DUTIES ACROSS BORDERS

Advancing Human Rights in Transnational Business

Edited by
Bård A. Andreassen
Võ Khánh Vinh

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INTRODUCTION

Business' Duties Across Borders: The New Human Rights Frontier

Bård A. Andreassen and Võ Khánh Vinh

1. INTRODUCTION

Modern human rights are dynamic. Through their interpretation, and reinterpretation in new situations and contexts, human rights adapt to new challenges and societal risks to basic human interests. This volume addresses how this insight can be demonstrated through the expanding field of human rights studies in business entities. It presents and examines experiences of the new regulatory turns of commercial actors, and discusses recent developments in human rights standard-setting and advocacy.

Human rights have long been understood as being state-centric: The basic model of human right claims that the individual is the rights-holder and the state (i.e. by all state organs and actors) the duty-bearer. This remains the basic model of human rights, but it is increasingly being modified and developed in a world of rapid change in terms of a relative decline in state authority and the rise of a polycentric world with comparably more powerful non-state actors. Alluding to these changes, Alston argues that there is a need for a re-imagining of 'the nature of the human rights regime in order to take adequate account of the fundamental changes' that have occurred globally in recent decades.[1] The present volume takes account of this insight, and situational human rights theory acknowledges that as part of contemporary globalisation, some types of non-state actors – notably business enterprises – are rapidly gaining influence and power that the human rights regime can no longer neglect.

Legal development – including human rights law – is generally reactive. It responds to new societal experiences that provoke a quest for regulation,

[1] P. Alston, 'The "Not-a-Cat" Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?' in P. Alston (ed.), *Non-State Actors and Human Right* (Oxford: Oxford University Press, 2005), p. 4.

restriction, and control. This is indeed what has happened in the field of human rights and business. Accidents and events that uproar ethical consciousness and public morals, outright violations of workers rights, and communities suffering from ruthless environmental exploitation are all types of experiences that have triggered demands for rights protection. Albeit slowly, attempts to define more precisely the human rights duties of commercial actors have been in process in response to experiences of economic globalisation. Accelerating rapidly with the neo-liberal economic policies introduced in the 1980s, globalisation has been structured by three interrelated processes: First, the growth of international economic, cultural, and normative interaction, ignited by the end of the Cold War, the economic reforms initiated in China under Deng Xiaoping, the invention of the World Wide Web, and a cascade of information technology innovations. The second stage was marked by a rapid spread of cultural norms and practices of consumerism. And thirdly, there has been a process of diffusing cosmopolitan moral and legal norms, where universal human rights have been but one point of reference for legal development, institutional reforms and more recently regulation of commercial market actors. The latter is, indeed, what interests us here: the current extrapolation of human rights duties of commercial actors as transnational norms.

The new regulatory turn of businesses through the mechanism of human rights must be understood and interpreted in this global socio-political context. Human rights dynamism is reflexive to these changes in global co-existence, interaction, and exchange, where the powers of transnational business entities trigger demands for polycentric regulations of business behaviour.

An early move in this direction was the development of corporate social responsibility (CSR), which expanded gradually in western capitalist economies from the 1950s; although CSR had roots dating back to the 1920s, when some argued that corporations should be seen as 'business services to society'.[2] According to Frederick, CSR in the 1950s mainly referred to three ideas: public managers as public trustees; balancing competing claims to corporate resources (share-holders vs. other stakeholders); and philanthropic services to society.[3]

Over the next decades until the 2000s, there were several shifts in the conceptual structuring and application of CSR by businesses. These shifts reflected changes in the normative foundation of corporate governance. In general, we observe a gradual development towards more responsiveness to stakeholders, as a means of keeping with businesses' legitimacy in society. Frederick characterises the 1950s and 1960s as a phase of 'corporate social responsiveness' with enterprises demonstrating some responsibilities to society by charity work and philanthropy. Yet gradually, stakeholders began raising expectations about the functioning and

2 R.C. Moura-Leite and R.C. Padgett, 'Historical Background of Social Corporate Responsibility' (2011) 7(4) *Social Responsibility Journal* 259.

3 W.C. Frederick, *Corporations, Be Good! The Story of Corporate Social Responsibility* (Indianapolis, IN: Dogear Publishing, 2006).

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governance dimensions of companies' behaviour. From the 1970s onwards, there was a growing attention to the conduct of doing business in the dominant market economies, with a focus on the effects and consequences of business behaviour on society. Donaldson emphasised that an inherent 'social contract' between businesses and society was emerging and became an ideological justification for CSR.[4] In the 1980s, the conception that CSR was 'good for business' and could improve profits was slowly gaining traction. Focus shifted towards a broader conception of CSR where ethical concerns where combined with institutionally responsive practices internally within companies, e.g. by the establishment of corporate assemblies with worker representation. Reflecting the public political discourse of the time, a focus on the external environmental impact of conducting business emerged.

By the 1990s, the notion of CSR was widely accepted in global markets, with the exception, perhaps, of several rapidly emerging market economies, China being the main case. According to Moura-Leite and Padgett,[5] by the mid-1990s 'the global capabilities of the internet and related technologies improved the power of institutions to create new pressure on companies to foster greater CSR'. CSR was now gradually becoming a financial asset by a restructuring of the reputational space of companies. Increasingly, public reputation was not just determined by, for instance, the qualities if products and services, standard of technical innovation and design, etc.; rather, these economic reputational dimensions were challenged by public perceptions of governance and ethical behaviour, concerns for workplace conditions, environmental awareness, and financial (non-corrupt) performance. For many international companies CSR became part of the business model to improve public relations, and in the early 2000s, CSR demands broadened to include demands for awareness of environmental sustainability, stakeholder communication, and public transparency in the conduct of business.[6] By this time, CSR also began to surface in China. One decade into the new Millennium, Lee concluded, with cautious optimism, that the development of CSR in China was complete, CSR was 'ushered' into China in the late 1990s and was gaining some ground under the control and guardianship of the state. Yet, while it was gaining some ground on environmental issues, this hardly included human rights concerns.[7]

This brings us to the relationship between CSR and the contemporary 'human rights and business' discourse. In the 1990s, human rights began to surface in debates on CSR. It was a new topic. The OECD Guidelines on Multi-lateral Enterprises of 1976 had not referred to human rights, and neither did the revised

4 T. Donaldson, *Corporations and Morality* (Prentice Hall, Englewood Cliff, NJ, 1982).
5 R.C. Moura-Leite and R.C. Padgett, 'Historical Background of Social Corporate Responsibility' (2011) 7(4) *Social Responsibility Journal* 534.
6 M.P. Lee, 'A review of theories of social resposibilities: its evolutionary path and the road ahead' (2008) 10 *International Journal of Management Reviews* 297–311.
7 *Ibid.*, p. 99.

versions of 1979, 1984 and 1991. However, when the Guidelines were revised again in 2000, reference was made, albeit in general terms, to the UN Universal Declaration of Human Rights, and more specifically to the need for respecting human rights in companies' operations. According to paragraph 2 of the General Policies of the OECD Guidelines (2000), enterprises should '[r]espect the human rights of those affected by their activities consistent with the host government's international obligations and commitments'. Another important international instrument paving the way for a rights approach to business responsibility was the ILO Tripartite Declaration Concerning Multinational Enterprises and Social Policy Reform of 1977. The aim of the Declaration was 'to encourage the positive contributions which multinational enterprise can make to economic and social progress and to minimize and resolve the difficulties to which their various operations may give rise'. Similar to the OECD Guidelines, the ILO Declaration is voluntary in nature. Yet these documents were the cornerstones of international CSR discourses and policies in the 1990s, and indeed laid the foundation for the developments in the first decade of the 2000s.

A major breakthrough in human rights attention to the conduct of business came in 1997 when the Sub-Commission on the Promotion and Protection of Human Rights set up a Working Group on the Working Methods and Activities of Transnational Corporations.[8] In its first session in 1999, the Working Group asked David Weissbrodt, one of the Working Group members, to prepare a code of conduct for the human rights principles for business enterprises. A first draft of a code was discussed at the Working Group's August 2000 session and revised drafts were discussed at the Sub-commission's sessions in 2001 and 2002.[9] A draft was adopted by the Sub-Commission in August 2003 (resolution 2003/16), entitled the Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (usually referred to as the Draft Norms)).[10]

In section A, *General Principles*, the Draft Norms hold that '[w]ithin their respective spheres of activity and influence, transnational corporations and other business enterprises have the obligation to promote, secure the fulfilment of, respect, ensure respect of, and protect human rights recognized in international as well as national law'. These and other formulations, for instance, that found in section H paragraph 18 stating that '[i]n connection with determining damages, and in all other respects, these Norms shall be enforced by national courts and/or international tribunals if appropriate', go far in ascribing legal

8 Before 1999, the Sub-Commission on the Promotion and Protection of Human Rights was known as the Sub-Commission on Prevention of Discrimination and Protection of Minorities. It was dissolved by the Human Rights Council, and met for the last time in August 2006. It was followed by a new expert body set up by the Council; the Human Rights Council Advisory Committee, which held its first meeting in August 2008.

9 E/CN.4/Sub.2/2002/WG.2/WP.1/Add.1.

10 E/CN.4/Sub.2/2003/12 (2003), wwwl.umn.edu/humanrts/introduction05-01-02final.html.

obligations to businesses, although they were designed as voluntary standards. Hence, confusion and discontent about the meaning, scope and binding nature of the Draft Norms soon occurred, and they were met with stiff critiques and resistance. The Human Rights Commission, to which the Sub-Commission reported, suggested to its superior UN body, the Economic and Social Council to '[a]ffirm that (the document containing the Draft Norms) has not been requested by the Commission and, as a draft proposal has no legal standing, that the Sub-Commission should not perform any monitoring function in this regard'.[11] The Commission, however, did not put the issue to a close. Instead it asked the High Commissioner for Human Rights to compile a report identifying how to strengthen standards on businesses human rights responsibilities, while taking the Norms into account. In April 2005, the Commission created a position as a Special Representative on the issue of human rights and transitional corporations 'and other business enterprises'.[12] In July 2005, UN General Secretary appointed Harvard Professor John Ruggie as Special Representative.

2. HUMAN RIGHTS AND REGULATION THEORY

This gradually evolving nexus between human rights norms and moral assessment of business behaviour reflects the underlying idea of modern human rights. Theoretically, human rights are instrumental in guiding purposeful action, and represent evaluative norms and criteria for individual and social behaviour. Hence, in modern societies, human rights are social mechanism for protecting against or governing significant social risks in society – or, as Ulrich Beck puts it, risks stemming from industrialisation and globalisation, that is, risks of modernisation.[13] Henry Shue referred to human rights risks as societal 'standards threats' that endangered basic human interests, decent living and a normal healthy life.[14] Increasingly, with expanding globalisation, market agents – in particular powerful transnational corporations – are 'producing' or perhaps more rightly, causing such standard threats, specifically by dictating poor working conditions, polluting local environments, depriving rural people of their land in search for natural resources, and in many other ways.

A standard reference and most deadly industrial disaster in modern history is the massive leak of methyl isconate gas at the Union Carbide's pesticide plant in Bhopal in India on 3 December 1984. It stands out as 'shocking experience' of human atrocities stemming from modern business. The Bhopal case represented

11 Commission of Human Rights Decision 2004/116, adopted on 20 April 2004.
12 Commission on Human Rights Resolution 2005/59, adopted on April 2005.
13 U. Beck, *Risikogesellschaft auf dem Weg in eine andere Moderne* (Frankfurt am Main: Suhrkamp Verlag, 1986), p. 30.
14 H. Shue, *Basic Rights. Subsistence, Affluence, and US Foreign Policy* (Princeton: University Press, 1980), p. 17.

a watershed in the growing global awareness of negative human impacts on transnational business. Thousands of people in nearby informal settlements died instantly from the leak and tens of thousands became riddled with diseases and disabilities related to the disaster in the years to follow: 'Campaigners put the death toll as high as 25,000 and say the horrific effects of the gas continue to this day'.[15] A quarter of a century later, surviving victims have still not been granted proper assistance and remedy, in spite of numerous lawsuits both inside and outside of India. Fifty per cent of the shares in the Union Carbide plant in India (Union Carbide India Ltd) were owned by Union Carbide in the United States of America, and the rest of shares divided between the Indian state and local Indian shareholders. Shortly after the disaster, a group of US lawyers filed more than 145 lawsuits against the parent company, Union Carbide, in US courts.[16] The Indian state also made numerous lawsuits. However, the Federal High Court of New York, the body handling the cases, dismissed them and argued that US courts amounted to *forum non conveniens*. The cases, the Court held, should be brought before India's own domestic courts. The parent company (based in the US) could not be taken to an Indian court, and hence, its complicity as a majority shareholder was not held liable. The Indian judiciary, however, proved to be highly ineffective in handling cases brought to court, and only in 2010 were eight of the responsible managers of UCIL convicted for being responsible for 'death by negligence' and sentenced to light prison terms and symbolic fines.[17]

The Bhopal case aptly demonstrates the 'standard threats' to which Shue refers. It also shows how a lack of appropriate protection mechanisms renders people powerless and without effective rights safeguards. The case evinces a lack of 'social guarantees' (in this case an effective judiciary, which left people vulnerable to risk and traumatic harm). According to Shue, '[c]redible threats can be reduced only by the actual establishment of social arrangements that will bring assistance to those confronted by forces that they themselves cannot handle'.[18] To be protected from such harms, people need firm institutional protection, 'not protection against any imaginable threat, but defences against predictable remedial threats.[19] It is exactly this function as *institutional mechanisms of protection against standard threats* that is the essence of human rights in practice.

It is important to note that this feature of human rights is adopted by the new business and human rights agenda: to expand the field of social and legal guarantees to protect people from social and human harm that follows from business behaviour. According to Ruggie, '[i]ndeed, history teaches us that markets pose the greatest risks – to society and business itself – when their

15 See news.bbc.co.uk/2/hi/south_asia/8725140.stm (2010).

16 J.G. Ruggie, *Just Business. Multinational Corporation and Human Rights* (New York: W.W. Norton, 2013), p. 7.

17 *Ibid.*

18 H. Shue, *supra* n. 14, p. 26.

19 *Ibid.*, p. 33.

scope and power far exceed the reach of the institutional underpinnings that allow them to function smoothly and ensure their political sustainability'.[20] In studying this issue, much of current research is rooted in the discipline of regulation. The business and human rights field is a new regulatory space[21] that provides justification, legitimacy and human rights based mechanisms for risk management, that is, mechanisms 'to reduce undesirable effects through appropriate modification of the causes, or less desirable, mitigation of the consequences'.[22] A human rights approach implies that we address how human rights are rules of regulation that structure the relationship between businesses and between business, governments, and other stakeholders.

While we recognise that human rights standards have not yet penetrated the normative foundation of business, we see trends toward greater attention, knowledge, and concern for human rights among domestic and international business actors. The assumption that human rights provides both ethical motivations and practical incentives for businesses to take rights seriously is not overtly naïve; human rights are part of a regulatory turn.

This implies that there is a case for both rational and normative institutional perspectives in studies of human rights responsibilities of business behaviour. From a rational business perspective, a company will pursue its legitimate goal of profit maximisation. It adapts to demands of the market. These demands may stem from new norms in the market (competitors invent new ways of operating that are giving competitive success), or they may stem from new state regulations. Hence, demands of the market change over time; the market is not a given, and external regulatory requirements and rules by states or international institutions are continuously influencing domestic and international economic relations. The regulatory space is in constant flux. Human rights and environmentally friendly demands are among the latest regulatory standards that have been introduced. When businesses adopt these standards, their effects turn in the regulatory space. It is, however, paradoxical that this development arises at a time when the neo-liberal economic policies for three decades sought the deregulation of the state and the private sector. One may wonder if the pendulum is beginning its return swing.

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20 A/HRC/8/5 (7 April 2008), 'Protect, Respect and Remedy: a Framework for Business and Human Rights', Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises.

21 L. Hancher and M. Moran (eds.), *Capitalism, Culture and Economic Regulation* (Oxford: Oxford University Press, 1989).

22 O. Renn, 'Three Deacdes of Risk Research: Accomplishment and New Challenges' (1998) *Journal of Risk Research* 1, 49–70.

3. HUMAN RIGHTS LAW AND BUSINESS: CONCEPTS, PRINCIPLES AND CHALLENGES

As noted above, the recent formulation of human rights regulation was spearheaded by the work of the then UN Special Rapporteur on Human Rights and Business, John Ruggie. The 'Ruggie process' restructured and reinterpreted existing human rights standards to make them applicable to market actors, reshaping the regulatory space, and by implication, the competitive environments of businesses.

Ruggie attempted to apply what he refers to as 'principled pragmatism' to his work. Through two mandate periods spanning from 2005–2011, he produced a series of documents through a process of consultation with numerous stakeholders worldwide, and developed a Framework (the 2008 report) and Guiding Principles on human rights and business (the 2011 report). Ruggie's basic approach is institutional combined with legal perspectives. He attributes the 'root cause' of the quandary of human rights and business to governance gaps created by contemporary globalisation 'between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences. These governance gaps provide the permissive environment for wrongful acts by companies of all kinds without adequate sanctioning or reparation'.[23] Typically, the worst cases of business-related human rights harms occur in countries where governance challenges are greatest – they take place disproportionately in low income countries; and countries with weak rule of law systems, large corruption problems; countries with high levels of internal conflict; and in states with pockets of stateless territories.[24]

By the 1990s, it had become widely recognised that the power of multinational corporations had expanded beyond the reach of effective public governance, and increasingly implied opportunities for companies to commit wrongful acts without sanction or redress. The framework and principles for the conduct of business that were developed, aimed at governing such prevailing governance gaps by regulating and reforming the conduct of both business and governments in a nexus of complementarity between public accountability and private actors' responsibilities.

Ruggie critiqued the Draft Norms for their 'exaggerated legal claims and conceptual ambiguities [...] engulfed by (their) own doctrinal excesses'.[25] Rather, Ruggie sought to develop an authoritative source of policy guidance for governments, businesses and civil society actors by 'establishing a common

23 A/HRC/8/5, *supra* n. 20, p. 3.
24 *Ibid.*, p. 6.
25 J.G. Ruggie, *supra* n. 16, p. 54.

global platform for action, on which cumulative progress can be built, step-by-step, without foreclosing any other promising longer-term developments'.[26]

The framework – which is referred to in several chapters in this volume, was based on three pillars, and a conceptual architecture for identifying the respective roles of government and business in protecting and respecting human rights, and for their separate and shared responsibility for remedial efforts when human rights harms are committed. Pillar I refers to the state's duty to protect against abuses by third parties (in this context, business enterprises) through appropriate policies, regulation, and adjudication. Pillar II refers to corporate responsibility to respect human rights, which implies duties to avoid infringing on people's human rights, and take action against adverse impact if it occurs. The third pillar refers to responsibilities to remedy and compensate and to provide legal and or non-legal remedies in cases of human rights abuses. Within this three-pillar framework – which does not imply new norms and human rights standards, but a new space for application of existing standards and treaty-based rights – Ruggie identified a set of 31 principles with a number of sub-provisions, specifying the responsibilities of companies and duties of states.

Since the adoption of the Framework and the Guiding Principles, international and national efforts towards their implementation have been made. When the UN Human Rights Council adopted the UNGP in June 2011, it also established an Interregional Working Group on the issue of Human Rights and Transnational Corporations and other Business Entities to oversee and contribute to the implementation of the GPs by the UN.[27] The Working Group was mandated to promote the dissemination of the Principles, identify and learn from good practices, support national capacity-building, develop dialogue with government and other stakeholders, and make recommendations about the implementation of the GPs at national, regional, and international levels.[28] The mandate of the Working Group was renewed in 2014 by the UN Human Rights Council In the renewal Resolution, the Working Group was tasked with, in particular, advancing the development of national action plans for the implementation of the Guiding Principles. In Geneva an annual Global Forum on Business and Human Rights has been held annually from 2012 to promote support and raise debates and dialogue among businesses, governments, non-governmental organisations and human rights academics.

A fundamental feature of the Guiding Principles is that they do not invent new law and new standards; they rest on the existing system of human rights law,

[26] A/HRC/17/31 (21 March 2011), 'Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises'; J.G. Ruggie, *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework*, p. 7.

[27] J.G. Ruggie, *supra* n. 16, p. xxi.

[28] S. Dhanarajan and C.M. O'Brien, 'Human Rights and Businesses. 14th Informal ASEM Seminar on Human Right', Background Paper to the Asia-Europe Meeting in Hanoi, 18–20 November 2014, p. 11.

institutions, and mechanisms. The main obligation of human rights protection and enforcement remains with the state. At the same time, the GPs strengthen the notion that businesses as non-state actors and *organs of society* (Preamble of the Universal Declaration of Human Rights) have responsibilities to respect and not harm human rights norms. This re-orientation of human rights norms has been under way for some time.[29] Its break-through came, as Dhanarajan and O'Brien state, 'at a time when this was essential to ensure their continuing relevance as a narrative responsive to people's lived experience of indignity and injustice'.[30] Yet controversy remains as to whether the best way of making business respect human right is through a legal approach by developing a binding treaty, or a system based on voluntariness, which also entails institutional and cultural changes through awareness, monitoring, and public discourses.

The UNGP represent a middle ground between these approaches. They stress that companies have responsibilities to respect human rights and the 'do no harm' principle. At the same time, the UNGP put emphasis on efforts to be made to develop new business behaviour through *due diligence*, institutional and cultural changes inside business entities, and across business sectors. This duty of companies to respect human rights is, at the same time, nested in the state's duty to protect. A policy response to this duty is the development of the new mechanism on national action plans for business and human rights, encouraged by the UN Working Group.

Disputes on the best strategic paths towards respect for human rights – regulating transnational corporations through an international treaty instrument vs. a more pragmatic position that sees national law and voluntary initiatives as predominant strategies to advance business responsibilities for human rights – continue unabated in spite of the growing impact and dissemination of the UNGPs since their adoption. The issue was made evident in June 2014 when the Human Rights Council passed two resolutions on human rights and business.[31]

The first resolution adopted by a sharply divided vote (20 in favour, 14 against and 13 abstentions) decided to establish an intergovernmental working group with the mandate to elaborate on a legally binding treaty 'to regulate, in international human rights law, the activities of transnational corporations and other business enterprises'.[32] A majority of the Council's members did not vote for the resolution, and most of the home countries of transnational enterprises (the US, EU, South Korea and Japan) voted against, while China supported the resolution with significant conditionality. Quite remarkably, in defining the target of a future treaty, the resolution decides that it should address 'transnational corporations

29 P. Alston, *supra* n. 1; B.A. Andreassen, 'Development and the Human Rights Responsibilities of Non-State Actors' in B.A. Andreassen and S.P. Marks (eds.), *Development as a Human Right. Legal, Political and Economic Dimensions* (Antwerp: Intersentia, 2010).

30 S. Dhanarajan and C.M. O'Brien, *supra* n. 28, p. 12.

31 A/HRC/26/L.22/Rev.1, p. 1 f.

32 *Ibid.*

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and other business entities', but then adds in a footnote that 'other business entities' denotes all business enterprises that have a transnational character in their operational activities and does not apply to local businesses registered in terms of domestic law'. This is certainly highly contentious, and implies, as illustrated, that the language of the proposed treaty would have covered international brands purchasing garments from the factories housed in the Rana Plaza Building in Dhaka in Bangladesh, which collapsed on 24 April 2013 with a death toll of 1,129, and more than 2,500 people injured. Yet it would not cover the local factory owners.[33] Critics of the legalisation of the issue thus argue that in view of past history of the making of human rights treaties, it is highly unlikely that a treaty will emerge and garner wide support in the near future. This certainly begs the question: what shall be done to do 'between now and then'?[34] One straightforward answer is to implement as effectively as possible the UNGPs. However, the danger is that a long-lasting process of drafting a new treaty will significantly undermine efforts to implement the Guiding Principles. This would represent a setback in the effort to advance the human rights and business agenda.

The second resolution reflected the view of the opponents of a treaty and was proposed by a group of states supportive of the continued implementation of the UNGPs. This resolution was adopted unanimously, without a vote, by the Human Rights Council and expresses strong support to the continued implementation of the UNGPs, including development of national action plans for the implementation of the Guidelines, and the role of the Working Group in developing national guidelines for judicial and non-judicial remedial mechanisms for victims of violations. The resolution also called for prolonging the mandate of the Working Group by three years. In fact, the resolution may play an important role in the process ahead: 'In the short run, the consultations it calls for on "the full range of legal options and practical measures to improve access to remedy" led by the Office of the High Commissioner and involving all stakeholder groups, will contribute practical information, insights, and guidance as the treaty negotiations get under way'.[35]

The quest for making businesses responsible for human rights in their operations can hardly be pursued by one regulatory strategy; rather, it calls for composite measures that complement each other. Experiences from the Draft Norms in the early 2000s indicate that this was not a constructive path and should not be repeated. The question whether a legal approach will give better results in terms of businesses' increased awareness, implementation, and enforcement of human rights norms without hard-law regulation is hypothetical and not possible to answer *ex ante*. One issue is the uncertain path towards a treaty and the challenge of having it ratified and implemented by the most central home

33 J.G. Ruggie, 'The Past as Prologue? A Moment of Truth for UN Business and Human Rights Treaty' (2014) 8 *IHBR Commentary* 1.
34 *Ibid.*
35 *Ibid.*, p. 6.

states of TNCs. Equally important is the question of how the key actors, that is, the transnational companies and other businesses enterprises, including host country subsidiary suppliers, will respond to different strategic paths. Creating more just business requires that respecting rights is integral to *doing* business. It requires changing conceptions of business as 'organs of society', and institutional and cultural changes in the operation and functions of companies. It requires institutional internalisation of human rights norms. A comparable experience has been made in terms of companies' responsibilities for environmental change in the Sustainability Company Project.[36] The aim of this research and innovation project, which started in 2010, was to examine how environmental concerns could be better integrated into decision-making and operations of companies. By doing this, the project aimed to contribute to sustainable development.[37] This, however, clearly requires mixed strategies. According to the project outline, '[t]aking companies' substantial contributions to climate change as a given fact, companies have to be addressed more effectively when designing strategies to mitigate climate change. A fundamental assumption is that traditional external regulation of companies, e.g. through environmental law, is not sufficient. Our hypothesis, confirmed through research, is that environmental sustainability in the operation of companies cannot be effectively achieved unless the objective is properly integrated into company law and thereby into the internal workings of the company'.[38]

This experience from the field of environmental law reflects limitations of international legal regulation, and emphasises the importance of a mixed strategies that combine national legal regulation (of company law) with changes in company cultures and institutional reforms. It also points to the sectorial dimension of competitive markets. Companies compete within market sectors, and make cost–benefit analyses of the commercial and normative strategies they pursue. Regulations should reflect sectorial approaches that make human rights integral to cost–benefit calculations and as part of building and retaining commitment among business actors. Sectorial approaches in the implementation of the Guiding Principles may help construct and institutionalise intra-sectorial commitment, enhancing the intra-sectorial regulatory spaces. As Deva writes in Chapter 1, respecting human rights should give companies a competitive advantage (enhancing their benefit). They should at the same time serve to manage company risks and help ensure that companies do not negatively impact on human rights as this will undermine their reputation and consequently

36 This is an international research project at the Department of Private Law, University of Oslo, see: www.jus.uio.no/ifp/english/research/projects/sustainable-companies/ (accessed 1 June 2015).

37 www.jus.uio.no/ifp/english/research/projects/sustainable-companies/project-description/ (accessed 2 July 2015).

38 *Ibid.* See also: B. Sjåfjell and B. Richardson (eds.), *Company Law and Sustainability – Legal Barriers and Opportunities* (Cambridge: Cambridge University Press, 2015).

their market position (or what Ruggie referred to in his 2008 report as *social expectations*). However, the challenge of the cost–benefit approach to business and human rights is, as Deva rightly points out, marred with the reverse calculus where business may chose a fee or a reputational loss if the expenses of paying fees, or loss in reputational capital, is commercially smaller than the profits of harmful human rights practices. This clearly accounts for invoking legal approaches to ensure respect for human right, primarily by improving national legislation and enforcement. Whether an international treaty will give added force to ensuring rights commitment is, as noted, hypothetical, at best. The argument here is that international law – in case of a new binding treaty on business and human rights – requires domestic jurisprudence as the predominant layer of law, and domestic means of implementation and enforcement. For an international treaty to be effective, recurring gaps of various types of governance need to be managed. This concerns the structure and governance of the legal and policy domains. These are in other words effective norms and practices of national and international law and jurisdictions that are capable of regulating multinational companies in both host and home state's jurisprudence, and legitimate, regulatory political institutions to ensure judicial independence. It also concern the support and advocacy for rights and responsibilities across border by civil society, including independent and effective media as a sphere of civic governance; and it certainly concerns corporate governance – how human rights principles are adopted and internalised by multinational companies and other business enterprises. The main human rights problem of today is not a lack of human rights norms, but the failure of states to *implement* existing binding human rights instruments. A new legal treaty – on state regulation of business behaviour – requires that these norms be internalised in the culture, conduct, and behaviour of multinational and other enterprises. At the same time, the work with a possible treaty should not distract from the implementation of the Guiding Principles which have gained astonishing support over the last four years.

In the first chapter of this volume Surya Deva takes a clear-cut position on the issue of making well-defined legal obligations for businesses. Human rights are not negotiable, he argues, and should not be treated as means to and end but as needs in themselves. There is a tendency to address human rights as 'good for business' as long as it is good for a financial bottom line. While Deva acknowledges that this 'business case' for human rights may have positive impacts on many companies' decisions and behaviour, he warns against making this the main justification for developing human rights duties for business actors. He is also critical of the consensus-building approach that Ruggie employed because it prevented a more 'robust' legal framework to evolve. With the adoption of Resolution 26/9 of the Human Rights Council, it is now time for the open-ended intergovernmental working group to design a treaty and treaty system. While Deva acknowledges that states (or at least those states where most MNCs are domiciled) may not yet be ready to make the move towards a more robust legal

regulatory regime, he argues that the current system must be more victim-focused and not just address the 'impact' of business on human rights. In this effort, the role of civil society is essential as a watchdog in monitoring commercial non-state actors. In his analysis, there is need for multiple (and integrated) approaches to make businesses accountable for human right abuses, and a treaty is but one of the approaches he devises.

Itai Apter advances this critique to the current efforts to drive business accountability (Chapter 2). Apter acknowledges that there has been much progress in nurturing an emerging global governance of standards for business behaviour, with a number of new tools that may help bring about remedies for victims and prevent abuses by commercial entities. Soft-law efforts to impose corporate liability for human rights abuse, including universal litigation and international guidelines, are constantly expanding. Yet she takes a critical look at whether existing remedies are effective or rather counterproductive placebos. She asks whether states should instead be encouraged to act domestically rather than through international agreements. She supports integrated, yet multiple strategies for holding companies accountable. There is, historically, no single strategy that has proven successful in its entirety. Yet, there is a need for both political and soft and hard-law solutions to advance accountability and nurture engagement of home regimes in ensuring foreign corporate compliance. Apter identifies strengths and weaknesses of the UN and OECD guidelines, arguing that these can, in certain contexts, contradict victims' best interests. At the same time, she argues that political, inter-state dialogue and solutions may facilitate the imposition of liability and provide remedy, even if they may circumvent legal resolutions and accountability.

One of the most egregious fields of company harm to communities and citizens is environmental damage. The prime example, referred to by several authors of this volume is the oil pollution caused by oil exploration by Shell in the Ogani delta in Nigeria in the 1990s. There are numerous other cases on soil degradation and damage in Latin America, for instance in Ecuador (by Chevron) and Peru, often with catastrophic results for indigenous people living in affected areas. Gentian Zyberi addresses conceptual issues of responsibilities for serious environmental damage caused by commercial enterprises and suggests a model for shared responsibilities between company, host state and home state (Chapter 3). He acknowledges that the distinction between civil liability and state responsibility is proving increasingly difficult to draw with precision, and the nature of the company (whether it is private, state owned, or mixed ownership) influences assessments of responsibilities according to international law. The model of shared responsibility that he suggests resonates with the current debates about the UN Guiding Principles. The host state, Zyberi argues, is responsible for establishing suitable national legal framework to protect against environmental harm caused by companies. At the same time, the home state may have responsibilities for adjudicating disputes. Zyberi argues that only strict legal

regulation can prevent companies to make a decision that entails high-level risks for environmental hazard.

While Deva argues that 'the business case for human rights' should not be a major justification for businesses to take human rights seriously, Güler Aras (Chapter 4) assumes that we cannot ignore that there are indeed good business reasons for ethical concerns and social corporate behaviour. Ethical corporate behaviour may have different instrumental justifications and normative and institutional grounding. Interestingly, there seems to be a trend in which companies see less risk in investing in markets with a transparent policy on corporate social responsibility. Aras also refers to consumer awareness that influence corporate behaviour and quotes data from Europe and the US that indicate significant positive shifts in business attention to ethical issues. Less recognised, but equally important, is the impact that CSR behaviour may have on companies' success in employee recruitment, retention and productivity. Although we do not have strong comparative empirical evidence to draw on, ethical concerns seems to emerge as a factor prospective employees take into consideration when choosing which company to work for. Ethical choice of the employee is merged with instrumental concerns of companies to attract good employees in order to save costs of recruitment and reduce turnover rates. Reflecting on debates around the UN Guiding Principles, she supports the position that ethical and corporate responsible behaviour provide a social 'licence to operate', which again is commercially important. It is, at the same time, not just a matter of internal ethical functioning of benevolent principles but, equally importantly, these principles must be seen and perceived by the larger society to have the intended positive effects on businesses.

A main controversy of the business and human rights discourse is the functionality of human rights law in restricting and sanctioning harmful corporate behaviour beyond state borders. A much-debated strategy, still legally unsettled as a doctrine of international law, is the use of extraterritorial adjudication in the pursuit of justice. In terms of foreign cubed cases, the famous *Kiobel* case, referred to by several authors of this volume, was not at all successful in using US courts. Yet, as Humberto Cantú Rivera points out (in Chapter 5), there might be a more promising trend in other countries than the US for holding parent companies responsible in their home jurisdiction for their subsidiaries abroad (so-called 'forum-shopping'). Equally important, perhaps, are efforts to give soft-law a semi-binding character through state practice and case law. An important issue discussed by Rivera is whether the UN Guiding Principles may, in certain instances, receive such powers by the *hardening* of soft law.

The question of extraterritorial human rights obligations is increasingly being addressed in the human rights discourse. The so-called Maastricht Principles adopted by legal scholars in September 2011 is often referred to as the clearest and most comprehensive interpretation of the principle. The Principles continue to inspire the application of extra-territorial reasoning and argumentation,

e.g. by the UN Committee on Economic, Social and Cultural Rights.[39] Ebenezer Durojaye argues that the principle of extraterritorial obligations provides potentially important support for holding MNCs responsible for human rights behaviour across and beyond borders. He discusses the Maastricht Principles in detail and addresses how their application may advance states duty to enforce business enterprises' accountability for human rights harms, but also the inherent weaknesses of the principles. Similar to Deva and Rivera, he advocates for hard law human rights instruments at the international level to complement the soft law nature of the Maastricht Principles.

The second section of the volume addresses a series of contextual issues. Can human rights provide guidance for better corporate governance designed to prevent corruption? Who are the main proponents of legal advancement and social activism for changing business practices? How can we address business *sectors*, and learn about their functioning in competitive environments and the scope conditions for heightening the normative and legal human rights thresholds of regulation? And how can we measure the effects of the 'human rights policies' that businesses adopt? In Chapter 7, Hana Ivanhoe argues that it remains contested whether corruption in itself represents a violation of human rights, even if it has significant adverse effects on people's enjoyment of fundamental rights. She addresses corruption in supply chain contexts where the MNC is involved in corrupt practices by bribing for contracts and other favours. This, she argues, is potentially in conflict with the right to self-determination, a view increasingly voiced in the international human rights discourse. We need, however, more empirical evidence to map out the threat that corruption poses to individual human rights; but while we search and systematise such evidence and establish causal relationships, Ivanhoe suggests developing a framework for addressing corruption as a human rights violation. The essential conceptual bricks for such a framework can be extracted and constructed from the doctrine of due diligence, which is inherent in the UN Guiding Principles, notably the duty of businesses to respect human rights, and experiences drawn from e.g. the US Foreign Corrupt Practices Act.

Hence, one important means of raising company awareness about possible human rights harms of their operators, and potentially prevent harms from occurring, is due diligence analysis. The UNGPs refer to due diligence as a method of indicating expected outcomes. Miho Taka (Chapter 8) examines the development and application of due diligence in the extractive industries, taking the Democratic Republic of Congo (the DRC) as a case study. The DRC is not just one of the most important producers of essential minerals for technical industries worldwide, it is also a country with serious internal conflicts in the production zones of extractive mineral. How can standards of due diligence

[39] See for instance the Concluding Observation on the Second Periodic Report of China of 23 May 2014, *cf.* E/C.12/CHN/CO/2.

be effectively introduced in such economic and social contexts? Taka offers a detailed discussion of due diligence standards developed by the extractive industry, refers to some important practices of standards, and discusses, most importantly, the many challenges, obstacles and dilemmas to effective human rights due diligence that exist in the DRC. There are serious problems of tracing supply chains responsibilities, and serious governance and security obstacles. An important feature of mining in high-value minerals in the DRC is that it is carried out by artisanal miners which largely have illegal and informal status. Taka addresses some significant dilemmas (and the unintended negative consequences) the application of due diligence standards may lead to in such socio-economic contexts, where the voices of local stakeholders are not taken into account. Human rights due diligence should take this dimension of inclusiveness very seriously in contexts of 'conflict minerals' exploration.

Another important institutional condition for business compliance with human rights standards is explicit corporate commitment to these standards. The UNGPs (Principles 15 and 16) refer to this condition as a demand for formulating corporate human rights policies, as a matter of self-regulation. Yet, critics argue that such voluntary policies easily can become a 'smoke-screen' covering lack of real action in spite of official declarations. Matthew Mullen in Chapter 9 asks what a corporate human rights policy entails, and addresses the need for developing appropriate indicators for human rights policy implementation and monitoring. Based on empirical studies of corporate human rights policy formulation, Mullen suggests a framework for assessing corporate human rights policies, which draws on the human rights based approach model often referred to in the development and human rights discourse. Corporate human rights policies need to be result-oriented, draw on international human rights standards, be inclusive and provide spaces for stakeholder impact, and be transparent and accountable. Corporations need to assume a role as a duty-bearer to respect rights, and he argues that there is a process towards making human rights mandatory due to increasing public interest and demand.

In the final section of this volume, we present three chapters to illustrate how the duty of states to protect against human rights violations by corporate business is undertaken in fields of particular concern. The state duty to protect is global, but particularly acute in emerging transitional economies. Vietnam is a pertinent case, and Ngueyn Thi Than Hai's study explores the role of Vietnamese state institutions in protecting against harmful corporate behaviour (Chapter 10). She argues that this has to be addressed in the context of the governance structures of the country. The chapter reviews relevant legislation and judicial practices and examines state capacity and 'political will' to address CSR and human rights issues consistently. It is typical that CSR is interpreted quite narrowly, without appropriate reflection of human rights standards in policies and institutional set up. At the same time, she finds signs that the new international discourse on human rights and business is taking root in Vietnam. More recently, it has

become topic in research, higher education teaching, and is being referred to in the media. Still, a comprehensive state approach to the obligation of public institutions to protect against harmful corporate behaviour is needed.

The second issue concerns the impact that *international investment agreements* may have on the state's capacity to protect from business human rights harms. When countries enter into such agreements, do they to retain enough *policy space* to enable the enforcement of human rights? Investment agreements usually do not explicitly refer to and even less protect human rights. According to the 'regulatory chill theory', a home government who has entered into an investment agreement will freeze its intended human rights policies if those contradict the interests of foreign investors who operate under the agreement. The state does so in order to keep its obligations under the agreement and to avoid expensive litigations and compensation claims from concerned companies. Stéphanie Gervais tests this hypothesis in Chapter 11 by empirically analysing two cases from Latin America (El Salvador and Ecuador). Gervais finds that the two cases partly contradict the regulatory chill hypothesis which provides some scope for optimism. While the legal cases analysed were not fully concluded at the time of writing, the process thus far gives enough evidence to suggest a number of important recommendations about creating a space that may ensure state compliance with its human rights obligations and, at the same time, enable it to enter international investment agreements. Among the recommendations, investment tribunals could create human rights complaint mechanisms in addition to investors' claim mechanisms; include references to workers and communities affected by investments; integrate anti-corruption clause and make explicit reference to the UNGP. Gervais also concludes that experiences from Latin America indicate that governments indeed may object to investment agreements when the effects are detrimental to human rights and environmental concerns.

A significant feature of contemporary globalisation is the establishment of Free Trade Zones (FTZ). Since the first FTZ was established in Ireland in 1959, the number of FTZs and the related Export-processing Zones (EPZs) and Industrial Zones (IZs) has grown immensely. These zones are designed to attract capital by different forms of rule exemptions, not least in rules and regulations about working standards and by temporary tax releases or immunities. The growth of economic and industrial zones has been particularly significant in rapidly emerging transitional economies, and they often have serious human rights problems in terms of working conditions and labour rights and related civil rights of access to information. Again, Vietnam is examined as an example of a transitional economy; the country has combined about 100 IZs and EPZs. In Chapter 12, Nguyen Nga Hong discusses how civil society organisations (CSOs) have developed different strategies for supporting the rights of worker and environmental rights in IZs in Vietnam. She analyses three CSOs who have employed strategies of cooperation, networking, and confrontation to advance workers rights and enhance CSR based on human rights principles. The work

of CSOs, however, relies on the political environment. Political institutions often restrict the freedom of CSOs and the independence of trade unions, which undermine the effectiveness of civic action and trade union mobilisation.

Finally do state-owned enterprises' special nature of ownership infer a legitimate demand for stronger regulatory mechanisms? Indeed, many MNCs in the world are mixed by private and state ownership, often with a state as a majority shareowner. Does state ownership entail some sort of state human rights duty beyond the duty to respect, as advised by the UNGP, and hence, imply a request for wider regulation of partially or wholly state owned companies? This is a topical issue, not least in extractive industries, e.g. the oil sector. Ramute Remezaite (Chapter 13) addresses this issue through an analysis of the Azerbaijani state-owned company SOCAR. Although she does not reach at a conclusive legal position, she argue, with reference to the UNGP that state ownership entails added duties of the state to ensure that state-owned companies do not violate human rights. At the same time, she contends that the political environment effectively impacts on the human rights conduct of the state-owned enterprise. She further refers to the authoritarian rule of Azerbaijan, lack of judicial independence and restriction on civil society, factors which do not bode well for regulating SOCAR.

4. CONCLUSION

In spite of significant advances in soft law over recent years, there is still no consensus that corporations should have obligations under international law. What is quite evident is that the work of the UN Special Representative on Business and Human Rights brought in a dynamism in this field of business respect for human rights which was long overdue. The gradualist approach chosen by Ruggie should be commended, although his work was not the end game. In fact, it has opened up for much broader processes of strategic complementarity, that is, further advances in this field need to expand along different lines: voluntary and mandatory, cultural and institutional, economic and political. This is in fact a strategic approach which resembles the integrative framework of corporate regulation proposed by Deva.[40] Of late, much attention has been put on the quest for an internationally binding treaty. This quest is likely to be in the construction phase for a long time, important as it is; yet it should not divert attention from other strategies and issues, in *the indeterminate meantime*. The UNGP discourse has brought a momentum which should not be lost; it has been quite successful, not least, in bringing in companies in the process of gradual attitudinal and behavioural change. This might sound utopian and naïve, but it is not. There is clear evidence that it is possible to advance human rights awareness and concerns

[40] S. Deva, *Regulating Corporate Human Rights Violations. Humanizing Business* (London: Routledge, 2012).

also among business actors. The growth of the Global Compact and other reporting initiatives does, at least, indicate that some change is taking place. We need more knowledge, however, to establish how international voluntary human rights initiatives may lead to business behavioural changes. What is clear is that interest of businesses themselves, achieved by persuasion, conviction based on knowledge or by 'the power of the market' – reputational concerns (or most likely a mix of these factors), have entailed communicative impulses that are required for better human rights respect and compliance by companies. It is essential, moreover, that compliance and respect for human rights does not just concern MNCs but also 'any other business enterprise' – small, medium-sized or large, national as well as transnational. In this exclusion of national companies lies a serious weakness in the ongoing work with a possible new treaty.

Over time, real changes need to be reflected in a variety of legislative measures and regulations. A new and important field of law and regulation is bilateral and multilateral trade agreements; equally important are reforms of domestic company law and regulations. The logic of human rights law requires domestic legal adaptation and compliance, and that states are willing and able to uphold their human rights obligations. State willingness and capacity for human rights compliance is the Achilles heel of human rights law. Hence, business respect for and compliance with human rights norms and law relies on governance reforms and political commitment. But in the case of business and human rights, governance reforms must take place at two levels: corporate governance and state governance. The governance capacity and reforms of states must permeate practices of commercial actors. It is not very likely that this will happen over night, but it is a necessary condition for human rights change in the business and human rights field to take place. The regulatory turn, therefore, requires a nexus of political and economic-institutional processes of change. Law, including a stronger human rights legal framework is an important factor, but conditional on other changes in culture, political commitment, and the normative structuring of markets. Market-sectorial approaches of regulation and reform may help to retain the interest and commitments of commercial actors as long as regulation is conceived as contributing to a fair level playing field of respective sectorial markets.

This collection of conceptual and empirical studies aims to highlight advances, dilemmas and significant policy and economic issues that need further studies and research to advance this new frontier of human rights theory and practice.