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MAPPING THE MOVEMENT

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Mapping The Movement: The Business And Human Rights Regulatory Framework

Justine Nolan

1. INTRODUCTION

Traditionally, responsibility for protecting and advancing respect for human rights has been assumed to be the duty of the state (national governments), with rules drawn predominantly from international treaties that might then be translated into national laws, such as health and safety or anti-discrimination legislation. It is only quite recently that discussion has expanded to focus on the human rights responsibilities of companies. In response to the evolution of the global business and human rights agenda in the last three to four decades, private (or public-private) regulation¹ has become a central means of driving consensus on how corporations can and should advance respect for (and sometimes protect) human rights. International law and its state-centric framework for protecting rights is proving inadequate to stem and redress corporate rights violations and has led to protection or governance gaps.

Writing in 2008, then United Nations (UN) Special Representative for Business and Human Rights (SRSG), John Ruggie noted that “the root cause of the business and human rights predicament today lies in the governance gaps created by globalization – between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences.”² That is, corporations often operate in countries that do not have the capacity or will to protect the rights of those within their jurisdiction; as a result, their activities are difficult to monitor and regulate, and wrongs often remain without redress. All around the global marketplace, non-state actors such as non-government organizations (NGOs), international institutions, unions, companies, multi-stakeholder groups, and industry bodies, have stepped in to develop governance mechanisms that attempt to fill such gaps.³

The adoption by the UN Human Rights Council in 2011 of the Guiding Principles on Business and Human Rights⁴ (Guiding Principles) signalled acceptance of the notion that corporate responsibility to respect human rights exists independently of, and as a complement to, states’ duties to protect human rights. While the Guiding Principles provide a useful foundation for future action, many stakeholders were already involved in developing non-state based regulatory initiatives – such as the Fair Labor Association or the Global Network Initiative – to develop industry standards, metrics, and implementing procedures that give substantive content to corporate human rights responsibilities. This transfer or sharing of regulatory authority between states and non-state actors utilizes a combination of hard and

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

² Human Rights Council, “Protect, Respect and Remedy: a Framework for Business and Human Rights,” Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, UN Doc. A/HRC/8/5 (7 April 2008), para. 3.

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

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

soft laws⁵ to establish relevant standards for corporate activity, including compliance mechanisms to monitor implementation of these standards.

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

2. THE HUMAN RIGHTS FRAMEWORK AND ITS TRADITIONALLY STATE-CENTRIC FOCUS

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

2.1 *Universal Declaration of Human Rights*

The Universal Declaration of Human Rights (UDHR) lists 30 substantive human rights that are promulgated as a common standard of achievement for all peoples and all nations: every “individual and organ of society” shall strive by teaching and education to promote respect for these rights and by progressive measures secure their universal and effective recognition and observance.⁷ Motivated by the experiences of the preceding World Wars, the UDHR was the first time that countries agreed on a comprehensive statement of inalienable human rights. The UDHR is expressed entirely in terms of entitlements for individuals and peoples rather than obligations on states or other entities. As a declaration of the UN General Assembly, it does not create legal obligations of itself. Nevertheless, the UDHR is frequently cited as the source of human rights obligations that corporations are urged to follow.

The expression “every individual” in the UDHR can be taken to include juridical persons. Thus “every individual and organ of society” excludes no one, including

⁵ Hard law refers to actual binding legal instruments and laws. By contrast, “there is no entrenched definition of what constitutes soft law, in this context it might commonly include instruments as diverse as those internationally formulated (other than a treaty) that contain ‘principles, norms, standards or other statements of expected behaviour’ but also widely accepted codes of conduct that have been developed by a group of stakeholders as a mechanism to prevent corporate rights abuses”: J. Nolan, “Refining the Rules of the Game: The Corporate Responsibility to Respect Human Rights” (2014) 30(78) *Utrecht Journal of International and European Law* 7, 9. See also D. Shelton, “Normative Hierarchy in International Law” (2006) 100(2) *American Journal of International Law* 291, 319; J. Ellis, “Shades of Grey: Soft Law and the Validity of Public International Law” (2012) 25(2) *Leiden Journal of International Law* 313, 334; and D. Vogel, “Private Global Business Regulation” (2008) 11 *Annual Review of Political Science* 261, 262, who refers to civil regulation as soft law and defines it as “socially focused voluntary global business regulations.”

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

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

corporations.⁸ Furthermore, the phrase “every organ of society” indicates that the human rights in the UDHR are to be respected, protected and promoted not only by states but also by all social entities capable of affecting the enjoyment of human rights, including corporations.⁹

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

2.2 *International Human Rights Treaties*

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

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

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

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

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

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

¹³ The core ILO Conventions are as follows: Convention concerning Forced or Compulsory Labour (C29), Geneva, 28 June 1930, in force 1 May 1932; Convention concerning Freedom of Association and Protection of the Right to Organise (C87), San Francisco, 9 July 1948, in force 4 July 1950; Convention concerning the Application of the Principles of the Right to Organise and to Bargain Collectively (C98), Geneva, 1 July 1949, in force 18 July 1951; Convention concerning Equal Remuneration for Men and Women Workers for Work of Equal Value (C100), Geneva, 29 June 1951, in force 23 May 1953; Convention concerning the Abolition of Forced Labour (C105), Geneva, 25 June 1957, in force 17 January 1959; Convention concerning Discrimination in Respect of Employment and Occupation (C111), Geneva, 25 June 1958, in force 15 June 1960; Convention concerning Minimum Age for Admission to Employment (C138), Geneva, 26 June 1973, in force 19 June 1976; Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor (C182), Geneva, 16 June 1999, in force 19 November 2000.

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

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

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

¹⁷ Convention on the Rights of the Child, New York, 20 November 1989, in force 2 September 1990, 1577 UNTS 3. See further Committee on the Rights of the Child, “Report on the Thirty-First Session,” UN Doc.

The state-centric framework of international human rights law emphasizes the primary responsibility of governments to protect human rights while remaining partially blind to the opportunity to speak more directly to influential non-state actors including corporations. The size, revenues, and global reach of some corporations now means that their potential power to impact communities is commensurate with those of states; yet they are not directly bound by international human rights laws.¹⁹ More recent treaties, and occasionally treaty bodies, have begun to refer more directly to the role of states in specifically preventing human rights abuses by corporations.²⁰ It is commonly assumed that these treaties do not themselves create direct obligations for corporations²¹ but instead require states to regulate and adjudicate the acts of corporations in order to fulfil their duty to protect human rights as outlined in the treaties. Thus, a state failure to ensure compliance by private employers with basic international (or comparable national) labor standards could amount to a violation of the right to work or to just and favourable working conditions. However, the fact that a treaty imposes an obligation on a state to protect private persons from the actions of another does not automatically enable an individual to seek legal recourse from another private actor (such as a company) for violating his or her rights. Without direct obligations for companies, any allegation of a violation of human rights needs to be framed in terms of the responsibility of the state to protect human rights from violations by private actors.

2.2.1 A Business and Human Rights Treaty?

The resolution adopted by the UN Human Rights Council in 2014²² to explore the development of a business and human rights treaty raises anew the issue of whether the

CRC/C/121 (11 December 2002), paras. 630-53 (discussing Day of General Discussion, “The Private Sector as a Service Provider and its Role in Implementing Child Rights,” 20 September 2002).

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

¹⁹ V. Trivett, “25 US Mega Corporations: Where They Rank If They Were Countries,” *Business Insider*, 27 June 2011, <http://www.businessinsider.com/25-corporations-bigger-tan-countries-2011-6?op=1&IR=T>.

²⁰ For example, the Convention on the Rights of Persons with Disabilities provides that states parties have an obligation to take all appropriate measures to eliminate discrimination on the basis of disability by any person, organisation or private enterprise: Convention on the Rights of Persons with Disabilities, New York, 13 December 2006, in force 3 May 2008, 2515 UNTS 3, art. 4(e). In 2004 the UN Human Rights Committee, commenting on the nature of a state’s obligations under the ICCPR, affirmed that the obligation is only discharged if individuals are protected by the state, not just against human rights violations by its agents, but also against acts committed by private persons or entities: Human Rights Committee, “General Comment 31, The Nature of the General Legal Obligation on States Parties to the Covenant,” UN Doc.

CCPR/C/21/Rev.1.Add.13 (29 March 2004), para. 8. Similarly, General Comments from the UN Committee on Economic, Social and Cultural Rights addressing the rights to work, health and water confirm the state’s duty to protect against abuse by corporations in the context of economic, social and cultural rights: Committee on Economic, Social and Cultural Rights, “General Comment 18, Article 6: the equal right of men and women to the enjoyment of all economic, social and cultural rights,” UN Doc. E/C.12/GC/18 (24 November 2005), para. 35; Committee on Economic, Social and Cultural Rights, “General Comment 15, The right to water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights),” UN Doc. E/C.12/2002/11 (20 January 2003), para. 23; Committee on Economic, Social and Cultural Rights, “General Comment 14, The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights),” UN Doc. E/C.12/2000/4 (11 August 2000), para. 35.

²¹ For an alternative view arguing that treaty obligations do apply directly to corporations see D. Bilchitz, “A chasm between ‘is’ and ‘ought’? A critique of the normative foundations of the SRS’s Framework and the Guiding Principles” in S. Deva and D. Bilchitz (eds.), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge UK: Cambridge University Press, 2013), p.107.

²² Human Rights Council, “Elaboration of an internationally legally binding instrument on transnational corporations and other business enterprises with respect to human rights,” UN Doc. A/HRC/26/L.22/Rev.1 (25 June 2014).

international human rights law framework can accommodate corporate liability. Questions arise as to the necessity for a treaty, the potential effectiveness of a treaty and the theoretical and practical feasibility of establishing a framework to hold hundreds of thousands of corporations to account.²³ The current debate harks back to that which began in the 1970s (with respect to the development of a UN Draft Code to regulate transnational corporations) and perhaps illustrates how little has changed in certain respects. This issue is discussed in more detail in Chapter 2.3 and 2.4.

2.3 ILO Conventions and Guidelines

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

The ILO (the establishment of which predates the UN by more than 25 years) liaises closely with UN charter-based and treaty-based bodies, and reports on issues such as child labor, discrimination, forced labor, migrant workers, and freedom of association. Although the essence of both the UN and ILO compliance mechanisms is based on dialogue and persuasion, the systems of supervision (ILO) and monitoring (UN) differ. The ILO’s unique tripartite structure aims to ensure the full participation of not only governments but also employer and employee representatives in the drafting and implementation of labor standards. Tri-part governance is not a panacea, however, and its effectiveness relies on the ability of each of the parties to negotiate as independent entities. In some regions of the world, “industrial relations law and practice are closely bound up with industrialisation and development strategies that are generally accompanied by state control over labour unions in order to maintain the stability that national governments may feel is needed for rapid economic development.”²⁵ China is but one example of a country where the independence of the three delegate factions to the ILO is compromised.

International labor standards take the form of conventions (legally binding treaties) that may be ratified by member states, which are then monitored for compliance. Recommendations (non-binding guidelines) may supplement a particular convention or provide more general guidance on labor standards and their implementation. In the nearly 100 years since its creation, the ILO has drafted numerous conventions and recommendations covering a diverse range of topics but it has been less effective in enforcing standards than creating them. The ILO has enunciated four “core labor standards” – freedom of association and collective bargaining, elimination of discrimination, elimination of forced labor, and elimination of child labor – which are linked to eight conventions, commonly referred to as the ILO’s fundamental or core conventions.²⁶ Like international human rights treaties, ILO conventions legally and directly bind states, rather than business. However, in 1977 the ILO

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

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

²⁵ W.R. Simpson, “The ILO and tripartism: some reflections,” (September 1994) *Monthly Labor Review* 40.

²⁶ See above n. 13.

attempted to speak more directly to business and launched its Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy.²⁷ The Declaration aims to provide guidance concerning how corporations can positively contribute to economic and social progress. It encourages companies to implement labor rights but does not contain any enforcement mechanisms to ensure they do so.

Snapshot

The ILO and the Cambodian Garment Sector

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

Monitoring reports concerning the labor standards have been used by the US government to assess quota increases, as well as by global corporate buyers to determine where they should place their orders. Quotas were eliminated in 2005, but the ILO program continues with the ongoing support of the Garment Manufacturers' Association in Cambodia, international buyers, and unions; however, concerns have been raised about progress since 2005.³⁰ Key to the continuation of the program are global buyers who are conscious of their own reputations and who, "in the continuing absence of a [local] well-funded labor inspectorate ... appear to be driving improved compliance with ILO labor standards."³¹

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

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

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

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

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

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

factories in part due to the fact that with the elimination of the quotas in 2005, the program became “non-binding and unenforceable.”³² Some argue that “by implementing non-binding programmes that offer carrots without wielding a stick, poverty wages and precarious work continue to be the norm in Cambodia’s garment factories.”³³

2.4 National Laws

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

Snapshot

US Foreign Corrupt Practices Act

When looking for examples of how a state might reasonably regulate corporate activities beyond its borders, one model of extraterritorial legislation that has had a widespread impact on the private sector is the US Foreign Corrupt Practices Act (FCPA).³⁸ Adopted in 1977,³⁹

³² D. Arnold, “Better Work or ‘Ethical Fix’? Lessons from Cambodia’s Apparel Industry,” Global Labour Column, <http://column.global-labour-university.org/2013/11/better-work-or-ethical-fix-lessons-from.html>.

³³ Ibid.

³⁴ Guiding Principle No. 1.

³⁵ The Commentary to Guiding Principle No. 2 states: “At present States are not generally required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction. Nor are they generally prohibited from doing so, provided there is a recognized jurisdictional basis. Within these parameters some human rights treaty bodies recommend that home States take steps to prevent abuse abroad by business enterprises within their jurisdiction. There are strong policy reasons for home States to set out clearly the expectation that businesses respect human rights abroad, especially where the State itself is involved in or supports those businesses. The reasons include ensuring predictability for business enterprises by providing coherent and consistent messages, and preserving the State’s own reputation.”

³⁶ See above n. 20.

³⁷ D. Augenstein and D. Kinley, “When human rights ‘responsibilities’ become ‘duties’: the extra-territorial obligations of states that bind corporations” in Deva and Bilchitz, *Human Rights Obligations of Business*, p.271.

³⁸ (1977) 15 USC §§ 78dd-1 et seq.

³⁹ A number of subsequent amendments have been made to the FCPA including those in the Omnibus Trade and Competitiveness Act of 1988, which arguably weakened the FCPA by enacting “a ‘knowing’ standard in order to find violations of the Act. This standard was intended to encompass ‘conscious disregard’ and ‘willful blindness.’ The amendments provided certain defenses against finding violations of the act, such as that the gift is lawful under the laws of the foreign country and that the gift is a bona fide and reasonable expenditure or for the performance or execution of a contract with the foreign government.” M.V. Seitzinger, *Foreign Corrupt*

the FCPA has influenced the way in which US businesses operate abroad, and has changed the global business environment more generally with respect to corruption. Setting a precedent for how a legislative model can reverberate globally, the FCPA was followed into operation by the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, and the UN Convention Against Corruption,⁴⁰ which established international standards for combating corruption. Companies have responded to these global anti-corruption laws by developing due diligence programs to proactively identify potential risks. The global implementation of laws to combat corruption is a useful model for assessing how greater rigor could be brought to bear in applying international human rights standards to business, and the mandated due diligence requirements showcase how the Guiding Principles could be hardened into a national legislative model with extraterritorial reach.

Another way states can “regulate” corporate activities that take place outside their territory is to mandate increased transparency in global business operations. For example, s. 1502 of the US Dodd-Frank Act requires all listed companies to report on the sources of minerals used in their products that originate from the Democratic Republic of Congo (DRC) or adjoining countries.⁴¹ The purpose of this provision is to provide greater transparency about how the trade in minerals is potentially fuelling and funding the armed struggle in the DRC; functionally, it relies on the adverse reputational impact of such disclosure rather than mandating penalties for actually sourcing minerals from conflict-afflicted regions.

Reporting requirements are a first step in linking transparency with accountability, but much depends on the quality of the reports and to what use the information is then put. A study of the first set of Conflict Minerals Reports submitted to the Securities Exchange Commission up to June 2014 argues that these reports exhibited a low level of compliance with due diligence requirements and identified several obstacles to achieving broader compliance, including that: “(i) international norms on supply chain due diligence are in their infancy; (ii) the proliferation of certification standards and in-region sourcing initiatives are still evolving and often competing; and (iii) inadequate local security and weak governance inhibit the mapping of mineral trade and the tracing of minerals in the region.”⁴²

Ultimately, however, laws – whether national or international – are only as strong as their enforcement capacity. In many countries, labor laws, in particular, are hampered by the inability or unwillingness of the state to enforce them. For example, in 2013 the US “federal

Practices Act (FCPA): Congressional Interest and Executive Enforcement (Congressional Research Service, 7 February 2012), <https://www.fas.org/sgp/crs/misc/R41466.pdf>.

⁴⁰ OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (21 November 1997); UN Convention Against Corruption, 31 October 2003, in force 14 December 2005, 2349 UNTS 41.

⁴¹ Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010). In addition, s. 1504 of the Act addresses financial transparency by requiring all listed oil and mining companies to disclose the revenues they pay to governments worldwide. See further A.P. Ewing in this volume, “Mandatory Human Rights Reporting,” p. [x].

⁴² G.A. Sarfaty, “Shining Light on Global Supply Chains” (2015) 56 *Harvard International Law Journal* (forthcoming), citing US Government Accountability Office, *SEC Conflict Minerals Rule: Information on Responsible Sourcing and Companies Affected* (Report to Congressional Committees, July 2013) 21. In addition, there are those who argue that the costs of such transparency initiatives (including funding the reporting and due diligence requirements and potentially directing trade away from developing countries in need of foreign investment) outweigh any potential benefits. For a summary of the pros and cons of such arguments see “Transparency, Conflict Minerals and Natural Resources: What You Don’t Know About Dodd-Frank,” Transcript of a discussion hosted by the Brookings Institution and Global Witness, 13 December 2011, <http://www.brookings.edu/research/opinions/2011/12/20-debating-dodd-frank-kaufmann>.

Occupational Health and Safety Administration ha[d] just two thousand inspectors to monitor over 8 million workplaces in the United States, meaning that it [could] inspect each workplace only once every 131 years.”⁴³ In 2013, the Bangladeshi government identified “the need to hire 800 additional labor inspectors to conduct factory inspections. Almost two years later, the government had created 392 new positions (almost half of the target number of inspectors). However, as of October 2014, the government had only been able to fill 50 of these positions.”⁴⁴ Likewise, reporting regulations with no sanctions attached for non-compliance are likely to result in partial compliance.⁴⁵ Such regulatory enforcement gaps have led to increased reliance on tools developed by non-state actors to monitor and report on workplace conditions.

3. INTERNATIONAL INSTITUTIONAL INITIATIVES

There have been a variety of attempts, particularly since the mid-1970s, to use “soft law” to regulate the impact of business practices on human rights, for instance, through multi-stakeholder guidelines, declarations, or codes of conduct. The institutional initiatives highlighted below are examples of attempts by various international organizations to harness the power of business to positively impact human rights by providing broad frameworks that assist companies in understanding what constitutes responsible business conduct. The utility of these initiatives is not their ability to act as a tool of legal accountability or as a means of providing sector specific advice on how to respect and protect human rights; rather, the initiatives engage with companies to assist them to better understand the general contemporary responsibilities of business with respect to human rights and in promoting ethical leadership on human rights.

3.1 *The UN Draft Code of Conduct on Transnational Corporations*

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

⁴³ P.J. Spiro, “Constraining Global Corporate Power: A Short Introduction” (2013) 46 *Vanderbilt Journal of Transnational Law* 1101, 1116, citing R. Rabinowitz, “OSHA Has a Big Job, on a Tiny Budget,” *The New York Times*, 29 April 2013, <http://www.nytimes.com/roomfordebate/2013/04/28/where-osha-falls-short-andwhy/osha-has-a-big-job-on-a-tiny-budget>.

⁴⁴ D. Baumann-Pauly, S. Labowitz and N. Banerjee, “Closing Governance Gaps in Bangladesh's Garment Industry – The Power and Limitations of Private Governance Schemes,” 12 March 2015, p.4, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2577535.

⁴⁵ Amnesty International and Global Witness, *Digging for Transparency: How US companies are only scratching the surface of conflict minerals reporting* (April 2015), <https://www.globalwitness.org/campaigns/democratic-republic-congo/digging-transparency/>.

3.2 *The Organisation for Economic Cooperation and Development Guidelines for Multinational Enterprises*⁴⁶

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

Snapshot

United Kingdom (UK) National Contact Point and Gamma

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

The UK NCP made a first assessment of the complaint in 2013 and offered the parties mediation but they were unable to reach agreement. In 2015 the UK NCP issued its findings⁵³

⁴⁶ OECD Guidelines For Multinational Enterprises (2011).

⁴⁷ Ibid, para. 1.

⁴⁸ See L.C. Backer, “Rights and Accountability in Development (‘RAID’) v DAS Air and Global Witness v Afrimex: Small Steps Towards an Autonomous Transnational Legal System for the Regulation of Multinational Corporations” (2009) 10(1) *Melbourne Journal of International Law* 258. See further K. Genovese in this volume, “Access to Remedy: Non-Judicial Grievance Mechanisms,” p.[x].

⁴⁹ For a database of the complaints see OECD Guidelines for Multinational Enterprises, Database of specific instances, <http://mneguidelines.oecd.org/database/>.

⁵⁰ See OECD Watch, www.oecdwatch.org.

⁵¹ United Kingdom Department for Business Innovations & Skills, “Initial Assessment by the UK National Contact Point for the OECD Guidelines for Multinational Enterprises: Complaint by Privacy International and Others against Gamma International UK Ltd,” June 2013, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/208112/bis-13-947-complaint-from-privacy-international-and-others-against-gamma-international-uk-ltd.pdf.

⁵² Ibid, para. 41.

⁵³ UK National Contact Point for the OECD Guidelines for Multinational Enterprises, “Privacy International & Gamma International UK Ltd: Final Statement after Examination of Complaint,” December 2014,

that Gamma's actions were not consistent with the general obligations in the Guidelines to respect human rights, that it had failed to develop a company policy on human rights, and it did not conduct appropriate due diligence.

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

3.3 UN Global Compact

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

While the Global Compact has been successful in attracting a large number of participants, now estimated at more than 12,000 participants, including over 8000 businesses,⁵⁵ its attempt to build a broad and inclusive tent has attracted some criticism, including with respect to the generality of its provisions, its participants' lack of commitment, and the limited accountability that participation entails.⁵⁶ The Global Compact is not a vehicle to push companies beyond their comfort zone in confronting their human rights responsibilities; nor is it a tool for holding corporations to account for human rights violations. It is an educational initiative that raises awareness around business and human rights issues and, as such, can be a useful basis for peer learning. The Global Compact was significant for squarely placing human rights on the corporate agenda and welcoming business into the fold of the UN but arguably the Global Compact has never reached its full potential as a learning platform and legitimately attracts criticism that it has instead been captured by "big business."⁵⁷

Snapshot

The Global Compact's Principles

Human Rights

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/402462/BIS-15-93-Final_statement_after_examination_of_complaint_Privacy_International_and_Gamma_International_UK_Ltd.pdf.

⁵⁴ J. Lee, "UN Global Compact Expels Hundreds for Non-Compliance," Triple Pundit, 22 January 2015, <http://www.triplepundit.com/2015/01/un-global-compact-expels-members-non-compliance/> (reporting that in 2014 the UN Global Compact expelled 657 companies for not submitting their Communication on Progress).

⁵⁵ UN Global Compact, Participants & Stakeholders, <https://www.unglobalcompact.org/ParticipantsAndStakeholders/index.html>.

⁵⁶ S. Deva, "Global Compact: A Critique of UN's 'Public-Private' Partnership for Promoting Corporate Citizenship" (2006) 34 *Syracuse Journal of International Law & Commerce* 107; J. Nolan, "United Nations' Compact with Business: Hindering or Helping the Protection of Human Rights" (2005) 24(2) *University of Queensland Law Journal* 445.

⁵⁷ A. Rasche, "'A Necessary Supplement' – What The United Nations Global Compact Is And Is Not" (2009) 48(4) *Business & Society* 511.

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

Labour Standards

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

Environment

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

Anti-Corruption

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

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

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

⁵⁸ Sub-Commission on the Prevention of Discrimination and Protection of Minorities, “The relationship between the enjoyment of economic, social and cultural rights and the right to development, and the working methods and activities of transnational corporations,” UN Doc. E/CN.4/Sub.2/Res/1998/8 (20 August 1998), para. 4.

⁵⁹ Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, UN Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003).

⁶⁰ Sub-Commission on the Promotion and Protection of Human Rights, “Responsibilities of transnational corporations and other business enterprises with regard to human rights,” Res. 2003/16 (13 August 2003), in Sub-Commission on the Promotion and Protection of Human Rights, “Report of the Sub-Commission on the Promotion and Protection of Human Rights on its Fifty-Fifth Session,” UN Doc. E/CN.4/Sub.2/2003/43 (20 October 2003), pp. 51-53.

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

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

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

The Norms provoked heated debate between business, government, human rights organisations, and international and corporate lawyers. A number of key business organisations objected to the Norms on a variety of fronts and lobbied strongly against any moves by the Commission to adopt the Norms.⁶⁵ In contrast, many NGOs stridently welcomed the Norms.⁶⁶ The main objections to the Norms were documented in a 2005 report prepared by the UN Office of the High Commissioner on Human Rights.⁶⁷

Critics of the Norms argued that: the legal responsibilities placed on business were more extensive than those placed on states; the Norms privatized the protection of human rights by shifting the responsibility from states to business; the implementation provisions were unworkable; some of the standards vague and duplicative of other initiatives; and the binding nature of the Norms could be counter-productive, potentially jeopardizing other

⁶¹ Commission on Human Rights, “Report on the sixtieth session (15 March – 23 April 2003),” UN Doc. E/CN.4/2004/127, Part I, ch. 42, p.28, para. (c).

⁶² Commission on Human Rights, “Human rights and transnational corporations and other business enterprises,” Human Rights Resolution 2005/69, UN Doc. E/CN.4/RES/2005/69 (20 April 2005).

⁶³ J.G. Ruggie, Remarks delivered at a Forum on Corporate Social Responsibility Co-Sponsored by the Fair Labor Association and the German Network of Business Ethics, Bamberg, Germany, 14 June 2006, <http://www.reports-and-materials.org/Ruggie-remarks-to-Fair-Labor-Association-and-German-Network-of-Business-Ethics-14-June-2006.pdf>.

⁶⁴ Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, Preamble, 3rd Recital.

⁶⁵ Commission on Human Rights, “Joint Views of the IOE and ICC on the draft norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights,” Joint written statement submitted by the International Chamber of Commerce and the International Organization of Employers, non-governmental organizations in general consultative status, UN Doc. E/CN.4.Sub.2.2003/NGO/44 (29 July 2003), <http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/918bbd410b5a8d2cc1256d78002a535a?Opendocument>. See also D. Kinley, J. Nolan and N. Zerial, “Reflections on the United Nations Human Rights Norms for Corporations” (2007) 25(1) *Companies and Securities Law Journal* 30.

⁶⁶ Amnesty International, *The United Nations Human Rights Norms For Business: Towards Legal Accountability* (2004). See also Human Rights Watch, *Nongovernmental Organizations Welcome the New UN Norms on Transnational Business* (2003).

⁶⁷ Commission on Human Rights, “Report of the United Nations High Commissioner on Human Rights on the responsibilities of transnational corporations and related business enterprises with regard to human rights,” UN Doc. E/CN.4/2005/91 (15 February 2005), paras. 21-22.

voluntary efforts such as the UN Global Compact, which was established during the Norms' drafting process.

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

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

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

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

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

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

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

⁶⁸ Human Rights Council, "Human rights and transnational corporations and other business enterprises," UN Doc. A/HRC/RES/17/4 (6 July 2011), para. 6(a).

⁶⁹ D. Bilchitz and S. Deva, "The human rights obligations of business: a critical framework for the future" in Deva and Bilchitz, *Human Rights Obligations of Business*, p.2.

⁷⁰ R.C. Blitt, "Beyond Ruggie's Guiding Principles on Business and Human Rights: Charting an Embrasive Approach to Corporate Human Rights Compliance" (2012) 48(1) *Texas International Law Journal* 33.

⁷¹ The Economist Intelligence Unit, "The Road from Principles to Practices," p.4.

⁷² *Ibid*, p.5.

of the critiques of the Guiding Principles, which argue that the broadly framed principles encourage, but do not oblige, companies to respect human rights.⁷³ Other criticisms⁷⁴ of the Guiding Principles centre on the following issues:

- **Extraterritorial protection of human rights.** One of the key issues regarding state enforcement of human rights (pillar 1) is the potential to protect human rights extraterritorially (that is, outside a state's territory). The fact that states have a duty to protect from third party violations is non-controversial. How far that obligation extends and whether it should be applied extraterritorially is far less settled. The Guiding Principles note that "States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises."⁷⁵ The Commentary to Guiding Principle No. 2 notes the possibilities open to states to broaden and deepen the scope of the duty to protect but does not go so far as to suggest states are obliged to act in this regard. This approach does not reflect increasing international recognition, including by UN treaty bodies,⁷⁶ of the legal obligation on states to take action to prevent abuses by their companies overseas.
- **Flexibility and ambiguity around the commitment for companies to respect human rights.** The Guiding Principles have been criticized for providing "far too much wiggle room [and including] too many 'shoulds' in place of 'shalls'."⁷⁷ The language used in the Guiding Principles when framing the corporate responsibility to respect human rights (pillar 2) stems from a social expectation (not legal obligation) to respect human rights and this is reflected in the recommendatory nature of the language employed.⁷⁸ The flexibility of the language may be welcomed by some stakeholders to allow for specific idiosyncratic tailoring of responses at a corporate level; however, the looseness of the language may also invite inaction and a business-as-usual approach from companies that remain hesitant about their responsibility to act.
- **Access to remedy must be mandated.** The Guiding Principles provide valuable guidance for developing state and non-state based systems to provide access to remedy (pillar 3) for victims of corporate abuses. As the Guiding Principles note, the concept of access to remedy is multi-pronged and includes judicial and non-judicial mechanisms. However, as one commentator observed back in 1999, "only a selected few among private corporations are likely to willingly submit to new responsibilities without being legally compelled to do so."⁷⁹ More than a decade later, this comment

⁷³ Human Rights Watch, "UN Human Rights Council: Weak Stance on Business Standards", 16 June 2011, <http://www.hrw.org/news/2011/06/16/un-human-rights-council-weak-stance-business-standards>.

⁷⁴ See generally Deva and Bilchitz, *Human Rights Obligations of Business*.

⁷⁵ Guiding Principle No. 1.

⁷⁶ See above n. 20.

⁷⁷ C. Jochnick, "Making headway on business and human rights," Oxfam America, *The Politics of Poverty*, 11 February 2011, <http://politicsofpoverty.oxfamamerica.org/2011/02/making-headway-on-business-and-human-rights/>.

⁷⁸ For example, Guiding Principle No. 11 ("Business enterprises ... *should address* adverse human rights impacts ..."); Guiding Principle No. 13 ("The responsibility to respect human rights requires that business enterprises: ... (b) *Seek to* prevent or mitigate adverse human rights impacts"); Guiding Principle No. 23 ("In all contexts, business enterprises *should*: ... (b) *Seek* ways to honour the principles of internationally recognized human rights when faced with conflicting requirements"); or Guiding Principle No. 24 ("business enterprises *should first seek* to prevent") (emphasis added).

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

still rings true, particularly with respect to the provision of reparations for victims of corporate abuse. While the number of corporations prepared to adopt human rights policies may have risen, the limited mechanisms for enforcing such policies remain largely embedded in soft law that, unless hardened, will have a very limited effect in preventing future violations of human rights by corporations.

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

4. STAKEHOLDER INITIATIVES ON HUMAN RIGHTS

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

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

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

⁸⁰ Human Rights Council, “Protect, Respect and Remedy: a Framework for Business and Human Rights,” para. 7.

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

⁸² See, e.g., Worldwide Responsible Accredited Production, <http://www.wrapcompliance.org/>.

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

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

Like codes of conduct, IFAs can differ from company to company but they consistently reference the ILO core conventions. While some IFAs include monitoring mechanisms and some do not, their purpose is to provide a framework for labor negotiations to take place with a minimum floor. IFAs are generally distinguishable from other codes in the corporate responsibility field because they result from negotiation with international workers' representatives. The focus of IFAs on labor rights mean that they represent a strong possibility for protecting the rights of workers in far flung areas around the globe. However, they too can suffer from some of the same problems that beset codes of conduct, such as failures in implementation and a top-down approach that would be strengthened by greater connection to local organizing.⁸⁵

It is arguable that the increasing reliance on codes of conduct and/or stakeholder initiatives to regulate human rights is linked to the lack of better mechanisms, such as an enforceable international agreement or stronger state protection of human rights, though their popularity may also be construed as a tactic for avoiding government regulation. More positively, the use of these initiatives can also be seen as a deliberate strategic choice to involve key participants (particularly business) in developing solutions to business and human rights challenges. The attraction of adopting a code of conduct can be easily understood if the standards are viewed as containing only aspirational goals that aim for the best possible scenario with limited accountability if such goals are not met. But the simple adoption of a code by a company is very different from a commitment to be involved in an MSI with rigorous monitoring and reporting requirements or signing an IFA with a global

⁸³ See S. Jerbi in this volume, "Extractives and Multi-Stakeholder Initiatives," p.[x].

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

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

union. The reality is that, not unlike the global state-centric framework for enforcing international human rights law, such initiatives are only as strong as their participants choose to make them, and they do not apply to those that do not want to join them. However, stakeholder initiatives have emerged as an effective regulatory technique for addressing corporate impacts on human rights and are not only an important supplement to international and national laws but perhaps a more immediate and practicable mechanism for protecting human rights.

5. CONCLUSION

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

Activities in the last 30 to 40 years have seen significant advances in both the legal and quasi-legal basis for holding corporations to account for human rights violations. The steady evolution of a global social expectation that companies should respect international human rights standards, combined with the occasional foray by states in adopting an expansive extraterritorial approach to protecting rights, is changing the nature and possibility of developing a firmer basis for corporate legal accountability for human rights. The growth and depth of soft law stakeholder led initiatives that have developed around the theme of corporate responsibility have come about partly in recognition of the failure of legal regulation (both internationally and domestically) to hold corporations to account, but these soft law initiatives have become and will continue to be an important tool in attempting to prevent and remedy corporate rights violations.