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"The End of the Beginning?": A Comprehensive Look at the U.N.'s Business and Human Rights Agenda from a Bystander Perspective

Jena Martin Amerson

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Cover Page Footnote

Associate Professor of Law, West Virginia University College of Law. Thanks to Kareem Amerson, Larry Catá Backer, Robert Bastress, Christine Bader, Gregory Bowman, andré douglas pond cummings, Anne Lofaso, Alison Peck, William Rhee, and Ruthann Robson. Many thanks also go to Emily Moy and Jamie Ritton for extraordinary research assistance, and thanks and high praise go to Bertha Romine for her amazing assistance and proofreading skills. In addition, this work was assisted greatly by the Business and Human Rights Resource Centre, whose compilations of many of the source documents on business and human rights have been a significant development for researchers in this area. This work was supported by the Bloom Faculty Research Grant. The author also would like to thank WVU College of Law for its support of this project.



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“THE END OF THE BEGINNING?”:
A COMPREHENSIVE LOOK AT THE U.N.’S
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FROM A BYSTANDER PERSPECTIVE

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Jena Martin Amerson *

ABSTRACT

With the endorsement of the Guiding Principles regarding the issue of business and human rights, an important chapter has come to a close. Beginning with the then U.N. Secretary-General’s “global compact” speech in 1999, the international legal framework for business and human rights has undergone tremendous change and progress. Yet, for all these developments, there has been no exhaustive examination in the legal academy of all of these events; certainly there is no one piece that discusses or analyzes all the major instruments that have been proposed and endorsed by the U.N. on the subject of business and its relationship with human rights issues. This Article attempts to fill that gap. By documenting the rise and development of Transnational Corporations as potential subjects under international law, the Article will help to provide a comprehensive overview of the issues concerning Transnational Corporations and businesses for the last twelve years. In addition, by examining the Guiding Principles through the lens of bystander rhetoric, this Article hopes to point the way forward to the next

* Associate Professor of Law, West Virginia University College of Law. Thanks to Kareem Amerson, Larry Catá Backer, Robert Bastress, Christine Bader, Gregory Bowman, andré douglas pond cummings, Anne Lofaso, Alison Peck, William Rhee, and Ruthann Robson. Many thanks also go to Emily Moy and Jamie Ritton for extraordinary research assistance, and thanks and high praise go to Bertha Romine for her amazing assistance and proofreading skills. In addition, this work was assisted greatly by the Business and Human Rights Resource Centre, whose compilations of many of the source documents on business and human rights have been a significant development for researchers in this area. This work was supported by the Bloom Faculty Research Grant. The author also would like to thank WVU College of Law for its support of this project.

phase in developing a meaningful accountability structure for TNCs
under international law.

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INTRODUCTION

Ruggie has gone to great lengths to analyze the environment in which multinational corporations operate today, particularly what he calls ‘governance gaps’ or ‘weak governance zones’—areas where few of the underpinnings of law and order exist. ‘This authority vacuum, or governance gap, often leads responsible companies to stumble when faced with some of the most difficult choices imaginable, or to try and perform de facto governmental roles in local communities for which they are ill-equipped. Less responsible firms take advantage of the asymmetry of power they enjoy to do as they will.’¹

On June 16, 2011, the U.N. Human Rights Council unanimously endorsed² the Guiding Principles on Business and Human Rights (“Guiding Principles” or “Principles”).³ With its vote to endorse these principles, an era of seismic shifts regarding business and human rights came to an end. In a matter of twelve years, the landscape of international human rights law changed dramatically. In this time frame, Transnational Corporations (“TNCs”) went from lurking in the shadows of the human rights debate, to being placed on the United Nations’ center stage, a spotlight firmly fixed upon them.⁴ Much of that change came at the hand of John Ruggie and his team. Acting as Special Representative⁵ to the U.N. on business and human rights⁶ issues from

1. Robert A. Senser, *Big Business and the U.N.: Toward a New Framework for Corporate Responsibility*, AM. THE NAT’L CATHOLIC WKLY., Dec. 1, 2008, available at http://www.americanmagazine.org/content/article.cfm?article_id=11253 (internal quotes omitted).

2. Scott Jerbi, *U.N. Adopts Guiding Principles on Business and Human Rights – What Comes Next?*, IHRB (Jun. 17, 2011), http://www.ihrb.org/commentary/staff/un_adopts_guiding_principles_on_business_and_human_rights.html.

3. These Principles were drafted by Special Representative John Ruggie.

4. See, e.g., Olivia Ward, *60 Years Later, Fight for Rights Carries on; in an Era of Turmoil, Many Wonder Whether the U.N.’s Universal Vow is a Work in Progress*, THE TORONTO STAR, Dec. 9, 2008, at AA.1.

5. The U.N. frequently appoints people to act as Special Representatives for various missions or mandates that it wants to complete. For a sample list, see *Special and Personal Representatives and Envoys of the Secretary-General, the Americas*, UN.ORG, <http://www.un.org/en/peacekeeping/sites/srsg/americas.htm> (last visited Jan. 3, 2012). The Special Representative acts at the behest of the appointing body at the U.N., performing various tasks and acting as a spokesperson for the U.N. within the scope of their mandate. In this instance, then Secretary-General Kofi Anan appointed John Ruggie as the Special Representative on the issue of human rights and

2005–2011, Ruggie analyzed the problems that plague TNCs regarding human rights issues and set forth his proposal to help solve the problem.⁷

However, while Ruggie’s work is transformational, it is still incomplete.⁸ The Guiding Principles are significant, but they are non-

Transnational Corporations. See Press Release, U.N. Secretary-General, Secretary-General Appoints John Ruggie of United States, Special Representative on Issue of Hum. Rts., Transnat’l Corp., other Bus. Enter., U.N. Press Release SG/A/934 (July 28, 2005), available at <http://www.un.org/News/Press/docs/2005/sga934.doc.htm>.

6. Generally speaking, the term business and human rights encompasses a broad range of activity relating to such diverse matters as trade, labor, and corporate governance. The idea underlying the term is that business entities are somehow implicated in circumstances that raise human rights issues. In this Article, I will use the term broadly, discussing TNCs’ responsibility and potential accountability within the context of human rights violations.

7. Ruggie’s contributions came under two mandates created by the U.N. Human Rights Council. The first mandate, which was created in April 2005, requested among other things that the Special Representative “identify[] and clarify[] existing standards of corporate responsibility and accountability with regard to human rights.” *Id.* The second mandate, which the U.N. issued after Ruggie completed his first mandate, requested that Ruggie provide recommendations to the Council on operationalizing the framework for business and human rights. Special Representative of the Secretary-General on the Issue of Hum. Rts. and Transnat’l Corp. and Other Bus. Enter., *Business and Human Rights: Further Steps Toward the Operationalization of the “Protect, Respect and Remedy” Framework*, Hum. Rts. Council, U.N. Doc. A/HRC/14/27 (Apr. 9, 2010) (by John Ruggie), available at <http://198.170.85.29/Ruggie-report-2010.pdf>. Although the U.N. issued two separate mandates, Ruggie often refers to them as one mandate in interviews. See Interview by John Sherman with Professor John Ruggie, Special Representative of the U.N. Secretary-General on Bus. & Hum. Rts, Int’l Bar Ass’n Webcast (Apr. 19, 2010), available at <http://www.ibanet.org/Article/Detail.aspx?ArticleUId=4b5233cb-f4b9-4fcd-9779-77e7e85e4d83> [hereinafter Interview by John Sherman].

8. Ruggie himself acknowledges this. In the Guiding Principles, he states “Council endorsement of the Guiding Principles, by itself, will not bring business and human rights challenges to an end. But it will mark the end of the beginning.” Special Representative of the Secretary-General on the Issue of Hum. Rts. and Transnat’l Corp. and Other Bus. Enter., *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, Hum. Rts. Council, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011) (by John Ruggie), available at http://www.ohchr.org/Documents/Issues/Business/A-HRC-17-31_AEV.pdf [hereinafter *Guiding Principles*].

binding. Victims of human rights abuses who lack the means of redress in their domestic sphere are still largely unable to turn to international law in order to hold TNCs accountable for their role in the abuse. This can lead to significant human rights abuses left unchecked, particularly in weak governance zones, where the State itself either perpetrates the abuse or is unwilling to stop the aggressor. While many are hopeful that Ruggie has laid the foundation in the Principles for future accountability mechanisms, the Principles themselves reject this as an appropriate use of its framework.

Previously, I have proposed a new paradigm for looking at TNCs⁹ under international law, namely that of a bystander.¹⁰ The basis for my proposal was that TNCs employ the rhetoric of the bystander to try to avoid responsibility for human rights violations under international law by confusing and dominating the dialogue on corporate accountability.¹¹ I maintained that until we find an accountability framework that incorporated the bystander name, TNCs would continue to control the debate regarding their role in human rights abuses and prevent the creation of an accountability framework that incorporates TNCs.¹² Examining the Guiding Principles from a bystander perspective will

9. Transnational Corporations is just one of many terms that have been employed for this corporate structure. Other terms, such as multi-business enterprises and multinational corporations, are also used. I adopt the use of Transnational Corporations for two reasons: 1) this term has appeared most often in my review of the United Nations' documents themselves; and 2) TNC most accurately conveys the jurisdictional uniqueness of these enterprises in my view. In addition, in Ruggie's first official report to the Human Rights Council, he points out that oftentimes state-owned companies or business enterprises that reside in only one jurisdiction are the greatest abusers of human rights. Special Representative of the Secretary-General on the Issue of Hum. Rts. and Transnat'l Corp. and Other Bus. Enter., *Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts*, Hum. Rts. Council, U.N. Doc. A/HRC/4/035 (Feb. 9, 2007) (by John Ruggie), available at <http://www.business-humanrights.org/SpecialRepPortal/Home/ReportstoUNHumanRightsCouncil/2007> [hereinafter *2007 Report*]. While that may be true, from an accountability standpoint, intrastate corporations do not present the same accountability issues that arise when corporations operate in multiple jurisdictions. These latter issues are my focus in this Article.

10. See Jena Martin Amerson, *What's in a Name? Transnational Corporations and Bystanders Under International Law*, 85 ST. JOHN'S L. REV. 1 (2011).

11. At its core, the TNC's bystander strategy is the following: in the wake of accusations from human rights advocates, TNCs maintain that they were merely bystanders (i.e., innocent third parties) to the underlying events, helpless to stop the tragedy from occurring. *Id.* at 5.

12. *Id.*

further enhance the discussion on the best accountability paradigms for TNCs in the realm of human rights abuses.

Using mainly primary source materials (such as the U.N.'s own foundational documents and contemporaneous articles and commentary from that time period),¹³ this article will examine the short history¹⁴ of business and human rights at the U.N. and analyze the impact that its work will have on international human rights law generally, as well as the bystander paradigm specifically. While the Guiding Principles represent a significant step forward in the area of business and human rights, more work needs to be done at the foundational level before business and human rights law becomes firmly entrenched at the international level. By analyzing these new normative goals from a bystander perspective, I hope to advance the debate regarding a feasible accountability model for TNCs under international law.

Part I of this Article offers some background on the bystander paradigm for TNCs. Part II provides a comprehensive¹⁵ documentation

13. In the introduction to his 2008 Official Report to the Human Right Council, Ruggie stated that “the international community is still in the early stages of adapting the human rights regime to provide more effective protection to individuals and communities against corporate-related human rights harm.” Special Representative of the Secretary-General on the Issue of Hum. Rts. and Transnat’l Corp. and Other Bus. Enter., *Protect, Respect and Remedy: A Framework for Business and Human Rights*, ¶ 1, Hum. Rts. Council, U.N. Doc. A/HRC/8/5 (Apr. 7, 2008) (by John Ruggie), available at http://www.unglobalcompact.org/docs/issues_doc/human_rights/Human_Rights_Working_Group/29Apr08_7_Report_of_SRSG_to_HRC.pdf [hereinafter *Respect Framework*]. Because scholarship in this area is still in its infancy, and given that most of the work on this subject for the last twelve years has come from the Special Representative’s office, examining the developments under Ruggie’s mandates is most effective for this Article’s assessment of business and human rights issues.

14. While there are many U.N. mandates and treaties that inform the issue of business and human rights, this Article will focus primarily on those that specifically address corporate responsibility—namely the U.N. Norms, The U.N. Global Compact, and the reports produced by Special Representative John Ruggie.

15. Comprehensive, but not exhaustive, Ruggie’s work alone in the last six years has generated hundreds of reports, addenda, responses, commentaries and workshop projects. A thorough analysis of each is beyond the scope of this Article. For a list of all the documents that were prepared by or submitted to Ruggie in connection with his work, see List of Documents Prepared by and Submitted to SRSG on Business and

of the seismic shift that has occurred in the area of business and human rights in the last twelve years. While this section begins with Kofi Annan's declaration regarding business and human rights through the work of the Global Compact, it will focus primarily on the U.N. Norms on the Responsibilities of Transnational Corporations and Other Business Entities with Regard to Human Rights ("U.N. Norms") and its aftermath—specifically examining the work of Special Representative John Ruggie and his mandates. Part III of this Article analyzes the Guiding Principles—the culmination of Ruggie's mandates—and discusses how the three pillars ("Protect," "Respect," and "Remedy") upon which the Guiding Principles are based affect the bystander paradigm. Part IV offers an analysis of the Guiding Principles, examining how it compares to its main predecessor, the U.N. Norms, as well as how it has had an impact on the bystander framework.

That the Guiding Principles will likely have an impact on international human rights law—now and in the future—is a premise beyond dispute. Thus, the Principles are truly the end of the beginning. Nonetheless, until a workable *accountability* framework is developed, the end of the beginning is all we have.

I. THE BYSTANDER BACKGROUND

One of the long-standing struggles that scholars and advocates have wrestled with are TNCs' position in the international legal framework with respect to human rights violations.¹⁶ These violations are

Human Rights (Aug. 10, 2010), available at <http://198.170.85.29/Ruggie-docs-list.pdf> [hereinafter Document List]. This list is current as of August 2010.

16. One of the most comprehensive discussions of this issue comes from Steven Ratner. See Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443 (2001). Other scholars have also joined the discussion over the years. See, e.g., Nien-hê Hsieh, *The Obligations of Transnational Corporations: Rawlsian Justice and the Duty of Assistance*, 14 BUS. ETHICS Q., no. 4, 643–661 (2004); Kenneth Paul Kinyua, *The Accountability of Multinational Corporations for Human Rights Violations: A Critical Analysis of Select Mechanisms and Their Potential to Protect Economic, Social and Cultural Rights in Developing Countries* (Working Paper Series No. K33, Sept. 30, 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1599842 (critically analyzing the effectiveness of the U.N. Human Rights Norms as a development in customary international law); David Kinley & Junko Tadaki, *From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law*, 44 VA. J. INT'L L. 931 (2004) (arguing that the current state-based framework for human rights accountability is

numerous. Among them are torture, gender discrimination, labor rights violations and environmental harm.¹⁷ They also arise in numerous scenarios. For example, villagers are subject to rape, torture, and death after a TNC begins operations in their village; afterwards, the TNC may disavow any involvement.¹⁸ An explosion at a plant in India causes thousands of deaths and incalculable harm to the environment; corporate executives in the U.S. disclaim any legal responsibility.¹⁹ Riots and deaths come after a TNC wins a contract to privatize Bolivia's water, and Bolivians are denied access to water at a reasonable price; yet the TNC claims that it was not involved in any of the actions that led to the abuses.²⁰ To compound the complexity, there is no current legal

inadequate and duties for TNCs under international law should be implemented); Paul Redmond, *Transnational Enterprise and Human Rights: Options for Standard Setting and Compliance*, 37 INT'L LAW. 69 (2003) (arguing for an international legal framework for TNCs); Larissa van den Herik & Jernej Netmar Cernic, *Regulating Corporations Under International Law: From Human Rights to International Criminal Law and Back Again*, 8 J. INT'L CRIM. JUST. 725 (2010) (exploring the idea of bringing corporate human rights responsibility into an international criminal law paradigm to remedy the existing enforcement gap); Rachel J. Anderson, *Reimagining Human Rights Law: Toward Global Regulation of Transnational Corporations*, 88 DENV. U. L. REV. 183 (2010) (arguing for the creation of global human rights law, as distinct from international human rights law, to be the law paradigm for TNCs); Cynthia Williams, *Corporate Social Responsibility in an Era of Economic Globalization*, 35 U.C. DAVIS L. REV. 705 (2002) (arguing that a new paradigm needs to be created that incorporates the reality of how corporations do business today).

17. Kinley & Junko Tadaki, *supra* note 16, at 934.

18. *Id.*

19. See discussion *infra* Section I.B. and accompanying footnotes.

20. These scenarios are based on, but not identical to, situations involving the following corporations: Unocal, Union Carbide, and Bechtel. For brief summaries of each (that also allude to strategies by TNCs that implicate a bystander strategy), see Boston Common Asset Management, *Indian Judge Orders Dow to Explain Shielding of Subsidiary in Bhopal Criminal Case*, CSR WIRE (Jan 11, 2005), http://www.csrwire.com/press_releases/20781-Indian-Judge-Orders-Dow-to-Explain-Shielding-of-Subsidiary-in-Bhopal-Criminal-Case (discussing Union Carbide's Bhopal disaster and the corporate responsibility issues involved); Andrew Gumbel, *Tale of Rape and Murder on Burmese Pipeline Haunts U.S.*, THE INDEPENDENT (Dec. 11, 2003), <http://www.independent.co.uk/news/world/americas/tale-of-rape-and-murder-on-burmese-pipeline-haunts-us-576248.html> (discussing Unocal); Sheraz Sadiq, *Timeline: Cochabamba Water Revolt*, PUBLIC BROADCASTING SYS. (June 2002), <http://www.pbs>.

framework under international law that imposes liability for TNCs in these situations.

Finding a theory of liability to hold TNCs accountable under international law is problematic. First, since many human rights violations occur in weak or nonfunctioning governance systems, attempts to use national laws to hold TNCs accountable for their role in human rights abuses has been largely unworkable.²¹ Second, any attempt to hold TNCs accountable at an international level is stymied by the underlying framework of international human rights law (namely as an accountability mechanism that was crafted by, and applied exclusively to, state actors).²² Third, attempts to try a transnational approach to accountability, while finding some limited success, are often barred by jurisdictional issues.²³ Fourth (and relatedly), the peculiar legal structure of corporations, with their capacity to limit liability through subsidiaries, provides a difficult, often insurmountable burden in trying to assess what role these enterprises and their representatives have in the vast number of human rights abuses that occur. Finally, TNCs often use bystander rhetoric to distance themselves from underlying human rights violations, placing the blame on the State or the community.²⁴

Moreover, TNCs also employ other means of escaping liability through their use of, what I have labeled, bystander rhetoric. Rarely do TNCs disavow the existence of an event; rather, they take the position that they are mere bystanders—witnesses to the underlying event that have abstained from participation.²⁵ This rhetoric is significant because, under most legal theories, bystanders cannot be held liable for the acts in question.²⁶ Apart from the question of legal complicity, the rhetoric is also significant because it shows an attempt to convey the idea of the innocent bystander—an entity who, in essence, is often made to witness (against its will) the struggle between the aggressor and his victim.²⁷ By

[org/frontlineworld/stories/bolivia/timeline.html](http://org.frontlineworld/stories/bolivia/timeline.html) (documenting the water riots in Bolivia and including statement by a Bechtel spokeswoman suggesting that “the political instability in Bolivia, rather than people’s ire at water-rate hikes, was responsible for the ‘civil unrest.’”).

21. *Respect Framework*, *supra* note 13.

22. Martin Amerson, *supra* note 10, at 2.

23. *Respect Framework*, *supra* note 13, at ¶¶ 88–89.

24. Martin Amerson, *supra* note 10.

25. Martin Amerson, *supra* note 10, at 5.

26. *Id.* at 15.

27. *Id.* at 5.

employing this rhetoric, both as a public relations strategy and a litigation strategy, TNCs can escape liability under most national and international systems.²⁸

A. THE BYSTANDER RHETORIC

TNCs and their corporate structures carry unique characteristics that make holding them liable difficult. First, TNCs are often specifically organized in such a way as to avoid liability for events that occur in different States.²⁹ For instance, many TNCs, while organizationally seamless, are separate legal entities.³⁰ Therefore, although a TNC may present one face to the global community, it is usually a collection of distinct legal entities. Its subsidiaries (which may be positioned on the ground during the abuses) are often organized under the laws of a Host State,³¹ while reporting directly to the executives of the parent corporation (domiciled in a different jurisdiction). As such, TNCs (and particularly the organizing parent corporation) are able to avoid liability for human rights abuses in the parent corporation's jurisdiction by emphasizing the separate legal status of the entity in the Host State.³²

Second, TNCs wield an unusually large amount of wealth and power that oftentimes dwarfs the income and capacity of the Host State.³³ Therefore, Host States that are dependent on TNCs for economic growth and development frequently turn the other way, or worse,

28. *Id.* at 34–44.

29. Mahmood Mashiouri, *Multinational Corporations and the Ethics of Global Responsibility: Problems and Possibilities*, 25 HUM. RTS. Q. 965, 974 (2003).

30. For an expansive analysis of the legal personalities of TNCs, including when their separate legal personalities can be overcome, see Binda Sahni, *The Interpretation of the Corporate Personality of Transnational Corporations*, 15 WIDENER L.J. 1 (2005).

31. Under international law, the Home State is the State where the TNC's primary headquarters are located. In contrast, the Host State is the locale of the operations that lead to human rights abuses.

32. See Sahni, *supra* note 30, at 34 (2005). Sahni explores how current corporate law allows a corporation to limit its own liability for its subsidiaries, whereby “[a TNC’s] ability to limit its owner’s liability makes the undertaking of otherwise risky projects more acceptable, thereby accelerating economic activity and development.” *Id.*

33. Martin Amerson, *supra* note 10, at 8 n.31; Mashiouri, *supra* note 29, at 973.

become complicit in human rights abuses to ensure that the TNCs will continue to remain.³⁴

Third, TNCs often embrace bystander rhetoric in the wake of human rights abuses. In essence, a TNC will claim that no overt act that led to the human rights abuse can be directly linked back to the TNC. As a result, the TNC will argue that it was merely a witness, a bystander to the underlying acts that occurred. Corporate actors will frequently acknowledge that there are human rights abuses occurring around them, but will disclaim any and all involvement with the acts, frustrating efforts to hold them accountable.

Despite the TNC’s rhetoric, many accountability mechanisms have been proposed³⁵ and attempted³⁶ to address the unique position of TNCs. By and large, these have focused on the actions of a TNC in relation to an underlying event. For instance, most litigation that has been launched against TNCs has attempted to ascribe some action to the TNC that led to the human rights abuse in question.³⁷ Nevertheless, TNCs uniformly

34. See Interim Report of the Special Representative of the Secretary-General on the Issue of Hum. Rts. and Transnat’l Corp. and Other Bus. Enter., *Promotion and Protection of Human Rights*, Comm’n on Hum. Rts., U.N. Doc. E/CN.4/2006/97 (Feb. 22, 2006), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G06/110/27/PD/F/G0611027.pdf?OpenElement> [hereinafter *2006 Interim Report*].

[Yet a] third rationale for engaging the transnational corporate sector has emerged in the past few years: the sheer fact that it *has* global reach and capacity, and that it is capable of acting at a pace and scale that neither Governments nor international agencies can match. Other social actors increasingly are looking for ways to leverage this platform in order to cope with pressing societal problems - often because Governments are unable or unwilling to perform their functions adequately.

Id. ¶ 16.

35. See, e.g., Jennifer Rubenstein, *Accountability in an Unequal World*, 69 J. POL. 616 (2007) (proposing a model of surrogate accountability for holding powerful actors responsible on the international stage).

36. In the United States, the proposed mechanism of choice was the Alien Tort Claims Act (“ATCA”). For a current view of the legal landscape surrounding ATCA, see Janine Stansinz, Note, *The Expansion of Limited Liability Protection in the Corporate Form: The Aftermath of Kiobel v. Royal Dutch Petroleum Co.*, 5 BROOK. J. CORP. FIN. & COM. L. 573 (2011).

37. One example is *Doe v. Exxon Mobil Corp.*, 573 F. Supp. 2d 16, 23 (D.D.C. 2008), a case brought by Indonesian villagers and their next of kin who alleged that soldiers who were employed by Exxon to maintain order for their pipeline brutalized and tortured the villagers. Another example is the case of Ken Wiwa, an activist executed by the Nigerian government for making claims that it, along with Shell, destroyed the environment and reaped profits. For an analysis of Shell’s involvement in Wiwa’s trial, see Martin Amerson, *supra* note 10, at 24-27.

deny their involvement in such underlying events. Given the weak legal framework for extraterritorial violations, plaintiffs who sue, particularly in the United States, are not often successful.³⁸

This is why the debate has often stalled: rather than focusing on corporations as the responsible actors, current international law mechanisms focus on the state as the actor, and corporations as mere bystanders—but there is no legal framework that addresses the complicity of such witnesses.³⁹ Moreover, TNCs have taken advantage

38. See generally Martin Amerson, *supra* note 10, at 23-31; see also Ronen Shamir, *Between Self-Regulation and the Alien Tort Claims Act: On the Contested Concept of Corporate Social Responsibility*, 38 LAW AND SOC'Y REV. 635, 655 (2004) (“[TNC]s thus depict themselves as both lacking an ability to have an impact on relevant policies and neutrally respectful of state policies in the countries where they operate.”). Shamir uses the examples of Coca-Cola in Indonesia and Unocal in Burma. Both corporations made defenses that they were too far removed from the situation to have any influence over the human rights abuses that occurred. *Id.* at 650. Shamir also analyzes the weaknesses of the ATCA, 28 U.S.C. § 1350, as a mechanism to sue TNCs for human rights abuses. *Id.* at 650-655. The defenses, combined with a weak doctrine, makes litigation an uphill battle for plaintiffs. *Id.* at 659-660.

39. *Id.* at 32. Complicity theory is one legal tactic that seeks to avoid the conundrum that exists when the alleged action is far removed from the prosecuted actor. In one respect, complicity is an attractive alternative—unlike many other theories of liability, it can be used with some underlying legal accountability mechanism in the international arena. The key shortcoming for complicity under international law as it stands now, is that it does not go far enough. For instance, the current consensus regarding complicity and international law is that “mere presence where an abuse occurs, or deriving incidental benefit from a relationship with one who commits an abuse or even from the abuse itself, is unlikely to result in legal liability for complicity.” See U.N. Secretary-General’s Special Representative for Bus. and Hum. Rts., Letter dated Sept. 12, 2008 from the Special Representative to the Legal Officer of Int’l Econ. Rel. of the Int’l Comm’n of Jurists (Sept. 12, 2008), available at <http://www.reports-and-materials.org/Ruggie-comments-ICJ-complicity-report-12-Sep-2008.pdf> (summarizing the current criminal framework for complicity).

While it bears many similarities to the idea of complicity, the bystander concept is not the same. The standard for complicity that is widely accepted as the most clear articulation of international law is found in a United States Court of Appeals case, *Doe v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002). At its core, complicity behavior is based, at least in part, on some overt act on the part of the actor that leads to “substantial assistance.” *Id.* at 951. In contrast, bystander liability, rather than being based on the actions of the TNC, is based on the relationship that the TNC has with the host country. As a result, bystander liability is arguably most appropriate in situations

of this legal structure by reinforcing, through their legal and nonlegal strategies, the claim that they only witnessed but did not participate in the underlying events.

Invoking a bystander strategy takes a new approach. Rather than focusing on the conduct of TNCs, it accepts TNCs as mere bystanders, using this rhetoric as a starting point for an accountability mechanism. A key characteristic then of any accountability structure built around this strategy marks a shift in focus from the *actions* of TNCs to the *special relationships* that TNCs have created (particularly in weak governance zones), and further, how those relationships may create special duties for TNCs under international law.

Sometimes these duties have been recognized in the legal system, albeit in extralegal ways (i.e., under principles of equity rather than precedent). One example is Union Carbide's involvement with an explosion at a plant in Bhopal, India.

B. INDIA'S BHOPAL DISASTER

Union Carbide has had a long history of operating in India.⁴⁰ On December 2, 1984, its facility, located in Bhopal, India, had an accident during which deadly gas emitted from the factory and out into the community. While the figures vary regarding the number of deaths that resulted, the most conservative estimates place the death toll at 400 from that evening alone.⁴¹ In subsequent months, the death toll would rise to 15,000.⁴² Since then, due to the continuing contamination of the area, as well as its groundwater and soil, illness and deaths relating to that

where the *relationship* is at issue because of the duties that arise from the recognition of special relationships. See Martin Amerson, *supra* note 10, at 12.

40. Internat'l Confed. of Free Trade Unions & Internat'l Fed. of Chemical, Energy, and General Workers Unions, *The Report of the ICFTU-ICEF Mission to Study the Causes and Effects of the Methyl Isocyanate Gas Leak at the Union Carbide Pesticide Plant in Bhopal, India, on December 2nd/3rd 1984*, BHOPAL.NET, <http://www.bhopal.net/oldsite/documentlibrary/unionreport1985.html> (last visited October 31, 2012).

41. There is also a wide range of estimates regarding the number of people who died in the days after the disaster, however, by all accounts, the numbers multiplied rapidly so that within the first seventy-two hours more than 1,200 were likely dead. *The Bhopal Disaster*, CENTER FOR SCIENCE AND ENVIRONMENT, <http://www.cseindia.org/us/erfiles/THE%20BHOPAL%20DISASTER.pdf>.

42. *Rallies Held over Bhopal Disaster*, BBC NEWS (Dec. 3, 2004), available at http://news.bbc.co.uk/2/hi/south_asia/4064527.stm.

evening still occur.⁴³ At the time of the accident, Union Carbide (now owned by Dow Chemical) was the parent company of Union Carbide India (“UCI”). The company had a 50.9% interest in UCI, sufficient to exercise control over the subsidiary.⁴⁴

Within a week of the accident, lawsuits were filed in the U.S. against Union Carbide, the parent corporation. The company defended on the grounds of *forum non conveniens*.⁴⁵ The U.S. District Court for the Southern District of New York, which had consolidated all of the suits into one lawsuit and one jurisdiction, agreed to dismiss the suit against Union Carbide if the company would consent to jurisdiction in India.⁴⁶ Once the suit was removed to India, the litigation continued. In 1989, the company made a settlement offer of \$470M.⁴⁷ The Indian Supreme Court subsequently approved the settlement amount.⁴⁸

Although Union Carbide argued that it should not be held responsible because it did not have control over the actions of its subsidiary, the Indian Supreme Court soundly rejected this principle. The Court held that because Union Carbide was the majority shareholder in its Indian subsidiary, it had the power to exercise “full control” over UCI and its board.⁴⁹ Even if it did not exercise that power, as Union Carbide alleged, that policy “could not absolve it from its liability.”⁵⁰ In this ruling the court, although not explicitly, turned the bystander strategy invoked by Union Carbide on its head and found that

43. *Id.*

44. Under Indian law, foreign direct investment is normally limited to 40%. Practising Law Institute, 765 Commercial Law & Practice Course Handbook Series International Joint Ventures 141, 155 (Mar. 1998). However, Union Carbide was granted an exemption. *Gas Leak Shatter Reputation*, LAWRENCE-JOURNAL WORLD (Dec. 16, 1984) available at <http://news.google.com/newspapers?nid=219&dat=19841216&id=83EzAAAAIIBAJ&sjid=DOKFAAAAIBAJ&pg=4436,3913765>.

45. *In re Union Carbide Corp. Gas Plant Disaster at Bhopal India in December, 1984*, 634 F.Supp. 842 (S.D.N.Y. 1986).

46. *Id.* at 867.

47. *Union Carbide v. Union of India et. al.*, (2/14/1989) (Supreme Court of India), available at <http://judis.nic.in>.

48. *Id.*

49. VAGTS ET AL., TRANSNATIONAL BUSINESS PROBLEMS 195-196 (4th ed.).

50. *Id.*

the sheer nature of the accident, along with principles of equity, made the company liable (if not solely liable) for the disaster.⁵¹

This case highlights the use of bystander rhetoric well. Union Carbide’s seemingly attenuated legal status from its subsidiary led the corporation to argue that it should not be held accountable for the disaster at Bhopal. The company could not (and did not) deny that the accident occurred; rather, it simply stated that its legal status as a U.S. corporation made it, in essence, a distant bystander to the event that occurred half a world away.

C. IMPLEMENTING A BYSTANDER THEORY

As of right now, the bystander strategy is in its formative stages. Although unusual in case law, the idea of holding a party responsible for their *inaction* is not without precedent.⁵² For instance, in certain limited situations in American tort law, nonfeasance can result in legal accountability and legal liability. In those situations, the relationship between the bystander and the victim creates a special duty which can then lead to liability for the duty bearer’s inaction.⁵³ Likewise, a contemplated bystander analysis for legal liability under international law might begin by analyzing relationships under this type of framework—one that will allow relationships to give rise to a duty that in turn forms the foundation for a theory of accountability.⁵⁴ To do

51. *Union Carbide v. Union of India* (Madhya Pradesh H.C.) No. 26/88 (1988), reprinted in VAGTS ET AL., *supra* note 49.

52. See, e.g., *DeShaney v. Winnebago Cnty.*, 489 U.S. 189 (1989); Kim Boyer, Comment, *County Welfare Department Liability for Handling Reports of Child Abuse*, 30 SAN DIEGO L. REV. 187, 190–191 (1993).

53. The case of *DeShaney v. Winnebago County*, 489 U.S. 189 (1989), provides a discussion of a special relationship and how a special relationship (in this case between the State and the victim) can create a duty to act. In *DeShaney*, a young boy was beaten extensively by his father over the course of many years. *Id.* at 192. During that time, the State had substantial evidence that abuse was occurring and yet did not step in to stop it. *Id.* at 192–93. As a result of the beatings, DeShaney suffered extensive brain damage. *Id.* at 193. In a 6-3 ruling, the Court held that the State had no duty to act. *Id.* at 200–02. However, the court noted that in certain instances, where a special relationship is created, it may give rise to a constitutional duty to act. *Id.* at 201–02. The Court also discussed whether a duty may be created under state tort law. *Id.*

54. In American case law, it is the relationship between the bystander and the victim that creates the duty to act. For an overview of the case law on the subject, see Boyer, *supra* note 52, at 190–91. Given that TNCs are often present in weak

otherwise would make the parameters of inaction too large and unwieldy for a serious structure of accountability.

The bystander framework, as articulated, also has room for flexibility. The American theory of nonfeasance happens to be one of the most promising areas where the bystander theory can grow, but there are many different jurisprudential theories that can be used to craft a workable framework for TNCs under international law. Unjust enrichment,⁵⁵ which has traditionally been categorized under theories of contract but is much more accurately a theory of equity, is another.

Moreover, an additional theory of accountability may stem from a theory of products liability. Under a products liability theory, a corporation assumes liability for the status of its product regardless of its final market.⁵⁶ So, for instance, a Taiwanese manufacturer can still face liability if it improperly manufactures a fire extinguisher that results in deaths and injuries in California. One can ask why the same result should not occur in a human rights framework. As one author notes: “If companies legally assume responsibility for the quality of their products regardless of where they are manufactured, should they not also bear some responsibility for the manner and conditions in which they are produced?”⁵⁷ All of these theories are an attempt to solve the problem that has occurred as a result of the rapidly evolving role of business within the world.

In his 2008 Report, Ruggie argues that the single greatest challenge to crafting a business and human rights regime stems from the rise of

governance zones, an appropriate accountability theory for business and human rights violations might focus on the relationship between the TNC and the aggressor, in lieu of or in addition to, the relationship between the TNC and the victim.

55. M.C.D., Annotation, *Nontort Liability of Third Person Who Receives Money or Property in Supposed Performance of Contract, to Party to Contract Who Was Entitled Thereto*, 106 A.L.R. 322 (1937).

56. For a geographically close example, see *In re Ephedra Products Liability Litigation*, 349 B.R. 333 (Bankr. S.D.N.Y. 2006) (addressing enforcement of a Canadian court’s bankruptcy order for a Canadian company’s involvement in marketing ephedra).

57. Justine Nolan, *Global Scourge of Corporate Buck-Passing on Workers’ Rights*, NATIONAL TIMES, June 10, 2010, <http://www.smh.com.au/opinion/society-and-culture/global-scourge-of-corporate-buckpassing-on-workers-rights-20100609-xw19.html#ixzz1TEOTnOVy>.

globalization.⁵⁸ Specifically, Ruggie argues that globalization, and with it the rise of TNCs that are subject to the laws of many jurisdictions, has created a governance gap that international law has not yet filled.⁵⁹ I agree with Ruggie's assessment and suggest further that this gap is precisely the area in which the bystander framework applies.

The bystander framework offers a mechanism whereby companies must take proactive steps to make sure that the relationships they are developing do not lead to violations of human rights law or ignore the consequences of those relationships at their peril.⁶⁰

II. OUT OF THE FIERY FURNACE: A REVIEW OF THE HISTORY OF BUSINESS AND HUMAN RIGHTS ON THE U.N. STAGE

The issue of business and human rights has been on the international legal terrain for less than two decades.⁶¹ Its genesis came

58. *Respect Framework*, *supra* note 13, ¶ 3.

59. The Respect Framework states that the governance gap can affect all corporations. *Id.* ¶ 17. However, it specifically uses TNCs as an example of the governance gap. *Id.* ¶ 3.

60. Indeed, this idea is a looming specter for many TNCs. *See* Memorandum Wachtell, Lipton, Rosen & Katz on A U.N. Proposal Defining Corp. Soc. Resp. for Hum. Rts. (May 1, 2008), *available at* http://amlawdaily.typepad.com/amlawdaily/files/wachtell_lipton_memo_on_global_business_human_rights.pdf (stating that Ruggie's proposed framework would "impose on corporations the obligation to compensate for the political, civil, economic, social or other deficiencies of the countries in which they do business.").

61. It is always difficult to set specific, temporal parameters when a movement emerges or becomes part of the national or international discourse. The issue of business and human rights is no exception. At least one source has identified the evolution as spanning three distinct phases. In the first phase, 1998–2002, mainly European and North American NGOs were pushing companies on their policies. The second phase, 2003–2006, was also led in North America and Europe, but shifted its focus to the conduct and impacts of corporations. The third phase, 2007–present, has emerged as a global debate that focuses mainly on "conduct on the ground." *Business & Human Rights*, BUSINESS & HUMAN RIGHTS RESOURCE CENTRE, <http://www.business-humanrights.org/GettingStartedPortal/Intro> (last visited Feb. 11, 2012). In contrast, at least one author traces the U.N.'s involvement in corporate accountability issues (if not specifically human rights issues) much further back. Connie De La Vega, Amol Mehra, & Alexander Wong, *Holding Businesses Accountable for Human Rights Violations: Recent Developments and Next Steps*, *Dialogue on Globalization*, 2 (July 2011), <http://library.fes.de/pdf-files/iez/08264.pdf> (tracing the issue to 1972 when the U.N. Economic and Social Council commissioned a study on "the role of transnational corporations and their impact on the development process as well as on international

from a grassroots strategy developed by human rights advocates who were growing frustrated by the lack of accountability measures for TNCs and other multi-business enterprises. The popular sentiment was that TNCs seemed to be involved in or witness to many of the human rights disasters that were taking shape. Yet, by and large, there was no redress available—TNCs seemed to conduct their business with impunity.

Since that time, the issue of business and human rights has begun to attract an enormous amount of attention.⁶² However, as mentioned earlier, finding a theory of liability to hold TNCs accountable under international law has been met with a myriad of problems. In addition, many TNCs employ the strategy of distancing themselves from underlying human rights violations, instead placing blame on the State or the community. For a long time, this was an effective legal strategy.⁶³ Nevertheless, TNCs did not escape exposure completely. In the court of public opinion, TNCs were losing.⁶⁴ Realizing that the use of legal

relations.”). Nevertheless, a case study of one human rights organization’s publicity campaign shows the evolution. A survey of all Human Rights Watch press releases in the 1990s shows that the first press release explicitly discussing TNCs in connection with human rights campaigns occurred on Dec. 28, 1998. *International Corporations Violate Women’s Rights in Mexico*, HUMAN RIGHTS WATCH, Dec. 29, 1998, <http://www.hrw.org/en/news/1998/12/28/international-corporations-violate-womens-rights-mexico>. From 1998–2011, there is a slow but steady increase in press releases linking TNCs to human rights issues. *See infra* Appendix B.

62. 2006 *Interim Report*, *supra* note 34.

There being no global repository of comprehensive, consistent, and impartial information, we cannot say with certainty whether abuses in relation to the corporate sector are increasing or decreasing over time, only that they are reported more extensively because more actors track them and transparency is greater than in the past. Of course, to victims of abuses this uncertainty matters little. But it does make it more difficult to design and assess the efficacy of alternative policy approaches to deal with these challenges – a bit like searching for ways to prevent and cure cancer without fully knowing its epidemiology.

Id. ¶ 20.

63. Martin Amerson, *supra* note 10.

64. *Cf. Respect Framework*, *supra* note 13, at ¶ 54 (discussing the effect of companies who fail to take responsibility for human rights issues in the “courts of public opinion”). In addition, although at the time of this writing TNCs have not yet been subject to an unfavorable verdict for international human rights claims (*i.e.*, under ATCA), there are nonetheless costs in litigating and even settling these issues. *See*

instruments was ineffective, many human rights advocates switched to publicity campaigns (frequently called “naming and shaming”) to highlight human rights abuses and force TNCs to change their behavior.⁶⁵

Businesses’ initial resistance to such strategies—and indeed the wider agenda of corporate social responsibility (“CSR”)—seems to have stemmed from the notion that corporations viewed business and human rights as a zero-sum game. Every move that a corporation made in the arena of a social cause was thought to take away from the *raison d’être* of a corporation—profit maximization.⁶⁶ Indeed, noted business author Steve Forbes expressed his views on the CSR movement in this way:

Under the label of Corporate Social Responsibility, firms are to take on a non-wealth-producing agenda of goals; profits will be lowered to safeguard labor rights, human health, civil liberties, environmental quality, sexual equality, and social justice. The fact that the corporation already plays its most effective role in these areas by profit maximization is little understood by CSR advocates.⁶⁷

Moreover, whether public relations and advocacy strategies were successful on a micro level seems impossible to prove. While some campaigns resulted in changed behavior,⁶⁸ many did not. For instance, a

David Kinley et al., *The Norms as Dead! Long Live the Norms! The Politics behind the United Nations Norms for Corporations*, in *THE NEW CORPORATE ACCOUNTABILITY: CORPORATE SOCIAL RESPONSIBILITY AND THE LAW* 468 (2007).

65. Emilie M. Hafner-Burton, *Sticks and Stones: Naming and Shaming the Human Rights Enforcement Problem*, 62 *INT’L ORG.* 689 (2008) (examining specifically, statistics regarding governments as perpetrators, but the term can be applied to any human rights violator); Deborah Spar, *The Spotlight and the Bottom Line: How Multinationals Export Human Rights*, *FOREIGN AFFAIRS*, Mar-Apr. 1998 (using the term “the spotlight phenomenon” in an examination of how corporations change their behavior when there is a heightened public awareness of human rights).

66. See Steve Forbes, *Foreward as cited in* DAVID HENDERSON, *THE ROLE OF BUSINESS IN THE MODERN WORLD: PROGRESS, PRESSURES, AND PROSPECTS FOR THE MODERN ECONOMY* (2004), available at <http://cei.org/sites/default/files/David%20Henderson%20%20The%20Role%20of%20Business%20in%20the%20Modern%20World%20Progress,%20Pressures%20and%20Prospects%20for%20the%20Market%20Economy.pdf>.

67. See *id.* at 10.

68. Tim Bartley & Curtis Child, *Shaming the Corporation: Globalization, Reputation and the Dynamics of Anti-Corporate Movements*, <http://www.indiana.edu/~tbsoc/SM-corps-sub.pdf> (arguing that publicly linking actors to systematic problems is an important part of social movements).

TNC could take advantage of a dwindling global attention span by simply waiting for a new corporate scandal to emerge, rather than taking steps to change their behavior.⁶⁹ At the very least, the work of human rights advocates did find success in bringing TNCs' behavior during human rights calamities into public discourse⁷⁰ and, in doing so, set the stage for the U.N. Global Compact and its success.

A. The U.N. Global Compact

The U.N. Global Compact (the "Global Compact" or "Compact") was launched in 2000 as a voluntary initiative to get businesses to engage in a wide-ranging societal agenda.⁷¹ At its heart, the Compact encourages businesses to pledge to honor ten principles that surround human rights issues.⁷² In return, the Compact allows businesses to become signatories. In the first year of its existence, the Compact had fifty signatories. As of this writing, the Compact has over 6,000.⁷³

The Compact came out of a challenge that Kofi Annan made to world business leaders during a speech at the World Economic Forum on January 31, 1999.⁷⁴ At the time, the proposal was called "unusual" because it involved a formal compact between the United Nations and

69. *Id.* at 23.

70. Bartley & Child, *supra* note 68.

71. *About Us*, THE UNITED NATIONS GLOBAL COMPACT, <http://www.unGlobalcompact.org/AboutTheGC/index.html> (last visited Feb. 11, 2012) [hereinafter U.N. GLOBAL COMPACT].

72. Unlike many of the initiatives that came after this, the Global Compact originally began as an initiative from then Secretary-General Kofi-Annun. During an economic meeting in Switzerland, Kofi Annan gave a speech in which he discussed a global compact between the U.N. and businesses that would encourage businesses to infuse their companies with the values of human rights norms. *See supra* note 74 and accompanying text.

73. *Participants & Stakeholders: U.N. Global Compact Participants*, THE UNITED NATIONS GLOBAL COMPACT, <http://www.unglobalcompact.org/ParticipantsAndStakeholders/index.html> (last visited Feb. 11, 2012).

74. U.N. Secretary-General Kofi Annan's Address to World Economic Forum in Davos (Feb. 1, 1999), *available at* <http://www.un.org/News/press/docs/1999/sgsm6619990101.shtml> [hereinafter Address in Davos].

business entities.⁷⁵ Moreover, the Compact allows its signatories to shroud themselves in the legitimacy of the United Nations.⁷⁶

Annan emphasized that the Compact would be voluntary but warned of a backlash against the global markets if businesses did not take more proactive steps to ensure that they were addressing human rights abuses within their sphere of influence.⁷⁷ In Annan’s words, the aim of the Compact was to “ensure that the global market is embedded in broadly shared values and practices which reflect global social needs, and that all the world’s people share the benefits of globalization.”⁷⁸ As part of the Compact, business leaders agreed to do three things: (1) become public voices of the Compact by embedding the principles of the Compact into the company’s organizational structure (such as its mission statements and annual reports); (2) annually report on the company’s progress (or lack thereof) “of putting the principles into practice;”⁷⁹ and (3) engage in partnership projects with the U.N. on both an operational and a policy level.⁸⁰

The Global Compact marked a strategic shift by the United Nations. Only a few years prior, the organization’s position was strongly against transnational firms, drafting summaries that documented their abuses.⁸¹ Its prior position reflected a deep suspicion that TNCs had

75. Alan Cowell, *Annan Fears Backlash over Global Crisis*, N.Y. TIMES, Feb 1, 1999, at A14.

76. Specifically, companies who signed onto the Compact would have limited use of the U.N.’s logo in their corporate materials.

77. Cowell, *supra* note 75. While Annan presented the initiative as one that would benefit businesses, there is some indication that the Compact also benefited the United Nations. Some have noted that Annan’s term as the head of the United Nations marked a move away from irrelevance that had been plaguing the organization in previous years. See Callie Kramer, *Kofi Annan and the United Nations win the 2001 Nobel Peace Prize*, 18 N.Y.L SCH. J. HUM. RTS. 475 (2002) (noting that “Kofi Annan was also lauded for . . . revitalizing the 56 year-old United Nations.”). Cf. Joseph Kahn, *Multinational Sign Pact on Rights and Environment*, N.Y. TIMES, Jun. 27, 2000, <http://www.nytimes.com/2000/07/27/world/multinationals-sign-un-pact-on-rights-and-environment.html?pagewanted=all> (stating that the Global Compact “is an attempt by Mr. Annan to make the world body a more effective force for labor and social standards”).

78. Kofi Annan, *A Deal with Business to Support Universal Values*, INT’L HERALD TRIB., July 26, 2000, at 8.

79. *Id.*

80. *Id.*

81. Editorial, *Taming Globalization*, WASH. POST, Aug. 7, 2000, at A20 [hereinafter *Taming Globalization*].

nothing positive to offer the world's communities. In contrast, Annan's speech marked a new consensus view in the organization that globalization was "the only remotely viable means of pulling billions of people out of the abject poverty in which they find themselves."⁸² TNCs became recognized as pioneering the shift toward globalization, taking part in the solution, not just the problem.⁸³

Interestingly, Ruggie was one of the main architects and strong defenders of the Global Compact.⁸⁴ As U.N. Assistant Secretary-General from 1997 to 2001, Ruggie responded to critics who believed that the Global Compact would simply provide companies with an easy whitewash of their image. Specifically, Ruggie stated:

You quote critics who assert that the secretary general's "global compact," designed to identify and promote good corporate practices in human rights, labor standards and the environment, opens the United Nations' doors to big business. These critics ignore the fact that the Compact is an equal partnership among business, international labor and global nongovernmental organizations. The

82. *Id.* (quoting an unnamed agency representative).

83. Many argue that the evolution of globalization has its roots in the post-Cold War world. Businesses, freed from the dominant political stratification between the East and the West, were able to tap into emerging markets in a way that previously would have been impossible. In fact, one author credits the end of the Cold War with the shift in focus towards advocacy of multinationals. Alan Cowell, *Advocates Gain Ground in a Globalized Era*, N.Y. TIMES, DEC. 18, 2000, at C19. In a discussion of the human rights advocacy strategy that emerged in the late 1990s with DeBeers and its mining of conflict diamonds, Cowell wrote:

The campaign and its fruits, though, go beyond diamonds, because they reinforce one of the most striking effects of the globalization that has been under way since the end of the cold war. Increasingly, with multinational corporations gathering unparalleled power as the standard-bearers of freewheeling capitalism—in many countries, more powerful than the governments themselves—they are being held to account by shoestring advocacy groups like Global Witness that have filled the vacuum created by the end of the ideological contest between East and West, between capitalism and socialism.

Id.

84. Robert A. Senser, *Big Business and the U.N.: Toward a New Framework for Corporate Responsibility*, AM. CATH. WKLY., Dec. 1, 2008, available at http://www.americanmagazine.org/content/article.cfm?article_id=11253. Much of Ruggie's later work as Special Rapporteur seems to be influenced by his work on the Global Compact.

United Nations has guidelines for dealing with business; they were adopted in July.

You report that one critic suggested that the inclusion in the global compact of companies that may have had spotty records in the past sends the wrong signal. The implication is that the United Nations should strive to improve the performance only of the perfect. Doing so would make life easier, but what would be the point?⁸⁵

Although the Compact was praised in some sectors⁸⁶ and seen as an important step forward in bringing businesses into the conversation regarding human rights,⁸⁷ its shortcomings flowed alongside its popularity among businesses. Because it was voluntary, there were no consequences for deviating from these principles apart from the public disapprobation stirred by human rights advocates' various shaming campaigns, which many regarded as ineffective.⁸⁸

Many international human rights groups, including groups who participated in the first Compact meeting, felt that self-regulation by

85. John Ruggie, Letter to the Editor, *Re 'Globalization Tops 3-Day U.N. Agenda for World Leaders'* (front page, Sept. 3), N.Y. TIMES, Sept. 5, 2000, at A30. Ruggie's initial position prior to becoming the Special Representative may have been one reason why people criticized him for his subsequent work on the Framework.

86. Victoria Brittain, *Business Rallies to U.N. Ethics Scheme*, THE GUARDIAN, July 26, 2000, at 12; Maria Livanos Cattai, *Yes to Annan's 'Global Compact' if It Isn't a License to Meddle*, INT'L HERALD TRIB., July 26, 2000, at 8; *Mark Moody-Stuart Welcomes the New Global Compact Between the U.N. and Business*, ECONOMIC NEWS, July 27, 2000; *Marketplace: Making Corporations Good, Global Citizens*, NAT'L PUB. RADIO, Sept. 6, 2000; Michael Oliver, *Global Governance and Civil Society*, PEACE MAG., January 2000, at v.16(1).

87. Of course, the Compact also had its critics right from the beginning. *See, e.g.*, Joshua Karliner & Kenny Bruno, Opinion, *The United Nations Sits in Suspicious Company*, INT'L HERALD TRIB., Aug. 6, 2000, at 6 (stating that the self-regulation process of the Global Compact "threatens the integrity of the U.N."). For a middle ground response, see *Taming Globalization*, *supra* note 81 (stating that while the Global Compact allowed corporations to have "cheap halos," the author concludes that "the idea of partnering with the private sector beats merely denouncing it").

88. Other initiatives that were used during this era include: The Sullivan Principles (voluntary codes of conduct adopted by businesses on issues that affect broader society) and the OECD and its Guidelines for Multinational Enterprises (State recommendations to businesses regarding standards of conduct). While these initiatives have some relevance to the international legal framework on business and human rights (not least of which is the offering of a soft law foundation for future accountability mechanisms), this Article focuses on various mandates that have come from the United Nations within the last eight years.

businesses under the Compact was insufficient. Pierre Sane, then Secretary General of Amnesty International, stated that in order for the Compact to be “‘effective and credible’ there must be publicly reported independent monitoring and enforcement via a sanctions system ‘so companies who are violating these principles cannot continue to benefit from the partnership.’”⁸⁹

In reality, there is little wonder that human rights advocates would seem frustrated by the Compact, given some of its vague and amorphous language. There are ten⁹⁰ principles that are at the heart of the Global Compact, each involving how businesses engage in a wider social agenda within four specific spheres: human rights, labor, environmental impact, and corruption.⁹¹ Only two of the ten principles explicitly fall under the rubric of human rights: “(1) Businesses should support and respect the protection of internationally proclaimed human rights; and (2) make sure that they are not complicit in human rights abuses.”⁹² Although many of the other principles are stated as labor issues, they in fact fall under the larger umbrella of human rights concerns.⁹³ Indeed, on its face, the ambiguous nature of the Global Compact seems to leave little hope of developing a consistent framework for operationalizing⁹⁴ its principles.⁹⁵

89. Karliner & Bruno, *supra* note 87.

90. The Global Compact, as originally conceived, had nine principles. The tenth (dealing with anticorruption issues) was added in 2004 during the first Global Summit on the Compact.

91. *About Us: The Ten Principles*, THE UNITED NATIONS GLOBAL COMPACT, <http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html> (last visited Feb. 11, 2012) [hereinafter *Ten Principles*].

92. U.N. GLOBAL COMPACT, *supra* note 71.

93. See *Ten Principles*, *supra* note 91, (Principles 3–6: Labour).

94. In interviews regarding his mandate, Ruggie uses the term “operationalize” to describe what he was attempting to do with the Guiding Principles. As used by Ruggie, operationalization is the process by which theories and legal doctrines are turned into a workable Framework of policies and assessments that can then be implemented by various actors. For consistency, I adopt that term here.

95. In the wake of these criticisms, the Global Compact office created a Report entitled “After the Signature: A Guide to Engagement in the United Nations Global Compact.” UNITED NATIONS GLOBAL COMPACT, AFTER THE SIGNATURE: A GUIDE TO ENGAGEMENT IN THE UNITED NATIONS GLOBAL COMPACT (JAN. 2012), available at http://www.unglobalcompact.org/docs/news_events/8.1/after_the_signature.pdf [hereinafter AFTER THE SIGNATURE].

Nevertheless, although the Compact’s foundational principles remain vague, the Global Compact office (set up in the wake of the program’s initiation) has taken steps to elaborate on some of these issues. For instance, one of the most significant developments made by the Global Compact is the introduction of the notion of sphere(s) of influence. The Compact defines sphere of influence as follows:

Companies are asked to embrace, support and enact the ten principles within their “sphere of influence.” Perhaps the term is better described as spheres of influence, and envisioned as a series of concentric circles, where influence diminishes as the circles get bigger. The smallest circle includes a company’s core business activities in the workplace and marketplace. This is where a company has the greatest control in affecting ESG (environmental, social and governance) performance. The next circle covers the supply chain. Control is weakened here, but in some cases the influence can be significant. The third circle includes a company’s community interaction, social investment and philanthropy activities. And the final circle of influence is a company’s engagement in public policy dialogue and advocacy activities.⁹⁶

Through this type of elaboration of the concepts embodied in its principles, the Global Compact attempts to push TNCs towards a greater realization of human rights. Unfortunately, an outside mechanism or review to track whether the Compact’s goals are being achieved is still lacking. Thus, a company can set up its own guidelines that might fall into the amorphous category of “respecting human rights” without actually engaging in the Compact the way the Global Compact Office suggests. Therefore, notwithstanding this failure to achieve the Compact’s goals, such businesses can conceivably continue to benefit from the imprimatur of the U.N. logo.

Some scholars contend that the Compact is presently a soft law mechanism that may give rise to a more tangible accountability framework in the future. As Erika George states, “International law must come to [recognize] that there are multiple and heterogeneous sources of authority in pluralistic systems. . . . We should consider whether corporations are making law in making pledges. Is the Global Compact

Rather than relying on vague, amorphous language, Ruggie’s framework and Guiding Principles examine the issue of business and human rights with clear policy goals and operational steps to actualizing those goals.

96. *Id.* at 11.

a contract?”⁹⁷ The Compact itself seeks to discourage the notion that it can be used as an accountability mechanism (either through breach of contract or otherwise). Indeed, the Compact was never intended as an operational framework; instead, the Compact’s follow-up literature makes clear that it is not a monitoring mechanism or even a standard of conduct.⁹⁸

As a result, the Global Compact (with its voluntary initiatives and unenforceable mechanisms) led many human rights advocates to the conclusion that what was really needed was an international legal instrument that would hold TNCs accountable.⁹⁹

97. Erika George, *The Place of the Private Transnational Actor in International Law: Human Rights Norms, Development Aims and Understanding Corporate Self-Regulation as Soft Law*, 101 AM. SOC’Y INT’L L. 28 (2007). George contends that because the statements contained in the Global Compact are policy statements that are adopted by what she views as legitimate authority, the Global Compact can make the way towards future binding frameworks. *Id.*

98. AFTER THE SIGNATURE, *supra* note 95, at 7.

99. In their nascent stage, business and human rights issues appeared to be framed largely within the context of the corporate social responsibility debate, perhaps because an appropriate alternative dialogue on the issue of accountability mechanisms was lacking. In fact, at least in nonlegal academia, much of the literature written on corporate social responsibility before the 1990s framed it as a moral or ethical issue, rarely as implicating fundamental human rights. For a survey on this literature, see Sita C. Amba-Rao, *Multinational Corporate Social Responsibility, Ethics, Interactions and Third World Governments: An Agenda for the 1990s*, 12 J. BUS. ETHICS, no. 7, at 553–572 (1993).

Now, however, it seems that the conversations have diverged. Therefore, each dialogue—that surrounding general corporate social responsibility issues and that involving business and human rights—should encompass its own sphere of scholarship. As Chris Avery, Director of the Business and Human Rights Centre, notes, “[s]ometimes the relationship between Corporate Social Responsibility (“CSR”) and human rights is not properly understood.” Avery elaborates: “A CSR approach tends to be top-down: a company decides what issues it wishes to address. . . . [b]ut a human rights approach is different. It is not top-down, but bottom-up—with the individual at the centre, not the corporation.” Chris Avery, Guest Editorial, *The Difference Between CSR and Human Rights*, CORP. CITIZENSHIP BRIEFING, Issue 89, Aug./Sept. 2006, available at <http://www.reports-and-materials.org/Avery-difference-between-CSR-and-human-rights-Aug-Sep-2006.pdf>.

B. THE U.N. NORMS

The U.N. Norms on the Responsibilities of Transnational Corporations and Other Business Entities (“the Norms”)¹⁰⁰ was one of the earliest documents to explicitly state that TNCs could be held liable under international law for human rights abuses.¹⁰¹ Drafted by the U.N. Sub-Commission on the Promotion and Protection of Human Rights (“Sub-Commission”) and drawing on numerous human rights treaties,

100. Comm’n on Hum. Rts., Subcomm., 55th Sess., *Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with Regard to Human Rights*, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (Aug. 13, 2003) [hereinafter *Norms*]. There is some debate in the academic community regarding whether previous treaties have implicitly drawn an accountability framework. For instance, the Norms themselves point to numerous treaties as the source of their authority. See discussion *infra* Part II.B.2. While certain treaties that bind TNCs deal with specific aspects of human rights (i.e., slavery and genocide), I am unaware of any other U.N. document that explicitly takes this approach towards human rights issues globally. As one author notes, the primary obstacle to the world community accepting that TNCs have a duty under international law to protect against human rights violations, “seems to be the fact that the U.N. human rights treaties are instruments of international law that bind ratifying States rather than non-State actors.” SILVIA DANAILOV, *THE ACCOUNTABILITY OF NON-STATE ACTORS FOR HUMAN RIGHTS VIOLATIONS: THE SPECIAL CASE OF TRANSNATIONAL CORPORATIONS* 33 (Geneva 1998), available at <http://www.lawanddevelopment.org/docs/transnationalcorps.pdf>.

101. In his June 2009 Report to the Council, Ruggie states that the Human Rights Council’s endorsement of the Respect Framework “marked the first time the Council or its predecessor had taken a substantive policy position on business and human rights.” Special Representative of the Secretary-General, *Business and Human Rights: Towards Operationalizing the “Protect, Respect and Remedy” Framework*, Hum. Rts. Council, U.N. Doc. A/HRC/11/13 (Apr. 22, 2009) (by John Ruggie), available at <http://www2.ohchr.org/english/bodies/hrcouncil/docs/11session/A.HRC.11.13.pdf> [hereinafter *2009 Report*]. Notably, this issue came up more broadly in the 1970s, in the wake of a scandal involving ITT’s alleged involvement in the overthrow of the Chilean government. In response, the U.N. created a commission to develop a code of conduct for TNCs. The code was formulated but never adopted by the United Nations and was finally abandoned in 1992. While the document marked the first attempt to discuss TNC conduct in relation to human rights, it was not *substantive* in scope. Chris Jochnick & Nina Rabaeus, *Business and Human Rights Revitalized: A New UN Framework Meets Texaco in the Amazon*, 33 SUFFOLK TRANSNAT’L L. REV. 413, 415 (2010). In addition, although the Sub-Commission did work on the Norms, they remained at this level and the then Commission on Human Rights never adopted them.

the Norms purportedly restated the guiding norms and principles at that time for holding TNCs accountable.¹⁰²

1. Textual Analysis

The Norms embody the first attempt by the U.N. to set forth accountability mechanisms for TNCs under international human rights law.¹⁰³ In addition, although they discuss the State's duty to protect, the focus of responsibility is laid squarely at the feet of TNCs. In order to secure their influence,¹⁰⁴ the Norms reference approximately thirty transnational instruments as the sources from which they derive their authority for TNCs and human rights issues.¹⁰⁵ In one sense, the Norms

102. *Norms*, *supra* note 100, *Preamble*. See David Weissbrodt & Muria Kruger, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, 97 AM. J. OF INT'L L. 901 (2003), at 901.

103. See *Norms*, *supra* note 100, for a more thorough discussion of the history of TNCs and human rights under international law.

104. Because the Norms were not "an international treaty open to ratification by States," they would not be "legally binding" on either States or TNCs. Nevertheless, as a purported restatement of the law regarding TNCs and human rights abuses, if adopted, the Norms could have been a powerful accountability tool for human rights advocates and victims of human rights abuses. INT'L NETWORK ON FOR ECON., SOC. & CULTURAL RTS., U.N. HUMAN RIGHTS NORMS FOR BUSINESS: BRIEFING KIT 4 (Jan. 2005), available at http://www.escri-net.org/usr_doc/Briefing_Kit.pdf; see also discussion *infra* note 136 and accompanying text.

105. Among the diverse set of instruments referenced are the International Code of Marketing of Breast-milk Substitutes (adopted by the World Health Assembly) and the Convention and Protocol Relating to the Status of Refugees. *Norms*, *supra* note 100, ¶ 2. There are a significant number of human rights treaties that can impact the intersection of business and human rights. In fact, one of Ruggie's main contentions in drafting the Norms was that all human rights can be impacted and influenced by corporate activities. In fact, one of the goals of the U.N. Norms was to analyze all the "relevant" human rights treaties and decide which ones in particular would be within the sphere of influence for corporations. Ruggie's work was in direct opposition to this approach. Instead, the Guiding Principles start from the premise that the "corporate responsibility to respect human rights applies to all internationally recognized human rights because business enterprises can have an impact – directly or indirectly – on virtually the entire spectrum of these rights." U.N. HUMAN RTS. OFF. OF THE HIGH COMM'R, THE CORPORATE RESPONSIBILITY TO RESPECT HUMAN RIGHTS, AN INTERPRETIVE GUIDE 13 (2012), available at <http://www.ohchr.org/Documents/Publicat>

draw on their precedent documents, particularly the U.N. Global Compact. For instance, the Norms’ statement “noting that transnational corporations and other business enterprises have the capacity to foster economic well-being, development, technological improvement and wealth,” appear to echo Kofi Annan’s remarks that globalization through shared values between business and society can lead to an age of “global prosperity.”¹⁰⁶

At the core, however, the thrust of the Norms is to specifically devise a mechanism that holds TNCs accountable under international law for human rights violations.¹⁰⁷ In that sense, the Norms are specific. While the Norms require TNCs to respect cultural and social rights generally,¹⁰⁸ they focus mainly on issues that overtly implicate TNCs—namely their role in targeted human rights abuses including workers’ rights, workplace discrimination, and consumer protection.¹⁰⁹

In addition to the specific subject matter that the Norms address, they also include two particularly controversial aspects: (1) the mandate for TNCs to implement the principles embodied in the Norms; and (2) a U.N. monitoring body to review the “application of the Norms.”¹¹⁰ These provisions may reflect an attempt by the Sub-Commission to address critics’ concerns, whereas two of the strongest criticisms of the

ions/HR.PUB.12.2_En.pdf.

106. Address in Davos, *supra* note 74.

107. Indeed, one of Ruggie’s chief objections to the Norms is his claim that, while purporting to be a restatement of the law, they invoked a binding accountability framework for TNCs. *See discussion infra* at footnote 134 and accompanying text.

108. *Norms*, *supra* note 100, ¶ 10.

109. *Id.* ¶¶ 3–8.

110. *Id.* ¶ 16. Putting aside the spirit of the monitoring process, the language in the Norms regarding monitoring is problematic. What exactly should the U.N. monitor? How should TNCs apply the Norms to their internal mechanisms? How should particular Norms apply, at any given period in time, to a TNC? The Norms are silent as to these questions. Likewise, the Norms Commentary sheds no light on this subject. Rather, the Commentary simply states that the Council should “receive information and take effective action when enterprises fail to comply with the Norms.” Comm’n on Hum. Rts., Subcomm’n, *Commentary on the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, ¶ 16(b), U.N. Doc. E/CN.4/Sub.2/2003/38/Rev.2 (Aug. 26, 2003), available at [http://www.unhchr.ch/Huridocda/Huridoca.nsf/e06a5300f90fa0238025668700518ca4/293378ff2003ceb0c1256d7900310d90/\\$FILE/G0316018.pdf](http://www.unhchr.ch/Huridocda/Huridoca.nsf/e06a5300f90fa0238025668700518ca4/293378ff2003ceb0c1256d7900310d90/$FILE/G0316018.pdf) [hereinafter *Norms Commentary*].

Global Compact were that it lacked an implementation procedure and a monitoring body.¹¹¹

In the Commentary accompanying the Norms, the Sub-Commission outlines a six-step process for making sure that TNCs implement these rules. They include:

- 1) distributing their internal operational rules to all relevant stakeholders (including employees, trade unions, contractors, subcontractors and suppliers);
- 2) providing training on the rules and how to implement them;
- 3) only working with contractors who follow the Norms;
- 4) increasing transparency “by disclosing timely, relevant, regular and reliable information regarding their activities, structure, financial situation and performance;”
- 5) informing affected communities about its activities; and
- 6) continually working on improving the Norms.¹¹²

These implementation procedures place a heavy burden on TNCs to demonstrate how their activities either benefit or harm groups and communities in the area of human rights. Further, a TNC would need to integrate human rights issues into all aspects of its operations in order for an implementation program to be successful, rather than simply relegating the subject to its corporate social responsibility department.

Moreover, the Norms took a bold step forward from previous U.N. documents by finding that an independent body should monitor and enforce TNCs’ implementation of these rules.¹¹³ In fact, the Commentary expands on this notion by arguing that a large and varied group of stakeholders should participate in the monitoring efforts. They

111. KENNY BRUNO & JOSHUA KARLINER, TANGLED UP IN BLUE: CORPORATE PARTNERSHIPS AT THE UNITED NATIONS 7–9 (Transnat’l Res. & Action Ctr. Sept. 2000), available at <http://s3.amazonaws.com/corpwatch.org/downloads/tangled.pdf>; Global Policy Forum Europe, Speaking Notes, Whose Partnership for Whose Development? Corporate Accountability in the U.N. System Beyond the Global Compact, 2 (July 4, 2007), available at <http://www.scribd.com/doc/17222782/20070704-Global-Compact-Alternative-Hearing-2007>.

112. *Norms Commentary*, *supra* note 110, ¶ 15.

113. *Norms*, *supra* note 100, ¶ 16.

included: the full U.N. Commission on Human Rights (the “Commission” or the “Council”), the Sub-Commission, NGOs, labor unions, individuals and others.¹¹⁴ Specifically, NGOs, labor unions, and other individuals submit information to either the Council or Sub-Commission. In turn, the two U.N. bodies, after receiving feedback from a TNC, could use the information received as a means to take “effective action” against the corporation.

Finally, the Norms co-opt the term “sphere of influence” from the voluntary Global Compact, applying and expanding it to a *mandatory* accountability mechanism for TNCs. Specifically, the Norms state that within their “respective spheres of activity and influence,” TNCs must respect and promote human rights.¹¹⁵ While never specifically defining the term, the Commentary offers an explanatory note on the idea by stating that TNCs’ obligations under the Norms apply “equally to activities occurring in the home country or territory . . . and in any country in which the business is engaged in activities.”¹¹⁶ It seems, therefore, that the use of the term shifted from the Global Compact (using “influence” to reference a TNC’s operational control) to a wider understanding that included both operational and spatial control.¹¹⁷ Therefore, the Sub-Commission’s work took a decisive step towards bringing an international accountability structure to bear on TNCs. Unfortunately, in the wake of the Norms’ eventual defeat, that agenda was left in a state of flux.

2. *The Backlash*

Specifically, there was a considerable amount of discord over how various camps at the U.N. viewed the Norms. Although the Commission eventually turned down the Norms in 2003, the Sub-Commission had

114. *Norms Commentary*, *supra* note 110, ¶ 16(b).

115. *Norms*, *supra* note 100, ¶ 1.

116. *Norms Commentary*, *supra* note 110, ¶ 1(a).

117. *Id.* ¶¶ 1(a)–(b) (discussing both the geographical and operational influences that TNCs exert, stating that TNCs should “inform themselves of the human rights impact of their principal activities and major proposed activities so that they can further avoid complicity in human rights abuses). This language is particularly significant for the bystander paradigm, suggesting that while a TNC’s actions may not directly cause a human rights abuse, the TNC’s presence (and corresponding influence) can contribute to it. *See discussion infra* Part III.C for a more extensive analysis of this language’s application to a bystander framework.

unanimously adopted them previously.¹¹⁸ Unlike the U.N.'s previous effort to address business and human rights issues (largely through the Global Compact), the Norms were a top-down, mandatory framework that would hold TNCs liable under international law for failing to respect human rights. Moreover, the Norms seemed to reflect the growing frustration held by many in the international community regarding the lack of accountability mechanisms for TNCs.

Nevertheless, before the Norms were even considered by the full Council, the consensus was that the Council would not pass them.¹¹⁹ As one U.N. representative noted at the time:

There is not much enthusiasm in Geneva for the Norms where it is felt that the Sub-Commission was trying to do two different things: i) distil everything from existing standards and ii) put this in treaty-like language. This raises all kind [sic] of legal questions, as in the end it is States that are responsible for human rights, not MNCs.¹²⁰

Many felt that the Norms were, in effect, dead on arrival,¹²¹ and indeed they were. When the Council took up the Norms in 2004, it “expressed [its] appreciation to the Sub-Commission for the work it had undertaken in preparing [the Norms] It affirmed, however, that the document had not been requested and . . . had no legal standing.”¹²²

118. The U.N. Commission on Human Rights and its Sub-Commission, the two bodies that voted on the Norms, no longer exist. The work that was undertaken by these two committees is now taken up by the U.N. Human Rights Council and the Human Rights Council Advisory Committee respectively. For the purpose of simplification, I use the latter terms for each from this point forward, regardless of when the relevant decision was rendered. For a timeline of when these names changed, see *infra* Appendix A.

119. IRENE et al., *The UN Norms for Business: Process, Content and Real Value*, 10 (May 12, 2004), available at <http://www.irene-network.nl/download/pubdebate.pdf> [hereinafter Public Debate Report].

120. *Id.*

121. Larry Catá Backer, *Multinational Corporations, Transnational Law: the United Nation's Norms on the Responsibilities of Transnational Corporations as a Harbinger of Corporate Social Responsibility in International Law*, 37 COLUM. HUM. RTS. L. REV. 287, 288 (2006).

122. Comm'n on Hum. Rts., *Summaries of Post-Sessional Meetings and Other Activities of the Expanded Bureau During the Period from May to September 2004*,

Indeed, the response to the Norms, particularly among the business community, was swift, ferocious, and effective.¹²³ During public debate on the Norms, Deputy-Director General of the Confederation of British Industries stated: “It is quite wrong to suggest that firms are generally involved in widespread abuse of human rights – where is the evidence?”¹²⁴

Ruggie himself was one of the Norms’ most vocal critics. Reflecting back on the climate in which the Norms were created, Ruggie stated:

The Norms exercise became engulfed by its own doctrinal excesses. Even leaving aside the highly contentious though largely symbolic proposal to monitor firms and provide for reparation payments to victims, its exaggerated legal claims and conceptual ambiguities created confusion and doubt even among many mainstream international lawyers and other impartial observers. Two aspects are particularly problematic in the context of this mandate. One concerns the legal authority advanced for the Norms, and the other the principle by which they propose to allocate human rights responsibilities between states and firms.¹²⁵

transmitted by Note of the Secretariat, at 27, U.N. Doc. E/CN.4/IM/2004/2 (Sept. 28, 2004), available at <http://www2.ohchr.org/english/bodies/chr/informal/documents.htm>. In fact, the Sub-Commission had been working on the Norms for four years before they submitted their final report. When asked during a public debate why the Commission let the Sub-Commission work on the report for four years unmolested, Piet De Klerk, Human Rights Ambassador responded, “[b]ecause it was not on the agenda.” Public Debate Report, *supra* note 119.

123. LOUISE J. OBARA, UNITED NATIONS COMMISSION OPEN FOR BUSINESS? THE APPOINTMENT OF A SPECIAL REPRESENTATIVE ON BUSINESS AND HUMAN RIGHTS available at http://www.brass.cf.ac.uk/uploads/United_Nations_Commission_Open_for_Business.pdf (discussing the business community’s response to the Norms and the subsequent resolution requesting a Special Representative).

124. David Gow, *CBI Cries Foul over U.N. Human Rights Code*, GUARDIAN (U. K.), Mar. 8, 2004, <http://www.guardian.co.uk/business/2004/mar/08/globalisation>. Note that the business community once again employed its bystander strategy in an effort to defeat the Norms. The argument did not focus on the frequency of human rights abuses, but rather placed the burden of showing TNCs’ involvement on the human rights victims and advocates.

125. 2006 *Interim Report*, *supra* note 34, ¶ 59. Ruggie has asserted that many human rights organizations have told him privately that they found the Norms to be a “deeply flawed instrument.” JOHN RUGGIE, RESPONSE BY JOHN RUGGIE TO MISEREOR/GLOBAL POLICY FORUM (June 2, 2008), available at <http://www.reports-and->

Ruggie's argument reflects the two biggest complaints against the Norms: their source of legitimacy and their target for accountability.¹²⁶ In short, Ruggie and others argued that the Norms were created with no legal mandate, while attempting to hold TNCs accountable under international law. According to Ruggie, neither tenet properly reflected international law at the time.¹²⁷

Not everyone, however, agreed with Ruggie's assessment. Some scholars have argued that the Norms were merely a restatement of international law at the time.¹²⁸ Likewise, the Sub-Commission itself, in

materials.org/Ruggie-response-to-Misereor-GPF-2-Jun-2008.pdf [hereinafter
RESPONSE: GLOBAL POLICY FORUM].

126. 2006 *Interim Report*, *supra* note 34, ¶ 59.

127. *Id.*

128. *See, e.g.*, David Weissbrodt & Muria Kruger, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, 97 AM. J. OF INT'L L. 901, 915 (2003) ("Hence, the legal authority of the Norms now derives principally from their sources in international law as a restatement of legal principles applicable to companies, but they have room to become more binding in the future."); Backer, *supra* note 121, at 287-288 ("The Norms are unlikely to be adopted in any sort of binding form in the current round of negotiation respecting its final form."); Lauren A. Dellinger, *Corporate Social Responsibility: A Multifaceted Tool to Avoid Alien Tort Claims Act Litigation While Simultaneously Building a Better Business Reputation*, 40 CAL. W. INT'L L.J. 55, 65 (2009) ("Although the U.N. Norms provide an excellent framework for transnational corporations to implement internal codes of conduct, there are no concrete enforcement measures, nor are there fully developed monitoring and verification mechanisms."); David Kinley & Rachel Chambers, *The U.N. Human Rights Norms for Corporations: The Private Implications of Public International Law*, 6 HUM. RTS. L. REV. 447, 482 (2006) ("The most that can be said regarding the Norms' legal status, is that any existing international law (as it applies to states) that has been codified in sections of the Norms obviously retains its force as international law and is unchanged by its re-statement in certain paragraphs of the Norms. These paragraphs may be described as having a 'declaratory effect'. They merely reinforce rights contained in either customary international law or treaties."); *see also* Hum. Rts. Council, General Debate item 3 - Human Rights and Transnational Corporations, Joint Statement 14th Session of the Human Rights Council, Geneva (Jun. 4, 2010), available at http://www.escr-net.org/usr_doc/JointBHRHRCStatement_HRW_ESCRNet_2010.pdf (questioning Ruggie's proposition "that the corporate responsibility to respect rights is not an obligation that current international human rights law generally imposes directly on companies but rather constitutes 'a standard of expected social conduct'").

the Norms’ introduction, argued that they were legal restatements, crafted, as one author notes, in “an attempt to comprehend and understand international law and gather it together in one document for easy reference by transnational corporations and human rights activists.”¹²⁹

Indeed, the disconnect between the Sub-Commission’s unanimous vote to adopt the Norms and its eventual defeat by Council has been largely overlooked.¹³⁰ Part of the reason for the defeat may have been process. The Sub-Commission was not operating under a mandate when it drafted the Norms. In addition, the first time the issue was placed on the full Council’s agenda came only after the Sub-Commission had already adopted the Norms. The full Council might have felt blindsided, particularly after the TNC lobbying effort went into effect.¹³¹

However, an equally likely explanation for the Norms’ defeat is the clear accountability structure that the Norms would have placed on corporations. Many business representatives pointed to the Global Compact as a more suitable paradigm for assessing corporate performance in the arena of human rights.¹³² In contrast, given the Norm’s enforcement mechanisms, it is of little wonder that the human rights community was quick to embrace them.¹³³

Despite the Norms’ defeat, they represent, at a minimum, an important historical moment in the evolution of the business and human rights agenda. In reality, however, their importance is much greater. The Norms represent an important shift in dialogue, whereby TNCs for the first time were brought into the debate on human rights from an accountability grounded framework rather than a voluntary framework.

That view is open to debate and in any case the law is highly dynamic and can adapt to meet pressing needs. Looking to the future, there is important scope for the Council to consider the actual and potential role of international law in further defining the corporate responsibility for human rights.

Id.

129. Richard Williamson, *Human Rights: A Common Cause*, LEGALWEEK.COM (Oct. 2, 2003, 1:00 AM).

130. See Comm’n on Hum. Rts., Subcomm, Rep. of the Sub-Comm’n on the Promotion and Protection of Hum. Rts. on its 55th Sess., July 28-Aug. 15, 2003, ¶ 81, U.N. Doc. E/CN.4/2004/2 (Oct. 20, 2003) (by Stanislav Ogurtsov).

131. For an account of the lobbying efforts by businesses to defeat the Norms, see Gow, *supra* note 124.

132. Williamson, *supra* note 129.

133. In fact, many of the NGOs that had worked on the Global Compact quickly turned to the Norms as an alternative measuring stick for holding TNCs accountable. *Id.*

Therefore, the Norms remain significant because they are, to date, the only U.N.-generated document that provides an accountability mechanism for TNCs on the issue of business and human rights. In this way, the Norms continue to be a touchstone and resource for those seeking to examine corporate responsibility from a legal rather than simply moral standpoint.

C. THE HUMAN RIGHTS COUNCIL'S MANDATES TO SPECIAL
REPRESENTATIVE JOHN RUGGIE

Once the Norms were defeated by the Council in 2005, advocates could have reasonably thought that the U.N.'s business and human rights agenda had permanently stalled.¹³⁴ Instead, the Council's next action led to its most active period for the development of the subject. In 2005, the Council asked Annan to appoint a Special Representative to report to the Council on human rights issues with regard to TNCs.¹³⁵ The Secretary-General appointed Ruggie.¹³⁶ What followed were six years of annual reports that had two key milestones: the development of the

134. At least one advocacy group that monitored the U.N.'s 61st session called the Council's work "disappointing." In fact, the concerns by advocates regarding business and human rights seemed to have been embroiled in larger concerns in the international community regarding the overall effectiveness of the U.N. Commission on Human Rights. Hum. Rts. Watch, *U.N. Rights Body Ignores Major Abuses: U.N. Commission on Human Rights Takes a Few Positive Steps*, HUM. RTS. WATCH, Apr. 21, 2005, <http://www.hrw.org/print/news/2005/04/21/un-rights-body-ignores-major-abuses>.

135. Even this resolution was divisive. The business communities once again lobbied against the appointment of a special representative, arguing that the U.N. was the wrong arena for crafting legal human rights frameworks that apply to TNCs. OBARA, *supra* note 123; Comm'n on Hum. Rts., Hum. Rts. Res. 2005/69: Human Rights and Transnational Corporations and Other Business Enterprises, 59th mtg., U.N. Doc. E/CN.4/RES/2005/69 (Apr. 20, 2005), *available at* www.unhcr.org/refworld/docid/45377c80c.html.

135. *2006 Interim Report*, *supra* note 34, ¶ 1.

136. Press Release, Secretary-General Appoints John Ruggie of United States Representative on Issues of Human Rights, Transnational Corporations, Other Business Enterprises (July 28, 2005), *available at* www.unhcr.org/refworld/docid/45377c80c.html.

136. *See 2006 Interim Report*, *supra* note 34, ¶ 1.

Respect Framework in 2008 and the U.N. Human Rights Council’s approval of the Guiding Principles in 2011.

Generally, the purpose of the first mandate was to frame the issues that affect TNCs in the field of human rights and provide context for the official report that would succeed it. Specifically, Ruggie’s original mandate was to

- Identify (and where necessary, clarify) the various standards that affect TNCs regarding human rights;
- Discuss the role of the States and their duty in regulating human rights abuses within their borders;
- Research and clarify how terms such as “complicity” and “sphere of influence” apply to TNCs;
- Develop materials to assist TNCs in implementing human rights impact assessments; and
- Compile a “compendium of best practices” for both States and TNCs to follow.¹³⁷

In order to complete the first mandate, Ruggie spent much of his time meeting with members of the world community, including “States, non-governmental organizations, international business associations and individual companies, international labour federations, United Nations and other international agencies, and legal experts.”¹³⁸ Human rights advocates urged Ruggie to construct a framework based on the Norms. The business community argued in favor of a Global Compact-like mechanism. After his consultations, Ruggie issued an interim report on February 22, 2006.¹³⁹

1. The 2006 Interim Report

The purpose of the Interim Report was to provide context to the Council regarding Ruggie’s mandate, set forth his strategy for fulfilling the mandate, and summarize next steps.¹⁴⁰ To that end, the Interim

137. See *2006 Interim Report*, *supra* note 34, ¶ 1.

138. *Id.* ¶ 3. Notably absent from this initial list was a discussion with the victims of human rights abuses themselves. The 2006 Interim Report also alludes to the acrimony that surrounded the drafting and voting on the U.N. Norms. *Id.* (commenting on “the history that preceded its creation”).

139. See *id.*

140. *Id.* at *Summary*.

Report summarizes the factors that led to the shifting landscape of international law, specifically with regard to business and human rights. To Ruggie, one of the most significant factors to change the business and human rights landscape was the rise of globalization. As he pointed out, at the time of the creation of the U.N. in 1945, the international order was “state-based.” Ruggie noted that in the immediate aftermath of World War II “the term ‘inter-national economy’ was still an accurate spatial description of the prevailing reality.”¹⁴¹ Yet, since then, Ruggie has noted that a “variety of actors for which the territorial State is not the cardinal organizing principle have come to play significant public roles.”¹⁴² His comments suggest that there is a growing recognition of non-state actors, particularly corporations, that have legal personalities in the international law realm.¹⁴³

In light of this reality, Ruggie undertook in his 2007 Report to map the various standards and mechanisms that the international arena had at its disposal for business and human rights issues.

2. *The 2007 Report*

On February 9, 2007, Ruggie followed up his interim report with an official report, which at the time was to end his mandate. The report, entitled “Business and Human Rights: Mapping International Standards

141. *Id.* ¶ 10. This idea of moving away from the spatial direction of the nation-state has taken hold outside the arena of human rights work. For instance, Lara Putnam, a history professor, discusses historians’ struggle to recount history without a nation-state reference point. See Lara Putnam, *To Study the Fragments/Whole: Microhistory and the Atlantic World*, 30 J. SOC. HIST. 3 (Spring 2006).

142. *2006 Interim Report*, *supra* note 34, at ¶ 10.

143. Later, Ruggie clarified this by suggesting that more and more, corporations are becoming subjects of international law, just simply not in the context of international human rights abuses. See *Respect Framework*, *supra* note 13, ¶ 20; see also David Kinley & Rachel Chambers, *The U.N. Human Rights Norms for Corporations: The Private Implications of Public International Law*, 6 HUM. RTS. L. REV. 447, 480 (2006) (“[I]t can be seen that companies, according to the widely accepted qualifying criteria, have at least some form of legal personality in public international law. This is not exactly the same type of personality as that of states, but this does not negate its existence.”)

of Responsibility and Accountability for Corporate Acts,”¹⁴⁴ was submitted to the Council. The Report summarized the state of international law with regard to business and human rights, but specifically did not offer recommendations for the future as the mandate requested. Instead, Ruggie requested an additional year to fulfill the mandate’s request on this point.¹⁴⁵

In the 2007 Report, Ruggie discusses the growing focus (in the international arena) on ways to hold TNCs liable for human rights violations.¹⁴⁶ States have a duty to protect substantive rights abuses by third parties, but a large number of States admit that they do not have any policies, programs, or tools in place to deal with corporate human rights abuses.¹⁴⁷ In fact, many rely on the framework of voluntary corporate initiatives for governance.¹⁴⁸ Therefore, if a particular state has no real accountability mechanism (such as in weak governance zones), Ruggie acknowledges that victims are often left without recourse.¹⁴⁹

The 2007 Report also refutes the idea that international law, at the time of the Report, permitted the direct accountability of TNCs for human rights violations.¹⁵⁰ Therefore, the Report directly refutes legal claims embodied in the Norms—namely that several human rights treaties allow for direct accountability mechanisms for TNCs under international law. Finally, while the Report does acknowledge the existence of various “soft law” mechanisms—whereby voluntary initiatives may be the source for future binding actions—Ruggie claims

144. 2007 Report, *supra* note 9.

145. *Id.* at ¶ 9. Although outside the scope of this Article, the 2007 Report flagged the extraterritorial obligations that one State may undertake when another State is not adequately protecting the people within its borders from human rights abuses. 2007 Report, *supra* note 9, ¶ 15. Ruggie assesses that, under current international law, a State is neither required nor prohibited from exercising some power—particularly in those instances when the people needing protection are the nationals of another State. *Id.* at n.5.

146. *Id.* ¶ 44 (stating that “corporations are under growing scrutiny by the international human rights mechanisms”).

147. 2007 Report, *supra* note 9, at ¶¶ 16-17.

148. *Id.* at ¶ 17.

149. *See id.* ¶ 16 (“The increasing focus on protection against corporate abuse by the U.N. treaty bodies and regional mechanisms indicates growing concern that states either do not fully understand or are not always able or willing to [fulfill] this duty.”).

150. *Id.* ¶ 44.

that “no definitive standards yet exist by which to assess [these mechanisms].”¹⁵¹

The most promising aspect of the 2007 Report is its discussion of notions of complicity under international law for TNCs and human rights abuses. According to the 2007 Report:

Corporate complicity is an umbrella term for a range of ways in which companies may be liable for their participation in criminal or civil wrongs. . . . The international tribunals have developed a fairly clear standard for criminal aiding and abetting liability: knowingly providing practical assistance, encouragement or *moral support* that has a substantial effect on the commission of a crime.¹⁵²

The term “moral support,” although not adopted universally,¹⁵³ would seem to capture a widening array of actions, or even inactions. As Ruggie notes, some tribunals have even used the element to include “silent presence coupled with authority.”¹⁵⁴ According to Ruggie, there is very little clarity on what factual scenarios would constitute moral support.¹⁵⁵

This dilemma highlights why developing a bystander framework is so important. States are either unable or unwilling to provide the protection for corporate related abuses. As Ruggie writes:

[O]f those states responding very few report having policies, programs or tools designed specifically to deal with corporate human rights challenges. A larger number say they rely on the framework of corporate responsibility initiatives, including such soft law

151. *Id.* ¶ 56.

152. *Id.* ¶ 31 (emphasis added).

153. For instance, as Ruggie notes, the court in *Unocal* did not adopt this as an element in its analysis of complicity. *Id.* ¶ 31 n.29.

154. *Id.* ¶ 32.

155. *Id.* The focus of moral support seems to be related to (1) a direct or indirect benefit and (2) some form of assistance (and therefore action). Therefore, while promising (and probably the closest idea to a bystander framework) this element still falls short of providing a meaningful basis for a bystander-based accountability structure.

instruments as the OECD Guidelines or voluntary initiatives like the Global Compact.¹⁵⁶

This is ironic particularly given how many TNCs tout the use of voluntary mechanisms, and how many States rely on these voluntary mechanisms.¹⁵⁷

Overall, the 2007 Report provided an extensive assessment of current international law in the area of business and human rights. While the 2007 Report was undoubtedly helpful in providing the foundation for Ruggie and his work, it was not until the 2008 Report, which contained Ruggie’s recommendations, that the U.N. came into its own on the issue of business and human rights.

3. *The 2008 Report: “Protect, Respect and Remedy”*

On April 7, 2008, Ruggie submitted his second official report.¹⁵⁸ This second official report, entitled “Protect, Respect and Remedy: A Framework for Business and Human Rights” (the “Framework” or the “Respect Framework”), provided Ruggie’s views and recommendations on the best way to address business and human rights issues.

The Framework stands on three essential pillars: (1) the State’s legal duty to protect individuals and communities from human rights abuses committed by others, including corporations; (2) a responsibility by corporations to respect human rights; and (3) an amelioration of current remedy mechanisms when human rights abuses have occurred.¹⁵⁹

To some extent, the contents of the Respect Framework reflect the Global Compact, relating back in various ways to the spirit surrounding Ruggie’s earlier work.¹⁶⁰ For instance, the Framework carries on the

156. *Id.* ¶ 17.

157. The irony continues: given the clear lack of success these voluntary mechanisms have had in redressing human rights abuses, it is odd that a voluntary mechanism is still the primary framework in this area.

158. In his first official report, Ruggie requested more time to complete this part of the mandate.

159. *Respect Framework*, *supra* note 13, ¶ 9.

160. This may have been intentional. Given the acrimony and bitterness surrounding both the Norms themselves and the appointment of a Special Representative, Ruggie may have felt that the best policy was to hearken back to the policy he knew and for which he had already developed goodwill. Notably, the Framework and its implementation document, the Guiding Principles, nevertheless contained significant elements of the Norms.

Global Compact's policy tradition by having no accountability mechanism for corporations. In fact, the Framework explicitly rejects the Norms' attempt to craft TNC accountability mechanisms.¹⁶¹ Furthermore, Ruggie argues that "as economic actors, companies have unique responsibilities. If those responsibilities are entangled with State obligations, it makes it difficult if not impossible to tell who is responsible for what in practice."¹⁶² His contention suggests that the responsibility outlined in the Framework is in no way a legal one, but rather a values-based normative goal in which TNCs aspire to respect human rights.¹⁶³ According to Ruggie, weak governance zones where TNCs are located are a primary challenge, and the 2008 Report once again emphasizes that "governance gaps are at the root of the business and human rights predicament."¹⁶⁴ In those areas, respecting human rights is increasingly problematic.

Later in the Respect Framework, Ruggie raises the issue of TNC accountability within the context of spheres of influence¹⁶⁵ and a company's due diligence.¹⁶⁶ Ruggie states, "the scope of due diligence to meet the corporate responsibility to respect human rights is not a fixed sphere, nor is it based on influence. Rather, it depends on the potential and actual human rights impacts resulting from a company's business activities and the relationships connected to those activities."¹⁶⁷ In doing so, Ruggie seems to reject the premise that TNCs have a specific, heightened duty for monitoring those human rights issues that affect their core business enterprises.

All in all, notwithstanding its flaws, the Respect Framework is a great achievement. In the words of one scholar, it will act as "an authoritative focal point that could help bring coherence to the

161. *Id.* ¶ 6.

162. *Id.*

163. *Id.* ¶ 54.

164. *Id.* ¶ 17.

165. *Id.* ¶¶ 65–72.

166. *Id.* ¶¶ 56–59.

167. *Id.* ¶ 72.

complexity of the business-human rights relationship.”¹⁶⁸ Even though the Respect Framework lacks an accountability mechanism for TNCs, it gives very specific recommendations to TNCs seeking to navigate the business and human rights terrain.

On June 18, 2008, The U.N. Human Rights Council unanimously adopted the Respect Framework and, by Resolution,¹⁶⁹ renewed Ruggie’s term under a new mandate.¹⁷⁰ The new mandate provided for eight specific requests, including

- Ruggie’s views and “practical recommendations” on states’ duties regarding business and human rights issues;
- More information regarding the interaction between corporate responsibility and human rights issues, along with “concrete guidance” on this to corporations and other stakeholders;
- Options and recommendations for ways to improve victims’ access to remedies when corporate activities lead to human rights abuses;
- Best practices for TNCs on the issue of business and human rights; and
- Annual updates.¹⁷¹

In response to the Council’s second mandate, Ruggie undertook an additional three-year term that involved a specific implementation program and a campaign to promote the Respect Framework. This culminated in the Guiding Principles.¹⁷²

168. Christiana Ochoa, *The 2008 Ruggie Report: A Framework for Business and Human Rights*, 12 AM. SOC’Y INT’L L. 1, 8 (Jun. 18, 2008), available at <http://www.asil.org/insights080618.cfm>.

169. Hum. Rts. Council Res. 8/7, Mandate of the Special Representative of the Secretary-General on the Issue of Hum. Rts. and Transnat’l Corp. and other Bus. Enter., U.N. Doc. A/HRC/RES/8/7 (June 18, 2008), available at http://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_8_7.pdf.

170. *Id.*

171. *Id.* ¶¶ 4(a)–(c), (e), (h).

172. Guiding Principles, *supra* note 8. In the intervening years, Ruggie also provided the Council with annual reports on his progress. These included: the 2009 Report (discussing, among other things, the financial crisis’s impact on business and human rights issues) and the 2010 Report. See *2009 Report*, *supra* note 101; Special Representative of the Secretary-General on the Issue of Hum. Rts. & Trans’l Corp. & Other Bus. Enter., *Report on: Business and Human Rights: Further Steps Toward the*

III. THE GUIDING PRINCIPLES

On March 21, 2011, Ruggie presented his Guiding Principles to the U.N. Human Rights Council for consideration. Through the Principles, Ruggie attempted to operationalize the Framework that he had submitted to the Council three years before. The Principles, as well as the Respect Framework on which they were based, were welcomed by the international community as a workable and practical framework to guide businesses and other stakeholders on how to implement a system to prevent and, if they occurred, redress human rights violations. The Principles consist of a number of foundational principles derived from the spirit of the Respect Framework, as well as new operational principles that build on the concepts embedded in the foundational principles.¹⁷³ In addition, Ruggie provides commentary for many of the issues outlined in the Principles.

Moreover, Ruggie made significant efforts to vet the Principles with the public and with all interested stakeholders before he presented them to the Council. For instance, on December 1, 2009, Ruggie launched a global online forum and requested comments regarding operationalizing the Respect Framework.¹⁷⁴ From November 22, 2010, to January 31, 2011, Ruggie posted a draft of the Guiding Principles and then solicited comments on their themes. Comments flowed in. In all, Ruggie received approximately 163 comments on various aspects of the

Operationalization of the "Protect, Respect and Remedy" Framework, Hum. Rts. Council, ¶¶ 16–53, U.N. Doc. A/HRC/14/27 (Apr. 9, 2010) (by John Ruggie), available at <http://198.170.85.29/Ruggie-report-2010.pdf> (focusing on the Respect Framework's first pillar, the State's duty to protect).

173. Guiding Principles, *supra* note 8.

174. The Forum closed in February 2011. Since then, the portal has been taken down and can no longer be accessed. For a press release of the launch see Press Release, United Nations, New Online Forum for Business & Human Rights Mandate, (Dec. 1, 2009), available at http://www.hks.harvard.edu/m-rcbg/CSRI/newsandstories/srsg_forum_launch.pdf. While the forum initially focused on corporate responsibility to respect human rights, it was subsequently expanded to comment on all aspects of the Guiding Principles.

draft.¹⁷⁵ Notably, many of the proposed changes that people suggested made their way into the final Principles.¹⁷⁶

In addition, Ruggie requested specific feedback from key stakeholders, soliciting expert consultations and convening working groups and workshops.¹⁷⁷ As a result, when the final Principles were submitted, they had wide-ranging endorsement from diverse stakeholders including specific businesses¹⁷⁸ and industries,¹⁷⁹ governments,¹⁸⁰ and nongovernmental organizations.¹⁸¹

The human rights community, while receptive, was slightly more muted in welcoming the Principles. While prominent organizations praised the Principles,¹⁸² many other organizations felt that the

175. Special Representative of the United Nations Secretary-General for Bus. & Hum. Rts., Online Forum (edited repository), (2011), <http://www.business-humanrights.org/media/documents/ruggie/online-forum-re-guiding-principles-nov-2010-to-jan-2011.pdf>.

176. *Id.* ¶ 5 (“absent any internationally-recognized hierarchy of treaty obligations, States are unlikely to place every single human right they have recognized above their legal obligations”). *Cf.* Guiding Principles, *supra* note 8 (eliminating that language). This statement, in particular, drew a number of comments questioning its accuracy.

177. Document List, *supra* note 15, at 15.

178. *See, e.g.,* *ING Congratulates U.N. Special Representative John Ruggie & His Team on Endorsement of Guiding Principles*, ONESOCIETYINITIATIVE.ORG, June 24, 2011, <http://onesocietyinitiative.org/ing-congratulates-un-special-representative-john-ruggie-a-his-team-on-endorsement-of-guiding-principles-80> (stating that the Principles are “an important milestone in the protection and promotion of human rights linked to business activities”).

179. Letter of Support from the Int’l Bus. Leaders Forum for the U.N. Protect, Respect and Remedy Framework, to John Ruggie, the Special Representative of the Secretary-General, (June 16, 2011), *available at* <http://www.business-humanrights.org/Links/Repository/1006814>.

180. *See, e.g.,* Press Release, Humanrights.gov, Businesses and Transactional Corporations Have a Responsibility to Respect Human Rights (June 16, 2011), *available at* <http://www.humanrights.gov/2011/06/16/businesses-and-transnational-corporations-have-a-responsibility-to-respect-human-rights/> (“The United States is pleased to cosponsor this Resolution [adopting the Guiding Principles]”).

181. *See, e.g.,* Public Statement, *Document - United Nations: A Call for Action to Better Protect the Rights of Those Affected by Business-Related Human Rights Abuses*, AMNESTYINTERNATIONAL.ORG (June 14, 2011), *available at* <http://www.amnesty.org/en/library/asset/IOR40/009/2011/en/55fab4a5-fb8a-4572-93f3-67581b2dca45/ior400092011en.html> (stating that the Respect Framework should be “the focal point for moving forward”).

182. *Id.* (stating that Ruggie was to be “commended for developing and raising awareness on the Framework”).

Principles were fundamentally flawed because they did not include either a mandatory system or a monitoring mechanism.¹⁸³ Thus, in one sense, the Principles might have been seen as more of the same, relying on businesses to self-monitor in order to achieve benefits for affected communities much like previous frameworks.¹⁸⁴

While the critics' claims do have some merit, a solid analysis of the Principles requires a much more nuanced approach. A comprehensive analysis of the Principles must include not simply an analysis of the text itself, but also a review of the following: (1) the context and climate in which the Principles arose (as well as a comparison of the climate in which the Norms were given); and (2) the process through which they were drafted. Without taking these factors into account, a full analysis of the Principles will be incomplete.

A. THE BACKGROUND

Some¹⁸⁵ have attributed the widespread acceptance of the Guiding Principles to the transparent process that Ruggie undertook in his work, including giving speeches, presenting interim reports, having sector

183. See, e.g., *U.N. Human Rights Council Adopts Guiding Principles on Business Conduct, yet Victims Still Waiting for Effective Remedies*, FIDH (June 17, 2011), available at <http://www.fidh.org/UN-Human-Rights-Council-adopts-Guiding-Principles> (proffering its main criticism, which is the lack of remedies available: "FIDH, along with several civil society organisations, has expressed concern on certain weaknesses in the Principles during the drafting process, in particular on the right to an effective remedy and the need for States' measures to prevent abuses committed by their companies overseas."); Hum. Rts. Watch, News Release, *U.N. Human Rights Council: Weak Stance on Business Standards*, June 16, 2011, <http://www.hrw.org/news/2011/06/16/un-human-rights-council-weak-stance-business-standards> ("The council failed to put in place a mechanism to ensure that the basic steps to protect human rights set forth in the Guiding Principles are put into practice," Human Rights Watch said.).

184. See Marcy Murningham, *Human Rights: A Moral and Material Business Concern*, THE MURNINGHAN POST, June 30, 2011, <http://www.murninghampost.com/2011/06/30/human-rights-a-moral-and-material-business-concern/>.

185. Letter from John K.S. Wilson, Dir.-Corp. Governance, TIAA-CREF, to John Ruggie, Special Representative of U.N. Secretary-General for Bus. & Hum. Rts., (May 10, 2011), available at <http://www.business-humanrights.org/media/documents/ruggie/tiaa-cref-ltr-to-ruggie-re-guiding-principles-10-may-2011.pdf>.

consultations and holding legal workshops.¹⁸⁶ In addition, Ruggie’s work in responding to the U.N. mandates can be seen as nothing less than thorough. Besides drafting and preparing reports for the Council, the work Ruggie and his team did included (1) undertaking a full analysis of the various treaties that implicate corporate activities and human rights issues; (2) convening legal workshops on a number of issues affecting business and human rights; (3) reviewing methodologies of human rights impact assessments for TNCs; (4) surveying numerous corporations regarding how they handle corporate social responsibility issues; and (5) reviewing State and regional provisions regarding business and human rights.¹⁸⁷

As a result, a number of different legal organizations endorsed Ruggie’s Guiding Principles. The International Bar Association’s CSR committee called the measure “timely, practical guidance on many complex issues of business and human rights”¹⁸⁸ and urged the Council to endorse them. The International Senior Lawyers Project stated that “the Principles will undoubtedly [be] the starting point for guiding—and judging—business efforts to identify, manage and remedy human rights.”¹⁸⁹

In addition, while business communities had some initial misgivings after the draft Guiding Principles began to circulate, law firms took great strides to reassure their (often corporate) clients that neither the Guiding Principles nor the Respect Framework was attaching legal accountability to TNCs.¹⁹⁰

186. See generally Document List, *supra* note 15.

187. See generally *id.*

188. Letter from Craig Phillips, Co-Chair IBA CSR Committee, and Kenneth Thompson II, Co-Chair IBA CSR Committee, to John Ruggie, Special Representative of U.N. Secretary-General for Bus. & Hum. Rts. (May 25, 2011), available at <http://www.business-humanrights.org/media/documents/ruggie/intl-bar-association-ltr-to-ruggie-25-may-2011.pdf>.

189. Memorandum from Int’l Seniors Law. Project (May 12, 2011), available at <http://www.business-humanrights.org/media/documents/ruggie/intl-senior-lawyers-project-ltr-re-guiding-principles-12-may-2011.pdf>.

190. See, e.g., Memorandum from Weil, Gotshal & Manges LLP on Corporate Social Responsibility for Human Rights: Comments on the U.N. Special Representative’s Report Entitled “Protect, Respect and Remedy: a Framework for Business and Human Rights” (May, 22, 2008), available at <http://198.170.85.29/Weil-Gotshal-legal-commentary-on-Ruggie-report-22-May-2008.pdf> (stating “we have been assured by the Special Representative himself that . . . his use of the term

This development of the Guiding Principles stands in stark contrast to that of the Norms. Although it took over four years for the Sub-Commission to craft the Norms, they did so without any mandate by the Council.¹⁹¹ In addition, while it seems the Sub-Commission solicited some input from the business community,¹⁹² many corporations later complained that the Sub-Commission undertook their work in a very opaque way.¹⁹³ Because Sub-Commission members who drafted the Norms were acting in their personal capacities—not as representatives of their governments¹⁹⁴—they were not bound by the political considerations of the full Council.¹⁹⁵ Given this lack of transparency, open communication and political considerations, it seems likely that part of the reason why the Norms were rejected, almost out of hand, stemmed at least in part from their opaque process.¹⁹⁶

B. TEXTUAL ANALYSIS

The Guiding Principles consist of eight foundational principles and twenty-four operational principles. They address a variety of issues in the area of business and human rights, including state-owned business, human rights impact assessments and implementation of corporate responsibilities for business and human rights issues.

Building on the three pillars originally outlined in the Respect Framework (a State's Duty to Protect individuals from human rights abuse; TNCs' duty to respect human rights; and increased access to

'responsibility' in the Report refers to moral obligations and social expectations—not binding law.”).

191. Public Debate Report, *supra* note 119.

192. Williamson, *supra* note 129.

193. Kinley et al., *supra* note 64, at 464.

194. Williamson, *supra* note 129.

195. In fact, many of them were law professors. *Id.*

196. Of course, an equally likely explanation is that the lack of transparency was merely used as a red herring by business leaders and States to avoid the accountability provisions of the Norms. For instance, one of the main criticisms lodged against the Norms was that it was created without a mandate of the full Council. However, drafting without a mandate apparently had precedent at the U.N. Kinley et al., *supra* note 64, at 466 (offering a far-reaching review of the politics and backdoor negotiations that led to the Norm's defeat).

remedies for victims of human rights violations) the Principles provide concrete, practical solutions for TNCs who wish to craft a workable policy regarding business and human rights.¹⁹⁷

The Principles also reaffirm their nonlegal accountability framework. For instance, in Ruggie’s commentary accompanying the foundational principle that outlines the legal foundation for “the responsibility of business enterprises to respect human rights,”¹⁹⁸ he makes clear that “the responsibility of business enterprises to respect human rights is distinct from issues of legal liability and enforcement, which remains defined largely by national law provisions in relevant jurisdictions.”¹⁹⁹ Once again, the Principles emphasize that the term “responsibility” (as discussed in the Respect Framework and here) is not in any way meant to convey legal responsibility on the part of TNCs. Rather, it is designed to encourage moral responsibility based on shared societal values regarding human rights issues.

Notably, however, within the parameter of corporate responsibility, the Principles are specific. The document lays out five foundational principles to guide TNCs in their responsibilities concerning human rights. First, it states that TNCs should respect human rights by avoiding infringing on the human rights of others.²⁰⁰ Second, various legal instruments should be used to determine the appropriate TNC human rights standards.²⁰¹ Third, in order to respect human rights, TNCs should “avoid causing or contributing” to human rights abuses and “prevent or mitigate” human rights activities that are linked to their operations.²⁰² Fourth, while all corporations (regardless of size) are responsible for respecting human rights, how businesses manage this responsibility will vary based on the size and structure of the operation, as well as the severity of its human rights impacts.²⁰³ Finally, TNCs must develop and

197. While all three pillars implicate business and human rights, this Article focuses on the responsibilities TNCs have to respect human rights.

198. Guiding Principles, *supra* note 8, § II.A, ¶ 12, at 13.

199. *Id.* at 13–14 (accompanying commentary).

200. *Id.* § II.A, ¶ 11, at 13.

201. *Id.* § II.A, ¶ 12. These instruments include the International Bill of Rights and the International Labor Organization’s Declaration on the Fundamental Principles and Rights at Work (accompanying commentary).

202. *Id.* § II.A, ¶ 13, at 14.

203. *Id.* § II.A, ¶ 14.

implement specific policies and procedures to help maintain responsibility for human rights.²⁰⁴

In order to operationalize these foundational principles, Ruggie states that TNCs should demonstrate a firm commitment to the issues regarding business and human rights by integrating the subject throughout the corporate structure.²⁰⁵ In addition, TNCs must conduct due diligence, including assessments of how their operations (both actual and potential) will impact the community around them (specifically from a human rights perspective).²⁰⁶ This assessment should be done early and updated regularly, to ensure that the situations that TNCs initially evaluated have not changed.²⁰⁷ Finally, TNCs should integrate the results from their assessments²⁰⁸ into all aspects of their operations, consult with experts and other stakeholders, track the response to their human rights policies, and maintain transparency and open communications with stakeholders on these issues.²⁰⁹

The Principles also state that, should a TNC's activities result in adverse human rights impacts, the TNC should immediately take steps to redress and remediate the harm.²¹⁰ The Principles, and the Respect Framework on which they are based, provide extensive guidance to TNCs who face legitimate questions regarding their role in human rights issues.

204. *Id.* § II.A, ¶ 15, at 15.

205. *Id.* § II.B, ¶ 16.

206. *Id.* § II.B, ¶ 17, at 16.

207. *Id.* (and accompanying commentary).

208. As it stands now, many business partners seem to be in favor of a move towards internal TNC human rights impacts assessment. *See, e.g.*, Letter from Robert Davies, Chief Exec. Officer, Int'l Bus. Leaders Forum, to John Ruggie, U.N. Special Representative to the Secretary-General on Bus. & Hum. Rts., (Jan. 12, 2007), available at <http://www.business-humanrights.org/Documents/>). However, some in the United States are concerned that producing additional assessments would create additional legal liability for corporations. *2009 Report, supra* note 101. Ruggie dismisses these concerns by arguing that the call for greater disclosure will lead to legal liability only if a corporation omits or misrepresents material facts. *Id.* at ¶ 82 (2009 Report).

209. Guiding Principles, *supra* note 8, § II.B, ¶¶ 18–21, at 17–20.

210. *Id.* § II.B, ¶ 22, at 20.

Overall, the Principles are incomplete, notwithstanding the significant leap forward taken by the Principles and the Respect Framework regarding a bystander paradigm in their discussion of TNCs' relationships (not just actions) as a source for assessing appropriate responses. Because the Principles rely on a system of self-monitoring for TNCs and remain silent on accountability mechanisms, they offer a more modest approach to tackling the issue of business and human rights than the Sub-Commission's work with the Norms. For some, it seems apparent that Ruggie's work did not go far enough. One writer states that Ruggie's report, although identifying governance gaps, does not in fact respond to those gaps with solutions: "Instead, it is limited to what its author deems politically achievable."²¹¹

C. IMPACT ON A BYSTANDER FRAMEWORK

There is no doubt that Ruggie's work will influence the development of international human rights law. Previously, issues of corporate actors and human rights had been dealt with under specific subject matters, such as labor issues and workers' rights. There was little, if any, dialogue in the international law arena that discussed ideas

211. JENS MARTENS, PROBLEMATIC PRAGMATISM, THE RUGGIE REPORT 2008: BACKGROUND, ANALYSIS AND PERSPECTIVES 1 (Elisabeth Strohscheidt, Misereor, ed., June 2008), available at <http://www.wdev.eu/downloads/martensstrohscheidt.pdf>. For Ruggie's vigorous response to the piece see RESPONSE: GLOBAL POLICY FORUM, *supra* note 125. While Ruggie does not deny the claim that his report was politically expedient ("[o]ne obvious question to ask is what purpose would be served by making recommendations that aren't feasible"), he takes issue with the tone of the Global Policy Report stating: "I would have hoped that the level of maturity in the business and human rights debate would have been sufficiently elevated by now for these tactics to have been confined to a dust bin." *Id.* In the end, some scholars tend to agree that Ruggie achieved the best result he could under the circumstances. For instance, John Knox, in analyzing Ruggie's approach to his mandate summarized the challenge Ruggie faced:

This situation presented Ruggie with an extraordinarily difficult political calculus. To develop a consensus on how to bring human rights law to bear on corporations, Ruggie had to propose an alternative to the Norms that addressed the desire for a robust application of human rights law to corporations but did not alienate the governments whose cooperation would be necessary to make the proposal effective. John Knox, *The Ruggie Rules: Applying Human Rights Law to Corporations* (forthcoming in RUGGIE'S MANDATE), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1916664.

regarding corporations and human rights. While the Norms were one attempt at the U.N. level to have that conversation, a substantive evaluation of their objectives is difficult because of the controversy in which they were mired. In contrast, Ruggie's work and transparent process in the area of business and human rights allowed the development of a clear and detailed map of the current terrain. What is more, his work has also paved the way, in some respects, for transformation in the future development of international human rights law.

For instance, the Respect Framework and the Guiding Principles represent the first time that the issue of business and human rights has had the imprimatur of the U.N. While this might seem like a modest achievement, this is quite a significant milestone in light of the prior absence of similar attention to the matter. In addition, it appears that the U.N.'s work on business and human rights is continuing. Since the Human Rights Council's endorsement of the Guiding Principles, it has established a working group whose mandate includes promoting and disseminating the Guiding Principles, identifying best practices on implementing the Guiding Principles, conducting country visits to various States, and "develop[ing] a regular dialogue and discuss[ing] possible areas of cooperation with Governments and all relevant actors."²¹²

In addition to the impact on the human rights agenda generally, more specifically, the Guiding Principles' potential impact on the bystander corporate accountability framework is also profound. As of yet, there is no corporate accountability framework that specifically encompasses TNCs as bystanders under international law. Nevertheless, certain key elements that would be required for any effective bystander accountability structure have begun to take shape with the help of recent developments. For example, an effective bystander accountability framework should have at its foundation of liability, a structure that is not based on overt action, or even complicity, but rather on relationship.

212. Human Rights Council Res., Human Rights and transnational corporations and other business enterprises, A/HRC/RES/17/4 (Jul. 6, 2011), available at <http://daccess-ddsny.un.org/doc/RESOLUTION/GEN/G11/144/71/PDF/G1114471.pdf?OpenElement>.

To that end, both the Respect Framework and the Guiding Principles are significant.

1. *The tripartite relationship in human rights abuses*

An integral part of understanding the bystander framework is to acknowledge that, oftentimes, there are in fact three people in a relationship: the victim, the aggressor, and the witness.²¹³ So, for instance, a TNC contracts out work to security guards (often off-duty militia). The security guards then commit untold horrors, harming people in the surrounding community. In this instance, the security detail are aggressors having committed the actual abuse, and the people in the community that suffered the abuse are victims. A lawsuit is brought against the TNC, but the TNC denies any involvement. Thus, the only reasonable role left for the TNC is that of a witness.

Moreover, while the Norms made mention of the idea that TNCs need to be vigilant in their dealings with contractors²¹⁴ and States,²¹⁵ the Guiding Principles more explicitly discuss the concept of relationship as a basis for TNC responsibility. This concept of relationship is at the heart of the bystander rhetoric. The bystander framework acknowledges that relationships are important and that the tripartite relationship among victim, witness, and aggressor (whether that aggressor is the State or whether that aggressor is a third-party actor) can come in line with some of the responsibilities of TNCs.

Likewise, in the Guiding Principles, Ruggie acknowledges that TNCs, not simply by their actions, but also by their relationships, can negatively impact human rights. Therefore, Principle 13 encourages TNCs to “seek to prevent or mitigate adverse human rights impacts that are directly linked to their . . . relationships.”²¹⁶ The accompanying commentary further elaborates on this concept by distinguishing between activities (which can encompass both actions and omission) and relationships.²¹⁷ Practically speaking, this means TNC activity can negatively impact human rights either through action or inaction, and either from its operations or its relationships. Moreover, the result is an

213. Martin Amerson, *supra* note 10, at 48.

214. *Norms*, *supra* note 100, ¶ 15.

215. *Id.* ¶ 11.

216. Guiding Principles, *supra* note 8, at ¶ 13.

217. *Id.*

interesting diagram for mapping a bystander framework whereby a TNC's actions (presumably in direct connection with its operations) can raise the possibility of liability, and a TNC's inactions (in direct connection with its relationships) can also raise liability. In that case, a framework is needed that encompasses these issues and links the relationship that the TNC has with the aggressor, to the duty.

2. *Sphere of influence and the bystander framework*

Also noteworthy in the continuing human rights dialogue, is the evolution of the term 'sphere of influence' and its potential impact on the bystander framework.²¹⁸ As originally used in the Global Compact, sphere of influence seemed operationally based—discussing spheres in which the company could exercise the most control. These would normally be those areas related to a company's core business activities. This concept expanded under the Norms, where it encompassed both an operational form of influence and a spatial form of influence. This

218. The term "sphere of influence" within the context of business and human rights has also evolved. Originally introduced in the Global Compact during Annan's speech on the subject, the term then became a part of the first principle. However, since 2005, the term was struck from the first principle and is now simply a part of the preamble. Later, it was revealed that John Ruggie, one of the most vocal critics of the term sphere of influence in the U.N. Norms, confessed in April 2010 that he was actually the one who co-opted the term for the business and human rights framework. See Global Compact Critics, *How Sphere of Influence Was Introduced into the Global Compact*, GLOBALCOMPACTCRITICS.BLOGSPOT.COM (May 8, 2010), <http://globalcompactcritics.blogspot.com/2010/05/global-compacts-principle-one-subject.html>. In fact, by the time of the 2008 Report, Ruggie argued in favor of abandoning the term altogether as he believed it to be "unhelpful for further elucidating the boundaries of the responsibility to respect." John Ruggie, *Response by John Ruggie to Ethical Corporation Magazine*, REPORTS-AND-MATERIALS.ORG (June 5, 2008), <http://www.reports-and-materials.org/Ruggie-response-Ethical-Corp-5-Jun-2008.pdf> [hereinafter *Response: Ethical Corp. Mag.*]. For a discussion on the origins of the term sphere of influence see Special Representative of the Secretary-General on the Issue of Hum. Rts. and Transnat'l Corp. and Other Bus. Enter., *Report Clarifying the Concepts of "Sphere of Influence" and "Complicity,"* Hum. Rts. Council, U.N. Doc. A/HRC/8/16 (May 15, 2008) (by John Ruggie), available at <http://www.reports-and-materials.org/Ruggie-companion-report-15-May-2008.pdf>.

expansion made room, whether intended or not,²¹⁹ for the bystander theory to come into play. Thus, the term sphere of influence now implicates bystander theory.

At its heart, the bystander framework is a methodology for shifting the corporate accountability dialogue away from the overt actions of a TNC to the impacts that a TNC's relationships has on human rights violations. This shift, although not explicitly stated in the form of bystander rhetoric, is implicit in the U.N.'s evolving view of business and human rights. Therefore, it is plausible for the bystander framework to develop as an accountability mechanism when TNCs have significant relationships with would-be perpetrators of human rights atrocities. From this perspective, the Guiding Principles are a positive development. They mark a shift from an implicit acknowledgment of control in TNCs' relationships (as discussed in the Global Compact) to an explicit acknowledgment of the importance of relationship to preventing human rights abuses.²²⁰

219. Indeed, Ruggie is emphatic that sphere of influence should not be used to extend accountability to TNCs based on relationships. He writes:

[I]t is not reasonable to attribute responsibility to companies solely on the basis of "influence" understood as "leverage." I note that sphere of influence combines together two very different meanings of influence: one is influence as "impact," where the company may be the cause of the harm; the other is influence as whatever "leverage" a company may be able to exert over other actors with which it may or may not have a business relation. Impact falls squarely within a company's responsibility to respect human rights; leverage may or may not, depending on circumstances.

Response: Ethical Corp. Mag., supra note 218.

This is the leap that Ruggie seems unwilling to make but that he set up by developing the accountability structure. However, this is the very leap that the bystander framework makes by addressing the leverage that a company's relationship with an actor (particularly the State) can have on human rights violations. In essence, Ruggie's Reports, Framework, and Guiding Principles dance around the edges. They cite the problem and even discuss how relationships are important, but they do not address squarely the implication that an accountability structure for corporations is appropriate. Perhaps this disconnect is inevitable. In order to get buy-in from the business community, Ruggie needed to create a nonbinding mechanism, rendering him unable to make the leap to an accountability structure based on relationship. Until this structure is achieved, however, human rights violations will continue to occur and companies will persist in hiding behind bystander rhetoric in order to escape liability.

220. The relationship aspect of the bystander framework is crucial. This is the relationship that creates the duty and the breach of that duty that can lead to a TNC's liability, even through their inaction.

3. *The bystander framework and the
TNC's relationship with the State*

One key piece is missing from any of the frameworks articulated to date—the relationship between the TNC and the State. Each of the U.N.'s foundational documents on business and human rights looked at the issue of the TNC and its relationship primarily through the lens of the TNC's relationship with other private parties.²²¹ The Norms, for instance, specifically discussed sphere of influence within the context of a TNC's work with vendors, suppliers, and other contractors. Ruggie's work expands on this discussion, including weak governance zones that may make it difficult for a TNC to navigate human rights issues. However, Ruggie's direct linkage of a TNC to a *State*, as a relationship resulting in adverse human rights impacts, is weak. For instance, in the Respect Framework, Ruggie discusses a corporation's responsibility to respect human rights. Specifically, he addresses “the context in which a company is operating, its activities, and the relationship associated with those activities”²²² as factors that should be considered in assessing that responsibility, without stating that a relationship with the State might be important to this calculation. Later, in the Respect Framework, the relationship between the State and the TNC appears but is understated. The Respect Framework discusses whether TNCs can contribute to abuse “through the relationships connected to their activities, such as with business partners, suppliers, State agencies, and other non-State actors.”²²³ State agencies are simply cast in a long line of other actors whose relationships with TNCs may create adverse human rights impacts.

Furthermore, there are unique power dynamics in a TNC's relationship with a State. The State, eager to accommodate the TNC, allows the TNC almost free reign, even changing its laws to make it

221. Some have argued that one of the Norms' biggest flaws is that it took that step when it discussed the primary relationship of the States vis-à-vis TNCs. However, the Norms' language regarding the primary responsibility of States and the secondary responsibility of TNCs is too amorphous to be of any help in this analysis.

222. *Respect Framework*, *supra* note 13, ¶ 25.

223. *Id.* ¶ 57.

more hospitable for the TNC’s activities.²²⁴ Once it arrives, the TNC’s wealth and influence oftentimes dwarfs that of the Host State,²²⁵ leading to stark power differentials that are not taken into consideration in our current accountability structure. Omitting these dynamics from current legal analysis has resulted in an incomplete framework, especially considering that many human rights abuses may arise from relationships between TNCs and States. In addition, the lack of explicit attention given to these relationships leaves open the door for improper assumptions that the consequences arising from TNCs’ relationships with States are the same as the consequences that arise from TNCs’ relationships with all other actors. This is clearly false and demonstrates how grouping these relationships together can create an inaccurate picture that can exacerbate the gaps in the current accountability structure.

Although States can be held accountable for their acts, creating a separate accountability structure based on TNCs’ relationships with States decouples the actions (or inactions) of each actor and minimizes the ability of each to hide behind the acts of the other. This transparency is essential to the development of human rights law. In short, much of TNCs’ involvement today with respect to human rights abuses, if performed by a State, can be considered coercive and lead to legal accountability.²²⁶ Given TNCs’ level of power and influence, it is necessary to examine TNCs with the same level of scrutiny and accountability as States.

224. For an excellent example of this, see the discussion *supra* Section I.B. on Union Carbide and the Bhopal disaster.

225. Martin Amerson, *supra* note 10, at 5.

226. The idea that human rights are underpinned with a freedom from coercion has deep jurisprudential roots and appears in many facets of business and human rights work. For instance, Professor Anne Marie Lofaso has written extensively on the notion of workers’ rights stemming from freedom from coercion. Moreover, Professor Lofaso points out that it is not merely the State that is a source of coercion, but also most institutions. See Anne Marie Lofaso, *Toward a Foundational Theory of Workers’ Rights: The Autonomous Dignified Worker*, 76 UMKC L. REV. 1, 17 (2007) (discussing the different jurisprudential theories regarding an individual worker and coercive institutions). Following this idea, it is reasonable to assume that the TNC, as an institution, is a large source of coercion. International law’s inability to address this is one of its biggest governance gaps. See Anne Marie Lofaso, *Workers’ Rights as Human Rights: Regaining Autonomy and Human Dignity at the U.S. Workplace* (forthcoming, peer review with Queens Law Journal).

In addition, a framework that does not take into account the unique relationship between a TNC and a State removes one of the main benefits of the paradigm—incentivizing proactive vigilance on the part of TNCs for human rights violations. Thus, accounting for this relationship is essential, and an effective bystander framework cannot allow benefits to improperly accrue to a TNC as a result of a State's oppressive conduct.

There are many other issues within the Guiding Principles and the Respect Framework that implicate the bystander framework.²²⁷ However, focusing on TNCs' relationships, particularly with the State, as a basis for establishing an accountability structure will go a long way towards developing a workable system under international law.

Notwithstanding the benefits of the bystander framework, incorporating nonfeasance into a theory of accountability will no doubt cause consternation for TNCs and other business enterprises that have previously hidden behind a veil of inactivity. This is not at all surprising. It is also paradoxical that TNCs demand a seat at the table for all international dealings that might affect their bottom line—how they interact with their trade partners, labor, suppliers, and subsidiaries—and yet do not take responsibility when the fruits of those relationships, namely relationships with actors who commit human rights abuses, yield terrible results. Allowing a framework to develop that focuses on the nonfeasance of corporations could have a remarkable impact in

227. For instance, another interesting issue that has evolved in the documents propounded by the U.N. and its agents is the consideration of culture as an important factor in changing or preventing human rights abuses. Culture is important to the dialogue generally because it sets the tone for what is and is not deemed acceptable. However, it also has greater significance for the bystander framework. Elsewhere, I have contended that a bystander analysis has been used even in situations where the TNC itself has actively participated in the harm caused. In those situations, it is the individual executives of TNCs who co-opt the language of the bystander framework by stating that their TNC's culture is predominantly hostile to issues regarding human rights (or other violations), and that they themselves are mere bystanders. Martin Amerson, *supra* note 10, at 23. Emphasizing that a corporation's culture is important and has a significant impact on human rights issues may close another loophole for high-level executives who wish to claim that they were powerless against the culture of a TNC.

diminishing human rights abuses that are linked to corporate activity. Knowing that their relationships with potentially responsible actors, including States, could be significant enough to result in liability, TNCs will be incentivized to engage at the highest level to ensure that the standards for human rights are being upheld. Executives and CEOs, for example, might become conversant in impact assessments that affect not just their bottom line, but the human rights paradigm for others.

4. *The bystander framework and the special duty of the TNC*

Another aspect of the bystander framework that may disturb the business community is that it has the potential to impose upon corporations special duties that may in certain circumstances go beyond the duties imposed upon States. Indeed, Ruggie flagged this as an issue when he stated:

[T]he allocation of responsibilities under the Norms in actual practice could come to hinge entirely on the respective capacities of States and corporations in particular situations - so that where States are unable or unwilling to act, the job would be transferred to corporations. While this may be desirable in special circumstances and in relation to certain rights and obligations, as a general proposition it is deeply troubling.”²²⁸

By the time Ruggie submitted his Framework and began drafting the Guiding Principles, there appeared to be a growing emergence in the discourse that relationships would need to be at the heart of business and human rights.²²⁹ Indeed, as noted scholar Larry Catá Backer stated:

If at least the most advanced multinational enterprises are the functional equivalent of states, then they ought to undertake burdens commensurate with their power and effects. . . . Mr. Ruggie makes the quite sensible point that large and powerful enterprises cannot on

228. 2006 *Interim Report*, *supra* note 34, ¶ 68.

229. See, e.g., Juliette Terzoeff, *U.N. Special Rep: Time to “Know and Show,”* WORLD POLITICS REVIEW, Mar. 2, 2010, <http://www.worldpoliticsreview.com/trend-lines/5206/u-n-special-rep-time-to-know-and-show>.

[R]aising human rights or environmental rights abuses with corporations has been a pragmatic move by activists to avoid directly challenging the role of the governments involved. A corporation or industry can’t arrest group leaders or ban their operations. At the same time, corporations do have power and can exert influence on governments to improve rights conditions.

Id. (emphasis added).

the one hand protect their power to operate unhampered within a framework of social norm systems, and at the same time invoke their formalist subordination to states under legal norm systems.²³⁰

To that end, the Guiding Principles, and their discussion of relationships and spheres of influence, provide a solid theoretical basis from which future bystander methodologies can be drawn.

D. The Failings of the Guiding Principles

Nevertheless, there are a number of ways in which the Guiding Principles could be more effective. In the first interim report, Ruggie stated that “[i]t is essential to achieve greater conceptual clarity with regard to the respective responsibilities of States and corporations.”²³¹ That promise was not, in fact, fulfilled in the Respect Framework or in the Guiding Principles. Rather than articulate specifically the responsibilities of corporations, Ruggie expressed only aspirational goals. This may be a semantic quibble, but to the extent responsibilities invoke something akin to a legal duty, they are clearly absent in the Guiding Principles’ analysis of a corporation’s duties. Indeed, neither the Respect Framework nor the Guiding Principles do anything to remedy that governance gap. Instead, the sole legal duty continues to fall on States, rendering the Principles incapable of remedying situations where States are either unable or unwilling to do more to prevent their citizens from suffering human rights abuses.²³² Of course, this failing is not unique to Ruggie’s framework. Indeed, many scholars argue that one

230. Larry Catá Backer, *On Challenges to Operationalizing a Transnational Framework for Business and Human Rights—the View From Geneva*, LAW AT THE END OF THE DAY BLOG (Oct. 13, 2009, 9:02 AM), <http://lcbackerblog.blogspot.com/2009/10/on-challenges-to-operationalizing.html>.

231. *2006 Interim Report*, *supra* note 34, ¶ 70.

232. This reminds me of that famous 1980s campaign “say no to drugs,” as if by merely stating what one should do, an issue can effectively be ended. The continued drug epidemic in this country shows that this is not the case. Similarly, telling States that they need to protect their citizens from human rights abuses does little to help those individuals if the international community does not provide the tools or a culture to make it happen. TNCs can provide both. By ascribing bystander liability to them in the meantime, TNCs are likely to be more proactive in curbing human rights abuses.

of the most fundamental failings of international human rights law is its one-dimensional view of the State as the duty bearer.²³³ Still, this failing is particularly exacerbated within the context of TNCs. Given how influential TNCs are to the international legal landscape, a framework that does not discuss them as duty bearers for human rights violations is fundamentally flawed.

In addition, while the Respect Framework and the Guiding Principles offer concrete guidance in the form of impact assessment and due diligence standards, both seem hollow within a self-monitoring system. Thus, the aspirational nature of these goals will do little to remedy the governance gaps that exist.

Moreover, there appears to be a gap in logic between the 2008 Official Report’s remarks on corporate responsibility and the proposals put forth in the Principles. Specifically, the 2008 Report states that “corporate responsibility to respect rights exists independently of States’ duties.”²³⁴ Notably, the International Organisation of Employers, the International Chamber of Commerce, and the Business and Industry Advisory Committee to the Organisation for Economic Co-operation and Development (“OECD”) seem to share this viewpoint. In their paper entitled *Business and Human Rights: The Role of Government in Weak Governance Zones*, the groups, while maintaining that States have primary responsibility for issues arising out of human rights abuses, also contend that companies still have to respect the law even if the Host State does not.²³⁵

If that is so, then why can we not develop an accountability framework that begins from the same—paradigms namely in which corporate accountability (or corporate duties) exist independently of

233. See David Kinley & Rachel Chambers, *The U.N. Human Rights Norms for Corporations: The Private Implications of Public International Law*, 6 HUM. RTS. L. REV. 447.

234. *Respect Framework*, *supra* note 13, ¶ 55.

235. INT’L ORG. OF EMP’RS, BUSINESS AND HUMAN RIGHTS: THE ROLE OF BUSINESS IN WEAK GOVERNANCE ZONES: BUSINESS PROPOSALS FOR EFFECTIVE WAYS OF ADDRESSING DILEMMA SITUATIONS IN WEAK GOVERNANCE ZONES ¶ 15 (Dec. 2006), available at http://www.business-humanrights.org/Links/Repository/596399/link_page_view (“All companies have the same responsibilities in weak governance zones as they do elsewhere. They are expected to obey the law, even if it is not enforced, and to respect the principles of relevant international instruments where national law is absent.”).

States' duties?²³⁶ That the U.N.'s work does not even try is its main failing.

CONCLUSION

Despite initial resistance from TNCs regarding the business and human rights agenda, company executives now seem to understand that allowing a corporation to be complicit in human rights violations comes not just at a moral cost, but more than likely at a business cost as well.²³⁷

236. For instance, Ruggie believes that TNCs' responsibilities for human rights in weak governance zones should still be maintained even when the State itself seems unwilling to prevent those abuses. *See, e.g.*, Special Representative of the Secretary-General on Hum. Rts. & Transnat'l Corp. & Other Bus. Enter., *10th OECD Roundtable on Corporate Responsibility: Updating the Guidelines for Multinational Enterprises*, discussion paper, ¶¶ 22–23 (June 30, 2010) (by John Ruggie), available at <http://www.oecd.org/dataoecd/17/35/45545887.pdf>.

Weak governance zones are one case in point. Early in his mandate, the Special Representative asked the world's largest international business associations to address this particular challenge. The updated Guidelines should incorporate their response: "All companies have the same responsibilities in weak governance zones as they do elsewhere. They are expected to obey the law, even if it is not enforced, and to respect the principles of relevant international instruments where national law is absent."

The challenge is more complex where national law conflicts with international standards and where legal compliance may undermine the corporate responsibility to respect human rights. Enterprises should be encouraged in such circumstances to seek ways to respect the spirit of international standards while avoiding outright violation of the law. At the same time, they should ensure that their actions do not exacerbate abuses or the risks to those subject to the abuse.

Id.

237. *See, e.g.*, Susan Aaronson & Ian Higham, Commentary, *Re-Righting Business: John Ruggie and the Struggle to Develop International Human Rights Standards for Transnational Firms*, Geo. Wash. U., Elliott School of Int'l Affairs (June 2011), available at http://www.business-humanrights.org/Categories/Individualcompanies/S/SNCFsocietyNationaldesCheminsdeFer?&batch_start=11&sort_on=sortable_title ("The costs to the firm [for human rights abuses] may include reputational risk, legal liability, operational risk (such as work stoppages, boycotts, blackmail, and sabotage), and loss of investor or consumer confidence."); Cynthia Williams & John Conley, *Is There an Emerging Fiduciary Duty to Consider Human Rights?*, 74 U. CIN. L. REV. 75 (2005) (discussing how the business lobby's position during the Supreme Court's first ATCA human rights case could lead to monetary exposure for businesses that do not consider human rights as part of their risk assessment); Jena Martin Amerson, *Business and*

At the same time, much of the recent debate around corporate accountability has centered on who is controlling the game. Most human rights activists believe that corporations are controlling the rules of the game and will continue to do so until such time as an accountability structure is developed for them under international law. Ruggie, in contrast, seems to believe that others have been controlling the game and that TNCs will not get the results they want unless they participate in the dialogue on business and human rights.²³⁸ In my view, the former belief is more persuasive. As one author writes: “Of course, businesses also spend much time and treasure attempting to influence the rules of the game—and ensuring that any changes to the rules, however broad or obvious their potential social benefits, do not affect their bottom lines.”²³⁹

If we accept that corporations are indeed controlling the game, the significance of a bystander framework is quite obvious. Using a paradigm that has as its initial source of accountability the TNC’s relationship with perpetrators, victims could finally have a concrete mechanism for addressing human rights abuses in weak governance zones. Of course, this idea is a controversial one. Holding a non-state actor liable under international law takes a significant step away from our current normative structure of international law. Likewise, holding these same non-state actors liable because of their relationships, rather than just looking at their actions, is at odds with most current theories of international law.

In light of this uneven terrain, Ruggie’s work is a necessary interim step in the right direction. Ruggie brokered a compromise from disparate populations who had taken hard-line stances before his involvement—in essence, “sneaking past the watchful dragons.”²⁴⁰ For

Human Rights: What’s the Board Got to Do with It?, 2013 ILL. L. REV. (forthcoming 2013) (arguing that businesses that fail to consider human rights as part of their due diligence are facing huge monetary liability).

238. Interview by John Sherman, *supra* note 7 (discussing his approach with the business community regarding human rights advocacy: “What I’ve said to the companies is, I have a better game for you [than naming and shaming] . . . [T]ake the game over and stop being reactive, and become proactive, and drive the agenda.”).

239. Tom Zeller Jr., *Can Business Do the Job All by Itself?*, N.Y. TIMES, Mar. 28, 2010, <http://www.nytimes.com/2010/03/29/business/energy-environment/29green.html>.

240. C.S. LEWIS, *OF OTHER WORLDS, ESSAYS AND STORIES* 56 (1966). Lewis used the term to connote how in some cases, using a narrative to convey an idea is more powerful than explicitly stating the idea in an expository form. In Lewis’s example, he

instance, many of the human rights groups that had initially welcomed the U.N. Norms realized they needed to let go of their allegiance to its specifics and instead embrace its spirit.²⁴¹ Likewise, TNCs had to be more open to the idea that they were not only subject to the national laws of their host States, but also could be subject to other accountability mechanisms.²⁴² This was an important step in establishing buy-in from the different stakeholders. Should a bystander framework subsequently be developed that holds TNCs accountable for their relationships with aggressors of human rights violations (the heart of the bystander narrative), TNCs would now be hard-pressed to object after contributing significant input and welcoming both Ruggie's framework and the Guiding Principles.²⁴³

Finally, discourse on Ruggie's work and corporate accountability often overlooks the purpose for which Ruggie was commissioned. Christine Bader, one of Ruggie's advisors during his time as Special Representative, noted that "John Ruggie was brought in to solve a particular problem, and that is to try to prevent people from getting hurt by corporate activity. He's trying to ensure that there is a floor where there was none before."²⁴⁴ To that end, the Guiding Principles may very well be "among the most important milestones in the recent era of

stated that using children's stories to allegorize Christian theory was much more effective than writing an apology on the subject. Likewise, Ruggie's aspirational tones and conciliatory methods may have been a much more effective way of creating TNC buy-in to a human rights paradigm than simply drafting a top-down accountability framework. Still, the jury is out regarding whether or not this method lays the foundation for any future, meaningful accountability structure.

241. See, e.g., Chris Jochnick, Making Headway on Business and Human Rights, OXFAM. (blog) (Feb. 11, 2011), available at <http://politicsofpoverty.oxfamamerica.org/index.php/2011/02/11/making-headway-on-business-and-human-rights/> (discussing how the human rights community's view of Ruggie's work has evolved).

242. Comments of Peter Frankental on the 2008 Framework. Comments part of International Law Discussion Group Summary Business and Human Rights: Closing the Gaps 8 (Nov. 6, 2008) available at http://www.chathamhouse.org/uk/files/12734_ilp061108.pdf.

243. See *supra* notes 181-188 and accompanying text.

244. Interview by Jonathan T. F. Weisberg with Christine Bader, Advisor to the U.N. Special Rep. of the Secretary-General for Bus. & Hum. Rts., at the Yale School of Management (May 2009), available at <http://qn.som.yale.edu/content/how-does-business-value-human-rights>.

corporate responsibility and sustainability, particularly given its emphasis on stakeholder engagement and collaboration among government, business and civil society.”²⁴⁵

No doubt, then, its endorsement by the Council does indeed signal the end of the beginning. Nonetheless, many may be left wondering how quickly we will progress beyond that beginning.

245. March Murningham, *Human Rights: A Moral and Material Business Concern*, THE MURNINGHAN POST (June 30, 2011), <http://murninghampost.com/2011/06/30/human-rights-a-moral-and-material-business-concern/>.

APPENDIX A (A TIMELINE OF BUSINESS AND HUMAN RIGHTS)

- 1993 – 1998. Human rights organizations begin shifting their advocacy strategies to more directly include TNCs.²⁴⁶
- 1997 – 2001. John Ruggie works at the U.N. as Assistant Secretary-General. In that capacity he helps draft both the Millennium Goals and the Global Compact.²⁴⁷
- 1999. Kofi Annan gives his speech regarding a Global Compact with business.²⁴⁸
- July 2000. The U.N. Global Compact begins with 50 signatories.²⁴⁹ Initially, the Compact states nine principles (a tenth principle against corruption was added in 2004).²⁵⁰

246. Human rights advocates in the United States began shifting their use of ATCA litigation from government officials to corporations, with the first lawsuit filed against a corporation in 1993. Migueal Juan Taboada et al., *The Accountability of Multinational Corporations for Human Rights' Violations*, 64/65 CUADERNOS CONSTITUCIONALES DE LA CÁTEDRA FADRIQUE FURIÓ CERIOL 171, 180. In addition, the first press release from Human Rights Watch that directly named corporations as human rights violators occurred on December 28, 1998. Press Release, Human Rights Watch, International Corporations Violate Women's Rights in Mexico (Dec. 28, 1998), available at <http://www.hrw.org/en/news/1998/12/28/international-corporations-violate-womens-rights-mexico>. See *Appendix B* for more details. For a detailed discussion of the temporal delineations for human rights advocates targeting business, see *infra* note 62 and accompanying text.

247. John Ruggie, HARVARD UNIVERSITY, JOHN F. KENNEDY SCHOOL OF GOVERNMENT, <http://www.hks.harvard.edu/m-rcbg/johnruggie/index.html> (last visited Feb. 19, 2012).

248. Press Release, U.N. Secretary-General, Secretary-General Proposes Global Compact on Human Rights, Labour, Environment, In Address to World Economic Forum in Davos, U.N. Press Release SG/SM 6881 (Feb. 1, 1999), available at http://www.pactmundial.org/recursos/doc/26323_1821822009135621.pdf.

249. Alan Cowell, *Advocates Gain Ground in a Globalized Era*, N.Y. TIMES, Dec. 18, 2000, at C19.

250. *About Us: Principle 10*, UNITED NATIONS GLOBAL COMPACT, <http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/principle10.html> (last visited Feb. 19, 2012).

- 2000. The U.N. Sub-Commission on the Promotion and Protection of Human Rights for the U.N. Commission on Human Rights (now the U.N. Human Rights Council) begins work on drafting the U.N. Norms.²⁵¹
- August 13, 2003. The Sub-Commission finalizes and approves the Norms.²⁵² It submits the Norms to the full Commission.
- April 4, 2004. The U.N. Commission on Human Rights put on hold the resolution on the Norms due to the frosty reception from member States.²⁵³ The Resolution also requests that the Office of the High Commissioner for Human Rights compile a report on the various standards in the area of business and human rights.²⁵⁴
- February 2005. The Office of the U.N. High Commissioner for Human Rights publishes and submits a report to the U.N. Commission on Human Rights regarding business and human rights. It suggests that the issue remain on the agenda and the Norms be further considered.²⁵⁵
- April 2005. The U.N. Commission on Human Rights adopts a resolution asking the Secretary-General to create a Special Representative.²⁵⁶
- July 2005. Kofi Annan appoints John Ruggie for a two-year mandate to be the Special Representative of the U.N. Secretary-General on business and human rights.²⁵⁷

251. KARL-HEINZ MODER, NORMS ON THE RESPONSIBILITIES OF TRANSNATIONAL CORPORATIONS AND OTHER BUSINESS ENTERPRISES WITH REGARD TO HUMAN RIGHTS 3 n.3 (Mar. 25, 2005), available at http://www.fes-globalization.org/geneva/documents/UN_Norms/25March04_UN-Norms_Background.pdf.

252. *Id.* at 1.

253. Kinley & Chambers, *supra* note 128, at 449.

254. INT’L NETWORK FOR ECON., SOC. & CULTURAL RTS., U.N. HUMAN RIGHTS NORMS FOR BUSINESS: BRIEFING KIT (Jan. 2005), available at http://www.escri-net.org/usa_sr_doc/Briefing_Kit.pdf.

255. *Id.* at 459.

256. Comm’n on Human Rights, Hum. Rts. Res. 2005/69: Human Rights and Transnational Corporations and Other Business Enterprises, 59th mtg., U.N. Doc. E/CN.4/RES/2005/69 (Apr. 20, 2005), available at www.unhcr.org/refworld/docid/45377c80c.html.

257. Press Release, U.N. Secretary-General, Annan Appoints Ruggie Special Representative on Rights, Corporations, Businesses, U.N. NEWS CENTRE (July 29, 2005), available at <http://www.un.org/apps/news/story.asp?NewsID=15212&Cr=huma>

- February 22, 2006. Ruggie completes and submits his interim report concluding that the Norms should be abandoned rather than pursued.²⁵⁸
- April 3, 2006. The Human Rights Council is established. It replaces the Commission on Human Rights.²⁵⁹
- February 8, 2007. Ruggie completes and submits his official report entitled “Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts.”²⁶⁰
- April 7, 2008. Ruggie submits his second official report entitled “Protect, Respect and Remedy, a Framework for Business and Human Rights.”²⁶¹
- June 18, 2008. The U.N. approves and endorses the framework unanimously and renews Ruggie’s term under a new mandate.²⁶²
- April 22, 2009. Ruggie submits a third official report, “Business and Human Rights: Towards Operationalizing

n&Cr1=rights. Prior to his appointment as a Special Representative, Ruggie worked for then Secretary-General Kofi Annan as his former Assistant Secretary-General and senior advisor for strategic planning. *Id.*

258. Kinley & Chambers, *supra* note 128, at 450.

259. G.A. Res. 60/251, ¶ 6, U.N. Doc. A/RES/60/251 (April 3, 2006), available at http://www2.ohchr.org/english/bodies/hrcouncil/docs/a.res.60.251_en.pdf.

260. Special Rep. of the Secretary-General on the Issue of Hum. Rts. and Transnat’l Corps. and Other Bus. Enterprises, *Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts*, Hum. Rts. Council, U.N. Doc. A/HRC/4/035 (Feb. 9, 2007) (by John Ruggie).

261. Special Rep. of the Secretary-General on the Issue of Hum. Rts. and Transnat’l Corp. and Other Bus. Enter., *Protect, Respect and Remedy: A Framework for Business and Human Rights*, Hum. Rts. Council, U.N. Doc. A/HRC/8/5 (Apr. 7, 2008) (by John Ruggie), available at http://www.unglobalcompact.org/docs/issues_doc/human_rights/Human_Rights_Working_Group/29Apr08_7_Report_of_SRSG_to_HRC.pdf.

262. Human Rights Council Res. 8/7, Mandate of the Special Representative of the Secretary-General on the Issue of Hum. Rts. and Transnat’l Corp. and Other Bus. Enter., 28th meeting, U.N. Doc. A/HRC/RES/8/7 (June 18, 2008), available at http://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_8_7.pdf; see also Interview with John Sherman, *supra* note 7.

the ‘Protect, Respect and Remedy’ Framework” to the U.N. Human Rights Council.²⁶³

- April 9, 2010. Ruggie submits “Business and Human Rights: Further Steps Toward the Operationalization of the ‘Protect, Respect and Remedy’ Framework” to the U.N. Human Rights Council.²⁶⁴
- March 21, 2011. Ruggie submits “Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework.”²⁶⁵
- June 16, 2011. The U.N. Human Rights Council unanimously adopts the Principles.²⁶⁶

263. Special Representative of the Secretary-General, *Business and Human Rights: Towards Operationalizing the “Protect, Respect and Remedy” Framework*, Hum. Rts. Council, U.N. Doc. A/HRC/11/13 (Apr. 22, 2009) (by John Ruggie), available at <http://www2.ohchr.org/english/bodies/hrcouncil/docs/11session/A.HRC.11.13.pdf>.

264. Special Representative of the Secretary-General on the Issue of Hum. Rts. and Transnat’l Corp. and Other Bus. Enter., *Business and Human Rights: Further Steps Toward the Operationalization of the “Protect, Respect and Remedy” Framework*, Hum. Rts. Council, U.N. Doc. A/HRC/14/27 (Apr. 9, 2010) (by John Ruggie), available at <http://198.170.85.29/Ruggie-report-2010.pdf>.

265. Special Representative of the Secretary-General on the Issue of Hum. Rts. and Transnat’l Corp. and Other Bus. Enter., *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, Hum. Rts. Council, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011) (by John Ruggie), available at http://www.ohchr.org/Documents/Issues/Business/A-HRC-17-31_AEV.pdf.

266. Press Release, Human Rights Council, New Guiding Principles on Business and Human Rights Endorsed by the U.N. Human Rights Council, United Nations Human Rights: Office of the High Commissioner for Human Rights, available at <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=11164&LangID=E> (last visited Feb. 19, 2012).

APPENDIX B

Human Rights Watch (“HRW”) is a nongovernmental organization dedicated to research and advocacy on human rights across the world. It regularly produces reports and press releases to expose actions of what it considers violations of international human rights standards set by the Universal Declaration of Human Rights. Even though typically these press releases are against State actors, occasionally HRW challenges corporations who may have violated human rights through their practices. The following is a comprehensive list of press releases from HRW against corporations, listing the date and the headline.²⁶⁷ Although many of the press releases challenge the State more than any other entity for allowing a given corporation to have such abusive practices, it nonetheless demonstrates a trend toward advocating for corporate accountability in human rights abuses.

- **Dec. 28, 1998**
“International Corporations Violate Women’s Rights in Mexico.”
- **Jan. 20, 1999**
“Computer Industry Must Speak Out On Chinese Internet Case”
- **June 25, 2000**
“China: Foreign Companies Should Protest Internet Detention”
- **Dec. 20, 2000**
“Human Rights Principles for Oil and Mining Companies Welcomed”
- **Jan. 30, 2001**
“Egypt: Cotton Co-Ops Violate Child Labor Laws”
- **Jan. 22, 2002**
“Enron: History of Human Rights Abuse in India”

267. The press releases can be found on the Human Rights Watch website: <http://www.hrw.org/news/list/40> (last visited Aug. 22, 2011).

- **Feb. 11, 2002**
"Guatemala: Women and Girls Face Job Discrimination"
- **May 21, 2002**
"Ecuador: Escalating Violence Against Banana Workers"
- **June 11, 2002**
"ILO Members Urged to Take Action on Child Labor in Agriculture"
- **Aug. 9, 2002**
"Yahoo Risks Abusing Rights in China"
- **Aug. 12, 2003**
"U.N.: New Standards for Corporations and Human Rights"
- **Oct. 26, 2003**
"D.R. Congo: U.N. Must Address Corporate Role in War"
- **June 21, 2006**
"Indonesia: Military Business Threatens Human Rights"
- **Aug. 10, 2006**
"China: Internet Companies Aid Censorship"
- **Feb. 16, 2007**
"Indonesia: Government Should Pull Military Out of Business"
- **Apr. 30, 2007**
"US: Wal-Mart Denies Workers Basic Rights"
- **Aug. 26, 2008**
"Lebanon: Migrant Domestic Workers Dying Every Week"
- **Oct. 27, 2008**
"Burma: US Consumers Should Avoid Banned Gems" (not directly corporate-related but it affects jewelers)
- **June 19, 2009**
"China: Filtering Software Challenges Computer Industry"
- **Jan. 12, 2010**
"China: Google Challenges Censorship"
- **Sept. 2, 2010**
"Saudi Arabia: Domestic Worker Brutalized"
- **Sept. 2, 2010**
"US: European Corporate Hypocrisy"
- **May 9, 2011**
"Kazakhstan: Philip Morris International Overhauls Labor Protections"