to change attitudes, behaviour

- and social relationships in a larger society”;¹
- “An organized set of people with a shared interest or experience of injustice, who build their collective power and create a shared agenda for change, which they pursue through collective action, with some continuity over time”;²
 - “A form of dynamic pluralistic behaviour which progressively develops structure through time and aims at partial or complete modification of the social order”.³

Social movements encompass those pursuing focussed aims e.g. women’s suffrage, as well as those with more widespread ends like the environmental movement. Some are reactionary, some reformist and some revolutionary, while still others focus on matters of identity (such as sexual orientation and gender identity). Various analyses of social movements stress the driving forces of resource mobilisation, political opportunity, leadership and framing (e.g diagnosis of a problem, prognosis for a solution, or the existence or articulation of a uniting set of core values).⁴ One aspect of social movement theory that seems especially instructive to a review of the evolution of business and human rights is the analysis it offers of the social movement lifecycle.

Stages of development of social movements⁵

- **Social Ferment, Inciency or Emergence** – a period of increased media coverage and mounting discontent around a particular social challenge, but with little or no organisation. Fledgling bodies start to carry out basic day-to-day tasks and raise awareness about the cause, but actions are limited to isolated individual efforts rather than collective action.
- **Coalescence** – following a pivotal event or series of events disparate groups start to coalesce, with increased levels of organisation and resource mobilisation, and greater clarity on what the earlier social unease was about, and who or what is responsible.
- **Formalisation or Bureaucratisation** – a phase with higher levels of organisation and coalition based strategies. Organisations become professionalised, replacing volunteers with specialist trained staff. There is increased access to political and other elites, and Government starts to take note and may start to address the movement’s goals.
- **Institutionalisation, Fragmentation or Decline** – At this stage the social movement may succeed, fail, be repressed or co-opted, or alternatively the movement’s goals may become established within the mainstream.⁶

1 Lundberg referenced in: <http://www.sociologydiscussion.com/social-movements/social-movements-meaning-causes-types-revolution-and-role/2248>

2 Movements & Why They Matter, Knowledge Building, CREA – Presentation shared by Srilatha Batliwala

3 Anderson and Parker referenced in: <http://www.sociologydiscussion.com/social-movements/social-movements-meaning-causes-types-revolution-and-role/2248>

4 Social movement theory typology explored in: https://rowman.com/webdocs/SP_CH2.pdf

5 See Herbert Blumer: <https://core.ac.uk/download/pdf/32225386.pdf>, Armand L. Mauss: https://rowman.com/webdocs/P_CH2.pdf

6 See Miller (1999) and Marcionis (2001) page 84: <https://core.ac.uk/download/pdf/32225386.pdf>

The Creation of the Human Rights Architecture

The post World War II period is of particular relevance in understanding the broader business and human rights story, though it should be noted that international labour rights standards have an even longer history, with the International Labour Organization marking its 100th anniversary in 2019, and humanitarian laws that apply to armed conflict dating back even further.

The Bretton Woods system- for all its flaws and inequities – was designed to boost economic growth, trade, and living standards, and its architects were motivated by a desire to prevent a return to the destructive protectionism, trade wars and currency devaluations characteristic of the inter-war years. Similarly, those who drafted the post-war rules-based system for safeguarding human rights were also driven by a determination to avoid any repeat of the human costs of the Depression, Holocaust, and World War II.



“
Where, after all, do universal human rights begin?
In small places, close to home - so close and so
small that they cannot be seen on any maps of
the world. Yet they are the world of the individual
person; the neighborhood he lives in; the school
or college he attends; the factory, farm, or office
where he works. Such are the places where every
man, woman, and child seeks equal justice, equal
opportunity, equal dignity without discrimination.
Unless these rights have meaning there, they
have little meaning anywhere. Without concerted
citizen action to uphold them close to home, we
shall look in vain for progress in the larger world.

Eleanor Roosevelt

”
States and their representatives came together, initially under the auspices of the United Nations, to create the International Bill of Rights, with the Universal Declaration of Human Rights (1948) as its standard bearer, then later elaborated through the twin International Covenants on Economic, Social and Cultural Rights (1966), and on Civil and Political Rights (1966). Seven further core human rights treaties⁷, as well as international labour standards⁸ helped consolidate the foundations of human rights, supplemented by treaty bodies and other mechanisms designed to monitor their implementation and investigate further as needed. This international framework was augmented by various regional human rights and other instruments⁹, many of which have been strengthened via domestic law and prosecutions.

Notwithstanding the imperfections of this patchwork of standards, institutions, and judicial and non-

7 The International Convention on the Elimination of All Forms of Racial Discrimination (1965), Convention on the Elimination of All Forms of Discrimination Against Women (1979), Convention Against Torture (1984), Convention on the Rights of the Child (1989), International Convention on the Protection of the Rights of Migrant Workers (1990), International Convention for the Protection of All Persons from Enforced Disappearance (2006), and the Convention on the Rights of Persons with Disabilities (2006).

8 The ILO Declaration of Fundamental Principles and Rights at Work (1998) spells out the ILO's core labour standards, and is the baseline expectation of all member nations.

9 African Charter on Human and People's Rights (2006), the European Convention on Human Rights (1950), American Convention on Human Rights (1969) and ASEAN Human Rights Declaration (2012).

judicial channels for remedy, it has created the framework that enabled greater national level action and afforded at least some level of protection and international accountability for human rights violations for over half a century. From a social movement standpoint, this framing has also provided the foundations for business and human rights today, underpinning the UN Guiding Principles on Business and Human Rights (2011), and offering the necessary authority and legitimacy against which disparate actors have been able to steer a course towards expected corporate human rights practice and strengthened corporate accountability.

Expansion of Global Business

The 1960s witnessed the early days of an almost exponential growth of corporations that has provided the backdrop and pre-condition for the business and human rights agenda. By 1970 there were an estimated 7,000 transnational corporations or corporations operating transnationally.¹⁰ That figure increased more than five-fold to 37,000 by 1994, with 200,000 foreign affiliates.¹¹ And by the eve of the most recent financial crisis which began in 2008, the number had more than doubled again reaching in excess of 77,000 corporations, with more than 170,000 foreign affiliates.¹² By 2014, the OECD estimated the figure of foreign affiliates exceeded 230,000.¹³

At first the expansion was limited to the economic power houses of North America, Western Europe, and Japan. Then a dramatic upswing in the number of companies from all corners of the globe investing abroad was evident, including in former Communist and developing countries. This was due in part to economic policy shifts in Mexico and Latin America in the 1980s, the collapse of the Soviet bloc in the late 1980s/early 1990s, China's increasing embrace of the market economy, and deregulatory policies pursued by many countries taking their cue from and in response to the so-called Washington Consensus (that effectively made market-oriented economic policies the norm). By the end of the 2000s, there had been a substantial growth in the number of multinational corporations from countries including China, India, Mexico and Brazil. These increasingly resembled their western cousins in various respects including by "bidding for and buying western companies and challenging global giants on their own turf".¹⁴

This is not to suggest that the adverse impacts of companies' actions were restricted to multinational corporations. Indeed, rampant abuses, often undetected, occurred (and continue to occur) in companies of all kinds. Abuses like child and forced labour, unequal pay for women, sexual harassment, violence against women, discrimination against minorities, indigenous peoples or other disadvantaged groups, hostility towards trade unions, and other forms of abuses were also present in small and medium companies, as well as in companies that only operate on home turf, including large domestic corporations and state-owned enterprises. They have usually faced less scrutiny as they are not as exposed to international trade, may not be part of global supply chains, and because their brands are less well known and hence fall under the radar for media, activists, consumers and others.

10 Global Business and Human Rights, first Edition 2011, European Lawyer Reference Series – p.17.

11 <https://unctad.org/en/Docs/wir94ove.en.pdf> - World Investment Report 1994: Transnational Corporations, Employment and the Workplace, UNCTAD 1994

12 https://unctad.org/en/Docs/iteiia20072_en.pdf - The Universe of the Largest Transnational Corporations, UNCTAD/ITE/IIA/2007/2, UNCTAD 2007.

13 <https://www.oecd.org/industry/ind/MNEs-in-the-global-economy-policy-note.pdf>

14 <http://www.unhistory.org/briefing/17TNCs.pdf>

A Global Code of Conduct for Companies?

Scrutiny of global corporations increased in the 1960s as labour was increasingly on the move, and trade and investment brought the world closer. The 1960s also saw an upsurge in protests against the status quo, most famously over the Vietnam War, as well as greater awareness of civil rights and decolonisation. In this context, critiques of the roles and influence of large corporations were voiced, and some openly questioned whether “multinational corporations are likely to render the sovereignty of the nation-state obsolete”.¹⁵ Such questions did not come out of the blue, but against a backdrop of cases of corporate interference in politics and policy making, and mounting concerns over governance gaps and corporate accountability.

For example, the International Telephone and Telegraph Company (ITT) was discovered to have conspired with the CIA to block the election of Salvador Allende¹⁶, and later in his overthrow in the 1973 Chilean Coup d'état¹⁷; the Gulf Oil company was found to have made corrupt payments to politicians in South Korea and Bolivia¹⁸; and media coverage and campaigns accused Nestlé of deploying methods to discourage breastfeeding to market its baby-milk substitute formula.¹⁹

Governments were starting to take note of these developments. For example, the US Senate Foreign Relations Committee set up a Subcommittee on Multinational Corporations and in 1972 the United Nations put in train a process “to study the impact of multinational corporations on economic development and international relations”.²⁰ A number of developing countries, especially from Latin America, were particularly supportive, having grown anxious about the power of multinationals which they saw as a threat to their authority and symptomatic of an unfair economic order.

In 1974, acting upon the recommendations of a Group of Eminent Persons, the UN established both a Commission on Transnational Corporations and the UN Centre on Transnational Corporations (UNCTC).²¹ Although the focus of their activities was not human rights, this work constituted the first attempt by the international community to document the impacts of multinational business activity, and to explore the feasibility of a draft normative framework on the rights and responsibilities of transnational corporations and host country governments vis-à-vis each other.

The resulting draft Code of Conduct for Transnational Corporations - though debated at length, before being dropped in 1993²² amid acrimony and opposition primarily from Western governments - heralded the shape of things to come. The eventual collapse of the draft Code - and the failure it represented to respond in an adequate manner to emerging concerns over the unchecked rising power of companies - should be noted in contrast with two landmark soft-law/non-binding instruments to emerge in the 1970s. These were the OECD Guidelines for Multinational Enterprises (OECD Guidelines) adopted in 1976 (although at that point the guidelines did not have a human rights component or grievance mechanism), and the ILO's Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy of 1977.

15 <https://www.foreignaffairs.com/articles/1974-10-01/multinationals-game-and-rules-multinational-corporations-world-politics>

16 <https://www.nytimes.com/1972/07/03/archives/papers-show-itt-urged-us-to-help-oust-allende-suggestions-for.html>

17 <http://www.unhistory.org/briefing/17TNCs.pdf>

18 <https://www.nytimes.com/1975/05/17/archives/gulf-oil-admits-it-illegally-gave-5million-abroad-top-executive.html>

19 <https://www.businessinsider.com/nestles-infant-formula-scandal-2012-6?r=US&IR=T>

20 https://unctad.org/en/docs/diaeia200910a4_en.pdf

21 <http://www.unhistory.org/briefing/17TNCs.pdf>

22 Business and Human Rights – Beyond the End of the Beginning, Edited by César Rodríguez-Garavito, Cambridge University Press 2017.

The Rise of Corporate Social Responsibility

The early 1970s marked a period of increased questioning as to whether State-based paradigms and governance systems were still fit for purpose. Companies that read the currents early looked closely at their corporate philanthropy and began to take the idea of corporate social responsibility (CSR) more seriously.

Characterised initially by philanthropy, volunteering, and efforts to support local procurement and small business development, understandings of CSR have evolved over time. Some focus on the idea of CSR as “international private business self-regulation”²³ while the European Commission has put forward a definition of CSR as “the responsibility of enterprises for their impacts on society” and outlines what businesses should do to meet that responsibility. Some critics deride CSR as ‘window dressing’, taking the view that such approaches are in fact nothing more than a ploy by companies to demonstrate their value to society in a bid to win over public trust, and shield themselves from demands for legal accountability.

Whether or not the criticism is fair, CSR’s primary focus has been on positive initiatives and almost exclusively on development-related activity. In its formative stages, such initiatives seldom addressed a company’s own impacts, its business model, or core activities, much less the ways workers or the communities affected by their operations were treated, nor took responsibility for the risks and impacts of their activities on affected people or their livelihoods. As a consequence, divisions emerged between some development and human rights advocates about the purpose of these activities, with frustrations enduring to this day.

There are legitimate questions over priorities set by corporate CSR initiatives and what their affected stakeholders may want. Would CSR initiatives match the development priorities of a state, or lead to uneven development across a country if companies focus only on projects near their operations? In some countries, CSR activities have legitimised state-led discrimination and sometimes aided corruption, such as when programmes are required to work with organisations linked with the government. Finally, CSR has been criticised for avoiding companies’ actual impacts, raising concerns over positive approaches to business engagement being allowed to take precedence over urgently needed reforms in core business activities harming individuals and communities.²⁴ The implications of these legacies still need to be fully resolved.

Business and Human Rights Pioneers

Amidst the growing wave of CSR, pockets of fresh insight and activity on the harder edge issues of human rights risk and impact emerged. These began to coalesce as the new millennium approached. This section does not claim to present a comprehensive summary of this period but a number of individuals and initiatives are noteworthy.

23 Sheehy, Benedict (2015-10-01). “Defining CSR: Problems and Solutions”. *Journal of Business Ethics*.

24 Ramasastry, Anita (2015-11). “Corporate Social Responsibility Versus Business and Human Rights: Bridging the Gap Between Responsibility and Accountability”. *Journal on Human Rights*.



Sir Geoffrey Chandler's professional archive, including all his public statements, writings and correspondence on business and human rights, is catalogued and available for public access via the Modern Records Centre of the University of Warwick, UK.²⁵

The late Sir Geoffrey Chandler is one individual deserving a special mention. Many regard the first Chair of the Amnesty International UK Business Group as a founding father of the business and human rights agenda in the western world. A one-time commando behind enemy lines in World War II, by the early 1970s Chandler was a senior executive at Shell Oil Company. In 1976 he delivered a landmark speech at the University of the West Indies arguing that:

"The Corporation should clearly recognize the responsibility for the welfare, health and safety of its employees; for the quality and safety of its products, and operations, [and] in an age of growing technological complexity and operations, the corporation must accept the philosophy of caveat ventitor ['let the seller beware'] not caveat emptor ['let the buyer beware']. [In short there] is a real choice between the cost of the product and its environmental impact to society as a whole to which corporations must respond".

Using principles borrowed from contract law, Sir Geoffrey argued that the onus of due diligence should shift from consumers to producers, urging the selling company to take responsibility for both the quality of its products and its social impacts. The key was his emphasis not on philanthropy, but on core business activities and their impact.

Another individual who took action, in this case in the context of anti-Apartheid movement calls for a boycott of South Africa, was Rev. Leon Sullivan, who was a board member of General Motors. He drafted what came to be known as the *Sullivan Principles* (1977). These called on US companies doing business in Apartheid South Africa to eliminate race-based discrimination at the workplace, including offering opportunities to discriminated communities, notably blacks, to advance within the corporation. Pay parity, fair employment policies, desegregated facilities, training programmes, and affirmative action – activities a company could control and implement within its premises – were key components of the Principles. Over one hundred US companies signed on to the Principles.²⁶ In 1984, a principle of working to eliminate laws and customs that impede social, economic, and political

25 "The Papers of Sir Geoffrey Chandler, Industrialist" can be accessed online at: <https://mrc-catalogue.warwick.ac.uk/records/CHR>

26 "Just Business – Multinational Corporations and Human Rights", p.69, John Ruggie, 2013, WW Norton & Company.

justice was added.²⁷

Set up in 1986, the Caux Round Table also took a principles-based approach - issuing the *CRT Principles for Business*²⁸ for responsible business conduct. Rooted in the Japanese concept of *kyosei* – meaning spirit of co-operation, or living and working together for the common good, the CRT Principles are noteworthy for the focus of going: “beyond shareholders toward stakeholders”, respect for rules and the environment, and building trust by going beyond the letter of the law.

Catalyst Cases

It is often the case that social change follows a catastrophic event. In trying to identify the beginnings of any social movement, one of the first things to look out for is a period of ‘social ferment’ – a time of increasing media coverage around a particular issue. Whether or not one views business and human rights as a social movement, merely an academic or professional discipline, or little more than a convenient short-hand for disparate efforts, a critical catalyst for business and human rights was a series of corporate incidents that captured news headlines, prompted moral outrage and in several instances led to eventual legal action.

First amongst them was the gas leak at the Union Carbide pesticide plant in Bhopal, India in 1984. Around three thousand Indians died within a matter of days, with tens of thousands more dying or suffering ill-health, disability, and birth-defects, in the months and years that followed. Bhopal cast all previous post-war corporate-related human rights disasters into the shadows, and a campaign to seek justice for its aftermath continues.

Mural near Bhopal Union Carbide factory



(credit flickr/jbhangoo)

Ken Saro-Wiwa - one of the Ogoni Nine



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- 27 These Principles went on to be revised and revamped in 1999. Unveiled by UN Secretary General Kofi Annan and Rev. Sullivan, the new Global Principles of Social Responsibility, as they were called, aimed at supporting economic, social and political justice by companies in global business operations, and included a clause in which companies were to explicitly: “Express our support for universal human rights and, particularly, those of our employees, the communities within which we operate, and parties with whom we do business”.
- 28 The CRT Principles were the product of nearly a decade’s worth dialogue, and collaboration among European, Japanese and UK business executives, see The Caux Round Table for Moral Capitalism: <https://www.cauxroundtable.org/principles/>

Another landmark event was the crisis in the Niger Delta. The Movement for the Survival of the Ogoni People (MOSOP) had been campaigning against environmental degradation in Ogoniland, targeting Shell Petroleum Development Company (SPDC)²⁹ over its environmental impacts. There was a broader campaign against the activities of oil companies, including the use of security forces by the companies, the uneven distribution of benefits from the industry, and lack of job opportunities. In 1995, the unfolding story saw controversial executions of the Ogoni Nine, including Ken Saro-Wiwa, after what international observers described as grossly unfair trials. Royal Dutch Shell was criticised for not doing enough to intervene in the military tribunal to prevent executions. It should be noted that the Nigerian military dictatorship ignored all appeals, including from US President Bill Clinton and British Prime Minister John Major. Other cases followed, accusing extractive companies of involvement in human rights harms, notably in conflict zones. BP in particular faced allegations of complicity in human rights abuses in Colombia in relation to its use of private security companies.³⁰

Meanwhile, particularly in the US, the apparel industry was attracting public anger. In the mid-1990s, allegations started to be levelled by faith-based and campaign groups against several US brands. Disney, Nike, The Gap, Target and Walmart were found to have used sweatshop labour in supplier factories in Honduras, China and parts of South-East Asia.³¹ The result was media attention and a clamour for action, including by high-profile student boycotts.

Civil Society Advocacy

Any movement requires organisational heft to get started. In the late 1980s, much of the international human rights community was initially reluctant to add corporate abuses to an already challenging agenda despite a range of efforts aimed at addressing unequal economic and political power structures. One explanation for the reluctance was the traditional human rights focus on state accountability. Beyond that, some NGO practitioners were ideologically suspicious of the private sector, and wary that engaging with business would further legitimise an already powerful actor.

The pendulum began to shift after the fall of the Berlin Wall and the collapse of the Soviet Union. This could be seen, for example, in a change to Amnesty International's mandate allowing it to begin examining the role of non-state actors. Sir Geoffrey Chandler was quick to respond, and in 1991 he recruited a number of senior UK business leaders to sponsor a Joint Statement of Intent, launching the Amnesty International UK Business Group.³² Other NGOs were already active, especially in efforts to combat sweatshop labour in the apparel sector, but the Amnesty Group fulfilled a critical role at this juncture in European business and human rights circles. Campaigns against Shell following the Ogoni case unlocked doors, allowing the Amnesty Business Group and counterparts in the Netherlands (Amnesty International Nederland and Pax Christi) to engage in dialogue. As a result of these lobbying efforts, Shell and later BP would publish revised sets of business principles and policies. Released in

29 SPDC was a joint venture between Shell and the Nigerian state-owned oil company.

30 "Human Rights Translated: A Business Reference Guide", Castan Centre for Human Rights Law, IBLF and UNOHCHR, p.14.

31 <https://www.peri.umass.edu/fileadmin/pdf/Rock.PDF>

32 The letter was signed by UK business leaders including Richard Branson, John Harvey-Jones, Peter Parker and Anita Roddick. The Amnesty UK Business Group (1991-2006) comprised volunteers and professionals from business, investment, civil society, academia, and the legal profession who served in their individual capacities. Under the chairmanship of Sir Geoffrey Chandler, and then Chris Marsden CBE, the Group persuaded many leading UK multinationals to develop human rights policies, and got involved in developing groundbreaking educational and advocacy tools like Human Rights – is it any of your business? (2000) and Business and Human Rights: the Geography of Risk (2002). The Group played an important role in incubating new business groups within Amnesty and beyond, including the Business and Human Rights Resource Centre and IHRB.

1997 and 1998 respectively, these committed the companies to respecting human rights across their operations, and are widely viewed as constituting the world's first corporate human rights policies. Around the same time, Human Rights Watch developed a set of 'Working Guidelines on Business and Human Rights', and followed this up with two landmark studies, one on Enron's alleged complicity in human rights violations in India, and another on oil companies in the Niger Delta and their human rights impacts.³³

Tactics among those advocating for business action on human rights at this time varied. Some felt only making business case arguments could open corporate minds to human rights considerations. Others - including Chandler - might allude to reputational damage or investment incentives, while forcefully making the moral argument underpinning business action on human rights.³⁴

In time, the Amnesty UK Business Group disbanded under mutual consent. Amnesty International is a global movement, and in 1998 it began to invest resources at the International Secretariat to increase scrutiny of corporations and to develop campaigns targeting them.

Many other NGOs followed similar strategies during this period, and developed groundbreaking research on specific industry sectors and contexts. New organisations began to take shape as well. In 1997, Chris Avery, a former Amnesty legal researcher, independently published a report *Business and Human Rights – A Time of Change* and designed a website to disseminate it. Avery soon had requests from others to post material on his site, and quickly realised the opportunity to serve as an information hub. The site grew in material and capacity demands quickly followed, and in 2002, a new organisation came into being to move this work forward: the Business and Human Rights Resource Centre, which has since become the principal repository of information within the business and human rights movement.

Corporate Legal Accountability Efforts

Operating concurrently with – but initially separately from – civil society advocacy and engagement efforts, others were focusing on corporate impacts via certain national court systems. From the 1990s, allegations of corporate liability for human rights violations started to be pursued, notably in the US with civil lawsuits brought under the Alien Tort Claims Act (also known as the Alien Tort Statute). Of particular note were a cluster of historical cases brought by Holocaust survivors against Swiss banks³⁵ for handing possessions to the Nazis, which was settled for record sums in 1998; and *Doe v. Unocal*, brought by EarthRights International and the Center for Constitutional Rights on behalf of villagers from Myanmar for alleged complicity in crimes including rape, forced labour, and murder perpetrated by military units securing Unocal's pipeline to Thailand. The case was reportedly settled for a multimillion-dollar figure in 2005. Although Unocal did not admit liability,³⁶ the case seemed to open the door for others. French oil and gas company Total also reached a settlement with litigants from Myanmar in a French court. However, after years of cases and appeals, some of which were settled out of court, a

33 In 1999 Human Rights Watch published: *The Enron Corporation: Corporate Complicity in Human Rights Violations and The Price of Oil: Corporate Responsibility and Human Rights Violations in Nigeria's Oil Producing Communities*.

34 Sir Geoffrey was quoted at one event as saying: "Silence or inaction will be seen to provide comfort to oppression and may be adjudged complicity....Silence is not neutrality. To do nothing is not an option". G. Chandler, "Oil Companies and Human Rights," Oxford Energy Forum (Nov. 1997), p. 3.

35 A case brought in 1998 against Swiss banks Credit Suisse and UBS settled the case for \$1.25 billion.

36 Human Rights Translated: A Business Reference Guide, Castan Centre for Human Rights Law, IBLF and UNOHCHR, p. 19.

landmark 2013 US Supreme Court ruling in *Kiobel v. Royal Dutch Petroleum* restricted the application of the Alien Tort Statute in federal cases involving allegations of abuse committed outside the US.³⁷

Cases continued to be pursued outside the USA as well. In the UK for example, the law firm Leigh Day & Co was active early on in securing compensation for claimants in several lawsuits, including against BP (on behalf of Colombian farmers), Shell (on behalf of families in the Niger Delta), and in a case settled out of court in 2009 against multinational oil trader Trafigura, in one of the largest groups claims in history on behalf of 30,000 residents of the Cote d'Ivoire.³⁸ Notably in 2012, in the case *Chandler v Cape plc*, the UK Court of Appeal established a precedent that a parent company owed a direct duty of care to the employee, Mr Chandler, of one of its subsidiaries who later contracted asbestosis.³⁹ The ruling revolved around the safety risks the parent company knew or ought to have known about, and would have been expected to pass on. The case created a foothold for future civil claims, although left certain matters unresolved including over what level of proximity needed to exist between the parent and its subsidiary for the parent to be accountable for its subsidiary's human rights harms; the ruling merely stated this would need to be analysed on a case by case basis. Most of these cases are in civil courts, but companies were not absolved of criminal allegations. In high risk zones, companies were exposed to risks of being complicit in actions by state or non-state forces, as experts pointed out.⁴⁰

Early Multi-Stakeholder Initiatives

Under pressure from human rights experts and the public to intervene, and mounting corporate demands for advice on appropriate responses, some governments were drawn into business and human rights debates and initiatives during these years. For example, in 1998, the human rights responsibilities of oil companies in conflict zones and areas of weak governance became the focus of a new initiative supported by the US and UK Governments to negotiate the **Voluntary Principles on Security and Human Rights** (2000),⁴¹ developed with extractive companies and human rights groups. By the turn of the millennium, the Voluntary Principles were just one of a handful of multi-stakeholder initiatives (MSI) to be pioneered with specific mandates to address the human rights responsibilities of corporations.

These efforts attempted to engage diverse groups to find solutions to complex business and human rights challenges. For many companies, MSIs provided a first entry-point into business and human rights during this time. Other MSIs engaged different strands of the extractive sector. The **Extractive Industries Transparency Initiative** (2002) sought to address concerns around corruption linked to the signature bonuses paid by extractive firm companies to host governments and **Kimberly Process Certification Scheme** (2003) worked to curb the flow of conflict diamonds.

37 <https://www.business-humanrights.org/en/shell-lawsuit-re-nigeria-kiobel-wiwa - c9306>

38 <https://www.leighday.co.uk/Our-experts/partners-at-ld/Martyn-Day>

39 The ruling hinged on the fact that the Cape and its subsidiary had relatively similar business, and that the parent company knew (or ought to have known) that the subsidiary's system of work was unsafe; had (or ought to have had) superior knowledge concerning health and safety with its industry; and had known or ought to have foreseen that the subsidiary or its employees would rely on its using that superior knowledge for the employee's protection – See: <https://www.druces.com/chandler-vs-cape-plc-companys-duty-of-care-to-subsidiary-companys-employees/>

40 See <http://redflags.info>

41 See "The Voluntary Principles at 10" for more background: <https://www.ihrb.org/focus-areas/commodities/commentary-the-voluntary-principles-at-10>

In the apparel sector, the **Fair Labor Association** (1999) grew out of a 1996 Clinton administration challenge to brands, unions, and NGOs known as the White House Apparel Industry Partnership (AIP) Task Force. It employed an approach based on ILO principles to address worker rights abuses linked to US companies via supplier factories across the globe. The **Ethical Trading Initiative** (1998) – the UK-led counterpart – did likewise, involving aid agencies, workers’ rights organisations and trade unions and retailers. Accreditation schemes, such as **Social Accountability 1000**, emerged at this time to certify facility compliance with certain sets of standards, before more systemic approaches came into play.

What united, and often continues to unite, these and more recent initiatives of this kind, such as the **Global Network Initiative** in the tech sector and the **International Code of Conduct Association** for the private security industry, was and is a pressing need to establish common standards; to bring granularity and collective thinking to the new set of human rights questions triggered by governance gaps arising from failures in regulatory, judicial, economic, and political systems. For many corporate participants, MSIs offered an opportunity to demonstrate a principles-based commitment to human rights, to access expert advice on ways to strengthen systems, processes and practices, to share and develop learning on specific human rights challenges, while occasionally employing mechanisms for monitoring, enforcement, and accountability. For the governments involved, MSIs offered a means of balancing their international legal obligations with a need to safeguard the interests of flagship companies and steer them through complex operating contexts. The initiatives are driven by a desire to raise standards and deliver tangible changes for rights-holders. However, NGO involvement has been mixed, and in some instances come to an end, amidst concerns over lack of robust accountability mechanisms for company participants involved in specific initiatives.

The Global Compact

In January 1999, UN Secretary General Kofi Annan brought the UN more proactively into the business and human rights arena with his call on business leaders to join a **UN Global Compact** of shared values and principles to “give a human face to the global market”. Company executives were invited to “embrace, support and enact a set of core values” articulated through nine principles covering human rights, labour standards and environmental practice (the 10th principle on anti-corruption was added in 2004); and to forge partnerships with trade unions and NGOs to encourage greater inclusivity and improve public trust in global markets.

From the outset, the Global Compact offered potential to bring companies, public sector bodies, trade unions, and civil society together with a view to raising standards of corporate practice. It also shifted the locus of the business and human rights debate from its hitherto largely European and North American origins, bringing in new stakeholders from all over the world. By 2010 on its tenth anniversary,⁴² the Global Compact had over 5000 active corporate participants, from 135 countries, and some 80 Local Networks, with solid levels of participation in China, India and across other emerging and developing economies.⁴³ Some NGOs denounced the initiative at the outset for so-called “blue-washing” – or giving enhanced legitimacy to companies by association with the UN –

42 For further details see: UN Global Compact and Human Rights: Developing a Vision for 2020, IHRB 2010. https://www.ihrb.org/pdf/UNGC_and_Human_Rights_Oct_2010_web.pdf

43 In 2019 the figures stand at approaching 9,000 active corporate participants, from 159 countries, with 67 Local Networks, with 9,134 companies delisted for failure to communicate progress - <https://www.unglobalcompact.org/docs/publications/2019-UNGC-Progress-Report.pdf>

in return for intangible evidence of good corporate practice. Others have continued to raise concerns over the robustness of its integrity measures and communication on progress reporting requirements.

The Norms on the Responsibilities of Business

In launching the Global Compact, Kofi Annan had warned that people did not yet have confidence in global markets, because the growth of corporations had outpaced “the ability of societies and their political systems to adjust to them, let alone to guide the course they take.” Between 1999 and 2001, demonstrations at gatherings of the World Trade Organisation in Seattle, the International Monetary Fund in Washington, and the Group of 8 industrially advanced countries in Genoa showed how prescient his words had been. Against this mood of anger, the UN Sub-Commission on the Promotion and Protection of Human Rights (an expert body of the then Commission on Human Rights) launched a process to develop a set of “Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights” (the Norms).⁴⁴

The UN Sub-Commission’s attempt to codify a set of human rights norms applicable to companies involved engagement with key stakeholders over a two-year period. Many companies grew alarmed at the breadth of human rights responsibilities potentially being ascribed to them, and ideas that they may be expected to pay reparations for human rights harms. Several governments opposed potential conflation of state responsibilities to non-state actors. Ultimately, in 2003, the UN Sub-Commission approved the Norms. But the UN Commission on Human Rights (the precursor to the UN Human Rights Council), while acknowledging “useful elements and ideas for consideration” decided that no further action on the Norms should be taken.

While the Norms did not carry legal responsibilities or weight, the debates and energy devoted to this initiative generated heightened interest and momentum within the UN over questions of corporate accountability, leading to a new UN mandate through which Secretary-General Annan appointed Professor Ruggie as his Special Representative on Business and Human Rights (SRSG).

The Special Representative on Business and Human Rights

Much has been written about the significance of the two-successive 3-year mandates of the SRSG (2005-2008 and 2008-2011), the UN “Protect, Respect and Remedy” Framework (2008) and its operationalisation through the UN Guiding Principles on Business and Human Rights (2011). The SRSG mandate, which benefited from extensive consultations with governments, companies and other actors, had several important features. First, it brought a robust evidence-based approach to examining prevailing corporate human rights risks and responses, including the added complexities of operations in conflict zones, and to potential corporate legal liabilities. Second, it emphasised the obligations of States to put in place appropriate regulatory and judicial environments and to incentivise good practice and foster rights-respecting corporate cultures. Finally, it stressed the

⁴⁴ Professor David Weissbrodt led the process to draft the Norms, alongside other experts serving in their personal capacity.

need to achieve effective remedy for victims. Thorny issues concerning extraterritorial jurisdiction, corporate and securities law, and the human rights impacts of international investment agreements, among others, also came under specific spotlights. Consultation and dialogue with a wide range of stakeholder groups from all regions was another critical component of this work, importantly drawing in new audiences which had previously been largely absent from such deliberations.

The UN Guiding Principles drew on a body of learning developed since the late 1990s. Besides examining company policies and practices, government regulations and approaches, lawsuits, prosecutions, and NGO reports, the SRSG also looked at the work of the socially responsible investment community and confirmed the value of corporate reporting that included specific attention to human rights. Efforts to apply environmental and social impact assessment methodologies to corporate human rights risks also contributed. BP had commissioned independent experts in 2001 to carry out a human rights impact assessment (HRIA) on its Tangguh project in Indonesia, and more importantly, it published the results. Independently, the Danish Institute for Human Rights had started to develop a Human Rights Compliance Assessment tool around the same time.⁴⁵ Other relevant tools included those developed by the Business Leaders Initiative on Human Rights; International Alert's Conflict Sensitive Business Practices, and International Finance Corporation performance safeguards, and with International Business Leaders Forum and the UN Global Compact, an assessment tool.⁴⁶ Collectively these and many other efforts lent legitimacy to the SRSG's incorporation of the concept of human rights due diligence within the UN Guiding Principles, and the concept's integration within the 2011 revision to the OECD Guidelines, ISO 26000 standard, and many other instruments since.

The UN Guiding Principles provided for the first time an authoritative framework for business and human rights. The evidence-based results of the SRSG's mandate were critical in securing uptake of the UN Guiding Principles as was the focus on 'impact', addressing company activities and relationships, across firms' value chains. The elevation of access to remedy in the Guiding Principles moved the business and human rights debate unequivocally beyond CSR, making accountability the central plank of future discussions. The UN Guiding Principles' affirmation that business could have adverse impacts on virtually any human right and therefore, responsibility to "know and show" that it was preventing and mitigating such impacts, established a firm foundation upon which all further efforts in this field would build.

45 The HRCIA was trailed by Shell before being officially launched in 2005. See for more details: https://www.business-human-rights.org/sites/default/files/HRCA_INTRODUCTION.pdf

46 See the Guide to Corporate Human Rights Impact Assessment Tools: <https://www.commddev.org/pdf/publications/Human-Rights-in-Business-Guide-to-Corporate-Human-Rights.pdf>

PRESENT:
Progress &
Challenges

3



Present: Progress and Challenges

3

Progress on the business and human rights agenda over the past decade is evident. Today, the UN Guiding Principles are broadly recognised as a globally agreed framework on business and human rights. That framework not only clarifies state duties to protect human rights but also sets out the independent responsibility of all business enterprises, whatever their size and wherever they operate, to ensure respect for human rights in their activities and business relationships through ongoing human rights due diligence processes. The Guiding Principles have also advanced understanding of and need for strengthened actions to ensure access to effective remedies for those adversely impacted by business activities.

The influence of this work beyond the UN is also clear, as can be seen in the fact that standard-setting bodies, national and international, as well as key inter-governmental organisations and industry sectors have all integrated core elements of the UN Guiding Principles (UNGPs) into their own standards and work to ensure corporate performance that respects human rights. Their specific requirements have also contributed to improved human rights coverage in existing and new corporate sustainability reporting frameworks⁴⁷ and have served as the basis for initiatives by multiple actors from the investment and civil society communities.

As John Ruggie has framed progress to date:

"We've done quite well on the policy front, with soft uptake of the UNGPs by states, international institutions, business enterprises, as well as civil society and workers organizations. The International Bar Association has outlined the relevance of the UNGPs for business lawyers. FIFA, the governing body of global football, has aligned future World Cup bidding requirements with the UNGPs and has also incorporated elements of them in its current practice. Efforts are underway to incorporate the UNGPs into the rapidly growing area of ESG investing, where environmental, social, and corporate governance criteria are combined with sophisticated financial and momentum analysis."⁴⁸

Examples: UN Guiding Principles and Convergence of International Standards

- *OECD Guidelines for Multinational Enterprises* (updated 2011) - applies the due diligence concept.
- *IFC Performance Standards on Environmental and Social Sustainability* (update from 2012) - recognises "the responsibility of business to respect human rights", the need for due diligence, and for grievance mechanisms to deliver remediation for harms.

⁴⁷ See for example: <https://www.globalreporting.org/standards> and <https://www.ungpreporting.org>

⁴⁸ <https://s160a488592275d27.jimcontent.com/download/version/1528663673/module/7458466664/name/180610%20John%20Ruggie%20-%20Statement%20on%20Swiss%20Citizens%20initiative.pdf>

- *ILO Tripartite Declaration of Principles concerning MNEs & Social Policy* (update from 2017) – declares that “Enterprises, including multinational enterprises, should carry out due diligence”.

The Guiding Principles have provided the impetus for States to develop national level actions through a number of routes. For example, since 2011, over 20 governments have adopted national action plans on business and human rights with similar numbers in the process of doing so at present.⁴⁹ Valuable guidance has been prepared to assist States in the development of action plans and related follow up initiatives⁵⁰ and initial comparative reviews of good practice have offered recommendations on issues such as transparency of process and stakeholder consultation as well as content, implementation, and monitoring steps.⁵¹

Although the national action plans have been praised as being useful in raising national awareness and encouraging greater policy coherence, they have been criticised as well for falling short in advancing effective protection in areas such as trade and investment, state-owned enterprises, and particularly in relation to legislative developments and access to remedy.⁵² This aligns with criticisms that progress on the business and human rights agenda has not been broad based enough, nor has it yet become a central aspect of mainstream business knowledge and practice. Indeed, even the world’s largest companies in key sectors are still far from achieving the levels of performance expected of them by the UN Guiding Principles, as demonstrated, for example, in the findings of the Corporate Human Rights Benchmark.⁵³

The Corporate Human Rights Benchmark

The Corporate Human Rights Benchmark (CHRB) began in 2013 as a network of investors, business, benchmarking, and human rights experts.⁵⁴ Their aim was to objectively assess which companies perform best on human rights. In 2019 CHRB launched its ranking of 200 of the world’s largest companies in high human-rights-risk sectors (agricultural products, apparel, extractives and ICT manufacturing) following a 2017 pilot benchmark and an extensive review of the methodology.⁵⁵

While some firms show the way forward, the overall picture remains deeply concerning⁵⁶:

- Companies at the top end of the rankings demonstrate that identifying and managing risks is a key part of their core business.
- Adidas, BHP Billiton, Freeport-McMoRan, Marks & Spencer Group, Repsol, Rio Tinto and Unilever all scored above 70% in 2019.

49 <https://www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx>

50 See for example: <https://mk0globalnapshvllfq4.kinstacdn.com/wp-content/uploads/2018/01/national-action-plans-on-business-and-human-rights-toolkit-2017-edition.pdf> <https://mk0globalnapshvllfq4.kinstacdn.com/wp-content/uploads/2018/01/guidance-on-national-action-plans-on-business-and-human-rights.pdf>

51 https://globalnaps.org/wp-content/uploads/2019/05/shrc_bhr_nap_report_summary.pdf

52 Cantu Rivera, Humberto, “National Action Plans on Business and Human Rights: Progress or Mirage”, *Business and Human Rights Journal*, Vol.4, Issue 2, pp.213-237, July 2019 <https://www.cambridge.org/core/journals/business-and-human-rights-journal/article/national-action-plans-on-business-and-human-rights-progress-or-mirage/4EC3C14499353D1CEE3E-5A96458F6363>

53 See the 2018 Corporate Human Rights Benchmark rankings, <https://www.corporatebenchmark.org/sites/default/files/documents/CHRBKeyFindings2018.pdf>

54 The CHRB network includes: APG Asset Management (APG), Aviva Investors, Business and Human Rights Resource Centre, The EIRIS Foundation, IHRB, Nordea Wealth Management and VBDO. See further www.corporatebenchmark.org

55 CHRB’s Methodology was the result of extensive multi-stakeholder consultation around the world, involving over 400 companies, governments, CSOs, investors, academics and legal experts..

56 <https://www.corporatebenchmark.org/sites/default/files/2019-11/CHRB2019KeyFindingsReport.pdf>

- The average score across all companies increased since 2017, but remains low, at 24%.
- In 2019, 1 in 5 companies had not shown any significant progress since the 2017 Pilot.
- More than half of the 200 benchmarked companies in 2019 scored less than 20% and only 1 in 10 companies scored more than 50%.
- 49% companies scored zero against every human rights due diligence indicator.

The 2019⁵⁷ results reinforce a picture of incremental improvements from leading companies, but a stubborn majority of poor scores raises questions as to whether many companies are serious about making public adequate information to demonstrate their commitment to avoiding harm to people in their pursuit of profits, and underlines the need for strong government incentives.

The reality is that many companies around the world are still not fully aware of the business and human rights agenda and are still avoiding proactive engagement on the issue in part because they have not been negatively spotlighted by the media, investors, or civil society. This is especially true for small and medium sized enterprises (SMEs), who according to some estimates account for over 90 per cent of all businesses and provide some two thirds of all employment globally.⁵⁸ It is also because most governments have not demanded better performance through legislation or related incentives. And because the focus has generally been on large, well-known multinational corporations from the global north, and with few exceptions, multinationals from the global south or emerging economies have not faced similar scrutiny.

Some States have taken initiatives over recent years to adopt new regulations with a particular focus on human rights disclosure requirements for large corporations. Several of these revolve around efforts to combat modern slavery and human trafficking, notably regulations adopted by the US state of California, the UK, and Australia (see table below). A focus on modern slavery and human trafficking appears to resonate with government and business stakeholders, and there is some anecdotal evidence to suggest that it has opened doors to discussions about the need for wider human right due diligence in both quarters.

Others take a more holistic rights-based approach and demand of companies evidence of the actions being taken to identify, assess, and prevent abuses. Notably, in 2017 France adopted a Duty of Vigilance Law requiring large French companies and foreign subsidiaries operating in France to both publish and implement a plan accounting for how they identify and prevent human rights impacts across the operations and business relationships. In March 2019, a European Parliament working group also launched a “Shadow EU Action Plan on Business and Human Rights” calling on the European Commission to adopt due diligence legislation.⁵⁹ Most recently, Finland announced that it would seek to adopt mandatory human rights due diligence at the national level and would work on related efforts in Europe during Finland’s EU presidency in 2019.⁶⁰ A still small but growing number of companies and business associations have made public statements expressing support for human rights due diligence regulations as a way to level the global playing

57 <https://www.corporatebenchmark.org/sites/default/files/2019-11/CHRB2019KeyFindingsReport.pdf>

58 https://www.ohchr.org/Documents/Issues/Business/ExSummary-WGBHR-SOE_report-HRC35.pdf

59 <https://responsiblebusinessconduct.eu/wp/2019/03/19/shadow-eu-action-plan-on-business-and-human-rights/>

60 <https://eu2019.fi/en/events/2019-10-07/business-and-human-rights-towards-a-common-agenda-and-action>

field on these issues.⁶¹ This is a trend which is likely to continue at national and regional levels.⁶²

Landmark Disclosure and Mandatory Due Diligence Regulation⁶³

- California Supply Chain Transparency Act (2010) – requires retail and manufacturing firms that do business in California with gross receipts over USD 100 million to disclose the steps taken to eradicate slavery and human trafficking from their supply chain and to verify these efforts or hold suppliers to account.
- UK Modern Slavery Act (2015) - requires UK companies with annual turnover above £36 million to publish an annual statement disclosing the steps taken to ensure no slavery or human trafficking exist in their supply chain. An Independent Anti-Slavery Commissioner provides advice, encourages good practice and drives prevention strategies.
- Australia Modern Slavery Act (2018) – requires entities based, or operating, in Australia with an annual consolidated revenue of over AUS 100 million to report annually on the risks of modern slavery in their operations and supply chains, and on its actions to assess and address those risks. A central, freely-accessible register of statements is in place. The Australian government is itself bound by the law, thereby extending the law to public procurement activities.
- France Duty of Vigilance Law (2017) - requires French companies with at least 5,000 employees worldwide and foreign companies with French subsidiaries with over 10,000 employees worldwide to publish and implement a vigilance plan and account for how they identify and prevent human rights impacts in their global operations (including via established business relationships with suppliers and sub-contractors).
- Netherlands Child Labour Due Diligence Law (May 2019) – comes into force in 2020, the law requires Dutch-registered companies and those delivering products or services to the Dutch market to declare steps taken to identify, prevent and assess child labour in their supply chains.

While the above summary makes clear that much has in fact been achieved, it is also the case that the ‘institutionalisation’ of business and human rights across and within jurisdictions has yet to happen. Widespread reports of business involvement in human rights abuses in all parts of the world continue apace. This is the case in part due to a lack of government and business leadership at the highest levels, given what may appear to some as competing policy priorities on issues from climate change to the UN’s 2030 sustainable development agenda (discussed further in the next chapter). It is also the case that translating the broad international human rights agenda into clear corporate policies and practices in different industry and geographic contexts continues to be challenging and requires significant shifts in priorities and increased knowledge within and across companies. As the field of business and human rights still remains a relatively new area for the large majority of companies, it is evident that effective financial incentives to encourage improved performance are still lacking, as are continued efforts to demonstrate how current business models, practices, and processes directly or indirectly contribute to adverse rights impacts on individuals and communities.

Slow uptake of the business and human rights agenda and lack of concrete improvements on the

61 <https://www.business-humanrights.org/en/list-of-large-businesses-associations-with-public-statements-endorsements-in-support-of-human-rights-due-diligence-regulation>

62 For an up to date list of mandatory human rights due diligence requirements and national level proposals: see: <https://www.business-humanrights.org/en/national-movements-for-mandatory-human-rights-due-diligence-in-european-countries>

63 <http://opiniojuris.org/2019/08/13/emerging-voices-momentum-builds-for-mandatory-human-rights-due-diligence/>

ground in multiple contexts have been among the key drivers of the ongoing inter-governmental process within the UN Human Rights Council to develop a binding international legal instrument.⁶⁴ This report does not aim to assess the current stage of this process, which completed its fifth working session in October 2019, except to note:

1. There are competing visions amongst governments and other stakeholders on what issues such a legal instrument should address, how it should be structured, and whether it should include direct legal obligations on business enterprises as well as States. The revised draft of the instrument discussed during the October 2019 session of the inter-governmental working group was seen as an improvement on the previous version and the somewhat more active participation of the EU in particular was widely viewed as an encouraging sign of broader engagement with the process moving forward.
2. The process of developing the instrument continues to be complex and divisive with a range of views being expressed on matters relating to participation and transparency. For example, some state and civil society actors question the role of businesses and industry associations in the development of the instrument and in discussions of the working group. At the same time, some States suggested that civil society actors of all kinds should have more restricted access to the discussions of the working group moving forward, a suggestion that was challenged at the conclusion of the October 2019 session.⁶⁵
3. There is an urgent need for more “joined up” thinking as this process moves ahead, which combines insights and agreed recommendations in other related streams of business and human rights activity in and outside the UN. For example, the work undertaken by the UN Human Rights Office on improving accountability and access to remedy for business and human rights abuses has been welcomed by States and as the UN Human Rights Office has noted, a series of recommendations from this project can be incorporated into any relevant standard-setting process.⁶⁶ It is up to States to ensure that this happens in practice as the process continues.

The business and human rights community will need to find ways of making itself more relevant to a range of societal challenges in the years ahead. Steps by a growing number of actors aimed at linking the business and human rights agenda to, for example, issues of climate change or the Sustainable Development Goals (SDGs) (see box below) point to the potential for new partnerships and new forms of engagement with a range of business sectors and a wider number of government ministries than has been the case to date. But moving in this direction given different discourses and priorities can lead to frustration and lack of clear impact. These issues are discussed in more depth in the next chapter.

The Sustainable Development Goals and Business and Human Rights

The 2030 Development Agenda⁶⁷ adopted by the UN in 2015 applies to all countries and stakeholders, including business. The 2030 Agenda is grounded in universal human rights and affirms international human rights instruments, seeking to “realise the human rights of all”.

64 <https://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session5/Pages/Session5.aspx>

65 <https://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session5/Pages/Session5.aspx>

66 <https://www.business-humanrights.org/sites/default/files/documents/OHCHR%20submission%20to%20IGWG%20on%20links%20between%20ARP%20and%20Revised%20Draft.pdf>

67 <https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20Sustainable%20Development%20web.pdf>

The SDGs see the private sector as an indispensable partner towards achieving its targets, but recognise that business needs to adhere to international standards to ensure labour, environmental and other protections, and thus makes explicit reference to the UN Guiding Principles, ILO labour standards and UN Convention on the Rights of the Child.

The UN Working Group on Business and Human Rights has issued a set of recommendations on ways to strengthen the synergies between the SDGs and business and human rights. These include a call for Governments to “ensure that their business partners for sustainable development have made a clear and demonstrable commitment to the UN Guiding Principles..., and uphold these Principles in efforts to reach the SDGs.”⁶⁸ Business and human rights organisations have made similar appeals, including in an open-letter to the UN Secretary General and UN Private Sector Forum in 2017.⁶⁹

On a related front, while the push for mandatory human rights due diligence is seen by many as being critical to fully mainstreaming respect for human rights in business practices, such efforts must be seen as distinct from those to hold corporations accountable for their involvement in human rights abuses. Sanctions for non-compliance with human rights due diligence legislation is clearly part of a broader accountability landscape, but that must also include more effective remedies at all levels for those whose rights are violated in the context of business actions or inactions. The work of the OHCHR Accountability and Remedy Project is relevant here – see box below). Different countries will likely take different approaches to such issues, as can already be seen in the early national legislative steps taken highlighted above. Scaling up such actions in a coordinated and coherent manner to the regional and international levels will be a significant challenge for the years ahead.

OHCHR Accountability and Remedy Project

Legal and practical barriers to remedy for business-related human rights abuses – such as cost and access, as well as a lack of willingness by State authorities to prosecute cases - have often left victims without access to justice. To address this the UN Human Rights Council asked the Office of the UN High Commissioner for Human Rights (OHCHR) to facilitate greater research and knowledge exchange on the subject, and has since extended this mandate twice.

Launched in 2014, the Accountability and Remedy Project (ARP)⁷⁰ aims to contribute to systems that deliver fairer and more effective remedy for victims of severe business-linked human rights abuses. It prioritises areas that require urgent attention and/or where reforms could deliver improvements to accountability and remedy in the short to medium term. ARP is currently in its third phase, each having involved extensive research and consultation to identify lessons learned, best practices, and challenges and opportunities to improve system effectiveness. In relation to business-linked human rights abuses the phases look at enhancing the effectiveness of judicial mechanisms (ARP I), Enhancing effectiveness of State-based non-judicial mechanisms (ARP II), and Enhancing effectiveness of non-State-based grievance mechanisms (ARP III).

68 https://www.ohchr.org/Documents/Issues/Business/Session18/InfoNoteWGBHR_SDGRecommendations.pdf

69 The letter stresses for governments and businesses to make their greatest possible contribution to sustainable development requires that they implement the UN Guiding Principles. It was signed by the Business and Human Rights Resource Centre, Danish Institute for Human Rights, IHRB, the International Corporate Accountability Roundtable, Oxfam International and Shift: <https://www.business-humanrights.org/sites/default/files/documents/SDGs-businesshumanrights-openletterSept2017.pdf>

70 For more on ARP I, II and III see: <https://www.ohchr.org/EN/Issues/Business/Pages/OHCHRAccountabilityandremedyproject.aspx>

ARP I and II findings⁷¹ pinpointed various challenges and provided States with a menu of options to consider on ways to “progressively and incrementally improve the effectiveness of their institutions from an access to remedy perspective”. The guidance and recommended policy objectives include practical steps to ensure benefits are felt on the ground for those adversely affected. The ARP findings could complement the Open-Ended Inter-governmental Working Group process towards an international treaty, by highlighting legal reforms States might need to consider if they were to put future treaty commitments into practice.⁷²

71 For the ARP I linked findings and recommendations see: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/093/78/PDF/G1609378.pdf?OpenElement> and for ARP II see: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/132/70/PDF/G1813270.pdf?OpenElement>

72 <https://www.ihrb.org/other/governments-role/commentary-clever-complementarities>



FUTURE: Opportunities & Threats

4

Future: Opportunities and Threats

4

This chapter looks ahead and attempts to set out some of the critical issues requiring further dialogue and action to ensure that advances on the business and human rights agenda continue and lead to greater impact. As we have seen, social movements typically go through phases of social ferment, coalescence, and formalisation, before entering either a period of 'decline' (including because the movement's goal has been achieved) or 'institutionalisation' where the movement's goals enter the mainstream. Business and human rights activism draws on a wide range of actors with differing agendas and tactics, and therefore some do not see it as a unifying single movement. But looking back over the past three decades, the trajectory of the activism and activities show noteworthy aspects that mirror movements in other areas.

If this is the case, what are the defining characteristics of the business and human rights agenda moving forward, what gives it continued legitimacy, and what if anything does it imply for priority-setting in the short-, medium-, and long-term? It is important to recall that social movements do not need to be formally organised. What generally binds them is⁷³:

- A constituency of people that operates through collective action
- The pursuit of a goal or set of goals aimed at bringing some change to society
- A shared analysis of the roots of a particular social problem, injustice, or set of conditions that have marginalised and disempowered part of society, and the changes they seek
- Leadership from the constituency at multiple levels so that it is not dependent on external leadership
- Use of a mix of actions and strategies, from protest, peaceful non-violent direct action, to public opinion building and critical engagement through advocacy and dialogue
- A level of continuity over time, which marks them out from other disruptions, such as spontaneous uprisings

Collective Action – An Essential Ingredient

Collective action has underpinned work in the area of business and human rights for over two decades, with collaboration among groups at the local or international level seeking to achieve results. Multi-stakeholder initiatives like those referenced earlier, or more recent forms of collective endeavor and partnerships operate in this way; forging alliances between business, government, human rights and union activists, and inter-governmental bodies to achieve common goals.

73 "Four stages of social movements", essay by Jonathan Christiansen: <https://www.ebscohost.com/uploads/imported/this-Topic-dbTopic-1248.pdf> and Movements & Why They Matter, Srilatha Batliwala, Knowledge Building, CREA from a presentation shared by Srilatha Batliwala.

Business and human rights groups often mobilise through coalitions, some exclusively brought together by civil society groups, such as Publish What You Pay, the International Corporate Accountability Roundtable, the CORE coalition in the UK, or the business and human rights network in India; or those that worked with socially-responsible investors to put the Corporate Human Rights Benchmark in motion, or through informal networks like the Business Network on Civic Freedoms and Human Rights Defenders, which convenes a group of brands to explore the role of companies in helping to protect civic freedoms and human rights through discussion and information exchange.⁷⁴

New forms of partnership are also emerging that benefit from collective approaches. For example, the *Accord on Fire and Building Safety in Bangladesh*⁷⁵ was developed in response to the Rana Plaza textile factory collapse in 2013 as a legally binding agreement between global brands and retailers and global unions and their Bangladesh affiliates. Separately the *Alliance for Bangladesh Worker Safety* was also set up in 2013 with a similar aim to improve safety in the country's ready-made garment factories; it also benefitted from a collaborative approach.⁷⁶ In November 2019, the Bangladesh Garment Manufacturers and Exporters Association launched the Readymade Sustainability Council – a tripartite body comprising factory owners, local and international labour organisations, foreign brands and buyers, which it is hoped will build on lessons from both the Accord and Alliance.⁷⁷ The *Coalition of Immokalee Workers*⁷⁸, similarly, brings together farmers, farmworkers, and retail food companies to combat human trafficking and gender-based violence at work on farms in the southern USA, and takes particular strength from worker-to-worker education and workers themselves monitoring human rights abuses in food production.

What unites alliances like those mentioned, and what often gives business and human rights its greatest strength, is the recognition that complex challenges are addressed more effectively by diverse constituencies coming together. This often means bringing a range of skills and expertise to bear, towards a common objective, but with the broader aim of ensuring that companies are accountable for their actions, and their core business activities and relationships do not inflict harm on people or exacerbate past injustices, and instead where possible serving as a force for good in society.

Historically, different factions have often co-existed under a larger umbrella movement. Business and human rights is no less a social movement simply because it encompasses those advocating for legal corporate accountability (e.g. those focused on legal accountability, national legislation, or a UN Treaty); those seeking to embed human rights due diligence and remedy within business practice, encourage investor action, promote UN Guiding Principles implementation; and grassroots groups, human rights defenders, and unions pursuing change through direct action at the coalface or factory floor. Abolitionism, the movements for women's rights and for the rights of LGBTI people, for example, all found strength in their diversity.

74 Facilitated by Business & Human Rights Resource Centre, The B Team and The International Service for Human Rights: https://www.business-humanrights.org/sites/default/files/Statement_Public_v2.pdf

75 The Accord was signed in the immediate aftermath to the Rana Plaza building collapse in April 2013, which killed 1,133 workers and critically injured thousands more. The Accord's programme included independent safety inspections, safety training and remediation channels offered a collaborative approach to supporting worker safety in the garment and textile industry. Over 220 companies signed the five-year Accord. In 2019 it transitioned into the RMG Sustainability Council <https://bangladeshaccord.org/about>

76 The Alliance wrapped up as planned at the end of its five year legally binding commitment in 2018: <http://www.bangladesh-workersafety.org/who-we-are/about-the-alliance>

77 <https://uk.reuters.com/article/uk-bangladesh-garments-accord/european-fashion-brands-agree-new-deal-in-bangladesh-idUKKCN1VO21W>

78 In 2001, farmworkers in Immokalee (FL) launched a Campaign for Fair Food that aimed to educate consumers on the labour conditions behind the food they eat. The CIW Fair Food Program aims to ensure decent wages and working conditions for fruit and vegetable pickers workers on farms. <http://ciw-online.org/about/>

No single group in society has a monopoly on legitimacy. The business and human rights agenda derives its legitimacy in large part from international standards and principles, and the moral imperative of putting affected groups at the heart of efforts to seek positive change. Perhaps the validity stems as well from the very act of acknowledging that no single stakeholder has all the answers, and that success often depends on learning, collaboration, and shared responsibility for results.

The Prognosis So Far

Reasons for pessimism persist in expecting changes in the current landscape that could bring about rapid mainstreaming of rights-based prevention and remedy approaches within business activities, operations, products, and services. Current levels of activity in business and human rights should not be mistaken for success. It is understandable that civil society has been lukewarm or indifferent to the plethora of soft-law standards, company disclosure requirements, baseline studies and the growing professionalisation of the field in the absence of consequential change in the daily lives of workers and those impacted by corporate-related human rights abuses. Much more work is still needed to translate business and human rights commitments into better performance, reduced impacts, and greater transparency and accountability.

At the same time, some experts interviewed for this report and via survey acknowledged the progress achieved in a relatively short time, given the diverse range of sectors and human rights issues involved. As an issue, business and human rights is not yet mainstreamed, but reasons for optimism should be acknowledged in the standard setting groundwork that has been achieved so far through the uptake of the UN Guiding Principles and their alignment across so many international and regional organisations, industry sectors, and individual businesses. This has enabled the business and human rights community to weigh up where the short-falls lie vis-à-vis corporate accountability and explore what viable solutions could address them, including through new international legal instruments.

There are also reasons to expect further rollout and awareness of rights-based due diligence requirements in the small but growing body of national laws making such practices mandatory, and the steady increase in national action plans, particularly in countries in Africa, Latin America and Asia that were not at the forefront of global business and human rights conversations two decades ago. New forms of partnership that are bringing grassroots actors more directly into business and human rights discussions should be encouraged, as these trends point to a future where affected groups are full participants and not only objects of discussions in Geneva and New York.

Opportunities and Threats to Further Progress

What then are the greatest threats and opportunities that face business and human rights as we approach the third decade of the 21st century?

In looking at the political climate today – amidst a growing trade war driven by protectionist policies, the rise in populist leaders, the increasing normalisation of nationalist and racist sentiments, and ongoing terrorist threats – it is evident that public confidence in the global market remains weak.

Today's threats include an ever-shrinking space for civil society activity, controls on press freedom, as well as increasing risks for human rights defenders and global union movements. The world has seldom been free from regional and civil wars, humanitarian disasters, or countries in which human rights violations occur with impunity, but for the generation of individuals that cut their professional teeth during the past few decades, the current political and socio-economic context presents a worrying operating climate which makes it harder to make further progress and protect the practices that have begun to take hold while avoiding any backsliding.

What makes the picture more bleak is that while the global economy has lifted millions out of poverty, it has also left many behind and exacerbated inequalities within societies. In the twenty-year period leading up to the 2008 financial crash, amidst technology transfers, free trade, and greater interconnectedness, countries like China, India, and Indonesia have seen a growing middle-class take root. Unskilled workforces in emerging markets have generally done better,⁷⁹ and China's share of world gross domestic product (GDP), measured in terms of purchasing power parity, grew from 4.1% in 1990 to 17.86% by 2016, while India's moved up from 3.6% to an estimated 7.3%.⁸⁰

Globalisation has also been scarred by growing inequalities. The top 1 per cent of the world's earners' real income went up by more than 60 percent.⁸¹ Some of the poorest regions of the world have made only marginal gains or have lost out. Due to these growing inequities, the international rules-based system has been blamed for failing to adequately mitigate adverse effects. The UN human rights architecture is no exception. In 2018, the year that marked the 70th Anniversary of the Universal Declaration of Human Rights, the US pulled out of the UN Human Rights Council, and under the Trump administration, starting in May 2018, the State Department has ceased responding to UN Special Rapporteurs on official complaints ranging from migration and poverty, to freedom of expression and justice. The EU has seen cracks emerge as nationalist and populist-led governments have undercut the Union's long held commitment to grant refugees asylum. Modern atrocities have gone unchecked in Myanmar, Syria, and Yemen. As UN Secretary General Antonio Guterres acknowledged on assumption of office in 2017: "the human rights agenda is losing ground and authoritarianism is on the rise."

Against this backdrop, the business and human rights community is under pressure to work smarter and faster to address the needs of the most vulnerable in society.

A major obstacle identified by those interviewed for this report dealt with concerns around government inaction and apparent lack of willingness to regulate, in part because of fears about making domestic companies uncompetitive. In most countries, governments are still not using their authority to ensure implementation of human rights standards within nationalised industries, or to encourage corporate respect for human rights via public procurement criteria, stock-market listing requirements, export credit rules, or court guidance on hearing criminal cases against companies.⁸²

In the quest to recognise business as a legitimate stakeholder in society, and to build the trust needed for dialogue between companies and civil society on issues of corporate responsibility and accountability, some are also questioning whether actors in the business and human rights community have become too comfortable with business constituents.

79 <https://www.ft.com/content/9cc98d1b-0d67-3951-af75-b5f92121bcf8>

80 <https://www.livemint.com/Money/cNmmQJZdnMhbk3Ydbs26wl/Which-countries-have-benefited-the-most-from-globalization.html>

81 <https://www.worldbank.org/en/news/feature/2013/10/25/The-Winners-and-Losers-of-Globalization-Finding-a-Path-to-Shared-Prosperity>

82 See also IHRB's Submission the United Nations Working Groups on Business and Human Rights on Policy Coherence in Government Action to Protect Against Business-Related Human Rights Abuses: <https://www.ihrb.org/other/governments-role/submission-government-policy-coherence>

Some companies have been proactive on business and human rights. Many have joined collective action initiatives, come forward to learn how to implement the UN Guiding Principles, and pushed for internal culture shifts on issues such as responsible recruitment. A few have demonstrated willingness to speak out on the precarious conditions facing human rights defenders. They remain, however, in the minority. There is still a lack of broad-based awareness and buy-in to business and human rights across the world's business community. This is a particularly acute challenge in emerging economies but, even among firms headquartered in countries where the responsible business debate is mature, there remains limited understanding around what respecting human rights means in practice.

Even for companies well-disposed to taking action, the space for business and human rights is being squeezed. Companies are also having to deal with the implications of political uncertainty, and new, more hostile, operating environments in which free trade and the rule of law can no longer be taken as given. This is interfering with their bandwidth, and middle-managers in companies, who could once get the attention of their CEOs, often have to struggle to be heard amid the clamour of other priorities. The perceived risk is that companies and governments have already moved on to seemingly more urgent challenges, and business and human rights will become, if anything, an afterthought.

The **Sustainable Development Goals** open the doors to new conversations with business and governments. In emerging economies the SDGs have been used by national human rights institutions (NHRIs) and others as a platform for bringing the business and human rights agenda to new audiences. The SDGs have also served to open up fresh funding opportunities for a range of civil society organisations.

Business and human rights can surely borrow from discourses in the development arena, but as in the era of CSR, human rights organisations are at risk of being overlooked, ignored, or accorded lower priority at the table as the SDGs command more attention and often encourage a narrow focus on particular goals at the expense of avoiding adverse impacts in core business operations. SDG strategies have so far failed to fully embrace the human rights agenda, the UN Guiding Principles, or to take on board the advice of the UN Working Group on Business and Human to ensure that: "respect for human rights must be a cornerstone when envisioning the role that business will play in the pursuit of the SDGs"⁸³ Some business and human rights advocates have also found it challenging to compete with the relative simplicity of SDG approaches and indicators of progress. They also raise the risk of creating a false dichotomy, suggesting that actions undertaken to promote development can off-set harms that could be caused by actions taken as part of a company's operations.

The growing **climate crisis** is a grave human rights challenge in its own right. As Mary Robinson, former UN High Commissioner of Human Rights, has remarked: "Climate change undermines the enjoyment of the full range of human rights – from the right to life, to food, to shelter and to health. It is an injustice that the people who have contributed least to the causes of the problem suffer the worst impacts of climate change".⁸⁴

Climate change threatens to devastate food supplies in the world's poorest countries as droughts and floods bring havoc to crops, livestock, and farming practices passed down through generations. Business, like every other part of society, will increasingly be forced to take proactive steps. An effective response will require nothing less than a radical restructuring of how goods and services are produced

83 UN Working Group recommendations on the subject warns that without business contributions based on accountability and respect for human rights, "the private sector risks undermining rather than supporting sustainable development". https://www.ohchr.org/Documents/Issues/Business/Session18/InfoNoteWGBHR_SDGRecommendations.pdf

84 <https://www.theguardian.com/environment/2019/mar/26/climate-change-denial-is-evil-says-mary-robinson>

and consumed, demanding new ways of doing business. In the food or textile industries, for example, companies will have to overhaul their water use and scale up recycling practices. From a business and human rights perspective, climate disasters will put workers at risk, fuelling migration still further. If – as is feared – water scarcity also brings about ‘hydro-political issues’ and ‘water wars’, it will likely create new conflict zones, bringing with them more complex commercial operating environments, which history has taught us often create conditions for heightened risk of human rights harms.

Going forward, the business and human rights community will need to speak more clearly and urgently on issues of climate justice, in particular through concepts such as ‘just transition’. As the human costs of environmental degradation become apparent, new insights will be needed. Advocates will be able to bring a human rights lens to conversations with companies. Transitioning to a zero-carbon society, for example, may help slow the threat from rising planetary temperatures, but achieving it is hard to envisage without short-to-medium term job losses in old polluting industries. Society and business will need to adapt and work together. Fossil fuel companies, for example, will need to play an active role in supporting workers transitioning into new jobs in the clean energy sector. There is no guarantee that environmental campaigners will welcome business and human rights interventions, especially if it seems to delay the pace of urgently needed environmental reforms.

The advent of **artificial intelligence** and growth of **robotics** will also pose complex challenges for business and human rights over the next decade. These technological advances offer enormous potential in human rights terms, bringing as they do a chance to revolutionise healthcare, herald changes in transport, education, and food production, some of which may even help mitigate the worst predictions around climate change. In time these industries will be a source of new jobs, provided that governments invest appropriately in skills development and education. Yet just as with the transition to a zero-carbon economy, the handover will transform the world of work, and likely threaten jobs and livelihoods. Driverless cars, for example, will have a devastating impact on jobs in the haulage and taxi industries. Evidence suggests that algorithm-based decision-making by companies could perpetuate human bias and result in ongoing levels of discrimination.⁸⁵ Facial recognition software is similarly under scrutiny for use by governments in ways that place dissidents, ethnic minorities and other marginalised groups at risk.⁸⁶ The expansion of mass data collection and the way in which data is analysed and stored by companies poses threats to the right to privacy.

The climate crisis and advent of artificial intelligence and robotics are only some of the emerging issues where those working in the business and human rights space must gather the evidence needed to better understand the specific issues at stake, and determine whether, and how, existing or new metrics can help engage companies and governments in seeking solutions. In this context, the lack of capacity and understanding of business and human rights in many circles continues to be a major obstacle. There is still limited understanding of existing standards and human rights approaches even among public sector bodies working with companies. More work therefore is still needed to unpack human rights and explain how it applies to everyday business practice.

The UN Working Group on Business and Human Rights has produced guidance on how SMEs can be better supported to implement the UN Guiding Principles, but it is clear from anecdotal evidence in both developed and developing countries that there is still great scope to build on and embed this guidance, including by engaging clusters of SMEs within the same industry sector. A major challenge also remains in educating not only companies on human rights, but also many of those affected by

85 <https://www.business-humanrights.org/en/technology-and-human-rights-artificial-intelligence>

86 <https://www.faiobserver.com/business/technology/ai-facial-recognition-technology-china-human-rights-news-88121/>

corporate human rights harms. Workers and vulnerable groups cannot be expected to participate effectively in due diligence and stakeholder engagement processes if they are unaware of their own rights and how to exercise them.

The **gender** dimension of business and human rights is another area that is still only just being properly explored. Women make up slightly more than half the world's population, but are underrepresented at senior levels within companies and often affected disproportionately by corporate human rights harms. At all levels of an organisation, women have faced discrimination, and in many instances bullying and violence, verbal or physical, and harassment. Women frequently face multiple forms of discrimination and additional barriers in seeking remedy. There is considerable scope to bring a gender lens more directly into efforts to implement the UN Guiding Principles. The UN Working Group on Business and Human Rights has drawn on relevant international human rights instruments - notably the Convention on the Elimination of all Forms of Discrimination Against Women and the recommendations of the UN Secretary-General's High-Level Panel on Women's Economic Empowerment - to inform its efforts and recently issued new guidance.⁸⁷ There is a great opportunity for others to build on this work.

The increasing legal liability of corporations globally also offers a major opportunity for the business and human rights movement going forward as it pursues corporate accountability. One example can be seen in the UK Supreme Court's ruling in *Lungowe v Vedanta Resources* is a milestone. In April 2019 the Court allowed a complaint to proceed to trial against the UK-based Vedanta and its Zambian subsidiary, Konkola Copper Mines plc (KCM), for alleged damages to the health and livelihoods of nearly two-thousand villagers resulting from toxic waste discharges into local watercourses from the Nchanga Mine operated by KCM.⁸⁸ The ruling established a legal principle of parent company liability. Ordinarily, parent and subsidiary companies are separate legal persons, but in this case – and building on the earlier *Chandler v Cape plc* - the Supreme Court ruled that it could be argued in trial that the parent company had a duty of care to the villagers owing to:

- The level of control the parent company exerted over the subsidiary's management⁸⁹, and
- The parent having sufficient knowledge of the propensity of KCM's activities to cause toxic harm, but failing to act on its own undertakings to prevent that harm.⁹⁰

The Vedanta case has implications for cases concerning parent company duties around the world. This is due to the persuasive influence UK Supreme Court rulings have within approximately a third of the world's jurisdictions that follow common law, and the fact that civil law jurisdictions have to follow common law if the human rights harm in question takes place in a common law country. The ruling also importantly forms a bridgehead between those in the business and human rights movement addressing questions of legal liability and those seeking to mainstream implementation of the UN Guiding Principles. Now a company's own human rights policy and due diligence systems can demonstrably be used in courts of law to hold it liable for human rights harms in its value chain. There is the risk that judgements of this kind will deter some companies from implementing human rights due diligence or make others more cautious about how they frame their commitments. This

87 <https://www.ohchr.org/EN/Issues/Business/Pages/GenderLens.aspx>

88 The ruling overcame a challenge on jurisdictional grounds. The Supreme Court determined that the Zambian community could only hope to access justice if the case was brought through the English Courts. Ordinarily Zambia would be the proper place for such proceedings, but because of constraints on the claimant's ability to access legal aid in Zambia and the fact that it was unlikely they could find a Zambian legal team with the requisite experience to handle a case of this scale and complexity the case should proceed in England.

89 As demonstrated by its published group-wide environmental control and sustainability standards (which stressed the extent to which the Board had oversight over its subsidiaries) and the implementation of those standards through training, monitoring and enforcement.

90 The Supreme Court found that Vedanta had released various public statements emphasising its commitment to address environmental risks and technical shortcomings in KCM's mining infrastructure.

makes it all the more important to encourage the growing trend toward mandatory human rights due diligence laws which help level the playing field. There is no guarantee of course that all countries in the world will follow-suit and put such laws in place, but through the influence of soft-law instruments, such as those coming out of the OECD, most companies and governments are under mounting pressure to demonstrate that they and the firms operating in their jurisdictions are not gaining market access through corrupt practices or human rights harms.

Room for hope also exists in the realm of criminal law. As early as 2006, the Fafo Institute surveyed the national laws of 16 countries from both civil and common law traditions across most continents, and found that most legal systems permit the criminal prosecution of legal persons. When coupled with the widespread integration of the Rome Statute of the International Criminal Court (which governs genocide, war crimes, crimes against humanity) to domestic legal systems, the result has been an emerging “web of liability”.⁹¹ The trend has only intensified in the intervening years. Now through domestic implementation of the OECD Bribery Convention, and the spread of laws mirroring the US Foreign Corrupt Practices Act and UK Bribery Act, the space for corporate impunity not only in relation to money laundering and bribery, but crimes with human rights implications is closing.

It should be clear by this point that further progress also requires responsible leaders. **Leadership** is at once a risk and an opportunity for business and human rights. The business and human rights movement has had its share of leaders over its formative years, with backgrounds spanning business, government, the UN, academia and civil society, often making these individuals uniquely capable of capturing the attention of multi-disciplinary audiences. Now a new generation of leaders must continue the work to inspire and inform further progress, in part by breaking down barriers between constituencies and issue areas, while having the courage to embrace diversity. Whereas in past decades a central task was to capture the attention of, and buy-in from, a fairly narrow group of company executives and government officials to build support for the agenda, business and human rights must increasingly compete for attention and recognition of its value. This will require further efforts to strategically raise the public profile of specific goals and initiatives, including towards new and effective regulations that achieve corporate accountability.

With this in mind, the business and human rights community needs to consider how it can attract new champions from a range of fields – from within companies, academia, civil society movements, unions, and governments. These leaders will need to ask difficult questions while appealing to a wider audience, including by connecting with grassroots actors working on issues like poverty alleviation, anti-corruption, and climate change. There is an enormous opportunity for the next generation of leaders to step forward and be vocal advocates for the business and human rights agenda. We all may be able to learn from the forthright approaches taken by young activists such as Greta Thunberg, Malala Yousafzai, and Emma Gonzalez. When one considers that in a country like India, 66% of the population is under 35, there is a huge incentive to increase levels of engagement with future leaders, for example by engaging business and legal programmes at universities as well as youth activist networks.

91 <https://redflags.info/faq/>



5 Conclusion

Conclusion

5

The business and human rights agenda is reaching a crossroads. We are at a moment to reflect on what binds together all those working in this space. Do we need to reinvigorate our efforts if we are to preserve our legitimacy and achieve greater impact in the years ahead?

This question is all the more urgent given the significant challenges facing the broader human rights community globally. Former UN High Commissioner for Human Rights, Zeid Ra'ad al-Hussein, in 2018 stressed the need to “mobilize a much broader community to defend human rights with our fierce and passionate commitment” and prevent the erosion of “the vital, life-saving importance of human rights for the daily lives and global future of our fellow human beings”.⁹²

There is perhaps a dual challenge for the next ten years. On the one hand, to become more focused and achieve clear outcomes that demonstrably benefit vulnerable individuals and groups. This means a tougher edge of accountability, stronger laws, better implementation, ending impunity, supporting human rights defenders, and in particular those that hold business to account. On the other hand, there is the need to integrate human rights perspectives into broader systemic approaches, in particular those that measure “ESG” (Environment, Social, Governance) across business as a whole and especially approaches that align with the UN Sustainable Development Goals and with strategies to confront the climate emergency. All too often human rights concerns are pushed to the edge of sustainability commitments, and this must not be replicated as the business and human rights movement aligns and integrates into ESG.

Governments across the board are falling short of expectations when it comes to business and human rights, and showing limited will to lead in the absence of voter pressure. More effective strategies are needed to ensure that governments incentivise frontrunners and punish free-riders. That requires making business and human rights messages and approaches more relevant to debates on a broader range of issues from climate change to fair taxation to economic and trade policies. To do otherwise would be an abrogation of the imperative to address issues where business activities affect people's dignity and wellbeing. The business and human rights discourse offers an invaluable lens largely absent from these and other discourses. One observation that has been made about business and human rights is that the governmental, business and NGO communities have grown in parallel but not often enough together – and that there has been a lack of accountability, and willingness to challenge each other while showing respect between all three.

Greater public outreach will be critical in order to generate popular understanding and interest in the subject and galvanise democratic demand for government action. There has always been hostility to the human rights agenda in certain contexts. In truth, in most countries and across most sections of society people remain largely ignorant about their rights and the international standards in place that governments have signed up to observing. Few people in business understand the broad range of rights, and workers and communities where corporate harms are taking place often struggle to articulate specific claims against corporate harms. The vast majority of the world's population has no idea what the business and human rights agenda is about, and the lack of connection with those the

92 <http://www.unis.unvienna.org/unis/en/pressrels/2018/unisinf540.html>

movement claims to represent is one of its greatest weaknesses. More efforts are needed to translate the moral force of human rights arguments into a language that resonates both with those working in business, and the wider public.

There is a time and place for using technical language to deal with technical issues, but only after a compelling argument has been made and narratives have been used to draw new audiences into the discussion. We need to empower workers and other impacted groups, and bring in students and young activists on all continents as well as the next generation of entrepreneurs in start-up companies. To do this, focusing less on the nuts and bolts of reporting requirements, and more about people's dignity in the face of corporate abuses is critical.

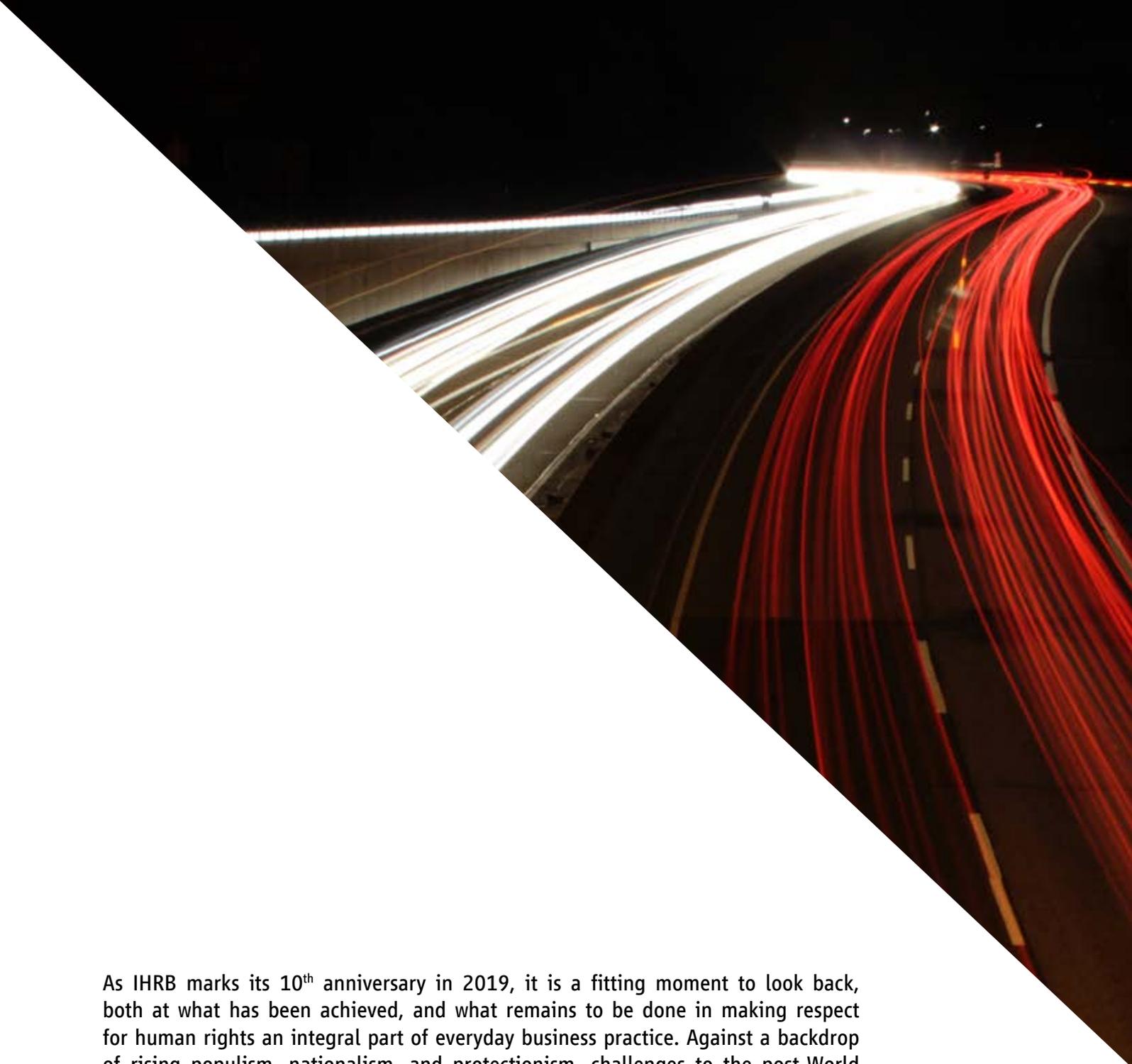
There is clearly scope for connecting with a wider range of constituencies addressing questions of global inequality and good governance. The business and human rights perspective was largely absent in the immediate aftermath of the 2008 financial crash, but now that financial leaders are voicing their own concerns, the time has come for business and human rights advocates to engage more proactively with potential allies on questions relating to the sustainability of the economic system that provides the backdrop to our work. More can be done as well to forge strategic partnerships with other movements like the global women's movement and those specialising on LGBTQI+ and child rights. Being more inclusive of those operating in all regions and at the grassroots is also critical in moving the agenda forward.

Continuing to invest in research and experimentation with new tools and approaches will also be essential in knowing how best to meet a whole variety of human rights challenges in multiple sectors, geographies and contexts over the next decade. Investments in peer-to-peer learning, and to understand how bottom-up initiatives can be supported and permeate global discussions must also be prioritised in the time ahead.

One example would be to deepen understanding and commitments on concepts that straddle the human rights and climate change agendas: such as climate justice and just transition. We urgently need evidence-based approaches that demonstrate the human rights impacts of adaptations away from high-carbon industries toward low-carbon technologies both in terms of jobs but also the wider impacts on communities. This is not to put a break on climate action but instead to put people at the heart of all decisions. IHRB has been amongst those who have developed sector-wide human rights impact assessment methodologies (in countries such as Colombia and Myanmar) that could be adapted to just transition strategies and initiatives.

The need to develop indicators and strengthen standards is a related challenge. Such standards will help make the case for mandatory human rights due diligence and greater corporate accountability, as well as give recognition to those companies serious about improving their human rights performance. This is ever more important in a world where populist messaging is being thrown about with impunity. It is essential as well if we are to make human rights a pre-competitive issue in trade and investment decisions.

A hallmark of any social movement is a shared analysis of the roots of a particular problem, injustice or set of conditions that have marginalised and disempowered part of society, and the changes they seek. While acknowledging the diversity of views that exist within the business and human rights community, as well as the significant progress that has been made, perhaps the time has come to invite a new conversation, one that is open to all interested in reflecting on current ways of working, and exploring where more could be done to support common goals. IHRB stands ready to work with others to bring the business and human rights community together for such discussions.



As IHRB marks its 10th anniversary in 2019, it is a fitting moment to look back, both at what has been achieved, and what remains to be done in making respect for human rights an integral part of everyday business practice. Against a backdrop of rising populism, nationalism, and protectionism, challenges to the post-World War II multilateral system, and the undermining of the international human rights architecture that has been built up for over 70 years, this report not only reflects on the past, but also looks ahead.

It traces decisive stepping stones in the business and human rights journey, highlighting the work of influential figures and initiatives. Recent developments and the current state of play are also examined, as are potential priorities as new opportunities and threats become clear. We hope these ideas will encourage further dialogue and new ideas for action.