

Business and Human Rights: The Evolving International Agenda

Author(s): John Gerard Ruggie

Source: *The American Journal of International Law*, Oct., 2007, Vol. 101, No. 4 (Oct., 2007), pp. 819-840

Published by: Cambridge University Press

Stable URL: <https://www.jstor.org/stable/40006320>

JSTOR is a not-for-profit service that helps scholars, researchers, and students discover, use, and build upon a wide range of content in a trusted digital archive. We use information technology and tools to increase productivity and facilitate new forms of scholarship. For more information about JSTOR, please contact support@jstor.org.

Your use of the JSTOR archive indicates your acceptance of the Terms & Conditions of Use, available at <https://about.jstor.org/terms>



JSTOR

Cambridge University Press is collaborating with JSTOR to digitize, preserve and extend access to *The American Journal of International Law*

CURRENT DEVELOPMENTS

BUSINESS AND HUMAN RIGHTS: THE EVOLVING INTERNATIONAL AGENDA

*By John Gerard Ruggie**

The state-based system of global governance has struggled for more than a generation to adjust to the expanding reach and growing influence of transnational corporations. The United Nations first attempted to establish binding international rules to govern the activities of transnationals in the 1970s.¹ That endeavor was initiated by developing countries as part of a broader regulatory program with redistributive aims known as the New International Economic Order.² Human rights did not feature in this initiative. The Soviet bloc supported it while most industrialized countries were opposed. Negotiations ground to a halt after more than a decade, though they were not formally abandoned until 1992.

“Soft law” approaches enjoyed broader political appeal. In 1976 the Organisation for Economic Co-operation and Development (OECD) adopted a set of Guidelines for Multinational Enterprises, and a year later the International Labour Organization (ILO) adopted a Tripartite Declaration of Principles Concerning Multinational Enterprises. Each was revised in 2000.³ Both reference the Universal Declaration of Human Rights (UDHR) and other international human rights standards.

Also in 2000, the United Nations Global Compact became operational. It is a voluntary initiative engaging companies and civil society, including labor, in promoting UN principles in

* Kirkpatrick Professor of International Affairs and Director, Mossavar-Rahmani Center for Business and Government, Kennedy School of Government, Harvard University; Affiliated Professor in International Legal Studies, Harvard Law School; United Nations Secretary-General’s Special Representative for Business and Human Rights (SRSG). For funding the research and consultations reported in this essay, I thank the governments of Canada, Belgium, Norway, Sweden, and the United Kingdom; the Friedrich Ebert Stiftung, the German Marshall Fund of the United States, and the United Nations Foundation; the Kennedy School’s Corporate Social Responsibility Initiative; and the United Nations Office of the High Commissioner for Human Rights. Harvard Law School also provided research support. Allens Arthur Robinson of Melbourne, Australia, provided pro bono legal research. My biggest debts are to my Geneva colleagues, Gerald Pachoud, on secondment from the Swiss Foreign Ministry, and Lene Wendland, of the High Commissioner’s Office; my Harvard-based legal research team, Rachel Davis, Amy Lehr, Michael Wright, and Vanessa Zimmerman; and Christine Bader, on secondment from BP. Beth Jenkins, Jonathan Kaufman, and Diego Quiroz Onate provided additional research assistance.

¹ UN Intergovernmental Working Group on a Code of Conduct, Draft UN Code of Conduct on Transnational Corporations, UN Doc. E/1990/94 (June 12, 1990).

² See generally Branislav Gosovic & John Gerard Ruggie, *On the Creation of a New International Economic Order*, 30 INT’L ORG. 309 (1976).

³ Organisation for Economic Co-operation and Development [OECD], Guidelines for Multinational Enterprises: Text, Commentary and Clarifications, OECD Doc. DAF/IME/WPG(2000)15/FINAL (2001), *available at* <[http://www.oilis.oecd.org/oilis/2000doc.nsf/LinkTo/daffe-ime-wpg\(2000\)15-final](http://www.oilis.oecd.org/oilis/2000doc.nsf/LinkTo/daffe-ime-wpg(2000)15-final)> [hereinafter OECD Guidelines]; International Labour Organization, Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (rev. Nov. 2000), 83 ILO OFF. BULL. (ser. A), No. 3 (2000).

the areas of human rights, labor standards, environmental protection, and, since 2004, anti-corruption.⁴ Focused on norm diffusion and the dissemination of practical know-how and tools, the Global Compact has become the world's largest corporate social responsibility initiative, with some three thousand participating companies and forty national networks. It is unique among such initiatives for its extensive involvement of developing-country companies.

Fueled by escalating reports of corporate human rights abuses, especially in the extractive sector and the footwear and apparel industries, the UN Sub-Commission on the Promotion and Protection of Human Rights (Sub-Commission), a subsidiary body of the then Commission on Human Rights composed of twenty-six more or less independent experts, established a working group on business and human rights in 1998.⁵ It was tasked with "mak[ing] recommendations and proposals relating to the methods of work and activities of transnational corporations in order to . . . promote the enjoyment of economic, social and cultural rights and the right to development, as well as of civil and political rights."⁶ In 2003 the working group produced the draft "Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights" (draft Norms).⁷

Written in treatylike language, the text comprises twenty-three articles setting out human rights standards for companies in areas ranging from international humanitarian law, through civil, political, economic, social, and cultural rights, to consumer protection and environmental practices. While acknowledging that states are the primary duty bearers in relation to human rights, it stipulates that transnational firms and other business enterprises, within their "spheres of activity and influence," have corresponding legal duties.⁸ It also requires that corporate compliance be monitored by national and international agencies, and victims provided with effective remedies.⁹

The Sub-Commission approved the text in 2003. According to their principal author, "The Norms are the first nonvoluntary initiative [in the area of business and human rights] accepted at the international level."¹⁰ But the story did not end there. The draft was then transmitted to the Commission on Human Rights (Commission), the intergovernmental parent body, for adoption at its next session in 2004.¹¹ And the Commission reacted coolly.

⁴ More information on the UN Global Compact is available at <<http://www.unglobalcompact.org>>. I helped establish the compact and had oversight responsibility for it during my tenure as UN assistant secretary-general (1997–2001); after I came to Harvard I continued to serve as Secretary-General Kofi Annan's special adviser for the compact until he appointed me to be SRSG for business and human rights in 2005.

⁵ The twenty-six members of the Sub-Commission are elected by the Commission, act in their personal capacity, and are mandated to undertake studies and make recommendations to the Commission.

⁶ UN Sub-Commission on Prevention of Discrimination and Protection of Minorities [its former name] Res. 1998/8, in Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on Its Fiftieth Session, UN Doc. E/CN.4/1999/4–E/CN.4/Sub.2/1998/45, at 30, 31–32, para. 4(d) (Sept. 30, 1998).

⁷ UN Doc. E/CN.4/Sub.2/2003/12/Rev.2 (Aug. 26, 2003) [hereinafter Draft Norms]. The first iteration was called a "draft code of conduct," and the second "draft guidelines." Presumably, the first sounded too robust and the second too mild. The working group members were Miguel Alfonso-Martínez, Cuba; El-Hadji Guissé, Senegal; Vladimir Khartashkin, Russian Federation; Soo-Gil Park, Republic of Korea; and David Weissbrodt, United States.

⁸ *Id.*, para. 1.

⁹ *Id.*, paras. 15–18.

¹⁰ David Weissbrodt & Muria Kruger, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, 97 AJIL 901, 903 (2003).

¹¹ UN Sub-Commission on the Promotion and Protection of Human Rights [Sub-Comm'n] Res. 2003/16, Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, UN Doc. E/CN.4/Sub.2/2003/L.11, at 52 (Aug. 13, 2003).

The main international human rights nongovernmental organizations (NGOs) endorsed the draft Norms, and began to refer to them as the “UN Norms,” while the business community, represented by the International Chamber of Commerce and the International Organisation of Employers, was firmly opposed.¹² For its part, the Commission granted that the document contained “useful elements and ideas” but added that it had not requested it and that, as a draft proposal, it had no legal standing. The Sub-Commission was also instructed not to engage in any monitoring of corporate activities.¹³

Although the Commission was not prepared to adopt the proposal, a broad spectrum of states, including several major industrialized countries, felt that the issue of business and human rights did require serious attention and sought ways to keep it on the agenda. Thus, the Commission asked the Secretariat to explore options and report back.¹⁴ With consensus still elusive a year later, the Commission then requested that the UN secretary-general appoint a special representative (SRSG), initially for a two-year term, with a wide-ranging mandate to “identify and clarify” international standards and policies in relation to business and human rights, elaborate on key concepts including corporate “complicity” and “spheres of influence,” and submit “views and recommendations” for consideration by the Commission.¹⁵ On July 25, 2005, the UN Economic and Social Council approved the Commission’s request, and three days later then secretary-general Kofi Annan appointed me to the post of SRSG.¹⁶

¹² International Chamber of Commerce and International Organisation of Employers, 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” (Mar. 2004), *available at* <<http://www.reports-and-materials.org/IOE-ICC-views-UN-norms-March-2004.doc>> [hereinafter IOE-ICC Joint Views].

¹³ UN Commission on Human Rights [CHR] Dec. 2004/116, UN Doc. E/CN.4/DEC/2004/116 (Apr. 22, 2004).

¹⁴ CHR, 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 (Feb. 15, 2005).

¹⁵ In CHR Resolution 2005/69, UN Doc. E/CN.4/2005/L.87, para. 1 (Apr. 15, 2005), *reprinted in* CHR, Report on the 61st Session, UN Doc. E/2005/23–E/CN.4/2005/135, at 268, the SRSG was given the following mandate:

- (a) To identify and clarify standards of corporate responsibility and accountability for transnational corporations and other business enterprises with regard to human rights;
- (b) To elaborate on the role of States in effectively regulating and adjudicating the role of transnational corporations and other business enterprises with regard to human rights, including through international cooperation;
- (c) To research and clarify the implications for transnational corporations and other business enterprises of concepts such as “complicity” and “sphere of influence”;
- (d) To develop materials and methodologies for undertaking human rights impact assessments of the activities of transnational corporations and other business enterprises;
- (e) To compile a compendium of best practices of States and transnational corporations and other business enterprises.

The resolution was cosponsored by Argentina, Austria, Belgium, Canada, Chile, Croatia, Cyprus, the Czech Republic, Denmark, Estonia, Ethiopia, Finland, France, Germany, Greece, Guatemala, Hungary, India, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Mexico, the Netherlands, Nigeria, Norway, Poland, Portugal, Romania, the Russian Federation, Slovakia, Slovenia, Spain, Sweden, Switzerland, and the United Kingdom.

¹⁶ UN Economic and Social Council, Decision on Human Rights and Transnational Corporations and Other Business Enterprises, UN Doc. E/2005/INF/2/Add.1 (July 25, 2005) (approving the UN secretary-general’s appointment of a special representative for the mandate).

This essay provides an overview of the SRSG mandate's work to date, and lays out the broad direction in which it is moving. In doing so, it indicates why I concluded that I could not "endorse" or "build upon" the draft Norms as the basis for my mandate, as some participants in the debate had urged me to do.¹⁷ The essay draws on two sets of reports I have submitted to the Commission and its successor body, the Human Rights Council; nearly two dozen research papers produced by or for the mandate; the results of three regional multistakeholder consultations (in Johannesburg, Bangkok, and Bogotá), four international workshops of legal experts, and two multistakeholder consultations focused on individual sectors (extractives and financial services); and site visits to the international operations of companies on three continents; as well as pro bono research conducted for the mandate by several law firms.¹⁸ The essay is divided into three parts: a brief examination of the central conceptual flaws of the draft Norms; some problematic factual claims made by Norms' advocates coupled with a mapping of standards, legal and otherwise, that currently govern the activities of business in relation to human rights; and a concluding discussion of the mandate's future directions.

I. CONCEPTUAL CHALLENGES

It would be surprising if all major actors in the "Norms" debate, quite apart from the substantive merits of their arguments, did not also behave strategically, in keeping with their perceived interests. Business typically dislikes binding regulations until it sees their necessity or inevitability. Governments often support the preferences of corporations domiciled in their countries and/or compete for foreign investment. And the imprimatur of "UN Norms" would have provided NGOs with a powerful campaign tool: declaring certain corporate acts to be "illegal" has far greater social purchase, even in the absence of viable enforcement mechanisms, than merely claiming corporate "wrongdoing."

The SRSG mandate, however, was not bound by these prior positions, nor was it intended simply to search for the lowest common denominator among them. Indeed, because the draft Norms were the only comprehensive business and human rights proposal on the table, I believed they merited careful assessment to see if they could serve as a sound basis for moving forward. But I found instead that they embodied sources of conceptual as well as factual confusion, with potentially deleterious consequences for the realization of rights. I summarize the

¹⁷ I received letters to this effect from the major international human rights organizations, including Human Rights Watch, the Fédération internationale des ligues des droits de l'homme, and Amnesty International. See Human Rights Watch, *Corporate Accountability: A Human Rights Watch Position Paper* (Sept. 9, 2005), available at <<http://hrw.org/english/docs/2005/09/09/global11723.htm>>; Fédération internationale des ligues des droits de l'homme, *Position Paper: Comments to the Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, Doc. 442/2 (Mar. 15, 2006), available at <<http://www.fidh.org/IMG/pdf/business442a.pdf>>; Letter to John Ruggie from Irene Khan, secretary general, Amnesty International, Ref. OSG/2006/30/ja (Apr. 27, 2006), available at <<http://www.reports-and-materials.org/Amnesty-Intl-comments-on-Ruggie-interim-report-27-Apr-2006.pdf>>. The two position papers are also available at <<http://www.business-humanrights.org/Documents/Ruggie-HRC-2006>>.

¹⁸ Materials related to my mandate, including reports, statements, working papers, commentaries, and announcements, may be found on the SRSG's home page at the Business and Human Rights Resource Center Web site, <<http://www.business-humanrights.org/Gettingstarted/UNSpecialRepresentative>>. I am extremely grateful to Chris Avery and his dedicated staff for making this invaluable service available.

key conceptual issues in the present part; they were addressed in the report I presented to the Commission in February 2006.¹⁹ I discuss the factual issues in the next part.

The Universe

To minimize charges of bias against globalization and the transnational corporations that are its most visible embodiment, the Norms project came to include “other business enterprises,” not only transnationals, within its remit. But it ended up exempting nationally operating businesses if they had no connections to transnational corporations, the impact of their activities was purely local, and their activities involved no violations of the right to security of the person—though neither the text nor the commentary indicated how the last of these exemptions would be determined *ex ante*.²⁰

According to the most recent figures, seventy-seven thousand transnational firms span the global economy today, with some 770,000 subsidiaries and millions of suppliers—Wal-Mart alone is reported to have more than sixty thousand suppliers.²¹ Transnationals operate in more countries than ever before, and increasingly in sociopolitical contexts that pose entirely novel human rights challenges for them.²² In addition, for many companies going global has meant adopting network-based operating models involving multiple corporate entities, spread across and within countries. Networks, by their very nature, require divesting a certain amount of direct control over significant operations, substituting negotiated relationships for hierarchical structures. This organizational form has enhanced the economic efficiency of firms. But it also has increased the challenges companies face in managing their global value chains—the full range of activities required to bring a product or service from its conception to end use.²³ As the number of participating units in value chains increases, so, too, does the potential vulnerability any particular link in the chain poses to the global enterprise as a whole.²⁴ At the same time, these distributed networks also have increased the available entry points through which

¹⁹ Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, Interim Report, UN Doc. E/CN.4/2006/97, paras. 56–69 (Feb. 22, 2006) [hereinafter Interim Report].

²⁰ Draft Norms, *supra* note 7, para. 21.

²¹ The overall figures are taken from UNCTAD, WORLD INVESTMENT REPORT 2006, UN Sales No. E.06.II.D.11 (2006), *available at* <http://www.unctad.org/en/docs/wir2006_en.pdf>. The number of Wal-Mart suppliers comes from the announcement of a lecture by Wal-Mart's CEO, H. Lee Scott, CEO, Wal-Mart, London Lecture of the Prince of Wales's Business and the Environment Programme, University of Cambridge Programme for Industry (Feb. 1, 2007), *available at* <<http://www.admin.cam.ac.uk/news/dp/2007013101>>.

²² This is particularly true of the extractive sector. For my 2006 report, I conducted a review of sixty-five NGO publications alleging significant corporate-related human rights abuses over the previous five years or so. Oil, gas, and mining accounted for two-thirds of the total. Virtually all cases took place in low-income countries, of which nearly two-thirds either had recently emerged from conflict or were still immersed in it. Moreover, all but two of the countries fell below the global average for the “rule of law” developed by the World Bank. *See* Interim Report, *supra* note 19, paras. 24–30.

²³ *See* Beth Kytle & John Gerard Ruggie, Corporate Social Responsibility as Risk Management: A Model for Multinationals (Harvard University, Kennedy School of Government, Corporate Social Responsibility Initiative Working Paper No. 10, Mar. 2005), *available at* <http://www.ksg.harvard.edu/m-rcbg/CSRI/publications/workingpaper_10_kytle_ruggie.pdf>.

²⁴ This pattern has characterized the global branded footwear and apparel industry, for example, which accounted for the second highest fraction of alleged human rights violations in the study reported in footnote 22 *supra*.

civil society actors can seek to leverage a company's brand and resources in the hope of improving not only the performance of the firm, but also the setting in which it operates.

Transnational corporate networks pose a regulatory challenge to the international legal system. To begin with, in legal terms purchasing goods and services from unrelated suppliers generally is considered an arm's-length market exchange, not an intrafirm transaction. Among related parties, a parent company and its subsidiaries are distinct legal entities, and even large-scale projects may be incorporated separately. Any one of them may be engaged in joint ventures with other firms or governments. Owing to the doctrine of limited liability, a parent company generally is not legally liable for wrongs committed by a subsidiary even where it is the sole shareholder, unless the subsidiary is under such close operational control by the parent that it can be seen as the parent's mere agent. Each legally distinct entity is subject to the laws of the countries in which it operates, but the transnational corporate group or network as a whole is not governed directly by international law. It is this foundational fact that the move to establish global legal standards for transnational corporations seeks to alter. And it has begun to change.

Rights and Duties

If international human rights obligations are to be attributed to transnational corporations, on what basis shall this be done? It seems clear that longstanding doctrinal arguments over whether such firms could be "subjects" of international law are yielding to new realities on the ground. For example, firms have acquired significant rights under various types of bilateral investment treaties and host government agreements, they set international standards in several sectors, and certain corporate acts are directly prohibited in a number of civil liability conventions dealing with environmental pollution.²⁵ Thus, at a minimum transnational corporations have become "participants" in the international legal system, as Rosalyn Higgins, president of the International Court of Justice, puts it, with the capacity to bear some rights and duties under international law.²⁶

The case made for the draft Norms went like this. The UDHR, in its preamble, proclaims that "every individual and every organ of society . . . shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance."²⁷ Transnational corporations have greater power than some states to affect the realization of rights, the argument continued, and "[w]ith power should come responsibility."²⁸ Therefore, these corporations must bear responsibility for the rights on which they may have an impact. And because

²⁵ See Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises [Report of the SRSG], Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts, UN Doc. A/HRC/4/35, para. 20 (Feb. 19, 2007) [hereinafter Business and Human Rights: Mapping International Standards]; see also Steven R. Ratner, *Business*, in THE OXFORD HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW, ch. 35, at 807 (Daniel Bodansky, Jutta Brunnée, & Ellen Hey eds., 2007).

²⁶ ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 50 (1995). As early as 1949, the ICJ stated: "The subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community." *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 1949 ICJ REP. 174, 178 (Apr. 11) [hereinafter *Reparation for Injuries*].

²⁷ Universal Declaration of Human Rights, GA Res. 217 (III), UN Doc. A/810, at 71 (1948).

²⁸ Weissbrodt & Kruger, *supra* note 10, at 901.

some states are unable or unwilling to make them do so under domestic law, they must be subjected to direct and uniform corporate responsibilities under international law.

The draft Norms enumerated rights that appeared to be particularly relevant to business, including nondiscrimination, security of the person, labor standards, and indigenous peoples' rights. But the list included rights that states have not recognized or are still debating at the global level, including consumer protection, the "precautionary principle" for environmental management, and the principle of "free, prior and informed consent" of indigenous peoples and communities. At the same time, the draft allowed that not all recognized rights pertain to business but provided no principled basis for making that determination. In response to the criticism that the list was overly inclusive, some Norms' advocates have suggested a shorter set of "core" rights that are said to enjoy the most widespread support and that business could easily grasp.²⁹ But that move, in turn, is subject to the riposte that the very concept of core rights is a "significant departure from the insistence within the international human rights regime on the equal importance of all human rights."³⁰ The issue remains unresolved and has led some observers to conclude that any detailed *ex ante* specification of rights for which companies might bear some responsibility is an inherently fruitless exercise—that in principle all rights could apply, but in any particular instance some will not.³¹

A far more serious problem concerns the draft Norms' proposed formula for attributing human rights duties to corporations. After recognizing that states are the primary duty bearers, the paragraph entitled "General Obligations" adds: "Within their respective spheres of activity and influence, transnational corporations and other business enterprises have the obligation to promote, secure the fulfilment of, respect, ensure respect of and protect" nationally and internationally recognized human rights.³² That is to say, within corporations' "spheres of influence" they would have exactly the same *range* of duties as states—from respecting to fulfilling rights—the only difference being that states' duties would be primary and corporations' duties secondary. But the draft Norms defined none of these terms. The concept of corporate spheres of influence, though useful as an analytical tool, seems to have no legal pedigree.³³ Therefore, the boundaries within which corporations' secondary duties would take effect remain unknown. Nor was the distinction between primary and secondary duties elaborated. With scope and threshold conditions left unspecified, the attribution of corporate duties seems most

²⁹ David Kinley & Junko Tadaki, *From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law*, 44 VA. J. INT'L L. 931 (2004).

³⁰ Philip Alston, 'Core Labour Standards' and the Transformation of International Labour Rights Regime, 15 EUR. J. INT'L L. 457, 459–60 (2004), rejecting even the ILO's declared core labor standards on these grounds.

³¹ The Business Leaders Initiative on Human Rights (BLIHR), a voluntary program comprising fourteen major global firms of which Mary Robinson is the honorary chair, is exploring whether and how human rights can be operationalized and integrated in companies' policies and management practices. They now use the Universal Declaration as their point of departure, having found the draft Norms list inadequate. See BLIHR, Report 3: Towards a 'Common Framework' on Business and Human Rights: Identifying Components 18–19 (June 2006), at <<http://www.blihr.org/Pdfs/BLIHR3Report.pdf>>.

³² Draft Norms, *supra* note 7, para. 1.

³³ Two law firms conducted a search of ten jurisdictions for the mandate and did not find the term "spheres of influence" used in legal contexts. It was introduced into corporate social responsibility discourse by the Global Compact, and has proven to be useful as a tool in corporate policymaking. It assists companies in scanning their operating environments for possible sources of risk and opportunities that could affect their social license to operate. See, e.g., BLIHR, UN GLOBAL COMPACT, AND OFFICE OF THE UN HIGH COMMISSIONER FOR HUMAN RIGHTS, A GUIDE FOR INTEGRATING HUMAN RIGHTS INTO BUSINESS MANAGEMENT (2005), available at <<http://www.blihr.org>> (follow "Tools" hyperlink).

likely in practice to come to hinge on the respective *capacities* of states and corporations in particular situations—so that where states were unable or unwilling to do their job, the pressure would be on companies to step in. This approach may be desirable in special circumstances, but as a general proposition it is deeply troubling on several grounds.

Philip Alston, former chair of the United Nations Committee on Economic, Social and Cultural Rights, identifies both the problem and its resulting dilemma:

If the only difference is that governments have a comprehensive set of obligations, while those of corporations are limited to their “spheres of influence”, . . . how are the latter [obligations] to be delineated? Does Shell’s sphere of influence in the Niger Delta not cover everything ranging from the right to health, through the right to free speech, to the rights to physical integrity and due process?³⁴

Alston raises concerns that this formula could undermine corporate autonomy, risk taking, and entrepreneurship, asking: “[W]hat are the consequences of saddling [corporations] with all of the constraints, restrictions, and even positive obligations which apply to governments?”³⁵ Indeed, because corporations are not democratic public interest institutions, they should be permitted to have such roles only in exceptional circumstances—for example, where they perform state functions.

The formula’s possible impact on the roles and responsibilities of governments is equally troubling. Within the constraints of “progressive realization,” the international human rights regime recognizes the legitimate need of governments to exercise discretion in making trade-offs and balancing decisions, and especially in determining how best to “secure the fulfilment” of, precisely, the economic, social, and cultural rights on which corporations may have greatest influence. Imposing the full range of duties on transnational corporations directly under international law by definition reduces the discretionary space of individual governments within the scope of those duties.³⁶ The draft Norms’ attempt to square the circle by requiring companies also to follow national laws and policy priorities—and even “more protective standards” wherever those may be found—is no solution.³⁷ It merely adds layers of conflicting prescriptions for firms to observe. In addition, where governance is weak to begin with, shifting obligations onto corporations to protect and even fulfill the broad spectrum of human rights may further undermine domestic political incentives to make governments more responsive and responsible to their own citizenry, which is surely the most effective way to realize rights.

Finally, attributing the same range of duties to corporations that currently apply to states, differentiated only in degree within undefined corporate “spheres of influence,” would generate endless strategic gaming and legal wrangling on the part of governments and companies alike. As illustrated by a recent Brazilian case where a corporation and a government authority are contesting which one reneged on its legal obligations to provide support to communities of indigenous peoples, the rights of vulnerable groups and individuals are not well served in such circumstances.³⁸

³⁴ Philip Alston, *The ‘Not-a-Cat’ Syndrome: Can the International Human Rights Regime Accommodate Non-state Actors? in* NON-STATE ACTORS AND HUMAN RIGHTS 3, 13–14 (Philip Alston ed., 2005).

³⁵ *Id.* at 14.

³⁶ Carlos M. Vázquez, *Direct vs. Indirect Obligations of Corporations Under International Law*, 43 COLUM. J. TRANSNAT’L L. 927, 950–54 (2005).

³⁷ Draft Norms, *supra* note 7, paras. 10, 19.

³⁸ After members of surrounding indigenous communities occupied mining sites of the Companhia Vale do Rio Doce (CVRD) in protest for what they regarded as insufficient provision of funds and services by the company, CVRD refused to continue making any payments to the communities through the National Indian Foundation (Funai), with which it

In sum, while it may be useful for some purposes to think of corporations as “organs of society,” they are specialized organs, performing specialized functions. The range of their duties should reflect that fact. As early as 1949, the International Court of Justice explained that recognizing an international person “is not the same thing as saying that . . . its legal personality and rights and duties are the same as those of a state.”³⁹ Imposing on corporations the same range of duties as states for all rights they may affect conflates the two spheres and renders effective rule making itself highly problematic.⁴⁰

II. MAPPING STANDARDS

Another problematic feature of the debate that preceded the creation of the SRSG mandate and carried over into it was the sharply divergent views about the actual state of international law regarding business and human rights. The draft Norms were described as “a restatement of international legal principles applicable to companies.”⁴¹ As we have just seen, they would have imposed direct obligations on corporations under international law and were said to be “non-voluntary” in character. According to one authoritative source, restatements “reflect the law as it presently stands or might plausibly be stated by a court.”⁴² The idea that the Norms project amounted to no more than a “restatement” of legal principles was contested by business and also questioned by academic observers.⁴³ Apparently, the Commission on Human Rights was not persuaded either, because my first task under the mandate, as noted above, was to “identify and clarify standards of corporate responsibility and accountability for transnational corporations and other business enterprises with regard to human rights”⁴⁴—essentially, to “restate” existing standards and indicate emerging trends.

Therefore, within the limits of our time and resource constraints, the SRSG’s team set out to map international standards and practices regarding business and human rights. In March 2007, I presented the results to the Human Rights Council in a report with four addenda of

had an agreement to do so, on the grounds that the communities were using illegal means to force the company to fulfill their demands. CVRD reported the events to the Organization of American States, seeking clarification of state duties vis-à-vis indigenous peoples. Funai sought an injunction from Brazil’s domestic courts, which was granted, ordering CVRD to resume payments. Funai is also seeking a declaration from the Brazilian Federal Court attributing legal responsibility to CVRD for social impacts caused by its mining activities. See CVRD and Funai’s press releases on this issue, available at <<http://www.cvr.com.br/saladecimprensa/cn/releases/releasc.asp?id=16724>>; <http://www.funai.gov.br/ultimas/noticias/1_semestre_2007/janeiro/un0131_001.htm> (in Portuguese).

³⁹ Reparation for Injuries, *supra* note 26, at 179.

⁴⁰ For an attempt to sketch out an analytical foundation for corporate duties that does recognize the respective social roles of states and corporations, see Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443 (2001).

⁴¹ David Weissbrodt & Muria Kruger, *Human Rights Responsibilities of Businesses as Non-state Actors*, in NON-STATE ACTORS AND HUMAN RIGHTS, *supra* note 34, at 315, 340. The language is slightly different in Weissbrodt & Kruger, *supra* note 10, at 915: “[T]he legal authority of the Norms now derives principally from their sources in international law as a restatement of legal principles applicable to companies.”

⁴² American Law Institute, Projects Overview, at <<http://www.ali.org/index.cfm?fuseaction=projects.main>>. The American Law Institute conducts periodic restatements of various bodies of U.S. law, documenting their evolution.

⁴³ See, e.g., IOE-ICC Joint Views, *supra* note 12. For a sampling of academic critiques, see Detlev F. Vagts, *The UN Norms for Transnational Corporations*, 16 LEIDEN J. INT’L L. 795 (2003); Vázquez, *supra* note 36; Rebecca M. M. Wallace & Olga Martín-Ortega, *The UN Norms: A First Step to Universal Regulation of Transnational Corporations’ Responsibilities for Human Rights?* 26 DUBLIN U. L.J. 304 (2004).

⁴⁴ See *supra* note 15.

supporting materials.⁴⁵ The mapping was organized into five clusters laid out along a continuum, starting with the most deeply rooted international legal obligations and ending with voluntary business standards: the state duty to protect against corporate abuses; corporate responsibility and accountability for international crimes; corporate responsibility for other human rights violations under international law; soft law mechanisms; and self-regulation.

The State Duty to Protect

All sides agree that the state is the primary duty bearer in relation to human rights. But its duty to protect against third-party abuses of rights, including by business entities, had received relatively little attention in the debate surrounding the draft Norms. This neglect is surprising inasmuch as international law firmly establishes that states have such a duty within their jurisdiction.⁴⁶ It exists under the core UN human rights treaties and is elaborated by the treaty bodies; it is also generally agreed to exist under customary international law. Indeed, the UN and regional human rights mechanisms have addressed it with increasing frequency. To document the UN treaty bodies' evolving understanding of this duty and what it implies, we conducted detailed analyses of their commentaries.⁴⁷

The earlier UN human rights treaties, such as the International Convention on the Elimination of All Forms of Racial Discrimination, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights (ICCPR), do not specifically address state duties regarding business. They impose generalized obligations to ensure the enjoyment of rights and prevent nonstate abuse. Thus, the Convention on Racial Discrimination requires each state party to prohibit racial discrimination by "any persons, group or organization" (Art. 2(1)(d)).⁴⁸ And some of the treaties recognize rights

⁴⁵ Report of the SRSG, *supra* note 25, para. 88. See also the four supporting addenda: Report of the SRSG, Addendum: State Responsibilities to Regulate and Adjudicate Corporate Activities Under the United Nations Core Human Rights Treaties: An Overview of Treaty Body Commentaries, UN Doc. A/HRC/4/35/Add.1 (Feb. 13, 2007) [hereinafter Addendum: State Responsibilities to Regulate and Adjudicate Corporate Activities]; Addendum: Corporate Responsibility Under International Law and Issues in Extraterritorial Regulation: Summary of Legal Workshops, UN Doc. A/HRC/4/35/Add.2 (Feb. 15, 2007) [hereinafter Addendum: Corporate Responsibility Under International Law]; Addendum: Human Rights Policies and Management Practices: Results from Questionnaire Surveys of Governments and the Fortune Global 500 Firms, UN Doc. A/HRC/4/35/Add.3 (Feb. 28, 2007) [hereinafter Addendum: Human Rights Policies and Management Practices]; Addendum: Business Recognition of Human Rights: Global Patterns, Regional and Sectoral Variations, UN Doc. A/HRC/4/35/Add.4 (Feb. 8, 2007) [hereinafter Addendum: Business Recognition of Human Rights]. These reports were compiled with the assistance of a Harvard-based research team, pro bono contributions from law firms, and international workshops of legal experts.

⁴⁶ States also have duties to respect, promote, and fulfill rights, but the most business-relevant is the duty to protect because it is directed at third-party abuse. Beyond the national territory, the scope of the duty will vary depending on the state's degree of control. The UN human rights treaty bodies generally view states parties' obligations as applying to areas within their "power or effective control." Note that where corporations perform public functions or are state controlled, their acts may be attributed to the state under international law. See GA Res. 56/83 (Dec. 12, 2001) (taking note of the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts).

⁴⁷ See Addendum: State Responsibilities to Regulate and Adjudicate Corporate Activities, *supra* note 45. We included general comments or recommendations where they exist, as well as other primary materials such as concluding observations on states parties' periodic reports.

⁴⁸ International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 UNTS 195.

that are particularly relevant in business contexts, including rights related to employment, health, and indigenous communities.

Beginning with the Convention on the Elimination of All Forms of Discrimination Against Women, adopted in 1979, and including the Convention on the Rights of the Child and the recently adopted Convention on the Rights of Persons with Disabilities, business is addressed more directly and in greater detail. The Convention on Discrimination Against Women, for example, requires states to take all appropriate measures to eliminate discrimination against women by any “enterprise” (Art. 2(e)), and within such specific contexts as “bank loans, mortgages and other forms of financial credit” (Art. 13(b)).⁴⁹ The treaties generally give states discretion regarding the modalities for regulating and adjudicating nonstate abuses.

The treaty bodies elaborate upon the duty to protect. General Comment No. 31 by the Human Rights Committee is one recent example. It confirms that under the ICCPR “the positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities.”⁵⁰ It further explains that states could breach Covenant obligations where they permit or fail “to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities.”⁵¹

The committees express concern about state failure to protect against business abuse most frequently in relation to the right to nondiscrimination, indigenous peoples’ rights, and labor and health-related rights. But they indicate that the duty to protect applies to all substantive rights recognized by the treaties that private parties are capable of abusing. The committees tend not to specify the precise content of required state action, but generally recommend regulation through legislation and adjudication through judicial means, including compensation where appropriate.

The committees have not expressly interpreted the treaties as requiring states to exercise extraterritorial jurisdiction over abuses committed abroad by corporations domiciled in their territory.⁵² Nor, however, do they seem to regard the treaties as prohibiting such action, and in some situations they have encouraged it. For example, the Committee on Economic, Social and Cultural Rights has suggested that states parties take steps to “prevent their own citizens and companies” from violating rights in other countries.⁵³ And the Committee on the Elimination of Racial Discrimination recently noted “with concern” reports of adverse impacts on

⁴⁹ Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 UNTS 13.

⁵⁰ Human Rights Committee, General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.13, para. 8 (May 26, 2004), *reprinted in* Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1/Rev.8, at 233 (May 8, 2006) [hereinafter Treaty Bodies Compilation].

⁵¹ *Id.*

⁵² Note that both the Convention Against Torture and the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography require states parties to establish jurisdiction over certain offenses where the victim or alleged offender is a national, or when the alleged offender is present in their territory and there is no extradition. Neither the Committee Against Torture nor the Committee on the Rights of the Child has discussed these provisions in relation to corporations.

⁵³ Committee on Economic, Social and Cultural Rights [CESCR], General Comment No. 15: The Right to Water, UN Doc. E/C.12/2002/11, para. 33 (Jan. 20, 2003), *reprinted in* Treaty Bodies Compilation, *supra* note 50, at 105.

the rights of indigenous peoples in other countries from the activities of corporations registered in a state party. The Committee encouraged that state to “take appropriate legislative or administrative measures” to prevent such acts, recommended that the state explore ways to hold such corporations “accountable,” and asked the state to provide information on measures taken in its next periodic report.⁵⁴

In general, international law permits a state to exercise extraterritorial jurisdiction provided there is a recognized basis: where the actor or victim is a national, where the acts have substantial adverse effects on the state, or where specific international crimes are involved.⁵⁵ Extraterritorial jurisdiction must also meet an overall reasonableness test, which includes nonintervention in other states’ internal affairs.⁵⁶ Debate continues over precisely when the protection of human rights justifies extraterritorial jurisdiction.

The regional human rights systems also affirm the state duty to protect against nonstate abuse and they establish similar correlative state requirements to regulate and adjudicate corporate acts.⁵⁷ The increasing focus on protection against corporate abuse by the UN treaty bodies and regional mechanisms indicates a growing concern that states either do not fully understand or are not always able or willing to fulfill this duty. This concern is reinforced by the results of a questionnaire survey of states I conducted, asking them to identify policies and practices by which they regulate, adjudicate, and otherwise influence corporate actions in relation to human rights.⁵⁸ Of those states responding, very few report having policies, programs, or tools designed specifically to deal with corporate human rights challenges. A larger number say they rely on the broader framework of corporate responsibility initiatives, including such soft law instruments as the OECD Guidelines and voluntary initiatives like the Global Compact. Very few explicitly consider human rights criteria in their export credit and investment promotion policies, or in bilateral trade and investment treaties, the points at which government policies and global business operations most closely intersect.

Corporate Responsibility and Accountability for International Crimes

By far the most consequential legal development identified in my 2007 report is the growing potential for companies to be held liable for international crimes—with responsibility imposed under domestic law but reflecting international standards of individual responsibility, as codified by the international *ad hoc* criminal tribunals and, especially, by the Statute of the International Criminal Court (ICC).⁵⁹

⁵⁴ See Concluding Observations for Canada, UN Doc. CERD/C/CAN/CO/18, at 4, para. 17 (May 25, 2007).

⁵⁵ Under the principle of “universal jurisdiction,” states may be obliged to exercise jurisdiction over individuals within their territory who allegedly committed certain international crimes. It is unclear whether and how such obligations extend jurisdiction over juridical persons, including corporations. See generally Addendum: Corporate Responsibility Under International Law, *supra* note 45.

⁵⁶ Of course, the entire human rights regime may be seen to challenge the classical view of nonintervention. The debate here hinges on what is considered coercive. See *id.* for details.

⁵⁷ For an overview, see ANDREW CLAPHAM, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS, ch. 9 (2006). On Africa, see generally Nsongurua J. Udombana, *Between Promise and Performance: Revisiting States’ Obligations Under the African Human Rights Charter*, 40 STAN. J. INT’L L. 105 (2004).

⁵⁸ See generally Addendum: Human Rights Policies and Management Practices, *supra* note 45.

⁵⁹ The ICC preparatory committee and the Rome Conference itself debated a proposal that would have given the Court jurisdiction over legal persons other than states, but differences in national approaches prevented its adoption.

The number of jurisdictions in which charges for international crimes may be brought against corporations is increasing as countries ratify the ICC Statute and incorporate its definitions into domestic law. Where national legal systems already provide for criminal punishment of companies, the international standards for individuals may be extended thereby, to corporate entities—as legal persons.⁶⁰ And if those legal systems also provide for extraterritorial jurisdiction with respect to international crimes, then those provisions, too, may be extended to corporations.⁶¹

ICC ratification is not the only means by which such standards may enter national legal systems. A significant, though not the sole, exception is the civil cases brought under the U.S. Alien Tort Claims Act (ATCA).⁶² No one-to-one mapping can be assumed between standards for natural and legal persons, but U.S. courts interpreting corporate liability for acts that amount to international crimes under the ATCA have drawn on accepted international principles of individual responsibility in doing so.⁶³

Given this expanding jurisdictional web, simple laws of probability alone suggest that corporations will be subject to increased liability risks for international crimes in the future. They may face either criminal or civil liability depending on whether international standards are incorporated into a state's criminal code or as a civil cause of action.⁶⁴ Further, companies cannot be certain where claims will be brought against them or what precise standards they may be held to. No two national jurisdictions have identical evidentiary and other procedural rules, and national systems vary significantly in modes of establishing a corporate "mind and will,"⁶⁵ and in cases involving corporate groups.⁶⁶

Few companies may ever directly commit acts that amount to international crimes. But there is greater risk of their facing allegations of "complicity" in such crimes. With nuanced

⁶⁰ For a detailed survey of sixteen countries from a cross section of regions and legal systems, see ANITA RAMASASTRY & ROBERT C. THOMPSON, *COMMERCE, CRIME AND CONFLICT: LEGAL REMEDIES FOR PRIVATE SECTOR LIABILITY FOR GRAVE BREACHES OF INTERNATIONAL LAW—EXECUTIVE SUMMARY* (2006), available at <<http://www.fao.no/liabilities>>. Of the sixteen, eleven were states parties to the ICC and nine had fully incorporated the Statute's three crimes; of these, six already provided for corporate criminal liability. Even some ICC nonparties have incorporated one or more of the Statute's crimes into their domestic laws, with potential legal implications for corporations.

⁶¹ Of the sixteen countries in the Fafo survey, *supra* note 60, eleven require a nationality link, five rely on universal jurisdiction, and several do both. Nine of these countries provide for some form of corporate criminal liability in their domestic laws.

⁶² 28 U.S.C. §1350 (2000).

⁶³ *Doe I v. Unocal Corp.*, 395 F.3d 932, 945–56 (9th Cir.), *rehearing en banc granted*, 395 F.3d 978 (9th Cir. 2003). The case later settled and was dismissed on stipulation. *Doe I v. Unocal Corp.*, 403 F.3d 708 (9th Cir. 2005) (vacating opinion below).

⁶⁴ They may also have civil proceedings brought against them for related wrongs under domestic law, such as assault or false imprisonment.

⁶⁵ The difficulty of doing so has led some jurisdictions to adopt a "corporate culture" approach. In Australia, where a firm's culture expressly or tacitly permitted the commission of an offense by an employee, the firm may be held liable: Criminal Code Act §12.3(2) (c)–(d) (1995) (Austl.). In the United States the 2006 Federal Sentencing Guidelines permit judicial consideration of whether a corporation has an "organizational culture that encourages ethical conduct and a commitment to compliance with the law." U.S. SENTENCING COMMISSION, 2006 FEDERAL SENTENCING GUIDELINES MANUAL §8B2.1(a).

⁶⁶ No uniform formula exists for "piercing the corporate veil" that separates a subsidiary from its parent company. One alternative may be imposing civil liability on the parent company for its own acts and omissions in relation to its foreign subsidiaries. See *Connelly v. RTZ Corp. PLC*, [1998] A.C. 854 (H.L.) (appeal taken from Eng.) (UK); *Lubbe v. Cape plc*, [2000] 4 All E.R. 268 (H.L.) (appeal taken from Eng.) (UK).

differences, most national legal systems recognize complicity as a concept. The ad hoc international tribunals have developed a fairly clear standard for individual liability in such cases: knowingly providing practical assistance, encouragement, or moral support that has a substantial effect on the commission of the crime.⁶⁷ Where national courts adopt this standard, it is likely that its application to corporations would closely track its application to individuals, although the element of “moral support” may pose specific challenges.⁶⁸ A company trying in good faith to avoid involvement in human rights abuses might have difficulty knowing what counts as moral support for legal purposes. Mere presence in a country and paying taxes are unlikely to create liability. But deriving indirect economic benefit from the wrongful conduct of others may do so, depending on such facts as the closeness of the company’s association with those actors. However, even where a corporation did not intend that a crime occur, it may be held liable if it knew, or should have known, that it was providing assistance that had a substantial effect on the commission of the crime.

As this scenario of expanding corporate liability unfolds, the uncertainty created by national variations in how international standards are applied in practice may become increasingly problematic for all parties and generate a demand for greater harmonization.

Corporate Responsibility for Other Human Rights Violations Under International Law

The traditional view of international human rights instruments is that they impose only “indirect” responsibilities on corporations—provided under domestic law in accordance with states’ international obligations. In contrast, the draft Norms, which imposed direct obligations on corporations under international law, were claimed to “derive legal authority from their sources in treaties and customary international law.”⁶⁹ Our mapping supports the traditional view as a matter of law, although social expectations of business activity increasingly reflect or invoke some of the standards of international instruments.

The precise requirements of customary international law continue to be debated, but at a minimum they include a recognizable degree of uniform and consistent state practice. A systematic mapping of national practices would require a comprehensive country-by-country study not only of the direct applicability of international law, but also of a range of other relevant measures, including constitutional protections of human rights, legislative provisions, administrative mechanisms, and case law, as well as *opinio juris*. Such an inquiry was well beyond our capacity constraints. However, the country analyses that were conducted for the mandate, coupled with the responses to my state survey, parallel the recent secondary literature in finding insufficient evidence at this time to establish direct corporate responsibilities under customary international law.⁷⁰

⁶⁷ See generally *Prosecutor v. Furundžija*, No. IT-95-17/1 (Dec. 10, 1998); *Prosecutor v. Akayesu*, No. ICTR-96-4-T (Sept. 2, 1998).

⁶⁸ The Supreme Court’s only decision under the ATCA, *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), does not preclude such liability for corporations, and the weight of current U.S. judicial opinion appears to support it—although there is disagreement among lower courts over its content and, in some cases, its existence. When applying the individual standard to corporations, the Ninth Circuit Court of Appeals in *Unocal* did not adopt the element of “moral support.” *Doe I v. Unocal Corp.*, 395 F.3d at 949 n.24.

⁶⁹ Weissbrodt & Kruger, *supra* note 41, at 340.

⁷⁰ For a study of seven jurisdictions conducted for the SRSG, see Allens Arthur Robinson, Brief on Corporations and Human Rights in the Asia-Pacific Region (Aug. 2006), available at <<http://www.reports-and-materials.org/>

Many UDHR provisions have entered customary international law. While there is some debate here too, they are generally agreed currently to apply only to states (and sometimes individuals) and not to include the preamble. Most UDHR provisions have also been incorporated in the Covenants and other UN human rights treaties. Do these instruments establish direct legal responsibilities for corporations?

The treaties do not address the issue explicitly. They do say that states have a duty to “ensure respect” for and “ensure the enjoyment” of rights. In theory, this could imply a direct legal obligation for all actors, including corporations, to respect those rights in the first place. But if so, the UN treaty bodies have not yet expressed that view. The most recent general comment on the right to work by the Committee on Economic, Social and Cultural Rights, for example, recognizes that various private actors, including national and multinational enterprises, “have responsibilities regarding the realization of the right to work”—for instance, that they “have a particular role to play in job creation, hiring policies and non-discriminatory access to work.”⁷¹ But then, in the same comment, the Committee appears to reiterate the traditional view that such enterprises are “not bound” by the Covenant.⁷² Similarly, the Human Rights Committee’s most recent general comment concludes that the treaty obligations “do not . . . have direct horizontal effect as a matter of international law”—that is, that they take effect as between nonstate actors only under domestic law.⁷³ Provisions under the ILO’s conventions operate in much the same manner, even though corporations are intended as one of their main addressees.

Nothing prevents states from imposing international legal responsibilities for human rights directly on corporations. But the evidence we reviewed does not indicate that they have already done so to any appreciable extent. Nonetheless, the increased attention the United Nations and other international human rights bodies are devoting to the need to prevent corporate abuse acknowledges that businesses are capable of both breaching human rights and contributing to their protection.⁷⁴ Moreover, even in the absence of direct international legal obligations, companies still may find themselves tried in the court of public opinion by the standards of these instruments. No doubt this fact helps explain the next two developments.

Soft Law

To address corporate responsibility and accountability for human rights, governments utilize a variety of other international mechanisms that have the force of soft law, some of which may also include legislative or regulatory dimensions.

Legal-brief-on-Asia-Pacific-for-Ruggie-Aug-2006.pdf>. For the state survey results, see Addendum: Human Rights Policies and Management Practices, *supra* note 45. A scholarly overview may be found in JENNIFER A. ZERK, *MULTINATIONALS AND CORPORATE SOCIAL RESPONSIBILITY* (2006).

⁷¹ CESCR, General Comment No. 18: The Right to Work (Art. 6), UN Doc. E/C.12/GC/18, para. 52 (Nov. 24, 2005), *reprinted in* Treaty Bodies Compilation, *supra* note 50, at 148. For similar remarks, see CESCR, General Comment No. 14: The Right to the Highest Attainable Standard of Health, UN Doc. E/C.12/2000/4, para. 42 (Aug. 11, 2000), *reprinted in id.* at 86; CESCR, General Comment No. 12: The Right to Adequate Food, UN Doc. E/C.12/1999/5, para. 20 (May 12, 1999), *reprinted in id.* at 63. *See also* UN Committee on the Rights of the Child, General Comment No. 5: General Measures of Implementation for the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6), UN Doc. CRC/GC/2003/5, para. 56 (Nov. 27, 2003), *reprinted in id.* at 387 (noting that the state duty to respect “extend[s] in practice” to nonstate organizations).

⁷² CESCR, General Comment No. 18, *supra* note 71, para. 52.

⁷³ Human Rights Committee, General Comment No. 31, *supra* note 50, para. 8.

⁷⁴ *See* Addendum: State Responsibilities to Regulate and Adjudicate Corporate Activities, *supra* note 45.

The first is the traditional soft law standard-setting role of intergovernmental organizations.⁷⁵ To illustrate, the OECD Guidelines recommend that firms “[r]espect the human rights of those affected by their activities consistent with the host government’s international obligations and commitments.”⁷⁶ But this benchmarking of corporate conduct leaves a sizable protection gap, because not all countries have adopted all human rights treaties, and even when they have, they may be unable or unwilling to enforce them. The problem is especially acute in what the OECD calls “weak governance zones.”⁷⁷ Therefore, early on in my mandate I requested that the three leading international business associations—the International Chamber of Commerce, the International Organization of Employers, and the OECD’s Business and Industry Advisory Committee—consult their memberships and recommend a formula to reduce this gap. In December 2006, they submitted a policy paper to the mandate that goes beyond the current OECD Guidelines: “All companies have the same responsibilities in weak governance zones as they do elsewhere. They are expected to obey the law, even if it is not enforced, and to respect the principles of relevant international instruments where national law is absent.”⁷⁸ If governments include this business-supported formula in the soon-to-be revised guidelines, it will mark an advance in the prior soft law standard. In the meantime it serves as prudential advice to companies.

Second, several intergovernmental initiatives recently have focused on ways to enhance accountability for compliance. For example, as a result of civil society demands, anyone can now bring a complaint against a transnational firm operating within the OECD Guidelines’ sphere to the attention of a National Contact Point (NCP)—a nonjudicial review procedure.⁷⁹ Some NCPs have also become more transparent about the details of complaints and conclusions, permitting greater social tracking of corporate conduct, although the NCPs’ overall performance remains highly uneven. Moreover, the OECD Investment Committee has expanded its oversight of the NCPs, providing another opportunity to review their treatment of complaints. For its part, the International Finance Corporation (IFC) has adopted performance standards that companies are required to meet in return for IFC investment funds, which include several human rights elements.⁸⁰ Client compliance is subject to review by an ombudsman. The IFC standards also have spillover effects, as they are followed by banks adhering to

⁷⁵ A number of commentators include the Global Compact in the category of soft law instruments. But it was a personal initiative of the UN secretary-general, not mandated by the General Assembly, and deliberately resistant to including principles that were not already enshrined in UN conventions or declarations. Instead, the compact sought to translate them into business-relevant language and tools.

⁷⁶ OECD Guidelines, *supra* note 3, General Policies II.2, at 11. The commentary notes the Universal Declaration “and other human rights obligations.” *Id.* at 12, para. 4.

⁷⁷ OECD, Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones (June 9, 2006), *available at* <<http://www.oecd.org/dataoecd/26/21/36885821.pdf>>. The report’s preface defines a weak governance zone as “an investment environment in which governments are unable or unwilling to assume their responsibilities. These ‘government failures’ lead to broader failures in political, economic and civic institutions that, in turn, create the conditions for endemic violence, crime and corruption and that block economic and social development.” *Id.* at 9.

⁷⁸ International Organisation of Employers, International Chamber of Commerce, & Business and Industry Advisory Committee to the OECD, Business and Human Rights: The Role of Business in Weak Governance Zones, para. 15 (Dec. 2006), *available at* <<http://www.business-humanrights.org/Updates/Archive/SpecialRepPapers>>.

⁷⁹ See OECD, ANNUAL REPORT ON THE GUIDELINES FOR MULTINATIONAL ENTERPRISES: 2006 EDITION, *available at* <http://www.oecd.org/document/40/0,3340,en_2649_34889_37785448_1_1_1_1,00.html>.

⁸⁰ The International Finance Corporation’s Environmental and Social Standards include fundamental labor rights, the health and safety of surrounding communities, avoidance of involuntary resettlement, the rights of indigenous peoples, and protection of cultural heritage. IFC, Environmental and Social Standards (Feb. 2006), *available at* <<http://www.ifc.org/ifcext/enviro.nsf/>>.

the Equator Principles, which are responsible for some 80 percent of global commercial-project lending.⁸¹

Beyond the intergovernmental system, a third type of initiative is emerging having the force of soft law and/or involves partial legalization; it is a multistakeholder form that engages corporations directly, along with states and civil society organizations, in addressing sources of corporate-related human rights abuses. Most prominent among them are the Voluntary Principles on Security and Human Rights, to promote corporate human rights risk assessments and the training of security providers in the extractive sector;⁸² the Kimberley Process Certification Scheme, to stem the flow of “conflict diamonds”;⁸³ and the Extractive Industries Transparency Initiative, to establish a degree of revenue transparency in the sums companies pay to host governments.⁸⁴ Each seeks to enhance the responsibility and accountability of states and corporations alike by means of operational standards and procedures for firms, often together with regulatory action by governments, both supported by transparency mechanisms.

Kimberley, for instance, involves a global certification scheme implemented through domestic law, whereby states seek to ensure that the diamonds they trade are from Kimberley-compliant countries by requiring detailed packaging protocols and certification, coupled with chain-of-custody warranties by companies. The Voluntary Principles have been incorporated in legal agreements between companies and host governments in several countries. And while the Extractive Industries Transparency Initiative is voluntary for governments, once they sign up, companies are legally required to make their government payments public. Although each has weaknesses that require improvement, the relative ease and speed with which such arrangements can be established, and the flexibility with which they can operate, make them an important complement to the traditional state-based treaty-making and soft law standard-setting processes.⁸⁵

Self-regulation

Finally, an expanding universe of self-regulation in the business and human rights domain can be seen in individual company practices, industry initiatives, and multistakeholder efforts. Although they have no status in law, they may have legal consequences. Some companies have found that making allegedly false claims or breaking promises can pose legal risks.⁸⁶ More broadly, the experience they generate may affect both the substance and the incidence of future regulations by demonstrating what works and what does not. I conducted two studies of voluntary initiatives and their uptake, submitting both to the Human Rights Council as addenda to my 2007 report. One was a questionnaire survey of the Fortune Global 500 firms (FG500),

⁸¹ IFC, *Who Benefits: Financial Institutions* (2007), at <<http://www.ifc.org/ifcext/sustainability.nsf/>>.

⁸² Voluntary Principles on Security and Human Rights, available at <<http://www.voluntaryprinciples.org>>.

⁸³ The Kimberley Process Certification Scheme (Nov. 2002), available at <<http://www.kimberleyprocess.com/>> (follow “KPCS” hyperlink).

⁸⁴ Extractive Industries Transparency Initiative, available at <<http://www.eitransparency.org>>.

⁸⁵ For discussions of advantages and risks of such novel approaches to international regulation, see Nico Krisch & Benedict Kingsbury, *Introduction: Global Governance and Global Administrative Law in the International Legal Order*, 17 EUR. J. INT’L L. 1 (2006), and other articles in that issue.

⁸⁶ See, e.g., *Kasky v. Nike*, 539 U.S. 654 (2003); see also *Doe v. Wal-Mart Stores*, No. CV05-7307-AG (Cal. Super. Ct. filed Sept. 13, 2005), *dismissed* (C.D. Cal. Mar. 30, 2007); Josh Gerstein, *Novel Legal Challenge to Wal-Mart Appears to Be Faltering on Coast*, N.Y. SUN, Dec. 12, 2006.

asking whether companies have human rights–related policies or management practices, and if so what their attributes are.⁸⁷ The second (“business recognition study”) consisted of coding three sources of information: the actual policies of a broader cross section of firms from all regions; the human rights–related criteria employed by eight collective initiatives, like the Fair Labor Association and the International Council on Metals and Mining; and the rights criteria applied by five socially responsible investment indices.⁸⁸

These studies indicate that voluntary initiatives have expanded rapidly in recent years. The FG500 survey suggests that substantial policy diffusion is going on: almost all respondents report having some human rights policies or management practices in place, yet fewer than half say they have experienced “a significant human rights issue” themselves. Uptake is concentrated among European, North American, and, to a lesser extent, Japanese firms. Newer entrants from elsewhere lag behind, though it is unclear whether this reflects a difference in approach or is merely a matter of timing.⁸⁹

Leading firms, collective initiatives, and socially responsible investment indices recognize a broad array of human rights. The self-reporting in the FG500 survey produced more impressive results than those we documented in the broader “business recognition study,” but the patterns were similar. Labor rights are the most widely recognized across all regions and sectors, topped by nondiscrimination. Recognition of other rights broadly tracks industry sectors. The extractive industry, for example, ranks community rights and the security of the person more highly than other sectors, while financial services stress privacy rights. In formulating their human rights policies, companies typically draw on international instruments or initiatives. But the language of the standards is rarely identical, and in some instances it is so elastic that the standards lose meaning, making it difficult for the company itself, let alone the public, to assess performance against commitments. There are also variations in the recognition of rights that seem unrelated to expected sectoral differences, appearing instead to reflect the political culture of companies’ home countries; for example, European-based firms tend to adopt a more comprehensive rights agenda than others, including social and economic rights, whereas U.S. firms acknowledge only a narrower spectrum of rights and rights holders.

The Achilles heel of self-regulatory arrangements to date is their underdeveloped accountability mechanisms. Company initiatives increasingly include rudimentary forms of internal and external reporting, as well as some form of supply-chain monitoring. But no universally—or even widely—accepted standards yet exist for these practices. The International Organization for Standardization is developing a social responsibility “guidance standard,” but it is not focused specifically on corporations or human rights.⁹⁰ The Global Reporting Initiative has developed standardized protocols to improve the quality and comparability of company social and environmental reporting, including human rights indicators, but fewer than two hundred firms report “in accordance with” its guidelines, another seven hundred do so partially, while

⁸⁷ See generally Addendum: Human Rights Policies and Management Practices, *supra* note 45.

⁸⁸ See Addendum: Business Recognition of Human Rights, *supra* note 45. This study relied on publicly available information.

⁸⁹ Numerous firms in the business recognition study only recently joined initiatives like the Global Compact and are only beginning to develop human rights policies.

⁹⁰ See generally information from the International Organization for Standardization, *available at* <<http://isotc.iso.org/livelink/livelink/fetch/2000/2122/830949/3934883/3935096/home.html>>.

others claim to use them informally.⁹¹ Experience to date has shown that supply-chain monitoring by itself produces only limited behavioral changes at the factory level.⁹² Beyond certain multistakeholder systems, like the Fair Labor Association, or third-party certified processes, such as Social Accountability 8000, social audits currently enjoy only limited credibility among external stakeholders.⁹³ Relatively few companies that engage in large-footprint projects seem ever to have conducted a full-fledged human rights impact assessment, although a larger number includes selected human rights criteria in broader social/environmental assessments.⁹⁴ And only a few such projects provide for community complaints procedures or remedies.

The leading socially responsible investment indices tend to be more comprehensive than company or industry-based policies, and they promote human rights impact assessments more strongly.⁹⁵ Moreover, the idea of “responsible investment” has gained considerable ground in the past few years, with greater involvement of mainstream institutions.⁹⁶

The substantial expansion of voluntary initiatives has not yet engaged many state-owned enterprises from emerging market economies, which are becoming important players on the global stage. And laggards of all provenances continue to find ways of avoiding scrutiny. But the biggest challenge may be bringing such efforts to a scale where they truly can move markets. For that to occur, it appears that states will need to structure business incentives and disincentives more proactively, while accountability practices must become more deeply embedded within market mechanisms themselves.

Summing Up

I presented this mapping to the Human Rights Council in March 2007. Eighteen delegations spoke in the ensuing interactive dialogue.⁹⁷ Some “welcomed” or noted it “with interest,” signifying a positive reception in UN parlance, while none indicated disagreement with its

⁹¹ These data are from August 2006. E-mail from staff of Global Reporting Initiative to SRSG John Ruggie (Dec. 2006) (on file with author).

⁹² See Richard Locke, Fei Quin, & Alberto Brause, Does Monitoring Improve Labor Standards? Lessons from Nike (Harvard University, Kennedy School of Government, Corporate Social Responsibility Initiative Working Paper No. 24, 2006), *available at* <http://www.ksg.harvard.edu/m-rcbg/CSRI/pub_workpapers.html>; see also Roseann Casey, Meaningful Change: Raising the Bar in Supply Chain Workplace Standards (prepared for SRSG regional consultation in Bangkok, June 2006), *available at* <<http://www.business-humanrights.org/Updates/Archive/SpecialRepPapers>>. Because of these limitations, the Fair Labor Association has adapted its operating model to include capacity building at the factory level. See FLA 3.0: Toward Sustainable Compliance, *available at* <<http://www.fairlabor.org/all/resources/FLA3.0/index.html>>. But patterns of procurement, such as seasonal surges of orders, also contribute significantly to the problem and are not redressed by any initiative.

⁹³ On FLA, see <<http://www.fairlabor.org/all/about/index.html>>, and on SA8000, see <<http://www.sa-intl.org/index.cfm?fuseaction=Page.viewPage&pageId=473>>.

⁹⁴ Responding to subparagraph (d) of the mandate, *supra* note 15, I also submitted a separate report to the Human Rights Council addressing the major methodological issues raised by different approaches to human rights impact assessments. Report of the SRSG, Human Rights Impact Assessments: Resolving Key Methodological Questions, UN Doc. A/HRC/4/74 (Feb. 5, 2007).

⁹⁵ Addendum: Business Recognition of Human Rights, *supra* note 45, at 4.

⁹⁶ See, e.g., UN Environment Programme (UNEP) and UN Global Compact, The Principles on Responsible Investment (Apr. 2006), *available at* <<http://www.unpri.org>>. More than 180 institutions have signed on, representing some \$8 trillion in investments under management. UNEP & UN Global Compact, Press Release, Principles for Responsible Investment Hit \$8 Trillion Mark on First Year Anniversary (Apr. 29, 2007), *available at* <http://www.unglobalcompact.org/NewsAndEvents/news_archives/2007_04_30.html>.

⁹⁷ Argentina, Belgium, Brazil, Bangladesh, Canada, Cuba, France, Germany, Indonesia, Iran, Ireland, Norway, Pakistan, Peru, Switzerland, the United Kingdom, the United States, and the European Union.

findings.⁹⁸ International business responded favorably.⁹⁹ Five leading NGOs, in a joint statement to the Council, expressed appreciation for my “attention and commitment” to the issue, while stressing the limits of voluntarism coupled with the need to give greater voice to victims.¹⁰⁰ Subsequently, the Group of Eight’s summit meeting in Heiligendamm, Germany, indicated its support for the mandate.¹⁰¹ Preferences on how to move ahead continue to vary. But the mapping exercise succeeded in its objective of providing a common foundation for future deliberations by constructing a brief “restatement” of current international standards and practices regarding business and human rights.

The extensive research and consultations that went into the conceptual and factual “ground clearing” phase of the mandate left little time for a strategic assessment of the major legal and policy measures that states and other social actors could take to close protection gaps, let alone to recommend which options might work best. Therefore, in my March 2007 presentation I asked the Council to extend the mandate by a year—giving it the normal three-year duration of mandates.¹⁰² It did so at its June 2007 session.

III. FUTURE DIRECTIONS

Increasing the effectiveness of the international human rights regime to deal with the challenges posed by globalization is a long-term project. The mapping reported in the previous part indicates that this is a fluid area, but one in which significant protection gaps remain. The findings of the mandate to date also suggest a number of guiding principles for building on the existing momentum and moving toward closing the gaps. Here, I briefly enumerate three that bear most specifically on the role of international law.

First, any “grand strategy” needs to strengthen and build out from the existing capacity of states and the states system to regulate and adjudicate harmful actions by corporations, not undermine it. Currently, at the domestic level some governments may be unable to take effective action on their own, whether or not the requisite will is present. And in the international arena states may compete for access to markets and investments, as a result of which collective action problems may restrict or impede their serving as the international community’s “public authority.” This observation drives the desire to impose direct obligations on corporations under international law. But doing so can itself have adverse effects on governance capacities,

⁹⁸ The United States indicated in its oral statement that it would follow up with a letter addressing certain technical issues with regard to the state duty to protect, but to date has not done so.

⁹⁹ See International Chamber of Commerce (ICC) and International Organisation of Employers (IOE), Joint Preliminary Views of the International Chamber of Commerce (ICC) and the International Organisation of Employers (IOE) to the 4th Session of the Human Rights Council on the Second Report of the Special Representative of the UN Secretary-General on Business and Human Rights, John Ruggie (distributed at the Human Rights Council, 2007) (on file with author).

¹⁰⁰ See Amnesty International, ESCR-Net, Human Rights Watch, International Commission of Jurists, & International Federation for Human Rights, Joint NGO Statement to the Human Rights Council (Mar. 2007), *available at* <<http://hrw.org/english/docs/2007/03/29/global15612.htm>>.

¹⁰¹ G8 Summit 2007, Heiligendamm, Growth and Responsibility in the World Economy, Summit Declaration 30–31, para. 84 (June 7, 2007), *available at* <<http://www.g-8.de/Webs/G8/EN/G8Summit/SummitDocuments/summit-documents.html>>.

¹⁰² When the mandate was established in 2005, a shorter time frame had been proposed in the hope of securing U.S. support, but the United States nevertheless voted against the authorizing resolution.

as discussed earlier—leaving aside the question of any such proposals' current political feasibility and legal enforceability. Therefore, it seems more promising in the first instance to expand the international regime horizontally, by further clarifying and progressively codifying the duties of states to protect human rights against corporate violations: individually, as home as well as host states, and collectively through the "international cooperation" requirement of several UN human rights treaties.¹⁰³ This approach will also establish greater precision regarding corporate responsibility and accountability, and create a broader understanding among states about where the current regime cannot possibly be expected to function as intended and where its vertical extension, therefore, is required. International instruments may well have a significant role to play in this process, but as carefully crafted precision tools complementing and augmenting existing institutional capacities.

Second, the focal point in the business and human rights debate needs to expand beyond establishing individual corporate liability for wrongdoing. To be sure, this is a critical element that must be—and in the area of crimes is being—addressed in its own right. But an individual liability model alone cannot fix larger imbalances in the system of global governance. As the political philosopher Iris Marion Young puts it in an important discussion of labor abuses in global supply chains: "because the injustices that call for redress are the product of the mediated actions of many, . . . they can only be rectified through collective action."¹⁰⁴ And that, she continues, requires a broader construction of "political" or "shared responsibility." Its aim, Young explains, is not to assign individual blame for discrete acts through backward-looking judgments, but "to change structural processes by reforming institutions or creating new ones that will better regulate the process to prevent harmful outcomes."¹⁰⁵ Soft law hybrid arrangements like the Kimberley Process represent an important innovation by embodying such a concept: combining importing and exporting states, companies, and civil society actors, as well as integrating voluntary with mandatory elements. They deserve attention, support, and emulation in other domains.

Finally, many elements of an overall strategy lie beyond the legal sphere altogether. Consequently, the interplay between systems of legal compliance and the broader social dynamics that can contribute to positive change needs to be carefully calibrated. No less a human rights authority than Amartya Sen warns against viewing rights primarily as "proto-legal commands"¹⁰⁶ or "laws in waiting."¹⁰⁷ Doing so, he argues, would unduly constrict—he actually uses the term "incarcerate"¹⁰⁸—the social logics and processes other than law that drive the evolving public recognition of rights. The implication of Sen's insight for the business and human rights agenda is that any successful regime needs to motivate, activate, and benefit from all of the moral, social, and economic rationales that can affect the behavior of corporations. This prospect requires providing incentives as well as punishments, identifying opportunities

¹⁰³ See, e.g., International Covenant on Economic, Social and Cultural Rights, Art. 2(1), Dec. 16, 1966, 993 UNTS 3.

¹⁰⁴ Iris Marion Young, *Responsibility and Global Labor Justice*, 12 J. POL. PHIL. 365, 387 (2004).

¹⁰⁵ *Id.*; see also Michael Green, *Institutional Responsibility for Moral Problems*, in GLOBAL RESPONSIBILITIES: WHO MUST DELIVER ON HUMAN RIGHTS? 117 (Andrew Kuper ed., 2005).

¹⁰⁶ Amartya Sen, *Elements of a Theory of Human Rights*, 32 PHIL. & PUB. AFF. 315, 319 (2004).

¹⁰⁷ Amartya Sen, *Human Rights and the Limits of Law*, 27 CARDOZO L. REV. 2913, 2918 (2006).

¹⁰⁸ Sen, *supra* note 106, at 319.

as well as risks, and building social movements and political coalitions that involve representation from all relevant sectors of society, including business—much as has been occurring in the environmental field. The human rights community has long urged a move “beyond voluntarism” in the area of business and human rights.¹⁰⁹ Sen’s advice suggests that this move be accompanied by willingness on its part also to look “beyond compliance.”

In sum, international law has an important role to play in constructing a better-functioning global regime to govern business and human rights. The effectiveness of its contributions will be maximized if it is embedded within, and deployed in support of, an overall strategy of increasing governance capacity in the face of enormously complex and ever-changing forces of globalization.

¹⁰⁹ See INTERNATIONAL COUNCIL ON HUMAN RIGHTS POLICY, BEYOND VOLUNTARISM: HUMAN RIGHTS AND THE DEVELOPING INTERNATIONAL LEGAL OBLIGATIONS OF COMPANIES (2002), *available at* <http://www.ichrp.org/paper_files/107_p_01.pdf>.