

A decorative graphic consisting of a grid of grey dots of varying sizes, with several dots highlighted in red. The dots are arranged in a pattern that roughly outlines a world map.

# Holding Businesses Accountable for Human Rights Violations

## Recent Developments and Next Steps

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- The corporate accountability movement emerged at the United Nations more than forty years ago. Since then, many organizations have attempted to address the issue primarily by encouraging corporations to participate in voluntary codes aimed at preventing human rights abuses. The most recent effort is the United Nations' Protect, Respect and Remedy Framework, issued by Special Representative John Ruggie, to address human rights and transnational corporations.
- Along with the Protect, Respect and Remedy Framework, Ruggie has also issued Guiding Principles to assist governments and corporations in the implementation of the framework. While these principles contain positive elements, they fall short of creating an effective mechanism for addressing the many corporate human rights violations that continue by not providing a remedy in the international arena when national systems are unavailable or ineffective.
- Corporate accountability is an enormous challenge that cannot be effectively dealt with through existing methods. A truly successful process would involve the creation of binding legal mechanisms that mandate oversight of corporations. These mechanisms should also provide effective redress for victims of corporate human rights abuses.



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## 1. Introduction

The increased activities of transnational corporations, which by definition manage production or deliver services from one state to another, have enhanced concern about the impact of these same activities on human rights. There is no doubt that businesses are capable of much good: generating economic growth, increasing opportunity, and contributing financial investment in some of the world's least developed areas. To prevent and mitigate potential corporate harms, however, accountability frameworks are needed. While work on building such measures began decades ago and developments continue on a regular basis, there is still much left to be done to ensure that business is conducted in a way that respects and protects human rights. This report presents and critiques existing efforts in the field of corporate accountability and explores next steps to both minimize the negative impacts of business activity on human rights while ensuring remedies are available when harm occurs.

The historical underpinnings of the corporate accountability movement within the United Nations are examined first, followed by consideration of other international instruments and how they have contributed to the growth of corporate accountability. The discussion then turns to the work and mandate of the UN Special Representative on the issue of human rights and transnational corporations and other business enterprises, including an analysis of the Guiding Principles to the Protect, Respect and Remedy Framework. The paper concludes with recommendations for steps that the international community should adopt to advance the corporate accountability movement, including mechanisms for redress.

## 2. History and Development of International Corporate Accountability within the United Nations

International development of corporate accountability is by no means a recent phenomenon. The United Nations began addressing corporate accountability in 1972, when its Economic and Social Council ordered a study of the role of transnational corporations and their impact on the development process as well as on international relations.<sup>1</sup> That request led to the establishment of the

UN Commission on Transnational Corporations (UNCTC) as an advisory body in December 1974.<sup>2</sup>

For most of its existence thus far, the UNCTC has focused on a number of different tasks. First, the agency furthered understanding of the political, economic, social, and legal effects of activities undertaken by transnational corporations, especially in developing countries. Second, it secured international arrangements that promoted the positive contributions of transnational corporations. The agency also devised national development targets and goals for world economic growth while attempting to eliminate possible negative effects. Third, the UNCTC sought to strengthen the negotiating capacity of host countries, in particular developing nations, in their dealings with transnational corporations.<sup>3</sup>

In addition to these tasks, one of the UNCTC's primary goals was to create an international code of conduct for transnational corporations. It began formulating such a code in 1977 and completed a final draft in 1990.<sup>4</sup> Despite the UNCTC's efforts to engage in dialogue with governments to complete work on the draft, it was unable to establish a set of standards for corporations related to human rights, and the code was never adopted. Thereafter, the UNCTC's programs mainly involved running workshops related to investment and trade, until 1993, when its responsibilities were transferred to the United Nations Conference on Trade and Development.<sup>5</sup>

In 2000, the United Nations Global Compact was launched.<sup>6</sup> It consists of ten principles and invites companies to embrace, support, and enact, within their sphere of influence, a set of core values in the areas of human rights, labor standards, the environment, and

1. UN Economic and Social Council, Resolution 1721 (LIII), July 28, 1972.

2. UN Center on Transnational Corporations, »Background and Activities of the Commission and the Centre on Transnational Corporations, 1972 to 1975«, <http://unctc.unctad.org/asp/UNCTC%20from%201972%20to%201975.aspx> (the name of the Commission was changed to Center).

3. UN Center on Transnational Corporations, »UNCTC Origins«, <http://unctc.unctad.org/asp/UNCTCOrgins.aspx>.

4. »United Nations Draft International Code of Conduct on Transnational Corporations«, 23 International Legal Materials 626 (1984). See also, Paul Lansing and Alex Rosaria, »An Analysis of the United Nations Proposed Code of Conduct for Transnational Corporations«, World Competition 14 (1991):37.

5. UN Center on Transnational Corporations, »Background and Activities of the Commission and the Centre on Transnational Corporations, 1990 to 1993«, <http://unctc.unctad.org/asp/UNCTC%20from%201990%20to%201993.aspx>.

6. UN Global Compact, <http://www.unglobalcompact.org/index.html>.



corruption. The principles are based on the idea that businesses should support and respect the protection of internationally proclaimed human rights and ensure that they avoid complicity in human rights abuses.<sup>7</sup> Further, the Compact called on businesses to protect the labor rights of their workers, including the elimination of forced labor and discrimination.<sup>8</sup> In addition, corporations were to promote and encourage environmental responsibility and actively work against all forms of corruption.<sup>9</sup> Despite UN support of the program, the Global Compact remained a voluntary corporate responsibility initiative without legal enforcement.

Subsequently, in 2003, the UN Sub-Commission on the Promotion and Protection of Human Rights adopted Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights Norms.<sup>10</sup> The authority of the Norms derived principally from the fact that they were a restatement of existing international and legal principles found in treaties and customary international law, including dozens of UN declarations and resolutions.<sup>11</sup> The Norms were a valuable articulation of obligations of corporations to respect human rights because they provided for greater accountability than previous efforts by requiring that »each transnational corporation or other business enterprise shall adopt, disseminate and implement internal rules of operation in compliance with the Norms«. <sup>12</sup> This was important because the Norms obligated corporations to the application of a specific human rights standard, which would be followed by the United Nations conducting periodic monitoring and verification of corporations' efforts as well as investigating complaints of violations.<sup>13</sup> Such a mechanism, unlike many previously developed measures, would thus allow the international community to actively hold corporations accountable for human rights standards.

7. UN Global Compact, »The Ten Principles«, Principles 1-2, <http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html>.

8. *Ibid.*, Principles 3-6.

9. *Ibid.*, Principles 7-9 and 10.

10. UN Economic and Social Council, Commission on Human Rights, »Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights« (hereafter Norms), UN doc. E/CN.4/Sub.2/2003/38/Rev.2, August 26, 2003.

11. See David Weissbrodt and Muria Kruger, »Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights«, *American Journal of International Law* 97 (October 2003).

12. Norms, para. 15.

13. *Ibid.*, para. 16.

In addition, the Norms expanded corporate responsibility beyond the transnational enterprise itself. They held that corporations should include the Norms in their arrangements and dealings »with contractors, subcontractors, suppliers, licensees, distributors, or natural or other legal persons that [they] enter into any agreement with«. <sup>14</sup> Here, the Norms recognized the nature of business activity and the importance of holding parent companies and their subsidiaries, contractors, and agents liable for violations of human rights. Even with the positive improvements incorporated in the Norms, the fatal flaw was the failure of the UN Commission on Human Rights, the parent body of the sub-commission, to adopt them. Without such approval, their accountability measures had little authority and could not be effectively realized.

### 3. Other International Accountability Instruments and Structures

In addition to various UN-developed mechanisms, other voluntary codes and systems have been introduced over the years. Among the most widely recognized and accepted are the Organisation for Economic Co-operation and Development's (OECD) Guidelines for Multinational Enterprises and the International Labour Organization's (ILO) Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy.<sup>15</sup>

The OECD Guidelines were drafted in 1976.<sup>16</sup> Talks on updating them began in June 2010, and on May 25, 2011, forty-two governments adopted the update at the fiftieth anniversary OECD ministerial meeting.<sup>17</sup> The Guidelines, which are an annex to the OECD Declaration on International Investment and Multinational Enterprises, cover business ethics on employment, human rights, the environment, information disclosure, combating bribery, consumer interests, science and technology, competi-

14. *Ibid.*, para. 15.

15. Organisation for Economic Co-operation and Development, OECD Guidelines for Multinational Enterprises: Recommendations for Responsible Business Conduct in a Global Context, [http://www.oecd.org/about/t0,3347,en\\_2649\\_34889\\_1\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/about/t0,3347,en_2649_34889_1_1_1_1_1,00.html); International Labour Organization, Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (hereafter Tripartite Declaration), 4th ed., [http://www.ilo.org/empent/Whatwedo/Publications/lang--en/docName--WCMS\\_094386/index.htm](http://www.ilo.org/empent/Whatwedo/Publications/lang--en/docName--WCMS_094386/index.htm).

16. OECD Guidelines for Multinational Enterprises, *supra* note 15.

17. Organisation for Economic Co-operation and Development, »New OECD Guidelines To Protect Human Rights and Social Development«, [http://www.oecd.org/document/19/0,3746,en\\_21571361\\_44315115\\_48029523\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/19/0,3746,en_21571361_44315115_48029523_1_1_1_1,00.html).



tion, and taxation. Governments signing on to the Declaration commit to promoting the Guidelines among multinational enterprises operating in or from their territories, with observance of the Guidelines supported by National Contact Points (NCPs), a unique implementation mechanism.<sup>18</sup> Each signatory establishes an NCP, which becomes the forum for promoting the Guidelines on a national level.<sup>19</sup> An NCP handles all enquiries and matters related to the Guidelines in that particular country, including investigating complaints about a company operating or headquartered there.<sup>20</sup>

The ILO Tripartite Declaration was first issued in 1977; the most recent edition was released in 2006. The principles enshrined therein address several areas of corporate activity, including the promotion of employment and equality of opportunity and treatment, and discuss ways for governments to develop national policies for vocational training and skill development that are closely connected to employment. In addition, favorable conditions of work and life, which include freedom of association and the right to organize, are encouraged. Periodic surveys are to be conducted to monitor the effect given to the Declaration by multinational enterprises, governments, and employer and worker organizations. A summary and an analysis of the replies received are submitted to the ILO governing body for discussion. One weakness of the Declaration is that it covers only a limited area: worker's rights. Thus, as a narrowly crafted mechanism, it cannot be used to address the broader range of human rights violations that corporations often commit.

The OECD Guidelines for Multinational Enterprises and the ILO Tripartite Declaration of Principles sought to directly engage corporations in the development of human rights programs within their businesses as well as add a layer of accountability over their implementation of the proposed standards. Although these codes are useful in addressing and emphasizing the importance of corporate participation in the protection of human rights, they, however, remain voluntary, reliant on the goodwill of corporations to implement them. Thus, impunity often prevails in the absence of strong legal mechanisms for accountability and redress.

18. OECD Guidelines for Multinational Enterprises, *supra* note 15.

19. *Ibid.*, 70.

20. *Ibid.*

## 4. Guiding Principles on Business and Human Rights: Implementing the UN Protect, Respect and Remedy Framework

In April 2005, the UN Commission on Human Rights adopted Resolution 2005/69, requesting the Secretary-General to appoint a Special Representative on the issue of human rights and transnational corporations and other business enterprises for an initial period of two years.<sup>21</sup> Later that year, Secretary-General Kofi Annan appointed Harvard professor John Ruggie to the post. When the UN Human Rights Council (UNHRC) was formed in 2006, it assumed the representative's mandate, which in 2008 was renewed for three years. Secretary-General Ban Ki-Moon subsequently retained the assignment.

Ruggie's efforts as Special Representative are commendable. He has carried out his work and mandate through a constructive and open dialogue among a diverse group of stakeholders. Most notably, he adopted the Responsibility to Protect (R2P) framework, originally used in the context of preventing and halting genocide, war crimes, crimes against humanity and ethnic cleansing.<sup>22</sup> From this foundation, he then produced the Protect, Respect and Remedy Framework to address corporate accountability.<sup>23</sup> In it, Ruggie presents three pillars for analyzing the respective duties and responsibilities of entities with respect to human rights.

The first pillar is the state duty to protect against human rights abuses by third parties, including business, through appropriate policies, regulation, and adjudication. The framework suggests that states, in carrying out this duty, focus on five priorities to promote corporate respect for human rights and prevent corporate-related abuse: strive to achieve coherence and effectiveness within government operations when working with businesses, including ensuring their ability to protect rights; promote respect for human rights when they do business with companies; foster corporate cultures respectful of hu-

21. UN Economic and Social Council, Commission on Human Rights, »Human Rights and Transnational Corporations and Other Business Enterprises«, para. 1, UN doc. E/CN.4/2005/L.87, April 15, 2005.

22. UN General Assembly, »2005 World Summit Outcome«, UN doc. A/RES/60/1, October 24, 2005.

23. UN Human Rights Council, »Protect, Respect and Remedy: A Framework for Business and Human Rights. Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises«, UN doc. A/HRC/8/5, April 7, 2008, <http://www2.ohchr.org/english/bodies/hrcouncil/8session/reports.htm>.



man rights at home and abroad; create policies to guide companies operating in conflict-affected areas; and address the issue of extraterritorial control over corporate activity.

The second pillar is the corporate responsibility to respect human rights. This requires corporations to act with due diligence to avoid infringing on the rights of others and to address adverse impacts that do occur. This responsibility applies to all aspects of business activity and requires corporations to consider their impact on all internationally recognized rights. The third pillar is putting emphasis on the need for greater access by victims to effective judicial and non-judicial remedies for violations they suffer.

The framework was distributed widely among governments and international organizations and represented the culmination of Ruggie's work to that point. The framework, however, required clarification for it to be fully implemented. The Guiding Principles were, therefore, developed to »operationalize« the framework and to provide concrete and practical recommendations for its implementation. Each of the thirty-one principles is accompanied by commentary and elaboration on how states and corporations can carry out their respective pillars of the framework. In March 2011, Ruggie released the final version of the Guiding Principles on Business and Human Rights: Implementing the United Nations Protect, Respect and Remedy Framework.<sup>24</sup> This version was the result of a November 2010 draft of the principles and an online discussion on the draft open until January 31, 2011. The Guiding Principles are useful because they are a result of extensive input and analysis by various stakeholder groups, including governments and corporations, and experts in various areas of law and policy. Along with some of the positive advancements made as a result of the principles, certain areas warrant additional attention here.

#### 4.1 Positive Areas

The Guiding Principles clarify the various roles of the players in corporate accountability. In particular, they help all the stakeholders better understand corporate responsibility for international human rights.

24. UN Human Rights Council, »Guiding Principles on Business and Human Rights: Implementing the United Nations »Protect, Respect and Remedy« Framework« (hereafter Guiding Principles), UN doc. A/HRC/17/31, Art. 31, March 21, 2011.

#### State Duty to Protect

First, the Guiding Principles are clear about the basis of the state duty to protect. It is the »States' international human rights law obligations [that] require that they respect, protect and fulfil the human rights of individuals within their territory and/or jurisdiction«, and this includes the duty to protect against human rights abuses by business enterprises.<sup>25</sup> In fact, this duty requires taking steps to prevent, investigate, punish, and redress corporate human rights abuses.<sup>26</sup> This language makes clear that states have a clear duty to protect human rights as a requirement under international law.

The Guiding Principles also refer to the creation of independent monitoring and accountability mechanisms in situations where states privatize the delivery of services that may have human rights impacts.<sup>27</sup> The language is clear that in these situations, states are not permitted to abandon their international human rights law duties. In fact, »[f]ailure by States to ensure that business enterprises performing such services operate in a manner consistent with the State's human rights obligations may entail both reputational and legal consequences for the State itself«.<sup>28</sup> This principle is especially relevant as countries around the world continue to privatize many services traditionally provided by the state. The example of the privatization of prisons and detention facilities is instructive on the potential human rights violations that can occur in such situations. Here Ruggie's articulation is especially potent.

The privatization of prisons has increased in recent years. There have been many recorded violations of prisoners' rights in private prisons in the United States and Australia, the two countries with the largest numbers of prisoners in private facilities.<sup>29</sup> Such situations are beginning to gain international attention because the private prison industry involves corporations that make shareholder interest and the maximization of profits their priority.<sup>30</sup> With such a business model, increasing

25. *Ibid.*, Principle 1 (commentary).

26. *Ibid.*

27. *Ibid.*, Principle 5.

28. *Ibid.* (commentary).

29. A. Connell, »Privatized Prisons and Human Rights: Report to the 13th Session of the Human Rights Council«, Human Rights Advocates, March 2010, <http://www.humanrightsadvocates.org/advocacy-at-the-un>.

30. J. White, »The Human Rights Implications of Prison Privatization: Report to the 16th Session of the Human Rights Council«, Human Rights Advocates, March 2011, <http://www.humanrightsadvocates.org/advocacy-at-the-un>.



revenue often comes at the expense of human rights, in this case borne by prisoners in the form of the sub-standard provision of food, lack of proper supervision, and unsatisfactory medical care. As a result, prisoners' quality of life and safety are negatively affected, and the danger of human rights abuses is high. The treatment of prisoners themselves, however, is just one of the problems. Another concern is the lobbying by private prison corporations to increase the types of crimes for which people can be imprisoned.<sup>31</sup> If successful, these efforts could greatly infringe on prisoners' due process rights. As Ruggie notes in the Guiding Principles, the danger of human rights abuses should influence and change how states choose to privatize government functions.

The Guiding Principles also seek to address situations in which the state's involvement extends beyond merely being a »host« country to a corporation. The duty to protect is especially important, as the commentary points out, when the business receives substantial support and services from the state, directly or indirectly. This increases the responsibility of the state to ensure that corporations respect human rights.<sup>32</sup> Further, the Guiding Principles note that the state duty to protect includes imposing human rights due diligence requirements on corporations »where the nature of business operations or operating contexts pose significant risk to human rights«.<sup>33</sup> This principle emphasizes that the state's responsibility to protect is especially important when it is involved in the corporation's business operations.

#### Corporate Responsibility to Respect

The Guiding Principles assert that the corporation's responsibility to respect is »a global standard of expected conduct for all business enterprises wherever they operate. It exists independently of States' abilities and/or willingness to fulfil their own human rights obligations, and does not diminish those obligations«.<sup>34</sup> Ruggie reinforces this point by emphasizing that this responsibility supersedes national laws that may govern business conduct in relation to human rights.<sup>35</sup> This is a critical

principle underpinning the need to fully engage corporations in adopting a business model that respects human rights.

Another principle addressing corporations is the need for business to adopt policies that demonstrate their commitment to human rights.<sup>36</sup> Notably, corporations should show their respect for human rights through communication and other transparent measures.<sup>37</sup> The standard requires that »[b]usiness enterprises whose operations or operating contexts pose risks of severe human rights impacts should report formally on how they address them«.<sup>38</sup> Such reporting mechanisms would provide for more transparency regarding businesses' response to their human rights impact as well as make it more feasible to provide remedies to victims.

Perhaps Ruggie's strongest contribution in elaborating corporate responsibility to respect human rights is the support and clarification of the concept of human rights due diligence. In the Guiding Principles, Ruggie notes, »In order to identify, prevent, mitigate and account for how they address their adverse human rights impacts, business enterprises should carry out human rights due diligence. The process should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed.«<sup>39</sup> Ruggie properly states that the process of due diligence is not a defense for potential corporate liability for human rights violations. While due diligence may offer evidence that a company has taken reasonable steps to avoid negative impacts on human rights, it does not absolve it from liability under relevant legal regimes. Thus, the due diligence process empowers companies to understand the nature and extent of their impacts and to work proactively in mitigating potential human rights-related risks.

#### Access to Effective Remedy

In addressing the need for remedy, Ruggie, as a result of stakeholder feedback, greatly expanded the commentary regarding the effectiveness criteria for non-judicial

31. Ibid., 12-13.

32. Guiding Principles, Principle 4.

33. Ibid. (commentary).

34. Ibid., Principle 11 (commentary).

35. Ibid.

36. Ibid., Principle 21 (commentary).

37. Ibid.

38. Ibid.

39. Ibid., Principle 17.





grievance mechanisms.<sup>40</sup> In the final version of the Guiding Principles, he clarifies the terms, expectations, and reasons for the use of criteria to ensure that the concerns and needs of victims of human rights violations are fully addressed in a legitimate and transparent manner. The goal is to ensure that all parties to a grievance process are able to trust and maintain confidence in the process's ability to serve their needs.<sup>41</sup>

## 4.2 Concerns and Critical Areas

The following are some of the areas that require changes and improvements to create a stronger and more comprehensive international accountability framework.

### State Duty to Protect

One concern about the Guiding Principles is that they do not provide for strong mechanisms in situations where states are unable or unwilling to protect citizens from corporate human rights abuses. Although Principle 7 specifically addresses state duties in conflict areas, the commentary merely provides for a voluntary effort when the »host« state of a corporation is unable to assert effective control. The commentary suggests that in such situations, the »home« states of offending transnational corporations have a role to play in ensuring that businesses are not involved in human rights abuses. It also proposes that »neighboring States can provide important additional support«.<sup>42</sup>

The situation in Zimbabwe is an example of the weakness in relying on host states to protect human rights in regard to business activities. The stand on human rights abuses taken under the Kimberley Process – a joint government, industry, and civil society initiative to stem conflict and abuse associated with diamond mining – took center stage after Zimbabwe's government clamped down on operations at the Marange mine at the end of 2008. During this time, Human Rights Watch reported that more than 200 people were killed by government forces seeking to secure the resources of the mine.<sup>43</sup> Following

several inspections, however, the Kimberley Process cleared two sales of diamonds extracted by Mbada Diamonds and Canadile Resources from the mine. Human Rights Watch reported that at the time of these sales, large parts of the fields remained under the control of the Zimbabwe Defense Forces, »who harass and intimidate the local community and engage in widespread diamond smuggling«.<sup>44</sup> Regardless, the Kimberley Process is moving forward in Marange before concerns are fully addressed, awarding Anjin Limited, a Chinese company, with concessions in the fields.<sup>45</sup> Although state forces are among those implicated, the involvement of both mining companies and the Kimberley Process is fueling these human rights violations. This situation reinforces the fact that often home states hold the power to protect human rights and should impose real and meaningful consequences on businesses complicit or engaged in human rights abuses.

Although it is important that the Guiding Principles recognize the particular human rights vulnerabilities in conflict situations, the required acknowledgments are all voluntary and hold no meaningful consequences for states whose businesses are operating in such areas. Ruggie notes, however, that to create a truly effective accountability mechanism, states should take appropriate steps to address gaps in human rights due diligence by »exploring civil, administrative or criminal liability for enterprises domiciled or operating in their territory and/or jurisdiction that commit or contribute to gross human rights abuses«.<sup>46</sup> Further guidance or examples would have been helpful for contextualizing the conflict zone situations and providing assistance to states looking to craft accountability frameworks for them.

### Corporate Responsibility to Respect

Another concern involves the Guiding Principles' recommendation that corporations assess their human rights impact. The suggested methods of assessment include having businesses identify their potential and real effects on human rights, respond to remedy such effects, and create a public reporting mechanism to inform stakehol-

40. Ibid., Principle 31 (commentary).

41. Ibid. [commentary part (a) through (e)].

42. Ibid., Principle 7 (commentary).

43. Avi Krawitz, »Delegates Call Upon Kimberley Process to Address Human Rights«, Diamonds.net, November 1, 2010, <http://www.diamonds.net/news/NewsItem.aspx?ArticleID=33157>.

44. Ibid.

45. Avi Krawitz, »Canadile Officials Appear in Court«, Diamonds.net, November 9, 2010, <http://www.diamonds.net/news/NewsItem.aspx?ArticleID=33289>.

46. Guiding Principles, Principle 7 (commentary).





ders about their efforts.<sup>47</sup> In presenting only a general set of recommendations, the lack of examples and specificity will lead to inconsistent application by businesses, if they make the effort at all. In fact, the Guiding Principles state that when corporations assess any adverse impact their operations may have had, the process should »involve meaningful consultation with potentially affected groups and other relevant stakeholders, as appropriate to the size of the business enterprise and the nature and context of the operation.«<sup>48</sup> It appears that the intent was to create flexibility to ensure the greatest amount of participation from businesses across economic sectors and operations. The reality is that without additional specificity, there is no concrete structure guiding businesses in implementing due diligence.

An effective assessment mechanism would specify the manner and frequency for all corporations to provide evaluations and would also detail how reporting of human rights impacts should take place. It would require an oversight body to which businesses would provide their gathered information, to ensure that there is a fair and legitimate process. Such an oversight body would offer victims of human rights abuses a centralized place to seek remedy for their grievances instead of having to approach the various corporations themselves. Corporations should be able to adjust these requirements to their specific method of business operations, but without a concrete framework, businesses will continue to be unmethodical in implementing their responsibility to respect human rights.

A further problem with the Guiding Principles is the failure to account for situations where corporations willfully violate human rights and refuse to implement remedies or are deceptive in their implementation. The principles offer no actual consequences for businesses that do not implement these principles although there is language to suggest the possibility of penalties. For example, if a corporation were to choose to continue a business relationship that contributes to human right abuses, the principles warn that the business entity »should be prepared to accept any consequences – reputational, financial or legal.«<sup>49</sup> There is no mention, however, of actual measures that could be used against violators or under

whose jurisdiction the corporation would fall. Penalties that may or may not be imposed would do little to curb corporations that ignore their international obligations.

#### Access to Effective Remedy

While the Protect, Respect, and Remedy Framework and the Guiding Principles are certainly welcome, their voluntary nature remains the primary concern. Without a mandatory or legal mechanism in place, it will be difficult to offer consistent remedies for victims. Another concern is that although the Human Rights Council directed the Special Representative »[t]o integrate a gender perspective throughout his work and to give special attention to persons belonging to vulnerable groups, in particular children«, Ruggie does not sufficiently do so in the principles.<sup>50</sup> There is no guidance for corporations on how to include this perspective in their behavior. For example, the commentary for Principle 12 mentions that enterprises should respect the human rights of specific groups who may be vulnerable and goes on to mention women, indigenous people, and children. This commentary, however, does not provide procedures for addressing situations when the rights of children, women, and other vulnerable groups may be affected. Without taking on these issues, these vulnerable groups will continue to be subjected to human rights abuses and remain at great risk of being denied redress.

#### 4.3 Conclusion to the Guiding Principles

Overall, the Guiding Principles provide valuable explanations and recommendations for how states and corporations should work together to prevent human rights abuses. These recommendations emphasize principles of corporate accountability that are internationally recognized. The principles are also important in helping stakeholders understand the practical ways in which the Protect, Respect, and Remedy Framework can be implemented.

Despite the problems noted here, the Guiding Principles are an important step for the development of international corporate accountability standards. While the principles, when approved by the UNHRC, are not intended to create legally binding obligations, or »hard« law,

47. Ibid., Principles 17-21.

48. Ibid., Principle 18.

49. Ibid., Principle 19 (commentary).

50. »Mandate of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises«, UN doc. A/HRC/RES/8/7, June 18, 2008.



for states, they can be considered a »soft« law instrument that can be viewed as over time creating customary international legal obligations or serving as the basis for drafting treaties. The development of international law would be advanced by the adoption of the Guiding Principles in national laws or references to them by judicial bodies or even governments when justifying particular practices related to regulation of business entities.

The development of customary international law, however, could be a lengthy process, with inconsistent availability of remedies. In light of the potential that large-scale human rights violations will continue to result from business operations, it is important that steps be taken by the international community to address the worst of those violations.

## 5. Policy Recommendations

The international community needs to seriously consider the viability of creating and implementing international legal mechanisms, including accountability and oversight instruments, to provide an effective remedy for victims aggrieved by business impacts on their human rights. Mechanisms housed in enterprises or industry associations cannot be allowed to substitute for independent judicial mechanisms. There are several remedial procedures that could be used in cases involving human rights abuses by corporate actors.

### 5.1 Legal Mechanisms

International legal mechanisms should include criminal and civil accountability for perpetrators of human rights abuses. An example of the former took place at the end of World War II, when those involved in the abuse of human rights under the Nazi regime, including manufacturers of the poisons used in the gas chambers, were held criminally accountable for their actions. The preeminent example is found in the trials of suspected war criminals before the Nuremberg Military Tribunals, where directors and founders of international corporations were found to be guilty of crimes against humanity for their aid and support in the operation of Nazi concentration camps.<sup>51</sup>

51. *United States of America v. Alfred Krupp et al.* (December 8, 1947–July 32, 1948); *United States of America v. Carl Krauch et al.* (August 27, 1947–July 30, 1948); *United States of America v. Friedrich Flick et al.* (April 19–December 22, 1947).

Currently, however, there is no established international criminal mechanism to address corporate human rights abuses. While the statute of the International Criminal Court (ICC) allows for persons to be prosecuted for crimes such as enslavement, forced disappearance, and unlawful deportation, there is no specific mention of corporations or their personnel.<sup>52</sup> During the Rome Conference, there was a proposal to include juridical persons, which would have included corporations, under the jurisdiction of the ICC.<sup>53</sup> The proposal was rejected, however, and it remains unclear whether corporate actors can be prosecuted for violating human rights. For the ICC to be a truly effective forum for addressing corporate human rights abuses, the international community needs to establish that corporate executives can be subject to liability under the ICC's jurisdiction.

Unlike criminal liability, civil liability usually only occurs at the domestic level. For example, the United States has the Alien Tort Statute (ATS), which gives federal courts the jurisdiction to hear cases filed by aliens regarding violations of international law.<sup>54</sup> ATS protects a range of rights, including »the law of nations and [those rights] recognized at common law«. <sup>55</sup> Some federal courts have held that corporations can be the subject of such lawsuits in the United States.<sup>56</sup> One U.S. federal court, however, recently held, in *Kiobel v. Royal Dutch Petroleum*, that corporations could not be sued under the statute because there was no international standard that allowed for enterprises to be subject to legal sanctions.<sup>57</sup> The court used an erroneous standard to conclude that because there were no provisions in international law for claims against corporations, the ATS could not be the basis for the claim against Royal Dutch Petroleum. The court confused the substantive standard for basing a claim under the ATS with the procedural issue of who can be sued, which is based on U.S. law. Corporations can be sued under laws of

52. Rome Statute of the International Criminal Court, UN doc. A/CONF. 183/9; 37 *International Legal Materials* 1002 (1998); 2187 UNTS 90, Art. 6-7, July 17, 1998; entered into force July 1, 2002.

53. Documents of the Working Group on General Principles of Criminal Law, Working Paper on article 23, paragraph 5 and 6, UN doc. A/ Conf. 183/C.1/WGGLP/L.5/Rev.2, July 3, 1998.

54. Alien Tort Statute, 28 U.S.C. §1350 (1948).

55. *Sosa v. Alvarez-Machain*, 542 U.S. 692 at 712 (2004).

56. See *Presbyterian Church of Sudan v. Talisman Energy*, 582 F.3d 244 (2d Cir. 2009); *Romero v. Drummond Company, Inc.*, 552 F.3d 1303 (11th Cir. 2008).

57. *Kiobel v. Royal Dutch Petroleum*, 621 F.3d 111 (2d Cir. 2010).



the United States, and that is the determinative factor under both U.S. and international law. The plaintiffs in *Kiobel* have asked the U.S. Supreme Court to review that decision. Regardless of that one decision, the creation of laws similar to the ATS in other countries would certainly be a move in the right direction. Such statutes must be clear that they cover corporate as well as individual actors.

An exception to the generally national nature of civil liability is the UN Compensation Commission, which the Security Council established in 1991 to process claims and pay compensation for losses resulting from Iraq's invasion and occupation of Kuwait.<sup>58</sup> Of interest, the commission permitted claims from individuals, corporations, and governments. Such rights given to corporations should come with a reciprocal duty to address claims directed at them from victims of human rights abuses. The Compensation Commission remains an anomaly, however, making it difficult to ensure the consistent global application of legal remedies.

The creation of international civil liability procedures will establish the criteria needed to hold corporate actors accountable. This is especially important where domestic civil mechanisms are unable to hold corporations accountable. There should be active discussion on how to create such liability and serious plans to begin work on a legal mechanism.

## 5.2 United Nations Mechanisms

On June 16, 2011, the UNHRC adopted a resolution establishing a working group to focus on promoting implementation of the Guiding Principles, developing a regular dialogue on corporate accountability, and identifying possible areas of cooperation with governments.<sup>59</sup> There are some positive aspects about the manner in which the UNHRC has chosen to continue this mandate, but since it has focused further activity on dissemination of the Guiding Principles, problems remain with its approach. Therefore the positive aspects and criticisms of the principles addressed above are applicable to the assessment of this latest action.

On the positive side is the action by the UNHRC to create the working group to address human rights concerns involving transnational corporations and other business enterprises. The council also established a forum on business and human rights that will meet annually, for two days. These actions will allot the issue needed time and raise its visibility. The working group involves the participation of five members selected from all regions of the world, increasing the possibility that a broad and independent perspective will be included in the work on the mandate. Further, a forum created under the guidance of the working group will offer an additional opportunity for all players to add their input on the subject since it is open to governments, UN bodies, corporations, and other stakeholders.

The UNHRC endorsed the Guiding Principles, but noted that despite the role that they may play in »providing comprehensive recommendations for the implementation of the United Nations Protect, Respect and Remedy Framework«, they do not foreclose other »long-term development, including further enhancement standards«.<sup>60</sup> Thus, recognition is given to the need to develop enforcement standards: In paragraph 4(e), the working group is requested »[t]o continue to explore options and make recommendations at the national, regional and international levels for enhancing access to effective remedies available to those whose human rights are affected by corporate activities«. Despite the problems with the Guiding Principles, their endorsement by the council provides an additional source for corporate accountability at the international level.

The mandate of the working group revolves around the dissemination, good practices, and support of the Guiding Principles. Considering the concerns discussed above, this focus is regrettable. Without the mandate to continue the gathering and drafting of accountability standards, further development of soft law standards might be hampered. The request that the working group explore remedies at all levels, however, leaves a great deal of leeway for further development in the third prong of the framework.

An early draft of the resolution provided that the working group consider complaints of victims related to the violation of human rights. This development had the

58. UN Compensation Commission, »Introduction«, <http://www.uncc.ch>.

59. UN Human Rights Council, »Human Rights and Transnational Corporations and Other Business Enterprises«, UN doc. A/HRC/17/L.17/Rev.1.

60. *Ibid.*, para. 4.



possibility of being an important step toward starting the process of accountability and remedies; it is commonly included in the thematic mandates of the UNHRC. Unfortunately, this part of the mandate was deleted in the final draft submitted to the UNHRC, though on a positive note, the mandate leaves open the possibility of country visits, which could possibly include meetings with victims. It remains unclear how much funding will be made available to the working group and the forum. Without adequate financial support, it will be difficult for them to carry out the terms of the mandate and maintain visibility for the issue in the international arena.

Although it is unfortunate that the continued oversight by the UNHRC on this topic will initially focus on the dissemination and promotion of the Guiding Principles, a great deal of room remains for constructive developments toward holding transnational corporations and other business enterprises accountable for human rights violations. It will be up to the concerned players, including governments, business, and civil society, to continue their involvement to ensure that this happens.

## 6. Putting the Pieces Together

Without mandatory or legal mechanisms in place, a culture of impunity may prevail among corporations and their approach to human rights violations. The international community needs to seriously consider the viability of creating and implementing international legal mechanisms, including accountability and oversight instruments, and providing effective remedies for victims aggrieved by business impacts. Internal industry mechanisms are no substitute for independent judicial mechanisms. The threat of legal recourse need not be targeted at well-intentioned corporate actors, but rather at the worst offenders: those engaged in or acting in complicity with human rights violations. Further, such mechanisms would create a level playing field across culture and context, ensuring that all businesses are held to the same standards in their practices. Many corporations have raised this particular issue.

The most comprehensive mechanism that the international community may be able to agree on at this time may be the creation of an international legal instrument obligating corporate enterprises and actors to abide by a

specific human rights standard for their business operations. In »Recommendations on Follow-up to the Mandate«, Ruggie suggests that a multilateral treaty might be appropriate for addressing circumstances »involving gross human rights abuses, potentially amounting to the level of international crimes«. <sup>61</sup> He has argued that it is difficult for the human rights regime to function in situations of conflict or widespread violence and that states have different interpretations of how these standards apply to business entities in such situations. <sup>62</sup> Ruggie goes on to suggest that the UN Convention Against Corruption would be an appropriate model for such an instrument. <sup>63</sup> The convention highlights several methods of dealing with corruption, including adopting preventative measures, criminalizing corrupt behavior, and establishing international cooperation between states. <sup>64</sup> These methods can also be directly applicable to an international corporate accountability treaty, so such provisions should be addressed in that regard.

A treaty at this juncture would be able to effectively incorporate the wide range of soft law instruments currently available, such as the OECD Guidelines for Multinational Enterprises, the UN Global Compact, and the Guiding Principles themselves, and build upon the work already done in relation to corporate accountability. It could further expand those ideas by creating mandatory, hard law addressing all aspects of business operations. An effective treaty would also include mandatory government oversight of corporate activity, a governing body to monitor states' implementation of treaty obligations, and human rights guidelines that corporations would be obligated to follow as well as procedures that address specific industries, such as agriculture or manufacturing. Most important, the treaty should create a body to provide clear complaint procedures and readily available responses to victims of human rights abuses. Much like the redress mechanism that should be incorporated into the Guiding Principles as mentioned earlier, the treaty would centralize complaints and provide an easily accessible source of remedy for victims. This

61. »Mandate of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, Recommendations on Follow-up to the Mandate«, February 11, 2011, 5.

62. *Ibid.*, 4.

63. *Ibid.*, 5.

64. UN General Assembly, United Nations Convention Against Corruption, UN doc. A/58/422, October 31, 2003; entered into force, December 14, 2005.



should be the main feature of such a treaty because no other international instrument is currently able to provide such a forum.

Overall, these policy recommendations are examples of how much further the corporate accountability movement needs to go to effectively hold business enterprises and all those involved in their operations liable for the human rights abuses that they commit. While some recommendations are certainly more feasible than others at this time, they should all be progressively considered as this movement continues to progress. Without laying the legal framework now to prevent corporate actors from further violating human rights, the potential for increased harm and threats to human rights only increases. With the culmination of Ruggie's work and mandate, the international community must continue actively working on developing meaningful corporate accountability measures that ensure the promotion and protection of human rights.



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