Risk, Uncertainty and the Future of Corporate Human Rights Due Diligence

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Abstract

Corporate human rights due diligence is now a social fact; it is no longer merely an idea or aspiration. This paper uses economist Frank H. Knight's famous, albeit controversial, distinction between *risk* and *uncertainty* to help elucidate foundational concepts and challenges for the theory, practice, and future regulation of HRDD. The EU, France, and Germany, among other jurisdictions, have recently adopted laws requiring large businesses to conduct human rights due diligence (HRDD) in their supply chains. The specific details of these laws, as well as their proper motivations, are contested vigorously in public deliberation. There is no overarching consensus about how legislators should define the scope of HRDD or about what rules should apply to businesses. When it comes to assessing human rights risks, the key question that both corporate decision makers and policy makers must contend with is one that Knight identified a century ago: "how far to go?" There is no definitive answer. This paper clarifies what is at stake. The uncertainties that surround HRDD should not be a cause of paralysis for businesses nor should they prevent policy makers from developing powerful and impactful regulatory tools. The paper concludes that policy makers should give priority to the normative-ethical motivation for corporate HRDD over any instrumental-economic business case that may be made in specific circumstances. Giving priority to ethics does not negate economic reasoning; rather, it recognizes that, when it comes to HRDD, economic reasoning must be led by ethical reasoning, and nested within it, not the other way around.

Keywords: human rights due diligence, corporate law, risk management, risk and uncertainty, corporate social responsibility, ethics, UNGPs, "business and human rights"

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> The actual procedure of making decisions in practical life is a rather inscrutable or "intuitive" formation of "estimates," subject to a wide margin of error or uncertainty.
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> —Frank H. Knight, "Risk, Uncertainty and Profit" (1921)

Introduction

The critical issue of how far businesses should be expected to go in their corporate human rights due diligence (HRDD) efforts, and at what expense, is highly contested. Law makers, business leaders, investors, human rights advocates, and corporate accountability activists approach this issue from different vantage points; and they tend to have contrasting expectations about what objectives ought to be pursued through corporate HRDD. This analytical paper supports a clearer understanding of the proper scope of, and motivation for, corporate HRDD. It seeks to invigorate emerging policy and practice in his area through a balanced assessment of contrasting motivations for undertaking corporate HRDD. In pursuing these aims, the paper identifies key conceptual ambiguities in corporate HRDD and demonstrates how these ambiguities exert a destabilizing effect on diverse political projects for mainstreaming and legislating human rights due diligence. This paper grapples with the ethical and practical question, difficult to resolve, of how diligent business decision makers ought to be when it comes to discovering, understanding, preventing, and mitigating business-related human rights abuses. It also considers how much, and for what reasons, corporate decision makers should *take care* on matters related to human rights. In answering these questions, the paper critically assesses the multifaceted and contested motivations that are given for conducting corporate HRDD under both voluntary and mandatory frameworks. Most

importantly, the paper advances our understanding of the extreme tensions that the concept of corporate HRDD embodies, and proposes new ways to go about resolving them.

The concept of corporate HRDD was introduced to the world in 2011, when the United Nations Human Rights Council unanimously adopted the UN Guiding Principles on Business and Human Rights (UNGPs).[1] Set within the heart of these principles, corporate HRDD is prescribed as a practical mechanism for steering the world's diverse economic organs toward greater respect for human rights. In this respect, corporate HRDD is, at its core, a normative construct: it is intended to support right conduct (i.e., ethical conduct) for business decision makers where odious tradeoffs between maximizing economic gain and respecting human rights may come into view. Today, the UNGPs are regarded as an "authoritative standard"[2] on human rights and business, and are considered a species of soft law. Nested within that standard, corporate HRDD is recognized as one of the UNGPs' most important operational components. Nonetheless, more than a decade after the adoption of the UNGPs, there remains much ambivalence about the proper scope of corporate HRDD. Such ambivalence persists even while

[1] The United Nations Guiding Principles on Business and Human Rights were unanimously endorsed by the UN Human Rights Council in 2011. *See* John Ruggie (Special Representative of the Secretary-General), *Rep. on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises: Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, 13, U.N. Doc A/HRC/17/31 (Mar. 21, 2011).

[2] *See, e.g.* SHIFT, THE EU COMMISSION'S PROPOSAL FOR A CORPORATE SUSTAINABILITY DUE DILIGENCE DIRECTIVE, SHIFT'S ANALYSIS, March 2022, at note 3. (Asserting that the UNGPs "are the authoritative standard on how to prevent and address business-related human rights harms. They expect states to adopt a smart mix of measures, mandatory and voluntary [e.g., human rights due diligence], national and international, to drive meaningful change in business behavior.")

groundbreaking new laws making corporate HRDD mandatory have been proposed and enacted in several jurisdictions.

What guides rule making for corporate HRDD today? The terms of reference used by lawmakers are found primarily in the UNGPs and in the Organisation for Economic Co-operation and Development's Guidelines for Multinational Enterprises (OECD Guidelines).[3] While common features can be found in all recent legislative initiatives,[4] the details vary considerably across jurisdictions. The operative scope and judicial treatment of HRDD concepts and rules remain very much in flux. As this paper will show, for all HRDD initiatives, the key question legislators face is "how far to go?" How far should businesses be expected to go in their efforts to identify, prevent, and mitigate adverse human rights impacts in their activities and relationships? The means for answering this question, which will be considered in detail below, lie in clarifying the proper and primary motive for legislators in mandating HRDD; it *also* lies in clarifying the proper and primary motivation for HRDD that is given in the UNGPs.

One thing is beyond doubt: corporate HRDD is no longer just words on paper. Today, HRDD is fairly described as a "social fact."[5] Incipient forms of mandatory corporate human rights due diligence (mHRDD) have been made into law in a number of jurisdictions. The first of these laws, the French *duty of vigilance*, has been in force since

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[3] On risk-based due diligence, *see* OECD, OECD DUE DILIGENCE GUIDANCE FOR RESPONSIBLE BUSINESS CONDUCT (2018), at 9.

[4] Recent legislative initiatives in Europe include: i) European Parliament Due Diligence Resolution and European Commission Proposal on Sustainability Due Diligence (adopted in November 2022), ii) German Supply Chain Law (adopted in 2021; enters into force in 2023), iii) Norwegian Transparency Law (came into effect in July 2022), iv) Dutch Responsible Business Conduct Bill (proposed), v) Belgian Duty of Vigilance (proposed), and vi) Austrian Supply Chain Bill (proposed).

[5] On social facts, *see* John G. Ruggie, *What Makes the World Hang Together? Neo-Utilitarianism and the Social Constructivist Challenge*, 52 INT'L ORG. 856 (1998).

2017.[6] This law requires large French companies to create a "vigilance plan" for identifying human rights risks and for preventing severe human rights impacts. While the law is groundbreaking in several important respects, a number of challenges have emerged in defining its scope and in implementing its civil liability enforcement mechanism.[7] More recently, in February 2022, the European Commission released its *Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence*.[8] The stated aim of the proposed directive is to require companies to identify, prevent, and mitigate, "potential or actual adverse human rights and environmental impacts connected with companies' own operations, subsidiaries and value chains."[9] The European Commission's proposal was released one year after Germany enacted a law that, beginning in 2023, requires large corporations to conduct HRDD in the first tier of their supply chain.[10] It will take a few years for the European Commission's more ambitious proposal to be transposed into law by the European Union's member states. The key question of how far businesses should go in conducting

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[6] *See* Loi no. 2017-399 du 27 Mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre.

[7] *See* Elsa Savourey & Stéphane Brabant, *The French Law on the Duty of Vigilance: Theoretical and Practical Challenges Since its Adoption*, 6.1 BUS. HUM. RIGHTS. J. 141 (2021).

[8] *See* European Commission, COM(2022) 71 final 2022/0051 (COD) Brussels, 23.2.2022, Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937. Note that a related, but separate, instrument on corporate sustainability reporting was adopted by the European Parliament in November 2022. *See* European Parliament legislative resolution of 10 November 2022 on the proposal for a Directive of the European Parliament and of the Council amending Directive 2013/34/EU, Directive 2004/109/EC, Directive 2006/43/EC, and Regulation (EU) No 537/2014, as regards corporate sustainability reporting (COM(2021)0189 – C9-0147/2021 – 2021/0104(COD)).

[9] *See* Paragraph 14, European Commission, COM(2022) 71 final 2022/0051 (COD) Brussels, 23.2.2022, Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Direcetive (EU) 2019/1937.

[10] *See* Gesetz über die unternehmerischen Sorgfaltspflichten zur Vermeidung von Menschenrechtsverletzungen in Lieferketten (Sorgfaltspflichtengesetz), Bundesministerium für Arbeit un Soziales, 24.03.2021.

HRDD is a point of contention in current debates over what final form the rules ought to take.[11]

What reasons have been given by policy makers for mandating corporate HRDD? Ostensibly, the primary motivation is to spur companies to identify, prevent, and mitigate adverse human rights impacts that may arise in connection with a business's activities and relationships—the primary concern being to address human rights "risk to people" (this concept is examined in detail below). Yet, at the same time, corporate HRDD is put forward by its proponents as a management tool for mitigating the material "risk to business" that may arise from creating adverse human rights impacts on third parties. Thus, both ethical and economic motivations are given for conducting corporate HRDD; this paper examines closely the antinomy overarching these concurrent motivations and describes how some of the most effective advocates for corporate HRDD walk a tightrope between economic and ethical poles. At times, these proponents move skillfully from one pole to the other—a style of principled funambulism.

[11] At time of writing, the European Parliament's Committee on Legal Affairs had recently released a draft report with recommended changes to certain provisions of the EU Commission's proposal, including recommended changes to the scope of due diligence that would be required. *See, e.g.* European Parliament Committee on Legal Affairs, Draft report on the proposal for a directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 (COM(2022)0071 – C9-0050/2022 – 2022/0051(COD)).

The principled funambulist

"The Tight-Rope Walker"
Painting by Jean-Louis Forain (1852-1931)

This paper shows how the proponents of corporate HRDD adopt an ethical approach when they give primacy to human rights "risk to people" over material "risk to business." And yet, as this paper also shows, for practical reasons, these same proponents must strike a balance between economic and ethical approaches. Such funambulism is required because traditional juridical and corporate governance frameworks tend to give priority to improving shareholder welfare over addressing wider social and environmental concerns. The proponents of HRDD also recognize that corporate decision makers must contend directly with the inexorable pressures of economic competition within markets; more often than not, these pressures lead them to give primacy to shareholder interests. This brute reality was reflected plainly when the *Economist* declared in 2016 that "shareholder value rules business."[12] The situation has not changed so much today, even

[12] The Economist, *Analyse this: Shareholder value: The enduring power of the biggest idea in business*, Mar. 31, 2016.

though some cracks have widened recently in the cultural foundations of the shareholder primacy norm.[13] It would be reasonable to argue today that the emergence of mandatory corporate HRDD represents an expanding crack in the edifice of shareholder primacy; for that very reason, HRDD legislative proposals have met great resistance from many business actors. The proponents of HRDD must contend with such resistance and frame their mission accordingly. While advocating for HRDD in this highly contested policy-space, the "principled funambulists" move pragmatically between highlighting its ethical motivations and its economic motivations.

Do ethical motivations for corporate HRDD dominate economic ones, or vice versa? This paper shows that the picture is mixed. An important finding of this paper is that, in his role as UN Special Representative on Business and Human Rights, John G. Ruggie imported, very discreetly, an *ethical* dimension into corporate HRDD. He achieved this by giving methodological primacy to human rights "risk to people" over material "risk to business" in the UNGPs. By making this move, Ruggie took corporate HRDD a step past the traditional economic-instrumentalist modes of corporate social responsibility and the economic-instrumentalist ethos of "enlightened shareholder value."[14] And yet, as this paper shows, when business decisions and policy decisions

[13] *See, e.g.* Martin Lipton, *It's Time to Adopt the New Paradigm*, HARV. L. SCH. F. ON CORP. GOV., Feb. 11, 2019, https://corpgov.law.harvard.edu/2019/02/11/ its-time-to-adopt-the-new-paradigm.

[14] The position argued for in this paper—that Ruggie's approach to HRDD gives primacy to human rights "risk to people" over material "risk to business"—is in tension with arguments made by Wettstein, who contends that "Ruggie is concerned predominantly with making a business case for corporate human rights responsibility, rather than with advancing a sound ethical argument" [at 19]. Wettstein argues that Ruggie's UNGP framework, "presents and justifies the imperative to respect human rights primarily in economic terms" and that "(m)oral reflection, on the other hand, is strangely absent in Ruggie's argumentation" [at 19]. *See* Florian Wettstein, *Human rights as a critique of instrumental CSR: Corporate responsibility beyond the business case*, 106 NOTIZIE DI POLITEIA 18-23 (2012). In contrast to Wettstein, this paper argues that the primacy given to "risk to people" in corporate human rights due diligence has

about HRDD must be made, great tension exists between the economic-instrumentalist and normative-ethical motivations for respecting human rights. This paper explains in detail why these tensions exist and considers what they portend for normative corporate HRDD projects worldwide.

The Intertwined Ethical and Epistemic Challenges of HRDD

Proponents of mandatory and voluntary corporate human rights due diligence must contend with three overarching and overlapping challenges. First, they must discern what kinds of human rights impacts business decision makers ought to know more about. Second, they must find ways to overcome the numerous practical challenges involved in producing actionable knowledge about the very things that business decision makers ought to know more about. Third, they must grapple with the specter of uncertainty that often looms over decision-making dilemmas that arise from issues and controversies related to human rights. This list of challenges reveals that the ethical and epistemic dimensions of corporate HRDD are bound together inextricably. The *epistemic* concerns pertain to what things are known; to what else needs to be known; and to how business decision makers come to know more about the potentially adverse human rights impacts of business activity. The *ethical* concerns pertain to what things business decision makers *ought* to know more about; as well as to the mixed ethical and legal question of how much effort and expense (and self-sacrifice) they *ought* to put into knowing more about those things. The policy maker and legislator face a related, but very different, set of

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ethical significance; it argues that Ruggie's approach to corporate human rights responsibility is not strictly instrumental-economic, and that Ruggie's approach to HRDD should not be viewed as strictly motivated by economic criteria.

questions. They must decide what are the appropriate sanctions that should apply in the event of ethical and practical lapses on the part of business decision makers. The policy maker is concerned with what kinds of penalties, if any, should be levied, and against whom (i.e., against corporate legal entities or human decision makers), for not possessing adequate knowledge about things that they *ought* to know about. What all this means is that putting corporate HRDD into practice requires greater practical understanding and ethical reflection about how *diligent* a corporate decision maker ought to be about preventing and mitigating adverse human rights impacts that the business may cause, contribute to, or be linked to.[15] Designing rules for mandatory HRDD in the face of the challenges enumerated above has proven to be a delicate, politically sensitive undertaking.

There is no straightforward way to go about reconciling the epistemic and ethical challenges for corporate HRDD, which, blended together, have delayed and destabilized the formation of rules and standards in jurisdictions like the European Union. To gain a better understanding of the nature of this problem, this paper revisits the century-old work of economist Frank H. Knight, focusing on his famous, though contentious, distinction between risk and uncertainty.[16] The key insight to be drawn from Knight's work lies in recognizing that, where there is human rights *risk*, there is also very likely to be a degree of *uncertainty*, for businesses and rights holders alike. The degree of uncertainty will vary dramatically, depending on the circumstances that business decision makers and human rights holders face. This paper argues that the presence of degrees of

[15] The language of causing, contributing to, and linked to, is found in Principle 13 of the UNGPs. *See* United Nations, *supra* note 1.
[16] *See* FRANK H. KNIGHT, RISK, UNCERTAINTY AND PROFIT 314 (1985).

uncertainty in the causal and temporal relationship between “risk to people” and “risk to business” (these concepts are discussed in detail below) destabilizes the instrumental-economic motivation that is given for corporate HRDD. In other words, the range of uncertainty in this relationship destabilizes the theoretical “convergence” over time of “risk to people” and “risk to business”—that is to say, it destabilizes the positive[17] “business case” for corporate HRDD. This means that, at present, the economic case for HRDD, when framed as a risk-management proposition, rests upon unsettled analytic and empirical foundations. This result has powerful implications for the future of HRDD policy, practice, and legislative design, which are considered in detail in the sections that follow.

Just what do we mean by the “convergence” of “risk to people” and “risk to business”? In its simplest form, this theorized convergence[18] can be represented as:

RP<>RB

Risk to people < convergence > Risk to business

This paper argues that the theorized convergence of “risk to people” (RP) with “risk to business” (RB) does not necessarily hold, in circumstances involving business-related human rights risks. Indeed, in some cases, “risk to people” and “risk to business” diverge

[17] On defining the positive and negative business cases for corporate responsibility, *see generally* Wettstein, *supra* note 14.

[18] It should be noted that the term *convergence* has been used by Wettstein in a similar context; however, there are subtle but important differences in how this term is deployed in this paper. This paper focuses specifically on how the theorized temporal-causal convergence of “risk to people” and “risk to business” is given as an instrumental-economic motivation for conducting corporate HRDD under the UNGPs. In contrast, Wettstein makes the broader point that “Instrumental CSR rests on the belief in the *convergence* between economic and social values” [my emphasis]. *See* Wettstein, *Id*. at 20.

rather than converge.

This paper also draws a distinction between *voluntary* risk taking and *involuntary* risk bearing. The voluntary risk takers of the world—investors and shareholders—have ample protection against costly "bad luck," in the form of internal guardrails that are firmly embedded in centuries-old business law and private law. Identifying, preventing, and mitigating "risk to business" already takes center stage in business law; to the contrary, identifying, preventing, and mitigating human rights "risk to people" is a novel endeavor for businesses. This paper argues that the relationship between *voluntary* "risk to business" and *involuntary* "risk to people" is not properly characterized as unidirectional and linear; instead, the relationship is better described as recursive and looping. This means that the causal relationships between the two domains of risk (voluntary "risk to business" and involuntary "risk to people") are bidirectional and rebounding.[19] The paper goes on to argue that the imbalances of power and legal privilege that occur across this particular recursive relationship are themselves sources of risk and degrees of uncertainty, especially to the disadvantaged "rights holders" who involuntarily bear the risks of business activity.

With reference to Knight, this paper argues that the dynamic feedback loops that operate between companies and rights holders destabilize the convergence thesis and leave corporate decision makers standing closer to the uncertainty end of the risk-uncertainty continuum than is commonly acknowledged. In many if not all circumstances, the relationship between human rights "risk to business" and "risk to

[19] On rebound dynamics in the concept of business risk, *see, e.g.* Deanna Kemp et al., *Differentiated Social Risk: Rebound Dynamics and Sustainability Performance in Mining* 50 RESOURCES POLICY 19, 24 (2016).

people" may be better characterized in terms of degrees of *uncertainty* rather than *convergence*. There are times when corporate decision makers, as well as rights holders, must contend with incalculable human rights *uncertainty* as well as *risk*. Where such human rights uncertainty exists, the proponent of the business case for HRDD stands on very shaky ground. This may seem to put well-meaning corporate decision makers in an untenable position—but this is not meant to be a story about throwing up our arms in the face of futility. Contending with the potential for human rights uncertainty should not be a cause for paralysis for business decision makers who are experimenting with HRDD; nor should it stop policy makers around the world from calibrating and enacting rules about mandatory corporate HRDD. Proponents of HRDD can avoid such paralysis by giving primacy to the normative-ethical motivation for HRDD and, in turn, subordinating the unproven and unstable instrumental-economic "business case."[20] The normative-ethical motivation should lead policy making and practice, while the "business case" should be wielded very sparingly, and only when there is compelling and resilient evidence to support it.

This paper concludes that the methodological primacy accorded by Ruggie and others to human rights "risk to people" in corporate HRDD reflects the ethical imperative not to leave harmful outcomes for people to chance, when chance can be (reasonably) avoided. Indeed, this imperative underlies the concept of the duty of care in tort law; in this respect, the primacy given to "risk to people" in HRDD is one that legal systems are

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[20] On the "business case" for social responsibility, *see, e.g.* Ulrich Thielemann & Florian Wettstein, *The Case against the Business Case and the Idea of "Earned Reputation,"* 111 DISCUSSION PAPERS OF THE INSTITUTE FOR BUSINESS ETHICS (2008). In their critique of the "business case" for corporate social responsibility, Thielemann and Wettstein argue that, "the business case argument turns 'ethics' [including human rights] … into a mere function of economic success and of the goal to increase profits and shareholder value" [at 3].

already very familiar with. The key conceptual ambiguity for HRDD and tort law frameworks lies in determining what chance of harm can be *reasonably* avoided; in other words, how far should a business go to avoid the chance of harm to third parties? Ultimately, this paper argues that the proper motivation for legislative and policy efforts to promote corporate HRDD is to protect people who face human rights risk and uncertainty involuntarily because of business activity. At the same time, the paper also acknowledges that, for pragmatic reasons, the instrumental economic motivation for corporate HRDD is often foregrounded by those who seek to drive change from *within* companies. In this way, the instrumentalist-economic motivation for corporate HRDD is used strategically by those who seek to advance HRDD on ethical grounds. Putting all of this together, it can be said that the corporate HRDD project involves a high-wire balancing act between the two poles of ethics and economics.

Risk, Uncertainty, and Human Rights

A century ago, in his controversial treatise *Risk, Uncertainty and Profit*, Frank H. Knight sought to clarify what he regarded to be a "fatal ambiguity" in the concept of risk. Risk, he contended, is measurable by statistical analysis of adequate quantitative data. Uncertainty, he argued, occurs where one is unable to form meaningful inferences from the data that one has (or doesn't have). By Knight's definition, uncertainty also occurs when the problem being examined is not amenable to quantitative analysis. Business risk, he argued, is "measurable uncertainty," while "unmeasurable uncertainty," in his view, is

properly called *uncertainty*.[21] "The best example of uncertainty," he surmised, "is in connection with the exercise of judgment or the formation of those opinions as to the future course of events, which opinions (and not scientific knowledge) actually guide most of our conduct."[22] Although Knight's positivist-leaning distinction between scientific knowledge and opinion is much too sharp, the notion that a continuum lies between measurable risk and unmeasurable "radical" uncertainty is a helpful one.[23] As demonstrated below, it is useful to keep this continuum in mind when thinking about the dynamic relationship between "risk to people" and "risk to business."

Where do material risks to business and risks to people lie on the continuum of measurable risk and unmeasurable uncertainty? The answer to this question, of course, can only be gleaned on a case-by-case basis. Take, for instance, the human rights issues that arise out of the unpredictable sway of the sorts of social upheavals that occur frequently in conflicts over extractive industry projects.[24] When entrenched conflicts over lands, resources, and the environment come to a boil,[25] corporate decision makers must

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[21] Knight distinguishes between risk and uncertainty in the following way: "The practical difference between the two categories, risk and uncertainty, is that in the former the distribution of the outcome in a group of instances is known (either through calculation a priori or from statistics of past experience), while in the case of uncertainty this is not true, the reason being in general that it is impossible to form a group of instances, because the situation dealt with is in a high degree unique." Knight, *supra* note 16, at 233.

[22] Knight, *supra* note 16, at 233

[23] While some Bayesians argue that Knight's sharp distinction between risk and uncertainty is invalid, Norman and Shimer argue that Knight's scheme can be "reconciled" with Bayesian probability theory. Bayesian theory shows that, by layering multiple subjective estimates, reasonably reliable assessments can be made even where there is uncertainty. *See* Alfred L. Norman & David W. Shimer, *Risk, Uncertainty, and Complexity*, 18.1 J. ECON. DYN. CONTROL 231-232 (1994).

[24] *See, e.g.* Daniel M. Franks, et al., *Conflict Translates Environmental and Social Risk into Business Costs*, 111 PROCEEDINGS NAT'L ACAD. SCIS. 7576 (2014); *see also* Rachel Davis & Daniel M. Franks, *The Costs of Conflict with Local Communities in the Extractive Industry*, 30 PROCEEDINGS FIRST INT'L SEMINAR SOC. RESPONSIBILITY MINING ch. 6 (2011).

[25] *See, e.g.* Copper Mesa Mining Corporation v. Republic of Ecuador (Perm. Ct. Arb. No. 2012-2). *See also* UNDER RICH EARTH (Malcolm Rogge dir., 2008).

contend with "hard cases," where the stakes are very high and where the outcomes of different courses of action are highly indeterminate. In one such situation that was recounted to the author of this paper, the general counsel (GC) of a mid-tier mining company faced a dilemma over whether to call on state security forces to forcibly remove Indigenous protestors who were occupying lands slated for mining development. Although the protestors believed that the mining company was illegally encroaching on Indigenous territory, the company's position was that it had obtained every legal permission needed to develop a mine on the lands. A group of Indigenous families had moved onto the disputed land, and they intended to cultivate and occupy this land indefinitely. As a result of this occupation, the mining project was delayed. Recalling this situation, GC told this paper's author that, "there was a reluctance to call in the police because they will use force too quickly. [And we had another] problem with holding the army back from clearing out [the Indigenous families] by force."[26] There can be no doubt that calling on state security forces to clear the path for development was an extremely risky move from a human rights standpoint; at the same time, for GC, the risk of long-term, adverse material consequences for the company of allowing the land occupation to continue was also a cause for concern. In recounting the potentially dire consequences of making the wrong move, GC conceded that, in the hard cases, "I look out for myself; I need to be responsible to myself." GC faced what may be described as a tragic decision/dilemma in which no option, on its face, was a "good" option.[27] Knight captured the sense of this indeterminate condition a century ago, when he said that, "the actual

[26] To preserve the informant's anonymity, the pseudonym "GC" is used here. [Interview notes on file with the author.]

[27] On "tragic dilemmas," *see* Martha C. Nussbaum, 2000. *The Costs of Tragedy: Some Moral Limits of Cost-Benefit Analysis*, 29 J. LEGAL STUD. 1005, 1014-17 (2000).

procedure of making decisions in practical life is a rather inscrutable or 'intuitive' formation of 'estimates,' subject to a wide margin of error or uncertainty."[28] Facing uncertainty about potentially grave outcomes, GC's decision making involved working with a "rather inscrutable or 'intuitive' formation of 'estimates,'" to use Knight's words, rather than calculations of maximal or optimal outcomes.[29] GC's decision-making problem included an ethical dimension that engaged his own values and sense of personal responsibility. In grappling with this problem, his decision-making process was reflective, not mechanical or algorithmic. He did not act as an economic value–maximizing automaton (*Homo economicus*); rather, he acted as an ethical and political being (*Homo sapiens*). This example illustrates plainly how, where human rights are at stake, the process of corporate decision making cannot be "boiled down" to cost-benefit calculations that are based on measurable economic criteria alone. In defining the parameters for decision making in such circumstances, immeasurable ethical and economic criteria intermingle, leading to what Knight referred to a century ago as "unmeasurable uncertainty" (see above).

Ultimately, in the story recounted by GC, state security forces were mobilized to forcibly remove the Indigenous community members from the disputed lands.[30] The violent actions of the security forces became the subject of intense scrutiny by civil society and the media. Social unrest over the mining project in the region continued unabated. Arguably, given the national and local contexts of the mining operations, such adverse human rights outcomes were entirely foreseeable. Then again, business decision-

[28] Knight, *supra* note 16, at 314.
[29] Knight, *supra* note 16, at 314.
[30] Much debate ensued about whether, and to what extent, the company's own private security forces were involved in the operation to remove the protesters.

makers might counter that such clarity comes only with the benefit of hindsight. It is typical in these kinds of conflicts[31] that opinions clash dramatically over what was predictable or not. In many situations, there is no sense that the risk of foreseeable harm to rights holders can be measured in any precise, quantifiable way. In some cases, qualitative and statistical evidence about general conditions can be used to make estimates about local conditions, but such estimates will necessarily be rough. Again, we can say that deciding what is the right course of action (and what is reasonable) in the circumstances involves what Knight referred to as a "rather inscrutable or 'intuitive' formation of 'estimates.'"[32] Facing potentially tragic human rights decision dilemmas, business decision makers are left making ethical judgments, not deductive calculations. In these trying circumstances, degrees of uncertainty and judgment are bedfellows.

Human Rights and Business Judgment

In "business and human rights" conflicts and controversies, no two scenarios are entirely alike, making it difficult to work from an established road map. Nonetheless, corporate decision makers must make judgments drawing on both economic and ethical criteria, and they must give instructions to those who are expected to implement them. Facing uncertainty, "the primary problem or function [of managers]," Knight asserted a century ago, "is *deciding* what to do and how to do it" [my emphasis].[33] Sixty years after

[31] *See generally* Marta Conde & Philippe Le Billon, *Why Do Some Communities Resist Mining Projects While Others Do Not?* 4:3 EXTR. IND. SOC. 681-697 (2017).
[32] Knight, *supra* note 16, at 314.
[33] Knight says that where there is uncertainty, the "centralization of this deciding and controlling function is imperative; a process of 'cephalization,' such as has taken place in the evolution of organic life, is inevitable." *See* Knight, *supra* note 16, at 268.

Knight, the economist Eugene Fama defined the "special role" of management as "decision making."[34] A basic tenet of today's business law is that, at a minimum, business decisions ought to have *some rational basis*. While the precise standard of what is considered rational differs across jurisdictions, it is safe to say that a business decision must not be a random guess. Courts generally are loath to second-guess business decisions when they are informed and made in good faith.[35] In their "special role" as decision makers, the challenge for managers is to define the relevant parameters; access reliable data; recognize the limits of their knowledge; and strive to make the best choices, or at least *defensible* ones, within those limits.[36] In furtherance of these goals, the purpose of corporate risk management is to constrain and manage the realm of uncertainty in the best way possible given the means available.[37] This approach is all well and good for day-to-day management in uninteresting times; however, the story changes when human rights dilemmas and controversies arise, as we shall see in the sections that follow.

In "normal" times, business decision makers first seek to reduce business risk by purchasing insurance. The actuary analyzes data to calculate probabilities and set a price

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[34] *See* Eugene F. Fama, *Agency Problems and the Theory of the Firm*, 88 J. POL. ECON. 288, 289 (1980).

[35] In Anglo-American corporate law, the applicable standard tends to be very deferential to business decision makers. *See, e.g.* Aronson v. Lewis, 473 A.2.d 805, 812 (Del. 1984) (providing for "a presumption that in making a business judgment the directors of the corporation acted on an informed basis, in good faith and in the honest belief that the action was taken in the best interests of the company").

[36] A handbook on corporate "due diligence" advises that, "in business, of course, the more responsible players have to reduce the gambling aspect [of decision making] and lower the risk of getting it wrong. This is particularly true of overseas decisions." *See* LINDA S. SPEDDING, DUE DILIGENCE HANDBOOK 38 (2009).

[37] For example, in the Delaware Court of Chancery's *Caremark* decision, the Court held that corporate fiduciaries must put in place some form of monitoring system (i.e., some form of due diligence) to take care that its employees are not engaged in illegal behavior. Note, however, that the purpose of this corporate "duty of care" is to protect the corporation and its stockholders, not to prevent harm to non-shareholders. *See* In re Caremark International Inc. Derivative Litigation, 698 A.2d 959 (Del. Ch. 1996).

on certain risks. But there are limits to what the actuary can achieve, and when human rights conflicts and controversies enter the picture, there is no insurance policy that can fully protect a business from all of the risks that may arise.[38] Applying Knight's reasoning here, the unmeasurable aspects of human rights risks would be better characterized as uninsurable uncertainties.[39] In recent years, accelerating climate change, COVID-19, war in Ukraine, and sweeping changes in the geopolitical landscape have made it clear that unmeasurable and uninsurable uncertainties can potentially create havoc for corporate decision makers. Sometimes *we simply don't know* how things will turn out. Nonetheless, decisions must be taken; and making decisions, as Fama indicated, is the "special role" given to management.

Prioritizing "Severe" Risks to People

When a business is suddenly thrust into a human rights controversy, or finds that it has gradually and unwittingly waded into one, the measurable realm of business risk quickly metamorphoses into uncertain territory—into *terra incognita*. For Knight, the manager's dilemma for any type of risk and uncertainty assessment is that, "it would doubtless be possible to use all the resources of society with more or less effect in reducing uncertainty, leaving none for any other use. It is a question of how far to go."[40]

[38] A 2014 report by the Chief Risk Officers Forum on "Human Rights and Corporate Insurance" stated: "Extending the coverage of insurance products and services to include human rights issues … is *uncharted territory*" (my emphasis). *See* HUMAN RIGHTS AND CORPORATE INSURANCE, CRO FORUM 14 (2014).
[39] Writing on uninsurable risk, Knight opines that, "the typical uninsurable (because unmeasurable and this because unclassifiable) business risk relates to the exercise of judgment in the making of decisions by the business man." Knight, *supra* note 16, at 268.
[40] Knight, *supra* note 16, at 348.

In considering human rights risk (or "human rights uncertainty"), this is precisely the question that business decision makers must ask themselves: "how far to go?" Indeed, the potential scope of HRDD is already vast, and the catalogue of internationally recognized human rights grows ever larger.[41] In a voluntary framework for HRDD, the cost to the business will depend, in part, on how thorough an analysis the decision makers choose to undertake. In a mandatory HRDD regime, the costs will be a function, in part, of the stringency of applicable law.[42] In either regime, managers will claim that, surely, they need not turn their mind to *all* human rights risks to *all* people. And they have a point; as Knight would say, "it is a question of how far to go."[43] And so, with costs in mind, as well as the many practical challenges involved in undertaking this work, many of the proponents of HRDD call upon managers to prioritize severe risks to people.[44] It is then put forward that severe risks to people "converge" with risks to business; and thus, a positive business case for conducting HRDD "starts to crystallize."[45] Another way of considering this equation (i.e., from a corporate value-seeking perspective) is that by

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[41] The UNGPs refer to a non-exhaustive list of international instruments, including: the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the International Labor Organization's Declaration on Fundamental Principles and Rights of Work.
[42] A study commissioned by the German government claimed, surprisingly, that the cost of implementing voluntary human rights due diligence was just 0.1% of a firm's annual turnover. *See* SABINE HAUPT ET AL., SORGFALTSPFLICHTEN ENTLANG GLOBALER LIEFERKETTEN, BUNDESMINISTERIUM FUR WIRTSCHAFTLICHE ZUSAMMENARBEIT UND ENTWICKLUNG (2021).
[43] Knight, *supra* note 16, at 348.
[44] On the "severity" criterion, *see* OECD, OECD DUE DILIGENCE GUIDANCE FOR RESPONSIBLE BUSINESS CONDUCT, 6, 27, 33 and 35 (2018). The OECD guidelines state that enterprises should "carry out human rights due diligence as appropriate to their size, the nature and context of operations and the *severity* of the risks of adverse human rights impacts" (my emphasis) [at 33].
[45] *See* Caroline Rees, President, Shift, Keynote Address at Rocky Mountain Mineral Law Foundation Conference on Human Rights and the Extractive Industries, Panama (February 18, 2016). Rees stated: "Where you have most risks to people, you have a pretty good lens on risk to business, and so the business case starts to crystallize." [notes on file with author]

prioritizing severe risks to people, a business can make optimal, long-term value-seeking adjustments to operations and strategy. By this reasoning, corporate HRDD is undertaken as an instrumental means for reducing risk to business, thereby adding value to the business over the long term. In the sections that follow, this instrumentalist-economic motivation for conducting corporate HRDD will be critically analyzed and subordinated to the primary and proper normative-ethical motivation for corporate HRDD.

Clarifying Terminology: Risk to People and Risk to Business

The meaning of “risk to people” is very broad and includes any risk that individuals and communities may face of being deprived of their human rights.[46] In contrast, the concept of “risk to business” is much more narrowly defined. In the discussion that follows, the theorized “convergence” of human rights risk to people (RP) and risk to business (RB) is indicated by the following shorthand:

RP<>RB

risk to people < converges with > risk to business

The negation of this relationship is indicated by:

~~**RP<>RB**~~

risk to people < does not converge with > risk to business

The opposite of this relationship is indicated by:

[46] Under the UNGPs, businesses are prescribed to look to internationally recognized human rights, *see supra* note 41.

RP><RB

risk to people > diverges from < risk to business

The theorized mutually beneficial aspect of the positive convergence relationship (RP<>RB) is critically analyzed in the sections below.

Drawing on modern portfolio theory, Utlu and Niebank state: “Risk in a business context means potentially adverse effects on the return the enterprise can expect to gain from an investment or from a business operation.”[47] When it comes to assessing *human rights risk*, they assert that “the corporate sector’s intention is to capture the potential impact on human rights from the point of view of a corporate risk calculation.”[48] Viewed from this narrow economic perspective, human rights “risk to business” includes financial, reputational, and legal risks that may rebound from conflicts and controversies involving stakeholders. In “scoping” for such risks in the course of conducting a risk assessment, some overall trends facing different sectors (such as the garment industry, extractives, hotels and hospitality, etc.) are observable; and this knowledge may be used by companies to pinpoint potential problems. Finding a positive value proposition for the firm in doing such risk assessments is an evident concern in many industries today, including financial services.[49] Be that as it may, under the United Nations Guiding

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[47] *See* Deniz Utlu & Jan-Christian Niebank, *Calculated Risk: Economic versus Human Rights Requirements of Corporate Risk Assessments*, GERMAN HUMAN RIGHTS INSTITUTE – ANALYSIS 19 (October 2017).

[48] *Id.* at 13. In contrast, some argue that it is a fallacy that corporate risk assessment is all about calculation. For example, in an Expert Roundtable on Business, Human Rights and Accounting, “many participants highlighted that investors are keen to understand how a company has assessed risk and what it is doing to address it; it was seen as a fallacy that they are purely interested in numbers.” *See* Shift, EXPERT ROUNDTABLE ON BUSINESS, HUMAN RIGHTS AND ACCOUNTING: A SUMMARY REPORT 4 (24 April 2019).

[49] *See, e.g.* BLACKROCK INVESTMENT STEWARDSHIP, OUR APPROACH TO ENGAGEMENT WITH COMPANIES ON THEIR HUMAN RIGHTS IMPACTS:

Principles on Business and Human Rights,[50] the primary purpose of conducting corporate HRDD is to identify, prevent, and mitigate human rights risks to people, rather than pecuniary risks to business.[51] And yet, when the convergence thesis (RP<>RB) is given as a motivation for businesses to conduct human rights due diligence, some ambiguity arises over whether corporate decision makers are expected to give primacy to "risk to people" or "risk to business." As noted in the introduction of this paper, two distinct motivations for conducting corporate human rights risk assessments are at play: i) the instrumentalist-economic motive (driven by rational self-interest), and ii) the normative-ethical motive (reflective and other-regarding). These distinct motivations underlie two contrasting approaches to corporate human rights risk assessment: i) assessments that are carried out for the primary purpose of reducing material risks to business; and ii) assessments that are carried out for the primary purpose of identifying, preventing, and mitigating human rights "risk to people" as an end in itself. The latter approach is properly called human rights due diligence, while the former is better regarded as a part of conventional corporate risk assessment. The significance of this distinction for HRDD policy and practice is elucidated further below.

COMMENTARY 1 (March 2021); *see also* BLACKROCK INVESTMENT STEWARDSHIP, ENGAGEMENT PRIORITIES FOR 2021 5 (March 2021).

[50] *See* John G. Ruggie (Special Representative of the Secretary-General), *Rep. on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises: Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, 13, U.N. Doc A/HRC/17/31 (Mar. 21, 2011). (Principle 15 and 17).

[51] A distinction between "risk to people" and "risk to business" is also implied in the French corporate duty-of-vigilance law. *See* Stéphane Brabant et al., *The Vigilance Plan: Cornerstone of the Law on the Corporate Duty of Vigilance*, REV INT. COMPLIANCE 9 (December 2017). (noting that, "although the required measures may bring to mind traditional risk management processes found in companies, there is, however, a fundamental difference: the purpose of the vigilance approach is to protect individuals and the environment whereas the purpose of classic risk management processes is to protect the company").

In similar fashion, the term "social risk" should be distinguished clearly from business risk. Graetz and Franks observe that, in practice, "social risk" and "business risk" are often used interchangeably. Here, too, a "fatal ambiguity" (to use Knight's words) ought to be resolved. As they see it, this ambiguity stems from, "a failure to distinguish between the risks to individual and group actors [i.e., risk to people] and the risks that such actors can precipitate for businesses/projects [i.e., risk to business]."[52] Graetz and Franks caution that such conflation may give rise to unintended costs for businesses *and* for the people affected, insofar as the "failure to treat social risk and business risk discretely potentially will have implications for a company's engagement with the host community, as well as its operations, reputation and financial capital."[53] Taking an example from the extractive industries, Worden argues that conflating social and business risk "can lead to situations where some social harms from mining may be underestimated or overlooked because they do not have immediate business implications; that is, they are not a risk *to* mining projects or operations" (emphasis in original).[54] It is clear that social harms are undesirable for the people who are directly affected. For businesses, the problem of underestimating or overlooking social harms is that they may translate into business risk at a later time. Here, the temporal dimension of the relationship between "risk to people" and "risk to business" begins to come into focus; this dimension is brought into the discussion further below.

[52] Geordan Graetz and Daniel M. Franks, *Conceptualising Social Risk and Business Risk Associated with Private Sector Development Projects*, 19:5 J. RISK RES. 581, 596 (2016).
[53] *Ibid*.
[54] Sandy Worden, *Is the Mining Industry Misdiagnosing Social Risk?*, PROCEEDINGS OF RISK AND RESILIENCE MINING SOLUTIONS (November 14-16, 2016).

Fasterling defines social risk differently, as "the actual and potential leverage that people or groups of people with a negative perception of corporate activity have on the business's (financial) value."[55] His definition of *social risk* is, in turn, roughly equivalent to what Kemp et al. refer to as *business risk*. Kemp et al. distinguish the terms in the following way: "When mining companies create risks to people, this is called social risk. When external stakeholders put business objectives at risk, this too is called social risk, but it is also referred to as business risk. For conceptual clarity, we call *risk to people* 'social risk' and *risk to business* 'business risk.'"[56] In the discussion that follows, this paper adopts Kemp's distinction between "risk to people," as social risk, and "risk to business," as business risk. The distinction is represented in this paper by the following shorthand:

social risk = risk to people = RP

business risk = risk to business = RB

Having clarified the key terminology, the paper turns to consider the pertinent sociological aspects of corporate HRDD.

[55] *See* Björn Fasterling, *Human Rights Due Diligence as Risk Management: Social Risk Versus Human Rights Risk* 2.2 BUS. HUM. RIGHTS J. 225, 229 (2017). For earlier formulations of "social risk" that are roughly equivalent to Fasterling's definition, *see* Tamara Bekefi et al., *Social Risk as Strategic Risk*, CORPORATE SOCIAL RESPONSIBILITY INITIATIVE WORKING PAPER NO. 30 (2006); *see also* Beth Kytle and John G. Ruggie, *Corporate Social Responsibility as Risk Management: A Model for Multinationals*, CORPORATE SOCIAL RESPONSIBILITY INITIATIVE WORKING PAPER NO. 10 (2005).

[56] *See, e.g.* Deanna Kemp et al., *Differentiated Social Risk: Rebound Dynamics and Sustainability Performance in Mining* 50 RESOURCES POLICY 19, 24 (2016).

Assessing Human Rights Risk: Perspective Matters

Conceptually, human rights risk might be regarded as an objective phenomenon or a socially constructed one.[57] Either way, in corporate human rights risk assessments (undertaken as part of HRDD or otherwise), natural persons must take on the role of setting the terms of reference, collecting data, analyzing results, making judgment calls, and authoring internal and public-facing documents. The result of this work must then be communicated to corporate decision makers who, in turn, may or may not choose to act on the findings. Under the UNGPs, the responsibility for conducting corporate human rights risk assessments lies with the business itself; in doing so, businesses are expected to take into account the perspectives of "rights holders" and "affected stakeholders."[58] In one of his last public appearances, Ruggie stated: "It is difficult to imagine how [human rights due diligence] could be done adequately without engaging at-risk stakeholders, or, where that is not possible, their legitimate representatives or subject matter experts."[59] In a similar vein, Sherman notes that, under the UNGPs, it is expected that a company "will identify the risks of its involvement in human rights abuse *from the perspective of the stakeholder*" (my emphasis).[60] The obvious practical challenge that companies face in doing this work is that there are always multiple stakeholder perspectives to consider; and

[57] *See* SOCIAL THEORIES OF RISK AND UNCERTAINTY: AN INTRODUCTION 4-7 (Jens O. Zinn ed., 2009). Zinn frames the distinction as "whether risk is primarily conceptualized as an entity, which has an objective existence and is objectively accessible beyond the social, or whether risks are primarily seen as being socially mediated or even socially constructed independent of its objective existence." [at 4].

[58] On the importance of consulting with "affected stakeholders," *see* David Kovick, *Meaningful Engagement with Affected Stakeholders*, SHIFT (2018).

[59] John G. Ruggie, *Keynote address: The S in ESG. Best Practices and the Way Forward*, SHIFT, 1 (2021).

[60] *See* John F. Sherman III, *Human Rights Due Diligence and Corporate Governance*, CRI WORKING PAPER NO. 79, 4 (2021) (referring to UNGP Principles 17-21).

it is not always easy to get access to all of them in equal measure. An even deeper challenge is that the affected communities (including "rights holders") and corporate risk personnel (including consultants) view the situation from radically different perspectives. Here, the theoretical debate over the "socially constructed" versus "objective" nature of risk comes to the fore. Who is more likely to "get it right"? The global expert analysts? Or the affected community members? The practical questions which arise concern assessing the significance of the (potentially radical) differences in perspective, and whether such differences may be overcome in the methods used for corporate-led assessments of human rights risk to people? This paper holds that, while not entirely insurmountable, the gaps between contrasting perspectives are often wider than commonly recognized. The reasons for this divide are considered here.

Serious disputes and conflicts between affected stakeholders (rights holders) and businesses over human rights issues frequently involve a clash of worldviews among highly differentiated actors: young and old, wealthy and indigent, family farmer and mining engineer. What matters most to the people involved in these disputes depends greatly on whether one is positioned *within* the business enterprise (e.g., managers, directors, shareholders,[61] joint-venture partners, engineers, community relations consultants, etc.) or *outside* of it (small farmers, Indigenous communities, artisanal miners, local residents, etc.). What is regarded as a risk depends very much on where one stands in relation to the proposed business activity. Perspective matters. Political, social, and economic inclusion or exclusion matters. And yet, under a conventional corporate

[61] Shareholders are often regarded to be legally separate from the corporation and, thus, as standing outside it. However, in looking at a firm or enterprise as a whole, the shareholders can be regarded as an integral part of the enterprise; for this reason, shareholders are regarded here as being *inside* the enterprise rather than entirely apart from it.

HRDD framework, the forum for deliberating over what risks matter most, and to whom, is neither democratic nor pluralistic. Although human rights risks may be observed and experienced differently from multiple perspectives (as they involve a plurality of interests and concerns), corporate HRDD under the UNGPs is a process that is controlled by business decision makers.[62] It should not be controversial to state that a company-funded and -controlled human rights due diligence assessment is a value-laden exercise and not a purely "objective" assessment. An independent observer would be quite reasonable in raising concerns about observational biases and blind spots. To address this concern, the proponents of HRDD take pains to emphasize that businesses should carry out "meaningful engagement" with potentially affected individuals and groups.[63] If the goal is to produce objective assessments, then the challenge lies in finding a way to reconcile the ranking of concerns that are assessed by the people directly affected (i.e., "actor assessed" concerns) with the ranking of those assessed by hired experts (i.e., "policy-

[62] For alternative approaches to human rights impact assessment that put rights holders at the center, *see* COLUMBIA CENTER ON SUSTAINABLE INVESTMENT, DANISH INSTITUTE FOR HUMAN RIGHTS, and SCIENCES PO LAW SCHOOL CLINIC, A COLLABORATIVE APPROACH TO HUMAN RIGHTS IMPACT ASSESSMENT (2017); *see also* OXFAM & FIDH, COMMUNITY-BASED HUMAN RIGHTS IMPACT ASSESSMENT (2016); *see also* Gabrielle Watson et al., *Human rights impact assessment in practice: Oxfam's application of a community-based approach*, 31(2) IMPACT ASSESSESSMENT AND PROJECT APPRAISAL 118 (2013).

[63] *See, e.g.* SHIFT, 3 THE EU COMMISSION'S PROPOSAL FOR A CORPORATE SUSTAINABILITY DUE DILIGENCE DIRECTIVE, SHIFT'S ANALYSIS (2022) (stating that, "meaningful engagement with affected stakeholders is central to making human rights due diligence under the UN Guiding Principles … effective in practice"). *See also* UNDP (Thailand), HUMAN RIGHTS DUE DILIGENCE: AN INTERPRETIVE GUIDE, 2022. https://www.ohchr.org/documents/publications/hr.pub.12.2_en.pdf (last visited Nov. 1, 2022) (stating that engagement with stakeholders, "enables an enterprise to identify whether stakeholders have the same or different perspectives (than the enterprise and than each other) on what constitutes an impact on their human rights and on how significant an impact may be"). Note that an earlier version of this paper was shared with UNDP staff, in 2021.

maker assessed" or "corporate-agent assessed" concerns).[64] Is it possible to reconcile diverging "actor assessed" and "corporate-agent assessed" concerns to arrive at an objective assessment of "risk to people" and "risk to business"? Perhaps, to a degree. The significance of this methodological challenge for corporate HRDD is considered further in sections below.

The matter of perspective has been highlighted in the technical literature on HRDD that has accumulated in recent years. For instance, in its guidance on HRDD in enterprise risk management, the World Business Council for Sustainable Development (WBCSD) gives priority to stakeholder perspectives: "In more familiar risk management processes, severity of risk is most often assessed in whole or in part from the perspective of risk to the organization, whether financial, reputational or otherwise. However, HRDD assesses risk *from the perspective of the affected stakeholders only*, that is, from the perspective of those who may be adversely impacted" (my emphasis).[65] According to the WBCSD, the "only" perspective that should be considered in HRDD is that of the affected stakeholders. Yet sometimes, businesses that seek to engage "meaningfully" with affected stakeholders face a conundrum: the affected people are not willing to engage in return. Indeed, there are times when affected community members may refuse

[64] Pointing to differences in valuation "when the parties' beliefs differ systematically," Kornhauser opines that, "the choice between actor-assessed and policy maker-assessed well-being as the policy-maker's maximand is … deeply perplexing and problematic." *See* Lewis A. Kornhauser, *Constrained Optimization: Corporate Law and the Maximization of Social* Welfare, in THE JURISPRUDENTIAL FOUNDATIONS OF CORPORATE AND COMMERCIAL LAW 54, 110 (Jody S. Kraus and Steven D. Walt eds., 2007).
[65] *See* COSO and WBSCD, ENTERPRISE RISK MANAGEMENT—APPLYING ENTERPRISE RISK MANAGEMENT TO ENVIRONMENTAL, SOCIAL AND GOVERNANCE-RELATED RISKS 54 (2018).

to engage with the company altogether.[66] They might have good reason to believe that their interests are better served by taking their concerns to government officials, or to the courts, rather than to company representatives. The point to be taken here is that business decision makers cannot take it for granted that a company-controlled HRDD assessment will succeed in capturing the full picture of human rights "risk to people" in all its dimensions and from all points of view. Some lack of knowledge and some degree of uncertainty may remain. In projects with large social and environmental footprints, including extractive projects, the degree of uncertainty surrounding attempts to capture human rights "risk to people" *as seen from their perspective* is potentially very high. This concern about potentially significant "gaps" in knowledge has implications for decision makers who must choose "how far to go" in conducting corporate-led HRDD. A wide range of human rights risk-assessment tools, as well as expertise, may be needed to tackle the job: these cost money and take time to implement. And yet, even with expert knowledge and state-of-the-art tools, the specter of "unmeasurable uncertainty," to use Knight's words, may loom in the background. After all, there is always another stone that one might turn over and reveal something underneath. Such uncertainty may confound the corporate decision maker, in their eagerness to "optimize" the company's HRDD efforts within an instrumental-economic logic. Setting out the "business case" for conducting corporate HRDD and meaningful engagement with affected stakeholders will involve rough estimates, impressions, and references to "best practices," rather than calculations. The impressionistic aspects of this kind of work are considered in more detail in the sections that follow.

[66] *See, e.g.* Copper Mesa Mining Corporation v. Republic of Ecuador, Part 4 (Perm. Ct. Arb. No. 2012-2).

Evidence in practice shows that, when it comes to assessing human rights risk to people, perspective matters. Rights holders and affected communities have their own set of priorities—and they carry out their own style of human rights risk assessments. In conducting an ethnographic study of environmental impact assessment and company-community conflicts over mining development in Peru, Li observed that, "determining what counted as an 'impact' or what constituted 'pollution' became points of controversy, as various actors sought to make perceptible (or imperceptible) the indeterminate and often unpredictable threats of mining activity." Li concluded that, "the dramatic changes to land and livelihoods that are produced by mining activity cannot be fully compensated" in economic terms.[67] As is reflected in Li's research on impact assessment, the divergent views of different social actors may be explained by information asymmetries,[68] variable time horizons,[69] stakeholder trust or lack thereof,[70]

[67] *See* FABIANA LI, UNEARTHING CONFLICT: CORPORATE MINING, ACTIVISM, AND EXPERTISE IN PERU 20 (2015).
[68] *See* Kenneth J. Arrow, *The Organization of Economic Activity: Issues Pertinent to the Choice of Market Versus Nonmarket Allocation*, in THE ANALYSIS AND EVALUATION OF PUBLIC EXPENDITURE: THE PPB-SYSTEM 1, 508 (Joint Economic Committee, 91st Cong., 1st Sess., 1969).
[69] *See* Kornhauser, *supra* note 64, at 111.
[70] Zinn writes: "Research has repeatedly shown how misinformation by official institutions rapidly decreases trust in the reliability of such institutions, and how difficult it is to rebuild trust once it is lost." *See* Zinn, *supra* note 57, at 13. *See also* Brian Wynne, *Misunderstood Misunderstanding: Social Identities and Public Uptake of Science*, 1:3 PUBLIC UNDERSTANDING OF SCIENCE 281 (1992).

psychological factors,[71] and epistemic considerations.[72] Fundamental disagreement[73] between companies and communities over "what matters" is, in itself, a potential source of human rights "risk to people" and "risk to business."[74] One example of such a recursive dynamic is where a community (or a part of a community) refuses outright to endorse a project and engages in political resistance to it.[75] Such situations give rise to especially difficult problems for any company that seeks to engage meaningfully with affected stakeholders, let alone reach a consensus about which specific human rights "risk to people" are most severe. And, at the same time, political resistance by communities may lead to serious and grave human rights risks and uncertainties for activists and community members (including "human rights defenders"). Fundamentally, the distinction made between "risk to people" and "risk to business" reflects the fact that

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[71] *See, e.g.* Rajiv Maher, *Squeezing Psychological Freedom in Corporate–Community Engagement*, 160, no. 4 J. BUS. ETHICS 1047-1066 (2019). As Zinn notes: "Risk perception research has shown how the quality of risks (e.g. its scale, dreadfulness, or likelihood) influences responses to risks." *See* Zinn, *supra* note 57, at 6.

[72] On epistemic problems in valuation, *see* Duygu Avci et al., *Valuation Languages in Environmental Conflicts: How Stakeholders Oppose or Support Gold Mining at Mount Ida, Turkey* 70:2 ECOLOGICAL ECONOMICS 228-238 (2010) (concluding that the evidence shows that "local people oppose such projects for various distinct reasons and monetary and/or technical compensatory schemes do not suffice to solve the disagreements that arise in a satisfactory way."); *see also* Amartya K. Sen, *The Discipline of Cost-Benefit Analysis*, 29:S2 J. LEGAL STUD. 931, 951 (2000) (writing that, in cost-benefit analysis, "there are particular difficulties with environmental valuations, especially existence values.")

[73] Li concludes: "Underlying the disputes over mining were disagreements about what counts as evidence and whose knowledge (that of mining experts, scientists, NGOs, or peasants (farmers) was credible and legitimate." *See* Li, *supra* note 67.

[74] Zinn asserts that, "risk conflicts are not only a question of objective knowledge. Instead a range of issues are involved, such as value conflicts, conflicts regarding the acknowledgement of different rationalities, conflicts regarding power and finally emotional aspects." Zinn, *supra* note 57 at 13.

[75] For a detailed account of such a conflict, *see* Copper Mesa Mining Corporation v. Republic of Ecuador, Part 4 (Perm. Ct. Arb. No. 2012-2). *See also* Canada: Wet'suwet'en Activists Vow to Continue Pipeline Fight After Arrests, GUARDIAN, 10 Feb, 2020. *See also* Martin Lukacs, By Rejecting $1bn for a Pipeline, a First Nation Has Put Trudeau's Climate Plan on Trial," GUARDIAN, 20 March, 2016.

rights holders and businesses assess their circumstances and risks from completely different vantage points—at times, very far apart. The chasm that lies between them can run very deep.

A Short Genealogy of "Risk to People" and "Risk to Business"

How did the technical distinction between material "risk to business" and "risk to people" in HRDD come about? This section provides a brief review of the origin and significance of these terms as they appear in the discourse on HRDD. Early in his mandate as UN Special Representative on Business and Human Rights, Ruggie turned his attention to company-community conflicts in the extractive sector.[76] He deployed the (then) nascent extractive industry "cost of conflict" literature[77] to support the business case for conducting HRDD.[78] On the surface, the case that Ruggie articulated was straightforward: foreseeing and avoiding conflicts with local communities will save a business money and can potentially enhance long-term business value. However, as we shall see below, Ruggie would later take pains to emphasize that, in conducting corporate HRDD, primacy should be given to "risk to people" over concerns about material "risk to business."

[76] *See* JOHN G. RUGGIE, JUST BUSINESS: MULTINATIONAL CORPORATIONS AND HUMAN RIGHTS p. xxxvi (2013). *See also* Louis V. Galdieri, "Ruggie and the Red Priest," https://lvgaldieri.com/2013/05/22/ruggie-and-the-red-priest-a-lesson-in-listening/ (last visited Oct. 12, 2022).
[77] See Franks et al. *supra* note 24.
[78] *See, e.g.* JOHN G. RUGGIE, EXPERT MEETING ON CORPORATE LAW AND HUMAN RIGHTS: OPPORTUNITIES AND CHALLENGES OF USING CORPORATE LAW TO ENCOURAGE CORPORATIONS TO RESPECT HUMAN RIGHTS 137-139 (2009).

Midway through his mandate as UN Special Representative, Ruggie explained in an interim report how he had adopted the term "due diligence" from the lexicon of business law, and added to it the task of uncovering "human rights risks":

> Due diligence is commonly defined as "diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or to discharge an obligation" [citing *Black's Law Dictionary*, 8th ed. (2006)]. Some have viewed this in strictly transactional terms—what an investor or buyer does to assess a target asset or venture. The Special Representative uses this term in its broader sense: a comprehensive, proactive attempt to uncover human rights risks, actual and potential, over the entire life cycle of a project or business activity, with the aim of avoiding and mitigating those risks.[79]

In this 2009 statement, the distinction between "risk to people" and "risk to business" is not explicitly drawn. However, the emphasis on "risk to people" becomes more clear-cut in Ruggie's 2011 commentary to Principle 17 of the UNGPs, which states: "Human rights due diligence can be included within broader enterprise risk-management systems, provided that it goes beyond simply identifying and managing material risks to the company itself, *to include risks to rights-holders*" (my emphasis).[80]

The practical importance of distinguishing between "risk to business" and "risk to people" was taken up explicitly a few years later by Shift, a think tank founded by members of Ruggie's former UNGP team. Introducing novel terminology in 2015, Shift bifurcated the concept of human rights risk into "material risk" to business, on the one hand, and what they came to call "salient risk" to people, on the other. According to Shift, "a company's salient human rights issues are those human rights that are at risk of

[79] *See* Human Rights Council, *Business and Human Rights: Towards Operationalizing the "Protect, Respect and Remedy" Framework*, A/HRC/11/13 (22 April 2009) para 71, at 18.
[80] *See* Principle 17 in John G. Ruggie (Special Representative of the Secretary-General), *Rep. on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises: Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, 13, U.N. Doc A/HRC/17/31 (Mar. 21, 2011).

the most severe negative impact through its activities or business relationships."[81] Ostensibly, the concept of "salient risk" concerns the risk of severe adverse human rights impacts on people—i.e., the interests and welfare of the "rights holders." Nonetheless, it is important to keep in mind that Shift deploys this terminology squarely in the context of company-controlled HRDD processes.[82] That is to say, "salient risk" is a technical term that pertains very specifically to corporate HRDD methodology and processes. It is regarded as something with which businesses—rather than rights holders—ought to concern themselves. Under the UNGPs, it is businesses that have the obligation to conduct HRDD, not affected communities. However, nothing in the UNGPs prevents a business from working directly with rights holders in carrying out its HRDD activities; indeed, as already noted, businesses are expected to consult and engage with stakeholders. And yet, it is fair to say that, in conventional corporate HRDD, control over these processes ultimately rests with corporate decision makers, not community decision makers.

Since it is impractical to think that a business, especially a large multinational enterprise, can examine in fine detail all possible human rights "risks to people" that are

[81] *See* SHIFT, HUMAN RIGHTS REPORTING FRAMEWORK 48 (2015) (Part B1, Statement of Salient Issues).
[82] The terms "salience" and "salient risk" appear in the corporate responsibility and sustainability reports of several major multinational enterprises. *See, e.g.* JT GROUP HUMAN RIGHTS REPORT: FROM PRINCIPLES TO PRACTICE 13-53 (2021) (explaining that, "to further increase our human rights due diligence work, we integrated human rights into existing risk identification tools such as our internal audit procedure. We adapted the methodology to include a greater focus on risks to people, rather than simply risks to the business, and trained our internal auditors accordingly"). *See also* META HUMAN RIGHTS REPORT 25-38 (2022); CITIBANK, GLOBAL CITIZENSHIP REPORT 133 (2017); NESTLÉ, NESTLÉ IN SOCIETY: CREATING SHARED VALUE AND MEETING OUR COMMITMENTS 60–61 (2017); M&S, HUMAN RIGHTS REPORT 9 (2016); MICROSOFT, CITIZENSHIP REPORT 40 (2015); and UNILEVER, HUMAN RIGHTS REPORT: ENHANCING LIVELIHOODS, ADVANCING HUMAN RIGHTS 26 (2015).

linked to its activities and relationships, Principle 14 of the UNGPs focuses on the criterion of "severity." Following directly from the UNGPs, Shift recommends that priority in HRDD should be given to the "most severe negative impact" on people.[83] According to Shift, it makes sense for businesses to prioritize risks in this way because severe risks to people "converge" with material risks to business over time. In other words, what the business identifies as a "salient risk" to people is likely indicative of a material risk to business at some point in the future. In this way, salient risk to people and material risk to business are thought to "converge," meaning that preventing or mitigating severe risk to people is more likely to reduce material risk to business. The "convergence" is a beneficial one insofar as reducing severe risk to people leads to the ancillary benefit of reducing material risk to business. And so, by prioritizing the identification, prevention and mitigation of severe risks to people, businesses can "do well, by doing good." This theorized beneficial convergence of "salient risk" with "material risk" is represented in this paper with the following shorthand:

Salient risk to people = SR
Material risk to business = MR

SR < converges > MR

In Shift's conceptual framework for HRDD, the relationship between the SR<>MR and RP<>RB formulae also has a temporal dimension. Shift's business case for conducting HRDD lies in the proposition that, "where companies are involved with *severe* impacts on human rights, there is a strong chance that there will be risks to their

[83] The OECD also prioritizes "severity." *See* OECD *supra* note 44, at 33.

business as well, at least in the medium to long term" (my emphasis).[84] By this formulation, "risk to people" emerges prior to "risk to business"; in other words, the direction of causation is thought to move unidirectionally, from RP to RB. We can represent this theorized causal relationship as follows:

RP => RB

SR => MR

=> indicates direction of causation

Shift defines the temporal dimension of the convergence thesis (RP<>RB and SR<>MR) somewhat loosely: a human rights "risk to people" that a company causes or to which it contributes tends to be linked causally to a "risk to business" that will occur at some future point in time (e.g., over the medium to long term):

over time T

RP < converges > RB : T

SR < converges > MR : T

This theorized temporal relationship is reflected in recent technical literature on HRDD. For instance, a version of this temporal relationship was articulated by the UNDP in its 2022 "Interpretive Guide" on HRDD, which states: "'Human rights risks' refers to the risks of having an adverse impact on human rights, as against risks to the enterprise itself, although *the former increasingly leads to the latter*" (my emphasis).[85]

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[84] *See* SHIFT, BUSINESS, HUMAN RIGHTS AND THE SUSTAINABLE DEVELOPMENT GOALS: FORGING A COHERENT VISION AND STRATEGY 12 (2016) (commissioned by the Business and Sustainable Development Commission).
[85] *See* UNDP (Thailand), HUMAN RIGHTS DUE DILIGENCE: AN INTERPRETIVE GUIDE 2, 2022. https:// www.ohchr.org/documents/publications/ hr.pub.12.2_en.pdf (last visited Nov. 1, 2022).

Shift's conceptual framework also includes the dimension of the "severity" of risk to people. Shift hypothesizes that, as compared to a non-severe risk, it is more likely that a severe human rights risk to people will give rise to some degree of material risk to business in the future. Here, the role of severity in Shift's causal framework can be represented in the following way:

over time T

SRP <^> RB : T

SRP = severe risk to people

<^> = more likely converges

Theoretically, once it succeeds in addressing severe risks to people, the company can move on to address moderate risks, and so on. Shift's basic conceptual framework, as represented above, has been taken up widely in recent technical literature on HRDD, such as the OECD Guidelines and publications by the World Business Council on Sustainable Development (WBCSD) and, as already noted, the United Nations Development Program (UNDP).[86] The basic conceptual framework put forward by Shift and supported, in part, by Ruggie's writing on the topic, has generally informed the methodology employed in corporate-controlled approaches to HRDD.

Almost immediately after the UNGPs were adopted in 2011, Shift and Ruggie led the way in getting businesses to adopt the general approach to corporate HRDD outlined above. One aspect of Shift's efforts to bring businesses on board with the UNGPs and HRDD has been the deployment of the beneficial convergence thesis. For instance, in a keynote address given at an extractive industry conference in Panama in 2016, the

[86] *See* UNDP, *ibid*; *see also* OECD *supra* note 44; *see also* COSO and WBCSD, *supra* note 65.

president of Shift stated: "Where you have most risks to people, you have a pretty good lens on risk to business, and so the business case starts to crystallize."[87] This approach reflected what was already inscribed in Shift's 2015 "UN Guiding Principles Reporting Framework," which recommended that human rights due diligence should be undertaken, "while recognizing that where impacts on human rights are *most severe*, they *converge strongly* with risk to the business as well" (my emphasis).[88] The approach that Shift sought to advance also aligned with views expressed at the time in the specialized literature on human rights and risk management. For example, as Graetz and Franks theorized: "Social risks arising from human rights transgressions arguably can be said with a higher degree of certainty to result in unforeseen project risks."[89]

Shift and others were undoubtedly correct to observe that human rights risks to people could, in some cases, rebound negatively upon businesses over time (leading to "risk to business"). The causal story implied here is a unidirectional one, moving temporally from human rights "risk to people" (adverse cause) to material "risk to business" (adverse effect). To avoid the ultimate adverse effect (lower business value), the business ought to avoid doing anything to cause or contribute to human rights "risk to people"; indeed, the business should seek to prevent "risk to people" from the start, even if that means using its leverage with respect to other parties (including the government). Highlighting this causal story about protecting firm value may help to convince business

[87] Rees, *supra* note 45.
[88] Shift, *supra* note 81. In 2015, Unilever was the first major multinational firm to use Shift's UNGP Reporting Framework. Consistent with Shift's approach, Unilever prioritized those impacts that are "most likely to be the most severe where they occur, based on how grave the impacts to the rights-holder could be, how widespread they are and how difficult it would be to remedy any resulting harm." *See* Unilever, *supra* note 82, at 29.
[89] *See* Graetz & Franks, *supra* note 52, at 597.

decision makers that it is in their interest to conduct HRDD. However, this narrative only reflects part of the causal dynamic at play in the relationship between “risk to people” and “risk to business.” This paper takes the view that the relationship between these two domains of risk is characterized more fully as bidirectional and recursive. In the sections that follow, the paper argues that there are interdependent feedback effects between the two domains of risk. Such recursive dynamics complicate, and may even reverse, the linear narrative that commonly underlies the business case for HRDD. Here, the theorized bidirectional, looping causality in the relationship between “risk to people” and “risk to business” is represented as follows:

over time T

RP =><= RB : T

=><= indicates bidirectional and looping causality

This more complex, more complete causal story gives full effect to the political agency of rights holders and affected communities vis-à-vis business decision makers. By this narrative, rights holders and affected communities may influence and generate outcomes over time that are in tension with, or run counter to, the “beneficial” convergence of interests that is implied in the business case for HRDD. This more complex, recursive causal story is the one to which policy makers should give priority in conceiving and designing approaches, voluntary or mandatory, to HRDD. The narrative underlying the business case for corporate HRDD is a useful one for motivating one set of actors in the causal story (business decision makers, investors, etc.). However, the narrative driving policy makers should be a complete one, meaning that it should include the motivations

and agency of rights holders and affected communities, as well as their contribution to the causal dynamic between "risk to people" and "risk to business" as it plays out over time.

From "Principled Pragmatism" to "Principled Funambulism"

In his first interim report to the United Nations as Special Representative on Business and Human Rights, Ruggie described his approach as a "principled form of pragmatism" that was comprised of "an unflinching commitment to the principle of strengthening the promotion and protection of human rights as it relates to business, coupled with a pragmatic attachment to what works best in creating change where it matters most—in the daily lives of people."[90] By this approach, foregrounding the business case for respecting human rights would motivate business actors to incorporate human rights into their policy frameworks and daily operations. As more businesses took on the task of conducting HRDD (for self-interested reasons), the collateral objective of creating positive change in the "daily lives of people" would be also realized. By foregrounding the business case in this way, Ruggie balanced precariously upon a tightrope drawn between the instrumentalist-economic case for respecting human rights and the ethical imperative[91] to respect people's human rights as an end in itself. Pragmatically speaking, such funambulism may have been required to keep business "in the room" during the

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[90] *See* John G. Ruggie (Special Representative of the Secretary-General), *Interim report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises – Promotion and Protection of Human Rights*, U.N. doc. E/CN.4/2006/97 (22 February 2006), at para. 81.

[91] In Fasterling's view, the moral imperative to respect human rights is a "perfect moral duty." *See* Björn Fasterling & Geert Demuijnck, *Human Rights in the Void? Due Diligence in the UN Guiding Principles on Business and Human Rights*, J. BUS. ETHICS 799 (2013).

course of Ruggie's mandate. The conceptual dilemma at play in this predicament is nicely summarized by Utlu and Niebank, who observe that, "if human rights risk management is decoupled from the business case, a 'management paradox' emerges." The decoupling of self-interest from corporate risk management, they argue, would deviate from conventional thinking about the purpose of a business enterprise: "If business enterprises as a matter of principle systematically take decisions of their own beyond the business case, i.e. to some extent act in a way that runs counter to incentive mechanisms and efficiency conditions, this would imply that the purpose and significance of enterprises is undergoing a shift."[92] Prioritizing concern about "risk to people" over "risk to business" would be, by this reasoning, tantamount to a radical upending of the purpose of a for-profit business enterprise.[93] Ruggie sidestepped the issue, at least temporarily. He avoided creating concerns about such a "management paradox" by foregrounding the business case for respecting human rights: long-run value for shareholders, he emphasized, would be enhanced rather than harmed by corporate HRDD.[94] This approach also helped to assuage the corporate decision maker who may have been concerned (rightly or wrongly) that using corporate resources to respect human rights would fall afoul of the corporate director's fiduciary duty of loyalty. The plausible case for long-term value creation (grounded in RP<>RB and SR<>MR) provided the

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[92] *See* Utlu & Niebank, *supra* note 47, at 22.

[93] For a discussion of this paradox in the investment management context, *see* Malcolm Rogge, *What BlackRock Gets Right in its Newly Minted Human Rights Engagement Policy*, HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE (5 May 2021).

[94] In his critique of Ruggie's UNGP framework, Wettstein points to the "instrumental logic of the business case in connection with Ruggie's responsibility to respect human rights." *See* Wettstein, *supra* note 14, at 29. This paper argues that characterizing Ruggie's UNGP framework in strictly instrumental terms elides the ethical motivation that underlies his strategic and pragmatic "long game" for positive change.

needed *rational economic basis*[95] for spending money on corporate HRDD.[96] In the lead-up to the adoption of the UNGPs, there is no question that Ruggie fully understood the strategic importance of putting the business case for respecting human rights front and center. Yet, it must also be recognized that in the final version of the UNGPs, Ruggie gave methodological primacy in conducting HRDD to "risk to people," not 'risk to business."

With the unanimous adoption of the UNGPs in 2011, Ruggie's principled pragmatism turned into principled funambulism: he shifted the emphasis from mitigating "risk to business" to ameliorating "risk to people." Indeed, Ruggie and the (then) newly created Shift Project continued to use the business case to motivate businesses to commit to respecting human rights. However, with the adoption of the UNGPs behind them, they turned also to highlighting the methodological primacy given to the identification, prevention and mitigation of severe human rights "risk to people."[97] With this change in emphasis, they sought to align corporate HRDD with two contrasting objectives in tandem: i) self-interested business objectives (long-term value creation); and ii) principle and collateral social objectives (identification, prevention and mitigation of adverse human rights impacts). By this dual motivational approach, the line that is often drawn between altruistic ethical motives and self-interested economic motives was blurred, creating both opportunities and risks for the entire HRDD project, as is elaborated further below.

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[95] On rational decision making and the business judgment rule, *see supra* note 35.
[96] On how the director's duty to monitor established in Delaware's *Caremark* decision can be applied to human rights risk and HRDD, *see* Sherman, *supra* note 60, at 4. (referring to UNGP Principles 17-21).
[97] *See* Shift, *supra* note 81.

In the decade that followed the adoption of the UNGPs, Shift's continued pragmatic wielding of the business case (RP<>RB, SR<>MR, SRP<^>RB) succeeded in increasing business appetite for corporate HRDD. To date, a significant number of major multinationals have made explicit commitments to the due diligence methodology set out in the UNGPs.[98] The popularization, in some quarters, of the business case for respecting human rights has also given policy makers in multiple jurisdictions more reason to support mandatory HRDD (mHRDD). With recent legislative developments on mandatory human rights and environmental due diligence (mHREDD),[99] today it is plausible to argue that a sea change is underway, such that corporate respect for human rights has moved into the mainstream, at least in Europe.[100] And yet, there is also much resistance to change. When the European Parliament voted overwhelmingly in favor of comprehensive draft legislation on mandatory human rights due diligence in early 2021, corporate lobbyists arrived quickly in Brussels to throw cold water on the proposal.[101] The European Commission's "Regulatory Scrutiny Board," which reviews and reports on proposed legislation, issued a "Negative" opinion[102] on the EU Parliament's proposal, leading to significant delays before the EU's executive branch, the European Commission, finally released its proposal in February 2022.[103] It remains to be seen

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[98] *See supra* note 82.
[99] *See* European Commission *supra* note 9.
[100] Legislation has also been proposed in Canada. *See* "An Act respecting the corporate responsibility to prevent, address and remedy adverse impacts on human rights occurring in relation to business activities conducted abroad," Bill C-262, First Reading, March 29, 2022, First Session, Forty-fourth Parliament, 70-71 Elizabeth II, 2021-2022.
[101] *See, e.g. Europe Inc. Wins as EU Delays New Business Rules*, POLITICO, May 21, 2021.
[102] European Commission, Regulatory Scrutiny Board Opinion, Proposal for a Directive of the European Parliament and of the Council on Sustainable Corporate Due Diligence and amending Directive (EU) 2019/1937, SEC(2022) 95, 26.11.2021.
[103] *See* European Commission *supra* note 9.

whether European mHREDD and the pro-social reforms of corporate law duties that are contained within it will be radically transformative in their final form.

While working with businesses to implement HRDD in some of the world's largest firms, Shift consistently put forward the business case as a compelling motivation for corporate action. At the same time, Ruggie's emphasis on the primacy of "risk to people" took on a distinctly non-instrumentalist tenor.[104] For instance, in his recommendations to the international football association FIFA in 2016, he reinforced the primacy of "risk to people" in HRDD: "Traditional enterprise risk management systems focus on risks to the enterprise itself. When it comes to considering human rights risks, *the essential starting point is risk to people*" (my emphasis).[105] At the same time, he pitched a soft version of the convergence thesis, stating that, "where [FIFA] is involved with significant risks to people, it often hurts its own reputation and bottom line."[106] In other statements, Ruggie and Shift's John Sherman have emphasized that, "the very purpose of conducting human rights due diligence 'is to understand *the specific impacts on specific people*, given a specific context'" (my emphasis).[107] In 2017, Ruggie and Sherman stated that corporate HRDD, "enters the picture by enabling the enterprise to discover whether and how it may become involved in human rights risks (forward

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[104] This paper's characterization of Ruggie's non-instrumentalist tenor in emphasizing "risk to people" is at odds with Wettstein's contention that, "Ruggie finds the justification for corporate human rights responsibility not in the inherent ethical value of human rights as moral entitlements, but in their instrumental value for the advancement of corporate interests." *See* Wettstein, *supra* note 14, at 19.
[105] *See* John G. Ruggie, *For the Game: For the World. FIFA and Human Rights*, CORPORATE RESPONSIBILITY INITIATIVE REPORT NO. 68, 31-32 (2016). (*See* Recommendation 3)
[106] *Ibid*.
[107] *See* John G. Ruggie & John F. Sherman III, *The Concept of "Due Diligence" in the UN Guiding Principles on Business and Human Rights: A Reply to Jonathan Bonnitcha and Robert McCorquodale.* 28.3 EUR. J. INT. LAW 924 (2017)(referring to the commentary in UNGP Principle 18).

looking) or is already involved in an adverse impact (present)."[108] This process, as Ruggie had already stipulated earlier, is not about "simply calculating probabilities" but is a "dialogical process that involves engagement and communication" with stakeholders.[109]

We can conclude this short review by observing that, while the UNGPs give methodological primacy to human rights "risk to people" in HRDD, its leading proponents have shown considerable agility in using different variations of the convergence thesis (RP<>RB, SR<>MR, SRP<^>RB) to motivate corporate decision makers to embed the "corporate responsibility to respect human rights" into the policies and operations of the companies they manage.[110] In taking this dual motivational approach, the world's leading proponents of corporate HRDD have performed a high-wire act of principled funambulism, drawing both praise and remonstrance.

Convergence and Divergence of Risks to Business and People

Just how far do the different variations of the convergence thesis (RP<>RB, SR<>MR, SRP<^>RB) take us toward a generalizable, positive business case for conducting corporate HRDD? The answer to this depends on who is wielding the convergence

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[108] *Id.*
[109] *See* JOHN G. RUGGIE, JUST BUSINESS: MULTINATIONAL CORPORATIONS AND HUMAN RIGHTS 99-100 (2013).
[110] It should be noted that, in his work as UN Special Representative, Ruggie did not take the validity of the convergence thesis for granted. As he noted in a summary of a consultation convened in 2010: "Questions were raised about the extent to which human rights impacts always translate into risks to the company (as opposed to risks to the rights holder), and whether senior corporate decision-makers needed further incentives to take such risks into account or whether the challenge now was encouraging greater consideration of such risks at the operational level." *See* John G. Ruggie, EXPERT MEETING OF NORTH AMERICAN CORPORATE AND EXTERNAL COUNSEL: EXPLORING HUMAN RIGHTS DUE DILIGENCE (April 30, 2010).

proposition, under what circumstances, and for what reason. In situations involving forced labor, human trafficking, and violent conflict, the notion that a business's bottom line might well be touched by a negative rebound effect is a very intuitive one; nonetheless, counterexamples abound in which businesses do well economically even where human rights "risk to people" is very high.[111]

In support of the convergence thesis, the aforementioned "cost of conflict" literature makes a compelling case that conflict with communities can be very expensive for extractive industry firms.[112] In such situations, there is a good argument to be made that corporate HRDD helps to avoid or mitigate some of the risks to business that may arise. The real challenge for the convergence thesis lies in the cases that don't stand out so clearly. Challenges also arise in cases where businesses might seek to derive a direct benefit from an ongoing conflict or from activities that pose an inherent risk to certain people's wellbeing (e.g., production of sugary soft drinks, firearms, or tobacco).[113] In these cases, the theorized beneficial convergence of "risk to people" with "risk to business" is not likely to hold. Indeed, in some cases, one can make a plausible argument that "risk to people" (RP) converges with a material opportunity for business, rather than a risk (RB). In such cases, the convergence observed may be apposite to what the proponents of HRDD generally hope for.[114] This negative result can be represented by the following shorthand:

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[111] Quijano and Lopez argue that situations arise in which "a product or activity is inherently harmful and there is no way of using or engaging in it without causing harm." *See* Gabriela Quijano & Carlos Lopez, *Rise of Mandatory Human Rights Due Diligence: A Beacon of Hope or a Double-Edge Sword*, BUS. HUM. RIGHTS J. 12 (2021).
[112] *See* Franks et al. *supra* note 24; *see also* Davis & Franks, *supra* note 24.
[113] *See* Quijano and Lopez , *supra* note 111.
[114] *See, e.g.* Massimo Guidolin & Eliana La Ferrara, *Diamonds Are Forever, Wars Are Not: Is Conflict Bad for Private Firms?* 97.5 AM. ECON. REV. 1978-1993 (2007); *see also* Massimo

RP = risk to people

MOB = material opportunity for business

RP < converges > MOB

It is also *plausible* (though not desirable!) that a business could reduce the costs of conflict or other social risks[115] without actually respecting human rights.[116] Fasterling goes so far as to suggest that companies that "excel in social risk management could—*in extremis*—increase risks to right-holders: when a corporation is able to minimize losses due to optimal knowledge about stakeholder reactions, its investments in projects that are controversial and may typically pose a threat to human rights eventually become less costly."[117] In other words, the risk-mitigation options that are available for reducing risks to business can be decoupled from what is required to mitigate the related human rights

Guidolin & Eliana La Ferrara, *The Economic Effects of Violent Conflict: Evidence from Asset Market Reactions*, 47.6 J. PEACE RES. 671-684 (2010); *see also* Philippe Le Billon, *Peacebuilding and White-Collar Crime in Post-War Natural Resource Sectors*, 3.1 THIRD WORLD THEMATICS 80-97 (2018); *see also* Stephen Chen, Profiting From FDI in Conflict Zones, 52.6 J. WORLD BUS. 760-768 (2017); *see generally* MADELAINE DROHAN, MAKING A KILLING: HOW AND WHY CORPORATIONS USE ARMED FORCE TO DO BUSINESS (2003).

[115] Fasterling notes that, "under a social risk [business risk] management model it is generally possible for a corporation to succeed in reducing social risk by managing perceptions without improving the situation for rights-holders." *See* Fasterling, *supra* note 55, at 242.

[116] Kemp et al. note: "What the cost of conflict research does not elaborate is the potential consequence for communities and other social groups and entities when risks do not result in a cost to the business or where the cost is acceptable to the business." *See* Kemp et al., *supra* note 56, at 19-26. Ganson cautions that it is possible for "companies to make high returns in fragile states without internalizing the costs and risks they pose to others." *See* Brian Ganson, *The Risky Business of De-Risking in Fragile and Conflict Affected States* (Dec. 16, 2017) https://www.cdacollaborative.org/blog/risky-business-de-risking-fragile-conflict-affected-states/ (last visited, Oct. 22, 2022).

[117] *See* Fasterling, *supra* note 55, at 243.

risk to people. This potentially negative result[118] was obliquely acknowledged in one of a series of questions posed to managers as part of Shift's "UN Guiding Principles Reporting Framework": "When tensions arise between the prevention or mitigation of impacts related to a salient [human rights risk to people] issue and other business objectives, how are these tensions addressed?" The Framework does not give a clear-cut answer; rather, it cautiously avers back to the convergence thesis (RP<>RB), stating that "companies that pose risks to human rights also risk their own success."[119] The subtext might be paraphrased in this way: *don't create human rights risk to people, as such risks have a way of rebounding onto the firm over the long run*. Shift's approach is sensible and marketable; and yet, deeper research and analysis are needed if we are to expect all companies to embrace the corporate due diligence agenda based on instrumental reasoning.[120] In any event, we might ask if proving the general empirical validity of RP<>RB is what really matters here. It may be that what is really important is whether the different variations of the convergence thesis (RP<>RB, SR<>MR, SRP<^>RB) can be used to change people's ways of thinking and transform management culture toward a more "rights-respecting" paradigm.

The Business Case as a Persuasive Tool for "Intrapreneurs"

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[118] Thielemann and Wettstein raise the specter that some firms "might even be more profitable by acting less responsibly." *See* Ulrich Thielemann & Florian Wettstein, *The Case against the Business Case and the Idea of "Earned Reputation,"* 111 DISCUSSION PAPERS OF THE INSTITUTE FOR BUSINESS ETHICS 17 (2008).
[119] *See* Shift, *supra* note 81, at 13.
[120] Fasterling concludes that, "the evidence that negative human rights impacts regularly affect firm value negatively is in fact quite thin, and where there is some evidence, it is at most indirect." *See* Fasterling, *supra* note 55, at 233.

A plethora of anecdotal evidence describes cases where human rights risks to people have led to business risks and crippling costs.[121] And yet, for every example that is given to support the business case for respecting human rights, situational counterexamples can be found that call it into question.[122] In their influential 2014 study, "Conflict translates environmental and social risk into business costs," Franks et al. acknowledged that little research had been done on "how the risks borne by communities in the form of social risk *interface* with business risk, and associated costs and financial liabilities" (my emphasis).[123] Nonetheless, Franks et al. were cautiously optimistic that "calculating the cost of conflict does offer sustainability professionals a powerful lever to exercise influence with companies."[124] In other words, they suggest that the "cost of conflict" analysis could be used as a tool by social responsibility *intrapreneurs*[125] to effect change from inside the business. The idea is that, working from within, intrapreneurs can encourage corporate decision makers to gain sustainable social license from communities rather than opt for more forceful approaches, such as "securitized" appeals to "law and order."[126] In this way, the business case (RP<>RB, SR<>MR, SRP<^>RB) can be wielded pragmatically, as a lever for lifting the profile of the social

[121] For a list of examples, *see* Shift, *supra* note 84, at 9-13.
[122] *See generally* the vast archive of materials on specific case studies that has been compiled over the last decade by the London-based Business and Human Rights Resources Centre. The Centre's online platform includes reports on alleged corporate human rights abuses involving more than 20,000 companies worldwide.
[123] *See* Franks et al. *supra* note 24, at 6.
[124] *Id.* at 5.
[125] On the role of "social intrapreneurs" as change agents within firms, *see* CHRISTINE BADER, EVOLUTION OF A CORPORATE IDEALIST: WHEN GIRL MEETS OIL (2016).
[126] Ganson and Wennmann refer to the "law and order" approach as "securitized risk management." *See* BRIAN GANSON & ACHIM WENNMANN, CONFRONTING RISK, MOBILIZING ACTION: A FRAMEWORK FOR CONFLICT PREVENTION IN THE CONTEXT OF LARGE-SCALE BUSINESS INVESTMENTS, FRIEDRICH-EBERT-STIFTUNG – GLOBAL POLICY AND DEVELOPMENT 11 (2012).

responsibility function within companies. Seen through this lens, the convergence thesis is regarded as a potentially useful advocacy tool because it can be used to persuade business decision makers to focus more attention on ameliorating human rights risks to people. When used in this way, resolving the empirical question of whether or not the convergence thesis is generalizable to all business activity is not so critical. For the intrapreneur, HRDD works when it changes business decision makers' "hearts and minds."

The convergence thesis is not only deployed to motivate companies to implement tailor-made HRDD policies and practices voluntarily; it is also used in debates for and against implementing mandatory HRDD laws. The convergence thesis is deployed by organizations like Shift to influence the very foundation, design, and scope of HRDD laws. As with the maneuvering that went on before the adoption of the UNGPs, the convergence thesis is also used to keep business "in the room" in contemporary policy deliberations over HRDD rules. And herein lies a paradox for the proponents of mHRDD: the general empirical validity of the convergence thesis certainly *does* matter if it is put forward by policy makers as an objective reason to prefer self-regulating, voluntary approaches to corporate HRDD over mandatory approaches. Why is this so? The empirical validity of the beneficial convergence thesis matters if it is given as a reason to *soften* mandatory HRDD rules to give businesses more leeway in tailoring their own approaches to policy and practice. So, for reasons of policy making (but not for motivating business), the question of whether the convergence thesis (RP<>RB, SR<>MR, SRP<^>RB) is empirically generalizable is examined further below.

Chi non risica non rosica (Nothing Ventured, Nothing Gained)

Knowing that conflicts with stakeholders can end up costing money, a business decision maker would take pains to avoid them. How is this done? Research in the extractive sector shows that differing attitudes of managers toward dealing with community relations and local opposition are very much tied to a firm's organizational culture.[127] Rees et al. have argued convincingly that corporate culture shapes the ways in which extractive industry managers approach conflict on the ground.[128] We can imagine that at least some business decision makers, when facing a conflict with communities, will prefer to use "the stick" when "the carrot" doesn't seem to do the job. If a mining company facing trenchant opposition on the ground chooses to play hardball, we can imagine that Machiavellian strategies for mitigating the rebounding risk to business could be devised (although the author does *not* endorse this approach!). After all, the business world is not populated by angels and white knights alone. The decision maker who faces a recalcitrant opposition might ask: "how hard do we push?" The rights holders on the ground, for their part, may respond with: "how hard do we resist?"[129] A company's approach to dealing with local resistance may also be influenced or constrained by the

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[127] *See, e.g.* John R. Owen & Deanna Kemp, *Corporate Character Formation and CSR: The Function of Habit and Practice in the Mining Industry* 4:5 AM. J. IND. & BUS. MANAG. 233 (2014); *see also* Ben Heineman, *Implementing Human Rights in Global Business – High Performance with High Integrity*, in BUSINESS AND HUMAN RIGHTS: FROM PRINCIPLES TO PRACTICE 98 (Dorothée Baumann-Pauly & Justine Nolan, eds., 2016) 98. *See also* JOHN F. SHERMAN III (SHIFT), RIGHTS RESPECTING CORPORATE CULTURE (2019).

[128] *See* CAROLINE REES ET AL., CONFLICT MANAGEMENT AND CORPORATE CULTURE IN THE EXTRACTIVE INDUSTRIES: A STUDY IN PERU (2012). S*ee also* TONY ANDREWS ET AL., THE RISE IN CONFLICT ASSOCIATED WITH MINING OPERATIONS: WHAT LIES BENEATH? (2017).

[129] Concerning the opposition's impetus to resist, Sunstein's remarks on valuing dignity ring true in this context: "If we care about welfare, we will pay a great deal of attention to dignity: When people feel that they have been treated disrespectfully … they will rebel." *See* Cass R. Sunstein, *Manipulation, Welfare, and Dignity: A Reply*, 1. J. MARK. BEHAV. 315, 9 (2016).

government's way of handling dissidents, including individuals and communities who actively oppose development projects (such as an open-pit mine). If dissidents threaten to derail a project, it's almost certain that, at some point, state security forces will move in to quell the opposition.[130] In this way, a company's approach to dealing with conflict on the ground can never be entirely disentangled from the host state's attitude toward human rights protection (or to the government's negation of human rights). The point to be taken here is that the causal relationship between human rights "risk to people" and material "risk to business" is nested within other relationships, including the relationship between the dissidents and the government. This nesting of the relationship between rights holders and businesses within other relationships (among governments, non-state actors, multilateral institutions, other businesses, etc.) further complicates any means of testing empirically the generalizability of the convergence thesis. The relationships among all of these actors is highly complex and dynamic.

The potentially recursive and looping causal relationship of "risk to people" and "risk to business" is best illustrated by the concerns that may arise over the conduct of security forces and local communities in extractive industry conflicts. Examples abound where companies and governments frame local opposition to a development project as *security risks* (risks to business) rather than *social risks* (risks to people). In such cases, the crisis is framed primarily in terms of the need to protect the firm's assets and operations in the short term, rather than the need to acquire and maintain social license over the long term.[131] Sometimes firms will cite *national security risks* that they believe

[130] *See, e.g.* Clayquot Sound (Canada); Dakota Access Pipeline (United States); Narmada Dam (India); El Estor (Guatemala); Llurimagua mining project (Ecuador); among countless others.
[131] *See generally* DROHAN, *supra* note 114.

arise from local opposition to strategic extractive projects.[132] In such circumstances, human rights defenders may be painted as anti-development naysayers or even saboteurs. When this type of narrative spreads, human rights defenders may become criminal suspects in the eyes of state security; at the same time, they may become the targets of gangs, mobs, and rogue private security guards.[133] The significance of this potential human rights "risk to people" should not be underestimated. The literature tracking threats and attacks on human rights defenders around the world is already vast and growing.[134] NGO reports demonstrate in much detail how environmental and human rights defenders are often treated by governments as criminals and terrorists.[135] Concerned over what has been referred to as the criminalization of social protest, in 2014 the UN Secretary General appointed a Special Rapporteur on the situation of human rights defenders. Numerous UN reports on the subject have since been published[136] and the UN Special Rapporteur's mandate was renewed by the Human Rights Council in

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[132] *See, e.g.* Jeffrey Monaghan & Kevin Walby, *Surveillance of Environmental Movements in Canada: Critical Infrastructure Protection and The Petro-Security Apparatus* 20:1 CONT. JUST. REV. 51-70 (2017); *see also Canada's environmental activists seen as "threat to national security,"* GUARDIAN, Feb. 14, 2013 (noting that "police and security agencies describe green groups' protests and petitions as 'forms of attack,' documents reveal"); *"Anti-petroleum" movement a growing security threat to Canada, RCMP say*, GLOBE & MAIL, Feb. 17, 2015.

[133] *See, e.g.* Ecuador v. Copper Mesa Mining Corporation, P.C.A. 2012-2 (2016); *see also* UNDER RICH EARTH (Malcolm Rogge dir., 2008).

[134] *See, e.g.* Global Witness, DECADE OF DEFIANCE, Sept. 2022; *see also*, BENNETT FREEMAN, ET AL., BUS. & HUM. RTS. RES. CTR., SHARED SPACE UNDER PRESSURE: BUSINESS SUPPORT FOR CIVIC FREEDOMS AND HUMAN RIGHTS DEFENDERS: GUIDANCE FOR BUSINESSES 11 (Aug. 2018); *see also Defending the environment has become a suicide mission in many parts of the world*, LOS ANGELES TIMES, Dec. 22, 2017.

[135] *See, e.g.* SHIN IMAI ET AL., JUSTICE AND ACCOUNTABILITY PROJECT, THE CANADA BRAND: VIOLENCE AND CANADIAN MINING COMPANIES IN LATIN AMERICA (2017).

[136] Human Rights Council, *Mandate of the Special Rapporteur on the Situation of Human Rights Defenders*, A/HRC/RES/25/18 (11 Apr. 2014).

2020.[137] In response to civil society advocacy campaigns, some major companies, such as Adidas AG, have adopted policies that explicitly address the threats that human rights defenders face in global supply chains.[138] The complex recursive dynamic at play in these scenarios reflects the fact that the company's behavior toward rights holders, as well as the government's actions, inaction, and reactions, are implicated together in the looping causal relationship between human rights "risk to people" and "risk to business."

Is the convergence thesis, as it is sometimes deployed by Shift and others, persuasive enough to change the minds of business decision makers who, facing trenchant opposition, are inclined to push harder? Not always. The adverse reputational effects of bad business conduct can, at times, be managed. Ruggie himself recognized the limits of reputational sanctions in a report that he prepared just prior to the adoption of the UNGPs. He referred to a survey of directors' duties, undertaken in 2011, in which respondents from the UK indicated that, "directors may be able to justify some reputational risk if they believe that their approach will nevertheless secure the company's long-term value."[139] What this means is that, for some decision makers, doing business in a risky environment may turn out to be a gamble that they are willing to take.[140] To give just one example of how this plays out in practice, the reputation of

[137] Human Rights Council, *Resolution adopted by the Human Rights Council on 22 June 2020*, A/HRC/RES/43/16 (6 July 2020).
[138] *See* THE ADIDAS GROUP, THE ADIDAS GROUP AND HUMAN RIGHTS DEFENDERS, Oct. 20, 2017. *See also* ADIDAS HUMAN RIGHTS POLICY, 2022 (approved by Kasper Rorsted, CEO).
[139] *See* John G. Ruggie (Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises), *Addendum: Human Rights and Corporate Law: Trends and Observations from a Crossnational Study Conducted by the Special Representative*, A/HRC/17/31/Add 2. (23 May 2011) at 17.
[140] On some of the steps taken by Facebook, Inc. to mitigate the reputational harm arising from a range of serious human rights controversies, *see* Kathleen Chayowski, *Mark Zuckerberg Gives Facebook a New Mission*, FORBES, June 22, 2017.

Facebook, Inc. (now Meta) was hit very badly when reports emerged that its platform was being used in Myanmar to incite hatred and ethnic violence against the Rohingya people; nonetheless, the value of the company's shares climbed steeply in the period following the crisis.[141] In other sectors, such as the extractive industry, a plausible strategy for mitigating business risk arising from local conflicts might involve spending more money on private security or working more closely with state security, even if the state security and private security forces are known for human rights abuses (this paper does *not* endorse such an approach!). Alternatively, decision makers might prefer to "de-risk" operations by moving them to jurisdictions where there are fewer risks to business arising from local conflict. De-risking, in this sense, might be good for the business, but it is unlikely to improve the situation for rights holders who remain on the ground; indeed, it could make matters worse for rights holders and affected communities.[142] In worst-case scenarios, business decision makers might attempt to engage with corrupt officials or paramilitary organizations rather than seek to acquire the social license to operate from the people who would be directly affected by their operations.[143] Where a firm does not have a valuable consumer-facing brand to protect, it might have greater tolerance for human rights risk, as unpalatable as that may seem. In addition to those already mentioned, other tactics for mitigating the risks that arise from operating without social license include waging public relations campaigns against opponents, devising litigation-

[141] *See* Sheera Frenkel, et al., *Delay, Deny and Deflect: How Facebook's Leaders Fought Through Crisis*, NEW YORK TIMES, Nov. 14, 2018.
[142] On "de-risking," *see* GANSON & WENNMANN, *supra* note 126, at 11.
[143] *See, e.g.* INTERNATIONAL FEDERATION FOR HUMAN RIGHTS, ET AL., THE CONTRIBUTION OF CHIQUITA BRANDS INTERNATIONAL INC. CORPORATE OFFICIALS TO CRIMES AGAINST HUMANITY IN COLOMBIA (May 2017) (Article 15 Communication to the International Criminal Court).

defensive corporate group structures, lobbying local governments to gain support, and strategic litigation against the opposition (sometimes referred to as strategic lawsuits against public participation, or SLAPPs). While there is no doubt that "risk to people" may converge with "risk to business" in some cases, innumerable examples exist where risks to business are manageable *without* exercising great concern (or any concern) over risk to people. For the proponent of HRDD who is motivated by normative-ethical concerns, such innumerable examples are the most troubling.

At present, it is difficult to assess whether the business case for voluntary HRDD will ever have the needed impact on decision makers of companies whose attitudes and activities pose the most risk to people. The results of recent research are not very promising in this respect. In a study conducted by the German government from 2019 to 2020, only a small fraction of companies that responded to a survey were able to demonstrate that they carried out "adequate" human rights due diligence (approximately one fifth of the respondents).[144] These results are supported by other empirical studies.[145] Indeed, the German government's move to implement *mandatory* human rights due diligence in 2021 was motivated, in part, by evidence of the slow uptake of voluntary human rights due diligence by German companies. We can conclude this section by proposing that the risks to people that corporate HRDD should be most equipped to

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[144] *See* AUSWÄRTIGES AMT, MONITORING THE NATIONAL ACTION PLAN FOR BUSINESS AND HUMAN RIGHTS (Oct. 13, 2020). https://www.auswaertiges-amt.de/de/aussenpolitik/themen/aussenwirtschaft/wirtschaft-und-menschenrechte/monitoring- nap/2131054.

[145] For a summary of the results of four studies, including reports by the Danish Institute for Human Rights and the European Commission, *see* EUROPEAN COALITION FOR CORPORATE JUSTICE AND CORPORATE RESPONSIBILITY (CORE) COALITION, DEBATING MANDATORY HUMAN RIGHTS DUE DILIGENCE LEGISLATION: A REALITY CHECK, 5-6 (Nov. 2020).

address occur where there is *no* clear and obvious convergence with risk to business. The greatest concerns about business conduct arise in situations where the positive business case for corporate respect for human rights is least likely to be advanced. The next section of this paper deconstructs the convergence thesis analytically, with a view to supporting this proposal.

Weighing "Risk to People" against "Risk to Business": Can It Be Done?

This section of the paper considers whether it is practically useful and valid for purposes of argument to rank and compare the value of human rights "risk to people" to that of material "risk to business." It considers whether making such comparisons helps to establish the theorized, unidirectional causal and temporal relationship that is implied in the narrative convergence of salient risk to people with material risk to business over time (SR<>MR:T). It also considers whether making value comparisons or correlations involving risk to people and risk to business (RP<>RB) is useful or desirable in motivating companies to undertake HRDD. And it considers the argumentative validity of the proposition that "severe" human rights risks to people are more likely to converge with risks to business than less severe ones (SRP<^>RB). In tackling these philosophical/analytical questions in this section and as a whole, this paper makes two interrelated claims: first, it argues that the conceptual foundations of the economic-instrumentalist convergence thesis (RP<>RB, SR<>MR, SRP<^>RB) are too unstable at present to support rigorous, generalizable empirical analysis; and, second, it argues that the conceptual instability of the convergence thesis underscores the need for policy and legislative initiatives on HRDD today to be grounded primarily in normative-ethical

motivations, not economic-instrumentalist ones (although they are not *necessarily* mutually exclusive).

The overarching question that is explored in this section is whether the values given to "risk to people" and "risk to business" can be ranked and compared such that a linear and unidirectional causal convergence or correlation between the two properties can be demonstrated. It finds that the logical relationship between RP and RB is not as clear as the proponents of the convergence thesis may hope it is; to the contrary, it is bidirectional, looping, and fuzzy. This result has contrasting implications for those who wield the convergence thesis for different purposes. For instance, despite its lack of precision, the business case for HRDD remains a powerful rhetorical device.[146] Fuzzy or not, it can be wielded to drive change from within companies or to garner industry support for legislative projects. But there are also drawbacks. In a world where legislative proposals for market regulation are vigorously debated, claims about the economic utility and efficiency of mandatory HRDD for businesses are hotly contested. While the convergence thesis is an attractive rhetorical device for some motivational purposes, it is a very contestable concept when deployed as a rational foundation for the creation of mandatory HRDD rules. In contrast, the normative-ethical motivation for HRDD is powerful even where the economic-instrumentalist motivation (the convergence thesis) falls flat. This result does not preclude the possibility that anecdotal and perhaps even broader empirical support for the convergence thesis can or will be made out in certain

[146] While technical in appearance, the convergence thesis embodies the "hopeful" (win-win) narrative about doing well by doing good. This sense of optimism aligns with Thielemann and Wettstein's observation that, "the assumption that ethics pays in the long run is rather old in general and represents a – in the history of thought still relatively recent – kind of market-metaphysical perspective." *See* Thielemann & Wettstein, *supra* note 118, at 2.

circumstances, under certain conditions.

The first step in the critical analysis is to register the values of "risk to people" (RP) and "risk to business" (RB) in the manner of an accounting ledger. One side of the ledger tracks risks to people who may be adversely affected by the business activity or activities linked to it. The opposite side of the ledger tracks risks to business, including risks to investors who voluntarily put "skin in the game." As noted earlier, it is thought that the convergence of these two sets of properties has a temporal dimension; that is to say, severe risks that are found on the "people side" of the ledger are likely, or more likely, to give rise to material risks on the "business side," over a period of time (T).

<u>HRDD Risk Ledger</u>

Risk to People Risk to Business

RP<>RB over T

SR<>MR over T

SRP<^>RB over T

Accounting for material risk on the business side of the ledger is plainly more straightforward than accounting for human rights risk on the rights holder's side. As noted previously, the risks to business are regarded to be the "potentially adverse effects on the return the enterprise can expect to gain from an investment or from a business operation."[147] In contrast, accounting for human rights risks to people involves making ethical and interpretive judgments regarding a potentially vast range of diverse subject

[147] *See* Utlu and Niebank, *supra* note 47, at 13.

matter and multifaceted criteria.[148]

At present, no known method exists to weigh the salience (SR) or severity (SRP) of human rights risks to individuals and groups on one side of the ledger against the value of material risk to business on the other (MR). Fasterling characterizes this problem in terms of the very different knowledge that is required to assess human rights risk to people as compared to social risk, which he defines as business risk. He writes that, "the information required by human rights due diligence to reduce and manage knowledge deficiencies differs [for enterprise risk management] in content and nature from information that is relevant for a business corporation's social risk management."[149] Porter points to a related problem for business decision makers more generally, stating that, "the moral calculus needed to weigh one social benefit against another, or against its financial costs, has yet to be developed. Moral principles do not tell a pharmaceutical company how to allocate its revenues among subsidizing care for the indigent today, developing cures for the future, and providing dividends to its investors."[150] This comparison problem is exacerbated by the fact that, for most industrial-scale business activities, the human rights of large numbers of people may be impacted in myriad individuated and interconnected ways. Additionally, the significance and intensity of risk to people will likely vary, sometimes considerably, from one affected person to the next.

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[148] As a Shift report from an expert roundtable on business, human rights, and accounting observes: "It was felt that one reason human rights were largely ignored or treated simplistically in current accounting innovations was that it is genuinely hard to get one's head around *the full diversity of issues involved*" (my emphasis). *See* SHIFT, EXPERT ROUNDTABLE ON BUSINESS, HUMAN RIGHTS AND ACCOUNTING: A SUMMARY REPORT 5 (Apr. 24, 2019).
[149] *See* Fasterling, *supra* note 55, at 236.
[150] *See* Michael E. Porter & Mark R. Kramer, *The Link Between Competitive Advantage and Corporate Social Responsibility* 84:12 HARV. BUS. REV. 78-92, 4 (2006).

Moreover, risks to people may shift over time, and the time horizons that matter to the people affected are distinct from those of business decision makers. The comparison of these two very different domains of risk (comparing the properties on the two sides of the ledger) involves serious, and perhaps sometimes insurmountable, methodological challenges.[151] To highlight this burden here is not to proffer it as a reason to stop experimenting; neither is it given as a reason to avoid scoping for human rights impacts. Rather, this methodological challenge is foregrounded here to emphasize how important it is to decouple our identification, observation, analysis, and assessment of human rights "risk to people" from any theorized link, by way of convergence or correlation, to material "risk to business."

Looking at the HRDD Risk Ledger above, it should be apparent that distinct quantitative and qualitative methodologies are needed to assess the value of risk on either side. In conventional wisdom, a wide range of business risks are thought to be collapsible into a single "score" that may represent the impact, discrete or aggregate, of risk on return (the money risk to the investor). On the other hand, it is difficult to conceive how the variable intensities and qualities of impact upon different people of different categories of human rights risks can be measured, scored, ranked, and compared.[152] The

[151] It should be noted that, in considering a different set of comparisons, Thielemann and Wettstein critically analyze how the social performance of firms (sometimes including human rights criteria) is measured and compared. For them, the comparison problem relates to scoring one firm's social performance against that of another firm. In their discussion on the measurement problem, they state: "Profits can be measured. On the 'ethical side' of the equation, however, we are facing such conceptual ambiguities." *See* Thielemann & Wettstein, *supra* note 118, at 6.

[152] Muchlinski criticizes the use of economic cost-benefit analysis in assessing "contributory fault" related to human rights impacts in international investment disputes. *See* Peter Muchlinski, Can International Investment Law Punish Investor's Human Rights Violations? Copper Mesa, Contributory Fault and its Alternatives, ICSID Review, (2022), pp. 1-19. He writes that, "economic measures will be of little use in relation to harm caused by investors' human rights violations. Human rights violations can be hard to quantify in monetary terms given that they do

task of comparing many different values of human rights "risk to people" (at the level of individuals and groups) against quantitative material "risk to business" gives rise to the much debated philosophical problem of whether it is possible to make meaningful "interpersonal comparisons of utility."[153] This problem rears its head in the methodology that has been proposed for HRDD. For example, it is difficult (though perhaps not impossible) to determine how to rank the value to one person of the loss of freedom of association as compared to the value to another of the loss of equality before the law. Making such interpersonal comparisons grows even more difficult if we then seek to assess the importance of those rankings in relation to the quantifiable value of money that shareholders may stand to gain or lose where human rights are at stake. In thinking about making comparisons, we must also consider whether the value of the risk to people that is tracked in the convergence thesis "ledger" should be assessed individually, or generally across a community. Either way, the conceptual problem which arises is that the summation of all individual values into a total value (i.e., into an aggregate score of "severity') does not capture the variable intensity and quality of human rights risks for each and all of the many differently situated individuals who are affected.[154] While

not always result in material loss to victims. For example, in [the investment arbitration case of] *Copper Mesa*, the main effect of the investor's conduct was to create fear and inhibition in the exercise of its legitimate rights by local citizens and communities rather than quantifiable harm to the person or property." [at 12]

[153] The problem was debated vigorously by Nicholas Kaldor and Lionel Robbins in the mid-twentieth century. *See* Nicholas Kaldor, *Welfare propositions of economics and interpersonal comparisons of utility*, THE ECONOMIC JOURNAL 549-552 (1939); *see also* Lionel Robbins, *Interpersonal comparisons of utility: a comment*, In ECONOMIC SCIENCE AND POLITICAL ECONOMY 199-204 (1997).

[154] This point is derived from the work of Amartya Sen and Bernard Williams. Sen and Williams criticize the "impersonal metric of utility," arguing that the summing of many people's utility into a single function neglects the autonomy and personal integrity of the individuals involved. *See* Amartya Sen & Bernard Williams, *Introduction: Utilitarianism and Beyond*, *in* UTILITARIANISM AND BEYOND 4-6 (Amartya K. Sen & Bernard Williams, eds., 1982).

summing up money value is, for the most part, a straightforward accounting exercise, it is unclear how the value of human rights that are vested in individuals, and that concern the dignity of the individual, can be measured and summed up in similar fashion. Once more, the key takeaway from all of this is that the valuation of human rights "risk to people" should be decoupled from any economic value proposition that a business may offer to its shareholders and potential investors.

The proponent of the convergence thesis may object that, in fixating on the interpersonal comparison problem, one loses sight of the bigger picture. The point of doing corporate HRDD, they may say, is to experiment and to find what works best in a given situation.[155] In practice today, aggregating "risk to people" and putting that information into a human rights risk "heat map" is done in a somewhat impressionistic manner, one which looks to general trends rather than microscopic details of the potential impacts upon differently situated individuals.[156] In considering how much detail is needed to assess human rights risks in this way, Knight's century-old question of "how far to go" resurfaces. A company can seek to evaluate broad trends and consider estimates about potentially severe human rights risks as a way to identify red flags from a materiality perspective. In the convergence thesis (specifically SRP<^>RB), potential impacts on people that rank as "severe" are considered more likely to be leading indicators of material "risk to business." The problem here is that, if the potential risk to business is not thought to be material, then the "convergence" of RP and RB vanishes and

[155] I am indebted to John F. Sherman III for sharing this insight with me.
[156] For an example of how an HRDD "risk map" is configured, *see* COSO, WORLD BUSINESS COUNCIL ON SUSTAINABLE DEVELOPMENT, ENTERPRISE RISK MANAGEMENT: APPLYING ENTERPRISE RISK MANAGEMENT TO ENVIRONMENTAL, SOCIAL AND GOVERNANCE-RELATED RISKS, 54 (2018).

the “business case” for preventing and mitigating risk to people in that situation disappears along with it. In such circumstances, a motivational quandary arises for management over what steps should be taken, if any, to address the severe risks to people that have been identified. With this quandary, it becomes apparent that the economic-instrumentalist convergence thesis is in tension with an approach that gives primacy to the prevention and mitigation of “risk to people” as an end in itself. From a normative-ethical point of view, it is quite straightforward to say that a business *should always* seek to identify, prevent and mitigate severe human rights “risk to people.” But this is not a stance grounded in economic analysis; it is a stance grounded in ethical reasoning and in ethical sentiment.

The principled pragmatist may point out that we ought to avoid getting lost in the details and keep the long-run strategic goals in mind: they may emphasize that the convergence thesis is a valuable tool for influencing business decision makers and for promoting the corporate responsibility to respect human rights under the UNGPs. The business case, they may say, *should* be used to promote positive change within businesses because *it works*—it changes peoples’ minds. Nonetheless, this analysis shows that the ranking and comparison of “risk to people” and “risk to business” under the rubric of the convergence thesis (RP<>RB, SR<>MR, SRP<^>RB) is better seen, at the present time, as an impressionistic and intuitive process, rather than a scientific one. Thus, it should be recognized that deploying the business case for HRDD as a rhetorical or heuristic device may bring opportunities, as well as risks, for those seeking to promote corporate respect for human rights.

Adopting Amartya Sen’s terminology, we can say that each side of the

convergence thesis "ledger" encompasses "distinct concerns" which, by their nature, are not straightforwardly comparable.[157] On the business side of the ledger, the risk "score" in one state of affairs can, in theory, be given as a monetary value; and this value can then be compared to that obtained in other possible states of affairs. On the people side of the ledger, the "risk to people" may concern anything that falls within the ambit of the "International Bill of Rights" (or of the idea of human rights more broadly), including such diverse concerns as censorship, hate speech, racial discrimination, forced disappearance, genocide, voting rights, occupational health and safety, privacy, and so on.[158] Such concerns relate to material outcomes (i.e., health outcomes, protection of Indigenous territory) as well as processes (democratic integrity, due process of law, "free, prior, and informed consent," etc.). These concerns also relate to what Sen refers to as the "choice act,"[159] with regard to whether the *choice* to exercise power, or not, is made by government officials and corporate decision makers. The diverse and multifaceted values on the "people" side of the ledger cannot be shoehorned, by any currently known deductive method, into a risk "score" that can be ranked and compared against the risk score on the "business" side, and vice versa.[160] Instead of characterizing the relationship

[157] *See* AMARTYA SEN, THE IDEA OF JUSTICE 395 (2009).
[158] See the list of human rights instruments that are noted in the UNGPs, *supra* note 41.
[159] On the concept of the "choice act," *see* Amartya Sen, Maximization and the Act of Choice, 65 ECONOMETRICA 745 (1997).
[160] We can further elucidate the non-computational and impressionistic relationship between "risk to people" and "risk to business" by drawing on Amartya Sen's foundational distinction between *comprehensive* and *culmination* outcomes in ethical and economic reasoning. The appraisal of human rights "risk to people" aligns with what Sen calls *comprehensive* outcomes (concerning both results and processes, including the way that decisions are made); whereas the appraisal of material risk concerns *culmination* outcomes (i.e., final results in terms of quantitative "scores"). For a detailed analysis of how to apply Sen's terminology to the field of corporate responsibility and business and human rights, *see* Malcolm J. Rogge, *Bringing Corporate Governance Down to Earth: From Culmination Outcomes to Comprehensive Outcomes in Shareholder and Stakeholder Capitalism*, 35 NOTRE DAME J.L. ETHICS & PUB. POL'Y 139-142 (2021).

of "risk to people" and "risk to business" as "converging" in a linear and unidirectional way, we should characterize it as fluid (bidirectional, looping, and fuzzy). There is no question that the two types of risk are interrelated; however, the relationship between these two sets of distinct concerns is better described in terms of complexity:

RP | distinct concerns | RB

SR | distinct concerns | MR

SRP | distinct concerns | RB

The *distinctness* of the two sets of concerns is further underscored by the fact that the methods used for appraising the values on one side of the ledger are *distinct* from the methods used on the other side. To give an example of how this distinction in regard to method is reflected in practice, Shift acknowledges the inconsistency of addressing "risk to people" within a corporate risk assessment that traditionally prioritizes materiality:

> Human rights risks cannot be immediately placed into existing corporate risk matrices because the criteria for prioritization are different. HRDD analyses the risks to stakeholders, with the severity of impacts on individuals (and to a lesser extent, likelihood) acting as the driving force for prioritizing risks…. Before transferring ownership of human rights risk analysis to corporate risk managers, human rights leaders [within companies] should ensure that risk managers have the necessary capacity to conduct the principled prioritization required under the UNGPs.[161]

The way to address this methodological concern, Shift says, is "to conduct the principled prioritization" of risks to people that is called for in the UNGPs. In other words, risk managers must be trained to identify "salient" risk to people (SR). Salient risks to people, in turn, are thought to be leading indicators of material risk to business (SR<>MR); while *severe* risks to people are said to be more likely to converge with material risk to business

[161] *See* SHIFT, HUMAN RIGHTS DUE DILIGENCE IN HIGH RISK CIRCUMSTANCES: PRACTICAL STRATEGIES FOR BUSINESSES, 11 (2015).

(SRP<^>RB). And so, we come full circle, as the convergence thesis—the business case for HRDD—is then offered up as a motivation for business decision makers to undertake this work in the first place.[162]

How does this approach to risk in HRDD fit into the risk-uncertainty continuum? The conclusion reached here is that handling multiple "distinct concerns" within a construct like the convergence thesis (RP<>RB, SR<>MR, SRP<^>RB) takes corporate decision makers beyond the realm of calculable risk assessment and edges them *closer* to the uncertainty end of the continuum. This does not mean that the relationship between these sets of distinct concerns is entirely clouded by *radical* uncertainty. Indeed, one of the main reasons for undertaking this fine-grained analysis is to contribute to efforts to understand the complex interface between "risk to people" and "risk to business," opaque though it may seem. The ethical challenges for corporate decision making relating to matters occurring at the uncertainty end of the risk-uncertainty continuum are reflected, in part, in the idea of "tragic" decision dilemmas, such as the one that the mining company general counsel (GC) faced (as described in the introduction to this paper). Dilemmas faced by corporate decision makers who strive to achieve their economic objectives while also respecting human rights are also addressed in the conclusions below.

Fasterling poses a hypothetical question that helps to elicit the uncertainty aspects in the relationship between outcomes for businesses and for rights holders under the convergence thesis. How, he asks, "does a manager decide to carry out a project that receives a poor human rights risk 'score', if the project 'scores' very well on other

[162] *See, e.g., supra* note 85.

corporate objectives such as profitability or market share, or if the project is essential to avert a massive loss of business and resulting lay-offs?”[163] The question eludes a clear answer, for the reasons already considered above. When the qualitative variability and uneven intensity of human rights impacts upon individuals and communities are acknowledged, conceiving of how to “score” such impacts in the same way that material outcomes for the business might be scored is a true challenge. In this regard, Knight’s century-old critique still resonates today: “The [erroneous] assumption that wants or ends are data reduces life to economics.”[164] In facing such dilemmas, the decision maker has no other choice but to seek richer data about why the human rights risk “score” is so low. Such data may be sought through “meaningful stakeholder consultation,” among other means; and yet, the practical limitations of such processes must also be acknowledged. As conveyed earlier, this challenge should not be tackled as though it were an engineering exercise; rather, it should be acknowledged that problem solving of this nature will concern a range of economic, political, and ethical matters affecting business actors *and* rights holders alike.

Distinguishing Voluntary Risk from Involuntary Risk

This final section considers the qualitative distinction that must be drawn between the *voluntary* aspect of “risk to business” and the *involuntary* aspect of human rights “risk to people”; and it highlights how this distinction further destabilizes any tentative conclusions that may be drawn based on the convergence thesis. The analysis helps to

[163] *See* Fasterling, *supra* note 55, at 238.
[164] Knight, *supra* note 16, at 51.

make clear that, in many circumstances, the interests of voluntary risk takers (shareholders and investors) and involuntary human rights risk bearers (rights holders and affected communities) may diverge over the long term, rather than converge. The potential for divergence can be represented in the following reformulation of the relationship between “risk to people” and “risk to business”:

RP = IRP (involuntary risk to people)

RB = VRB (voluntary risk to business)

IRP >< VRB

involuntary risk to people > diverges < voluntary risk to business

IRP><VRB represents the negation of the “beneficial” convergence thesis in situations where power imbalances and the distribution of legal advantages and disadvantages across the two sides of the convergence thesis “ledger” portend lose-win outcomes, rather than win-win outcomes, for rights holders and businesses. Here, the parties who voluntarily take risks (investors, shareholders) profit from advantages and immunities not available to those who must involuntarily bear the risk of being left worse off over the long run. For rights holders and affected communities, the “divergence” of human rights risk to people and material risk to business may take on the mark of injustice: investors and shareholders stand to “win” while affected communities, without decision-making power, stand to lose. In these circumstances, structural and background conditions undermine the possibilities for well-meaning business decision makers who seek to bring about a beneficial convergence of “risk to people” and “risk to business” over the long term. The most pressing normative and methodological challenges for the corporate

HRDD project lie where there is a strongly divergent relationship of involuntary human rights "risk to people" and voluntary "risk to business" (IRP><VRB).

Highlighting the *involuntary* aspect of human rights "risk to people" brings to the fore the asymmetrical political-economic and juridical relationships that underlie and give rise to the two different domains of risk. This approach recognizes explicitly that vast power imbalances abound in the relationships between businesses and rights holders. These imbalances are undergirded, in part, by the legal privileges, powers, and immunities[165] accorded to corporations and shareholders in business law and in "private law" (property, contract, tort).[166] Some of the juridical origins of these imbalances reside in foundational corporate law concepts, including the principle of limited liability and the doctrine of the separate legal personality of the corporation.[167] The imbalances can also arise from the ways in which government power is wielded, such as the power to expropriate lands. Such power imbalances have a bearing on the *freedom* and *unfreedom* of two disparate groups of people: i) the voluntary risk takers (shareholders and investors) who have a chance to gain freedom by taking risks; and ii) the involuntary risk bearers (rights holders and affected communities) who stand to lose freedom in the event

[165] On the "jural relations" of legal powers, immunities, privileges, and disabilities, *see* Wesley Newcomb Hohfeld, *Some fundamental legal conceptions as applied in judicial reasoning*, 23.1 YALE LAW JOURNAL 16-59 (1913).

[166] On the "permissive" aspect of legal privileges, Duncan Kennedy observes that a "basic reason for the invisibility of the distributional consequences of law is that we don't think of ground rules of permission as ground rules at all, by contrast with ground rules of prohibition…. Permissions to injure play an enormously important role in economic life…. Within this category of legal permissions, perhaps the most invisible is the decision not to impose a duty to act on a person who is capable of preventing another's loss or injury or misfortune." *See* Duncan Kennedy, *The Stakes of Law, or Hale and Foucault*, 15 LEGAL STUD. F. 327, 333-334 (1991).

[167] For further discussion on how such imbalances are embedded within the landscape of corporate law, *see* Malcolm Rogge, *Vesting Transnational Corporate Responsibility in Natural Persons v. Legal Persons – What Matters Today*, *in* CORPORATE CITIZEN: NEW PERSPECTIVES ON THE GLOBALIZED RULE OF LAW (Oonagh Fitzgerald, ed., 2020).

of adverse outcomes.[168] The power imbalances that underlie this asymmetry are exacerbated where there is corruption, extreme inequality, poverty, lack of due process of law, and lack of democratic freedoms. The negative effects of such power imbalances are gravely exacerbated where human rights are routinely violated and abused. The challenge of defining "how far to go" in terms of rules, standards, and methodologies, for both mandatory and voluntary corporate HRDD, is most fraught in situations where power balances are dramatically skewed in favor of businesses over rights holders.[169]

The asymmetrical political-economic and juridical relationships between IRP and VRB can be illustrated in the following example: first, consider the investors who freely choose to invest their money in a project according to their risk appetite. If, on the one hand, things go well, their wealth grows. With an increase in wealth, their capabilities expand; and with expanded capabilities, they enjoy greater freedom.[170] On the other hand, if things go badly, the investors may lose "skin in the game." This is an unfortunate result, to be sure, but things could be much worse; after all, the investors and shareholders are protected by the corporate law principle of limited liability. With limited liability, corporate law confers a legal immunity that protects the shareholders' personal

[168] The link between "freedom" and capability (through economic means) made here is derived from the work of Amartya Sen. *See generally* AMARTYA SEN, DEVELOPMENT AS FREEDOM (1999).

[169] For examples of how the challenge for HRDD in conflict situations has been considered in technical literature, *see e.g.* UNITED NATIONS DEVELOPMENT PROGRAMME, HEIGHTENED HUMAN RIGHTS DUE DILIGENCE FOR BUSINESS IN CONFLICT-AFFECTED CONTEXTS (2022), https://www.undp.org/publications/heightened-human-rights-due-diligence-business-conflict-affected-contexts-guide (last visited Oct. 22, 2022); *see also* United Nations, Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises, *Business, human rights and conflict affected regions: Towards heightened action*, U.N. Doc A/75/212 (July 21, 2020).

[170] On freedom and capabilities, *see* Amartya K. Sen, *Development as capability expansion*, *in* HUMAN DEVELOPMENT AND THE INTERNATIONAL DEVELOPMENT STRATEGY FOR THE 1990'S 41-58 (Keith Griffin and John Knight eds., 1990).

assets, so that their financial loss is limited to their initial investment. In making a free choice to invest their money, they consent to taking on risk; yet, the risk is contained, as corporate law protects a shareholder's personal assets in the event of a business failure. The situation is very different for people and communities who are adversely impacted by the physical effects of business activity through no choice of their own. They face the human rights risks of very different kinds of failures, such as severe environmental contamination or catastrophic technical failure. Whereas shareholders enjoy the legal *immunity* conferred on them by limited liability, the involuntary risk bearers are saddled with a corresponding legal *disability*[171]—they are barred from seeking compensation directly from the shareholders of the business that caused the harm. For this and for a host of other reasons, "all those who suffer"[172] from the adverse human rights impacts of economic development might never be compensated for the losses[173] that they are forced to bear. In economic terms, they involuntarily bear the effects of the negative "externalities" that are generated by the very activities that the voluntary risk takers (shareholders and investors) stand to gain from. When human rights are at stake, the harms they are forced to bear might be regarded as immeasurable by any price.[174] In the

[171] For a detailed analysis of the jural relations of immunity/disability, *see* Malcolm Rogge, *Business, Human Rights and the Jural Relations of Corporate Law: Wesley Hohfeld in a Global System*, available at SSRN: https://ssrn.com/abstract=3578694.

[172] The phrase is drawn from Kaldor's classic statement on hypothetical compensation. *See* Nicholas Kaldor, *Welfare Propositions of Economics and Interpersonal Comparisons of Utility*, 49 ECON. J. 549, 550–51 (1939).

[173] Kemp et al. note that, "a community's understanding of their losses is often quite different from the understanding of a multinational corporation." *See* Deanna Kemp et al., *Global Perspectives on the State of Resettlement Practice in Mining*, 35:1 IMPACT ASSESSMENT AND PROJECT APPRAISAL 22-33, 29 (2017).

[174] Referring to environmental conflict in the Niger Delta, Idemudia asserts: "There is no amount of road or bridge construction, provision of electricity or awarding of scholarships that can compensate for the loss of livelihood resulting from 5400 incidences of oil spills." *See* Uwafiokun Idemudia, *Oil Extraction and Poverty Reduction in the Niger Delta: A Critical Examination of Partnership Initiatives*, 90:1 J. BUS. ETHICS, 91-116, 111 (2009).

event that the involuntary risk bearers do receive money compensation for harms and damage, such compensation might be regarded, subjectively or objectively, as inadequate.[175] This illustration shows clearly that the value and quality of the risks involved in the two domains of involuntary "risk to people" and voluntary "risk to business" are fundamentally distinct. Where the political-economic and juridical asymmetries described above are most exaggerated, the prospect of a beneficial convergence of "risk to people" and "risk to business" is most likely to be elusive. In such situations, *voluntary* corporate HRDD efforts (motivated by the "business case") are most likely to be inadequate; meaning that mandatory and systemic approaches to HRDD (motivated by a normative-ethical approach) are more likely to be required.

One concrete example of involuntary "risk to people" is the risk that rights holders may be subject to forced displacement to make way for an extractive industry project (such as the scenario described in GC's story above, in the introduction). In their study on development-induced displacement, Penz et al. point out that, "displacement involves a totally disproportionate 'contribution' to development required of the displaced."[176] They list some of the potentially devastating risks and uncertainties such persons are sometimes forced to bear: "How does a person who is asked to move decide what she needs to find an equivalent standard of living, in all its aspects in some new location that she is totally unfamiliar with? How can she know how quickly she will find a job there, what it will pay her, what her rent will be, what her neighborhood will be like, whether it

[175] Conde and Le Billon argue that "under-financing" of displacements and the inadequacy of compensation are frequent underlying causes of conflict. *See* Conde & Le Billon, *supra* note 31, at 4.
[176] *See* PETER PENZ ET AL., DISPLACEMENT BY DEVELOPMENT: ETHICS, RIGHTS AND RESPONSIBILITIES 80 (2011).

will be good for her children, what the risks of violence are, and so forth? There is a massive information problem."[177] In these situations, the broadest sense of involuntary human rights "risk to people" becomes most apparent: such risk comprises a threat to people's freedom and to their ability to live better lives, now and in the future.[178] A substantial body of research shows that many of the people who are involuntarily displaced by such projects are inadequately compensated for their loss.[179] In such scenarios, the voluntary risk takers (investors, shareholders) stand to post material gains while the involuntary risk bearers must contend with potentially life-changing adverse impacts.

In megaprojects such as mines and dams, there is often no middle ground—a project either goes ahead or it doesn't. In such situations, the stakes are very high, both for governments, investors, and operating companies; and for the people on the ground who may be directly affected. Empirical studies show that, even with compensation, individuals and communities who are forced to relocate may be left substantially worse off.[180] For communities concerned about finding themselves worse off in the long run,

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[177] *Id.* at 73.
[178] On Sen's capability theory, *see* Sen, *supra* note 170.
[179] *See, e.g.* Alidu Babatu Adam et al., Households, Livelihoods and Mining-Induced Displacement and Resettlement, 2:3 EXTR. IND. SOC. 581, 586 (2015). The authors conclude: "A review of available evidence on MIDR [mining-induced displacement and resettlement] cases suggests a global pattern of poor planning and implementation practice with affected persons being worse off as a result of their displacement." [at 586]
[180] According to a recent comparative analysis of legal and regulatory frameworks for resettlement in six countries (Botswana, Chile, Côte d'Ivoire, Papua New Guinea, Peru, and Ghana): "Compensation based on [fair market value] and without additional provisions indicating that business and other economic activities are compensable, can be insufficient to cover the losses borne by affected landholders. Affected populations that built, used and maintained improvements on their land may receive compensation that is insufficient to cover what they spent on assets over time."
The report noted also that a World Bank study conducted in Peru "found that the market value approach was not always successful in ensuring that affected populations maintain their economic status after expropriation." *See* VLADO VIVODA ET AL., AUSTRALIA: CENTRE FOR

they may have reason to believe that putting a stop to a project is the best option. Protests, legal challenges, physical barricades, and other actions taken by community members may lead to lengthy delays or complete disruptions in the development of a project. In some cases, determined holdouts may vow to resist forced relocation, "hasta las últimas consequencias."[181] Very localized conflicts of this nature, between people who support a project and those who oppose it, have their own way of generating human rights "risk to people," including what could be regarded as severe risks. The recursive aspect of this relational dynamic is that postures of resistance by communities give rise to particular varieties of risks to people and to business, as battle lines are drawn between individual, community, company, and state. The politics of resistance on the ground[182] have the potential to constrain or neutralize the economic power wielded by businesses, thus creating "risk to business." The evolution of such dynamic relationships among differentiated actors over time, including both voluntary and involuntary risk takers, is not fully reflected in the unidirectional "business case" narrative for corporate HRDD (RP<>RB, SR<>MR, SRP<^>RB).

Where some people are forced to bear human rights risks linked to business activity while others stand to gain from it, the mark of injustice is most apparent. Human

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SOCIAL RESPONSIBILITY IN MINING, COMPARATIVE ANALYSIS OF LEGAL AND REGULATORY FRAMEWORKS FOR RESETTLEMENT IN THE GLOBAL MINING INDUSTRY 18 (2017). *See also* WORLD BANK, LAND GOVERNANCE ASSESSMENT FRAMEWORK: FINAL REPORT FOR PERU 37 (2013).

[181] Translated as "resist to the end." A classic example of such a scenario is described in the lengthy factual background to a dispute between Ecuador and the investors in a mining exploration project in that country. *See* Copper Mesa Mining Corporation v. Republic of Ecuador, Part 4. (Perm. Ct. Arb. No. 2012-2) *See also* UNDER RICH EARTH (Malcolm Rogge dir., 2008).

[182] *See, e.g.* Rajiv Maher, *Pragmatic Community Resistance Within New Indigenous Ruralities: Lessons from a Failed Hydropower Dam in Chile*, 68 J. RURAL STUD. 63-74 (2019).

rights and business conflicts and controversies often arise where people come to believe that they are forced to pay a disproportionate price for economic development that will benefit others, not themselves. When the value of compensation for harms (such as loss of freedom) is regarded by the involuntary risk bearers to be wholly inadequate, they might well view the gains made by the voluntary risk takers (investors, shareholders) as a form of *unjust enrichment*.[183] The evident unfairness of the deal may amount to a serious irritant compromising social peace.[184] Here again, the recursive aspect of the relationship between "risk to people" and "risk to business" shows itself. Facing off against community members who believe that they are victims of a serious injustice, different companies led by different personalities will employ different strategies to address the problem.[185] At the same time, communities and individuals will take proactive steps of their own. The tactics used on both sides will evolve and change as conflicts unfold. The risks generated from the tactics used are markedly different for rights holders on the ground as compared to investors with "skin in the game." The fortunes and misfortunes of "winners" and "losers" in economic development are linked: risks and opportunities for affected communities and businesses are bound inextricably together. Similarly, human rights "risk to people" and material "risk to business" are, without a doubt, intertwined, but we should not be naïve to think that businesses will always find a value proposition in respecting human rights rather than turning a blind eye to them.

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[183] In a case in Peru, Indigenous people were "compensated" for land taken; but, very shortly thereafter, the land was mortgaged for a value several magnitudes greater than what was originally paid in compensation. *See* Charis Kamphuis, *Foreign mining, law and the privatization of property: A case study from Peru*, 3 J. HUM. RIGHTS. & ENV. 217 (2012).

[184] *See, e.g.* Matthew Murphy & Jordi Vives, *Perceptions of Justice and the Human Rights Protect, Respect, and Remedy Framework*, 116(4) J. BUS. ETHICS 781-797 (2013).

[185] *See* Rees, et al., *supra* note 128.

Conclusion

No Cause for Paralysis

A century ago, Knight made a provocative claim: "The data of [human] conduct are provisional, shifting and special to individual, unique situations in so high degree that *generalization is relatively fruitless*" (my emphasis).[186] While his claim is perhaps too all-encompassing, the assertion rings true when it comes to the unique individual's "sense of injustice" as it is felt in response to violations and abuses of human rights.[187] With this visceral sense in mind, we must give the ethical and political dimensions of corporate HRDD a firm place in the foreground of our analysis. The challenge this carries with it, however, is that the immeasurable and stochastic aspects of ethics and politics in HRDD puts corporate decision makers and policy makers closer to the "uncertainty" end of Knight's risk-uncertainty continuum. Corporate HRDD is not a solely technical exercise; it cannot be exercised mechanically or algorithmically. This is why stakeholder consultation should be "meaningful" and not hollow, even though it is not entirely clear what "meaningful" stakeholder consultation actually means in practice (it is, very much, a matter of opinion).

Ultimately, what do affected communities and "rights holders" want from businesses and governments that have their own interests and priorities in mind? In speaking of human "wants," Knight explained that, "it is their essential nature to change

[186] FRANK H. KNIGHT, THE ETHICS OF COMPETITION AND OTHER ESSAYS 28 (1935), reprinted from Frank H. Knight, *Ethics and the Economic Interpretation*, XXXVI THE QUARTERLY JOURNAL OF ECONOMICS 454-481(1922).
[187] On the "sense of injustice," *see* JUDITH N. SHKLAR, THE FACES OF INJUSTICE 5 (1990).

and grow; it is an inherent inner necessity in them."[188] He believed that, "the chief thing which the common-sense individual actually wants is not satisfaction for the wants which he has, but more, and *better wants*" (my emphasis).[189] An individual's involvement in a community struggle to vindicate their human rights is just one aspect of a person's aspiration to realize even "better wants," for themselves and for others, over the course of a lifetime. In his critique of utilitarianism, Knight asks whether people's desires, "can adequately be treated as *facts* in the scientific sense, or are they 'values,' or 'oughts,' of an essentially different character not amenable to scientific description or logical manipulation?"[190] We do not need to delve too deeply into this philosophical quandary here; however, we should be prepared to recognize that human rights, as qualitative "oughts," are foundationally distinct from economic "facts," including calculable (or roughly estimable) material "risk to business" as it is conceived in the convergence thesis (RP<>RB, SR<>MR, SRP<^>RB). The distinctness of the two domains of risk (involving "oughts" and "facts") generates instability in the convergence thesis insofar as it attempts to put the two domains on the same plane. The best way to overcome this instability, as this paper argues, is to give priority to the normative-ethical motivation for corporate HRDD over any instrumental-economic business case that may be set out in specific circumstances. Giving such priority does not negate economic reasoning; rather, it recognizes that economic reasoning must be led by and nested within ethical reasoning, not the other way around. Of course, this does not mean that there will be no

[188] KNIGHT, *supra* note 186, at 22.
[189] *Id*.
[190] *Id.* at 21.

disagreements about ethics; nor that the idea of human rights will ever be fixed and immutable.

Nothing of what has been said here should be cause for paralysis for any corporate decision maker or government policy maker. Is human rights uncertainty *radical* "Knightian" uncertainty? Maybe sometimes, but certainly not always. Business decision makers should strive to make a range of credible estimates about "risk to people" through desk research, meaningful stakeholder consultation, scenario planning, surveys, conversation, hearing people, and other mixed methods, including artificial-intelligence assisted data analysis. In undertaking HRDD, the key question that business decision makers must contend with internally is, to use Knight's words, "how far to go?" There is no definitive answer. The way forward must be worked out over time. To date, legislators in different jurisdictions have taken different approaches to this question; some of these are more comprehensive and ambitious than others.[191] Business lobbyists, civil society, and policy makers will continue to debate how stringent or flexible such rules should be. A "rights-respecting" approach may, at times, seem to conflict with an "efficiency-seeking" approach. In calibrating the rules, principles, and guidelines through deliberative processes, we can acknowledge that sometimes human rights "risk to people" will morph into "unmeasurable uncertainty," even as we recognize that corporate HRDD can be a highly effective tool for changing business behavior. The complexities and ambiguities identified in this paper help to highlight where more conceptual and empirical work needs to be done to improve outcomes for rights holders.

[191] For instance, the Germany Supply Chain law is focused largely on the first tier of suppliers; while other approaches, such as the French Duty of Vigilance and the proposed EU due diligence framework take a broader approach.

Risk and Uncertainty Cut Both Ways: Positively and Negatively

In thinking about how to make corporate HRDD work best, it is essential to acknowledge that the recursive and dynamic relationships between businesses and rights holders can give rise to risk in the positive *and* negative sense (risk and opportunity) for everyone involved. If business decision makers attend to relationships skillfully, the firm may see great economic benefit; if they do not, the losses potentially could be immense. At the same time, the rights holders' own choices and actions in response to human rights risks may or may not improve their position: they, too, must weigh risks and opportunities. Whether rights holders succeed in reaching their objectives depends, in part, on how they approach their relationships to the company, the government, and other stakeholders. Rights holders and affected communities are by no means a monolithic group; there may well be tensions among them about strategy, tactics, and long-term objectives. While it is important to highlight the strength of agency of rights holders, it should also be recognized that the power dynamic that always exists between company and community places rights holders at a disadvantage. At times, the disadvantage to rights holders is much better described as subjugation or extreme exploitation. In the worst cases, categories of modern slavery and crimes against humanity apply. Notwithstanding this continuing power imbalance, there are many examples of rights holders overcoming disadvantages through highly organized and effective campaigns. When individual and community resistance is successful, the recursive and looping relationship of "risk to people" and "risk to business" pushes business decision makers well into to the uncertainty end of the risk-uncertainty continuum. The outcomes of such disputes are

very difficult to predict. There is no definitive roadmap for corporate HRDD under such circumstances. Even so, by lessons learned from lived experience, the rights holders, as well as the business decision makers, may strive to make better decisions along the way. By giving priority to the normative-ethical motivation for corporate HRDD, corporate decision makers will be in a better place to make the right choices.

Fortune and Misfortune in Risk and Uncertainty

The worldwide impacts of accelerating climate change and the sudden arrival of COVID-19 demonstrate clearly how uncertainty is always present in the background. While the possibility of a global pandemic was well understood prior to its onset, the precise way in which the pandemic would run its course was, to be sure, impossible to predict. The impacts of the pandemic on businesses and the wider economy was extremely varied: some firms did very well during this period while many others failed. Uncertainty, as Knight conceived it, introduces the element of entrepreneurial "luck" into the economic landscape.[192] One of his more curious insights was that uncertainty may give rise to commercial advantages as well as disadvantages. This insight is something that advocates and practitioners of "business and human rights" should be very careful to consider. The lamentable truth is that an unethical but opportunistic decision maker might find economic "success" in turning human rights risk and uncertainty into material advantage. In such circumstances, the decision maker profits, in part, from another person's "bad luck."[193] For as long as commercial exchange has occurred in the world, a "stroke of

[192] KNIGHT, *supra* note 16, at 283.
[193] Zinn points out that "risk" is not necessarily a negative aspect; indeed, risk-taking is regarded as a positive value in many contexts: "Risk is not restricted to negative aspects. The notion of *risk*

luck" for one entrepreneur may well entail loss or disaster for another. When human rights are at stake, economic opportunism (a "stroke of luck" for the entrepreneur) may lead to potentially devastating human rights outcomes for individuals and groups affected. The key challenge and goal for corporate HRDD is to prevent and mitigate the abuses of human rights that may occur when some other person (investor, shareholder, business owner, employee, government official) stands to gain in economic terms from that very abuse. This is quite a distinct goal from the instrumentalist-economic motivation that is given priority in the "business case" for corporate HRDD.

People might object to speaking of corporate human rights abuses as occasions of "bad luck," and for good reason; the fates of affected communities and rights holders should not be left to chance. Just a few years before Knight (who was an economist) published *Risk, Uncertainty and Profit*, the sociologist Max Weber famously described the sense in which the world of "intellectualist rationalization" is a "disenchanted" one. In modern life, he said, there is an impression that, "there are no mysterious incalculable forces that come into play, but rather that one can, in principle, master all things by calculation."[194] Perhaps reacting to Weber's specter of a disenchanted world, Knight propounded the notion that some decisions, even in commerce, come about through "an intuitive formation of estimates" rather than rational calculations.[195] Today, it is well

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taking refers to a positive and a negative side as a weighing up between gains and losses. Research on voluntary risk taking has shown that seeking risks can become a value itself, thus questioning the underlying normative assumptions of mainstream risk research that risks have to be avoided and reduced" (emphasis in original).
See Zinn, *supra* note 57, at 4.

[194] *See* Max Weber, *The Disenchantment of Modern Life*, *in* FROM MAX WEBER: ESSAYS IN SOCIOLOGY 129-156 (Hans Heinrich Gerth and C. Wright Mills eds., 1946). Originally published in 1918.

[195] KNIGHT *supra* note 16.

understood that business decision making involves all of these things: intuition, estimates, calculations, inferences, bad luck, and good luck.[196] When thinking about the human rights impacts of entrepreneurial activity in the world, we ought to be lucid about the fact that sometimes the entrepreneur's "achievement" in turning a risky and uncertain situation into material advantage entails tragic outcomes for others. Today, there is no known guardrail that is able to prevent all instances of entrepreneurial and corporate opportunistic misfeasance. Where serious misfeasance does occur, grievous misfortune befalls the human rights victims, be they garment workers who are crushed when an overloaded factory building collapses; family members whose homes are destroyed when a mining tailings dam bursts; or victims of rogue private security guards with personal scores to settle. At bottom, the methodological primacy that is accorded to "risk to people" in HRDD is the expression of the ethical imperative not to leave the occurrence of grave misfortune to chance, when chance can be reasonably avoided. That this imperative is framed within a range of reasonableness implies that there are limits to what corporate HRDD can achieve. Corporate HRDD efforts will never be enough for the victims of grave human rights abuses; nonetheless, such efforts may mean that there will be fewer victims to begin with. Corporate HRDD is conventionally understood to be a standard of conduct, not of result. HRDD is not, in and of itself, a human rights remedy.

Long before the advent of corporate human rights impact assessment (HRIA) and HRDD as realms of technical expertise, Ulrich Beck argued that the relationship between

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[196] On "guesstimates" in cost-benefit analysis, see John C. Coates IV, *Cost-Benefit Analysis of Financial Regulation: Case Studies and Implications*, 124 Yale L.J. 882, 891–96 (2015).

the social production of wealth and the social production of risk is a systemic one.[197] Even today, in countries around the world, countless legally available (though unethical) options exist for turning situations involving human rights risk and uncertainty into profitable business opportunities. Such opportunism is enabled, in part, by the rules, privileges, immunities, and powers that are inscribed in the transnational system of business law that exists today.[198] With the incremental and progressive developments that flow from the adoption of the UNGPs and the uptake of HRDD by some major firms, such options may be more constrained in some jurisdictions today, if not entirely eliminated. That said, catastrophic events like the failure of the Brumadinho mining tailings dam in Brazil, in 2019,[199] prove that the worst problems will not be corrected solely through market-based incentives and voluntary mechanisms. The business case for conducting voluntary corporate HRDD is not enough. Mandatory corporate HRDD mechanisms are needed to complement, rather than substitute for, other evolving hard legal mechanisms for corporate accountability, including smart regulation, civil liability, and administrative and criminal remedies.

"If you cannot measure, measure anyhow!"

About a century ago, Knight quipped: "if you cannot measure, measure anyhow!"[200]

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[197] *See* ULRICH BECK, RISK SOCIETY: TOWARDS A NEW MODERNITY 19 (1992) (writing that, "in advanced modernity the social production of wealth is systematically accompanied by the social production of *risks*").
[198] *See* Rogge, *supra* note 167.
[199] *See* DEANNA KEMP & ANDREW HOPKINS, CREDIBILITY CRISIS: BRUMADINHO AND THE POLITICS OF MINING INDUSTRY REFORM (2021).
[200] As quoted by Herbert Stein, WALL STREET JOURNAL A14, November 1, 1995. Knight was reportedly reacting to an inscription authored by Lord Kelvin at the University of Chicago, which stated that, "when you cannot measure it … your knowledge is of a meager and

Notwithstanding the limits considered in this paper, the business case comprises a compelling rhetorical motivation for companies to conduct HRDD. At the same time, we should remain clear-headed about the many conceptual challenges that remain for *measuring* human rights risk and its complex, recursive relationship to material risk. Writing about the business case for corporate social responsibility, orthodox corporate law scholars Kraakman et al. point out, in a sobering manner, that it is not always plausible that the long-term interests of shareholders align with the "external interest" that is being promoted: "Most attempts to protect external interests—from gender equality in the boardroom to the reduction of systemic risk and the protection of human rights—can be, and have been, rationalized in terms of promoting long-term shareholder value. Nevertheless, while the long-term interests of shareholders may at times coincide with those of society at large, *perfect alignment in all circumstances is implausible*" (my emphasis).[201] Fasterling has articulated a comparably abstemious take on the issue, stating that, "the business case is a gamble on whether or not future research can confirm a convergence between social and human rights risk."[202] This paper has highlighted some of the enduring philosophical challenges for defining, measuring, ranking, and comparing human rights "risk to people" and "risk to business" within a framework of convergence. The measurement problems for the convergence thesis which exist at the firm level (such as the examples given in this paper) are mirrored in the larger economy. Devising standardized methods for measuring, ranking, and comparing the "social" in ESG factor

unsatisfactory kind." *See* PETER L. BERNSTEIN, AGAINST THE GODS: THE REMARKABLE STORY OF RISK 219 (1996).
[201] *See* THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH 94 (Reinier Kraakman et al., eds., 2017).
[202] *See* Fasterling, *supra* note 55, at 245. Here, Fasterling uses the term "social risk" to denote what Kemp et al. refer to "business risk." *See* Kemp et al, *supra* note 56.

investment[203] is proving a serious challenge for many of the same reasons considered in this paper. Writing in 2017, O'Connor and Labowitz have noted that, "the complete lack of clear social standards has resulted in a 'noisiness' that fundamentally compromises the ESG industry's effectiveness."[204] They caution that, in attempting to measure "the real-world effects of companies on the human rights of the people and communities they touch … there is great potential to misrepresent social phenomena in the attempt to simplify what is inherently complex."[205] The analysis provided in this paper underscores their point, with specific reference to the methods used in HRDD. The information "noise" in the socially responsible investment field that O'Conner and Labowitz complained of five years ago has not been filtered out in the intervening period.[206] Indeed, there are some indications that attempts to decontaminate the data have revealed even deeper challenges. For instance, in an empirical study published in 2021, Christensen et al. find, quite troublingly, that corporate "ESG disclosure generally exacerbates ESG rating disagreement rather than resolving it."[207] Evidently, we still have a very long way to go when it comes to "measuring" human rights "risk to people" and understanding its relationship to long-term material "risk to business."

In spite of the measurement challenges noted above, much effort continues to be put into substantiating the instrumental-economic claim that respecting human rights is,

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[203] "ESG" refers to environmental, social, and governance factor investment.
[204] *See* CASEY O'CONNOR AND SARAH LABOWITZ, NYU STERN CENTER FOR BUSINESS AND HUMAN RIGHTS, PUTTING THE "S" IN ESG: MEASURING HUMAN RIGHTS PERFORMANCE FOR INVESTORS 28 (March 2017).
[205] *Id*.
[206] *See, e.g.* Florian Berg et al. *Aggregate confusion: The divergence of ESG ratings*, REVIEW OF FINANCE 1-30 (2022).
[207] *See* Dane M. Christensen et al., *Why is Corporate Virtue in the Eye of the Beholder? The Case of ESG Ratings*, THE ACCOUNTING REVIEW (Feb. 26, 2021). Available at SSRN: https://ssrn.com/abstract=3793804

broadly speaking, good (or at least neutral) for business and investors.[208] Beginning in 2018, Shift launched an interdisciplinary collaborative project to develop new metrics, called "Valuing Respect."[209] While Shift and other organizations have made important advances in defining the nature of the problem at hand, the development of new methodologies for measuring and comparing human rights risks to people and risks to business is still in the experimental phase.[210] At the same time, experimental approaches to accounting for the social and environmental impacts of corporations alongside traditional financial accounts are also being developed.[211]

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[208] Some will continue to insist, perhaps correctly, that attempts to substantiate the claim that "ethics pays" are misguided. Thielemann and Wettstein argue that the notion that "ethics pays in the long run" (what they call a "formula") is "misguided" or "simply wrong." They conclude that the proposition that "ethics pays in the long-run" really means that a business will "pursue the kind of 'ethics' that pays in the long-run." In other words, the notion that "ethics pays" is, at bottom, an instrumentalist approach to social responsibility that gains "legitimacy through profitability." *See* Thielemann & Wettstein, *supra* note 118, at 35.

[209] In the launch of their project, Shift stated that, "much of the information on which companies' human rights performance—and, by extension, their broader 'social' performance—is assessed, is at best superficial and at worst misleading. This distorts how companies allocate their resources and it leads markets (and others) to reward at times poor or inadequate behaviors, while leading practice can go unrecognized and under-supported." https://www.shiftproject.org/resources/collaborations/valuing-respect/ (last visited, Oct. 22, 2022).

[210] For instance, in a discussion paper on "Accounting for Companies' Human Rights Performance," Shift notes that the "Accounting Blueprint" developed by the Berlin-based Reporting 3.0 platform shows some promise, but, it "remains a high-level vision that leaves the same questions open as to how and to what extent companies' human rights impacts and management of those impacts could be effectively reflected in financial accounts…. Those answers remain to be discovered." *See* SHIFT, ACCOUNTING FOR COMPANIES' HUMAN RIGHTS PERFORMANCE (discussion paper) 21 (2019). *See also* REPORTING 3.0, THE BLUEPRINT FOR NEW ACCOUNTING: LAYING THE FOUNDATIONS FOR FUTURE-READY REPORTING, (June 2018); https://www.r3-0.org/wp-content/uploads/2019/07/R3-BP2.pdf (last visited Oct. 22, 2022).

[211] *See, e.g.* George Serafeim & Katie Trinh, *A framework for product impact-weighted accounts. Impact-Weighted Accounts Research Report*, HARVARD BUSINESS SCHOOL ACCOUNTING & MANAGEMENT UNIT WORKING PAPER 20-076 (2020).

People Are Not Slot Machines

People, said Knight, are not slot machines and should not be treated as if they were.[212] This aphorism is fitting when thinking about the relationship between rights holders and business managers. This paper has shown that the fault that arises in using the convergence thesis to motivate corporate HRDD lies in treating the value of human rights "risk to people" as measurable data that can be assessed on the same plane as material "risk to business." As Ruggie and Sherman have emphasized, the goal of corporate human rights due diligence is: "to understand the specific impacts on specific people, given a specific context."[213] Their attention to specificity is quite apt, as human rights concern the dignity of *unique individuals* within the social sphere. And yet, the concentration given to specific people poses a practical challenge for business enterprises that seek to understand the "big picture" within the means at their disposal. To be practical, the methods used in community relations science rely a great deal, though not exclusively, on aggregative methods such as survey questionnaires and focus groups. Given the wide scope of concerns, and the potential number of people affected, it is difficult to avoid using such tools for social impact assessment; indeed, they *should* be used if they help to identify risks to people. At the same time, enterprise risk management (ERM) involves an assessment of aggregate risk to the enterprise as a whole.[214] ERM's aggregative approach reflects the fact that business actors are, by their training and vocation, most keenly interested in what happens "at scale." In contrast, human rights impacts affect individuals uniquely; for every human right at issue, the dignity of the

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[212] Frank H. Knight, *Ethics and Economic Reform*, 6 ECONOMICA 18 (1939).
[213] *See* Ruggie & Sherman, *supra* note 107, at 927.
[214] *See generally* COSO, *supra* note 156, at 54.

individual is impacted in myriad ways that are not easy to capture through survey and other aggregative methods. The human rights claims that are brought before regional human rights tribunals and UN treaty bodies tend to be deeply personal—they concern the specific victim's viscerally felt "sense of injustice."[215] The names of individual victims, like Angel Manfredo Velásquez Rodríguez, are memorialized in the titles of the tribunal's written decisions.[216] The sense of injustice leads individual victims and their families to demand their day in court, where they can tell their story firsthand. In human rights claims, the painful granular details of unique personal experience weigh heavily. The most compelling accounts of human rights defenders and victims are those that give proper place to the dignity of the individuals involved while also recognizing systemic effects and injustices. Under normal circumstances, the level of specificity that is expected in the formal adjudication of human rights claims is far beyond the reach of any style of aggregative corporate social impact assessment and corporate HRDD. Recognizing this tension further underscores how human rights "risk to people" and material "risk to business" are such *distinct* concerns.

The conceptual and methodological challenges for the convergence thesis that have been explored in this paper are not offered as reasons to throw up our hands in surrender. This is not an exercise in futility. As Jarvis remarks: "Uncertainty might … not be the 'black hole' that Knight paints it, but a category where effective management protocols can be developed to reduce its effect and anticipate its consequences."[217]

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[215] SHKLAR, *supra* note 187, at 5.
[216] Inter-American Court of Human Rights, Case of Velásquez Rodríguez v. Honduras, Judgment of July 29, 1988 (Merits).
[217] *See* Darryl S.L. Jarvis, *Theorising risk and uncertainty in international relations: The contributions of Frank Knight*, 25.3 INTERNATIONAL RELATIONS 308 (2011).

Indeed, the convergence thesis is used extremely effectively by "intrapreneurs" to encourage business decision makers to widen their perspective, to experiment with new empirical methods, and to take actions to mitigate human rights harms to people that may be caused by or linked to their business activity. From a practical standpoint, highlighting the potentially crippling costs to a business of ignoring severe human rights risks in its value chain can be a very effective tactic for getting the attention of CEOs, board members, and shareholders. There is no doubt that doing this work has the potential to make real improvements to people's wellbeing, in many situations. The essential point to glean from this analysis is that the convergence thesis only takes us so far in motivating corporate HRDD. Rights holders are most vulnerable where the business case leads in the wrong direction—toward greater risk-taking by company decision makers, toward using more aggressive tactics on the ground, and toward a greater willingness to foist risk onto people in the community. The greatest concern for rights holders lies where the "beneficial convergence" of "risk to people" and "risk to business" does *not* hold; and recognizing this concern brings the *involuntariness* of human rights "risk to people" to the fore.

Principled Funambulism: Between Ethics and Economics

This paper shows how the evolving practice of corporate human rights due diligence' (HRDD) is driven by both *ethical* and *economic* motivations. Whether the theory underlying HRDD rests *primarily* in economic concerns or in ethics is a contestable question. Day to day, the corporate decision maker walks an indistinct line, drawn between the realm of ethics and the paradigm of economics; when concerns about human

rights enter the picture, that dividing line disappears into thin air. In "business and human rights," the apparently separate domains of ethics and economics turn out to share the same foundations.[218] As Ruggie did, the "principled funambulist" will consider the value of both economic and ethical motivations for corporate HRDD. This paper explains why the "beneficial convergence" of "risk to people" and "risk to business" in HRDD (the "business case") should not be the primary motivation given to policy making and law in the realm of HRDD. The proper motivations for corporate HRDD, in practice and in regulatory frameworks for mandatory HRDD, are normative-ethical ones. Nonetheless, the business case for respecting human rights may be deployed instrumentally with effect, to help inspire and inform a new "rights-respecting" narrative within companies about what criteria *ought* to guide decision making. While *Homo economicus* might consider human rights "risk to people" because there is a good business case for doing so, humane decision makers will prioritize "risk to people" because it is good according to their conscience. If there is a contradiction in striving to do both, it need not be a fatal one.

[218] *See* AMARTYA SEN, ON ETHICS AND ECONOMICS (1999). Sen argues against the "engineering" approach to economics, in which human beings are treated as means rather than ends in themselves.