

# Beyond CSR: The Story of the UN Guiding Principles on Business and Human Rights



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# Beyond CSR: The Story of the UN Guiding Principles on Business and Human Rights

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*The root cause of the business and human rights predicament today lies in the governance gaps created by globalization – between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences.*

*There is no single silver bullet solution to the institutional misalignments in the business and human rights domain. Instead, all social actors – States, businesses, and civil society – must learn to do many things differently. But those things must cohere and become cumulative, which makes it critically important to get the foundation right.'*

*Report of the Special Representative of the Secretary General on Business and Human Rights (2008).<sup>1</sup>*

This paper is intended for corporate lawyers who increasingly are being asked to advise their clients on business and human rights issues. It addresses the far-reaching implications of the UN Guiding Principles on Business and Human Rights ('UNGPs'), which the UN Human Rights Council unanimously endorsed in 2011, following six years of multistakeholder consultations, research, and pilot projects. Their uptake has been broad and swift. They have become the global authoritative standard, providing a blueprint for the steps all States and businesses should take to uphold human rights.

The paper explains why the UNGPs are profoundly different from voluntary initiatives and self-regulation, commonly placed under the umbrella term of Corporate Social Responsibility (CSR).

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<sup>1</sup> John G. Ruggie, *Protect, Respect and Remedy: A Framework for Business and Human Rights: Report of the Special Representative of the Secretary General on Business and Human Rights*, UN Doc. A/HRC/8/5 (7 Apr. 2008), <https://business-humanrights.org/sites/default/files/reports-and-materials/Ruggie-report-7-Apr-2008.pdf> (accessed 11 March 2020).

It traces the three sources of governance that produced a thick consensus around the UNGPs and resulted in operationalization of the three-pillar Protect, Respect, and Remedy framework created by Professor John Ruggie, the author of the UNGPs and former Special Representative of the Secretary General on Business and Human Rights.

The paper explains the content of each pillar of the UNGPs. It then shows how they are increasingly incorporated or reflected in law, regulation, judicial and administrative decision-making, public policy, multistakeholder norms, commercial and financial transactions, the practices and policies of leading companies, and the advocacy of civil society.

It concludes by urging corporate lawyers to act as wise counsellors by going beyond CSR when advising clients on human rights, in order to help their clients navigate the often-unclear boundaries between hard and soft law.

## 1. Introduction

Voluntary business policies and practices; enactment and enforcement of strong laws; and robust advocacy by civil society—all three are necessary to prevent and address global business-related human rights abuses. Yet none is sufficient by itself to solve the problem of business and its impacts on human rights. They must work together in a mutually supporting framework.

Securing worldwide consensus on such a framework, and how to implement it in practice, is the singular achievement of the 2011 UN Guiding Principles on Business and Human Rights ('UNGPs'), authored by Harvard Kennedy School Professor John Ruggie, the former UN Special Representative on Business and Human Rights ('SRSG').<sup>2</sup> The UNGPs now constitute the authoritative global standard on business and human rights.

They have achieved this status by going beyond Corporate Social Responsibility ('CSR'), a source of governance based on voluntary conduct and self-regulation that is

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<sup>2</sup> United Nations, Office of the High Commissioner for Human Rights (OHCHR), *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework (2011) (hereinafter 'UNGPs')*, available at [http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf) (accessed 11 March 2020).

grounded in a company's long-term self-interest. The UNGPs draw upon two other key sources of governance – States and civil society (including stakeholder advocacy groups, trade unions, and investors, etc.). The resulting combination of these three sources of governance is the interdependent three-pillar Protect, Respect, and Remedy framework, on which the UNGPs are founded.

This paper recaps the background of the UNGPs, summarizes their content, and describes their uptake, particularly as they may be relevant to corporate lawyers who must advise their business clients on their implications.<sup>3</sup>

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<sup>3</sup> Professor Ruggie and others have written extensively about these topics. In particular, *see* the following resources, referred to later in this paper:

(a) UN Office of the High Commissioner on Human Rights, *The Corporate Responsibility to Respect Human Rights: An Interpretive Guide* (2012) (hereinafter '*Interpretive Guide*'), available at [http://www.ohchr.org/Documents/Publications/HR.PUB.12.2\\_En.pdf](http://www.ohchr.org/Documents/Publications/HR.PUB.12.2_En.pdf) (accessed 11 March 2020);

(b) John G. Ruggie, *Just Business* (Norton, 2013) (hereinafter '*Just Business*');

(c) John G. Ruggie, *The Social Construction of the UN Guiding Principles on Business and Human Rights*, 12 Jun. 2017, Harvard Kennedy School Faculty Research Working Paper Series, HKS Working Paper No. RWP17-030 (hereinafter '*Social Construction*') available at <https://www.hks.harvard.edu/publications/social-construction-un-guiding-principles-business-human-rights> (accessed 11 March 2020);

(d) John G. Ruggie, *Life in the Global Public Domain: Response to Commentaries on the UN Guiding Principles and the Proposed Treaty on Business and Human Rights* (2015) (hereinafter '*Global Public Domain*') available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2554726](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2554726) (accessed 11 March 2020);

(e) John G. Ruggie and John F. Sherman, III, *The Concept of 'Due Diligence' in the UN Guiding Principles on Business and Human Rights: A Reply to Jonathan Bonita and Robert McCorquodale* (2017) 28(3) E.J.I.L. 921–928 (hereinafter '*Due Diligence*'), available at <https://doi.org/10.1093/ejil/chx047> (accessed 11 March 2020);

(f) The International Bar Association's (IBA's) *Practical Guide on Business and Human Rights for Business Lawyers* (2016) (hereinafter '*IBA Practical Guide*'), the companion *IBA Reference Annex to the Practical Guide on Business and Human Rights for Business Lawyers* (2016) (hereinafter '*IBA Reference Annex*'), and the *IBA Business and Human Rights Guide for Bar Associations* (2015) (hereinafter '*IBA Bar Association Guide*'), which are available at <https://www.ibanet.org/LPRU/Business-and-Human-Rights-Documents.aspx> (accessed 11 March 2020); and

(g) Shift, *Business, Human Rights and the Sustainable Development Goals: Forging a Coherent Vision and Strategy* (2016), commissioned by the Business and Sustainable Development Commission (hereinafter '*Human Rights and the SDGs*'), available at <https://www.shiftproject.org/resources/publications/business-human-rights-sustainable-development-coherent-strategy/> (accessed 11 March 2020).

## 2. Background of the UNGPs

In June of 2011, following six years of nearly fifty international consultations, research reports and pilot projects, the United Nations (UN) Human Rights Council unanimously endorsed the UNGPs.

The UNGPs were the first, and to this date is the only, guidance that the Council and its predecessor body, the Commission on Human Rights, issued for States and business on human rights. This was also the first time that either body had endorsed a normative text on any subject that they did not negotiate themselves. The endorsement was unanimous.<sup>4</sup>

The UNGPs consist of thirty-one Guiding Principles, each with integrated commentary. They are based on a three-pillar, interdependent, 'Protect, Respect, and Remedy' framework. First, States have a duty to protect human rights from abuse by third parties, including business, through appropriate law, policy, regulation, and adjudication (UNGPs 1–10). Second, business enterprises have a responsibility to respect human rights; this means that they should identify, avoid, and address harm to human rights through their activities and businesses relationships (UNGPs 11–24). Third, where individuals and communities have suffered harm, both States and business enterprises have a role to play in providing access to an effective remedy (UNGPs 25–31).

Finally, the uptake of the UNGPs has been broad and swift. The former UN High Commissioner for Human Rights, Zeid Ra'ad Al Hussein, described the UNGPs as 'the global authoritative standard, providing a blueprint for the steps all States and businesses should take to uphold human rights'.<sup>5</sup> They are increasingly incorporated or reflected in law, regulation, judicial and administrative decision-making, public policy, multistakeholder norms, commercial and financial transactions, the practices and policies of leading companies, and the advocacy of civil society.

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<sup>4</sup> *Just Business*, *supra*, n. 3.

<sup>5</sup> Zeid Ra'ad Al Hussein, *Ethical Pursuit of Prosperity*, *The Law Society Gazette*, 23 Mar. 2015, available at <https://www.lawgazette.co.uk/comment-and-opinion/ethical-pursuit-of-prosperity/5047796.article> (accessed 10 March 2020).

### 3. Globalization, Fragmentation of Production, and Human Rights

The collapse of the Soviet Union in the early 1990s accelerated a sharp increase in globalized trade. Global trade has been marked by increased fragmentation of business production processes across multiple sectors and countries, the development of complex and lengthy global supply chains and the increasing number of people employed in, and communities affected by such trade.<sup>6</sup>

The increase in global trade has raised the standard of living for many around the world and reduced poverty levels. However, many were cut off from the benefits of development and suffered human rights harm. These harms included: forced labour, human trafficking, and child labour in global supply chains, occupational accidents, and work-related disease; harm to communities that lost livelihoods, access to health, clean water, and suffered other human rights harm due to impacts from the growing, harvesting, or extraction of commodities for global supply chains; violence against communities and individuals from security forces guarding company facilities in former conflict zones; and the use of data supplied by Internet and technology companies to repressive governments to enable them to track and harass political dissidents.<sup>7</sup> This list is not exhaustive.

The first articulations of human rights in international declarations and conventions were primarily addressed to governments.<sup>8</sup> However, business enterprises had also become involved in human rights harm. Emblematic examples in the 1980s and 1990s included: revelations of child labour in Nike's suppliers in SE Asia; the death of thousands following an explosion at Union Carbide's pesticide plant in Bhopal, India; the Nigerian military's hanging of Ken Saro-Wiwa and eight others for protesting Shell's oil exploration operations in Nigeria; and Yahoo's revealing to Chinese authorities the

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<sup>6</sup> *Human Rights and the SDGs*, *supra* n. 3.

<sup>7</sup> *Human Rights Translated 2.0: A Business Reference Guide*, produced by the OHCHR, International Business Leaders Forum and Monash University's Castan Centre for Human Rights Law (2008), available at [http://www.ohchr.org/Documents/Publications/HRT\\_2\\_0\\_EN.pdf](http://www.ohchr.org/Documents/Publications/HRT_2_0_EN.pdf) (accessed 10 March 2020). *See also*, *IBA Reference Annex*, Appendix C, *supra* n. 3.

<sup>8</sup> *Just Business*, *supra* n. 3 at 3–9; *Social Construction*, *supra* n. 3 at 5.

name of a customer who was then imprisoned for reporting on public unrest.<sup>9</sup> Such events resulted in not only severe harm to people but also harm to companies – through litigation, naming, and shaming campaigns by international NGOs, reputational damage, business interruption, divestment, reduced access to capital markets, and other harm.<sup>10</sup>

The laws of individual nations had proven insufficient to regulate the human rights behaviour of these global enterprises, particularly in less developed countries, where national regulation or enforcement had failed to keep up with the pace of economic change, or indeed, to align with the States' own international human rights duties.

Businesses responded to claims of their involvement in human rights abuses in various ways, including by voluntary initiatives and self-regulation. Such efforts, under the umbrella term of CSR, grew out of corporate philanthropy.<sup>11</sup> Typical examples of CSR initiatives include voluntary standards and verification schemes, company supply chain codes of conduct, and collective, multistakeholder, and public-private initiatives.<sup>12</sup> For example, Harvard Business School Professor Michael Porter's 'shared value' paradigm envisioned that CSR could be integral to a company's competitive strategy when it employed 'the policies and operational practices that enhance the competitiveness of a company while simultaneously advancing the economic and social conditions in the communities in which it operates'.<sup>13</sup>

However, civil society viewed CSR suspiciously, because it is not legally binding, allowing companies to burnish their reputations while avoiding real accountability for their involvement in behaviour that harms human rights.<sup>14</sup> They lobbied for better enforcement of existing laws, stronger laws, and a global legal framework of legal accountability. This generated a bitter debate between businesses and civil society over voluntary versus mandatory standards.

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<sup>9</sup> *Just Business*, *supra* n. 3, at 3–16.

<sup>10</sup> *Ibid.*

<sup>11</sup> *Ibid.*

<sup>12</sup> *Ibid.*

<sup>13</sup> Michael Porter and Mark Kramer, *Creating Shared Value* (2011) Harvard Business Review 6.

<sup>14</sup> *Just Business*, *supra* n. 3, available at <https://hbr.org/2011/01/the-big-idea-creating-shared-value> (accessed 11 March 2020)



#### 4. The UN Response: 2011 UN Guiding Principles on Business and Human Rights (UNGPs)

Efforts to address business involvement in human rights harm made their way to the United Nations. In 2003, a UN subcommission approved Norms on the Responsibilities of Transnational Corporations, which would have imposed on companies, within their undefined 'sphere of influence', the same binding human rights obligations that States had assumed under treaties that they had ratified.<sup>15</sup> Civil society supported the norms, business associations resisted them, and States stayed mostly silent. The UN Commission on Human Rights confirmed that they had 'no legal standing'.<sup>16</sup>

In 2005, then-UN Secretary General Kofi Annan appointed Harvard Kennedy School Professor John Ruggie as his Special Representative on Business and Human Rights ('SRSR') to break the logjam. Ruggie, a political scientist, had been the UN Assistant Secretary General for Strategic Planning. Annan asked him to develop a framework that would outline the respective responsibilities of States and businesses on human rights. The SRSR then began what became a six-year process of consultations, research, and pilot projects. The scope of his mandate expanded, culminating in the UN's unanimous endorsement of the UNGPs in 2011.

In his research, the SRSR identified a governance gap in which global society lacked the capacity to deal with business-related human rights harm. He concluded that voluntary initiatives and self-regulation were ineffective by themselves to address the problem globally. At the same time, he saw that creating an overarching legal framework would be an unrealistic goal for his mandate.<sup>17</sup>

To fill the gap, he rejected the 'voluntary/mandatory dichotomy that had paralyzed creative thinking for so long'.<sup>18</sup> Seeing no silver bullet solution, he concluded instead

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<sup>15</sup> *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003), available at <http://hrlibrary.umn.edu/links/norms-Aug2003.html> (accessed 10 March 2020).

<sup>16</sup> UN Human Rights Commission Resolution 2004/11, U.N. Doc. E/CN.4/2004/L.73/Rev.1 (20 Apr. 2004).

<sup>17</sup> *Just Business*, *supra* n. 3 at 68.

<sup>18</sup> *Global Public Domain*, *supra* n. 3.



that an authoritative normative system had to use the three distinct governance systems in a mutually reinforcing manner.<sup>19</sup>

To implement this framework, Ruggie grounded the UNGPs in three interdependent and mutually supporting pillars:

Pillar I – the State duty to protect against human rights abuses by third parties, including business, through effective policies, regulation, and adjudication;

Pillar II – the corporate responsibility to respect human rights, which means to act with due diligence to avoid infringing on the rights of others and to address adverse impacts with which a business may be involved; and

Pillar III – the need for greater access by victims to effective remedy, both judicial and non-judicial.

Each pillar is explained in further detail below.

#### **5. UNGP Pillar I—The State Duty to Protect Human Rights (UNGPs 1-10)**

The UNGPs do not create new legal obligations for States. Rather, they recognize *existing* obligations that international human rights law imposes on States to protect people from human rights harms committed by third parties, including business. Pillar 1 therefore focuses on how States can take appropriate steps to prevent, investigate, punish, and redress business-related human rights harms through effective policies, legislation, regulations, and adjudication (UNGP 1). States also have existing obligations to provide access to an effective remedy.

#### **6. UNGP Pillar II – The Corporate Responsibility to Respect Human Rights (UNGPs 11–24)**

The responsibility to respect human rights is the baseline global expectation of all business enterprises. The responsibility extends to all internationally recognized human rights, the sources of which include, at a minimum, ‘The International Bill of Human Rights’ (which consists of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic,

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<sup>19</sup> *Global Public Domain and Social Construction*, both *supra* n. 3.

Social and Cultural Rights) and the International Labour Organization's Declaration on Fundamental Principles and Rights at Work (UNGP 12).<sup>20</sup>

The corporate responsibility to respect human rights applies to all businesses, regardless of their size, sector, operational context, ownership, and structure (UNGP 14). Pillar II deliberately uses the term 'responsibility' rather than 'duty' (as in Pillar I) to signify that the corporate responsibility to respect human rights is not by itself legally binding.

However, it does not exist in a law-free zone. National laws often require companies to respect certain human rights (e.g., through health and safety, non-discrimination, environmental or criminal laws, etc.).<sup>21</sup>

Compliance with the law is a bedrock requirement of the responsibility to respect human rights. Businesses are expected to seek ways to honour international human rights principles when faced with conflicting legal requirements. And they are expected to treat the risk of involvement in gross human rights abuses as a matter of legal compliance wherever they operate. This last point reflects the high risk of corporate criminal legal liability for involvement in such abuses. Therefore, corporations should not vest primary responsibility for identifying and addressing the risks of such abuses in the hands of more market-driven company functions, such as CSR or public relations (UNGP 23).

The responsibility to respect human rights is neither a voluntary sign-up proposition nor a matter of corporate philanthropy. Global society expects a business to respect human rights whether or not it agrees to meet that expectation. Further, the responsibility to respect exists over and above compliance with national laws and regulations. It exists independently of the State's ability or willingness to meet its own

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<sup>20</sup> Where a company's activities may impact on a potentially marginalized or vulnerable group (e.g., children, women, migrant workers, indigenous peoples), it will also need to pay attention to the international human rights standards that apply to members of that group. *See* Commentary to UNGP 12.

<sup>21</sup> *See*: (a) *Interpretive Guide*, *supra* n. 3 at 13; *IBA Reference Annex*, s. 2.4; and (b) *Frequently Asked Questions about the Guiding Principles on Business and Human Rights*, OHCHR, 8, available at [www.ohchr.org/Documents/Publications/FAQ\\_PrinciplesBusinessHR.pdf](http://www.ohchr.org/Documents/Publications/FAQ_PrinciplesBusinessHR.pdf) (accessed 11 March 2020).

duty to protect human rights. That is, the absence of national laws on human rights or a failure in their enforcement does not limit the businesses' responsibility to respect human rights (UNGP 11).

#### **a. What It Means to Respect Human Rights**

To meet their responsibility to respect, businesses should avoid infringing on the human rights of others, both in their direct activities and in their business relationships (UNGPs 11 and 13). The term 'business relationships' is broadly defined to include all relationships a company has with its business partners, entities in its value chain, and any other non-State or State entity directly linked to its business operations, products, or services.<sup>22</sup>

To meet its responsibility to respect, a business should also implement appropriate policies and processes (UNGP 15), including:

- a high-level policy commitment to respect human rights, supported by operational-level policies, training, and incentives that embed the commitment throughout the organization (UNGP 16);
- human rights due diligence processes through which the business: (1) assesses the actual and potential impacts on human rights arising from its own activities and through its business relationships (UNGP 18); (2) integrates the findings from these assessments and takes action to prevent or mitigate adverse impacts (UNGP 19); (3) tracks the effectiveness of its efforts to address human rights impacts (UNGP 20); and (4) is prepared to communicate these efforts to affected stakeholders and others (UNGP 21);
- the provision of, or cooperation in, legitimate processes to remediate human rights harms that the business has caused or contributed to, which may include non-judicial operational-level grievance mechanisms (UNGPs 22, 29, and 31).

#### **i. Policy Commitment**

A policy commitment is a high-level, public statement that the business will respect human rights. It serves as a critical source of the business' ability to influence others to respect human rights by setting a clear expectation for its own workforce, and for its business relationships. A business should embed its policy statement throughout its systems and processes, through authentic leadership, appropriate performance

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<sup>22</sup> *Interpretive Guide*, s. II (Key Concepts), *supra* n. 3.

incentives, alignment with other company policies and processes, and proper organizational alignment (UNGP 16).<sup>23</sup>

## ii. Human Rights Due Diligence

Human rights due diligence a ‘knowing and showing’ process that enables businesses to know what human rights they are impacting, and to show what they are doing about it. Companies should undertake human rights due diligence on an ongoing basis to identify, prevent, mitigate, and account for how they address their adverse human rights impacts, actual and potential, in their own activities and in their business relationships (UNGP 17). Its purpose is to prevent or mitigate potential impacts and to remedy actual impacts.

Lawyers and businesses are familiar with the term due diligence, a process to manage business risks or to meet a mandated duty of care. The SRSG was also familiar with these concepts but did not base human rights due diligence upon legal usage – whether international or domestic. Rather, human rights due diligence should be viewed in light of its own unique purpose to respect human rights, rather than draw deeply from legal antecedents, for at least three reasons.

First, as far as international law is concerned and as Professor Ruggie has subsequently written, it would be ‘fundamentally inappropriate’ to transpose ‘a state-based legal concept onto the responsibility to respect’.<sup>24</sup> He later explained that in drafting the UNGPs, he sought consciously to move beyond ‘the conceptual shackles’ of traditional international human rights law by drawing upon the interests, capacities, and engagement not only of States but also of market actors, civil society, workers’ organizations, and the intrinsic power of ideational and normative factors. He aligned himself with Amartya Sen, who insists that human rights are much more than laws’ antecedents or progeny. Indeed, Sen writes that such a narrow legalistic view threatens

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<sup>23</sup> For a detailed discussion, see Shift, *Embedding Respect for Human Rights Within a Company’s Operations* (Workshop Report No 1, Jun. 2012), [www.shiftproject.org/publication/embedding-respect-human-rights-shift-workshop-report-no-1](http://www.shiftproject.org/publication/embedding-respect-human-rights-shift-workshop-report-no-1) (accessed 11 March 2020).

<sup>24</sup> *Due Diligence*, supra n. 3, quoting Amartya Sen, *Elements of a Theory of Human Rights* (2004) 32 *Philosophy and Public Affairs* 319.

to ‘incarcerate’ the social logics and processes other than law that drive public recognition and respect for human rights.<sup>25</sup>

Second, human rights due diligence is focused on harm to people, not harm to business. The more severe the harm to people, the more likely it is that harm to business and harm to people will converge in the mid to long term.<sup>26</sup> However, ‘the very purpose of conducting human rights due diligence ‘is to understand the specific impacts on specific people, given a specific context’ (Guiding Principle 18, Commentary), not merely to manage commercial risks to the company itself’.<sup>27</sup>

Last, human rights due diligence is not intended as a tick-the-box list of actions that immunizes a company from legal claims, thereby elevating form over substance and rewarding processes that do not result in better human rights outcomes.<sup>28</sup> However, conducting appropriate human rights due diligence should count in a company’s favour in court, by showing that it ‘took every reasonable step to avoid involvement with an alleged human rights abuse’ (UNGP 17, Commentary).

Human rights due diligence is a four step process that requires engagement with stakeholders or their representatives in order to understand their perspective throughout the process because its purpose is to identify and address risks to people.<sup>29</sup> It consists of assessing impacts, responding to them in an integrated fashion, tracking progress, and being prepared to communicate to stakeholders.

### **1. Assessing Impacts**

Assessing human rights impacts entails mapping the risks of impact to people according to their severity and likelihood, in order to prioritize the responsive actions that the company should take. Of the two, severity is the more critical factor; it is defined by an impact’s scale (its gravity), its scope (the number of people involved), and its

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<sup>25</sup> *Global Public Domain*, *supra* n. 3.

<sup>26</sup> *Human Rights and the SDGs*, *supra* n. 3 at 12.

<sup>27</sup> *Due Diligence*, *supra* n. 3 at 924.

<sup>28</sup> John F. Sherman III and Amy Lehr, *Human Rights Due Diligence: Is it Too Risky?*, Harvard Kennedy School Corporate Responsibility Initiative, Working Paper No. 55 (2010), available at [https://sites.hks.harvard.edu/m-rcbg/CSRI/publications/workingpaper\\_55\\_shermanlehr.pdf](https://sites.hks.harvard.edu/m-rcbg/CSRI/publications/workingpaper_55_shermanlehr.pdf), (accessed 11 March 2020).

<sup>29</sup> *Interpretive Guide*, *supra* n. 3, e.g., at 38.

irremediability (whether it is possible to make people whole for their injury) (UNGP 24). The impact's likelihood is affected by such factors as the company's operating context, the specific business relationship in question, and the company's own management.<sup>30</sup>

## 2. Integrating and Acting in Response

After assessing its human rights impacts, a business should integrate its findings and take appropriate action to respond to them. How a company is involved in human rights harm determines how it should respond. Under the UNGPs, businesses may become involved in human rights impacts in one of three ways – cause, contribute, and linkage:

- (1) First, they can *cause* an impact when their actions lead directly to an impact (e.g., a factory exposes workers to hazardous chemicals without providing them with adequate personal protective equipment).
- (2) Second, they can *contribute* to an impact when their actions enable, encourage, or motivate human rights harm by another (e.g., an internet company provides confidential data about the identity of its users of its services to a repressive government that enables the government to track and harass political dissidents, contrary to international human rights standards). Or, one factory may contribute to an adverse impact when it and other factories discharge waste effluents that contaminate drinking water.
- (3) Third, they can be *directly linked* to an impact that they neither caused nor contributed to (e.g., a company manufactures and sells portable ultrasound machines that are used to screen for female fetuses in order to facilitate their abortion in favour of male children, notwithstanding the company's exercise of due diligence to prevent such use).<sup>31</sup>

No bright line separates whether a business 'contributed' to an impact and whether it is merely 'linked' to the impact. Contribution and linkage sit on a continuum. Where they sit in a particular case depends on a variety of factors, including 'the extent to which a business enabled, encouraged, or motivated human rights harm by another; the extent to which it could or should have known about such harm; and the quality of any mitigating steps it has taken to address it'.<sup>32</sup>

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<sup>30</sup> *Interpretive Guide*, supra n. 3, e.g., at 12.

<sup>31</sup> *Interpretive Guide*, supra n. 3, ss 8.1–8.6.

<sup>32</sup> John G. Ruggie, *Comments on Thun Group of Banks Discussion Paper on the Implications of UN Guiding Principles 13 & 17 In a Corporate and Investment Banking Context*, 21 Feb. 2017,

As set forth in UNGPs 19 and 22, the appropriate response of a business to a negative impact, potential or actual, depends on its mode of involvement. First, if the business caused the harm, then it should cease its action causing the harm and remediate it. Second, if it contributed to the harm by another, it should cease its action contributing to the harm, seek to use or build leverage with the other party to prevent or mitigate the risk of future harm, and contribute to remedy of the harm. Third, if it is only linked to harm that it did not cause or contribute to, then it should try to use or build its leverage to prevent or mitigate the risk of future harm by the other party, but is not expected to contribute to the remedy.

The responsibility of a business to respond to its involvement in a human rights impact by another does not depend on whether it has leverage over the other party. Rather, leverage is relevant *only* to determine the type of responsive action to be taken, which depends on the mode of involvement. The term ‘leverage’, as used in the UNGPs, means the ability of a business to influence another party’s human rights performance.<sup>33</sup>

If a business cannot use or build leverage to mitigate the harm, then it should consider ending the relationship, taking into account the potential human rights risks of doing so, and other factors such as whether the relationship is crucial to the enterprise and the severity of the harm (UNGP 19, Commentary).<sup>34</sup>

### 3. Tracking and Communicating

UNGP 20 is based on the concept that ‘what’s measured gets managed’.<sup>35</sup> Tracking the effectiveness of a company’s efforts to address identified human rights impacts should draw on the perspectives of potentially affected stakeholders – not just the company itself – and involve an appropriate mix of quantitative and qualitative indicators.

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available at <https://business-humanrights.org/sites/default/files/documents/Thun%20Final.pdf> (accessed 11 March 2020).

<sup>33</sup> See *Interpretive Guide*, *supra* n. 3 at 49, and Shift, *Using leverage in business relationships to reduce human rights risks* (November 2013), available at <https://www.shiftproject.org/resources/publications/leverage-business-relationships-reduce-human-rights-risk/> (accessed 11 March 2020).

<sup>34</sup> *Interpretive Guide*, *supra* n. 3 at 50.

<sup>35</sup> *Interpretive Guide*, *supra* n. 3 at 52.



UNGP 21 provides that a business should be prepared to communicate how it addresses its human rights impacts. This can include everything from direct communication with potentially affected stakeholders to formal public disclosure, where the human rights impacts, potential and actual, are severe. However, communicating risks under the UNGPs does not require disclosure of all issues identified in a company's due diligence or the steps it takes to mitigate them.<sup>36</sup> Nor does it require disclosures of legitimately confidential commercial information, information that is legally protected, or disclosures that would pose risks to stakeholders (UNGP 21). In such cases, the business should explain its general approach towards addressing its human rights risks.<sup>37</sup>

### **7. Pillar III – Access to Effective Remedy (UNGPs 25–31)**

The third pillar of the UNGPs – remedy – is addressed both to States (as part of their duty to protect human rights) and to businesses (as part of their responsibility to respect human rights).

States have the primary obligation under international human rights law to take appropriate steps to ensure that those who are affected by human rights abuses in their territory and/or jurisdiction have access to effective remedy, both judicial and non-judicial (Guiding Principle 25 and 26). This should include reducing existing barriers to judicial remedy, providing effective non-judicial grievance mechanisms (such as labour tribunals or other administrative channels), and considering access to non-State-based grievance mechanisms, such as those established by international financial institutions (UNGPs 26 through 28).

The business remedial responsibility has two aspects. First, as part of its responsibility to respect human rights, a company should actively participate in the remediation of human rights harm that it identifies it has caused or contributed to (UNGP 22). This means providing for, or cooperating in, legitimate remedial processes, such as a court or a non-judicial grievance mechanism, that are appropriate to the nature of the harm. If

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<sup>36</sup> *Interpretive Guide*, *supra* n. 3 at 58.

<sup>37</sup> *Interpretive Guide*, *supra* n. 3 at 55–57.

the company disagrees that it caused or contributed to harm, it can contest the allegation in court.<sup>38</sup>

Second, businesses should establish or participate in operational-level grievance mechanisms in order to prevent and address grievances early, before they amount to human rights impacts. Such mechanisms can also act as an important feedback loop to identify particular issues or trends and prevent future problems (UNGP 29). Collaborative initiatives by industry bodies and others should also ensure the availability of effective grievance mechanisms (UNGP 30).

In order to be effective, all non-judicial grievance mechanisms should meet specific criteria: legitimacy, accessibility, predictability, equitability, transparency, rights compatibility, serving as a source of continuous learning, and (for operational-level grievance mechanisms supported or provided by companies) being based on engagement and dialogue (UNGP 31).

## **8. Uptake of the UNGPs**

As noted at the outset, the uptake of the UNGPs has been widespread and rapid, compared to other contested global initiatives, such as those relating to climate change.<sup>39</sup> Their implementation has spread far beyond their UN origins. This resulted from a process of ‘norm cascading’ by distributed networks of independent entities and institutions, public and private, rather than a top down, command, and control regulation. This reflects Professor Ruggie’s desire that the UNGPs ‘trigger an iterative process of interaction among the three global governance systems, producing cumulative change over time’.<sup>40</sup>

Some of the more notable examples of this uptake are discussed below.

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<sup>38</sup> *Interpretive Guide*, *supra* n. 3 at 67.

<sup>39</sup> *Social Construction*, *supra* n. 3 at 25.

<sup>40</sup> *Id* at 26.

### a. Multistakeholder Norms

The UNGPs have been incorporated or reflected in multistakeholder standard-setting bodies. The OECD's Guidelines for Multinational Enterprises ('OECD Guidelines') were revised in 2011 to include a specific chapter on human rights, as well as the cross-cutting concept of due diligence, that mirror the UNGPs.<sup>41</sup> The OECD Guidelines and Pillar II of the UNGPs were synchronized deliberately in order to avoid confusion.<sup>42</sup>

In addition, the International Organization for Standardization (ISO) issued ISO Standard 26000, a guidance on social responsibility, following a process that ran in parallel with the development of the UNGPs, and is closely aligned with them.<sup>43</sup> ISO standards and guidance have significant business uptake, particularly in Asia.<sup>44</sup>

The International Finance Corporation, which is the private lending arm of the World Bank, incorporated key elements of Pillar II of the UNGPs, including human rights due diligence, into its performance standards;<sup>45</sup> they are tracked by 92 banks in 37 countries, covering over 70% of project financing in emerging markets.<sup>46</sup>

### b. Public Policy

The UNGPs have been endorsed as a matter of public policy by many governments. The G7 Leaders endorsed the UNGPs in 2015.<sup>47</sup> The G20 leaders referred to the UNGPs as a core standard to be used in achieving sustainable global supply chains.<sup>48</sup> The European

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<sup>41</sup> *2011 Update to the OECD Guidelines for Multinational Enterprises* (25 May 2011) (hereinafter 'OECD Guidelines') available at [www.oecd.org/investment/mne/oecdguidelinesformultinationalenterprises.htm](http://www.oecd.org/investment/mne/oecdguidelinesformultinationalenterprises.htm) (accessed 11 March 2020).

<sup>42</sup> *Social Construction*, *supra* n. 3 at 19.

<sup>43</sup> International Organization for Standardization, *ISO 26000 Guidance on Social Responsibility* (2014), available at [www.iso.org/iso-26000-social-responsibility.html](http://www.iso.org/iso-26000-social-responsibility.html) (accessed 11 March 2020).

<sup>44</sup> *Social Construction*, *supra* n. 3 at 20.

<sup>45</sup> International Finance Corporation, *IFC Performance Standards on Environmental and Social Sustainability* (1 Jan. 2012), available at [http://www.ifc.org/wps/wcm/connect/topics\\_ext\\_content/ifc\\_external\\_corporate\\_site/sustainability-at-ifc/publications/publications\\_handbook\\_pps](http://www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/sustainability-at-ifc/publications/publications_handbook_pps) (accessed 10 March 2020).

<sup>46</sup> Equator Principles, available at <https://equator-principles.com> (accessed 11 March 2020).

<sup>47</sup> *G-7 Leaders' Declaration* (8 Jun. 2015), available at <https://www.whitehouse.gov/the-press-office/2015/06/08/g-7-leaders-declaration> (accessed 11 March 2020).

<sup>48</sup> *G20 Leaders' Declaration: Shaping an interconnected world* (8 Jul. 2017), available at [http://europa.eu/rapid/press-release\\_STATEMENT-17-1960\\_en.htm](http://europa.eu/rapid/press-release_STATEMENT-17-1960_en.htm) (accessed 11 March 2020).

Commission endorsed the UNGPs in its 2011 Communication on Corporate Responsibility and called upon all Member States to develop National Action Plans to implement them.<sup>49</sup> To date, approximately twenty-four countries, including Chile, Denmark, France, Germany, Italy, The Netherlands, Norway, Sweden, the UK, and the US, have published so-called National Action Plans to implement the UNGPs, and another thirty are in the works.<sup>50</sup>

These developments are echoed in other initiatives across the world. In 2014, the EU and the African Union issued a Joint Statement on Business and Human Rights confirming their commitment to promote and implement the UNGPs.<sup>51</sup> The Association of Southeast Asian Nations (ASEAN) is actively exploring ways to implement the UNGPs.<sup>52</sup> The Organization of American States resolved in 2014 to promote the application of the UNGPs and urged Member States to disseminate them as broadly as possible.<sup>53</sup>

### **c. Reporting and Disclosure**

The UNGPs are reflected in evolving human rights reporting policy, laws and regulations, stakeholder pressure, and multistakeholder initiatives. These reflect growing demands from regulators, investors, shareholders, labour, consumers, and civil society

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<sup>49</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions (2011), *A renewed EU strategy 2011–14 for Corporate Social Responsibility*, available at [https://www.eurocommerce.eu/media/7237/position-csr-renewed\\_csr\\_strategy\\_2011-14-07.03.2012.pdf](https://www.eurocommerce.eu/media/7237/position-csr-renewed_csr_strategy_2011-14-07.03.2012.pdf) (accessed 11 March 2020).

<sup>50</sup> Business & Human Rights Resource Centre, *National Action Plans*, available at <https://business-humanrights.org/en/un-guiding-principles/implementation-tools-examples/implementation-by-governments/by-type-of-initiative/national-action-plans> (accessed 11 March 2020).

<sup>51</sup> EU-AU *Joint Statement on Business and Human Rights*, 16 Sep. 2014, available at [http://eeas.europa.eu/delegations/african\\_union/press\\_corner/all\\_news/news/2014/20140916\\_1\\_en.htm](http://eeas.europa.eu/delegations/african_union/press_corner/all_news/news/2014/20140916_1_en.htm) (accessed 11 March 2020).

<sup>52</sup> ASEAN CSR Network, *Business and Human Rights*, available at <http://asean-csr-network.org/c/programs/business-a-human-rights/207-business-and-human-rights> (accessed 11 March 2020).

<sup>53</sup> Organization of American States, *Promotion and Protection of Human Rights in Business*, AG/RES.2840 (XLIV-0/14), 4 Jun. 2014, available at [http://www.oas.org/en/sla/dil/docs/AG-RES\\_2840\\_XLIV-O-14.pdf](http://www.oas.org/en/sla/dil/docs/AG-RES_2840_XLIV-O-14.pdf) (accessed 11 March 2020).

organizations for accurate information on companies' social and environmental impacts.<sup>54</sup>

With respect to regulatory requirements, the 2014 European Parliament's Directive on Disclosure of Nonfinancial and Diversity Information<sup>55</sup> requires EU Member States to implement public reporting by about 6,000 large businesses on environmental, social, and employee-related, respect for human rights, anti-corruption and bribery matters. This includes a description of the relevant policies, outcomes, and the risks related to those topics. The Directive references the UNGPs as an international framework that companies can rely upon in providing this information.<sup>56</sup>

In the United Kingdom (UK), the 2013 revisions to the UK Companies Act now require all listed companies to report publicly on environmental matters, the company's employees, and social, community, and human rights issues, where this information is 'necessary for an understanding of the development, performance or position of the company's business' in achieving its strategic objectives.<sup>57</sup> The UK Financial Reporting Council in June 2014 published guidance on corporate reporting pursuant to the Act, which explicitly referred to the UNGPs as a source of guidance for directors.<sup>58</sup> In May 2015, the UK adopted the Modern Slavery Act, which seeks to eradicate slavery and human trafficking from company supply chains. It requires certain companies to publicly

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<sup>54</sup> Anna Triponel and Caroline Rees, *The Rising Tide of Human Rights Reporting Requirements* (2014), [www.shiftproject.org/article/rising-tide-human-rights-reporting-requirements](http://www.shiftproject.org/article/rising-tide-human-rights-reporting-requirements) (accessed 10 March 2020).

<sup>55</sup> Directive 2014/95/EU (2014), available at [https://ec.europa.eu/info/business-economy-euro/company-reporting-and-auditing/company-reporting/non-financial-reporting\\_en](https://ec.europa.eu/info/business-economy-euro/company-reporting-and-auditing/company-reporting/non-financial-reporting_en) (accessed 10 March 2020).

<sup>56</sup> European Commission, *Non Financial Reporting*, <https://ec.europa.eu/info/business-economy-euro/company-reporting-and-auditing/company-reporting/non-financial-reporting-en> (accessed 10 March 2020); and Communication from the Commission – *Guidelines on non-financial reporting (methodology for reporting non-financial information)* C/2017/4234 (5 Jul. 2017), available at <https://op.europa.eu/en/publication-detail/-/publication/845ab879-6182-11e7-9dbe-01aa75ed71a1> (accessed 11 March 2020).

<sup>57</sup> The Companies Act 2006 (Strategic Report and Directors' Report) Regulations 2013, SI 2013 No. 600, available at [www.legislation.gov.uk/ukdsi/2013/9780111540169/contents](http://www.legislation.gov.uk/ukdsi/2013/9780111540169/contents) (accessed 11 March 2020).

<sup>58</sup> Financial Reporting Council, *Guidance on the Strategic Report* (June 2014), available at <https://www.frc.org.uk/Our-Work/Publications/Accounting-and-Reporting-Policy/Guidance-on-the-Strategic-Report.pdf> (accessed 11 March 2020).

describe the steps that the company has taken (including due diligence and other processes) to ensure that slavery and human trafficking are not taking place in its supply chain.<sup>59</sup>

In the US, the California Transparency in Supply Chain Act of 2010<sup>60</sup> Cal. Civ. Code s. 1714.43 requires large companies doing business in California to disclose their efforts to eliminate human trafficking and slavery from their supply chains. At the federal level, Section 1502 of the 2010 Dodd-Frank Act requires publicly traded companies to ensure that the raw materials they use to make their products are not tied to extreme violence from the conflict in Democratic Republic of the Congo, by tracing and auditing their mineral sustainable procurement.

#### **d. ESG Investing**

Investor pressure to report meaningfully on human rights performance has intensified driven not only by mandatory reporting requirements but also by investors themselves. Sustainability topics, including prominently Environmental, Social, and Governance (ESG) factors, have become increasingly important to investors and have accounted for an exponential growth of investment funds that use ESG criteria.

For example, the number of investment Funds using ESG factors has grown exponentially, from fewer than 50 in 2,000 to nearly 1,100 in 2016 (Merrill Lynch, 2016). According to the Global Sustainable Investment Alliance (GSIA, 2016), by then those Funds had some 25 trillion USD in assets under management (AUM) globally or roughly one-quarter of all AUM. As of 2016, more than half of all Funds in Europe and Australia included ESG criteria; in Canada nearly 38 per cent; in the US less than 22 per cent, perhaps reflecting the American financial sector's traditionally more narrow conception of what constitutes shareholder value and materiality. However, since the election of Donald Trump as US President in 2016, monthly inflows into ESG mutual funds and

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<sup>59</sup> Modern Slavery Act 2015, available at [www.legislation.gov.uk/ukpga/2015/30/contents/enacted](http://www.legislation.gov.uk/ukpga/2015/30/contents/enacted) (accessed 20 March 2020).

<sup>60</sup> Cal. Civ. Code s. 1714.43 (2010), available at <https://codes.findlaw.com/ca/civil-code/civ-sect-1714-43.html> (accessed 11 March 2020).

exchange trade funds in the US have averaged three times the pace of the prior year (Fonda, 2018).<sup>61</sup>

The ‘S’, or social impact, factor in ESG measures ‘how well a company manages its risks to people connected with its core business’ and is therefore ‘heavily populated with labor and human rights elements’.<sup>62</sup> As a result of the status of the UNGPs as the authoritative global standard on business and human rights, alignment with the UNGPs has become critically important to investors as an indicator of a company’s social performance as a component of ESG.

For example, the UN Guiding Principles Reporting Framework, an initiative launched by Shift and by Mazars (an international accounting firm) in 2016 following extensive global multistakeholder consultations, creates a framework that enables companies to describe in one place their progress on implementing their respect for human rights. Over eighty companies (including its first adopters, Unilever, ABN AMRO, Ericsson, H&M, Nestle, and Newmont) currently use it for public reporting and/or internal management. Eighty-seven investors, representing more than USD 5.3 trillion in assets under management, have signed a statement in support of it.<sup>63</sup>

#### **e. Laws Mandating or Encouraging Human Rights Due Diligence**

In addition to laws and policies regarding reporting and disclosure, governments have enacted, or are considering enacting, laws that require or incentivize companies to engage in human rights due diligence.

The Business and Human Rights Resource Centre web portal maintains an updated listing of such legislation. As of 20 February 2020, two EU countries (France and The Netherlands) have enacted such laws, and ten are considering doing so (Austria,

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<sup>61</sup> John G. Ruggie and Emily K. Middleton, *Money, Millennials and Human Rights: Sustaining ‘Sustainable Investing’* (2019) 10(1) Global Policy 144 (hereinafter ‘*Sustainable Investing*’), available at

[https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/working\\_papers/CRI69\\_FINAL.pdf](https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/working_papers/CRI69_FINAL.pdf) (accessed 11 March 2020).

<sup>62</sup> *Sustainable Investing*, *supra* n. 62.

<sup>63</sup> *The UN Guiding Principles Reporting Framework*, available at [www.ungpreporting.org](http://www.ungpreporting.org) (accessed 11 March 2020).



Belgium Denmark, Finland, Germany, Italy, Luxembourg, Norway, Switzerland, and the UK).<sup>64</sup> The EU is also considering such laws, and the European Commission has commissioned a comprehensive report on how countries can do so.<sup>65</sup>

In response to the 2013 Rana Plaza collapse, France enacted a Duty of Vigilance Law in 2017.<sup>66</sup> The law was inspired by, and mostly tracks, the components of the human rights due diligence process of the UNGPs.<sup>67</sup> It requires large French companies to establish and implement an effective human rights vigilance plan, which covers their subsidiaries and certain of their contractors and suppliers. Injury caused by a company's failure to implement an effective plan can subject the company to civil tort liability.

In 2019, The Netherlands approved the Child Labour Diligence Law, which requires companies (whether or not registered in The Netherlands) that sell goods to Dutch consumers to determine whether child labour occurs in their supply chains, and if so, to set out a plan of action on how to combat it, and issue a statement showing its due diligence investigation and plan. It provides for criminal penalties for failure to exercise human rights due diligence. Key details of its implementation are still being worked out.<sup>68</sup>

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<sup>64</sup> Business & Human Rights Resource Centre, *National movements for mandatory human rights due diligence in European countries*, available at <https://www.business-humanrights.org/en/national-movements-for-mandatory-human-rights-due-diligence-in-european-countries> (accessed 10 March 2020).

<sup>65</sup> BIICL, Civic Consulting, and LSE, *Study on due diligence requirements through the supply chain: Final Report* (January 2020), Section 5.4.1, available at <https://www.biicl.org/newsitems/16396/european-commission-study-on-due-diligence-in-supply-chains-published> (accessed 10 March 2020) ('EC Due Diligence Report').

<sup>66</sup> Business & Human Rights Resource Centre, *France: Natl. Assembly adopts law imposing due diligence on multinationals to prevent serious human rights abuses in supply chains*, available at <https://www.business-humanrights.org/en/france-natl-assembly-adopts-law-imposing-due-diligence-on-multinationals-to-prevent-serious-human-rights-abuses-in-their-supply-chains> (accessed 10 March 2020).

<sup>67</sup> Anna Triponel and John F. Sherman, III, *Legislating human rights due diligence: opportunities and potential pitfalls to the French duty of vigilance law* (May 2017), available at <https://www.ibanet.org/Article/Detail.aspx?ArticleUid=e9dd87de-cfe2-4a5d-9ccc-8240edb67de3> (accessed 11 March 2020).

<sup>68</sup> Business & Human Rights Resource Centre, *Dutch Senate votes to adopt child labour due diligence law*, available at <https://www.business-humanrights.org/en/dutch-companies-issue-open-letter-in-support-of-child-labour-regulation>, (accessed 10 March 2020).

#### **f. Laws Encouraging or Incentivizing Human Rights Due Diligence**

Other laws and regulations do not refer to human rights due diligence explicitly, but nevertheless incentivize companies to conduct human rights due diligence.

For example, prior to the 2011 UNGPs, in 2008, the US adopted the Trafficking Victims Reauthorization Act, which in 15 USC. § 1595 gives trafficked individuals the right to bring a civil action against those who receive anything of value by participating in a venture ‘which that person knew or should have known has engaged in an act in violation of this chapter.’ However, as discussed further in Section F.3 below, the alleged failure of multinational companies to conduct human rights due diligence in their international supply chains is now being invoked to support a class action under the statute.

In 2012, the US adopted the U.S. Federal Acquisition Regulation, ‘Combatting Trafficking in Persons’, FAR Subpart 22.17 and Part 52 (2012), requires all US government contractors to take detailed actions to eliminate human trafficking at all levels of their supply chains, including the development and implementation of compliance plans, with significant sanctions for non-compliance.<sup>69</sup>

In 2017, the UK adopted the Criminal Finances Act of 2017, which authorizes UK prosecutors to seize property that was obtained by or ‘in connection with’ gross human rights abuse, regardless of when the property was obtained.<sup>70</sup> The law does not require proof of intent or permit a defence that the company took reasonable steps to avoid profiting from such harm. Although the Act does not refer to the UNGPs explicitly, it puts significant pressure on UK companies to conduct human rights due diligence, on both their own operations and their partners and supply chain, to ensure that they will not be deemed to have profited from gross human rights abuse.

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<sup>69</sup>Federal Acquisition Regulation, ‘Combatting Trafficking in Persons’, FAR Subpart 22.17 and Part 52 (2012), available at <https://www.federalregister.gov/documents/2015/01/29/2015-01524/federal-acquisition-regulation-ending-trafficking-in-persons> (accessed 11 March 2020).

<sup>70</sup> Criminal Finances Act 2017, Chapter 22, available at [http://www.legislation.gov.uk/ukpga/2017/22/pdfs/ukpga\\_20170022\\_en.pdf](http://www.legislation.gov.uk/ukpga/2017/22/pdfs/ukpga_20170022_en.pdf) (accessed 11 March 2020).

### **g. Zero-Draft Treaty Negotiations**

As noted at the outset, the UNGPs are not legally binding by themselves. However, a UN Working Group has been working since 2014 towards a development of a complimentary and legally binding convention that would regulate the activities of translational corporations by reference to international human rights law.

This resulted in a so-called Zero Draft Treaty issued in July 2018, which is now under active consideration and debate by companies, governments, and civil society. To oversimplify, the Zero Draft would: require States to establish in their domestic law legal liability for human rights abuses; require States to provide fair, effective, and prompt access to justice and remedies to affected stakeholders; and require States to mandate human rights due diligence by transnational businesses.<sup>71</sup>

A few of the more heavily debated aspects of the Zero-Draft Treaty relate to: its application only to transnational companies, and not to domestic corporations; the ability of governments to regulate effectively the manifold activities of all transnational activities; the application of the Treaty to buyer-led purchasing chains that are linked by contract rather than equity relationships (e.g., Apple); and the relationship of mandatory due diligence to the attribution of liability.<sup>72</sup>

### **h. Legal Claims by Affected Stakeholders and Others to Hold Companies Accountable**

A key factor leading to endorsement of the UNGPs was the invocation by ‘individuals and communities adversely affected by corporate globalization ... of human rights to express their grievances, resistance, and aspirations’.<sup>73</sup> The UNGPs have helped to sustain and accelerate a continued global growth in legal claims by affected

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<sup>71</sup> Shirin Chua, Freshfields Bruckhaus Derringer LLP, *UN Working Group on a Convention to Regulate Transnational Business and Human Rights - Comments on the ‘zero draft’ Due Soon* (February 2019), available at <https://www.lexology.com/library/detail.aspx?g=29a45ec5-9107-40ab-88f7-849a04e9e0c9> (accessed 10 March 2020).

<sup>72</sup> John G. Ruggie, *Comments on the ‘Zero Draft’ Treaty on Business & Human Rights* (hereinafter ‘Ruggie, Zero Draft Comments’), available at <https://www.business-humanrights.org/en/comments-on-the-“zero-draft”-treaty-on-business-human-rights> (accessed 11 March 2020).

<sup>73</sup> *Just Business*, *supra* n. 3.

stakeholders against companies in a variety of contexts, including: claims under customary international law; statutory claims under mandatory due diligence laws; claims against buyers of goods that were manufactured with human rights abuse; and claims against parent companies. Also relevant is the use of human rights due diligence as a defence to such claims.<sup>74</sup>

### **i. Mandatory Due Diligence Law Claims**

As discussed earlier, the 2019 French Duty of Vigilance law provides that injury caused by a failure to implement an effective plan of diligence can subject the company to civil liability. As of early 2020, the Act's enforcement mechanism (an injunction) had been triggered five times, with two cases reaching a court.<sup>75</sup>

### **ii. Customary International Law Claims**

In *Araya v Nevsun Resources, Ltd.*, the Supreme Court of British Columbia allowed a lawsuit to proceed against Nevsun, a Canadian mining company, and refused to strike evidence regarding the sufficiency of the company's human rights due diligence. The plaintiffs, who are refugees from the State of Eritrea in East Africa, allege common law claims based on customary international law violations (i.e., crimes against humanity, forced labour, and torture) at the company's Bisha mine in Eritrea. In so ruling, the Court considered, over Nevsun's objections, a transcript of the testimony before the House of Commons, of Lloyd Lipsett, a business and human rights expert who had conducted a human rights assessment of the mine:

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<sup>74</sup> It is beyond the scope of this paper to examine all of the many ways in which the language and standards of internationally recognized human rights are increasingly being used by victims and States to hold companies accountable in court for their involvement in human rights abuse, which are often intertwined with claims of environmental degradation. The Corporate Legal Accountability Portal of the Business & Human Rights Resource Centre contains an excellent and regularly updated web portal that summarizes the status of these lawsuits). See Business & Human Rights Resource Centre, *Corporate Legal Accountability*, available at <https://www.business-humanrights.org/en/corporate-legal-accountability> (accessed 10 March 2020).

<sup>75</sup> Stephane Brabant and Elsa Savourey, *All Eyes on France – French Vigilance Law First Enforcement Cases (1/2) Current Cases and Trends* (24 January 2020), available at <https://www.cambridge.org/core/blog/2020/01/24/all-eyes-on-france-fre...-vigilance-law-first-enforcement-cases-1-2-current-cases-and-trends/> (accessed 10 March 2020).

I have extensively relied upon the UN's Guiding Principles on Business and Human Rights for framing the assessment. Obviously, these UN guiding principles are the relevant global standard for business and human rights; however, I find them particularly useful because they emphasize a procedural approach to ongoing human rights due diligence.

Opinion, p. 23.<sup>76</sup>

On February 28, 2010, the Supreme Court of Canada allowed the case to proceed on the ground that plaintiffs had made out a claim for breach of customary international law, or *jus cogens*, which is part of Canadian law, and which applies to Nevsun as a Canadian company.<sup>77</sup> Neither the Appeals Court nor the Supreme Court addressed the significance of Mr. Lipsett's testimony to the case. Presumably, that will await further proceedings at the trial court level.

### iii. Claims Against Buyers of Goods

Notre Dame Law School Professor Emeritus Doug Cassel has argued that the time for judicial recognition of a common law duty of care to exercise human rights due diligence is ripe, since the basic elements of such a duty—foreseeability, proximity, fairness, and public policy— are in place.<sup>78</sup> Although no courts have yet so ruled, due diligence as an affirmative duty of care is beginning to emerge in judicial litigation.

A recent example is a class action lawsuit filed in the US District Court for the District of Columbia in December 2019 against major multinational electronics and automobile companies; each defendant sells products that contain rechargeable lithium ion rechargeable batteries which are made with the mineral cobalt, mined in the Democratic Republic of the Congo ('DRC').<sup>79</sup> The cobalt makes its way from artisanal

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<sup>76</sup> *Araya v. Nevsun Resources, Ltd.*, 2016 BCSC 1856 (2016), available at <https://www.cci.ca/content/uploads/2016/10/BCSC-Nevsun-judgment-Oct-2016.pdf> (accessed 11 March 2020).

<sup>77</sup> *Nevsun Resources Ltd. V. Araya*, 2020 SCC 5 (February 28, 2020), available at <https://www.canlii.org/en/ca/scc/doc/2020/2020scc5/2020scc5.html> (accessed 10 March 2020).

<sup>78</sup> Doug Cassel, *Outlining the Case for a Common Law Duty of Care to Exercise Human Rights Due Diligence* (2016) 1(2) *Business and Human Rights Law Journal* 179–202, available at [http://journals.cambridge.org/abstract\\_S2057019816000158](http://journals.cambridge.org/abstract_S2057019816000158) (accessed 11 March 2020).

<sup>79</sup> *Class Action Complaint, Jane Doe 1, etc. v. Apple Inc 1, etc.*, U.S. District Court for the District of Columbia, 16 December 2019, available at [https://www.classaction.org/media/does-et-al-v-apple-inc-et-al\\_1.pdf](https://www.classaction.org/media/does-et-al-v-apple-inc-et-al_1.pdf) (accessed 11 March 2020).

mines to traders, to smelters/refiners, to component producers, to contract manufacturers, and finally to electronics and care companies.

The plaintiff class consists of children who allege that they were forced to work in highly dangerous conditions in these mines in the DRC, at less than subsistence wages. The complaint alleges that the defendants are liable for this harm because they failed to exercise adequate human rights due diligence in their supply chains to identify and address these severe human rights impacts.

This alleged failure forms the basis of claims under the US Trafficking Victims Protection Reauthorization Act, 18 U.S.C. § 1595 et. seq., ('TVPRA') and ancillary State common law theories (unjust enrichment, negligent supervision, and intentional infliction of emotional distress). The TVPRA subjects defendants to civil liability if they participated in a venture, knowingly received anything of value from the venture, and 'knew, or should have known', that the venture had engaged in forced labor.

The plaintiff's allegations that defendants failed to exercise human rights due diligence are designed to support the claim that defendants knew or should have known that their products had been manufactured with child slave labor.

Currently, the case is only at the pleadings stage. Defendants will likely contest the complaint vigorously. However, the plaintiffs' use of human rights due diligence as an affirmative duty of care to support statutory and common law claims against buyers may indicate where the law will evolve over time.

#### **iv. Claims Against Parent Companies**

Judicial recognition of a common law duty of care to conduct human rights due diligence would also have implications for claims against corporate parents, since as Professor Cassel notes, the headquarters of about 2,000 multinational companies are located in common law countries.<sup>80</sup>

No common law cases have yet so ruled explicitly. However, they are coming close. On 20 April 2019, in a closely watched case, the UK Supreme Court decided in *Vedanta*

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<sup>80</sup> *Ibid.*

*Resources PLC et al v. Lungowe et al*<sup>81</sup> to allow common law negligence claims to go trial in the UK against a UK parent company arising from the extraterritorial conduct of its foreign subsidiary. Claimants are 1,826 very poor Zambian citizens who were members of rural farming communities. They assert loss of livelihoods through damage to land and waterways and health problems caused by alleged toxic emissions from the Konkola Copper Mines in Zambia. The mine was owned by a Zambian subsidiary of Vedanta, a then-UK domiciled parent company.

In allowing the claim against the UK parent to go forward to trial, the Court declined to ‘straightjacket’ the circumstances under which parent companies could owe a duty of care to parties allegedly harmed by its subsidiaries. Rather, it held that a parent duty of care could arise from any one of several fact-intensive elements: (1) the existence of a group-wide policy purporting to exercise a degree of parental supervision and control over the subsidiary’s actions in question; (2) the taking by the parent of active steps by training, supervision, and enforcement, to ensure that their subsidiaries implement the policies, even where the group policies do not by themselves give rise to a duty of care to third parties; or (3) failing to take such active steps to prevent harm, even where the parent does not hold itself out as exercising that degree of supervision and control of its subsidiaries.<sup>82</sup>

The *Vedanta v. Lungowe* decision sets an example for common law courts elsewhere.

For example, the UNGPs have been raised explicitly in Canadian human rights litigation in support of a common law duty of care. In *Choc and Others v. Hudbay* (2013), Guatemalan villagers sued a Canadian parent company in Canada for civil damages, alleging that they suffered violence at the hands of security forces retained by the mining company’s Guatemalan subsidiary. In denying a motion to strike the complaint, the trial court ruled that the complaint could be read to state a novel duty of care owed by the Canadian parent to the Guatemalan villagers to safeguard the villagers from such

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<sup>81</sup> *Vedanta Resources PLC and another (Appellants) v Lungowe and others (Respondents)*, [2019] UKSC 20 (April 2019), available at <https://www.supremecourt.uk/cases/uksc-2017-0185.html> (accessed 11 March 2020).

<sup>82</sup> *Ibid.*, para. 53.



violence, based on the parent company's knowledge of the risk of violence and its involvement in the security operations of the subsidiary.<sup>83</sup>

Although the Court's ruling did not refer to the UNGPs, Amnesty International Canada had filed a brief in support of the villagers, arguing that the UNGPs, among other international standards, supported the existence of a duty of care. It cited UNGP 23's expectation that companies should treat involvement in gross human rights abuses as a matter of legal compliance and the Canadian government's endorsement of the UNGPs.

Similarly, in *Garcia et al v. Tahoe Resources* (2014), Guatemalan villagers who were allegedly shot by the company's security personnel sued the company's Canadian parent in the Canadian court. They alleged that the parent company owed a duty of care to the villagers, due to its control of the subsidiary's security operations and its commitment to the UNGPs and other standards. The British Columbia Supreme Court rejected the defendant's motion to dismiss and allowed the case to proceed to trial, after which it settled.<sup>84</sup>

#### **v. Human Rights Due Diligence as a Defence to Liability**

If the failure to conduct human rights due diligence can be used to establish liability, then its exercise should serve as a shield against liability, whether in the context of a statutory or a common law claim. The UNGPs recognize such a defence in the commentary to UNGP 17:

Conducting appropriate human rights due diligence should help business enterprises address the risk of legal claims against them by showing that they took every reasonable step to avoid involvement with an alleged human rights abuse. However, business enterprises conducting such due diligence should not assume that, by itself, this will automatically and fully absolve them from liability for causing or contributing to human rights abuses.

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<sup>83</sup> *Hudbay Minerals Lawsuits (re Guatemala)*, Business and Human Rights Resource Centre, available at <http://business-humanrights.org/en/hudbay-minerals-lawsuits-re-guatemala-0> (accessed 11 March 2020).

<sup>84</sup> *Tahoe Resources Lawsuit (re Guatemala)*, Business and Human Rights Resource Centre, available at <https://business-humanrights.org/en/tahoe-resources-lawsuit-re-guatemala> (accessed 11 March 2020).

The EU is considering such a defence in its evaluation of mandatory due diligence legislation.<sup>85</sup> Some key questions for consideration would be: (a) what is the level of due diligence necessary to assert a defence; (b) how to avoid transforming human rights due diligence into a formalistic ‘tick-box’ process designed mainly to protect the company from legal liability, without achieving real human rights performance improvement; (c) who should bear the burden to establish or disprove such a defence; and (d) the need to avoid creating perverse incentives through legislation that would drive companies to distance themselves from meaningful human rights due diligence.<sup>86</sup>

Finally, whatever its value may be as a defence to legal liability, effective human rights due diligence should also lower the company’s exposure to human rights lawsuits by improving the company’s human rights performance, and thereby reducing the severity and number of incidents that generate legal claims.<sup>87</sup>

#### **vi. Judicial Challenges to a State’s Failure to Protect Persons and Communities From Human Rights Harm Under Pillar 1**

The UNGPs have also been used in judicial challenges to state conduct that falls below their duty to protect persons and communities from business-related human rights harm.

For example, in *Kaliña and Lokono Peoples v. Suriname* (2015), the Inter-American Court of Human Rights ruled that the government of Suriname had violated its duties under the American Convention on Human Rights by failing to protect indigenous communities from environmental harm by mining companies, and by not ensuring that

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<sup>85</sup> *EC Due Diligence Report*, n. 68, *supra*.

<sup>86</sup> Rachel Davis, *Beyond Voluntary: What it Means for States to Play an Active Role in Fostering Business Respect for Human Rights* (February 2019), available at <https://www.shiftproject.org/resources/viewpoints/beyond-voluntary-states-active-role-business-respect-human-rights/> (accessed 11 March 2019).

<sup>87</sup> John F. Sherman, *Should a Parent Company Take a Hands-off Approach to the Human Rights Risks of its Subsidiaries?*, International Bar Association (2018) 19(1) *Business Law International* 23, available at [https://www.shiftproject.org/media/resources/docs/ParentalLiability\\_BLI\\_Sherman-January2018.pdf](https://www.shiftproject.org/media/resources/docs/ParentalLiability_BLI_Sherman-January2018.pdf) (accessed 11 March 2020).

a timely and appropriate independent social and environmental impact assessment was conducted. In so ruling, the Court relied explicitly on Pillar 1 of the UNGPs.<sup>88</sup>

In addition, the UNGPs have also been invoked to challenge legislation for violation of the State duty to protect. In *In re University of Stellenbosch Legal Aid Clinic, et al* (2015), the High Court of South Africa invalidated a South African debt collection law that enabled lenders to implement predatory, unfair, and deceptive debt collection practices, thereby depriving tens of thousands of vulnerable low-wage earners of their rights of access to courts for remedy, to an adequate standard of living, and to a family life. In so holding, the High Court stated, among other reasons, that the UNGPs ‘place a duty upon the state to take measures to prevent the abuse of human rights in their territory by a business enterprise’ and that States are therefore ‘obliged to reduce legal and practical barriers that may deny individuals a remedy’.<sup>89</sup>

#### **vii. Non-judicial Dispute Resolution Developments**

The OECD non-judicial dispute resolution mechanism has become a key source of global precedent setting and learning regarding the application of the UNGPs to particular disputes. In that process, any interested party can bring a complaint (called a ‘Specific Instance’) to a designated OECD country office (called a ‘National Contact Point’ or NCP), alleging breach of the OECD Guidelines for Multinational Enterprises.<sup>90</sup> The NCP will attempt to mediate the dispute or issue an opinion. There has been a sharp increase

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<sup>88</sup> Inter-American Court of Human Rights, *Case of the Kaliña and Lokono Peoples v. Suriname*, Judgment of 15 Nov. 2015, paras. 223–226, available at <https://iachr.ils.edu/cases/kaliña-and-lokono-peoples-v-suriname>, (accessed 10 March 2020).

<sup>89</sup> *In re University of Stellenbosch Legal Aid Clinic, et al*, High Court of South Africa (Western Cape Division, Cape Town), Case No. 16703/14 (8 Jul. 2015), Judgment, para. 11, [2015] ZAWCHC 99, available at <http://www.saflii.org/za/cases/ZAWCHC/2015/99.html> (accessed 11 March 2020). On appeal, the Supreme Court of South Africa concluded that the statute was not unconstitutional because it had been misconstrued and misapplied by the lenders. *University of Stellenbosch Legal Aid Clinic (Clinic) et al v Minister of Justice and Correctional Services et al* [2016] ZACC 32, available at <https://www.escri-net.org/caselaw/2017/university-stellenbosch-legal-aid-clinic-clinic-others-v-minister-justice-and> (accessed 11 March 2020).

<sup>90</sup> OECD Guidelines, *supra*, n. 41, para. 25.

in the number and scope of human rights complaints against multinational companies since the 2011 revision.<sup>91</sup>

Although neither the OECD Guidelines nor the Specific Instance Process is legally binding, they can have a considerable bite. In one case, an adverse finding by an OECD NCP regarding failure to consult with indigenous people led to a public naming and shaming campaign by NGOs, divestiture of the company's stock by major institutions, a drop in its market price, and ultimately, denial by the government of its permission to proceed with a project.<sup>92</sup>

### **viii. Private International Law on Business and Human Rights**

Pressures from governments and stakeholders have helped to drive the UNGPs into binding business commitments, thereby helping to create a new *lex mercatoria* of business and human rights.<sup>93</sup>

By directing all of its partners and suppliers to comply with the UNGPs, a multinational enterprise can cascade these standards throughout its supply chain. For example, FIFA, the governing body of world football, the world's largest and richest

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<sup>91</sup> John G. Ruggie and Tamaryn Nelson, *Human Rights and the OECD Guidelines for Multinational Enterprises: Normative Innovations and Implementation Challenges* (August 2015) HKS Faculty Research Working Paper Series, rWP15-045, available at <http://dx.doi.org/10.2139/ssrn.2601922> (accessed 11 March 2020).

<sup>92</sup> UK National Contact Point for the OECD Guidelines for Multinational Enterprises, *Final Statement by the UK National Contact Point for the OECD Guidelines for Multinational Enterprises: Complaint from Survival International Against Vedanta Resources plc* (25 Sep. 2009), available at <https://www.oecd.org/investment/mne/43884129.pdf> (accessed 11 March 2020). For a history of the dispute, see *Vedanta Resources lawsuit (re Dongria Kondh in Orissa)*, Business and Human Rights Resource Centre, available at <https://business-humanrights.org/en/vedanta-resources-lawsuit-re-dongria-kondh-in-orissa> (accessed 11 March 2020).

<sup>93</sup> See John G. Ruggie and John F. Sherman, III, *Adding Human Rights Punch to the New Lex Mercatoria: The Impact of the UN Guiding Principles on Business and Human Rights on Commercial Legal Practice* (2015) 6(3) *Journal of International Dispute Settlement* 455–461, available at [https://scholar.harvard.edu/files/john-ruggie/files/adding\\_human\\_rights\\_punch\\_to\\_the\\_new\\_lex\\_mercatoria.pdf](https://scholar.harvard.edu/files/john-ruggie/files/adding_human_rights_punch_to_the_new_lex_mercatoria.pdf) (accessed 11 March 2011).

sport, is beginning to require all of its business partners and suppliers to comply with the UNGPs, including in future FIFA World Cup tournaments.<sup>94</sup>

In addition, when local laws protecting human rights are inadequate, different businesses can collaborate among themselves and other stakeholders to commit to raise industry standards as a whole. A recent example is the participation by the international ready-made garment industry in new multistakeholder initiatives in response to the 2013 collapse of the structurally defective Rana Plaza factory in Bangladesh, which killed over 1,100 poorly paid workers and injured about 2,000 others, in the deadliest garment factory accident in history.<sup>95</sup> Reliance by buyers on third-party auditing and factory monitoring had proven ineffective in Bangladesh, where building safety standards were inadequately enforced.<sup>96</sup>

Nearly 230 apparel companies responded in 2013 with two separate initiatives to collaborate to improve factory safety conditions Bangladesh factories: the Accord on Fire and Building Safety in Bangladesh (Accord);<sup>97</sup> and the Alliance for Bangladesh Worker Safety (Alliance).<sup>98</sup> Both initiatives provide for funding of factory safety improvements, inspections, training, and increased worker safety protections. The terms of both initiatives are enforceable by mandatory arbitration. The main difference between the two is in the participation of unions. The Alliance is a business-centric initiative that consists of 26 mostly US garment brands. The Accord consists of 200 mostly non-US western apparel brands from twenty countries, international and Bangladeshi trade unions, and NGO witnesses.<sup>99</sup>

As discussed in the next section, arbitration has already taken place under the Accord.

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<sup>94</sup> See FIFA's new Human Rights Policy and June 2017 Activity Update, available at <https://www.fifa.com/search/?q=Human+Rights+Policy> (accessed 11 March 2020).

<sup>95</sup> Motoko Aizawa and Salil Tripathi, *Beyond Rana Plaza: Next Step for the Global Garment Industry and Bangladeshi Manufacturers* (2015) 1(1) *Business and Human Rights Journal* 145–151, available at <https://www.cambridge.org/core/journals/business-and-human-rights-journal/article/beyond-rana-plaza-next-steps-for-the-global-garment-industry-and-bangladeshi-manufacturers/B362D6DB2E0A46EFAB81361E7F4201C1> (accessed 11 March 2020).

<sup>96</sup> *Ibid.*

<sup>97</sup> *Ibid.*

<sup>98</sup> *Ibid.*

<sup>99</sup> *Ibid.*

## ix. Arbitration of Human Rights Issues

In light of the gaps that exist in judicial processes for providing remedy, arbitrations are increasingly being looked to as one way to fill that gap.

### 1. Private Commercial Arbitration

Commercial arbitration of contract disputes between private contracting parties is seen as a problematic forum for the resolution of human rights disputes and the remedy of human rights harm. This is due to various features of traditional commercial arbitration including its confidentiality, lack of transparency and of participation by affected stakeholders, and the lack of human rights expertise of commercial arbitrators. However, this may be beginning to change.

In 2016, two of the union members of the Bangladesh Accord, discussed above, commenced arbitrations against two fashion brand members before the Permanent Court of Arbitration in The Hague, for alleged failure to remediate facilities on time and to make it financially feasible for its suppliers to pay for remediation. The arbitrations were commenced under the rules of the UN Commission on International Trade Law ('UNCITRAL'), which, as described below, provide for greater transparency than commercial arbitration rules. The arbitrations have been settled, and the tribunal ordered that selected case information be made public, in light of the public interest. The second arbitration resulted in a 2.3 million USD settlement requiring a fashion brand member of the Accord to remedy life-threatening workplace hazards.<sup>100</sup>

In parallel, the Working Group on International Arbitration of Business and Human Rights has developed 'The Hague Rules on Business and Human Arbitration', which sets out rules and procedures for a commercial arbitration panel that would help to fill the

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<sup>100</sup> See: (a) Press Release, *Bangladesh Accord Arbitrations, etc.* (2017), Permanent Court of Arbitration (October 2017), available at <https://pcacases.com/web/sendAttach/2238> (accessed 11 March 2020); (b) IndustriALL, *Settlement reached with global fashion brand in Bangladesh Accord arbitration* (December 2017), available at <http://www.industrialunion.org/settlement-reached-with-global-fashion-brand-in-bangladesh-accord-arbitration> (accessed 11 March 2020); and (c) IndustriALL, *Unions reach second settlement under Bangladesh Accord with an apparel brand following delays over fixing hazards at its factories* (January 2018), available at <https://www.business-humanrights.org/en/bangladesh-unions-reach-settlement-with-apparel-brand-following-delays-over-fixing-hazards-at-its-factories> (accessed 11 March 2020).

access to remedy gap under Pillar III of the UNGPs. It would be devoted specifically to resolving business-to-business human rights disputes, would be more transparent, and would permit the participation of affected stakeholders, as now permitted by the UNCITRAL Rules.<sup>101</sup>

## 2. Foreign Investor Host State Treaty Arbitration

Foreign investment arbitration tribunals are starting to take human rights impacts into account in their awards. Unlike commercial arbitrations, investment treaty arbitrations involve both public and private parties. They sit at the intersection of the State duty to protect human rights and the corporate responsibility to respect human rights. They involve claims that a State exercised its public authority in violation of its obligations to foreign investors under bilateral investment treaties. The contractual rights of the parties are often grounded in host State government agreements, such as production sharing agreements, concessions, and other similar arrangements, that provide foreign investors with rights to extract minerals or build pipelines, for example.

Although States have a duty to protect human rights, the threat of arbitration by the investor may chill the State from exercising that duty robustly or effectively. During his mandate, the SRSG expressed concerns about limitations imposed by such treaties on the State duty to protect, the lack of transparency in treaty arbitrations, and the exclusion of public interests from treaty arbitrations.<sup>102</sup>

The traditional mind-set of treaty arbitration tribunals is based on commercial arbitration and is not conducive to consideration of human rights impacts on stakeholders who are not parties to the arbitration.<sup>103</sup> To address this problem, in 2011, the SRSG urged UNCITRAL to amend its arbitration rules to provide for greater transparency to promote greater public awareness and participation in disputes that

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<sup>101</sup> *The Hague Rules on Business and Human Rights Arbitration* (2019), available at <https://www.cilc.nl/project/the-hague-rules-on-business-and-human-rights-arbitration/> (accessed 10 March 2020).

<sup>102</sup> John G. Ruggie, *Protect, Respect and Remedy: A Framework for Business and Human Rights*, *supra* n.1 at para. 34.

<sup>103</sup> LSE IHR Project, *Interview of Tony Landau QC on arbitration and human rights*, available at <http://blogs.lse.ac.uk/investment-and-human-rights/portfolio-items/landauinterview/> (11 March 2020).

affect public interests.<sup>104</sup> UNCITRAL amended its rules to provide for greater transparency in 2014.<sup>105</sup>

In addition, in 2011, the SRSG provided detailed guidance to States and foreign investors on the negotiation of underlying host State/foreign investor agreements, in a separate addendum to the UNGPs, titled 'Principles for Responsible Contracts: Integrating the Management of Human Rights Risks into State-Investor Contract Negotiations'.<sup>106</sup> Professor Ruggie has subsequently written that such guidance is necessary because the adverse human rights impacts of major infrastructure projects can generate 'a downward spiral in trust between foreign investors and communities' that 'can result in the loss of a company's social license to operate, long before it loses its legal license to operate'.<sup>107</sup>

Bilateral treaty arbitration tribunals have begun to acknowledge the relevance of the UNGPs. For example, in *Urbaser v. Argentina* (2016), a bilateral treaty arbitration tribunal considered a counterclaim filed by Argentina against a foreign investor that allegedly impaired the human right to water. Although the tribunal did not find the substance of the claim to be supported in the specific facts of the dispute, it characterized the UNGPs as 'the basic document' that applies international human rights standards to companies and rejected the investor's position that 'the human right to water is a duty that may be born solely by the State, and never borne also by private companies'.<sup>108</sup>

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<sup>104</sup> Julia Salasky, *The New UNCITRAL Rules and Convention on Transparency* (2014), available at <http://blogs.lse.ac.uk/investment-and-human-rights/portfolio-items/transparency-in-investment-treaty-arbitration-and-the-un-guiding-principles-on-business-and-human-rights-the-new-uncitral-rules-and-convention-on-transparency/> (accessed 11 March 2020).

<sup>105</sup> *Ibid.*

<sup>106</sup> OHCHR, *Principles for Responsible Contracts: Integrating the Management of Human Rights Risks into State-Investor Contract Negotiations – Guidelines for Negotiations (hereinafter 'Principles for Responsible Contracts')*, available at [http://www.ohchr.org/Documents/Publications/Principles\\_ResponsibleContracts\\_HR\\_PUB\\_15\\_1\\_EN.pdf](http://www.ohchr.org/Documents/Publications/Principles_ResponsibleContracts_HR_PUB_15_1_EN.pdf) (accessed 11 March 2020).

<sup>107</sup> John G. Ruggie, *Keynote Remarks, Association of International Petroleum Negotiators* (2012), available at <https://business-humanrights.org/sites/default/files/media/documents/ruggie/ruggie-remarks-association-intl-petroleum-negotiators-20-apr-2012.pdf> (accessed 11 March 2020).

<sup>108</sup> Award (December 2016), in *Urbaser, SA, et al and the Argentine Republic*, ICSID Case No. ARB/07/26, para. 1196, available at <https://www.italaw.com/sites/default/files/case->



Following *Urbaser*, in *Bear Creek Mining Corporation v. Peru* (November 2017), a bilateral treaty arbitration panel upheld the mining company investor's challenge to a governmental decree prohibiting mining in areas where community opposition to the mine had turned violent. However, the panel limited the investor's damages to sunk costs (18.1 million USD, compared to 522 million USD demanded by the investor), where the circumstances showed that the investor had a limited prospect of obtaining a 'social license to operate' for the mine. The dissenting arbitrator would have further reduced damages to 9.1 million USD for the investor's contributory fault.<sup>109</sup> This result echoes Professor Ruggie's comment above that investors and host States need to get the underlying transaction right in the first place by addressing potential community concerns which, if ignored, will jeopardize the investor's social licence to operate.

Finally, States such as The Netherlands are responding to this issue by revising their model bilateral investment treaties to permit reduction of compensation for non-compliance with the UNGPs and the OECD Guidelines for Multinational Enterprises.<sup>110</sup>

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[documents/italaw8136\\_1.pdf](#) (accessed 11 March 2020). The dispute was between Argentina and a Spanish investor under a 1991 bilateral investment treaty between Argentina and Spain, arising out of a 2000 concession agreement for water and sewer services to Buenos Aires, Argentina. The investor claimed that Argentina violated the concession and ultimately terminated it. Argentina filed a counterclaim alleging that the investor had violated its commitments under international law based on the human right to water. The tribunal accepted the counterclaim but denied it on the merits because it was not adequately grounded in the underlying concession agreement, which did not impose specific human rights duties on the investor. Award, para. 1210. It remains to be seen whether a bilateral treaty arbitration tribunal would reach a similar result in an arbitration of a dispute arising out of a host state/foreign investor agreement that does impose such duties, as recommended by the SRSG's *Principles for Responsible Contract*, *supra* n. 119, or a bilateral investment treaty that preserves space for a state to fulfill its duty to protect human rights.

<sup>109</sup> See: Daniela Paez-Saldago, Herbert Smith Freehills, *Four Key Takeaways of the Decision in Bear Creek Mining Corp v Republic of Peru* (16 Dec. 2017), available at <http://arbitrationblog.kluwerarbitration.com/2017/12/16/bear-creek-mining-v-peru/> (accessed 11 March 2020); and Amanda Neil, Freshfields Bruckhaus Deringer, *Human rights and investment arbitration: what we can expect in 2019*, available at <https://humanrights.freshfields.com/post/102fg7j/human-rights-and-investment-arbitration-what-we-can-expect-in-2019> (accessed 11 March 2020).

<sup>110</sup> *Ibid.*

## x. Bar Associations

Finally, international and national bar associations have endorsed the need for the legal profession to implement the UNGPs in their practice. Professor Ruggie has written that corporate lawyers were among the most consequential new players that he had invited into the business and human rights debate, due to their access to and influence with company boards and top management.<sup>111</sup> Corporate lawyers around the world participated in pro bono projects to examine the extent to which the corporate laws of dozens of nations permitted companies to factor human rights into their decision-making.<sup>112</sup>

Last, the International Bar Association, which is the voice of the international legal profession, consists of over 200 bar associations worldwide, and has over 80,000 individual members, supported the SRSG's mandate, helped to fund the SRSG's pilot projects on non-judicial remedy, and urged the UN Human Rights Council to endorse the UNGPs. In 2015 and 2016, the IBA endorsed the UNGPs and issued practical guidance documents for bar associations and business lawyers on business and human rights and on the implications of the UNGPs for the legal profession. It identified various legal practice areas that the UNGPs affect, such as dispute resolution, reporting and disclosure, corporate governance, enterprise risk management, supply chain contracts, M&A agreements, and other agreements. It described the opportunities and challenges for law firms in taking the UNGPs into account in their business activities (including service to clients).<sup>113</sup>

The IBA Bar Association Guide urged national bar associations to undertake proactive and systematic steps to implement the UNGPs. In that connection, the American Bar

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<sup>111</sup> *Just Business*, *supra* n. 3.

<sup>112</sup> *Ibid.*

<sup>113</sup> *See*: (a) *IBA Practical Guide*; (b) *IBA Reference Annex*; and (c) *IBA Bar Association Guide*, *supra*, n. 3. In 2017, the IBA followed up the Practical Guide with an interactive, web-based guidance for lawyers on the implications of the Guiding Principles for supply chain contracts and M&A agreements. *See IBA Handbook on Business and Human Rights*, available at <https://www.ibanet.org/Handbook-for-lawyers/Introduction.aspx#about> (accessed 11 March 2020).

Association,<sup>114</sup> the Law Society of England and Wales,<sup>115</sup> and the Japan Federation of Bar Associations<sup>116</sup> have endorsed and issued guidance for their member lawyers on implementation of the UNGPs into legal practice.

In 2017, the European Bars Federation/Fédération des Barreaux d'Europe (FBE), a Strasbourg-based association of 250 European bar associations with approximately 800,000 lawyers, launched a Guidance on Business and Human Rights for European Law Societies to help them address the implications of the UNGPs.<sup>117</sup>

The FBE Guidance was driven by the EU's recognition of the UNGPs as the authoritative policy framework on business and human rights in aligning the EU's Strategy on Corporate Social Responsibility and other EU initiatives, including the development of National Action Plans to implement the UNGPs. The FBE Guidance recommends that bar associations make far-reaching and proactive efforts to embed the UNGPs into all areas of legal practice, including considering amending professional codes of conduct for lawyers.

To that end, on 1 February 2018, the Geneva Bar Association, an FBE member, amended its Professional Code of Conduct to provide that lawyers should do their best to mitigate the risks of human rights abuses by corporate clients by promoting their inclusion up front in the early stages of their advice or when helping to prepare agreements or contracts. This language is precatory, not merely permissive.<sup>118</sup>

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<sup>114</sup> Resolution 109, American Bar Association (2012), available at [https://www.americanbar.org/content/dam/aba/administrative/human\\_rights/hod\\_midyear\\_109.aucthecheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/human_rights/hod_midyear_109.aucthecheckdam.pdf) (accessed 11 March 2020).

<sup>115</sup> Law Society of England and Wales, *Business and Human Rights: A Practical Guide* (2016), available at [www.lawsociety.org.uk](http://www.lawsociety.org.uk) (accessed 11 March 2020).

<sup>116</sup> *Guidance on Human Rights Due Diligence*, January 2015. Japan Federation of Bar Associations (English translation by the Asia-Pacific Human Rights Center and Sustainability Japan Forum), available at [https://www.nichibenren.or.jp/library/en/document/data/150107\\_guidance.pdf](https://www.nichibenren.or.jp/library/en/document/data/150107_guidance.pdf) (accessed 11 March 2020).

<sup>117</sup> Ilustre Colegio de Abogados de Madrid and Sustentia, *Guidance in Business and Human Rights for European Law Societies' approved by the Fédération des Barreaux d'Europe* (FBE) (June 2017), available at <http://www.sustentia.com/wp-content/uploads/2018/02/GUIDE-ON-BUSINESS-HUMAN-RIGHTS-ICAM-FBE-January-2018-Sustentia-English.pdf> (accessed 11 March 2020).

<sup>118</sup> See: L'Ordre des avocats de Genève, *'Us & Coutumes'* (2018), Art. 3 (Responsabilité sociale), available at [https://www.odage.ch/medias/documents/regles-profession/Us\\_Coutumes\\_2018.pdf](https://www.odage.ch/medias/documents/regles-profession/Us_Coutumes_2018.pdf)

## 9. Conclusion

In 1999, the then-UN Secretary General, Kofi Annan, predicted that unless globalization can be made to work for everyone, it would not work for anyone. He warned that unless this happened, there would be a backlash against globalization resulting in ‘protectionism; populism; nationalism; ethnic chauvinism; fanaticism; and terrorism’.<sup>119</sup> Today’s world economy is highly globalized; it has not worked for everyone, and the backlash is in full force. The result is not sustainable for businesses, governments, and society.

What does this mean for corporate lawyers? It means going beyond CSR when advising their clients on human rights. This means helping clients navigate the often-unclear boundaries between hard and soft law. In the words of David Rivkin, the past president of the IBA, business lawyers ‘cannot now – if we ever could – conceive of our role exclusively as technical specialists in black-letter law. Rather, our clients need us to be wise counselors, who integrate legal, ethical and business concerns in all our advice. Embracing that role should not, of course, come at the expense of our entrenched and unique professional obligations to our clients. But we serve our clients best by ensuring that we are able to advise them on what is legal and what is right’.<sup>120</sup>

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(accessed 11 March 2020); and John F. Sherman, III, *When Counseling Clients on Risk, Lawyers Need to Take a Proactive Approach on Human Rights: New Initiatives by European Bar Associations Recommend that Lawyers Advise Clients on Human Rights Risks with a Focus on Prevention of Impacts* (2018), available at <https://www.shiftproject.org/resources/viewpoints/lawyers-proactive-risk-human-rights/> (accessed 11 March 2020).

<sup>119</sup> Kofi Annan, address to World Economic Forum in Davos, 31 Jan. 1999, <http://www.un.org/press/en/1999/19990201.sgsm6881.html> (accessed 11 March 2020).

<sup>120</sup> David W. Rivkin, *Forging the Path as Wise Counselors* (September 2016), available at <http://www.shiftproject.org/resources/viewpoints/forging-the-path-as-wise-counselors/> (accessed 11 March 2020).