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Business and Human Rights: The Road to Principled Pragmatism

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1. Introduction

Business enterprises play a key role in the economic development of any country. Yet the responsibility of non-state actors, including business enterprises, to ensure such development is both sustainable and achieved without having a negative social impact has been a topic of both scholarly and policy debate for several decades. In the mid-1950's, it came into vogue under the label of Corporate Social Responsibility (CSR).¹ Since then, researchers, practitioners, politicians, and representatives of civil society have been seeking to clearly define "CSR"; however, there is to date, no definition upon which all actors agree.²

In the aftermath of various human rights violations involving business actors at the end of the 20th century and the beginning of the 21st century, global attention was drawn to the issue of the responsibility of business to respect human rights. Various commentators argued that human rights issues are an integral part of CSR and hence, a corporate responsibility to respect human rights needed to be clearly defined and delineated.³ Of key concern to scholars and activists has been: how should the corporate responsibility to respect human rights be regulated and enforced? If enforcement is not legal (*i.e.* binding in law and mandatory), how can its enforceability be ensured? Conversely, what is the practical impact of expecting corporations to respect human rights and what basis does it have under international law, bearing in mind international law has traditionally been considered as regulating states?⁴ This question can be further elaborated: should state regulation, codes of conduct, or other forms of self-regulation be utilized to regulate business, or a mix of all three? And should business' responsibility be characterized in the same manner as that traditionally afforded to states, or is a new approach called for?

It was into the fray of this much polarised debate that the U.N. Special Representative of the Secretary-General (SRSG) on the issue of human rights and transnational corporations and other business enterprises, Professor John Ruggie, was appointed. Ruggie was appointed in the hope that he would provide clarity on these questions.⁵ After years of extensive research and consultations with government, business and civil society on five continents, he proposed the United Nations "Protect, Respect and Remedy: a Framework for Business and Human Rights"⁶ in 2008 and "Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework" (UNGP) in 2011.⁷ The Guiding Principles were unanimously endorsed by the UN Human Rights Council in June 2011; at the same time, the Council established a working group to promote the effective and comprehensive dissemination and implementation of the Guiding Principles.⁸

1 Karolina Windell, "Corporate Social Responsibility under Construction: Ideas, Translation, and Institutional Change" (manuscript, Uppsala University, 2006), pp. 4 - 9.

2 Despite the varying definitions and interpretations of the content and meaning of CSR, the popularity of the idea during the last decade has been impressive. For further discussion see: *ibid.*, pp. 10 - 15; Jennifer A. Zerk, *Multinationals and Corporate Social Responsibility* (Cambridge: Cambridge University Press, 2006); Radu Mares, "Institutionalisation of Corporate Social Responsibility, Synergies between the Practices of Leading Multinational Enterprises and Human Rights Law/Policy" (Lund University, 2006).

3 Windell, "Corporate Social Responsibility under Construction: Ideas, Translation, and Institutional Change", pp. 4 - 9.

4 Andrew Clapham, *Human Rights Obligations of Non-State Actors* (Oxford: Oxford University Press, 2006).

5 *Human Rights and Transnational Corporations and Other Business Enterprises*, 20 April 2005. U.N. Res. E/CN.4/2005/91; *Mandate of the Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, Human Rights Council, 2008. U.N. HRC/Res/ 8/7.

6 Human Rights Council. *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights including the Right to Development: Protect, Respect and Remedy: A Framework for Business and Human Rights: Report of the Special Representative of the Secretary-General on the issue of Human Rights and Transnational Corporations and other business enterprises, John Ruggie.* A/HRC/8/5, 7 April 2008.

7 Human Rights Council. *Report of the Special representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie: Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework.* A/HRC/17/31, 21 March 2011.

8 Human Rights Council. *Human Rights and Transnational Corporation and Other Business Enterprises.* A/HRC/RES/17/4, 6 July 2011.

The UNGP, for the first time, provides a set of universally agreed upon principles detailing the state duty to protect, and the corporations' responsibility to respect human rights, as well as both states' and corporations' responsibility to provide access to remedies for human rights violations. The UNGP provides clarity not only with regard to the state duty to ensure that all businesses operating in its jurisdiction respect human rights and avoid any infringements, but also provides businesses with guidance on how to prevent and manage the negative impact of their activities on human rights. Moreover, due to its universal nature, the Guiding Principles apply to all business enterprises regardless of size, sector, ownership, or operating context.

The adoption of the UNGP by the UN Human Rights Council marked, in the words of Professor Ruggie, the "end of the beginning." In order to be effective, governments, businesses, trade unions and the civil society all have roles to play in its implementation, both domestically and internationally. Therefore, it is necessary to disseminate information about the UNGP. It is in this context that this paper is written.

The aim of this paper is to provide an overview and background on the UNGP that is both comprehensive and easy for business to understand. It highlights how the UNGP evolved and the core principles it aspires to instil in the business community.

2. The Road to the UNGP

Before considering the UN Guiding Principles and their relevance for business, it is worth taking a look at the path which led to their adoption. The following section provides an overview of the key issues underlying the need for the UNGP and key developments which then led to the establishment of Ruggie's mandate and the eventual endorsement of the UNGP.

2.1. Lessons from the Past: Regulatory Gaps

Extra-territoriality. Traditional notions of regulating business largely considered the issue of regulation in terms of a country's domestic legal regime. However, several problems limiting business' compliance with regulation have arisen in this regard, particularly in the developing world context. A key issue, therefore, which arose, was the jurisdictional basis upon which to regulate multinational corporations (MNCs). The activities of businesses are, principally, subject to the laws of the states in which they operate. However, due to the complex structure of MNCs vis-à-vis the usually limited territorial application of domestic laws, a national law may not always be capable of regulating all the business activities of an enterprise. Multinationals may operate in various jurisdictions through different legal entities, but remain under the same group of companies. Who, then, should regulate MNCs (including their subsidiaries) as a whole? Is it the obligation of the home or the host country? Some countries have attempted to propose and apply laws which could regulate the activities of their companies overseas.⁹ Even so, the extent to which such extraterritorial jurisdiction can be exercised and enforced remains unclear. A key concern that the UNGP confronted was how to deal with the issue of regulating the complex web of relationships created by MNCs. This concern became particularly pressing when bearing in mind both the distinct responsibilities for parent and subsidiary companies in different legal systems and the jurisdictional reach of different domestic laws.¹⁰ Depending on where human rights violations are alleged to be occurring, this could create a legal vacuum within which MNCs could claim to have no liability because they were not subject to either domestic or international laws pertaining to that country. In this regard, there is an on-going debate regarding whether host or home country regulation should apply: should the home country, usually

⁹ The United States has led this movement through the application of its Aliens Tort Claim Act to deal with human rights violations by corporations. The EU countries have taken a more cautious approach to the issue by producing non-binding codes of conduct. Australia proposed that its parliament issue a draft law, but this was rejected. See Surya Deva, "Acting Extraterritorial to Tame Multinational Corporations for Human Rights Violations: Who Should 'Bell the Cat'?", *Melbourne Journal of International Law* 5, (2004): pp. 52 - 54; *Resolution on EU Standards for European Enterprises Operating in Developing Countries, towards a European Code of Conduct*, 14 January 1999. C 104/180.

¹⁰ For a particularly interesting recent development regarding the obligations of a parent company in the actions of a subsidiary, see the Hud Bay litigation in Ontario Canada, over human rights abuses committed by Hud Bay Inc in Guatemala: <http://www.chocversushudbay.com/> [Last accessed 30 January 2015].

perceived as being the stronger party, enforce regulation on their companies operating abroad; or should the host country, often situated in less developed parts of the world and in need of foreign investment, try harder to deal with illicit behaviours?.

Diversity of applicable regulatory regimes. Another challenge pertaining to national legislation concerns the diversity of regulatory regimes adopted in any given jurisdiction. In many cases, the regulation of trade and investment can be seen to either directly or indirectly contravene a state's obligations under international human rights law, or at the very least, place additional pressure on its capacity to uphold those obligations. For example, states often give preferential treatment to multinational corporations, providing them with "tax holidays" or other tax benefits or less stringent employment and/or environmental standards in order to attract foreign direct investment. Yet at the same time, because many developing countries have an absence of rule of law or weak and/or ineffective judicial mechanisms to hold corporations accountable, corruption, unclear regulations, or ineffectual governance, can result in such benefits to the corporation being obtained while violating the human rights of local populations.

Post-colonialism and an emerging free market ideology. These jurisdictional challenges are, of course, not novel. During the 1960s and 1970s, developing countries rallied for the passage of binding international regulations that would curb the alleged violations committed by MNCs. These efforts failed, due to the structural and institutional legacy of colonialism which left developing countries in a state of political and economic dependence on the West.¹¹ At that time, corporations were regarded as "agents" of a post-colonial attempt by Western governments to exert power and control over the resources of developing nations. Hence, the trend at the time appears to have been to adopt a protectionist approach to regulation, providing states (particularly developing countries) with the capacity to move towards economic self-determination and limit the power of MNCs. Nevertheless, over the course of the 1980s in the US and Europe, neo-liberal pressure in the direction of privatisation, deregulation, and greater economic freedom at once reinforced free market ideology and somewhat undermined attempts to keep MNCs at bay.¹² Informal civil regulation became a new trend until the 1990s, in keeping with the MNCs' emerging status as a partner of government and society.¹³

2.2. Attempts to regulate business and human rights

Concurrent to these political and legal developments and prior to the UNGP, there was also a wave of attempts to develop different international standards to regulate corporations' responsibility to respect human rights. Among them, two developments are key to understanding the UNGP: namely the Draft Code of Conduct and the Draft Norms of the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights.

2.2.1. UN Draft Code of Conduct on Transnational Corporations (TNCs)

The UN Draft Code of Conduct developed by the Commission on Transnational Corporations represents the first significant international attempt by the United Nations to create a universal instrument to regulate business activities.¹⁴ The idea was prompted by general concerns on the emerging power of big businesses including MNCs (or TNCs) in the economic and political arena;¹⁵ existing inequalities between developing and developed

¹¹ Desiree Abrahams, *Regulation for Corporations: A Historical Account of TNC Regulation* (Geneva: United Nations Research Institute for Social Development, October 2005), p. 22.

¹² *Ibid.*, p. 23.

¹³ Desiree Abrahams, *Regulating Corporations: A Resource Guide* (Geneva: United Nations Research Institute for Social Development (UNRISD), July 2004), p. 3.

¹⁴ *Possible Methods of Work Related to the Drafting of a Code of Conduct*, 1 - 12 March 1976. UNE/C.10/10.

¹⁵ This refers to the situation in which the American-based corporation, together with the US government, was alleged to be involved in preparations for a military coup against the elected President of Chile, Salvador Allende, and promoting economic chaos. See: *The New Code Environment*, April 1990. ST/CTC/SER.A/16, p. 2.

countries, as well as with TNCs;¹⁶ and the limited effect of existing instruments on these problems.¹⁷ In response to such concerns, the UN Economic and Social Council requested that the Secretary General establish a group to study the impact of corporations on development and international relations. Thus, the UN Centre on Transnational Corporations and the UN Commission on Transnational Corporations were established.¹⁸ The main mandate of the Commission was to draft a global code of conduct for corporations. The drafted Code was largely completed by 1981, and finalised by 1990.

States initially welcomed the draft for different reasons. Support from developing countries was based on their wish for economic self-determination. Reflecting the Chilean experience, these new states feared that foreign direct investment through MNCs would lead to an economic colonisation which would interfere with their sovereignty.¹⁹ Therefore, they desired regulation that would prevent such a possibility by strictly limiting the role of MNCs. From the perspective of developed states, such codes were considered to represent an opportunity for healthy competition.²⁰ In short, the push to implement a code of conduct was derived from the desire to protect state interests.

The original plan was that the Draft Code of Conduct would express an agreement among governments regarding proper conduct by TNCs.²¹ It was intended to apply to governments rather than TNCs, with the expectation that having similar standards of treatment from states of TNCs would indirectly effect their behaviour.²² However, the 1990 Draft Code of Conduct clearly stated that it was applicable to both enterprises²³ and the state.²⁴ In this regard, TNCs were expected to respect the national sovereignty and observe national laws, regulations and administrative practices of the host countries.²⁵ They were also expected to adhere to the social and cultural objectives of the country in which they operate,²⁶ abstain from interference in the domestic politics of host nations as well as intergovernmental relations,²⁷ and refrain from corrupt practices.²⁸ Corporations must respect human rights and fundamental freedoms in the countries in which they operate, and shall not discriminate on the basis of race, colour, sex, religion, language, social, national and ethnic origin, or political opinion,²⁹ including exerting efforts to cease collaboration with racist policies of South Africa.³⁰

States, on the other hand, are obliged to incorporate the norms contained in Draft Code of Conduct into their law and make periodic reports on its implementation.³¹ While the emphasis is on applying the law of host

16 *Transnational Corporations: Issues involved in the Formulation of a Code of Conduct*, 20 July 1976. E/C.10/17, paras. 16-18.

17 The efforts surrounding MNCs' activities represent a response to the general concerns about MNC behaviour noted in various UN Resolutions on matters such as permanent sovereignty over natural resources of developing countries, transfer of technology, foreign private investment in its relationship to development, the economic rights and duties of states, and promotion of exports. Several other events further hastened the decision to draft a code of conduct, including the adoption of OECD Guidelines on Multinational Corporation, the ILO Tripartite Declaration on Multinational Corporation (1977), and WHO International Code of Marketing of Breast Milk Substitutes (1987). They are perceived as partial and non-comprehensive regulation on MNC. See: *ibid.*, paras. 14 & 19.

18 *Transnational Corporations: Issues involved in the Formulation of a Code of Conduct*, 20 July 1976. E/C.10/17, para. 8.

19 John M. Kline, *Ethics for International Business: Decision Making in a Global Political Economy* (Routledge, 2005), p. 45.

20 *The New Code Environment*, 1990. ST/CTC/SER.A/16.

21 *Transnational Corporations: Issues involved in the Formulation of a Code of Conduct*, para. 50.

22 *Ibid.*

23 *Development and International Economic Co-Operation: Transnational Corporations*, Second Regular, 12 June 1990. UN E/1990/94, Annex, para 1 (a).

24 *Ibid.*, para. 3.

25 *Ibid.*, Annex, paras. 41 - 43.

26 *Ibid.*, Annex, paras. 7 - 9 & 13; *ibid.*

27 *Ibid.*, Annex, paras. 16 - 19.

28 *Ibid.*, Annex, para. 20.

29 *Ibid.*, Annex, para. 14.

30 *Ibid.*, Annex, para. 15.

31 *Ibid.*, paras. 47 - 66.

countries, a variety of laws from home countries, governing areas such as antitrust, taxes, technological transfer, and export control and prohibition, may be applied based on jurisdictional doctrine provided that such laws are not used as vehicles to intervene in the internal affairs of the host state.³² Hence, obligations are imposed on governments with respect to their own behaviour towards TNCs and towards other governments in connection with TNCs.³³

The newest version of the Draft Code was completed on 31 May 1990, but was blocked by continued disagreement over a number of issues. While the developing countries demanded a strict and elaborate format to help protect their sovereignty, the developed countries preferred a flexible and minimalist approach to create a healthy environment for competition. Other crucial questions that remain unresolved were the legitimacy of special treatment by host states with respect to property, compensation as a result of nationalization, national treatment, and jurisdiction. Moreover, as was discussed above, the environment in which the Code was drafted is marked by high political tensions and antagonism between TNCs and developing (host) countries, as well as tensions in the immediate aftermath of the Cold War. As a consequence, discussions surrounding the UN Draft Code became bogged down by political interests. The negotiations were finally suspended in July 1992, and by March 1993, the Centre for Transnational Corporations had been converted into a smaller agency within the UN Conference on Trade and Development. Its mandate was no longer related to drafting the code of conduct, but rather, to general issues concerning TNCs.

2.2.2. The Draft Norms on the Responsibility of Transnational Corporations and other Business Enterprises with regard to Human Rights

The increasing number of reports of human rights violations by corporations, particularly in the mining and manufacturing sectors since the 1980s and 1990s, then drove the Sub-Commission on the Promotion and Protection of Human Rights to establish a working group on the question of human rights and business. In 2003, the Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights was adopted by the Sub-Commission and submitted to the Commission on Human Rights (now Human Rights Council). The text remains as a draft since it was not adopted by the Commission on Human Rights due to general disagreements.³⁴

The Draft Norms refer to the Universal Declaration on Human Rights, as well as other international instruments. The very fact that there was a move towards having businesses uphold human rights norms is significant.³⁵ The scope of the Draft Norms is broad, applying to all types of corporations regardless of legal nature.³⁶ The Draft Norms also highlight the obligation of companies to ensure that their contractors and suppliers will implement the Draft Norms in their respective operations, stating that “[e]ach transnational corporation or other business enterprise shall apply and incorporate these Norms in their contracts or other arrangements and dealings with contractors, subcontractors, suppliers, licensees, distributors, or natural or other legal persons that enter into any agreement with the transnational corporation or business enterprise in order to ensure respect for and implementation of the Norms.”³⁷

32 *Transnational Corporations: Issues involved in the Formulation of a Code of Conduct*, para. 146.

33 In this respect, the home country’s prescriptive law should not be used as a vehicle to intervene in the internal affairs of the host country. Meanwhile, host states are restricted to providing national treatment, nationalisation and compensation. See: *ibid.*

34 *Draft Norms on the Responsibility of Transnational Corporations and other Business Enterprises with Regard to Human Rights*, 2002. U.N. Doc. E/CN.4/Sub.2/2002/13, paras. 18 - 40; *Clarifying the Concepts of ‘Sphere of Influence’ and ‘Complicity’; Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises*, John Ruggie, Eighth Session, 15 May 2008. U.N. A/HRC/8/16, paras. 21 & 22.

UN Doc. E/CN.4/Sub.2/2001/WG.2/WP.1/Add.1, 21 May 2001, UN Doc. E/CN.4/Sub.2/2001/WG.2/WP.2; working paper by Mr Eide :UNDoc E/CN.4/Sub.2/2001/WG.2/WP.2. see also : UN Doc. E/CN.4/Sub.2/2001/9, 14 August 2001.

35 Surya Deva, “UN’s Human Rights Norms for Transnational Corporations and Other Business Enterprises: An Imperfect Step in the Rights Direction?,” *ILSA Journal of International & Comparative Law* 10, (2004): p. 499.

36 *Draft Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, 2003. U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 paras. 20 & 21.

37 *Ibid.*, para. 15.

Substantively, these Draft Norms represent the most comprehensive code of conduct yet created for MNCs, covering all fields relevant to a corporation's operations and setting out human rights principles for companies in areas ranging from international criminal and humanitarian law; civil, political, economic, social and cultural rights; to consumer protection and environmental practices. The Norms also provide a novel monitoring structure. Aside from the responsibility of the state to establish and reinforce the necessary legal and administrative framework to ensure the implementation of the Draft Norms,³⁸ enterprises are also subject to "periodic monitoring and verification by United Nations, other international, and national mechanisms... regarding application of the Norms"³⁹ —which direct monitoring is a marked departure from the usual practice wherein the responsibility for enforcement lies with the states. Notably, the Norms also provide for self-regulation, stating that "enterprises shall conduct periodic evaluations concerning the impact of their own activities on human rights under these Norms."⁴⁰

Despite the Draft Norms' comprehensive and unique approach, it lacked critical support from states. Countries such as the US, UK, Australia, Saudi Arabia, Egypt, and India had reservations about the applicability of such Norms. It was viewed that regulating business at the international level would impair a state's jurisdiction, as well as confuse the concept of human rights. This does not mean that businesses are free from human rights obligations, but only that such regulation should fall within the ambit of states rather than the international community.⁴¹ From a business perspective, obligations from international regulation would create an additional burden for corporations, and jeopardise competition among businesses.⁴² Finally, there was resistance from NGOs and civil society based on the fear that imposing such obligations on non-state actors would divert important attention from states.⁴³

The response from some scholars was similarly unenthusiastic. Professor Emeritus Maurice Mendelson argued that, while the Norms impose obligations on states and TNCs, the Norms are imprecise as to the source of their legal authority. New international law can be created only by treaty or the formation of a rule of customary international law, and the Norms are neither.⁴⁴ He also noted the confusion of normative content in that the Norms mix law, soft law, guidelines, non-law, would-be law, and assorted categories of rules "in a most unsatisfactory normative stew."⁴⁵ The Norms also run counter to the general structure of international law which places the responsibility for ensuring good governance and respect for human rights on states and their instrumentalities. Finally he noted several practical problems. For instance, the Norms impose on business enterprises the "obligation to promote, *secure the fulfilment of*, respect, ensure respect of and protect human rights recognized in international as well as national law" within their "spheres of activity and influence." Citing the ICESCR as example, Mendelson noted that this obligation goes beyond that of the states, as the ICESCR only requires states to promote the *progressive realization* of most of these rights.⁴⁶

38 *Ibid.*, para. 17.

39 *Ibid.*, para. 16.

40 *Ibid.*

41 *Comments by Australia in Respect of the Report Requested from the Office of the High Commissioner for Human Rights by the Commission on Human Rights in its decision 2004/116 of 20 April 2004 on Existing Initiatives and Standards Relating to the Responsibility of Transnational Corporations and related Business Enterprises with Regard to Human Rights*, 8 September 2004. 52/04.8 September 2004. 52/04.</DisplayText><record><rec-number>396</rec-number><foreign-keys><key app="EN" db-id="svx5rpattze2wpewresxre9mv5dxfvvwdra5">396</key></foreign-keys><ref-type name="Government Document">46</ref-type><contributors></contributors><titles><title>Comments by Australia in Respect of the Report Requested from the Office of the High Commissioner for Human Rights by the Commission on Human Rights in its decision 2004/116 of 20 April 2004 on Existing Initiatives and Standards Relating to the Responsibility of Transnational Corporations and related Business Enterprises with Regard to Human Rights</title></titles><dates><year>8 September 2004</year></dates><pub-location>Geneva</pub-location><isbn>52/04</isbn><urls><related-urls><url>http://www2.ohchr.org/english/issues/globalization/business/docs/australia.pdf</url></related-urls></urls><custom1>Australian Permanent Mission to the UN</custom1></record></Cite></EndNote>

42 *The Economic Effects of the Regulatory Burden*, (Swedish Agency for Growth Policy Analysis, 2010).

43 Steven R. Ratner, "Corporations and Human Rights: A Theory of Legal Responsibility" *Yale Law Journal* 111, no. 443 (2001).

44 Maurice Mendelson Q.C., "In the Matter of the Draft 'Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with regard to Human Rights'; Submission to UN Consultation on Business and Human Rights", Office of the High Commissioner for Human Rights, <http://www2.ohchr.org/english/issues/globalization/business/docs/confederationbritish2.doc>, (23 January, 2009).

45 *Ibid.*, para. 2.

46 *Ibid.*

Similarly, John Ruggie found the Norms to be deeply flawed.⁴⁷ Two aspects were particularly problematic. One concerns the legal authority advanced for the Norms and the other concerns the allocation of human rights responsibilities between states and corporations.⁴⁸ Ruggie observed that the Norms took existing state-based human rights instruments and simply asserted that many of their provisions are now binding on corporations as well. However, like Mendelson, he argued that that assertion has little authoritative basis in international law. All existing instruments aimed at holding corporations to international human rights standards are of a voluntary nature. Relevant instruments that do have international legal force impose obligations on states (including the obligation to prevent private actors from violating human rights), not companies.⁴⁹

With regard to the second issue of imprecise allocation of human rights responsibilities between states and corporations, he noted that, unlike states, corporations do not have a general role in relation to human rights but a specialized one. In the absence of a principled basis for differentiating responsibilities, the Norms impose obligations on the TNCs to the extent of their “spheres of influence.” However, neither the text of the Norms nor the Commentary offers a definition of “spheres of influence.” Case law provides no explicit references to such a definition. Thus, the strictly legal meaning of the concept remains elusive and not a suitable basis for establishing binding obligations.⁵⁰ In addition, the imprecise allocation of responsibilities would, in practice, shift obligations to corporations where the state fails to act.⁵¹ Making the state and corporations co-equal duty bearers for the broad spectrum of human rights may undermine efforts to make governments more responsible.

David Kinley and Rachel Chambers, meanwhile, took the position that the Norms add value to the discourse on corporate responsibility, observing that they have taken on a life of their own outside the United Nations, despite their lack of clarity. Several companies included the Norms in their operations, and certain human rights NGOs applied them as a reference in their advocacy and lobbying.⁵² John Ruggie also recognised that the Norms had useful elements in that it gave a summary of rights that may be affected by business and a collation of source documents from international human rights instruments as well as voluntary initiatives. Nonetheless, in the end, Ruggie, in carrying out his mandate as SRSG on the issue of human rights and transnational corporations and other business enterprises, decided to build on these initiatives but at the same time find a more “realistic” approach to business and human rights.

3. The United Nations Guiding Principles on Business and Human Rights and “Protect, Respect, and Remedy” Framework

In 2005, Ruggie was appointed as SRSG on the issue of human rights and transnational corporations and other business enterprises with the mandate to identify what international human rights standards currently regulate corporate conduct as opposed to the conduct of states and clarify their respective roles in safeguarding human rights. In June 2008, the Special Representative concluded a final report—the “Protect, Respect, and Remedy” Framework—as well as the UNGP in 2011, clarifying the relevant actors’ responsibility to the Human Rights Council.

47 John Ruggie, *Promotion and Protection of Human Rights; Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises* (Commission on Human Rights, 22 February 2006), para. 69.

48 *Ibid.*, para. 59.

49 *Ibid.*, para. 60-65.

50 *Ibid.*, para. 67.

51 *Ibid.*, para 68. See also John Gerard Ruggie, “Business and Human Rights: The Evolving International Agenda,” *American Journal of International Law* 101, (2007): pp. 825 - 827.

52 David Kinley and Rachel Chambers, “The UN Human Rights Norms for Corporations: The Private Implications of Public International Law,” *Human Rights Law Review* 6, no. 3 (2007): p. 461.

The Framework and the UNGPs were aimed at developing a common global normative platform and authoritative guidance as a basis for making cumulative step-by-step, progress on the regulation of MNCs.⁵³

3.1. Finding the right approach

At the beginning of Ruggie’s term, debates surrounding “voluntary” versus “mandatory” approaches to regulating corporate conduct dominated the discourse on business and human rights at the international level. While business communities favoured voluntary means, human rights advocates tended to prefer a mandatory one.⁵⁴

Those who emphasized an obligatory component argued that a voluntary responsibility would fail to provide sufficient conditions for a corporate responsibility to prevent human right violations to become enforceable.⁵⁵ This approach lacks both the legitimacy and effective enforcement mechanisms of hard law, leading to uncertainty on standards and responsibility in the case of non-compliance.⁵⁶ A contrary position argued that voluntary initiatives can actually lead to the successful coordination and cooperation amongst actors with different interests, which is scarcely achievable through mandatory means.⁵⁷ Voluntary initiatives are considered by some to be the “win-win solution” for corporations and states, as it puts to rest the fear that regulation will discourage investment.

However, framing corporate human rights obligations in terms of its mandatory or voluntary nature reflects a simplistic approach, as law consists of differing levels of compliance and cooperation. It can also be derived from many kinds of norms, not only ethical ones. The status of being voluntary and mandatory, like that of ethical and legal, is more a matter of a degree than an uncontested value. Moreover, these distinctions between voluntary and mandatory responsibility tend to treat law as the sole and final answer to problems concerning corporate behaviour. Yet, mandatory legal requirements will not necessarily lead to higher standards of corporate behaviour and transparency. An effective application of law cannot be separated from other social and political factors.

The most important question, instead, is how to integrate corporate human rights responsibility into both law and corporate policy. This can be achieved either by imposing obligations on corporations or by encouraging them, depending on the rights concerned and the context involved. In either case—whether mandatory or voluntary, ethical or legal—the establishment of norms should be regarded as a tool, not a goal.

Moving beyond the mandatory versus voluntary dichotomy, Ruggie attempted to devise a smart mix of reinforcing policy measures that are capable over time of generating cumulative change and achieving large-scale success over time.⁵⁸ He applied an approach of principled pragmatism defined as “an unflinching commitment to the principle of strengthening the promotion and protection of human rights as it relates to businesses, coupled with a pragmatic attachment to what works best in creating change where it matters most—in the daily lives of people.”⁵⁹ He viewed the issue of human rights and business in terms of its practical uses and successes, rather than theoretical questions.

53 John Ruggie, *Just Business: Multinational Corporations and Human Rights* (New York & London: WW Norton & Company 2013).

54 *Ibid.*

55 Thomas M. Frank, *Fairness in International Law and Institutions* (Oxford: Oxford University Press, 2002).

56 John J. Kirton and Michael J. Trebilcock, “Introduction: Hard Choice and Soft Law in Sustainable Global Governance,” in *Hard Choice, Soft Law; Voluntary Standards in Global Trade, Environment and Social Governance*, ed. John J. Kirton and Michael J. Trebilcock (Canada: Ashgate, 2004), p. 6.

57 *Ibid.*

58 *Just Business: Multinational Corporations and Human Rights*.

59 *Promotion and Protection of Human Rights; Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises*. Para. 81.

This pragmatism is reflected in the process Ruggie used to produce the Framework and Guiding Principles, specifically through constructive engagement (*e.g.* surveys, consultative meetings, site visits and interviews) with different stakeholders including the business community, states, and the civil society. These engagements were targeted to identify the level of understanding on the issue, allow stakeholders to provide inputs on the development of the UNGP, and finally to ensure that stakeholders have a sense of ownership over the UNGP.

Pragmatism is also evident in the content of the UNGP, as it builds on existing obligations that are binding on states and on accepted ethical responsibilities of companies. It recognises that business and human rights challenges cannot be met by states, corporations and civil society acting on their own. Therefore, the Guiding Principles weave together three different rationales, which comprise of its three pillars, into a single normative platform.⁶⁰

- For states, the focus is on the legal obligations they have under the international human rights regime to protect human rights abuses by third parties, including business, as well as policy rationales that are consistent with, and supportive of, meeting those obligations.⁶¹
- For businesses, beyond compliance with legal obligations that may vary across countries in their applicability and enforcement, the Guiding Principles focus on the need to manage the risk of involvement in human rights abuses, which requires acting with due diligence to avoid infringing on the rights of others, and to address harm where it does occur.⁶²
- For affected individuals and communities, the Guiding Principles provide a basis for the further realization of their right to remedy, both judicial and non-judicial.⁶³

3.2. Status

Although unanimously endorsed by the Human Rights Council, the UNGP is not a treaty and, hence, not legally binding. The UNGP's normative contribution lies not in the creation of new international law obligations but in "elaborating the implications of existing standards and practices for states and businesses; integrating them within a single, logically coherent and comprehensive template; and identifying where the current regime falls short and how it should be improved."⁶⁴ The endorsement by the Human Rights Council establishes the Guiding Principles as a common normative platform and authoritative global reference point for business and human rights.⁶⁵

3.3. The Three Pillars of the UNGP

The UNGP has 31 Principles in all, together with extensive commentary. They rest on three pillars: the state duty to protect against third party abuse, the corporate responsibility to respect human rights, and access to effective remedy.

60 John G. Ruggie. "Just Business: Multinational Corporations and Human Rights." Lecture during 2013 Raymond and Beverly Sackler Distinguished Lecture, University of Connecticut, 28 February 2013.

61 *Ibid.*

62 *Ibid.*

63 *Ibid.*

64 *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*. Introduction to the Guiding Principles, para. 14.

65 *Ibid.*

3.3.1. State Duty to Protect

States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication.⁶⁶

The state duty to protect against human rights abuses within their jurisdiction by third parties, including business enterprises, is derived from core human rights treaties and customary international law, and is part of the very foundation of the international human rights regime.⁶⁷ This duty requires states to play a key role in regulating and adjudicating abuse by business enterprises or risk breaching their international obligations.

This duty implies that states should clearly set out the expectation that all business enterprises domiciled in their jurisdiction respect human rights throughout their operations.⁶⁸ Where there is a recognized jurisdictional basis, this may involve forms of regulation that have extraterritorial application. States should also ensure that laws and policies governing the creation and on-going operation of business enterprises do not constrain but enable business to respect human rights. These obligations could be carried out by developing and enforcing appropriate laws and policies; providing businesses with effective guidance on how to respect human rights throughout their operations; and encouraging businesses to communicate how they address their human rights impacts.⁶⁹

These obligations are heightened with reference to businesses that are owned or controlled by the state, or that receive substantial support and services from state agencies. Where appropriate, this could include requiring such businesses to perform human rights due diligence.⁷⁰

Host governments should additionally maintain an adequate domestic policy space to meet their human rights obligations when they enter into international agreements.⁷¹ Therefore, states should ensure that the terms of international agreements, including investment agreements, do not constrain the policy and regulatory ability of the state to fully implement new human rights legislation.

3.3.2. Corporate Responsibility to Respect

Business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.⁷²

The corporate responsibility to respect human rights means acting with due diligence to avoid infringing on the rights of others, and addressing harms that do occur. The term “responsibility” instead of “duty” reflects the fact that respecting rights is not currently an obligation that international human rights law generally imposes directly on companies, although elements of it may be reflected in domestic laws.⁷³ Corporate responsibility is a global standard of expected conduct acknowledged in voluntary and soft-law instruments related to corporate responsibility, and now affirmed by the Human Rights Council by its endorsement of the UNGP. Because busi-

⁶⁶ *Ibid.*, Guiding Principle 1.

⁶⁷ John Ruggie, *Implementation of General Assembly Resolution 60/251 of 15 March 2006 entitled “Human Rights Council”, Report of the Special Representative of the Secretary-General on the issue of Human Rights and Transnational Corporations and other business enterprises: Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts* (Human Rights Council 19 February 2007), A/HRC/4/35. Para. 10-18.

⁶⁸ *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*. Guiding Principles 2-3.

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*, Guiding Principle 4.

⁷¹ *Ibid.*, Guiding Principle 9.

⁷² *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*. Guiding Principle 11.

⁷³ United Nations. “The UN “Protect, Respect and Remedy” Framework for Business and Human Rights.” September 2010. Available at: <http://198.170.85.29/Ruggie-protect-respect-remedy-framework.pdf>

ness enterprises can have an impact on virtually the entire spectrum of internationally recognized human rights, their responsibility to respect applies to all such rights.⁷⁴

This responsibility requires business to avoid causing or contributing to adverse human rights and to address such impacts when they occur. Additionally, businesses should seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, *even if they have not contributed to those impacts*.⁷⁵

To meet their responsibility, the UNGP requires businesses to have a *policy commitment* to respect human rights; a *human rights due diligence process* to identify, prevent, mitigate and account for how they address their human rights impacts; and processes to enable the *remediation* of any adverse human rights impact they cause or to which they contribute.⁷⁶

3.3.3. Access to Remedy

As part of their duty to protect against business-related human rights abuse, states must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy.⁷⁷ States also should consider ways to facilitate access to effective non-state-based grievance mechanisms dealing with business-related human rights harms.⁷⁸

To comply with their duty to protect, states should take steps to investigate, punish, and redress human rights abuses through judicial or non-judicial mechanisms. The UNGP describes remedies to include a wide range of substantive forms that aim to counteract or correct any human rights harms that have occurred. Remedy may include apologies, restitution, rehabilitation, financial or non-financial compensation and punitive sanctions, as well as the prevention of harm. Procedures for the provision of remedy should be impartial, protected from corruption and free from political or other attempts to influence the outcome.⁷⁹

Grievance mechanisms include any routinized state-based or non-state-based, judicial or non-judicial process through which grievances concerning business-related human rights abuse can be raised and remedy sought. With regard to domestic judicial mechanisms, states should take steps to ensure their effectiveness and consider ways to reduce legal, practical and other relevant barriers that could lead to a denial of access to remedy.⁸⁰ Non-judicial mechanisms play an important role alongside judicial processes. They may be particularly significant in a country where courts are unable, for whatever reason, to provide adequate and effective access to remedy. Non-judicial mechanisms, whether state-based or independent, should conform to the principles of legitimacy, accessibility, predictability, rights-compatibility, equitability and transparency.⁸¹

Business enterprises also have the responsibility to provide or participate in redress mechanisms. To make it possible for grievances to be addressed early and remediated directly, business enterprises should establish or participate in effective operational-level grievance mechanisms for individuals and communities who may be

74 *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*. Guiding Principle 12, Commentary.

75 *Ibid.*, Guiding Principle 13.

76 *Ibid.*, Guiding Principle 15.

77 *Ibid.* Guiding Principle 25.

78 *Ibid.*, Guiding Principle 28.

79 *Ibid.*, Guiding Principle 25, Commentary.

80 *Ibid.*, Guiding Principle 26.

81 Ruggie, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social, and Cultural Rights, including the Right to Development: Protect, Respect, and Remedy: A Framework for Business and Human Rights: Report of the Special Representative of the Secretary General on the issue of Human Rights and Transnational Corporations and other Business Enterprises*.

adversely impacted.⁸²

Operational-level grievance mechanisms allow business enterprises to analyse trends and patterns in complaints, and to identify systemic problems and adapt their practices accordingly. These mechanisms make it possible for grievances, once identified, to be addressed and for adverse impacts to be remediated early and directly by the business enterprise and, as a result, prevent harms from compounding and grievances from escalating. Company-level mechanisms should operate through dialogue and engagement rather than the company itself acting as adjudicator of its own actions.⁸³

3.4. Responses of ASEAN States to the UNGP

Ensuring that businesses act responsibly has been an aspiration among ASEAN Member States even prior to the endorsement of the UNGP. The ASEAN Intergovernmental Commission on Human Rights (AICHR) identified Corporate Social Responsibility among the thematic issues for further study in its 2010-2015 Work Plan and released the findings of a baseline study on CSR and Human Rights in June 2014.⁸⁴ There are numerous examples in the region of efforts and programs in line with “corporate social responsibility,”⁸⁵ “corporate governance,”⁸⁶ and “sustainability.”⁸⁷ While “corporate social responsibility” is the more familiar term in the region, experts have maintained that at the heart of CSR is the principle of respecting human rights, and factoring them in business decisions and policies.⁸⁸

Specifically with regard to the UNGP, Indonesia, Malaysia, and Thailand, as members of the UN Human Rights Council, voted in favour of the Council’s endorsement of the Guiding Principles in June 2011. Among ASEAN countries, Indonesia responded most overtly and positively to the UNGP and the Framework.⁸⁹ On 31 May 2011, after Ruggie’s presentation of his final report and the Guiding Principles to the UN Human Rights Council, Indonesia stated that it is willing to learn further the impact of business activities on human rights and committed to consider human rights when it deals with business enterprises.⁹⁰ To implement this commitment, Indonesia established a corporate governance sub-commission whose duties are to set up standards and monitor ethical business practises.⁹¹

82 *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*. Guiding Principle 29.

83 Ruggie, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social, and Cultural Rights, including the Right to Development: Protect, Respect, and Remedy: A Framework for Business and Human Rights: Report of the Special Representative of the Secretary General on the issue of Human Rights and Transnational Corporations and other Business Enterprises*.

84 “Workshop on CSR and Human Rights in ASEAN: Outcomes of the AICHR Thematic Study.” *AICHR* (17 June 2014). Webpage. Accessed 28 January 2015. <http://aichr.org/press-release/workshop-on-csr-and-human-rights-in-asean-outcomes-of-the-aichr-thematic-study/>

85 See e.g. Law No. 40 of 2007 on Limited Liability Companies (Indonesia). English translation available at: <http://www.dplawoffices.com/limitedliabilitycompanies.pdf>; and Law No. of 2007 on Investment (Indonesia). English translation available at: http://www.bkpm.go.id/img/Investment_Law_Number_25-2007.pdf.

86 See e.g. ACMF. “ASEAN Corporate Governance Scorecard.” *ACMF* PDF. Accessed 28 January 2015. http://www.theacmf.org/ACMF/upload/asean_cg_scorecard.pdf; and The Stock Exchange of Thailand. *The Principles of Good Corporate Governance for Listed Companies*. 2012. Available at: http://www.set.or.th/en/regulations/cg/files/CGPrinciples2012_Eng_May2013.pdf

87 See e.g. Magnus Böcker. “Sustainability Report.” *SGX* Webpage. Accessed 28 January 2015. <http://investorrelations.sgx.com/sustainability-report.cfm>

88 “News and Updates: Regional Workshop and Consultation on Business and Human Rights”, Working Group for an ASEAN Human Rights Mechanism, <http://www.aseanhrmech.org/news/regional-workshop-consultation-business.html>, (29 January, 2015).

89 Patricia Rinwigati Waagstein, “Indonesia,” in *Business and Human Rights in ASEAN: A Baseline Study*, ed. Christine Kaufmann et al. (Jakarta: Human Rights Resource Center, 2013).

90 “Statements by govts at Human Rights Council Session”, <http://www.business-humanrights.org/SpecialRepPortal/Home/ReportstoUNHumanRightsCouncil/2011#85935>).

91 *Ibid.*

Efforts to introduce the UNGP are also seen in various workshops/discussions held by state agencies—often together with civil society organisations—across ASEAN. For instance, in 2012, the Working Group for an ASEAN Human Rights Mechanism, together with the Philippine Representative to the AICHR, conducted a Regional Workshop and Consultation on Business and Human Rights.⁹² A workshop hosted by Indonesia's National Commission on Human Rights (**Komnas HAM**) on “Human Rights and Business: Plural Legal Approaches to Conflict Resolution, Institutional Strengthening and Legal Reform” resulted in the adoption of the Bali Declaration on Human Rights and Agribusiness in South East Asia. This document recognized the work of the SRSB and welcomed the related Working Group that would promote the dissemination and implementation of the Guiding Principles.⁹³ In the Philippines, the Commission on Human Rights was among several institutions that hosted a workshop on business and human rights in 2014 aimed at increasing understanding on the background and the highlights of UNGP.⁹⁴

The Human Rights Commission of Malaysia (**SUHAKAM**) has also taken an active role in promoting and implementing the UNGP. In 2012, it received a grant to conduct a research, specifically “The Role of SUHAKAM in Addressing Corporate Human Rights Violations: A Study on Logging and Plantation Industries in Malaysia.”⁹⁵ Most importantly, in 2014, SUHAKAM, together with UNDP Malaysia, began holding a series of roundtables through which SUHAKAM is drafting a framework for Malaysia's National Action Plan to implement the UN Guiding Principles on Business & Human Rights.⁹⁶ A National Action Plan would be an important means to strengthen protection against human rights abuses by business enterprises through an inclusive process of identifying needs and gaps as well as practical and actionable policy measures and goals. National Action Plans can take the form of a stand-alone plan or be integrated into related broader strategies, such as those on human rights or corporate social responsibility.⁹⁷ Currently, no ASEAN country has adopted a National Action Plan to implement the UNGP; Malaysia's anticipated National Action Plan, including its drafting process, would serve as a valuable example for other countries in the region to study.

Countries outside ASEAN have also adopted policies in line with the UNGP which are impacting and driving change in the region. For example, since 2013, the United States has been requiring companies investing more than \$500,000 in Myanmar to publish an annual report on their activities, including their due diligence policies.⁹⁸ The Netherlands is also contributing to this movement by supporting the Myanmar Centre for Responsible Business, a local platform that focuses on promoting and enabling responsible investment in Myanmar, in accordance with the UN Guiding Principles.⁹⁹ The Myanmar Centre for Responsible Business supplies knowledge, tools and training to enable companies, investors, government authorities and civil society organisations in Myanmar to fulfil their roles. The United Kingdom, during its presidency of the G8, obtained G8 support for responsible business investment in Myanmar in line with the UN Guiding Principles. Aside

92 “News and Updates: Regional Workshop and Consultation on Business and Human Rights”, Working Group for an ASEAN Human Rights Mechanism, <http://www.aseanhrmech.org/news/regional-workshop-consultation-business.html>, (29 January, 2015).

93 See “Bali Declaration on Human Rights and Agribusiness in Southeast Asia,” in *Human Rights and Business: Plural Legal Approaches to Conflict Resolution, Institutional Strengthening and Legal Reform* (Bali: Komisi Nasional Hak Asasi Manusia (Komnas Ham), 2011).

94 “RAFI is Introduced in the Philippines for the First Time.” *Human Rights Resource Centre* (4 November 2014). Webpage. Accessed 28 January 2015. <http://hrrca.org/content/rafi-introduced-philippines-first-time>

95 “Business and Human Rights.” *Human Rights Commission of Malaysia* Webpage. Accessed 29 January 2015. <http://www.suhakam.org.my/business-and-human-rights/>

96 “HRRC Gives Overview of Business and Human Rights in ASEAN at SUHAKAM Roundtable Discussion.” *Human Rights Resource Centre* (10 November 2014). Webpage. Accessed 29 January 2015. <http://hrrca.org/content/hrrc-gives-overview-business-and-human-rights-asean-suhakam-roundtable-discussion>

97 United Nations General Assembly. Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises. 5 August 2014, A/69/263.

98 United States Department of State. US Government Approach on Business and Human Rights. 2013. 13-14. Available at: <http://www.humanrights.gov/wp-content/uploads/2013/06/usg-approach-on-business-and-human-rights-updatedjune2013.pdf>

99 “National Action Plan on Business and Human Rights”, Netherland Government, http://www.netherlandsmission.org/binaries/content/assets/postenweb/v/verenigde_staten_van_amerika/the-permanent-mission-to-the-un/actionplanbhr.pdf

from this, a resource centre in Yangon was established with support from the UK government.¹⁰⁰ The center aims is to sensitize incoming investors to the importance of human rights compliance in Burma, based on the UNGP.¹⁰¹

4. Conclusion

Despite numerous obstacles and failed attempts, the global community has finally reached a consensus and agreed on a framework that delineates the roles of states and business enterprises as well as provides for access to redress to affected individuals and communities. In ASEAN, the UNGP has inspired a number of states, businesses, and civil society to take a look at their respective regulatory frameworks and consider how their initiatives align with the normative platform described by the UNGP. While the unanimous endorsement of the Guiding Principles by the Human Rights Council signals a strong universal political commitment, there is wide disparity in the levels of knowledge and commitment with regard to implementing the UNGP in ASEAN—as is likely the case in other regions as well. Considering that some jurisdictions in ASEAN have already put in place state-initiated mechanisms that seek to encourage responsible business conduct, it can be argued that ASEAN has already taken the first steps to create a network of reinforcing policy measures that would, in time and with continued positive action, bring about significant change. Hence, current efforts to create social awareness on the UNGP should be sustained and built upon, to the end of ensuring that ASEAN moves toward regional prosperity not at the expense of the rights of its citizens.

100 *Good Business: Implementing the UN Guiding Principles on Business and Human Rights*, Secretary of State for Foreign and Commonwealth Affairs, September 2013.

101 *Ibid.*

