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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

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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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Abstract

With the endorsement of Special Representative John Ruggie’s Guiding Principles regarding the issue of business and human rights, an important chapter of this subject 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. and human rights with respect to businesses. 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 with Transnational Corporations (TNCs) and businesses for the last twelve years. In addition, by examining the final culmination - the Guiding Principles - through the lens of bystander rhetoric, the article hopes to point the way forward to the next phase in developing a meaningful accountability structure for TNCs under international law.
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 exists. ‘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.’ ”

On June 16, 2011, the U.N. Human Rights Council unanimously endorsed\(^3\) the Guiding Principles on Business and Human Rights (the “Guiding Principles”).\(^4\) 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. Much of that change came at the hand of John Ruggie and his team. Acting as Special Representative to the U.N. on business and human rights issues, Ruggie spent the last six years analyzing the problems that plague TNCs regarding human rights issues and set forth his proposal to help solve the problem.

However, while Ruggie’s work is transformational, it is still incomplete.\(^5\) The Guiding Principles are significant, but they


\(^4\) These Principles were drafted by Special Representative John Ruggie.

\(^5\) 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
are non-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 for redress against TNCs. 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.

In a previous article I proposed a new paradigm for looking at TNCs under international law, namely that of a bystander. 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. As such, I maintained that until we found an accountability framework that incorporated this bystander


6 Transnational Corporation is just one of many terms that have been employed for this corporate structure. Others terms used include multi-business enterprises and multinational corporations. I have adopted the use of transnational corporations for two reasons: one because it is the term I have seen used most often in the United Nation’s documents themselves. Second, I believe TNC most accurately conveys the jurisdictional uniqueness of these enterprises. In addition, in his first official report to the Human Rights Council, Ruggie points out that often times state owned companies or business enterprises that reside in only one jurisdiction are often the greatest abusers of human rights. Special Representative to the Secretary General (SRSG) John Ruggie Report to U.N. Human Rights Council, Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts, U.N. Doc. A/HRC/4/035 (Feb. 9, 2007) (hereinafter “2007 Report”). While that may be true, from an accountability standpoint, intra state corporations do not present the same accountability issues that arise from being a corporation that operates in multiple jurisdictions. It is those issues in particular that I am addressing.


8 At its heart, 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 bystanders) to the underlying events, helpless to stop the tragedy from occurring. Id. at 5.
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.\textsuperscript{9} Now, with this article, I hope to examine the Guiding Principles from a bystander perspective and determine whether it helps move the paradigm forward.

Using mainly primary source materials (such as the U.N.’s own foundational documents and contemporaneous articles and commentary from that time period),\textsuperscript{10} this article will examine the short history\textsuperscript{11} of business and human rights at the U.N. and analyze the impact that its work will have on international human rights law generally and 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 one of this article offers some background on the bystander paradigm for TNCs. Part two provides a comprehensive\textsuperscript{12} documentation of the seismic shift that has

\textsuperscript{9} Id.

\textsuperscript{10} 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.” SRSG John Ruggie Report to U.N. Human Rights Council, Protect, Respect and Remedy: A Framework for Business and Human Rights, at ¶1. U.N. Doc. A/HRC/8/5 (Apr. 7, 2008) (hereinafter “Respect Framework”). Therefore, given that most of the work on this subject for the last twelve years has come from the Special Representative’s office, the most effective way to assess the environment is by examining the work done under his mandates, particularly because the scholarship in this area is still in its infancy.

\textsuperscript{11} While there are many UN mandates and treaties that inform the issue of business and human rights, this article will focus primarily on the ones that have corporate responsibility (either voluntarily or mandatorily) at its cornerstone - namely the U.N. Norms, The U.N. Global Compact and the reports produced by Special Representative John Ruggie.

\textsuperscript{12} Comprehensive, but not exhaustive. Ruggie’s work alone in the last six years has generated hundreds of reports, addendums, responses, commentaries and
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 and its aftermath - specifically the work of Special Representative John Ruggie and his mandates. Part three of this article analyzes the Guiding Principles - the culmination of Ruggie’s mandate and discusses how the three pillars upon which they are based (Protect, Respect and Remedy) affect the bystander paradigm. Part four, offers an analysis of the Guiding Principles, examining how it compares to its main predecessor, the U.N. Norms on the Responsibilities of Transnational Corporations and Other Business Entities with Regard to Human Rights, as well as how it has had an impact on a bystander framework.

That the Guiding Principles will 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 is the TNCs position in the international legal framework with respect to human rights violations. The issues are numerous. They include: torture, gender discrimination, labor rights violations, and environmental harm. They also arise in numerous scenarios. Villagers are subject to rape, torture, and death after a TNC begins operations in their village; afterwards, the TNC disavows any involvement. 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. Riots and deaths come after workshop projects. A thorough analysis of each is beyond the scope of this article. For a list of all the documents, as of January 2010, 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 Human Rights (Jan. 12, 2010) (hereinafter “Document List”) available at http://www.law.ed.ac.uk/euenterpriseslf//links/files/BIB-WEB-Aug-JAN2010.pdf
a TNC wins a contract to privatize the country’s water and Bolivians are denied access to water at a reasonable price; the TNC claims that it was not involved in any of the actions that led to the abuses.\(^\text{13}\)

In a previous article, I analyzed TNCs’ reactions to events such as these. Rarely do TNCs disavow the existence of the event; rather, TNCs take the position that they are mere bystanders – witnesses to the underlying event but having abstained from participation.\(^\text{14}\) This rhetoric is significant because, under most legal theories, bystanders cannot be held liable for the acts in question.\(^\text{15}\) 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, one who is, in essence often made to witness (against its will) the struggle between the aggressor and his victim.\(^\text{16}\) Therefore, by employing this strategy both as a public relations strategy and a litigation strategy, TNCs can escape liability under most national and international systems.\(^\text{17}\)


\(^{14}\) Amerson, *supra* note 7 at 5.

\(^{15}\) Id. at 15.

\(^{16}\) Id. at 5.

\(^{17}\) Id. at 34 - 44.
A. THE BYSTANDER RHETORIC

The unique position surrounding TNCs is compounded by two key elements. First, TNCs are often specifically organized in such a way as to avoid liability for things that occur in different jurisdictions. For instance, many TNCs, while organizationally seamless, are separate legal entities. While it may present one face to the global community, it is usually a collection of distinct legal entities, with its subsidiaries (who are on the ground during the abuses) often organized under the laws of a Host State, 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 by emphasizing the separate legal status of the entity in the Host State.

Second, TNCs wield an unusually large amount of wealth and power that often times dwarfs the income and capacity of the Host State. Therefore, Host States that are dependent on TNCs for economic growth and development oftentimes turn the other way, or worse become complicit in human rights abuses to ensure that the TNC will continue to remain.

19 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)
20 Under international law, the Home State is the State where the TNCs primary headquarters are located. In contrast, the Host State is where the operations that lead to human rights abuses is located.
21 Mashiouri, supra note 18 at 973.
22 Amerson, supra note 7 at n.31; Mashiouri, supra note 18 at 973.
23 See John Ruggie, Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises delivered to the Human Rights Council, U.N. Doc. E/CN.4/2006/97 (Feb. 22, 2006) [hereinafter “2006 Interim Report”] (stating “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
While many accountability mechanisms have been proposed and attempted to address the unique position of TNCs, by and large they focus on the actions of the TNC in relation to the underlying event. For instance, most litigation that has been launched against TNCs has attempted to ascribe some action to the TNC that resulted in the abuse. Since the TNC uniformly denies its involvement in the underlying event, the litigation often lags.

This is why the debate has often stalled - rather than focusing on corporations as witnesses (who have not been addressed under any legal framework) corporate accountability mechanisms have been built around the conduct of the actor.
TNCs have taken advantage of this legal structure to claim, in essence, that they were merely witnesses to the underlying events.

The bystander strategy takes a new approach. Rather than focus on the conduct of the TNC it takes the TNCs where they are - claiming that they are witnesses – and uses 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 the TNC to the special relationships that TNCs have created (particularly in weak governance zones) and how those relationships may create special duties for the TNC under international law.

B. 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 someone responsible for their inaction is not without precedent. For instance, in certain limited situations in American tort law the idea of nonfeasance can have consequences for 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. Therefore, any contemplated bystander analysis for legal liability under

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Unocal Corp., 395 F.3d 932 (2002). At its heart then, complicity behavior is based, at least in part, on some overt act on the part of the actor that leads to “substantial assistance.” 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. If the bystander relationship is such that its action can amount to a gauze of legitimacy and credibility, then bystander liability would seem to be the most appropriate because of the special relationship created and the duty that results. See Amerson supra note 7 at 12.

29 The case of DeShaney v. Winnebago County, 489 U.S. 189 (1989) provides a fulsome 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. During that time, the state has substantial evidence that abuse was occurring and yet, did not step in to stop it. As a result of the beatings, DeShaney suffered extensive brain damage. In a 6-3 ruling, the Court held that the state had no duty to act. However, the court noted that in certain instances, where a special relationship is created, this may give rise to a constitutional duty to act. The Court also discussed whether a duty may be created under state tort law.
international law should start by analyzing the relationship; the relationship is where the duty is created and the duty is what leads to the foundation of a theory of accountability. To do otherwise would make the parameters of inaction too large and unwieldy for a serious structure of accountability.

In his 2008 Report, Ruggie argues that the single greatest challenge to crafting a workable framework stems from the rise of globalization. Specifically, Ruggie argues that globalization, and with it the rise of TNCs who are subject to the laws of many jurisdictions, has created a governance gap that international law has not yet filled. I agree with this assessment. This is exactly the type of area where the bystander framework applies.

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

One final theory for accountability could be traced back to products liability. Under a products liability theory, a corporation assumes liability for the status of its product regardless of where it finally ends up. So, for instance, a fire extinguisher improperly manufactured in Taiwan that results in deaths and injuries in

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30 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 Kim Boyer, Comment, County Welfare Department Liability for Handling Reports of Child Abuse, 30 SAN DIEGO L. REV. 187, 190 – 191 (1993). Given the context of a TNCs presence in a weak governance zone, it could be that an appropriate accountability theory for business and human rights violations would focus instead on (or in addition to) the relationship between the TNC and the aggressor, instead of merely the TNC and the victim.

31 The Respect Framework states that the governance gap can affect all corporations. However, they specifically use TNCs as an example to show how the governance gap can play out. Respect Framework, supra note 10 at ¶ 3.

32 For a geographically close example, see In re Ephedra Products Liability Litigation, 349 B.R. 333 (S.D.N.Y. 2006)(enforcement of a Canadian court’s bankruptcy order for a Canadian company’s involvement in marketing ephedra).
California, can still subject the Taiwanese manufacturer to liability. One can ask, why the same results wouldn’t 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?”

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


The issue of business and human rights has only been on the international legal terrain for under two decades. Its genesis


34 Indeed, in this idea is the looming specter for many TNCs. See Memorandum, Wachtell, Lipton, Rosen & Katz A United Nations Proposal Defining Corporate Social Responsibility For Human Rights (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.”)

35 It is always difficult to set specific, temporal parameters around when a movement emerged or became a part of the national or international discourse. The issue of business and human rights is not the exception. At least one source has placed the evolution over three distinct phases: the first phase beginning in 1998 - 2002 where mainly European and North American NGOs were pushing companies on their policies. The second phase, from 2003 – 2006, was still being led in North America and Europe but had shifted its focus to the conduct and impacts of corporations. The third phase (from 2007 - today) has emerged as a global debate that focuses mainly on “conduct on the ground.” Business and Human Rights Resource Center available at http://www.business-humanrights.org/GettingStartedPortal/Intro However, at least one author traces the U.N.s involvement in corporate accountability issues (if not specifically
came from a grassroots strategy developed by human rights advocates who were growing frustrated at the lack of accountability measures for TNCs and other multi business enterprises. The popular sentiment was that TNCs seemed to be involved in or a witness to many of the human rights disasters that were taking shape. Yet, by and large, there was no redress available: the 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. Nonetheless finding a theory of liability to hold TNCs accountable under international law met with a myriad of problems. First since many of the human rights violations occurred in weak or non-functioning governance systems, attempting to use national laws to hold TNCs accountable for their role in human rights abuses was unworkable. Second, any attempt to hold TNCs accountable at an


36 2006 Interim Report, supra note 23 (“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.”)

37 Respect Framework, supra note 10.
international level was stymied by the underlying framework of international human rights law (namely as a mechanism for state actors and by state actors). Third, attempts to try a transnational approach to accountability, while meeting with some limited success, were often barred by jurisdictional issues. 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 had in the vast number of human rights abuses that were occurring. Finally, TNCs would use bystander rhetoric to distance themselves from the underlying human rights violation, placing the blame on the states or the community.

While this strategy proved fairly effective from a legal standpoint, TNCs did not escape exposure completely; in the court of public opinion, TNCs were losing. Realizing that the use of legal instruments was ineffective, many human rights advocates switched to publicity campaigns (frequently called “naming and

38 Amerson, supra note 7 at 2.
39 Noted scholar Steven Ratner sounded the clarion call regarding many of these issues in 2001, before these issues took center stage on the international arena. In his seminal piece Corporations and Human Rights: A Theory of Legal Responsibility, Ratner raised many of these issues regarding TNCs and the limits of international law. Steven R. Ratner, Corporations and Human Rights: a Theory of Legal Responsibility, 111 YALE L.J. 443 (2001). Since then there has been some, but not a substantial amount of literature examining Transnational Corporations duties under international law. See e.g., Larry Cáta Backer, From Moral Obligation to International Law: Disclosure Systems, Markets and the Regulation of Multinational Corporations, 39, GEO. J. INT’L L. 591 (2008) (discussing various mechanisms under international law that could be framed for a TNC narrative).
40 Amerson, supra note 7.
41 C.f. Respect Framework, supra note 10 at ¶ 53(discussing what the effect of companies who fail to take responsibility for human rights issues, will have in the “courts of public opinion”). In addition, although TNCs have not yet been subject to an unfavorable verdict for international human rights claims (i.e., under A.T.C.A.) there are nonetheless costs in litigating and even settling these issues. See 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 RESP. AND THE LAW 468 (2007).
shaming”) to highlight the human rights abuses and attempt to get TNCs to change their behavior.\(^{42}\)

The initial resistance to businesses focusing on human rights (or indeed the wider agenda of corporate social responsibility) seems to stem from the notion that corporations viewed business and human rights as a zero-sum game: where every move that a corporation made in the arena of social causes, would take away from the raison d’être of a corporation - wealth maximization for shareholders. 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. They want direct action and they want it now.\(^{43}\)

Whether the strategy was successful on a micro level seems impossible to prove. While some campaigns, resulted in changed behavior\(^{44}\) many did not. And, given the global reduction in attention spans, TNCs could simply wait for the new corporate scandal to emerge, rather than taking steps to change their behavior.\(^{45}\) At the very least however, the work of human rights advocates succeeded in bringing TNCs behaviors during human


\(^{44}\) Tim Bartley and Curtis Child, *Shaming the Corporation: Globalization, Reputation and the Dynamics of Anti-Corporate Movements*, AMERICAN SOCIOLOGICAL REVIEW.

\(^{45}\) C.f. Hafner-Burton, supra note 42.
rights calamities into the public discourse,\textsuperscript{46} setting the environment for the U.N. Global Compact and its success.

\textbf{A. THE U.N. GLOBAL COMPACT}

The UN Global Compact was launched in 2000 as a voluntary initiative to get businesses to engage on a wide-ranging societal agenda. At its heart, it has businesses pledge to honor ten principles that surround human rights issues.\textsuperscript{47} The Compact allows businesses to become signatories. In the first year of its existence the company had fifty signatories. As of this writing, the Compact has over 6,000.\textsuperscript{48}

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. At the time, the proposal was called “unusual” because it involved a formal compact between the United Nations and business entities.\textsuperscript{49} The Compact allows business entities who became signatories to shroud themselves in the legitimacy of the United Nations.\textsuperscript{50} 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.\textsuperscript{51} In Annan’s words, the

\textsuperscript{46} Bartley and Child, \textit{supra} note 44.
\textsuperscript{47} Unlike many of the initiatives that came after this, the Global Compact originally began as an initiative from then Secretary General Kofi-Annan. During a speech at an economic meeting in Switzerland, Kofi Annan gave a speech in which he discussed a global compact between the U.N. and businesses that will lead to these businesses infusing their companies with the values of human rights norms.
\textsuperscript{49} Alan Cowell, \textit{Annan Fears Backlash over Global Crisis}, \textit{The New York Times}, Feb 1, 1999 at A14.
\textsuperscript{50} Specifically, companies who signed onto the Compact would have limited use of the UN’s logo in its corporate materials.
\textsuperscript{51} Cowell, \textit{supra} note 49. 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. \textit{C.f.} Joseph Kahn, \textit{Multinational
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.”  

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” and; (3) engage in partnership projects with the U.N. on both an operational and a policy level.

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. The position reflected a deep suspicion at the U.N. that TNCs had nothing positive to offer the world’s communities. 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.” TNCs, as the pioneers in the shift toward globalization, were felt to be part of the solution, not just part of the problem.

Sign Pact on Rights and Environment, THE NEW YORK TIMES, Jun. 27, 2000 (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.”)

Kofi Annan, A Deal with Business to Support Universal Values, INTERNATIONAL HERALD TRIBUNE, July 26, 2000 at 8.

Annan, supra note 52.

Kofi Annan, A Deal with Business to Support Universal Values, INTERNATIONAL HERALD TRIBUNE, at 8 (July 26, 2000).


Taming Globalization, supra note 55 (quoting an unnamed agency representative).

Many argue that evolution of globalization had 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. In discussing the human rights advocacy strategy that emerged in the late 90s with DeBeers and its mining of conflict diamonds the author wrote “The campaign and its fruits, though, go beyond diamonds, because they reinforce one of the
Interestingly, Ruggie was one of the main architects and strong defenders of the Global Compact.\textsuperscript{58} As Assistant Secretary General (a post he held from 1997 – 2001), Ruggie responded to critics who believed that the Global Compact would simply provide companies with an easy white wash 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 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?\textsuperscript{59}

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.” Alan Cowell, \textit{Advocates Gain Ground in a Globalized Era}, \textit{The New York Times}, Dec. 18, 2000 at C19.


While the Compact was praised in some sectors and seen as an important step forward in bringing businesses into the conversation regarding human rights, its success was also the source of its shortcomings. Because it was voluntary, there were no consequences for deviating from these principles (other than the shame that comes from the various shaming campaigns put forth by human rights advocates, which many felt to be ineffective).

Many international human rights groups, including groups who participated in the first Compact meeting, felt that the self-regulation by businesses was insufficient. Pierre Sane, then president 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 sanctions Representative, may have been one reason why people criticized him for his subsequent work on the Framework.


Of course, the Compact also had its critics, right from the beginning. See e.g., Joshua Karlner and Kenny Bruno, Opinion, The United Nations Sits in Suspicious Company, INTERNATIONAL HERALD TRIBUNE at 6 (Aug. 6, 2000)(stating that the self-regulation process of the Global Compact “threatens the integrity of the U.N.”). For a middle ground of the response see Editorial, Taming Globalization, WASHINGTON POST, Aug. 7, 2000 at A20 (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.”)

Other initiatives that were used during this era include: The Sullivan Principles (voluntary codes of conduct adopted by businesses on issues that affect the larger society) and the OECD and their Guidelines for Multinational Enterprises (State recommendations to businesses regarding standards of conduct). While these initiatives all have some relevance to the international legal framework on business and human rights (not the least of which include offering a soft law foundation for future accountability mechanisms) this article will focus on the various mandates on the subject that have come from the United Nations within the last eight years.
system ‘so companies who are violating these principles cannot continue to benefit from the partnership.’” 63

There are ten 64 principles that are at the heart of the Global Compact, all involving how businesses engage in a wider social agenda within four specific spheres: human rights, labor, environmental impact, and corruption. 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.” 65 In addition, although many of the other principles are stated as labor issues, they in fact fall under the larger rubric of human rights concerns. 66

Given the language above, there seems to be little wonder that human rights advocates would seem frustrated with the Compact. How can the Global Compact be seen as anything other than aspirational at best and duplicitous at worst? With language so vague and amorphous there seemed to be little hope in developing a consistent framework for operationalizing its principles. 67

While the foundational principles remain vague, the Global Compact office (set up in the wake of the program’s initiation) has

63 Karliner and Bruno, supra note 61.
64 The Global Compact, as originally conceived, had nine principles, the tenth (dealing with anti-corruption issues) was added in 2004 during the first Global Summit on the Compact.
66 See Principles 3 - 6 “LABOUR Principle 3 Businesses should uphold the freedom of association and the effective recognition of the right to collective bargaining; Principle 4 the elimination of all forms of forced and compulsory labour; Principle 5 the effective abolition of child labour; and Principle 6 the elimination of discrimination in respect of employment and occupation.” http://www.unglobalcompact.org
gone to some lengths to elaborate on some of the issues. For instance, one of the most significant developments that occurred through the Global Compact is the notion of spheres of influence. The Compact’s definition of sphere of influence is 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.68

By elaborating on the concepts embodied in its principles, the Global Compact attempts to push TNCs towards a greater realization of human rights. Unfortunately, since there is no outside mechanism or review for whether the Compact’s work is being done, a company can set up its own guidelines that would, conceivably fall into the amorphous good of “respecting human rights” without in any way engaging in the Compact the way the Office suggests. Nonetheless, if they continue to do some work on this, they would again conceivably, be able to continue to use the imprimatur of the UN logo.

Some scholars contend that the Compact is a soft law mechanism that may give rise to a more tangible accountability framework in the future. As Erika George states “International law

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must come to [recognize] that there are multiple and heterogeneous sources of authority in a pluralistic systems. … We should consider whether corporations are making law in making pledges. Is the Global Compact a contract?" However, the Compact itself seeks to discourage this as an end. Indeed, the Compact was never intended as an operational framework; the Compact’s follow-up literature makes clear that it is not a monitoring mechanism or even a standard of conduct.⁶⁹

Still, the voluntary initiatives, with their unenforceable mechanisms, in the Global Compact led many who worked in the human rights field to feel that what was needed was an international legal instrument to hold TNCs accountable.⁷⁰

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⁶⁹ 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 of 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 sees as a legitimate authority, this can make the way towards future binding frameworks.


⁷¹ It seems that in its nascent stage, business and human rights were issues framed within the context of the corporate social responsibility debate. Given the predominant lack of any separate dialogue occurring on the issue of accountability mechanisms for corporations regarding human rights issues that seemed appropriate. In fact, at least in non-legal 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 JOURNAL OF BUSINESS ETHICS 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, “sometimes the relationship between Corporate Social Responsibility and human rights is not properly understood.” Avery elaborates: “A CSR approach is top-down: a company decides what issues it wishes to address … but a human rights approach is different. It is not top-down, but bottom-up – with the individual at the centre, not the corporation.” 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”)72 is the first document drafted by a U.N. body to explicitly state that TNCs could be held liable under international law for human rights abuses.73 Drawing on numerous human rights treaties, the Norms offer what it calls a “restatement”74 of that era’s norms and principles for holding TNCs accountable for various abuses.

72 U.N. Sub-Commission on the Promotion and Protection of Human Rights, 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 “U.N. Norms” or “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 § 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 makes this approach explicit to 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, “seems to be the fact that the UN 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, at 33, available at http://www.lawanddevelopment.org/articles/transnationalcorps.html

73 While the Norms, in its document, does not herald itself as the first of its kind in that way, this proposition can be supported by the following facts. 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.” Report of the Special Representative of the Secretary-General., Business and Human Rights: Towards Operationalizing the “Protect, Respect and Remedy” Framework, U.N. Doc. A/HRC/11/13 (April 22, 2009) (hereinafter “the 2009 Report”). Despite the Sub-Commission’s work on the Norms, this is an accurate statement: the Human Rights Council never adopted the Norms therefore they stayed at a Sub-Commission level. Therefore, given that this was the first policy statement by the most logical arm of the U.N. to take such stands and, given the reaction by all to the Norms promulgation, it seems likely that this was the first document to make the explicit claim that TNCs should be held liable under international law for human rights issues. For further support, I would point to the fact that the Norms, which would be the most logical document to have such precedential history, is silent on any previous explicit legal statements holding TNCs accountable.

74 Norms, supra note 72.
1. The Background

In 2003, the U.N. Sub-Commission on the Promotion and Protection of Human Rights (the “Sub-Commission”) unanimously adopted the Norms.\textsuperscript{75} 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 seem to reflect the growing frustration in the international community regarding the lack of accountability mechanisms for transnational corporations; the Norms take a different approach. In contrast to the frameworks that were in circulation at the time, the Norms squarely places TNCs at the heart of an accountability framework.

This, however, was also the source of its demise. Before the Norms were taken up by the full Commission (what is now the U.N. Human Rights Council), the consensus was that the Council would not pass the Norms. As one U.N. representative noted at the time,

\begin{quote}
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 of legal questions, as in the end it is States that are responsible for human rights, not MNCs.\textsuperscript{76}
\end{quote}

\textsuperscript{75} 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 those two committees are now taken up by the U.N. Human Rights Council and the Human Rights Council Advisory Committee respectively. For the purpose of simplification, I will use one term for each, regardless of the date of the relevant decision. For a timeline on when the name changes occurred, please see Appendix A.

Many felt that the Norms were, in effect, dead on arrival\textsuperscript{77} and indeed they were. When the Council took up the Norms in 2004, they “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.”\textsuperscript{78}

Indeed, the response to the Norms, particularly among the business community was swift, ferocious and deadly.\textsuperscript{79} 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?”\textsuperscript{80}

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


\textsuperscript{78} Summaries of post-sessional meetings and other activities of the expanded Bureau during the period from May to September 2004, U.N. Doc. E/CN/IM/2004/2 at 27. 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 “because it was not on the agenda.” Public Debate Report, supra note 76.


\textsuperscript{80} David Gow, \textit{CBI Cries Foul over UN Human Rights Code}, \textit{THE GUARDIAN}, Mar. 8, 2004. 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 human rights advocates).
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.81

Ruggie’s argument reflects the two biggest complaints against the Norms: their source of legitimacy and their object for accountability. 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.

Not everyone, however, agreed with Ruggie’s assessment. Some scholars argue that the Norms are merely a restatement of current international law.82 The Sub-Commission itself, in the

82 See e.g., Julie Campagna, United Nations Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with Regard to Human Rights: The International Community Asserts Binding Law on the Global Rule Makers, 37 J. MARSHALL L. REV. 1205, 1210 (2004). See also, Joint Statement 14th Session of the Human Rights Council Geneva (Jun. 4, 2010) General Debate item 3 - Human Rights and Transnational Corporations (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’” by stating “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.”)
introduction to the Norms argued that the Norms were exactly that - 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.”

In the wake of the defeat of the Norms by the full Council, it is often overlooked that the Sub-Commission unanimously voted to adopt the Norms. In this sense part of the reason for the defeat may have been process; since the Sub-Commission was not operating under a Mandate and the issue had never been placed on the full Council’s agenda item until after the Sub-Commission had adopted them, the full Council could have felt blindsided, particularly after the TNC lobbying effort went into effect.

However, an equally likely explanation for defeating the Norms was 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. In contrast, because of its enforcement mechanism, it’s of little wonder that the human rights community was quick to embrace them.

So what was it about the Norms that generated such strong reactions on either side? In short: its ambition.

2. Textual Analysis

As stated earlier, the Norms embody the first attempt by a U.N. treaty body to set forth accountability mechanisms for TNCs under international human rights law. In addition, although it

84 For an account of the lobbying efforts by businesses to defeat the Norms, see Gow, supra note 80.
85 Williamson, supra note 83.
86 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 transnational corporations accountable. Williamson, supra note 83.
87 See supra note 72 for a more fulsome discussion of the history of TNCs and human rights under international law.
discusses the State’s duty to protect, the focus of responsibility in this document is laid squarely at the feet of TNCs. In order to secure its influence, the Norms reference approximately thirty transnational instruments as the sources from which they derive their authority for TNCs and human rights issues. In one sense the Norms drew on their precedent documents, particularly the UN Global Compact with business. For instance, the Norms statement “noting that transnational corporation and other business enterprises have the capacity to foster economic well-being, development, technological improvement and wealth” seems to echo Kofi Annan’s speech that globalization through shared values between business and society, can lead to an age of “global prosperity.”

However, at their heart, the principles of the Norms take shape in the rules to which it states TNCs should be held accountable. In that sense, the Norms are specific. While the Norms require TNCs to respect cultural and social rights

88 An often overlooked but crucial aspect of the Norms is that because the Norms are not “an international treaty open to ratification by States,” they are not, therefore, “legally binding” on either States or TNCs. Nonetheless, as a purported restatement of the law regarding TNCs and human rights abuses, if adopted, the Norms would have been a powerful accountability tool for human rights advocates and victims of human rights abuses. International Network for Economic, Social and Cultural Rights, U.N. Human Rights Norms for Business: A Briefing Kit, E.C.S.R. at 4 (Jan. 2005) available at http://www.escr-net.org/usr_doc/Briefing_Kit.pdf.

89 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. UN Norms supra note 72 at ¶ 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 treaties that 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 vehemently disagreed with this approach. Ruggie believed that all human rights treaties should be considered as a part of assessing how corporations should respond to the international legal framework. Part of Ruggie’s work did, however, assess the landscape regarding criminal liability for corporations who engage in very bad acts that implicate human rights issues.

90 Kofi Annan, Address to World Economic Forum in Davos (Feb. 1, 1999).
generally, their main focus is on issues that implicate TNCs and their role in targeted human rights abuses including: workers’ rights; workplace discrimination; and consumer protection.\textsuperscript{92}

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 regarding “application of the Norms.”\textsuperscript{93} These provisions may reflect an attempt by the Sub-Commission to address critics’ concerns; a lack of both an implementation procedure and a monitoring body were two of the greatest sources of criticisms for the Global Compact.\textsuperscript{94}

In the Commentary accompanying the Norms the Sub-Commission outlined a six-step process for making sure that TNCs were implementing these rules. They include

1. distributing its 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;

\textsuperscript{91} Norms, \textit{supra} note 72 at ¶ 10.

\textsuperscript{92} \textit{Id.} at ¶¶ 3-8.

\textsuperscript{93} \textit{Id.} at ¶ 16. Putting aside the spirit of the monitoring process, the language in the Norms on this aspect is problematic. What exactly should the U.N. be monitoring? Is it how TNCs are applying the Norms to their internal mechanisms? Or it how a review of which particular Norms apply, at any given period in time, to a TNC. The Norms do not state. Likewise, the Norms Commentary shed no light on this subject. Rather the Commentary simply states that the Council should “receive information and take affective action when enterprises fail to comply with the Norms.” \textit{Commentary on the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, U.N. Doc. E/CN.4/Sub.2/2003/38/Rev.2 at ¶16(b) (2003) (hereinafter “Norms Commentary”).}

(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.95

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, any successful implementation program would seem to require an integration of human rights issues into all aspects of the TNC’s operations, not simply relegate the subject to a corporate social responsibility department.

Moreover, the Norms take a bold step forward from previous U.N. documents by finding that the monitoring and enforcement of TNCs’ implementation of these rules should come from an independent body – the U.N.96 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 include: the Council; the Sub-Commission; NGOs; labor unions; individuals; and others.97 Specifically, NGOs, labor unions and other individuals could submit information to either the Council or Sub-Commission. The two U.N. bodies, in turn, after receiving responses from TNCs, could use the information received as a means to take “effective action” against the corporation.

Finally, the Norms co-opted the term “sphere of influence” from the voluntary Global Compact and applied and expanded it to a mandatory accountability mechanism for TNCs. Specifically, the Norms contend that within their “respective spheres of activity and influence,” TNCs must respect and promote human rights.98 While never specifically defining the term, the Commentary offers an

95 Norms Commentary supra note 93 at ¶ 15.
96 U.N. Norms, supra note 72 at ¶ 16.
97 Commentary, supra note 93 at ¶ 16(b).
98 Norms, supra note 72 at ¶ 1.
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.” As such, it would seem that the term shifted from its use in the Global Compact (in using influence to reference a TNC’s operational control) to a wider understanding that includes both operational and spatial control. As such, the Sub-Commission’s work took a decisive step towards bringing an international accountability structure to bear on TNCs. Unfortunately, in the wake of its defeat, that agenda was left in a state of flux.

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

Once the Norms were defeated by the Council, advocates could have reasonably thought that the U.N.’s business and human rights agenda had permanently stalled. 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. The Secretary-General appointed Ruggie.

99 Commentary, supra note 93 at ¶ 1(a).
100 Commentary, supra note 93 at ¶ 1(a) & (b) (discussing both the geographical influence that TNCs should exert and operational influence by 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 in particular is significant for the bystander paradigm as it seems to hint that while a TNC’s action might not itself directly contribute to the human rights abuses it can certainly contribute to it. See discussion infra § IV.C for a more extensive analysis of this language’s application to a bystander framework.
101 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. Human Rights Watch, U.N. Rights Body Ignores Major Abuses, HUMAN RIGHTS WATCH (Apr. 21, 2005) available at http://www.hrw.org/print/news/2005/04/21/un-rights-body-ignores-major-abuses
102 Even this resolution was divisive. The business communities once again lobbied against the appointment of a special representative at all, arguing that
Generally, the purpose of the first mandate was to frame the issues that affect TNCs regarding 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.¹⁰⁴

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 labor federations, U.N. and other international agencies, and legal experts.”¹⁰⁵ Notably absent from this initial list was a discussion with victims of human rights abuses themselves.¹⁰⁶ The 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, 2006.¹⁰⁷

I. The 2006 Interim Report

The purpose of the Interim Report was to provide context to

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¹⁰⁵ 2006 Interim Report supra note 23 at ¶.
¹⁰⁶ The interim report also alludes to the acrimony that surrounded the drafting and vote on the UN Norms when he writes “the history that preceded its creation” 2006 Interim Report supra note 23 at ¶.
¹⁰⁷ 2006 Interim Report supra note 23 at ¶.
the Council regarding Ruggie’s mandate; set forth his strategy for fulfilling the mandate; and summarize next steps.\textsuperscript{108} To that end, the Interim 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.” As Ruggie notes, in the immediate aftermath of World War II “the term ‘international economy’ was still an accurate spatial description of the prevailing reality.”\textsuperscript{109} Yet, since then, Ruggie notes, a “variety of actors for which the territorial state is not the cardinal organizing principle have come to play significant public roles.”\textsuperscript{110} As a result, the nation-state has dwindled in importance particularly in the economic realm.\textsuperscript{111}

Given this dichotomy, 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. \textit{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 of Responsibility and Accountability for Corporate Acts,”\textsuperscript{112} was submitted to the Human Rights Council.

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\item \textsuperscript{108}2006 Interim Report, \textit{supra} note 23 at Summary.
\item \textsuperscript{109}2006 Interim Report, \textit{supra} note 23 at ¶. 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 the struggle that historian scholars have from recounting history without using a nation-state reference point for a spatial demarcation. See Lara Putnam \textit{To Study the Fragments/Whole: Microhistory and the Atlantic World}, 30 J. Soc. Hist. 3 (Spring 2006).
\item \textsuperscript{110}2006 Interim Report, \textit{supra} note 23 at ¶.
\item \textsuperscript{111}Later, Ruggie clarifies this by stating that more and more, corporations are becoming subjects of international law, just simply not in the context of international human rights abuses. Respect Framework, \textit{supra} note 11 at ¶ 20.
\item \textsuperscript{112}2007 Report, \textit{supra} note 6.
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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.\footnote{113}

In the 2007 Report, Ruggie discusses the growing focus on the international stage for ways to hold TNCs for human rights violations.\footnote{114} However, Ruggie concedes that, as international law is currently framed, the majority of victims for human rights abuses must rely on national systems for relief.\footnote{115} Therefore, if the particular State at issue has no real accountability mechanism (such as in weak governance zones), Ruggie acknowledges that victims are often left without recourse.\footnote{116}

The 2007 Report also refutes the idea that international law at the time of the Report allowed for direct human rights accountability for TNCs.\footnote{117} As such, the Report directly refutes the legal claim embodied in the Norms – namely that there are in fact several human rights treaties that allow for direct accountability mechanisms for TNCs under international law. Moreover, 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 that “no definitive standards yet exist by which to assess [these mechanisms].”\footnote{118}

\footnote{113} One of the interesting things that the 2007 Report flagged, which is outside the scope of this article, is 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, \textit{supra} note 6 at ¶ 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.\footnote{114}

\footnote{114} 2007 Report, \textit{supra} note 6 at ¶ 44 (stating that “corporations are under growing scrutiny by the international human rights mechanisms.”).\footnote{115}

\footnote{115} 2007 Report, \textit{supra} note 6 at ¶ 44.\footnote{116}

\footnote{116} See 2007 Report supra note 6 at ¶ 17 (stating “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.”).\footnote{117}

\footnote{117} 2007 Report, \textit{supra} note 6 at ¶ 44.\footnote{118}

\footnote{118} 2007 Report, \textit{supra} note 6 at ¶ 56.
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. 119

The term “moral support,” although not adopted universally,120 would seem to capture an widening array of actions, or even inactions. As Ruggie notes, some tribunals have even used the element to include “silent presence coupled with authority.”121 According to Ruggie, there is very little clarity on what factual scenarios would constitute moral support.122

This dilemma highlights why developing a bystander framework is so important. Namely, that States are either unable or unwilling to provide the protection for corporate related abuses. As Ruggie writes, “Of 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 instruments as the OECD Guidelines or voluntary initiatives like the Global Compact.”123 This is ironic

119 2007 Report, supra note 6 at ¶ 31 (emphasis added).
120 For instance, as Ruggie notes, the court in Unocal did not adopt this as an element in its analysis of complicity. 2007 Report, supra note 6 at n. 29
121 Id. at ¶ 32.
122 Id. at ¶ 32. It does seem, however, that the focus of the moral support seems to be related to (1) a direct or indirect benefit and (2) some form of assistance (and therefore action). As such, 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.
123 Id. at ¶ 17.
particularly given how many TNCs tout the use of voluntary mechanisms and how many States rely on these voluntary mechanisms.124

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 developing an “authoritative focal point”125 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.126 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 the issue regarding business and human rights.

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.127

In a number of ways, the Respect Framework reflected Ruggie’s earlier work on the Global Compact. Much of what the Framework discusses related back to the spirit surrounding the

124 The irony continues: given the clear lack of success these voluntary mechanisms have in redressing human rights abuses, it seems ... odd that a voluntary mechanism is still the primary framework in this area.
126 In his first official report, Ruggie requested more time to complete this part of the mandate.
127 Respect Framework, supra note 10 at ¶ 6.
Global Compact. For instance, the Framework Report continues the Global Compact’s policy tradition by having no accountability mechanism for corporations. In fact, the Framework Report explicitly rejects the Norms’ attempt to craft TNC accountability mechanisms. 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.” As such, Ruggie argues that the responsibility that the Framework Report outlines, is in no way a legal one, rather it is a values-based normative goal whereby TNCs aspire to respect human rights. The main challenge according to Ruggie is the weak governance zones in which many TNCs now operate; the 2008 Report once again emphasizes emphatically that “governance gaps are at the root of the business and human rights predicament.” 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 influence and a company’s due diligence. In rebutting what he sees as an underlying theme of the Norms, Ruggie rejects the premise that TNCs have a heightened duty for monitoring those human rights issues that affect its core business enterprises. Rather, 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

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128 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. And yet the Framework and its implementation document, the Guiding Principles, also contain significant elements of the Norms.

129 Respect Framework, supra note 10 at ¶ 6.

130 Id.

131 Id. at ¶ 54.

132 Id. at ¶ 17.

133 Id. at ¶¶ 65-72.

134 Id. at ¶¶ 56-59.
human rights impacts resulting from a company’s business activities and the relationships connected to those activities.”

However, regardless of its flaws the Respect Framework is a great achievement. It will act, in the words of one scholar, as “an authoritative focal point that could help bring coherence to the complexity of the business-human rights relationship.” Even though the Respect Framework lacks an accountability mechanism for TNCs, it gives very specific recommendations to TNCs seeking to navigate through the business and human rights terrain.

On June 18, 2008, The UN Human Rights Council unanimously adopted the Respect Framework and, by Resolution, renewed Ruggie’s term under a new mandate. 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, on 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;
- annual updates.

In response to the Council’s second mandate, Ruggie undertook an additional three-year term that involved a specific

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135 Respect Framework supra note 10 at ¶ 72.
136 Ochoa, supra note 125.
138 Id.
139 Id.
implementation program and a campaign to promote the Respect Framework. This culminated in the Guiding Principles.\(^\text{140}\)

**IV. The Guiding Principles**

On March 21, 2011, Ruggie presented his Guiding Principles to the U.N. Human Rights Council for consideration. The Principles were Ruggie’s attempt 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. They consisted of a number of foundational principles (that derive from the spirit of the Respect Framework) as well as operational principles that flow from the foundational principles.\(^\text{141}\) In addition, Ruggie also provides commentary for many of the issues outlined in the Principles.

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.\(^\text{142}\) From November 22, 2010, until January 31, 2011, Ruggie posted a draft of the Guiding Principles, supra note 5. In the intervening years, Ruggie also provided the Council with annual reports on his progress. These included: the 2009 Report, supra note 73 (discussing, among other things, the financial crisis’s impact on business and human rights issues) and the 2010 Report, Report of the Special Representative, *Business and Human Rights: Further Steps Toward the Operationalization of the “Protect, Respect and Remedy” Framework*, U.N. Doc. A/HRC/14/27 (Apr. 9, 2010) (focusing on the Respect Framework’s first pillar, the State’s duty to protect).

\(^\text{141}\) Guiding Principles, *supra* note 5.

\(^\text{142}\) 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 United Nations, New Online Forum for Business & Human Rights Mandate, UN available at http://www.hks.harvard.edu/m-rchb/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.
Principles and then solicited comments on their themes. Comments flowed in. In all, Ruggie received approximately 163 comments on various aspects of the draft. In addition, many of the proposed changes that people suggested made its way into the Final Principles.

Moreover, Ruggie requested specific feedback from key stakeholders, soliciting expert consultations and convening working groups and workshops. As a result, when the final Principles were submitted, they had wide-ranging endorsement from diverse stakeholders including specific businesses and industries, governments, and non-governmental organizations.


144 Compare, e.g., Draft Guiding Principles at ¶ 5, available at http://www.business-humanrights.org/media/documents/ruggie/online-forum-re-guiding-principles-nov-2010-to-jan-2011.pdf (stating that “absent any internationally-recognized hierarchy of treaty obligations, States are unlikely to place every single human right they have recognized above their legal obligations”) with the Guiding Principles (eliminating that language). This statement, in particular, drew a number of comments questioning its accuracy.

145 List of Documents, supra note 12 at 15.

146 See, e.g., ING, ING Congratulates UN Special Representative John Ruggie & His Team on Endorsement of Guiding Principles (Jun. 24, 2011) (stating that the Principles are “an important milestone in the protection and promotion of human rights linked to business activities.”)


The human rights community, while receptive, was slightly more muted in welcoming the Principles. While prominent organizations praised\textsuperscript{150} the Principles, many other organizations felt that the Principles were fundamentally flawed because they did not include either a mandatory system or a monitoring mechanism.\textsuperscript{151} In that sense the Principles were more of the same as previous frameworks, relying on businesses to self-monitor in order to achieve benefits for affected communities.\textsuperscript{152}

While the critics’ claims have merit, in truth, an analysis of the Principles requires a much more nuanced approach. A comprehensive analysis of the Principles needs to 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

Some\textsuperscript{153} 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 consultations, and holding legal workshops.\textsuperscript{154} In addition, Ruggie’s work in responding to the Mandate can be seen as nothing less than thorough. Besides drafting and preparing Reports for the Council, the work Ruggie

\textsuperscript{150} Amnesty Press Release, \textit{supra} note 149 (stating that Ruggie was to be “commended for developing and raising awareness on the Framework”).


\textsuperscript{154} See generally List of Documents, \textit{supra} note 12.
and his team undertook included (1) undertaking a full analysis of the various treaty bodies that implicate corporate activities and human rights issues; (2) convening legal workshops on a number of issues affecting business and human rights; (3) reviewing methodological assessments 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.\(^{155}\)

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”\(^{156}\) and urged the UN Human Rights Council to endorse them. The International Senior Lawyers Project states that “the Principles will undoubtedly [be] the starting point for guiding – and judging -- business efforts to identify, manage and remedy human rights.”\(^{157}\)

In addition, while the 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 it nor the Respect Framework was attaching legal accountability to TNCs.\(^{158}\)

\(^{155}\) See generally List of Documents, supra note 12.


This process stands in stark contrast to the development 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.\textsuperscript{159} In addition, while it seems as though the Sub-Commission solicited some input from the business community,\textsuperscript{160} many corporations later complained that the Sub-Commission undertook their work in a very opaque way.\textsuperscript{161} In addition, the Sub-Commission members who drafted the Norms were acting in their personal capacities, not as representatives of their governments.\textsuperscript{162} As such, they were not bound by the political considerations of the full Council.\textsuperscript{163} Given the 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.\textsuperscript{164}

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 implementing corporate responsibilities for business and human rights issues.

Building on the three pillars originally framed 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 remedies for victims of human rights violations) the Principles provide concrete, practical, solutions for

\textsuperscript{159} Public Debate Report, \textit{supra} note 78.

\textsuperscript{160} Williamson, \textit{supra} note 83.

\textsuperscript{161} Kinley et al., \textit{supra} note 41, at 464.

\textsuperscript{162} Williamson, \textit{supra} note 83.

\textsuperscript{163} In fact, many of them were law professors. \textit{Id}.

\textsuperscript{164} 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, \textit{supra} note 41, at 466. Kinley \textit{et. al} offers a far reaching review of the politics and back-door negotiations that led to the Norm’s defeat.

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TNCs who wish to craft a workable policy regarding business and human rights.\textsuperscript{165}

The Principles also reaffirm their non-legal accountability framework. In the commentary accompanying the foundational principle outlining the legal foundation for “the responsibility of business enterprises to respect human rights,”\textsuperscript{166} Ruggie 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.”\textsuperscript{167} Once again the Principles emphasize that the term “responsibility” (as discussed in the Respect Framework and used here) is not in any way meant to convey legal responsibility on the part of TNCs. Rather it is designed to encourage a moral responsibility based on shared societal values regarding human rights issues.

However, within the parameter of corporate responsibility, the Principles are specific: the document lays out five foundational principles to guide TNCs in their responsibilities for human rights abuses. First, it states that TNCs should respect human rights by avoiding infringing on the human rights of others.\textsuperscript{168} Second, various legal instruments should be used to determine the appropriate TNC human rights standards.\textsuperscript{169} 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.\textsuperscript{170} 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.\textsuperscript{171} Finally, TNCs must develop and implement specific

\textsuperscript{165} While all three pillars implicate business and human rights, this article will focus on the responsibilities TNCs have to respect human rights.
\textsuperscript{166} Guiding Principles, \textit{supra} note 5 at ¶ 12.
\textsuperscript{167} \textit{Id.} (accompanying commentary).
\textsuperscript{168} \textit{Id.} at ¶ 11.
\textsuperscript{169} \textit{Id.} at ¶ 12. These instruments include the International Bill of Rights and the International Labor Organization’s Declaration on the Fundamental Principles and Rights at Work.
\textsuperscript{170} \textit{Id.} at ¶ 13.
\textsuperscript{171} \textit{Id.} at ¶ 14.
policies and procedures to help maintain responsibility for human rights.\textsuperscript{172}

In order to operationalize these foundational principles, Ruggie states that TNCs should demonstrate a firm commitment for the issues regarding business and human rights by integrating the subject throughout the corporate structure.\textsuperscript{173} 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).\textsuperscript{174} This assessment should be done early and updated regularly, to ensure that the situations that TNCs initially evaluated have not changed.\textsuperscript{175} Finally, TNCs should integrate the results from their assessments\textsuperscript{176} 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.\textsuperscript{177}

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.\textsuperscript{178} 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.

In addition, the Principles and the Respect Framework take a significant leap forward for a bystander paradigm by discussing

\begin{footnotesize}
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\item \textsuperscript{172} Guiding Principles, \textit{supra} note 5 at ¶ 15.
\item \textsuperscript{173} Guiding Principles, \textit{supra} note 5 at ¶ 16 (the Principles state “at the most senior level of the business enterprise”).
\item \textsuperscript{174} Guiding Principles, \textit{supra} note 5 at ¶ 17.
\item \textsuperscript{175} Guiding Principles, \textit{supra} note 5 at ¶ 17 (and accompanying commentary).
\item \textsuperscript{176} As it stands now, many business partners seem to be in favor of the move for internal TNC human rights impacts assessment. (\textit{See e.g.}, letter from IBLF to Ruggie (2007). However, some in the United States are concerned that producing additional assessments would create additional legal liability for corporations. 2009 Report, \textit{supra} note. Ruggie dismisses these concerns by arguing that it human rights and disclosure will only lead to legal liability if you omit or misrepresent material facts in this area.
\item \textsuperscript{177} Guiding Principles, \textit{supra} note 5 at ¶¶ 18 -21.
\item \textsuperscript{178} Guiding Principles, \textit{supra} note 5 at ¶ 22.
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the TNC’s relationships (not just actions) as a source for assessing its response. Nonetheless, the Principles are incomplete. By relying on a system of self-monitoring for TNCs and staying silent on accountability mechanisms for TNCs, they offer a more modest approach to tackling the issue of business and human rights then Sub-Commission’s work with the Norms.

However, 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.”

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 regarding corporations and human rights. While the Norms were the first attempt at the U.N.’s level to have that conversation, because of the controversy in which they were mired, a substantive evaluation of what the Norms were attempting to do for international human rights law is difficult. In contrast, Ruggie’s work and transparent process allows for a clear and detailed road map of the current terrain of business and human rights. As such, his work will be transformational in the future development of international human rights law, generally.

179 Jens Marten, Problematic Pragmatism, The Ruggie Report 2008: Background, Analysis and Perspectives at 1 (June 2008). available at http://www.wdev.eu/downloads/martensstrohscheidt.pdf. For Ruggie’s vigorous response to the piece see John Ruggie, Response by John Ruggie to Misereor / Global Policy Forum (Jun. 2, 2008), available at http://www.reports-and-materials.org/Ruggie-response-to-Misereor-GPF-2-Jun-2008.pdf. While Ruggie does not deny the claim that his report was politically expedient (stating “one 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.”
More specifically, the Guiding Principles’ potential impact for advancing a bystander framework for corporate accountability is also profound. While as of yet, there is no corporate accountability framework that encompasses TNCs as bystanders under international law, there are certain key elements that any bystander accountability structure, in order to be effective, would have to encompass one that has, at its foundation of liability, a structure that is not based on overt action, or even complicity, but rather is based on relationship. To that end, both the Respect Framework and the Guiding Principles are significant.

An integral part of understanding the bystander framework is to acknowledge that, oftentimes, there are in fact three people to a relationship: the victim, the aggressor and the witness. Since many TNCs deny being perpetrators to human rights abuses, the only reasonable role left to them is that of witness. While the Norms make mention of the idea that TNCs need to be vigilant in their dealings with contractors, and States, the Guiding Principles are much more explicit in that they discuss the concept of relationship as a basis for TNC responsibility. This is at the heart of the bystander rhetoric. It acknowledges that relationships are important and that the tripartite relationship between 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.

In the Guiding Principles, Ruggie acknowledges that TNCs, not simply by their actions, but also by their relationships, can negatively impact human rights. As such, Principle 13 encourages TNCs to “seek to prevent or mitigate adverse human rights impacts that are directly linked to their … relationships.” The accompanying commentary further elaborates on this concept: it distinguishes between activities (which can encompass both actions and omission) and relationships. As a result, the activities that can negatively impact human rights can come from either action or inaction and either from its operations or its relationships. This seems to create an interesting diagram for mapping a

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180 Amerson, supra note 7 at 48.
181 Norms, supra note 72 at ¶ 15.
182 Id. at ¶ 11.
bystander framework; whereby a TNC’s inactions (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.

Another interesting thing that has occurred - from a bystander lens - in the evolution of the dialogue of human rights is the evolution of the term ‘sphere of influence’ and its potential impact on the bystander framework.\(^{183}\) As originally used in this context, sphere of influence seemed designed to help the TNC envision where it had the most control. In other words, sphere of influence, under the Global Compact was subject matter based - the company could exercise the most control over those issues related to its core business activities. Under the Norms however, the concept seems to have expanded; the Norms used the term to encompass both an operational form of influence and a spatial form of influence.

Whether intended or not,\(^ {184}\) therefore, the term sphere of influence implicates the bystander theory. The bystander

\(^{183}\) The term sphere of influence within the context of business and human rights has also evolved. Originally introduced 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 UN Norms, confessed in April 2010 that he was actually the one who co-opted the term for the business and human rights framework, GLOBAL COMPACT CRITICS, How Sphere of Influence was Introduced into the Global Compact, http://globalcompactcritics.blogspot.com/2010/05/global-competits-principle-one-subject.html. In fact, by the time of the 2008 Report, Ruggie argues in favor abandoning the term completely 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 (June 5, 2008) available at http://www.reports-and-materials.org/Ruggie-response-Ethical-Corp-5-Jun-2008.pdf. For a discussion on the origins of the term sphere of influence see Report Clarifying the Concepts of “Sphere of influence” and “Complicity” (May 15, 2008), available at http://www.reports-and-materials.org/Ruggie-companion-report-15-May-2008.pdf.

\(^{184}\) Indeed, Ruggie is emphatic that sphere of influence should not be used to extend accountability to TNCs based on relationships. As he writes,
framework, at its heart, is a methodology for shifting the corporate accountability dialogue away from the overt actions of the TNC to the impacts that a TNC’s relationship has on human rights violations. This shift, although not explicitly stated in bystander rhetoric, is implicit in the U.N.’s evolution of regarding business and human rights. As such, the bystander framework allows an accountability mechanism, to be developed when TNCs develop significant relationships with would be aggressors of human rights atrocities. In that way, the Guiding Principles are a positive development. They mark a shift from an implicit nod of control through (as discussed in the Global Compact) relationships and TNCs to an explicit acknowledgment of the importance of relationship in preventing human rights abuses.\footnote{185}

\begin{quote}
\begin{center}
\textit{\textcolor{red}{\textbf{it 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.}
\end{center}
\end{quote}


This is the leap that Ruggie seems unwilling to make but that he set up by developing the accountability structure. This is the leap that the bystander framework squarely addresses the leverage that a company’s relationship with an actor (particularly the State) can have on human rights violations. It seems in essence that Ruggie’s Reports, Frameworks 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, namely that corporations should face an accountability structure for these things. Perhaps that was inevitable: Ruggie in order to get buy-in from the business community, needed to make the mechanism non binding (and therefore not make that leap to an accountability structure based on relationship), but until we do so, human rights violations will continue to occur and companies will continue to hide behind the bystander rhetoric to escape liability.\footnote{185} The relationship aspect of the bystander framework is crucial - it is the relationship that creates the duty and the breach of that duty that can lead to liability for the TNC, even through their inaction.
However, one key piece is missing - 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 TNCs relationship with other private parties. The Norms, for instance, specifically discuss sphere of influence within the context of the TNC’s work with vendors, suppliers and other contractors. Ruggie’s work expands on that by discussing weak governance zones that may make a TNC’s ability to navigate through human rights issues difficult. However, Ruggie’s direct linking of a TNC’s relationship with a State to adverse human rights impacts is muted. For instance, in the Respect Framework, Ruggie discusses “the context in which a company is operating, its activities, and the relationship associated with those activities” without stating that the relationships with the States could cause that. Later, in the Respect Framework, the relationship between the State and the TNC is stated but muted: 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.” State agencies are simply one in a long line of other actors whose relationship with the State may create adverse human rights impact.

By failing to take into account the particular dynamics involved in the relationship between a TNC and the State, the U.N.’s framework remains incomplete. In fact, a TNC’s relationship with the State seems to be at the heart of many of the human rights abuses: the State, eager to accommodate the TNC allows the TNC almost free reign and may even change its laws to make it more hospitable for the TNC’s activities. The case of Union Carbide and India provides an excellent example of this. Union Carbide (now owned by Dow Chemical) was the parent company of Union Carbide India. The company had a 50.9% interest in UCI, sufficient to

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186 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 a 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.

187 Respect Framework, supra note at ¶ 25.

188 Respect Framework, supra note at ¶57.

189 The case of Union Carbide and India provides an excellent example of this.
arrives, the TNC’s wealth and influence oftentimes dwarfs that of the Host State leaving to stark power differentials that are not accounted for in our current accountability structure. Placing the TNC’s relationship with the State in a grouping of all other non-State actors implies that the relationship between the TNC and the State is the same as it is with all other actors and therefore has the same consequence. This is most certainly not true. And yet, framing the issue in this way creates a huge gap in the accountability structure because often times States are one of the main perpetrators of human rights violations.

While States can be held accountable for their acts, creating a separate accountability structure based on the TNC’s relationship with that State decouples actions (or inactions) of each actor and minimizes the ability of each to hide behind the acts of the other. This is essential to the development of human rights law because it magnifies the gap between State actions and TNC behavior. In short, much of what TNCs do today regarding human rights, if performed by a State, it would be considered coercive and lead to a legal accountability. Developing a bystander framework that

exercise control over the subsidiary. At the time, under Indian law, a foreign corporation was not ordinarily allowed to own more than 40% of an Indian company. VAGTS ET AL., TRANSNATIONAL BUSINESS PROBLEMS, at 197. Union Carbide, however, petitioned and was granted an exception. On December 2, 1984, its facility located in Bhopal, India, had an accident and deadly gas emitted from the factory and out into the community. While the figures range regarding the total number of deaths, the most conservative estimates place the deaths, just from that evening, at 2500. In subsequent months the death toll would rise to 15,000. (Rallies held over Bhopal Disaster, BBC NEWS, (Dec. 3, 2004) available at http://news.bbc.co.uk/2/hi/south_asia/4064527.stm). Since then, due to the ongoing contamination of the area, its groundwater and the soil, illness and deaths relating to that evening still occur. Id.

Amerson, supra note 7 at 5.

The idea that human rights are underpinned with a freedom of coercion has deep jurisprudential roots and appears in many facets of business and human rights work. For instance, Prof. Anne Marie Lofaso has written extensively on the notion of workers’ rights stemming from the freedom from coercion. Moreover, Prof. Lofaso points out that, it is not merely the State that is a source of coercion, but also most institutions. See, e.g., Anne Marie Lofaso, Toward a Foundational Theory of Workers’ Rights: The Autonomous Dignified Worker, 76 U.M.K.C. L. REV. 1, 17 (2007)(discussing the different jurisprudential theories regarding an individual worker and coercive institutions). Following
does not take this into account misses one of the main benefits of the bystander paradigm, the added vigilance of the TNC to make sure that it is not creating situations through State parties from which it (the TNC) will benefit.

There are many other issues within the Guiding Principles and the Respect Framework that implicate the bystander framework. However, focusing on the 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.

Entrusting a theory of accountability to a model of nonfeasance will no doubt cause consternation for TNCs and other business enterprises. This is not at all surprising, and yet TNCs have benefited from the overt actions of others and hidden behind this façade/veil of inactivity. It seems like a fundamental paradox that TNCs want a seat at the table for all international dealings that would affect their bottom line - how they interact with labor, how they interact with suppliers, how they interact with subsidiaries, and yet not take responsibility when the fruits of those relationships yield terrible results. Allowing for a framework to develop based on the nonfeasance of corporations could have a

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this idea, it seems 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.

\[192\] For instance, another interesting issue that has evolved in the documents propounded by the U.N. and its agents is the idea of culture as being an important factor for changing or preventing human rights abuses. As it stands now in the dialogue, culture is important because it sets the tone for what is deemed acceptable and what is not deemed acceptable. However, it also has 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 wrongs. In those situations, it is the individual executives of the TNC who co-opt the language of the bystander by stating that the culture of the TNC was predominantly hostile to issues regarding human rights (or other violations) that the individual was merely a bystander to the entity itself. Amerson, *supra* note 7 at 23. By emphasizing that the culture is important and that it has a significant impact on human rights issues, may close another loop for higher level executives who wish to claim that they were powerless against the culture of the TNC.
remarkable impact in diminishing human rights abuses that are linked to corporate activity. Knowing that the relationship is significant enough to cause reliance and incentivization to actors and States for shirking human rights responsibilities will become engaged at the highest level to ensure that the standards for human rights are being upheld. Executives and CEOs will become conversant in impact assessments that affect not just their bottom line but the human rights paradigm for others.

Another aspect of a bystander framework that may disturb the business community is that it may impose upon corporations special duties that may in certain circumstances go beyond the duties imposed upon States. In fact Ruggie flags this as an issue when he states “the allocation of responsibilities under the Norms 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.”

By the time that Ruggie submitted his Framework and began drafting the Guiding Principles, there seems to have been a growing emergence in the discourse that relationships would need to be at the heart of business and human rights. Indeed, as noted scholar Larry Cáta 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

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193 2006 Interim Report, supra note 23 at ¶ 68.
194 See, e.g., Juliette Terzieff, U.N. Special Rep: Time to Know and Show, WORLD POLITICS REVIEW (Mar. 2, 2010) (stating “raising 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.” (emphasis added) available at http://www.worldpoliticsreview.com/trend-lines/5206/u-n-special-rep-time-to-know-and-show
the quite sensible point that large and powerful enterprises cannot on 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.\textsuperscript{195}

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

D. THE FAILINGS OF THE GUIDING PRINCIPLES

In the first interim report Ruggie stated that “It is essential to achieve greater conceptual clarity with regard to the respective responsibilities of states and corporations.”\textsuperscript{196} However, that promised was not, in fact, fulfilled in the Respect Framework or in the Guiding Principles. Rather than articulate what the responsibilities of corporations are for human rights issues, Ruggie has expressed only aspirational goals for what he wants to achieve. This may be a semantic quibble but to me, responsibilities invoke something akin to a legal duty, something the Guiding Principles makes clear is not present in their analysis of a corporation’s duties. Neither the Respect Framework nor the Guiding Principles do anything to remedy that governance gap – by continuing to put the primary, indeed the sole legal duty on States, the Principles will not remedy those situations where States are either unable or unwilling to do more.\textsuperscript{197}


\textsuperscript{196} 2006 Interim Report, \textit{supra} note 23 at ¶ 70.

\textsuperscript{197} This reminds me of that famous 1980s campaign “say no to drugs,” as if merely by stating that this is what you should do you can effectively end the issue. The continued drug epidemic in this country shows that it did not. 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 the culture to do so. TNCs can provide both. By ascribing bystander liability to them in the meantime, it will allow for TNCs to become more proactive in seeing these human rights abuses curbed.
In addition, while the Respect Framework and the Guiding Principles offer concrete guidance in the form of impact assessment and due diligence standards, these seem hollow in the face of a self-monitoring system. As such, the aspirational nature of these goals will, I fear, do little to remedy the governance gaps that exist.

There also seems to be a logical gap between what the 2008 Official Report is saying about corporate responsibility and what the Principles now propose. Specifically, the 2008 Report states, “corporate responsibility to respect rights exists independently of States’ duties.” This issue seems to be echoed by the International Organisation of Employers, International Chamber of Commerce, Business and Industry Advisory Committee to the Organisation for Economic Co-operation and Development (OECD). In their paper entitled “Business and Human Rights: The Role of Government in Weak Governance Zones” the groups, while stating that the States still have primary responsibility, also state that companies still have to respect the law, even if the Host State doesn’t.

If that’s so, then why can’t we develop an accountability framework that begins from the same paradigms - namely that corporate accountability (or corporate duties) exists independently of States’ duties? That the U.N.’s work fails to even try is its main failing.

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198 Respect Framework, supra note 10 at ¶ 55.
199 Business and Human Rights: The Role of Business in Weak Governance Zones, at ¶ 15. (Dec. 2006) (stating “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.”) available at http://www.business-humanrights.org/Links/Repository/596399/link_page_view
200 See, e.g., John Ruggie, Updating the Guidelines for Multinational Enterprises, discussion paper at ¶ 22 – 23 (June 30, 2010)(stating “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
CONCLUSION

Despite initial resistance from TNCs regarding the business and human rights agenda, company executives now seem to be understanding that exposing a corporation to human rights violations comes not just at a moral cost, but more than likely at a business cost as well.\(^{201}\) Now then, much of the debate around corporate accountability, although implicit, seems to have at its heart this notion - who is controlling the game? Most human rights activists believe that corporations are and will continue to control the rules of the game 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 businesses contributing to the framework would help them to control the game.\(^{202}\) I tend to agree with the more pessimistic view. As one author writes: “Of course, businesses also spend much time and treasure attempting to influence the rules of the game - and

\(^{201}\) See, e.g., Susan Aaronson and Ian Higham, commentary Re-Righting Business: John Ruggie and the Struggle to develop International Human Rights Standards for Transnational Firms, BUSINESS AND HUMAN RIGHTS RESOURCE CENTRE (stating “the costs to firms [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.”) \textit{available at} http://www.business-humanrights.org/SpecialRepPortal/Home/Protect-Respect-Remedy-Framework/GuidingPrinciples

\(^{202}\) Interview by John Sherman with John Ruggie (April 19, 2011) (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] ... take the game over and stop being reactive, and become proactive and drive the agenda.”) \textit{transcript available at} http://www.ibanet.org/Article/Detail.aspx?ArticleUid=4B5233CB-F4B9-4FCD-9779-77E7E85E4D83
ensuring that any changes to the rules, however broad or obvious their potential social benefits, do not affect their bottom lines.”203

As such, part of the success of Ruggie’s mandates is that, in essence, he has brokered a compromise from disparate populations who had taken hard line stances before his involvement - in essence, “sneaking past the watchful dragons.”204 For instance, many of the human rights groups who had welcomed the UN Norms, had realized that they needed to let go of their allegiance to its principles and instead embrace its spirit. Likewise, TNCs had to be more open to the idea that they were not just subject to the national laws of the host State but may also be subject to other accountability mechanisms.205 This is an important step not only to establish buy-in from the different stakeholders but also because, should an accountability framework develop later on that takes into account the larger global governance scheme, TNCs would look rather silly opting out of the very framework they supported. In addition, should a framework of accountability be adopted that relies on TNCs relationship with the aggressor of a human rights violation, then TNCs would be hard pressed to object - after all they had significant input and welcomed both Ruggie’s framework and the Guiding Principles.206

In the debate on Ruggie’s work and corporate accountability, what often gets overlooked is the purpose for which Ruggie was commissioned in the area of business and human rights. 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 getting hurt by corporate activity. He’s trying to ensure that there is

204 C.S. LEWIS, LETTERS TO MALCOLM CHIEFLY ON PRAYER (discussing his use of the Chronicles of Narnia as a way to sneak past the watchful dragons).
206 See supra notes 146 and 147 and surrounding discussion.
a floor where there was none before.”

To that end, the Guiding Principles may very well be “among the most important milestones in the recent era of corporate responsibility and sustainability, particularly given its emphasis on stakeholder engagement and collaboration among government, business and civil society.”

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 the beginning.

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1995 – 1998. Human rights organizations begin shifting their advocacy strategies to more directly include TNCs.¹

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.²

1999. Kofi Annan gives his speech regarding a Global Compact with business.³

July 2000. The U.N. Global Compact begins with 50 signatories.⁴ Initially, the Compact states nine principles (a tenth principle against corruption was added in 2004⁵).


August 13, 2003. The Sub-Commission finalizes and approves the Norms. Submits the Norms to the full Commission.⁷

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.⁸ 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.⁹

2004. After advocacy efforts by human rights groups and the Norms’ controversial nature, the U.N. Commission on Human Rights places the issue on its agenda during its March and April 2005 session. Ultimately, it requests the Office of the U.N. High Commissioner for Human Rights to compile a report on the legal status of all existing initiatives and standards regarding business responsibilities and human rights.¹⁰

February 2005. The Office of the U.N. High Commissioner for Human Rights publishes and submits a report to the UN Commission on Human Rights regarding business and human rights. It suggests that the issue
remain on the agenda and the Norms to be further considered.\textsuperscript{xii}

- April 2005. The U.N. Commission on Human Rights adopts a resolution asking the Secretary General to create a Special Representative.\textsuperscript{xiii}
- 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.\textsuperscript{xiv}
- February 22, 2006. Ruggie completes and submits his interim report concluding that the Norms should be abandoned rather than pursued.\textsuperscript{xv}
- April 3, 2006. Human Rights Council established. It replaces the Commission on Human Rights.\textsuperscript{xvi}
- April 7, 2008. Ruggie submits his second official report entitled “Protect, Respect and Remedy, a Framework for Business and Human Rights.”\textsuperscript{xviii}
- June 18, 2008. U.N. approves and endorses the framework unanimously and renewed Ruggie’s term under a new mandate.\textsuperscript{xix}
- June 16, 2011. The UN Human Rights Council unanimously adopts the Principles.\textsuperscript{xxiii}
Human Rights Watch (HRW) is a non-governmental 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 by listing the date, the headline, and the link to the press release. Although many of the press releases challenges the State more than any other entity for allowing a corporation to have such abusive practices, it nonetheless demonstrates a trend toward corporate accountability for human rights.

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”

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”


vi Karl-Heinz Moder, Norms on the Responsibilities of Transnational

vii Id. at 1.


ix Kinley & Chambers, supra note viii, at 12.

x Id., at 13.


xiii Kinley & Chambers, supra note viii at 6.


available at
1= (last visited Aug. 22, 2011).