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Beyond Ruggie’s Guiding Principles on Business and Human Rights: Charting an Embrasive Approach to Corporate Human Rights Compliance

ROBERT C. BLITT*

Abstract

To what extent should or must a corporation contemplate international human rights law? Following a brief discussion of the increasing influence of transnational corporations and global business transactions, as well as the growth of the international human rights system, this Article uses the 2011 United Nations’ *Guiding Principles on the effective prevention of, and remedy for, business-related human rights harm* as a jumping-off point for addressing the most recent developments related to identifying and regulating business-related human rights practices. After identifying an emerging divide between endorsement and criticism of the Guiding Principles, the Article concludes with a forward-looking view, arguing that although the Guiding Principles may represent a good starting point, corporations genuinely concerned with ensuring the effective minimization or elimination of exposure to potentially embarrassing and costly human rights liabilities should be prepared to apply a more rigorous approach.

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* Associate Professor of Law, University of Tennessee College of Law. The author would like to thank John Ruggie for providing feedback on an early draft of this Article as well as John Bradley and the staff of the *Texas International Law Journal* for their rapid and able editorial guidance in bringing this final version to press. The author also acknowledges the generous support of the University of Tennessee College of Law for funding the research associated with this Article.

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INTRODUCTION

Your corporation, Minerals R Us, is confronted with public protests and lawsuits in various countries around the world five years into an otherwise profitable merger with Lior Minerals Inc., a company headquartered in Gisserville, the capital of Lioria.¹ While Minerals R Us is now the primary supplier of iMineral, a key component necessary for powering all forms of modern gadgetry, it appears that Lior Minerals Inc. managed to extract the coveted iMineral—a complex and dangerous process—only after displacing an indigenous tribe and employing children based on racial preference, all the while preventing unionization through threats and the imposition of onerous contractual terms that essentially relegated employees to forced laborers.

At the time of the merger, no one thought to scrutinize whether Lior Minerals’ business practices violated human rights. Likewise, the cigar-chomping CEO of Minerals R Us, Richard McKnight, never bothered to travel to Lioria to view employee conditions firsthand because the country consistently ranked near the top of the Failed States Index and was notorious for its widespread violence, which particularly targeted foreigners. During discussions leading up to the merger, McKnight was heard to remark—to affirmative nods from the board of directors—“Mine baby, mine!” and “Who gives a rat’s ass how it gets done. Just do it.”

1. The names, places, and minerals referenced here are purely hypothetical and intended only for the sake of example.

While this scenario may be illustrative of past standard operating procedures for many corporations, and arguably may persist in some boardrooms today, the takeaway message intended from this Article cautions counsel against ignoring human rights liabilities at their own, their principals', and indeed even their corporation's peril. This advice is premised on the dynamic and increasingly socially conscious global arena within which businesses operate, and more specifically, on the emerging international framework intended to address business-related human rights harms. Following a brief discussion of the increasing influence of transnational corporations (TNCs)² and global business transactions, as well as the growth of the international human rights system, this Article will discuss the most recent developments related to identifying and regulating business-related human rights practices. The departure point for this analysis will be the March 2011 Guiding Principles on Business and Human Rights,³ the culmination of John Ruggie's six-year effort as the Special Representative of the United Nations Secretary-General (SRSG) on the issue of human rights and transnational corporations and other business enterprises.⁴

This report, while heralded as a milestone, is only a departure point for the simple reason that it underestimates the rapidity in which the human rights environment for businesses is unfolding. Human rights advocates have already expressed concern that the SRSG's Guiding Principles do not go far enough.⁵ In fact, the principles set a minimal-expectation bar for businesses, promulgating a series of non-binding "lowest common denominator" recommendations that arguably neglect a more complex reality.⁶ Based on a consideration of the emerging divide between endorsement and criticism of the Guiding Principles, I conclude with a forward-looking view, arguing that although the principles may represent a good starting point, corporations genuinely concerned with ensuring the effective minimization or elimination of exposure to potentially embarrassing and costly human rights liabilities should be prepared to apply a more rigorous approach.

2. For the purposes of this Article, I use the terms TNC and multinational corporation (MNC) interchangeably. See Peter F. Drucker, *The Global Economy and the Nation-State*, 76 FOREIGN AFF. 159, 167-68 (1997) (noting that more multinational corporations are becoming transnational in nature).

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

4. Shortly after his mandate as Special Representative ended, Mr. Ruggie accepted a Senior Advisor position with Foley Hoag LLP's Corporate Social Responsibility (CSR) practice. See John G. Ruggie, FOLEY HOAG LLP, <http://www.foleyhoag.com/People/Specialists/Ruggie-John.aspx> (last visited Dec. 10, 2012) (describing Ruggie's position at Foley Hoag LLP).

5. See, e.g., *UN Human Rights Council: Weak Stance on Business Standards*, HUM. RTS. WATCH (June 16, 2011), <http://www.hrw.org/en/news/2011/06/16/un-human-rights-council-weak-stance-business-standards> (stating that various organizations have expressed concern that Ruggie's Guiding Principles are weaker than established human rights norms).

6. See David Bilchitz, *The Ruggie Framework: An Adequate Rubric for Corporate Human Rights Obligations?*, 12 SUR INT'L J. HUM. RTS. 199, 216 (2010), available at http://www.surjournal.org/eng/contendos/getArtigo12.php?artigo=12,artigo_10.htm (explaining that, in an effort to find consensus, Ruggie undermined basic human rights standards by failing to state that corporations are bound to these standards under international law).

I. A BRIEF HISTORY OF THE RISE OF TRANSNATIONAL CORPORATIONS, THE GLOBAL ECONOMY, AND INTERNATIONAL HUMAN RIGHTS

A. *The Rise of the Transnational Corporation*

While the origins of the modern-day TNC can be traced back to the East India Company⁷ or even to ancient Rome,⁸ it was not until the turn of the 20th Century that an increasingly large number of enterprises began developing a transnational structure. This pattern continued through the era leading up to the Second World War, and in the period that followed expanded at an unprecedented pace, fueled by communication and transportation advances and associated cost savings brought about by “containerized freight, airborne deliveries and the telex.”⁹

In the 1960s, MNCs came to be regarded “as more progressive, dynamic, [and] geared to the future than provincial companies which avoid foreign frontiers and their attendant risks and opportunities.”¹⁰ Indeed, this period represented a historical “high-water mark in the spread of the transnational networks of United States-based industrial enterprises,” with foreign affiliates reaching an all-time high.¹¹ By the early 1990s, virtually all industrialized countries provided a base for numerous MNCs, which were fast becoming “the dominant form of organization responsible for the international exchange of goods and services.”¹² Likewise, the pace and scale of mergers also began growing exponentially during this period.¹³

In the wake of this extraordinary pattern of growth and globalization, TNCs found themselves in the startling position of outperforming the national economies of states¹⁴—a dramatic turn of events considering that hitherto nation-states had been considered the primary, if not exclusive, actors within the international order.¹⁵ To be certain, the nation-state’s iron-fisted grip on sovereignty has been challenged from other directions,¹⁶ but the global rise of TNCs is unique insofar as the value-added

7. NICK ROBINS, *THE CORPORATION THAT CHANGED THE WORLD: HOW THE EAST INDIA COMPANY SHAPED THE MODERN MULTINATIONAL* x–xii (2006).

8. STANLEY BING, *ROME, INC.: THE RISE AND FALL OF THE FIRST MULTINATIONAL CORPORATION* xv (2006).

9. Raymond Vernon, *Transnational Corporations: Where are They Coming From, Where are They Headed?*, 1 *TRANSNAT’L CORPS.* 7, 10 (1992).

10. Howard V. Perlmutter, *The Tortuous Evolution of the Multinational Corporation*, *COLUM. J. WORLD BUS.*, Jan-Feb 1969, at 9, 10.

11. Vernon, *supra* note 9, at 12.

12. *Id.* at 7.

13. *Id.* at 20.

14. Consider Apple Inc.’s \$76 billion pile of cash, which in mid-2011 outstripped U.S. cash reserves. Matt Hartley, *U.S. Balance Now Less Than Apple Cash*, *FIN. POST* (July 28, 2011, 4:56 PM), <http://business.financialpost.com/2011/07/28/u-s-balance-now-less-than-apple-cash/>.

15. The Charter of the United Nations reaffirms this traditional view by restricting its membership exclusively to “other peace-loving states.” U.N. Charter art. 4, para. 1. The modern state system typically dates to the Treaty of Westphalia in 1648. Daud Hassan, *The Rise of the Territorial State and The Treaty of Westphalia*, 9 *Y.B. N.Z. JURIS.* 62, 69 (2006).

16. See Robert Charles Blitt, *Who Will Watch the Watchdogs? Human Rights Nongovernmental Organizations and the Case for Regulation*, 10 *BUFF. HUM. RTS. L. REV.* 261, 304 n.192 (2004) (offering examples of non-governmental organizations making critical statements that have posed a challenge to the sovereignty of some nation-states, such as Sudan, in the past).

activities of the 100 largest corporations have grown faster than those of nation states, indicating their critical importance in the global economy.¹⁷ As if to underscore the point, studies estimate that TNCs today make up one-third to one-half of the world's 100 largest economic entities.¹⁸ In the face of this economic might, it seems reasonable that Howard V. Perlmutter, writing in the 1960s, called "the senior executives engaged in building the geocentric enterprise . . . the most important social architects of the last third of the twentieth century. For the institution they are trying to erect promises a greater universal sharing of wealth and a consequent control of the explosive centrifugal tendencies of our evolving world community."¹⁹

Despite its 1960s sanguinity—and putting aside that the phrase "geocentric enterprise" conjures up a discarded script from *Mad Men* (CEO of Minerals R Us: "We need some creative ideas for cleaning up our shabby corporate image." Sterling Cooper Copywriter: "How does 'geocentric enterprise' grab you?")—Perlmutter's vision evidences that even early in their modern development, TNCs, for better or worse, exhibited a powerful potential capable of displacing the ability of government to exert influence over their actions.²⁰ If anything, the last fifty years have made it clear that states no longer hold a monopoly on manipulating the international system, and moreover, that corporate and state interests are not necessarily always *simpatico*.²¹ Indeed, much like states, many TNCs today "have the resources and power both to perpetrate and to escape responsibility" for human rights abuses.²²

Partly because of this unfolding new reality, a parallel rising emphasis on greater accountability now confronts these corporate actors. As writer Charles Handy has observed:

If we haven't bothered much about these things in the past, it is probably because we never thought of businesses as political institutions, but rather as engines and instruments of commerce, as machines not communities. We did not, therefore, apply the same rules to them as we would to a

17. Press Release, U.N. Conference on Trade and Development, *Are Transnationals Bigger than Countries?*, U.N. Press Release TAD/INF/PR/47 (Aug. 12, 2002) [hereinafter UNCTAD Press Release]; see also SARAH ANDERSON & JOHN CAVANAGH, INSTITUTE FOR POLICY STUDIES, *TOP 200: THE RISE OF CORPORATE GLOBAL POWER* i (2000) ("The Top 200 corporations' sales are growing at a faster rate than overall global economic activity. Between 1983 and 1999, their combined sales grew from the equivalent of 25.0 percent to 27.5 percent of World GDP.").

18. UNCTAD Press Release, *supra* note 17.

19. Perlmutter, *supra* note 10, at 18. According to Perlmutter, the geocentric enterprise offered "an institutional and supra-national framework which could conceivably make war less likely, on the assumption that bombing customers, suppliers and employees is in nobody's interest." *Id.*

20. Vernon, *supra* note 9, at 27.

21. Whereas the bottom line for many TNCs is maximizing share price, nation-states ideally seek to improve material welfare as a whole while keeping the peace. See Celia Wells & Juanita Elias, *Catching the Conscience of the King: Corporate Players on the International Stage*, in *NON-STATE ACTORS AND HUMAN RIGHTS* 141, 145–50 (Philip Alston ed., 2005) (comparing the traditional role of international law in a "state-centric" system, where the motivation is the protection of citizens, to the altered role of international law where the state sovereignty is challenged by MNCs interested in low production costs effectuated by minimal human rights standards).

22. *Id.* at 142; see also Claudio Grossman & Daniel D. Bradlow, *Are We Being Propelled Towards A People-Centered Transnational Legal Order?*, 9 AM. U.J. INT'L L. & POL'Y 1, 8 (1993) ("The fact that they have multiple production facilities means that TNCs can evade state power and the constraints of national regulatory schemes.").

nation-state, where matters of human rights, free speech and the responsibility of governors to the governed would be argued about and even fought over.²³

B. International Human Rights Law: From Humble, Non-binding Beginnings

The 1948 Universal Declaration of Human Rights (UDHR) is often credited as the first modern acknowledgment on the part of states that international law can in fact serve as a source of rights and responsibilities for individual as well as state actors.²⁴ While the United Nations (U.N.) General Assembly voted unanimously to endorse the UDHR, it did so with the express understanding that its content constituted an aspirational statement of human rights principles, rather than a binding treaty capable of establishing legally enforceable obligations on the part of states.²⁵ In the words of Eleanor Roosevelt, chairperson of the international commission responsible for drafting the UDHR, it “was not a treaty or international agreement and did not impose legal obligations; it was rather a statement of basic principles of inalienable human rights setting up a common standard of achievement for all peoples and all nations.”²⁶

Despite the seemingly constrained ambition of the UDHR, binding international law has a funny way of being created out of the customary (distinct from contractual or treaty) practices of states, provided that such practices are readily identifiable as being widespread, consistent, and motivated by a sense of legal obligation.²⁷ And this is precisely what has transpired in the case of the rights expressed in the UDHR. Soon after the UDHR’s passage, the International Court of Justice reasoned that its provisions reflected guiding principles of law and basic tenets of humanity.²⁸ By the 1970s, evolving state practice allowed the renowned international law scholar Ian Brownlie to acknowledge that “the indirect legal effect of the Declaration is not to be underestimated and it is frequently regarded as a part of the ‘law of the United Nations.’”²⁹ Closer to home, the United States Court of Appeals for the Second Circuit in 1980 observed that the prohibition against torture

23. Charles Handy, *The World in 1997: Will Your Company Become a Democracy?*, ECONOMIST, Jan. 10, 2011, available at <http://www.economist.com/node/17878558>.

24. Margaret R. Somers & Christopher N.J. Roberts, *Toward a New Sociology of Rights: A Genealogy of “Buried Bodies” of Citizenship and Human Rights*, 4 ANN. REV. L. SOC. SCI. 385, 391 (2008) (quoting JUDITH BLAU & ALBERTO MONCADA, HUMAN RIGHTS: BEYOND THE LIBERAL VISION 33 (M.D. Lanham ed., 2005)) (The UDHR is “today recognized as perhaps the ‘fundamental source of inspiration for international efforts to promote and protect human rights and fundamental freedoms, and . . . the canonical reference for all other human rights instruments.’”).

25. See *The Foundation of International Human Rights*, UNITED NATIONS, http://www.un.org/en/documents/udhr/hr_law.shtml (last visited June 24, 2012) (noting that the UDHR was originally a commitment to upholding dignity and justice that was slowly translated into law over the years).

26. 1948 U.N.Y.B. 527, U.N. Sales No. 1950.I.II [hereinafter U.N.Y.B.]; *History of the Document*, UNITED NATIONS, <http://www.un.org/en/documents/udhr/history.shtml> (last visited June 24, 2012).

27. See *Corfu Channel Case (U.K. and N. Ir. v. Alb.)*, 1949 I.C.J. 4, at 22 (Apr. 9) (“Such obligations are based, not on the Hague Convention of 1907 . . . but on certain general and well-recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war; the principle of the freedom of maritime communication; and every State’s obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States.”).

28. *Id.*

29. IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 559 (7th ed. 2008).

had “become part of customary international law, as evidenced and defined by the [UDHR].”³⁰

In an even broader recognition of this unfolding process, others have concluded that many of the UDHR's provisions “have become incorporated into customary international law, which is binding on all states.”³¹ The U.N. itself confirmed this evolutionary process on the occasion of the UDHR's 60th anniversary, when it recognized that the document's aspirational commitment

[o]ver the years . . . has been translated into law, whether in the forms of treaties, customary international law, general principles, regional agreements and domestic law, through which human rights are expressed and guaranteed. Indeed, the UDHR has inspired more than 80 international human rights treaties and declarations, a great number of regional human rights conventions, domestic human rights bills, and constitutional provisions, which together constitute a comprehensive legally binding system for the promotion and protection of human rights.³²

Ultimately, the UDHR was only the opening salvo in the rapid development of a binding system of international human rights law that continues to expand and entrench itself today in international, regional, and domestic contexts. Beginning with the lynchpin covenants governing both civil and political rights and economic, social, and cultural rights³³ (together with the UDHR, sometimes referred to as the International Bill of Human Rights), the international community has drafted and ratified a total of nine core international human rights treaties, with the most recent—addressing enforced disappearance—entering into force at the end of 2010.³⁴ Among other things, these regimes require state reporting on implementation and establish committees of independent experts responsible for engaging with state parties and providing authoritative interpretations of treaty provisions.³⁵

30. *Filartiga v. Pena-Irala*, 630 F.2d 876, 882 (2d Cir. 1980).

31. Hurst Hannum, *The UDHR In National and International Law*, 3 HEALTH & HUM. RTS. 144, 145 (1998).

32. *The Foundation of International Human Rights Law*, UNITED NATIONS, <http://www.un.org/events/humanrights/2008/ihr.html> (last visited June 21, 2012).

33. International Covenant on Civil and Political Rights [ICCPR], G.A. Res. 2200A (XXI), U.N. Doc. A/6316 (Dec. 16, 1966) (entered into force Mar. 23, 1976); International Covenant on Economic, Social and Cultural Rights [ICESCR], G.A. Res. 2200A (XXI), U.N. Doc. A/6316 (Dec. 16, 1966) (entered into force Jan. 3, 1976).

34. *Human Rights Treaty Bodies*, OFF. U.N. HIGH COMMISSIONER HUM. RTS., <http://www2.ohchr.org/english/bodies/treaty/index.htm> (last visited June 22, 2012). In addition to the International Convention for the Protection of All Persons from Enforced Disappearance (CPED) and the covenants noted above (ICCPR and ICESCR), the core treaties consist of the following: The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) (1965); the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) (1979); the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment (CAT) (1984); the Convention on the Rights of the Child (CRC) (1989); the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW) (1990); and the Convention on the Rights of Persons with Disabilities (CRPD) (2006). See *International Law*, OFF. U.N. HIGH COMMISSIONER HUM. RTS., <http://www2.ohchr.org/english/law/index.htm> (last visited June 24, 2012) (providing a list and links to the full text of the core international human rights instruments).

35. *Human Rights Treaty Bodies*, *supra* note 34.

Even more profoundly, the European regional human rights system has established a judicial mechanism empowered to hear individual complaints filed against state parties and issue binding judgments. Within this framework, the European Court of Human Rights serves as the final “supranational” court of appeal on matters relating to the European Convention for the Protection of Human Rights and Fundamental Freedoms—a treaty premised on “tak[ing] the first steps for the collective enforcement of certain of the rights stated in the [UDHR].”³⁶ Similar efforts and systems have evolved in other geographic regions including the Americas and Africa with varying degrees of success.³⁷

Finally, in the domestic context, the promise of the UDHR has informed the drafting of national constitutions and served as a touchstone for defining human rights protections for over half a century.³⁸ In this regard, its influence has been broad and far-reaching, coloring the constitutional outcomes in a diverse array of countries, including New Zealand, Iraq, Afghanistan, South Africa, and all the states of the former Soviet Union and Warsaw Pact, to name a few.³⁹

From this brief survey, it becomes evident that the powerful logic, appeal, and moral currency of human rights continues to gain ground, permeating virtually every aspect of our lives, from the global to the local. Human rights have served as the rallying cry for “Arab Spring” protestors braving confrontation with their governments in the streets,⁴⁰ and violations of these rights have provided the basis for the International Criminal Court’s indictment against the now-deceased Libyan strongman Muammar Gaddafi.⁴¹ In a parallel development, the human rights discourse—long considered applicable only to the relationship between governments and the governed—is increasingly being invoked as a reference point for relationships between individuals and corporate actors. For example, the 1979 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) foreshadowed this spillover effect by requiring state parties *inter alia* “[t]o take all appropriate measures to eliminate discrimination against women *by any person, organization or enterprise*” (emphasis added).⁴² To gauge how far-reaching and all-permeating this phenomenon has become, consider that all of the following have potential human rights implications: the coffee you drink,⁴³ the clothing you

36. European Convention for the Protection of Human Rights and Fundamental Freedoms pmb., *opened for signature* Nov. 4, 1950, E.T.S. No. 005 (entered into force Sept. 3, 1953).

37. See Dinah Shelton, *International Human Rights Law: Principled, Double, or Absent Standards*, 25 LAW & INEQ. 467, 476–79 (2007) (discussing the UDHR and subsequent human rights treaties in the Americas); Nsongurua J. Udombana, *Mission Accomplished? An Impact Assessment of the UDHR in Africa*, 30 HAMLIN J. PUB. L. & POL’Y 335, 336–38 (2008) (noting the impact of the UDHR on organizational efforts in Africa to improve human rights and their effectiveness).

38. A.E. Dick Howard, *A Traveler from an Antique Land: The Modern Renaissance of Comparative Constitutionalism*, 50 VA. J. INT’L L. 3, 18 (2009).

39. Robert C. Blitt, *Should New Bills of Rights Address Emerging International Human Rights Norms? The Challenge of ‘Defamation of Religion,’* 9 NW. U. J. INT’L HUM. RTS. 1, 2 (2010).

40. Shadi Mokhtari, *The Middle East and Human Rights: Inroads Towards Charting Its Own Path*, 10 NW. U. J. INT’L HUM. RTS. 194, 195 (2012).

41. Prosecutor v. Muammar Mohammed Abu Minyar Gaddafi, Case No. ICC-01/11, Warrant of Arrest, para. 3 (June 27, 2011), <http://www.icc-cpi.int/iccdocs/doc/doc1099321.pdf>.

42. Convention on the Elimination of All Forms of Discrimination against Women art. 2(e), G.A. Res. 34/180, U.N. Doc. A/RES/34/46 (Sept. 3, 1981) [hereinafter CEDAW].

43. See *As the Global Coffee Crisis Worsens, a Human Rights Organization Launches a Grassroots Campaign Demanding that Followers Start Offering Fair Trade Coffee*, DEMOCRACY NOW (Dec. 24, 2001), http://www.democracynow.org/2001/12/24/as_the_global_coffee_crisis_worsens (discussing the global crisis

wear,⁴⁴ your Internet search results,⁴⁵ the computer you buy,⁴⁶ and the diamonds encrusting the whip Lady Gaga reportedly presented Beyoncé for her 29th birthday.⁴⁷

Thus, the story of the UDHR is the story of how aspirational non-binding principles, or “soft law,” can evolve continually over time into more durable and enforceable “hard law”—either in the form of a written treaty or in the consolidation of customary international practice. As I argue below, this is the most important lesson for corporate counsel to internalize when contemplating the evolving relationship between business and human rights. Put simply, although SRSR Ruggie’s freshly minted Guiding Principles might strike one as plainly non-binding and aspirational today, these same principles can and will find surreptitious ways of growing up and becoming enforceable international norms that may carry serious repercussions for corporations, officers, and ill-prepared shareholders.

created by the collapse in coffee prices and human rights campaigns demanding free trade coffee); *see also* Sarah Lyon, *Fair Trade Coffee and Human Rights in Guatemala*, 30 J. CONSUMER POL’Y 241, 242–43 (2007) (arguing that “fair trade consumption plays an important role in the realization of human rights”); *Global Human Rights Statement*, STARBUCKS COFFEE CO., 1, <http://assets.starbucks.com/assets/1d7de46ff5f845d89c01a81bebdbdb59.pdf> (last visited July 25, 2012) (manifesting Starbucks’s desire to “uphold the provision of basic human rights and to eliminate discriminatory practices”).

44. *See* Kathy Marks, *Exposed: The Reality Behind London's 'Ethical' Olympics*, THE INDEPENDENT (Apr. 14, 2012), <http://www.independent.co.uk/news/world/asia/exposed-the-reality-behind-londons-ethical-olympics-7644013.html> (discussing allegations of widespread violations of workers’ rights in Indonesian factories contracted to manufacture Olympics apparel for Adidas).

45. *See* Amy Schatz, *Web Firms Under Fire to Protect Human Rights*, WALL ST. J. (Mar. 2, 2010), <http://online.wsj.com/article/SB10001424052748704548604575097603307733826.html> (discussing Google’s decision to “stop censoring search results in China after the company’s servers came under a cyber-attack there”); David Drummond, *A New Approach to China: An Update*, Mar. 22, 2010, OFFICIAL GOOGLE BLOG (Mar. 22, 2010, 2:03 PM), <http://googleblog.blogspot.com/2010/03/new-approach-to-china-update.html> (explaining Google’s attempt to balance the demands of the Chinese government and resultant cyber-attacks on human rights activists with the company’s desire to offer uncensored search results). Shortly after Google transferred its service to Hong Kong as a result of these cyber attacks, Microsoft willingly stepped in to strike a deal with Baidu, China’s leading search provider, wherein it would supply the Chinese company with censored web search services in English. Matt Warman, *Microsoft Bing in Search Deal with China's Baidu*, TELEGRAPH (July 4, 2011, 5:09 PM), <http://www.telegraph.co.uk/technology/microsoft/8616260/Microsoft-Bing-in-search-deal-with-Chinas-Baidu.html>.

46. *See Fair Labor Association Begins Inspections of Foxconn*, APPLE (Feb. 13, 2012, 3:32 PM), <http://www.apple.com/pr/library/2012/02/13Fair-Labor-Association-Begins-Inspections-of-Foxconn.html> (discussing Apple’s decision to allow voluntary audits of its factories by the Fair Labor Association).

47. *Whip, Whip Hooray*, THE SUN (Sept. 7, 2010) <http://www.thesun.co.uk/sol/homepage/showbiz/bizarre/3127396/Cracking-birthday-present-for-Beyonce-from-GaGa-pal.html>. The author hazards a guess that Gaga did not insist that the diamonds be certified conflict-free. Information about conflict diamonds is available at *Conflict Diamonds: Sanctions and War*, U.N. DEP’T PUB. INFO. (Mar. 21, 2001), <http://www.un.org/peace/africa/Diamond.html>. For information on the Kimberley Process diamond certification system, *see* KIMBERLEY PROCESS, http://www.kimberleyprocess.com/home/index_en.html (last visited June 30, 2012) (“The Kimberley Process (KP) is a joint government, industry and civil society initiative to stem the flow of conflict diamonds—rough diamonds used by rebel movements to finance wars against legitimate governments.”). Critics debate whether or not the definition of a conflict diamond should be expanded. *See, e.g.*, Sandra Nyaira, *Kimberley Process Meeting Ends Without Consensus on Zimbabwe Diamonds*, VOICE AM. (June 23, 2011), <http://www.voanews.com/zimbabwe/news/Kimberley-Process-Meeting-Ends-Without-Consensus-on-Zimbabwe-124439624.html> (reporting on disagreements during a recent meeting regarding Zimbabwe conflict diamonds).

II. CORPORATIONS AND HUMAN RIGHTS LIABILITY—A WORK IN PROGRESS

A. Overview

A rich and expansive literature debating the theoretical and practical implications of ascribing liability for human rights violations to corporate entities has emerged during the past twenty years.⁴⁸ However, the following section is concerned primarily with SRSR Ruggie's 2011 report to the U.N. Human Rights Council (H.R.C.), which sets out guiding principles for addressing the relationship between business and human rights. The justification for this narrow focus flows from the fact that Ruggie's effort, encompassing a lengthy and inclusive consultation process, has garnered U.N. endorsement and therefore stands as the most internationally authoritative statement in this area. Despite this pedigree—or perhaps because of it—the Ruggie report has also gained its share of detractors, as will be discussed below.

The SRSR's appointment dates back to 2005,⁴⁹ following a contentious and ultimately unsuccessful first attempt by a separate U.N. initiative to establish TNC human rights obligations along the same baseline as is applicable to states.⁵⁰ After concluding that little in the way of consistent standards or practices governed TNCs in this area, the SRSR in 2008 recommended a three-pillar framework for improving the existing fragmentary and inconsistent approach: "Protect, Respect and Remedy."⁵¹ In summary, this framework calls for:

Preserving "the [S]tate duty to protect against human rights abuses by third parties, including business enterprises, through appropriate policies, regulation, and adjudication."

48. See, e.g., Anthony D'Amato, *Are Human Rights Good For International Business?*, 1 NW. J. INT'L L. & BUS. 22, 24 (1979) (discussing possible inconsistencies between multinational investments and human rights); Diane F. Orentlicher & Timothy A. Gelatt, *Public Law, Private Actors: The Impact of Human Rights on Business Investors in China*, 14 NW. J. INT'L L. & BUS. 66, 68 (1993) (positing that businesses investing in China are responsible for ensuring that their actions do not "contribute to the systematic denial of human rights"); HUMAN RIGHTS STANDARDS AND THE RESPONSIBILITY OF TRANSNATIONAL CORPORATIONS 32–34 (Michael K. Addo ed., 1999) (attempting to define a framework for transnational corporate responsibility for human rights through a collection of essays, which were presented at the University of Exeter); Beth Stephens, *The Amoralty of Profit: Transnational Corporations and Human Rights*, 20 BERKELEY J. INT'L L. 45, 48 (2002) (addressing the uncontrolled human rights danger multinationals pose as analyzed in light of the Holocaust and other modern events); TRANSNATIONAL CORPORATIONS AND HUMAN RIGHTS 28 (Jedrzej George Frynas & Scott Pegg eds., 2003) ("In both practical and academic terms, the issues surrounding TNCs and human rights are fast proving themselves to be a growth market for the twenty-first century."); Peter Muchlinski, *Social and Human Rights Implications of TNC Activities in the Extractive Industries*, 18 TRANSNAT'L CORP. 125, 125 (2009) (discussing human rights violations linked to TNCs as they occur in the extractive industries). For additional reading, see generally *Getting Started Portal*, BUS. & HUM. RTS. RESOURCE CENTRE, <http://www.business-humanrights.org/GettingStartedPortal/15reports> (last visited July 7, 2012) (providing links to various resources on business and human rights).

49. Emeka Duruigbo, *Corporate Accountability and Liability for International Human Rights Abuses: Recent Changes and Recurring Challenges*, 6 NW. U. J. INT'L HUM. RTS. 222, 242 (2008).

50. *Id.*; U.N. ESCOR, Comm'n on Hum. Rts., *Economic, Social, and Cultural Rights: Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, pmb1., U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (Aug. 26, 2003).

51. *Guiding Principles*, *supra* note 3, at 3–4.

Requiring corporate respect for human rights under a due diligence standard intended to avoid “infringing on the rights of others and to address adverse impacts” involving the TNC; and

Enhancing “access by victims [of human rights violations] to effective remedy, both judicial and non-judicial.”⁵²

With a renewed mandate from the H.R.C., Ruggie moved to “operationalize” this framework by developing concrete and practical recommendations which he ultimately set forth in his March 2011 report, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*.⁵³ Shortly thereafter, the H.R.C. unanimously endorsed Ruggie’s report and moved to establish a working group dedicated, *inter alia*, to “effective and comprehensive dissemination and implementation of the Guiding Principles.”⁵⁴

B. The 2011 Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework

1. Key Parameters

There are two things the SRSG’s Guiding Principles do not accomplish. First, as is evident from the title, the principles do not aspire to create binding international law or impose obligations on TNCs. Rather, its “normative contribution lies . . . in elaborating the implications of existing standards and practices for States and businesses; integrating them within a single, logically coherent and comprehensive template; and identifying where the current regime falls short and how it should be improved.”⁵⁵ Similarly, the Guiding Principles do not offer a plug-and-play “tool kit” for identifying corporate human rights responsibilities. Instead, they proffer a sliding-scale approach for corporations based on their size and, ostensibly, their location.⁵⁶ In the words of the report, “When it comes to means for implementation . . . one size does not fit all.”⁵⁷

Inherent in the SRSG’s approach is a rejection—to the relief of many corporate boardrooms—of what he labels the “advocacy community’s” attempt “to lay on business itself all manner of responsibility for social outcomes.”⁵⁸ The purpose, therefore, of the Guiding Principles is to “clearly differentiate the respective roles of

52. *Id.* at 4.

53. *Id.*

54. *Id.* at 3; Human Rights Council Res. 17/4, Human Rights and Transnational Corporations and Other Business Enterprises, 17th Sess., June 16, 2011, U.N. Doc. A/HRC/17/L.17/Rev.1, para. 6(a) (July 6, 2011).

55. *Guiding Principles*, *supra* note 3, at 5. Here it is worth recalling Mrs. Roosevelt’s statement to delegates concerning the UDHR. U.N.Y.B., *supra* note 26, at 527.

56. *See Guiding Principles*, *supra* note 3, at 5 (“While the Principles themselves are universally applicable, the means by which they are realized will reflect the fact that we live in a world of 192 United Nations Member States, 80,000 transnational enterprises, 10 times as many subsidiaries and countless millions of national firms, most of which are small and medium-sized enterprises.”).

57. *Id.*

58. OECD, *Prof. John Ruggie on Businesses and Human Rights*, YOUTUBE (Dec. 10, 2010), <http://www.youtube.com/watch?v=dVDupBFJiqE>.

businesses and governments and make sure that they both play those roles.”⁵⁹ In other words, while government retains the exclusive responsibility for protecting and fulfilling human rights obligations, the litmus test for corporations under the Guiding Principles only inquires whether business enterprises *respect* human rights.⁶⁰

According to international law, the duty to respect requires that actors “refrain from interfering directly or indirectly with the enjoyment” of human rights.⁶¹ This “entails the prohibition of certain acts . . . that may undermine the enjoyment of rights.”⁶² Put more succinctly, it obligates actors “not to commit violations themselves.”⁶³ However, under the Guiding Principles, a further key distinction is drawn between obligation and responsibility. The responsibility to respect human rights “means that business enterprises should act with due diligence to avoid infringing on the rights of others and to address adverse impacts with which they are involved.”⁶⁴ Yet the term responsibility, as opposed to duty or obligation, is intended to indicate “that respecting rights is not currently an obligation that international human rights law generally imposes directly on companies, although elements of it may be reflected in domestic laws.”⁶⁵

With these clarifications, we are still left with an outstanding question: Are the Guiding Principles informed by a broad or narrow interpretation of human rights? The text of Guiding Principle 12 suggests the latter approach by framing “internationally recognized human rights . . . at a minimum, as those expressed in the International Bill of Human Rights [IBHR] and the principles concerning

59. *Id.*

60. *Guiding Principles*, *supra* note 3, at 13. To a lesser extent, the Guiding Principles also address certain responsibilities relating to remedying human rights violations. *See id.* at 22–27 (discussing various judicial, administrative, legislative, and other appropriate mechanisms for providing effective remedies when business-related human rights abuses occur).

61. Comm. on Econ., Soc. & Cultural Rights, Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights: General Comment No. 15 (2002): The Right to Water (Arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights), Nov. 11–29, 2002, para. 21, U.N. Doc. E/C.12/2002/11, ESCOR, 29th Sess. (Jan. 20, 2003). This is also referred to as a negative obligation since it informs states of what they must *not* do. JEAN-FRANÇOIS AKANDJI-KOMBE, COUNCIL OF EUROPE, HUMAN RIGHTS HANDBOOK NO. 7, POSITIVE OBLIGATIONS UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS: A GUIDE TO THE IMPLEMENTATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 11 (2007), available at <http://echr.coe.int/NR/rdonlyres/1B521F61-A636-43F5-AD56-5F26D46A4F55/0/DG2ENHRHAND072007.pdf>. Positive obligations require actors to take action. *Id.* The duty to respect typically comes alongside the obligation to protect against human rights abuses and the obligation to fulfill basic human rights. *International Human Rights Law*, OFF. U.N. HIGH COMMISSIONER HUM. RTS., <http://www.ohchr.org/en/professionalinterest/Pages/InternationalLaw.aspx> (last visited July 7, 2012).

62. MANFRED NOWAK, OFFICE OF THE U.N. HIGH COMMISSIONER FOR HUMAN RIGHTS, NO. 8, HUMAN RIGHTS HANDBOOK FOR PARLIAMENTARIANS 11 (2005). For example, with regard to education, governments are prohibited from impinging upon the liberty of parents “to establish private schools and to ensure the religious and moral education of their children in accordance with their own convictions.” *Id.*

63. AKANDJI-KOMBE, *supra* note 61, at 5.

64. *Guiding Principles*, *supra* note 3, at 4.

65. John Ruggie, U.N. Special Representative for the Sec’y Gen. for Bus. & Human Rights, *The U.N. “Protect, Respect and Remedy” Framework for Business and Human Rights*, 2 (Sept. 2010) [hereinafter *Framework for Business and Human Rights*]. The plain meaning of “responsibility” suggests a moral obligation to behave correctly or a thing that one is required to do, rather than a duty to which an actor is legally bound. OXFORD UNIVERSITY PRESS, OXFORD AMERICAN DICTIONARY 577 (1980). Although the final Guiding Principles do not provide explicit recognition that “responsibility” is distinct from “duty” or “obligation,” the difference is implied insofar as the term duty is invoked in regard to states only.

fundamental rights set out in the International Labour Organization's [ILO] Declaration on Fundamental Principles and Rights at Work."⁶⁶ From this wording, the Guiding Principles create the appearance of a baseline that leaves open to debate the larger spectrum of recognized rights, including, for example, norms established under CEDAW and CPMW⁶⁷—to name but two international treaties that may have immediate particular relevance to corporate practices.

Consideration of the Commentary accompanying Guiding Principle 12 goes some way towards alleviating the issue of which rights are to be respected. For example, it rightly acknowledges "business enterprises can have an impact on virtually the entire spectrum of internationally recognized human rights."⁶⁸ It also provides that, "[d]epending on circumstances, business enterprises may need to consider additional standards."⁶⁹ However, several concerns still persist with this formulation. First, it devalues the international community's ongoing commitment to elaborating a normative rights framework beyond the IBHR, as manifested in the entry into force of no fewer than seven additional "core international human rights treaties."⁷⁰ Part of the motivation for this ongoing endeavor may be attributed to the inadequate explication of norms as well as inattention to specific issues under the IBHR. For example, as the preamble to CEDAW acknowledges, "despite [the IBHR] extensive discrimination against women continues to exist."⁷¹ Core treaties such as CEDAW represent "the product of more than half a century of continuous elaboration" of human rights norms and "set international standards for the protection and promotion" of these norms.⁷² Relegating reference to these core treaties to the Commentary of Guiding Principle 12 does this hard fought international effort a disservice by implying the divisibility of rights and downplaying the trend towards greater international scrutiny of private actors, including potential liability where recognized rights are harmed.⁷³

Second, Guiding Principle 12, at least in part, sources its human rights norms in the ILO's Declaration on Fundamental Principles and Rights at Work, a document that emphasizes principles and rights relating to "(a) freedom of association and

66. *Guiding Principles*, *supra* note 3, at 13. The Declaration on Fundamental Principles and Rights at Work, adopted by the ILO in 1988, "is an expression of commitment by governments, employers' and workers' organizations to uphold basic human values . . . vital to our social and economic lives." *ILO Declaration on Fundamental Principles and Rights at Work*, INT'L LABOUR ORG., <http://www.ilo.org/declaration/lang--en/index.htm> (last visited June 22, 2012).

67. See Blitt, *supra* note 39, at 2–3 (discussing the debate between whether established international standards represent "the normative ceiling or only the floor"); *International Law*, *supra* note 34 (introducing CEDAW and CMPW).

68. *Guiding Principles*, *supra* note 3, at 13.

69. *Id.* at 14.

70. This term is an intentional one used by the United Nations and others to encapsulate the primary international human rights treaties. See, e.g., *International Law*, *supra* note 34 (listing the "nine core international human rights treaties").

71. CEDAW, *supra* note 42, pmb1.

72. OFFICE OF THE U.N. HIGH COMM'R FOR HUMAN RIGHTS, FACT SHEET NO. 30, THE UNITED NATIONS HUMAN RIGHTS TREATY SYSTEM: AN INTRODUCTION TO THE CORE HUMAN RIGHTS TREATIES AND THE TREATY BODIES 7, <http://www2.ohchr.org/english/bodies/docs/OHCHR-FactSheet30.pdf> (last visited July 15, 2012).

73. See JERNEJ CERNIC, HUMAN RIGHTS LAW AND BUSINESS: CORPORATE RESPONSIBILITY FOR FUNDAMENTAL HUMAN RIGHTS 97 (2010) ("The core international human rights treaties explicitly and implicitly refer to state human rights obligations of states in relation to corporate conduct.").

effective recognition of the right to collective bargaining; (b) the elimination of . . . forced or compulsory labour; (c) the abolition of child labour; and (d) the elimination of discrimination in respect of employment and occupation.”⁷⁴ Although the declaration’s relevance in the context of corporate responsibility is understandable, its non-binding status necessarily renders it a less authoritative source of law than the core treaties. Indeed, the decision to invoke the declaration within the text of the Guiding Principle ultimately comes at the expense of forgoing explicit reference to the core international treaties that establish a broader range of compulsory norms beyond the declaration’s narrow focus. Citing the declaration as a source of minimum-recognized human rights norms is also curious insofar as the declaration has fewer parties than some of the core international human rights treaties, including the CRC and CEDAW,⁷⁵ and offers fewer formalized tools for meaningful review, engagement, and enforcement.⁷⁶

Finally, referencing “additional standards” in the Commentary to the Guiding Principles presumes that decision makers within the corporate community—and potentially judicial and arbitral forums down the road—will be prepared to give weight to this supplemental source as a tool for elucidating the full scope and intent of the Guiding Principles. Examining international norms and practices that govern treaty interpretation indicates that such an approach is by no means guaranteed. The *pacta sunt servanda*, or good faith rule of treaty interpretation, “does not call for an ‘extensive’ or ‘liberal’ interpretation in the sense of an interpretation going beyond what is expressed or necessarily to be implied in the terms of the treaty.”⁷⁷ Similarly, where the text of a given treaty is deemed sufficiently clear, interpretation rules shun resorting to related *travaux préparatoires* including commentary for additional guidance.⁷⁸ Accessing the commentary—and the additional standards they may reference—is thus contingent on a subjective finding that the language used “leaves the meaning ambiguous or obscure.”⁷⁹ Accordingly, in the immediate context of

74. *ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up*, INT’L LABOUR ORG., <http://www.ilo.org/declaration/thedeclaration/textdeclaration/lang--en/index.htm> (last visited July 7, 2012).

75. The ILO declaration represents the views of the organization’s 183 member states. *Tripartite Constituents*, INT’L LABOUR ORG., <http://www.ilo.org/global/about-the-ilo/who-we-are/tripartite-constituents/lang--en/index.htm> (last visited June 20, 2012). By way of comparison, the CRC and CEDAW have 193 and 187 state parties respectively. Convention on the Rights of the Child, G.A. Res. 44/252, U.N. GOAR, 44th Sess., U.N. Doc. A/44/252 (Nov. 20, 1989); CEDAW, *supra* note 42.

76. According to the ILO, the declaration’s follow up mechanisms are essentially promotional. Rev. of Ann. Rep. Under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work, 310th Sess., Mar. 2011, at 1, I.L.O. Doc. GB.310/3 (2011). An annual review is required for those states that have not ratified the ILO’s fundamental human rights conventions, and a Global Report on the effect given to the promotion of the fundamental principles and rights at work is published to inform ongoing ILO discussions. *Id.* In 2011, fifty-one states were subject to the annual review process. *Id.* at 2, 19. The ILO’s 2010 *Resolution on the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work* reiterates that its objective “is of a strictly promotional nature.” *Id.* at 31. In contrast, the core international human rights treaties establish various opportunities for general comments and recommendations that may impact obligations of private actors, including corporations and also allow for decisions that address individual complaints where specific treaty obligations may have been violated. CERNIC, *supra* note 73, at 98–99.

77. *Draft Articles on the Law of Treaties with Commentaries*, [1966] 2 Y.B. Int’l L. Comm’n 187, 219, U.N. Doc. A/CN.4/191.

78. *Id.* at 222–23.

79. Vienna Convention on the Law of Treaties art. 32(a), *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 (entered into force on Jan. 27, 1980).

Guiding Principle 12, the term “at a minimum” may or may not trigger consideration of preparatory work based on the discretionary finding of a given decision maker.⁸⁰ Adopting a clearer, more authoritative and inclusive reference to the core international human rights treaties noted above could easily avert this potentially uncertain outcome. Unlike the halting standard promulgated under Guiding Principle 12, a more robust reference to existing international human rights standards would more effectively put corporations on notice regarding the full range of scenarios under which a responsibility to respect might arise, better conform with the international community’s approach to identifying and codifying human rights, and generally reflect a more embracing and straightforward approach to corporate human rights compliance.⁸¹

2. Guiding Principles for Respecting Human Rights

With this curious framing of applicable international human rights in place, the Guiding Principles urge business enterprises to respect human rights by recommending that they:

- (a) Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur; [and]
- (b) Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.⁸²

To accomplish these objectives, an enterprise must have three basic mechanisms in place: (1) a formal policy commitment to respect human rights approved at the most senior level and reflected in operational policies and procedures; (2) “a human rights due-diligence process to identify, prevent, mitigate and account for” business-related impacts on human rights; and (3) remediation processes to address any “adverse [business-related] human rights impacts [the enterprises] cause or to which they contribute.”⁸³

With regard to the due-diligence mechanism, the Guiding Principles propose that a business enterprise assess actual and potential human rights impacts it “may cause or contribute to through its own activities, *or which may be directly linked to its operations, products or services by its business relationships*” (emphasis added).⁸⁴ This responsibility, according to the SRSG, should be “ongoing, recognizing that the human rights risks may change over time as the business enterprise’s operations and operating context evolve.”⁸⁵ Moreover, to further validate the due-diligence process,

80. VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY 584 (Oliver Dörr and Kirsten Schmalenbach eds., 2012).

81. For example, invoking the core international human rights treaties in the Guiding Principles proper would obviate the commentary’s need for providing an unwieldy definition for “core internationally recognized human rights” that arguably underestimates the full panoply of rights contained across the nine core treaties. *Guiding Principles*, *supra* note 3, at 13.

82. *Id.* at 14.

83. *Id.* at 15.

84. *Id.* at 16.

85. *Id.*

the enterprise should rely on both internal and independent external expertise and also take steps to meaningfully consult with relevant stakeholders and other potentially affected groups.⁸⁶

This seemingly far-reaching process is intended to identify and prevent certain deleterious human rights impacts that may arise in a given business venture, including those from associated business relationships or engagement with vulnerable minority groups or populations.⁸⁷ Accordingly, the due process mechanism—like the other recommended mechanisms set forth under the Guiding Principles—is envisioned to apply to all enterprises across the board. That said, a determination of whether a given enterprise has satisfactorily complied with its responsibilities is subject to a sliding scale that varies based on “size, sector, operational context, ownership and structure,” as well as the magnitude of the human rights impact in question.⁸⁸ In other words, any human rights policy commitment, due diligence process, or relevant remediation process is expected to be more rigorous where the corporation is larger, a greater risk of a more severe human rights impact appears, or additional national human rights obligations may be in play. Conversely, smaller businesses that may be operating in less controversial areas are subject to a less rigorous compliance standard under the Guiding Principles.

3. Guiding Principles for Responding to Negative Human Rights Impacts

Once a business has an operational due diligence mechanism in place, the Guiding Principles outline three specific responses corporations should take for addressing adverse human rights impacts. First, where an enterprise “causes or may cause an adverse impact, it should take the necessary steps to cease or prevent the impact.”⁸⁹ Second, where an enterprise contributes or may contribute to the harm, it should act “to cease or prevent its contribution and use its leverage to mitigate any remaining impact to the greatest extent possible.”⁹⁰ In both instances, as part of preventing, ceasing, or mitigating the harm, the Guiding Principles recommend actively engaging in remediation, including the use of non-judicial “[o]perational-level grievance mechanisms.”⁹¹

Finally, if a business enterprise does not cause or contribute to an adverse human rights impact, but has its operations, products, or services directly linked to another entity responsible for adverse human rights impacts, the situation, according to the Guiding Principles, “is more complex.”⁹² To clarify the business enterprise’s responsibilities under this third scenario, the SRSG identifies several variable factors that will be relevant to the determining analysis, including “the enterprise’s leverage over the entity concerned, how crucial the relationship is to the enterprise, the severity of the abuse, and whether terminating the relationship with the entity itself

86. *Guiding Principles*, *supra* note 3, at 17.

87. *Id.*

88. *Id.* at 14.

89. *Id.* at 18.

90. *Id.*

91. *Id.* at 20. Over-reliance on non-judicial and corporate-controlled remediation tools has been the target of some criticism by human rights groups. See *infra* notes 117–18 and accompanying text (examining criticism by Amnesty International and Human Rights Watch regarding the Guiding Principles’ failure to create an enforcement mechanism of its own).

92. *Guiding Principles*, *supra* note 3, at 18.

would have adverse human rights consequences.”⁹³ Regardless of which questions are deemed relevant here, unlike the first two scenarios set out above, the Guiding Principles do not impose a remediation responsibility in cases where the adverse impact is merely directly linked to the business enterprise's operations, products, or services.⁹⁴

The manner in which the Guiding Principles address the complexity of a corporation being directly linked to harmful human rights impacts appears to weigh heavily in favor of preserving the business enterprise's economic interests. Indeed, the scenario itself is premised on tacitly consenting to another actor causing or contributing to an adverse human rights impact.⁹⁵ Still, the Guiding Principles caution that, at the end of the day, a decision by the business entity to preserve a potentially deleterious relationship may come at a cost: “[A]s long as the abuse continues and the enterprise remains in the relationship, it should be able to demonstrate its own ongoing efforts to mitigate the impact and be prepared to accept any consequences—reputational, financial or legal—of the continuing connection.”⁹⁶ Additionally, the Guiding Principles urge that any corporate human rights impacts—whether caused, contributed, or directly linked—be communicated publicly and at an ongoing and sufficiently detailed level.⁹⁷

4. “Issues of Context”

The SRSR's final comments regarding corporate respect for human rights are provided under the vague heading “Issues of context.”⁹⁸ Here, business enterprises are urged “[i]n all contexts” to follow three rudimentary, if feebly drafted, golden rules:

- (a) Comply with all applicable laws and respect internationally recognized human rights, wherever they operate;
- (b) Seek ways to honour the principles of internationally recognized human rights when faced with conflicting requirements;
- (c) Treat the risk of causing or contributing to gross human rights abuses as a legal compliance issue wherever they operate.⁹⁹

The formulation of these basic tenets raises a number of questions. In the first instance, should the Guiding Principles function to entrench a principled distinction between “comply” and “respect?”¹⁰⁰ By the same token, precisely what are “ways to

93. *Id.*

94. *Id.* at 20–21.

95. *See id.* at 19 (pointing out the possibility of situations in which the business has no leverage to persuade a related entity to prevent or mitigate adverse impact, but is also not in a position to end the relationship with that entity).

96. *Id.* at 19.

97. *Id.* at 20.

98. *Guiding Principles, supra* note 3, at 21.

99. *Id.*

100. As noted above, the Guiding Principles assert that even “respecting rights is not currently an obligation that international human rights law generally imposes directly on companies.” *Framework for*

honor” human rights principles and who will be responsible for defining them? Do you honor human rights by acknowledging their existence in the business entity’s annual report or by refusing to do business with a regime or business partner that causes or condones human rights violations? Should a business be absolved of human rights responsibility altogether where it operates within a state that is not in compliance with international human rights norms? Faced with this latter scenario, the Commentary on the Guiding Principles recommends that a corporation only respect human rights “to the greatest extent possible in the circumstances.”¹⁰¹ This ambiguous standard appears to invite a business-as-usual approach even in the face of potentially appalling human rights outcomes, on the permissive basis that the corporation can “demonstrate their efforts” to respect international human rights.¹⁰²

Despite this relatively weak formulation, the Guiding Principles rightly caution businesses operating in conflict-affected areas that any venture should be weighed against the “the expanding web of potential corporate legal liability arising from extraterritorial civil claims, and from the incorporation of the provisions of the Rome Statute of the International Criminal Court in jurisdictions that provide for corporate criminal responsibility.”¹⁰³ Here, it is worth recalling that any prospective form of corporate liability reinforces the existing rules concerning individual accountability for human rights violations that still may befall corporate directors, officers, and employees based on their actions.

C. Life After Ruggie’s Guiding Principles: Endorsement and Critique

1. Endorsement

Reaction to the Guiding Principles has varied from enthusiastic endorsement to vehement criticism. The U.N. H.R.C. has welcomed the SRSR’s findings and is quickly moving to expand their relevancy as a touchstone for interactions between businesses and human rights.¹⁰⁴ Likewise, at its 2011 meeting, the Organization for Economic Cooperation and Development (OECD) rapidly took up and endorsed the Guiding Principles.¹⁰⁵ More concretely beyond statements of support, the OECD overhauled its 2008 *Guidelines for Multinational Enterprises* by specifically incorporating the SRSR’s Guiding Principles into a new chapter that for the first

Business and Human Rights, *supra* note 65, at 2. To what extent does this distinction entrench prior or current practice rather than account for prospective changes that appear to be evolving through customary international law or other sources of law?

101. *Guiding Principles*, *supra* note 3, at 21.

102. Imagine a situation in which a corporation refuses to hire or provide services to any individual from a government-persecuted racial minority in the name of complying with domestic law and then defends the practice by asserting that it acted to respect human rights “to the greatest extent possible in the circumstances.” *See id.* (“[B]usiness enterprises are expected to respect the principles of internationally recognized human rights to the greatest extent possible in the circumstances.”).

103. *Id.* at 21.

104. H.R.C. Res. 17/4, *supra* note 54, at 2.

105. OECD, OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES 3 (2011), *available at* <http://www.oecd.org/dataoecd/43/29/48004323.pdf> [hereinafter OECD GUIDELINES]. Established in 1961, the OECD is an intergovernmental organization dedicated to promoting policies to “improve the economic and social well-being of people around the world.” *About OECD*, OECD, http://www.oecd.org/pages/0,3417,en_36734052_36734103_1_1_1_1_1_1_1,00.html (last visited June 20, 2012).

time addresses in a comprehensive manner business-related human rights concerns.¹⁰⁶ U.S. Secretary of State Hillary Clinton praised the revised OECD guidelines for their potential to help governments “determine how supply chains can be changed so that it [sic] can begin to prevent and eliminate abuses and violence. We’re going to look at new strategies that will seek to make our case to companies that due diligence, while not always easy, are [sic] absolutely essential.”¹⁰⁷ As of June 2011, forty-two states have committed to the OECD’s more robust standards,¹⁰⁸ which are part of the overarching 1976 OECD Declaration and Decisions on International Investment and Multinational Enterprises.¹⁰⁹

In a similar show of support, the European Commission “strongly welcome[d]” the U.N. H.R.C.’s approval of the SRSG’s Guiding Principles on business and human rights and noted that they would serve as “an important reference for the [European Union’s] renewed policy on corporate social responsibility.”¹¹⁰ Finally, the U.N. Global Compact, “the world’s largest corporate citizenship and sustainability initiative,”¹¹¹ has acknowledged the SRSG’s Guiding Principles as relevant inasmuch as it provides “further operational clarity” for the Global Compact’s own foundational human rights principles.¹¹²

106. OECD GUIDELINES, *supra* note 105, at 4.

107. Hillary Rodham Clinton, *Secretary Clinton’s Remarks on the Commemoration of the 50th Anniversary of the OECD on Guidelines for Multinational Enterprises*, HUMANRIGHTS.GOV (May 26, 2011), <http://www.humanrights.gov/2011/05/26/secretary-clintons-remarks-on-the-commemoration-of-the-50th-anniversary-of-the-oecd-on-guidelines-for-multinational-enterprises/>.

108. This number represents all thirty-four OECD members as well as Argentina, Brazil, Egypt, Latvia, Lithuania, Morocco, Peru, and Romania. *New OECD Guidelines to Protect Human Rights and Social Development*, OECD (May 25, 2011), http://www.oecd.org/document/19/0,3746,en_21571361_44315115_48029523_1_1_1_1,00.html.

109. The 1976 Declaration enshrines a policy commitment by government signatories to “improve the investment climate; encourage the positive contribution multinational enterprises can make to economic and social progress; [and] minimise and resolve difficulties which may arise from their operations.” *OECD Declaration and Decisions on International Investment and Multinational Enterprise*, OECD, http://www.oecd.org/document/24/0,3746,en_21571361_44315115_1875736_1_1_1_1,00.html (last visited June 21, 2012).

110. *Business and Human Rights: New United Nations Guidelines*, EUROPEAN COMMISSION (June 17, 2011), http://ec.europa.eu/enterprise/newsroom/cf/itemdetail.cfm?item_id=5220.

111. *U.N. Global Compact Participants*, U.N. GLOBAL COMPACT (July 28, 2011), <http://www.unglobalcompact.org/ParticipantsAndStakeholders/index.html>. The Global Compact’s board, appointed and chaired by the U.N. Secretary-General, is the U.N.’s highest-level advisory body involving the private sector. *Global Compact Governance*, U.N. GLOBAL COMPACT (Apr. 30, 2011), http://www.unglobalcompact.org/AboutTheGC/stages_of_development.html. Its thirty-one members comprise representatives of business, civil society, and international organizations. *Id.* For a critical perspective on the Global Compact, see Graham Knight & Jackie Smith, *The Global Compact and Its Critics: Activism, Power Relations, and Corporate Social Responsibility*, in DISCIPLINE AND PUNISHMENT IN GLOBAL POLITICS: ILLUSIONS OF CONTROL (Janie Leatherman ed., 2008) (describing “how the attempts to expand global CSR regimes through the UN Global Compact and the UN Norms for Business have been limited in their ability to impact actual practices”).

112. *The U.N. Protect, Respect and Remedy Framework for Business and Human Rights: Relationship to U.N. Global Compact Commitments*, U.N. GLOBAL COMPACT (May 2010), http://www.unglobalcompact.org/docs/issues_doc/human_rights/Resources/UNGC_SRSGBHR_Note.pdf (emphasis omitted). “Principle 1 calls upon companies to respect and support the protection of internationally proclaimed human rights; and Principle 2 calls upon them to ensure that they are not complicit in human rights abuses.” *Id.*

In addition to governmental and intergovernmental support, numerous corporations have applauded the Guiding Principles for, among other things, “clarify[ing] the distinct, interrelated roles and responsibilities of States and business entities” and for helping to “operationalize . . . respective approaches to human rights in a business context.”¹¹³ Reinforcing this favorable impression, investment advisors and corporate lawyers alike have begun urging parties to adopt the Guiding Principles. In a note to investors, one Swedish institutional investment advisor group reasoned that U.N. approval of the principles lent them “authoritative status as the global standard for preventing and addressing the risk of adverse impacts on human rights linked to business activity.”¹¹⁴ Similarly, an Australian law firm has concluded that the U.N. endorsement establishes the Guiding Principles as an

authoritative document for both States and business [I]t is likely that they will have a significant influence on the domestic legal and policy standards that will apply to business in the future [T]he Principles will become the new standard for ‘best practice’ for business on human rights internationally and the touchstone against which businesses will evaluate their culture and response to human rights issues.¹¹⁵

2. Critique

As laudatory as governments and businesses would appear to be, not everyone has consumed the Kool-Aid of the Guiding Principles. Many leading human rights nongovernmental organizations (NGOs) have publicly criticized the principles for not going far enough to regulate the human rights impact of corporate actors. For example, the International Federation for Human Rights (FIDH), an umbrella group representing over 150 human rights groups around the world, has concluded that the “road towards accountability is still a long way ahead” because the Guiding

113. Letter from Bob Corcoran, Vice President, Corporate Citizenship, General Electric, to Professor John G. Ruggie, Special Representative of the Sec’y-General on the Issue of Human Rights and Transnational Corps. (May 20, 2011), *available at* <http://www.global-business-initiative.org/SRSGpage/files/GE%20letter%20to%20John%20Ruggie.pdf>; *see also* Letter from Richard Wong, Vice President, Global Corporate Soc. Responsibility and Emp. Relations, Flextronics, to Professor John G. Ruggie, Special Representative of the Sec’y-General on the Issue of Human Rights and Transnational Corps. (May 25, 2011), *available at* <http://www.global-business-initiative.org/SRSGpage/files/Letter%20to%20Ruggie%20110525%20flextronics.pdf> (“writing to thank and commend” Ruggie for his framework); Letter from Edward E. Potter, Dir., Global Workplace Rights, Coca-Cola, to Professor John G. Ruggie, Special Representative of the Sec’y-General on the Issue of Human Rights and Transnational Corps. (May 26, 2011), *available at* <http://www.global-business-initiative.org/SRSGpage/files/Guiding%20Principles%20Endorsement%20from%20Coke.pdf> (offering congratulations to Ruggie for his framework on behalf of the Coca-Cola Company).

114. Gisela Riddarström, *U.N. and OECD Guidelines Reinforce Expectations on Companies to Respect Human Rights*, ETHIX PRESS (June 28, 2011), <http://www.ethix.se/content/ethix-press-un-and-oecd-guidelines-reinforce-expectations-companies-respect-human-rights>.

115. *Focus: U.N. Endorses Guiding Principles for Business and Human Rights*, ALLENS (June 29, 2011), http://www.allens.com.au/pubs/ldr/focsrjun11_01.htm. Allens is “a major legal force in Asia.” <http://www.allens.com.au/about/index.htm> (last visited June 21, 2012). *See also U.N. Guiding Principles for Business & Human Rights: Issuance of Ruggie Principles Portends Increasing Need for Multinational Businesses to Focus on Human Rights Compliance*, STEPTOE & JOHNSON LLP (Apr. 20, 2011), http://www.stepto.com/publications-newsletter-pdf.html/pdf/?item_id=172 (noting that “[w]hile the Principles do not constitute ‘law,’ they will likely lead to increased human rights regulations”).

Principles fail to ensure “the right to an effective remedy and the need for States’ measures to prevent abuses committed by their companies overseas.”¹¹⁶

Alongside FIDH, Human Rights Watch (HRW) and Amnesty International, two of the largest and most influential international human rights NGOs, have likewise taken a critical stance vis-à-vis the Guiding Principles. HRW blasted the document for refusing to establish a “global standard” for corporate responsibility and opting instead in favor of a sliding scale based on business size and geographic location.¹¹⁷ The NGO further accused the U.N. H.R.C. of disregarding recommendations by dozens of civil society groups, blaming the body for “squander[ing] an opportunity” to establish a mechanism that would ensure the Guiding Principles are actually “put into practice.”¹¹⁸ According to HRW, the U.N. H.R.C.’s endorsement of the Guiding Principles amounted to nothing more than an “endorse[ment] [of] the status quo: a world where companies are encouraged, but not obliged, to respect human rights.”¹¹⁹

In a similar manner, Amnesty International criticized the Guiding Principles’ failure to adequately address key corporate accountability issues and suggested mandating rather than only recommending a due diligence approach, effectively preventing and punishing extraterritorial human rights abuses, and explicitly recognizing the right to a judicial remedy as a human right.¹²⁰ Amnesty also took aim at the U.N. H.R.C. for failing to empower its newly established Working Group on the issue of human rights and transnational corporations and other business enterprises with the ability to weigh and assess the implementation and effectiveness of the “protect, respect and remedy” framework and the Guiding Principles. According to Amnesty International, without a stronger mandate, the Working Group would be unable to “to take proactive steps to tackle the need for greater clarity and increased legal protections. If not corrected, this will be a missed opportunity.”¹²¹ Indeed, the U.N. H.R.C. resolution endorsing the Guiding Principles omits any mention of the term “legal” or any reference to the potential for a future

116. *U.N. Human Rights Council Adopts Guiding Principles on Business Conduct, yet Victims Still Waiting for Effective Remedies*, FIDH (June 17, 2011), <http://www.fidh.org/UN-Human-Rights-Council-adopts-Guiding-Principles>. A more detailed analysis of the shortcomings in the draft *Guiding Principles* signed by over 120 NGOs is available at *Joint Civil Society Statement on the Draft Guiding Principles on Business and Human Rights*, FIDH (Mar. 3, 2011), <http://www.fidh.org/Joint-Civil-Society-Statement-on-the-draft,9066>. Another statement released by a coalition of over fifty NGOs in advance of the June 2011 U.N. H.R.C. meeting is available at *Joint Civil Society Statement: Advancing the Global Business and Human Rights Agenda: Follow-up to the Work of the Special Representative of the Secretary-General (SRSG) on Human Rights and Transnational Corporations and Other Business Enterprises*, CTR. FOR ECON. AND SOC. RTS. (May 2011), http://www.cesr.org/downloads/Joint-civil-society-statement-on-business-and-human-rights-May-2011_1.pdf.

117. *U.N. Human Rights Council: Weak Stance on Business Standards*, HUM. RTS. WATCH (June 16, 2011), <http://www.hrw.org/en/news/2011/06/16/un-human-rights-council-weak-stance-business-standards>.

118. *Id.*

119. *Id.*

120. Public Statement, *United Nations: A Call for Action to Better Protect the Rights of Those Affected by Business-Related Human Rights Abuses*, AMNESTY INT’L 2 n. 4 (June 14, 2011), <http://www.amnesty.org/ar/library/asset/IOR40/009/2011/en/0ba488bd-8ba2-4b59-8d1f-eb75ad9f3b84/ior400092011en.pdf>.

121. *Id.* at 3.

international instrument that would hold corporations accountable for human rights violations.¹²²

The Child Rights Information Network (CRIN), a UK-based NGO dedicated to the promotion of children's rights, has also sternly rebuked the SRSG's final report:

It is with great disappointment that we see no . . . substantive discussion of the rights particular to children that have long been a matter of international law. . . . '[I]t is difficult to imagine th[e Guiding Principles] could provide any meaningful guidance for States and business enterprises seeking to 'protect, respect and remedy' the human rights of children.'¹²³

This omission is especially troubling because the SRSG's mandate, *inter alia*, required giving "special attention to persons belonging to vulnerable groups, in particular children."¹²⁴ However, this shortcoming may potentially be remedied through the new U.N. Working Group's mandate, which does preserve an emphasis on continuing to "integrate a gender perspective throughout [its] work . . . and to give special attention to persons living in vulnerable situations, in particular children."¹²⁵

Although the process that led to the adoption of the Guiding Principles is unlikely to be impugned for a lack of transparency or collaboration, the SRSG has not responded to the substantive allegations set out above,¹²⁶ many of which relate back to the desire to seek greater accountability for corporate action that may cause or facilitate human rights violations. Accordingly, from a human rights standpoint, the key stumbling block moving forward remains convincing state and corporate actors of the need for legally binding and enforceable international norms capable of effectively regulating business conduct wherever human rights concerns may arise.¹²⁷

122. H.R.C. Res. 17/4, *supra* note 54.

123. *Business and Human Rights: CRIN Response to Adoption of the Guiding Principles*, CRIN (June 21, 2011), <http://www.crin.org/resources/infodetail.asp?id=25245>. Ruggie's final report does allude to the 2007 Paris Principles and Guidelines on Children Associated with Armed Forces or Armed Groups. *Guiding Principles*, *supra* note 3, at 8–9. However, it explicitly excludes the provisions of the Convention on the Rights of the Child from the "authoritative list of the core internationally recognized human rights." *Id.* at 13; *see supra* notes 34 and 67 and accompanying text (listing the internationally recognized core human rights treaties).

124. Human Rights Council Res. 8/7, Mandate of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, 8th Sess., U.N. Doc. A/HRC/RES/8/7, para. 4(d) (June 18, 2008).

125. H.R.C. Res. 17/4, *supra* note 54, para. 6(f).

126. In contrast, SRSG Ruggie quickly responded to criticism raised by MiningWatch Canada concerning the Guiding Principles' overreliance on non-judicial grievance mechanisms. *Having the Ruggie Pulled Out From Under Us: From "Sanction and Remedy" to Non-Judicial Grievance Mechanisms*, MININGWATCH CANADA (June 6, 2011), <http://www.miningwatch.ca/article/having-ruggie-pulled-out-under-us-sanction-and-remedy-non-judicial-grievance-mechanisms>; *see also* John Ruggie, *Response by UN Special Representative on Business & Human Rights John Ruggie to MiningWatch Canada*, BUS. & HUM. RIGHTS RESOURCE CENTRE (June 15, 2011), <http://www.business-humanrights.org/Links/Repository/1006780/jump> (showing that he responded to MiningWatch's criticism within two weeks). This example, however, may be a case of picking the proverbial low-hanging fruit. According to Ruggie's response, much of MiningWatch's criticism "actually addresses a draft . . . released for public comment last November, not the March final." *Id.*

127. For John Ruggie's plainspoken take on this, *see Business and Human Rights: Together at Last? A Conversation with John Ruggie*, 35 FLETCHER F. WORLD AFF. 117, 117 (2011) (describing the refusal of the U.N. Commission on Human Rights to adopt the "Norms on Transnational Corporations and Other Business Enterprises" because governments and businesses opposed the idea of making them legally

The difficulty inherent in this challenge is reinforced by a survey of the corporate community currently willing to engage even with seemingly non-threatening, non-binding human rights principles. In practice, only a minute fraction of the world's businesses appear to be genuinely concerned with the human rights implications of their activities. For example, the U.N. Global Compact, hailed as "the world's largest corporate citizenship and sustainability initiative," has an existing membership of only 8,000 participants, with approximately 6,000 being businesses situated across 135 countries.¹²⁸ While these numbers may appear impressive at first glance, even the U.N. Secretary-General has labeled the initiative's current participation rate inadequate, insofar as it reflects only a small percentage of the estimated "70,000 multinationals and millions of small businesses."¹²⁹ Moreover, already more than 2,400 companies have faced expulsion from the Global Compact's esteemed membership "for failing to report to their stakeholders on [human rights-related] progress they have made."¹³⁰ SRSG Ruggie has confirmed this cynical manipulation by businesses of the Global Compact's human rights agenda: "Apparently [the corporations] simply wanted to sign up and associate themselves with this U.N. initiative and get co-branded, but didn't intend to do anything."¹³¹ This bleak picture is compounded when one considers that a survey conducted by the SRSG identified fewer than 300 corporate entities with established human rights policies.¹³²

Along these lines, it is also worth recalling that the OECD and the European Union, strong supporters of the Guiding Principles, represent only a small fraction of the world's nations. While these bodies play a vital role in shaping international trade and commerce practices, they by no means represent global public opinion concerning the SRSG's Guiding Principles. In addition, the OECD's revised 2011 *Guidelines for Multinational Enterprises* are vulnerable to many of the same criticisms leveled against the SRSG's Guiding Principles. For example, the OECD guidelines are drafted in a manner that may enable corporations to downgrade their human rights responsibilities based on the country in which they operate.¹³³ Acting on such a variable yardstick, a corporation might pursue business opportunities in a "rogue" state that has neglected to ratify relevant international human rights treaties, and thus empower itself to act in a manner that would breach human rights norms if undertaken elsewhere. In an attempt to foreclose this possibility, the OECD guidelines suggest that "enterprises should seek ways to honour [human rights] to the fullest extent which does not place them in violation of domestic law."¹³⁴ Relying on

binding).

128. *U.N. Global Compact Participants*, U.N. GLOBAL COMPACT, <http://www.unglobalcompact.org/ParticipantsAndStakeholders/index.html> (last updated July 28, 2011).

129. *Secretary-General Urges Companies to Join Global Compact*, U.N. GLOBAL COMPACT, <http://www.unglobalcompact.org/news/134-06-21-2011> (last updated June 21, 2011).

130. *Id.*

131. *Business and Human Rights: Together at Last?*, *supra* note 127, at 120.

132. Only companies that have adopted a formal policy statement explicitly referring to human rights are included in the list, whether or not they participate in the Global Compact. *Company Policy Statements on Human Rights*, BUS. & HUM. RTS. RESOURCE CENTRE, <http://www.business-humanrights.org/Documents/Policies> (last updated July 6, 2012). Over half of the corporations listed are European. *Business and Human Rights: New United Nations Guidelines*, *supra* note 110.

133. OECD GUIDELINES, *supra* note 105, at 31.

134. *Id.* at 32.

this type of tenuous language opens the door to any number of scenarios that are antithetical to respect for universal human rights norms. For example, a corporation acting under the pretense of complying with domestic law could intentionally exclude from its workforce members of a persecuted minority group yet still claim to be satisfying the guidelines. Here, the plain choice that would ensure compliance with the spirit, if not letter, of international human rights law would be to terminate operations in that country until the discriminatory legislative framework is rectified. This route, however, is neither required nor recommended by the OECD guidelines or the Guiding Principles.

Even if one follows additional OECD guidance suggesting that enterprises, irrespective of country of operation, should refer to “at a minimum . . . the internationally recognised human rights expressed in the International Bill of Human Rights”¹³⁵ (i.e. the UDHR, ICCPR, and ICESCR), businesses are still left with permission to violate rights provided under other core international human rights instruments, including the CERD, CEDAW, and CRC. In this regard, the OECD’s standards mirror the same flawed departure point introduced under the SRSG’s Guiding Principles:¹³⁶ both cheapen a hard-fought elaboration of international human rights law by casting aside key treaties intended to particularize safeguards for historically vulnerable groups—such as racial minorities, women, and children—and thereby shield them from further discrimination and maltreatment.¹³⁷

Finally, the OECD’s endorsement of the SRSG’s approach to adverse human rights impacts directly linked to a corporation’s operations, products, or services by virtue of its relationship with another entity signals adoption of another flaw inherent in the Guiding Principles. As noted above, applying the proposed subjective framework in these types of scenarios affords the enterprise wide discretion in defining its level of responsibility based on a variety of factors such as “the enterprise’s leverage over the entity concerned, how crucial the relationship is to the enterprise, the severity of the impact, and whether terminating the relationship with the entity itself would have adverse human rights impacts.”¹³⁸ From this perspective, in addition to being premised on legitimating the perpetuation of business transactions with actors responsible for human rights abuses, the OECD formulation fails to establish any meaningful objective standard for corporate decision making under these circumstances, thus opening the process to potential abuse.

CONCLUSION: NAVIGATING A POST-GUIDING PRINCIPLES WORLD

As the U.N. H.R.C. Working Group on the issue of human rights and transnational corporations begins its mandate to further operationalize the SRSG’s Guiding Principles, it is clear that the precise nexus between business and human rights remains very much a work in progress. Businesses taking their first steps in a “post-Guiding Principles” world must still confront the open question: What, if any, human rights responsibilities are we expected to observe? While recent U.N. activity

135. *Id.*

136. *Guiding Principles*, *supra* note 3, at 13.

137. *See id.* at 13–14 (stating corporations should refer to other instruments when dealing with the rights of women, children, and minorities, but failing to provide specific U.N. instruments as guidance beyond the ICCPR and ICESCR); OECD GUIDELINES, *supra* note 105, at 31 (noting the chapter on human rights is in line with Guiding Principles).

138. OECD GUIDELINES, *supra* note 105, at 33.

may have bestowed a patina of authoritativeness on the SRSG's Guiding Principles, these principles remain—at least for the present time—non-binding. Nevertheless, ongoing debate, civil society action, shifting domestic law, and the efforts of the U.N. H.R.C. Working Group may all conspire in the future to generate a more binding legal requirement on corporations to respect human rights norms, regardless of enterprise size or location.

For their part, human rights NGOs are unlikely to back down from the objective of a binding accountability regime for businesses enshrined under international law. Indeed, the NGO campaign of attrition—being waged piecemeal on the international level within intergovernmental fora as well as through domestic courts around the world—shows no signs of letting up.¹³⁹ In the latter context, municipal developments indicate some traction for holding corporations accountable. For example, in the United States, recent case law signals a divide in approach concerning corporate liability under the Alien Tort Statute (ATS).¹⁴⁰ A Second Circuit majority in *Kiobel v. Royal Dutch Petroleum* concluded that “corporate liability has not attained a discernable, much less universal, acceptance among nations of the world in their relations *inter se*, and it cannot not, as a result, form the basis of a suit under the ATS.”¹⁴¹ However, other jurisdictions paint a different understanding. A U.S. District Court (N.D. Ill.) explicitly rejected *Kiobel* as contrary to “persuasive precedent indicating that corporations can be held liable under the ATS,”¹⁴² based in part on the Eleventh Circuit’s *Romero v. Drummond Co., Inc.* decision.¹⁴³ Likewise, a Florida district court, also following the Eleventh Circuit, recently denied Chiquita Brands International’s motion to dismiss ATS claims filed against it “for torture, extrajudicial killing, war crimes, and crimes against humanity.”¹⁴⁴

In a related vein, the U.S. Court of Appeals for the Ninth Circuit reversed and remanded a lower court decision rejecting personal jurisdiction over DaimlerChrysler Aktiengesellschaft (DCAG) for allegedly allowing one of its Argentinian subsidiaries to collaborate with “state security forces to kidnap, detain, torture, and kill the plaintiffs and/or their relatives during Argentina’s ‘Dirty

139. See William Bradford, *Beyond Good and Evil: The Commensurability of Corporate Profits and Human Rights*, 26 NOTRE DAME J.L. ETHICS & PUB. POL’Y 141, at 159–69 (2012) (describing strategies NGOs have implemented to mandate compliance with corporate human rights obligations).

140. See Alien Tort Statute, 28 U.S.C. § 1350 (2003) (“The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”).

141. *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 148–49 (2d Cir. 2010); see also John Gibeaut, *Shell Gets a Pass on Nigerian Claims, But Tort Law’s Future Still Unclear*, A.B.A. J., Jan. 2011 at 14, 15 (Regarding the majority decision, lead plaintiffs’ lawyer Paul L. Hoffman stated: “They issued [the judicial opinion] without a single brief or a single word from either party I’ve never seen that in 30 years.”).

142. *Holocaust Victims of Bank Theft v. Magyar Nemzeti Bank*, 807 F. Supp.2d 689, 694 (N.D. Ill. 2011).

143. *Id.*; see also *Romero v. Drummond Co.*, 552 F.3d 1303, 1315 (11th Cir. 2008) (“the law of this Circuit is that [the ATS] grants jurisdiction from complaints of torture against corporate defendants”). But see *Flomo v. Firestone Natural Rubber Co.*, 744 F.Supp.2d 810, 818 (S.D. Ind. 2010) (holding “no corporate liability exists under the ATS”). Both the *Holocaust Victims* and *Flomo* courts are within the jurisdiction of the U.S. Court of Appeals for the Seventh Circuit.

144. *In re Chiquita Brands Int’l, Inc.*, 792 F.Supp.2d 1301, 1359 (S.D. Fla. 2011).

War.”¹⁴⁵ Alluding to the ATS and state interest in adjudicating the suit, the Court reasoned:

[A]lthough the events at issue did not take place in California and although the plaintiffs are not California residents, the forum state does have a significant interest in adjudicating the suit. California partakes in the “shared interest of the several States in furthering fundamental substantive social policies.” Here, as the claims are predicated upon the ATS and [Torture Victims Protection Act], that policy is providing a forum to redress violations of international law by defendants who have enough connections with the United States to be brought to trial on our shores, even though the injury is to aliens and occurs outside our borders—“a small but important step in the fulfillment of the ageless dream to free all people from brutal violence.”¹⁴⁶

DCAG is also drawing fire in a separate legal battle unfolding in New York following a Second Circuit Appeals Court decision to remand a set of ATS claims filed by dozens of individuals allegedly injured by DCAG’s apartheid era activities in South Africa.¹⁴⁷ Subsequently, the district court ruled against a number of ATS claims but allowed certain others to move forward, including against DCAG, GM, and Ford for aiding and abetting torture, cruel and inhuman treatment, extrajudicial killing, and apartheid based on their provision of military equipment and trucks used by government forces for attacks on protesting citizens and activists.¹⁴⁸ In September 2009, the South African Government announced its support for the lawsuit, withdrawing its previous opposition to the case.¹⁴⁹

Returning to *Kiobel*, the U.S. Supreme Court accepted a petition for certiorari and, following initial oral arguments in February 2012, directed the parties to file supplemental briefs addressing the question of “[w]hether and under what circumstances the Alien Tort Statute . . . allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States.”¹⁵⁰ The case itself, as decided by the Second Circuit Court of Appeals, already comes with its own strongly worded rejection of the majority’s interpretation of prevailing law concerning corporate liability—paradoxically in the form of a concurring opinion:

The majority opinion deals a substantial blow to international law and its undertaking to protect fundamental human rights. According to the rule

145. *Bauman v. DaimlerChrysler Corp.*, 644 F.3d 909, 911 (9th Cir. 2011).

146. *Id.* at 927 (citation omitted). In November 2011, the Ninth Circuit Court of Appeals unanimously denied a petition for rehearing and a petition for rehearing en banc. *Bauman v. DaimlerChrysler Corp.* 676 F.3d 774, 774 (9th Cir. 2011).

147. *Khulumani v. Barclay Nat. Bank Ltd.*, 504 F.3d 254, 264 (2d Cir. 2007). The Supreme Court, unable to muster the requisite quorum of six after four Justices recused themselves, affirmed the Second Circuit ruling without opinion. *American Isuzu Motors, Inc. v. Ntsebeza*, 553 U.S. 1028 (2008).

148. *In re S. African Apartheid Litig.*, 617 F.Supp.2d 228, 264 (S.D.N.Y. 2009). *But see* *In re Motors Liquidation Co.*, 447 B.R. 150, 153 (S.D.N.Y. 2011) (disallowing the “move for certification of [Apartheid Claimants’] claims as class proofs of claim” and invoking *Kiobel* as controlling authority “binding on [it] and every other lower court in the Second Circuit”).

149. Wendell Roelf, *S. Africa Changes Tack, Supports U.S. Apartheid Suits*, REUTERS, Sept. 4, 2009, <http://af.reuters.com/article/topNews/idAFJJOE5830DH20090904>.

150. *Kiobel v. Royal Dutch Petroleum Co.*, 132 S. Ct. 1738 (2012) (mem.).

my colleagues have created, one who earns profits by commercial exploitation of abuse of fundamental human rights can successfully shield those profits from victims' claims for compensation simply by taking the precaution of conducting the heinous operation in the corporate form. Without any support in either the precedents or the scholarship of international law, the majority take the position that corporations . . . are not subject to international law, and for that reason such violators of fundamental human rights are free to retain any profits so earned without liability to their victims.¹⁵¹

In Canada, the courts of Quebec continue to grapple with a case alleging that an Australian mining company facilitated a massacre of civilians in Kilwa, Democratic Republic of Congo (DRC) by providing logistical support to the Armed Forces of the Democratic Republic of Congo (FARDC).¹⁵² The court of first instance rejected Anvil Mining Ltd.'s preliminary motion to dismiss in part because of a finding that the plaintiffs—family members of the victims—stood little reasonable chance of judicial consideration in Australia or the DRC and ultimately risked being left without any recourse to justice.¹⁵³ The Quebec Court of Appeals overturned this decision less than a year later, holding that the Superior Court judge erred in law by failing to positively link the dispute in DRC to any of the activities directed out of Anvil's Montreal office.¹⁵⁴ In a press release following the ruling, the Association Canadienne contre l'impunité (ACCI) expressed its "deep[] disappoint[ment] that the Court would deprive the victims of what could be their only remaining hope to seek justice" and announced its intention to appeal the decision to the Supreme Court of Canada.¹⁵⁵

Against this backdrop of human-rights-NGO pressure and uncertainty within the judicial arena, many corporations have opted to settle claims for human rights violations out of court, often at great financial expense.¹⁵⁶ Examples include three settlements stemming from Holocaust-era litigation, a settlement for an estimated \$20 million by U.S. clothing retailers for alleged sweatshop violations, and over \$15 million in compensation to the families of Ken Saro-Wiwa and John Kpuinen, two men whose deaths were linked to Royal Dutch Petroleum's oil-exploration efforts in the Ogoni region of Nigeria.¹⁵⁷

151. *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 149–50 (2d Cir. 2010).

152. *Association Canadienne contre l'Impunité v. Anvil Mining Ltd.*, 2011 QCCS 1966 paras. 2–4 (Can. Que.).

153. *Id.* paras. 38–39.

154. *Anvil Mining Ltd. v. Association Canadienne contre l'Impunité*, 2012 QCCA 117 paras. 91–94 (Can. Que.). The Appeals Court also questioned the plaintiff's position—and the lower court's acquiescence—that Australia could not realistically serve as a more appropriate trial venue. *Id.* paras. 101–03.

155. Press Release, Canadian Ass'n Against Impunity, *Congolese Massacre Survivors to Pursue Justice at the Supreme Court of Canada* (Jan. 31, 2012), <http://www.globalwitness.org/library/congolese-massacre-survivors-pursue-justice-supreme-court-canada>.

156. See, e.g., *Doe I v. Unocal Corp.*, 395 F.3d 932, 937 (9th Cir. 2002) *on reh'g en banc sub nom.* *John Doe I v. Unocal Corp.*, 403 F.3d 708 (9th Cir. 2005) (highlighting the uncertainty of corporate human rights claims in the first human rights case in which jurisdiction was granted over a corporation). Settlement was subsequently recognized in *John Doe I v. Unocal Corp.*, 403 F.3d 708 (9th Cir. 2005).

157. Michael Goldhaber, *The Life and Death of the Corporate Alien Tort*, LAW.COM (Oct. 12, 2010), <http://www.law.com/jsp/article.jsp?id=1202473215797>.

Faced with this reality, let's return to the outstanding question: What, if any, human rights responsibilities are corporations expected to observe? If thirty years ago the usual modus operandi for business was profit without regard for "indigenous rights" or "child labor," moving forward that standard is necessarily—if slowly—changing. Despite this gradual shift, business enterprises retain the autonomy to determine their individual courses of action. In other words, the answer, for the moment, is that corporations have the freedom to choose. On one hand, they can opt to maintain the "pre-Guiding Principles" status quo and run the risk of being perceived as a pariah falling outside the new "authoritative" corporate responsibility consensus, including accepting any liability that may ensue. Alternatively, they can fulfill the minimum recommendations established under the SRSG's Guiding Principles. Although this would arguably appear to satisfy current best practices, this latter option still exposes the corporation to potentially costly liability down the road—either in a court of law or the court of public opinion—if and when corporate implementation of the Guiding Principles is deemed inadequate or defective.

By way of conclusion, therefore, this Article ends with a proposal for a third option: that corporations get in front of what, by all indications, is a moving target and take an embrace approach to human rights compliance. In practical terms, this means instead of observing select "lowest common denominator" human rights principles as envisioned by the SRSG, corporations should seek out higher ground by complying with all applicable human rights treaty norms. This approach is premised on an understanding that the notion of minimum standards in human rights law "dialectically entails as well the notion of something more demanding than the minimum—that is, the possible expansion of rights to which people are entitled."¹⁵⁸ Importantly, it also promises a variety of value-added benefits for willing business enterprises. In the first instance, positioning a corporation to comply with due diligence standards and other practices based on a more inclusive range of human rights norms will significantly reduce or even potentially eliminate exposure to human rights liability now and in the future. Simply put, aligning business activities with the full spectrum of recognized international human rights norms can more effectively help identify and prevent harmful impacts as well as insulate the corporation from the evolutionary changes inherent in customary international law.¹⁵⁹

Second, this approach promises to eliminate the uncertainty and inconsistency associated with making corporate human rights responsibilities contingent upon a given host country's existing treaty obligations and the nature or scope of the company's activities therein. As U.S. Deputy Assistant Secretary Daniel Baer has observed, "In States that violate human rights, it will be more difficult for businesses to respect those rights—because domestic law may require actions inconsistent with internationally recognized human rights, because State practices encourage businesses to take actions that undermine the enjoyment of human rights, or because States involve businesses in their own human rights violations."¹⁶⁰ Establishing a

158. Jacek Kurczewski & Barry Sullivan, *The Bill of Rights and the Emerging Democracies*, LAW & CONTEMP. PROBS. Spring 2002, at 259.

159. This would require an expanded due diligence process, including sensitivity to relevant emerging international human rights norms expressed outside of treaty regimes. See Giovanni Mantilla, *Emerging International Human Rights Norms for Transnational Corporations*, 15 GLOBAL GOVERNANCE 279, 292 (2009), available at <https://apps.cla.umn.edu/directory/items/publication/300487.pdf> (describing a method of increased corporate responsibility through increased due diligence on the part of corporations).

160. Deputy Assistant Secretary Daniel Baer, *Businesses and Transnational Corporations Have a Responsibility to Respect Human Rights*, HUMANRIGHTS.GOV (June 16, 2011),

single transnational policy expressly aligned with the standards promulgated by the U.N. human rights treaty bodies in place of the SRSG's mercurial guidelines promises corporations independence from variances derived from host state practices, avoids potential conflicts arising from patchwork policies, and ultimately lends itself to a more reliable process and outcome.¹⁶¹ Naturally, in the context of TNC activity that gives rise to cultural, social, political, legal, and economic differences, such a policy becomes even more essential. Moreover, implementing a streamlined due-diligence process around a universally applicable human rights policy also promises the added benefit of being more cost-effective.¹⁶²

A third benefit of adopting an embrasive human rights approach is the likely spike in public goodwill directed at the corporation. This advantage should not be understated. As the U.N. Global Compact demonstrates, businesses already recognize the value of associating their brands with social responsibility and human rights, even if they do not sincerely implement related undertakings.¹⁶³ Boycotts remain a powerful consumer tool, and such actions promise an even greater impact as social awareness, activism, and Internet connectedness become further embedded in global culture. Taking concrete measures to distinguish a corporation's genuine commitment to human rights from other free riders or generic endorsers of the Guiding Principles therefore promises to go a long way in building a corporate brand as well as consumer—and shareholder—confidence.

Finally, two derivative benefits associated with this “third way” proposal are worth noting here. First, by more actively managing its human rights footprint, a corporation can contribute to halting the larger cycle of human rights violations that the Guiding Principles perpetuate. As noted, the SRSG's standards enable business enterprises to preserve relationships with human rights violators that may be directly linked to their operations, products, or services.¹⁶⁴ Rather than allow such relationships to continue, an embrasive human rights approach would operate to shut them down. As a consequence, actors identified as human rights abusers would be denied a source of economic oxygen and, more dramatically, as the allegations against Anvil Mining illustrate, would potentially be denied the wherewithal to carry out or continue human rights violations.¹⁶⁵ This shift to requiring that business

<http://www.humanrights.gov/2011/06/16/businesses-and-transnational-corporations-have-a-responsibility-to-respect-human-rights/>.

161. In the event that a corporate head office is situated in a country enjoying stronger human rights protections than afforded under international law, the domestic norms should govern the corporation's activities regardless of where they occur. *See, e.g.*, Charter of Fundamental Rights of the European Union, art. 53, Dec. 18, 2000, 2000 O.J. (C 364) 5.

162. *See, e.g.*, ICMM, HUMAN RIGHTS IN THE MINING AND METALS INDUSTRY: INTEGRATING HUMAN RIGHTS DUE DILIGENCE INTO CORPORATE RISK MANAGEMENT PROCESSES 6 (Mar. 2012), <http://wp.cedha.net/wp-content/uploads/2012/06/Integrating-human-rights-due-diligence.pdf> (discussing human rights due diligence and explaining that the “[f]ailure to effectively address human rights risks can lead to significant costs in terms of the management time required to respond to crises, and may impact a company's ability to access resources elsewhere or receive funding/insurance from some financial institutions or export credit agencies”).

163. *See* U.N. GLOBAL COMPACT, <http://www.unglobalcompact.org/> (last visited July 11, 2012) (noting that corporate participants based in the United States include Starbucks, PepsiCo, Coca-Cola, Nike, Ford Motor Company, General Electric, Hewlett-Packard, United Airlines, J.C. Penney, Pfizer, and others).

164. *See supra* notes 92–93 and accompanying text.

165. *See Congolese Raise Mining Lawsuit in Supreme Court*, CBC NEWS (Mar. 26, 2012),

relations conform to all international human rights norms can have a transformative effect by prodding other enterprises into an embrative human rights business model through a combination of peer pressure and the promise of potential economic advantage. At the very least, the embrative approach is distinct from the SRSG's Guiding Principles insofar as it proposes a clear-sighted and principled stance against interactions with recognized human rights violators. Lastly, this "third way" may also operate to reduce or eliminate liability risks for individuals associated with the business entity. Championing a corporate culture that respects and safeguards the full range of international human rights law requires an environment where related decisions are more closely scrutinized for compliance, concerns are identified and resolved earlier, and managers and staff are empowered to act accordingly.

Perlmutter's musings from half a century ago provide a relevant context for closing.¹⁶⁶ It remains accurate to say that corporations retain a significant potential for positively shaping the world we live in, though this potential remains—at least for the moment—mostly untapped and non-obligatory. If the Guiding Principles demonstrate anything, it is that the international community is increasingly serious about exploring how this potential can be harnessed as a means of minimizing corporate actions that may cause harm to individuals, groups, and our planet's resources. From this vantage point, the more corporate counsel integrates a robust understanding of existing international human rights into corporate decision-making, the greater the likelihood will be of consistently and predictably minimizing or eliminating conduct likely to trigger deleterious human rights consequences now and into the future. This, coupled with the spillover benefits outlined above, should weigh heavily in favor of adopting an approach that uses the Guiding Principles as a starting point, but moves quickly to enlarge and enhance its reach.

<http://www.cbc.ca/news/canada/montreal/story/2012/03/26/congolese-families-look-to-supreme-court-in-bid-to-sue-anvil-cp.html> (explaining that if the Supreme Court of Canada decides to hear the case, there could be "major implications on whether Canadian companies can be held accountable for their involvement in human rights violations committed abroad").

166. See Perlmutter, *supra* note 10, at 18 (remarking that "the senior executives engaged in building the geocentric enterprise could well be the most important social architects of the last third of the twentieth century").