The Intentional Human Rights Failures of States

by

Maggie Feldman-Piltch
Class of 2014

A thesis submitted to the faculty of Wesleyan University in partial fulfillment of the requirements for the Degree of Bachelor of Arts with Departmental Honors in General Scholarship

Middletown, Connecticut April 11, 2014
I first want to acknowledge my University major advisors Professor Richard Adelstein and Professor Lori Gruen for their invaluable support and spectacular teaching over the last six semesters.

I am especially grateful to Professor Adelstein for also acting as my thesis advisor. I should have known a life long Cubs fan would be unwilling to give up, even in the darkest, most seemingly hopeless moments. This process has been anything but smooth sailing but you never allowed that to get in the way of pushing the boundaries of what I believed myself to be academically capable of. Thank you for support, ideas, patience, and most of all your criticism.

Anya Morgan, my thesis and life mentor. The best part of this project was finally getting to be real friends with you.

I want to also thank Dean Marina Melendez, for guiding me through the last four years, reminding me to keep everything in perspective and being an incredible role model, and Rabbi David Leipziger Teva, for reminding me I have a greater purpose in life than to write a paper. Also to President and Mathilde Roth for their strategic use of 140 characters and genuine concern for the community they are important and cherished members of.

To my parents who embody practical idealism and never told me I was better at something than I really was. You have saved the world from an incredible amount of tackiness and helped me to discover what I am truly passionate about. Thank you for teaching all of your children they are capable of making great change in the world, if they work for it.

My wonderful siblings, you are each so special to me, and I’m certain you will not make it to the last page of this thesis. You can stop reading now.

This last year would have been insurmountable without the constant love and support of my Wesleyan family, especially the Sisters of Rho Epsilon Pi, the Wesleyan Cheerleading Squad, and Wesleyan Jewish Community. The CJ to my Toby, Cassie Garvin -thank you for being the greatest cheerleader ever and Gideon Levy, my long lost sibling- you’re the best. JP- I would not have made it to April 11 without you. Thank you for encouraging me to trust myself, and I promise you will never hear me say the word “thesis” again. Also, to Matzoball, the most magnificent rescue hedgehog in the world.

Finally, the completion of this thesis is a testament to the power of better than good teaching. To Thomas Liwosz, Mark DiGiacomo, and Todd Paige without whom I would not have even made it out of middle school.
# Table of Contents

Abstract .................................................. 3  
Introduction ............................................... 6  
  Literature Review ....................................... 6  
  Overview of Argument .................................. 12  

Chapter One: How States Fail .............................. 18  
  Introduction ............................................. 18  
  The Human Rights Obligations of States ............... 21  
  The Human Right to an Adequate Standard of Living .. 25  
  Identifying Governance Gaps .......................... 29  
  Market Forces and the Inability of Firms to Act Alone. 34  
  How the State Can Meet Its Obligations ................ 40  

Chapter Two: Intentional Governance Gaps .............. 42  
  Polycentrism and the Role of the International Human Rights Regime 42  
  Chapter Overview .................................... 44  
  Hard Law and Human Rights ............................ 49  
  Soft Law and Human Rights ............................ 53  
  The Draft Norms and Guiding Principles ............... 59  
  Substantiating the Claim of Intentionality ............. 67  
  Conclusion .............................................. 75  

Chapter Three: Moving Forward ......................... 78  
  Why Human Rights Matter ................................ 79  
  One World, One Government: Alternative Governance Options .... 80  
  The Moral Obligation of Firms .......................... 83  
  Firms as Agents of Systems Change ..................... 86  
    The Systems Thinking and Change Approach .......... 87  
    Utilizing Firms as Leverage Points ................... 92  
  Coming Together: A Case Study ........................ 94  

Conclusion .................................................. 99  
  Restatement of Argument ................................ 99  
  Areas for Further Study ................................ 100  

Bibliography .................................................. 102  

Appendix ...................................................... 113  
  Universal Declaration of Human Rights ................. 114  
  Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights 119  
Abstract

This thesis considers the human rights obligations of states and firms in a capitalist society through an economic analysis of law.

While the UDHR stipulates every organ of society shares in human rights obligations, the primarily responsibility rests with the state. When the state fails to meet its human rights commitments, governance gaps are created which allow other organs of society to violate human rights. This thesis specifically discusses examples of human rights violations by firms that are within the legal framework put in place by the state, focusing on behavior of firms that prevent individuals from reasonably accessing an adequate standard of living, which is protected by the 25th article of the UDHR.

The UDHR, the founding document of the International Bill of Human Rights, is a core piece of the international human rights regime. The existence of a globally recognized definition of human rights should eliminate the potential for governance gaps. I examine why this is not the case in practice. Some scholars posit international law primarily exists in a soft form because the contracting costs of hard law are too high to facilitate compromise among international actors. It is the position of this thesis that implementation tools and non-voluntary terms are absent from human rights agreements simply because states do not consider the universal protection, respect, and fulfillment of human rights to be a priority. I attribute this preference for soft law as the cause of governance gaps and the result of the state’s lack of desire to meet its
human rights obligations. Thus, their existence is intentional. This perspective is supported by a comparison of the Norms on the Responsibilities of Transnational Human Rights Obligations and United Nations Guiding Principles on Business and Human Rights, two United Nations human rights documents that I devote considerable time to analyzing, as well as additional scholarship on the topic. I then consider what the obligations are of firms who violate human rights in the normal course of profit maximization. I argue firms have a moral obligation to motivate state’s to meet their human rights obligations and ultimately utilize Donella Meadow’s description of systems change and leverage points to argue firms can and must motivate change through leverage points.
Introduction

Literature Review

When I first began this project, I was convinced large firms were of guilty of violating human rights. I assumed that what I perceived as low pay, long hours, and dangerous conditions experienced by individuals in garment factories in the developing world was an automatic violation of their human rights. While I recognized the agency of workers in selecting employment, I felt compelled to draw attention to the distinction between truly making a choice and picking the best of bad options. I focused on arguing for a moral obligation requiring firms to not only refrain from violating human rights but to also fulfill the rights of those in their sphere of influence, specifically employees and members of the communities they operate in.

In China 2020: How Western Business Can--and Should--Influence Social and Political Change in the Coming Decade, Michael Santoro makes a similar argument based on Locke’s concept of the social contract in Two Treatises of Government.\(^1\) Locke argued individuals in a state of nature would be morally bound to The Law of Nature not to harm one another.\(^2\) Santoro argues that by entering into an exchange, which is a form of social contract, firms are obligated to engage in behaviors that directly advance human rights in China- or any state


they operate within. Wesley Cragg, Daniel Augenstein and David Kinley, Klaus Leisinger, and Kevin Farnsworth have also argued there is a moral obligation for firms to act regarding human rights though based on firm’s perceived ability to directly impact the economic, social and cultural human rights of their workers, and the apparent unwillingness or inability of the state to act.

In “Business and Human Rights: A Value-Based Approach,” Wesley Cragg outlines the evolution of the relationship between states and firms in the last 40 years. He articulates three factors of globalization that are integral to understanding what he refers to as the, “growing anger over the current allocation of human rights responsibilities [among state and non-state actors].” Cragg argues the increase in government-like powers held by corporations, the diminished will or capabilities of governments to meet human rights obligations, and the evolving distribution of power between firms and governments means firms: 1) now have access to the largest pools of capital to date, allowing them to finance and generate “nature altering science;” 2) can now exercise more control in shaping the regulatory environments they operate within through bargaining, lobbying, and negotiation; 3) can also force states to compete with one another for private sector investment. Cragg argues this results in a lack of laws regarding workers right in an attempt to create a more hospitable

---

3 Santoro, M. 2010.
5 Cragg, W. 2010.
6 Cragg, W. pg 17. 2010.
7 Cragg, W. 2010.
environment for firms. Augestein and Kinley in, “When Human Rights ‘Responsibilities’ become ‘Duties’: The Extra-Territorial Obligations of States that Bind Corporations,” share this point. They argue the traditional “state-based paradigm” no longer works because of globalization and the diffusion of supply chains means firms operate in multiple states with differing governance codes. According to Augestein and Kinley, this polycentrism makes it difficult for a state to effectively regulate firms.

Cragg’s depiction of the evolving allocation of power between states and firms and the argument laid out in Kevin Farnsworth’s “Business and Human Rights” best support Augestein and Kinley’s assertion that more responsibility for human rights must be allocated to firms. Farnsworth relies on Peter Townsend’s research, which articulates four ways transnational corporations (TNCs) are seen to impact inequality, poverty, autonomy and freedom within the developed and developing countries they operate in. By relocating large portions of the means of production to often poorly regulated and lower tax states, often to boost profits, labor protection measures and employment standards are lowered.

---

8 Cragg, W. pg. 17. 2010.
11 Farnsworth, K. 2010.
Relocating means of production causes a rise in unemployment in the previously occupied location as well as a decrease in taxable income. This results in the undermining of social protection by increasing the burden on welfare systems while simultaneously reducing the tax base used to fund the social safety net, requiring the reduction of other resources to cover costs.\textsuperscript{12} Michael Moore’s film "Roger and Me" provides a well-illustrated example of this impact. It tracks the effect of General Motor’s relocation of manufacturing to Mexico on the city of Flint, Michigan. The community goes from a stable, healthy community to one plagued by poverty, crime, and devaluation as a result of the dramatic decrease in employment and taxable income to fund the social safety net much of the city comes to rely upon.

Townsend also argues that the pursuit of sales or new markets can lead corporations to “cut corners” and engage in inappropriate or illegal practices.\textsuperscript{13} TNCs who invest in corrupt or undemocratic states are accused of undermining workers’ rights and colluding with regimes that imprison, torture, and kill members of opposition groups.\textsuperscript{14} Farnsworth argues many of these states have significantly less environmental and labor regulation than where production took place previously, which does not evolve in response to the arrival of large firms.\textsuperscript{15} As a result, dangerous human rights violations can and often do take place in plain sight.\textsuperscript{16}

\textsuperscript{12} Farnsworth, K. 2010.
\textsuperscript{13} Farnsworth, K. 2010.
\textsuperscript{14} Farnsworth, K. 2010.
\textsuperscript{15} Farnsworth, K. 2010.
\textsuperscript{16} Farnsworth, K. 2010.
Klaus Leisinger’s argument shares a similar perspective as Cragg and Farnsworth but with a different conclusion. Their “Business and Human Rights” focuses on the importance of distinguishing the obligations of firms in “normal circumstances” as opposed to non-normal circumstances, and what he calls the “must” and “ought” dimensions of Corporate Social Responsibility (CSR). Lesinger defines “Normal” Circumstances as when corporations operate in countries characterized by good governance systems (i.e., legitimized exercise of political power; correct financial, economic, social and other policy decisions; the rule of law; rational allocation of resources). Unfortunately many countries circumstances are not “normal.”

In such circumstances, companies should go beyond the “must” dimension to the “ought” dimension which asks firms to do more than their legal obligations to human rights. Leisinger states a company must produce high-quality goods and services for which there is a demand from potential buyers with purchasing power and sell them at profitable prices in order to operate in a market system. In doing so, the firm must comply with all laws and regulatory requirements while also respecting relevant customs. In order to conduct activities, the business creates and maintains healthy and safe jobs,

18 Leisinger, K. 2006.
20 Leisinger, K. 2006.
22 Leisinger, K. 2006.
pays employees competitive a wage and treats them fairly. Additionally, the “must” dimension of responsibility includes environmental protections, contributions to pension funds/insurance systems, and paying taxes as required by the law. By accepting this “essential dimension” of CSR, firms contribute to the fulfillment of economic, social and cultural human rights of citizens, just by doing business under “normal circumstances.” Outside of such environments though, Leisinger argues it is in the interest of the firm to go beyond its legal obligation to remedy the states failures within its sphere of influence.

Leisinger frames the human rights responsibilities of businesses not as moral obligations but rather as a self-serving necessity, stating:

“The commitment of the state and its bodies does not exclude the assumption of responsibility by ‘other organs of society’. On the contrary, this becomes a duty precisely when the holders of state power are not able or willing to protect the citizens of a country from violation of their rights. Looking at the annual reports of Amnesty International, it is precisely in places where the state fails to meet its primary responsibilities that the potential vulnerability for companies is particularly high, because they have to operate in an extremely difficult sociopolitical environment.”

He concludes by stating there is no “moral question” in corporate social responsibility. Instead arguing a good manager realizes strong human rights commitments are a necessary component in being recognized as a world-class company.

---

26 Leisinger, K. 2006.
As appealing of an idea as this is, I found it to be weak and difficult to build upon. Firms cannot be responsible for moral obligations above and beyond those already within the legal system and still maximize profit. It is more convincing that a firm's human rights violations are closely linked to the failure of the state(s) they operate within.

**Overview of Argument**

I began investigating international human rights agreements as a means of relieving the collision of polycentrism in human rights governance, which are laid out by Gary Backer in “Governance Polycentrism-Hierarchy and Order Without Government in Business and Human Rights Regulation.” ²⁹ This thesis considers the human rights obligations of states and firms in a capitalist society through an economic analysis of law. It engages with primary sources as well as foundational texts on the topics of human rights, international governance and systems change while actively integrating traditionally marginalized perspectives.

Chapter one begins with an examination of the human rights and responsibilities enumerated in the International Declaration of Human Rights, specifically the right to an adequate standard of living, the responsibilities attached to them, and how those obligations are met in a capitalist system. I argue firms are able to violate human rights because states fail to protect,

respect, and fulfill human rights, which results in governance gaps. A slightly altered understanding of this concept is recognized by Annie Delaney and her collaborators in “Regulatory Challenges in the Australian Garment Industry: Human Rights in a post-Ruggie Environment,” among others, as a symptom of the true cause of human rights violations by firms.\(^{30}\) I show that firms are unable to remedy these violations adequately in a market system without state support, further indicating they occur as a result of the state’s failure. I conclude by arguing additional legal structures must be in place to ensure firms do not unintentionally violate human rights and asking how international human rights law that explicitly protects these rights can coexist with state-based governance gaps.

I look to answer this question in chapter two. I first consider the role of polycentrism in creating the global human rights regime and collisions of governance systems.\(^{31}\) I then explore hard and soft law with a framework drawn largely by the work of Kevin Abbott and Duncan Snidal’s “Hard and Soft Law in International Governance,” along with input from Michael Reisman and Kal Raustiala and consider the common assumption that high contracting costs make soft law a stronger choice for international human rights agreements than hard law.\(^{32}\)\(^{33}\)\(^{34}\)\(^{35}\) Abbot and Snidal measure a law’s effectiveness across three


\(^{31}\) Backer, L. 2014.

dimensions - obligation, precision, and delegation and implementation.  

Agreements with strength in all three areas fall under the classification of hard law, which is associated with high contracting costs and low transaction costs. Documents that are weaker in one or more of these areas are categorized as soft law, which has much lower contracting costs but higher transaction costs. 

Raustiala uses a similar framework to analyze the form and structure of international legal documents by legality, adherence to the status quo outlined in earlier documents, and enforcement mechanisms. 

I argue soft law offers more flexibility in agreements and generally lacks enforcement mechanism and binding language making it the preferred approach for international agreements, especially in human rights law. I attribute this preference for soft law as the cause of governance gaps and the result of the state’s lack of desire to meet its human rights obligations, and thus their existence is intentional. This perspective is further substantiated by a comparison of the Norms on the Responsibilities of Transnational Human Rights Obligations and United Nations Guiding Principles on Business and Human Rights, two United Nations human rights documents that I devote considerable

time to analyzing. Softer treaties that do not require enforcement mechanisms, such as The Guiding Principles on Business and Human Rights, generate stronger support from states than those with enforcement terms. Several papers by Wade Cole and contributions from Oona Hathaway that quantitatively measure the impact of specific elements on treaty ratification and the subsequent effect on behavior support my conclusion that enforcement mechanisms and binding terms dissuade states from supporting a document and their absence perpetuates governance gaps which allow human rights violations.

Throughout my research I was struck by the continued use of voluntary terms to prevent human rights violations and change the behavior of states or firms when they are clearly ineffective. This conclusion is shared by Steven Bittle and Laureen Snider in “Examining the Ruggie Report: Can Voluntary Guidelines Tame Global Capitalism?” However, Bittle and Snider argue the failure of

---

these documents is a result of the Guiding Principle’s incomplete incorporation of the driving force of global capitalism-profit maximization.\textsuperscript{48} While this is true, there are larger forces at play. Penelope Simons argues in “International Law’s Invisible Hand” that governance gaps prevent any international human rights agreement from truly succeeding.\textsuperscript{49} Simons argues the restricting of the legal system is necessary to eliminate governance gaps.\textsuperscript{50} While I agree with this assertion, I further conclude such a reshaping will not occur until human rights become a global priority.

In the final chapter, I return to my original assumption of moral obligation—but as it obligates firms to motivate state’s to protect, respect, fulfill human rights after briefly highlighting the danger of an international disregard for human rights and exploring potential alternative governance options. I substantiate this claim with the Universal Declaration of Human Rights preamble, and consider potential options for enforcing the human rights obligations of states. Ultimately—I utilize Donella Meadow’s description of systems change and leverage points to argue firms can and must motivate change through leverage points.\textsuperscript{51} \textsuperscript{52} The chapter ends with a brief case study of BSR, Business for Social Responsibility, a non-profit member-based organization.

\textsuperscript{47} Nolan, J. 2013.
\textsuperscript{48} Bittle, S., and Snider, L. 2013.
\textsuperscript{50} Simons, P. 2012.
\textsuperscript{52} Meadows, Donella. "Places to Intervene in a System." \textit{Whole Earth} 91 (1997): 78-84.
that uses the relationships between firms, civil service organizations, and governments to further environmental and human rights progress.\textsuperscript{53}

CHAPTER ONE
How States Fail

Introduction

This chapter will explore governance gaps as they occur in relation to human rights, specifically the human right to an adequate standard of living. It will use the human rights violations of firms that occur in a capitalist system while still meeting legal obligations to the state to argue the state has failed to protect, respect, and fulfill the human rights of individuals as it is required to under international law.

The term governance gap, first described by John Ruggie in an early version of the United Nation’s Guiding Principles on Business and Human rights, refers to the “failure to regulate increasing corporate power,” which according to Ruggie creates a “permissive environment where blameworthy acts by corporations may occur without adequate sanctioning or reparation.”54 55 56 57

56 In “Regulatory Challenges in the Australian Garment Industry: Human Rights in a post-Ruggie Environment,” Delaney et al. apply regulatory theory to examine the human rights responsibilities of firms in the Australian garment industry, focusing on the distinct responsibilities of states, firms, and non-state actors as articulated in the UN’s Guiding Principles of Business and Human Rights. The article concludes that the Guiding Principles reinforced governance gaps which enables human rights violations to occur without consequence. As I argue in chapter two, I agree with this
This explanation of human rights violations by firms fails to consider the status of state human rights obligations and its impact on corporate behavior. As I argue in this chapter, it is the role of the firm to maximize profit in the most efficient way possible, not to determine statutes. The primary human rights responsibility rests on states, as it is their role to regulate society for the benefit of the individuals with in. Attributing human rights violations to firms without considering the state’s behavior as paramount ignores the states duties to protect, respect, and fulfill human rights as well as the impact of market forces on firm behavior. In this thesis, the term governance gap indicates a regulatory lapse on the part of the state that allows firms to violate human rights legally, rather than a failure of firms. The presence of a governance gap is argued to be evidence of the state’s failure to meet its human rights responsibility adequately.

After discussing the scope and characteristics of human rights, I address the human rights obligations of states in a capitalist society and assert they are unfilled. While legislation like a minimum wage rate and social assistance
programs attempt to protect and fulfill the right to an adequate standard of living, I argue they are insufficient because firms are able to legally violate this right. Using an example of a based-in-reality firm, I show firms can and do violate their employee's right to an adequate standard of living when their actions prevent individuals from reasonably accessing an adequate standard of living.

Despite the violations being carried out by firms, international law places the primary responsibility to ensure economic rights with the state. I support this decision by showing firms are unable to remedy the violation of their employee's rights without compromising their main purpose— to increase efficiency and decrease costs by maximizing profit. If firms do not maximize profit in a market system, they are less competitive and more susceptible to failure and dissolution. I argue for firms to legally remedy violations without sacrificing themselves to the market, the government must participate in the process. This underscores the necessity of human rights duties resting primarily with states as well as indicating the current safeguards to prevent violations by firms are insufficient. I conclude this chapter by arguing additional legislation must be put in to ensure place human rights responsibilities are met, and questioning the adequacy of international human rights agreements that do not eliminate these governance gaps.

---

The Human Rights Obligations of States

According to the United Nation's Office of the High Commissioner on Human Rights (OHCHR), human rights are freedoms and claims inherent to all human beings whatever their nationality, place of residence, sex, gender, national origin, color, religion, language or any other status. Every person is entitled to enjoy human rights without discrimination and they are inherent by virtue of humanity alone. This means human rights do not need to be purchased, granted, or acquired in any way. Human rights are inalienable and universally applicable. Therefore an individual cannot be deprived of or arbitrarily discriminated against in the application of their rights within qualified legal boundaries. This forbids states or other organs of society from impeding on the human rights of an individual or ensuring the rights of one group of individuals over another. For example, states cannot meet their human

____________________

63 OHCHR. What are Human Rights.
64 This thesis uses the definition of human rights and their associated characteristics as recognized by the United Nations over the last 65 years. However, there are alternative perspectives regarding human rights. Some scholars argue the UDHR and related documents represented a narrow, Western view of human rights and fail to incorporate the values and opinions of other cultures and societies. It is the position of this thesis that every individual is inherently entitled to full realization for their human rights as articulated in the UDHR and related sources. For more on this discussion see Renteln’s *International Human Rights: Universalism versus Relativism* (2013), Donnelly’s *Universal Human Rights in Theory and in Practice* (2013), and Steiner, Alston, and Goodman’s *International Human Rights in Context* (1996).
65 OHCHR. What are Human Rights.
rights obligations to men but not women. However, there are specific legal boundaries to this protection. This includes that the right to freedom of movement may be suspended by humane imprisonment if an individual is found guilty of a crime by a fair trial by an independent judiciary.\textsuperscript{67} Like all rights, human rights are accompanied by implicit duties, which in this case are primarily the responsibility of states.\textsuperscript{68}

In 1948, the Universal Declaration of Human Rights (UDHR) affirmed minimum human rights in the first international treaty on the subject.\textsuperscript{69} The UDHR is the founding document of what is now referred to as the International Bill of Human Rights, which also includes the International Covenant on Political and Civil Rights (1966, entered into force 1976) and the International Covenant on Economic, Social, and Cultural Rights (1966, entered into force 1976).\textsuperscript{70} Currently, all member states of the United Nations have ratified at least one major human rights treaty, the International Bill of Human Rights, while more than 80% have ratified four or more.\textsuperscript{71} According to the OHCHR, a majority of the world recognizes the International Bill of Human Rights.\textsuperscript{72} By ratifying these documents, states they affirm their responsibility to protect, respect, and fulfill

\textsuperscript{67} OHCHR. What are Human Rights.
\textsuperscript{68} Icelandic Human Rights Centre.
the human rights articulated within it. These documents organize human rights into five categories—civil, cultural, economic, social, and political. 73 All of these rights are recognized in the International Bill of Human Rights.74 Civil and political rights often work together to protect public participation in society, while economic, cultural, and social rights are regularly grouped together.75 Civil rights generally serve to protect individuals from excesses on the part of the state, such as discrimination based on unchangeable personal characteristics like race, ethnicity, sex or gender.76 Political rights include procedural justice and rights to participate in civil society through the right to free association and freedom to assemble as well as freedom of speech and religion.77 Economic, social, and cultural rights are bit more general. The right to benefit from science and culture, and participation in and development through cultural life fall under the loosely defined cultural rights category.78 79 An adequate standard of living and freedom from discrimination in hiring practices, wage rate, and treatment are examples of recognized economic rights, while the rights to education, health

73 UDHR. Articles 22-23. 1948.
76 UDHR. Articles 1-5. 1948.
79 UDHR. Articles 24, 27. 1948.
care, housing and a social safety net are social rights.\textsuperscript{80} This thesis is concerned
with violations of or negative impacts on human rights by firms and will
therefore focus on the category of human rights this specific organ of society has
the most direct impact on, economic, social, and cultural (ESC) rights.\textsuperscript{81}

The UDHR charges states and all organs of society with fulfilling human
rights.\textsuperscript{82} The specific mention of states has been interpreted by the OHCHR as an
indication that human rights duties rest primarily with states.\textsuperscript{83} This has been
solidified by later human rights agreements and is widely accepted in
scholarship and practice.\textsuperscript{84} International law requires states to protect, respect,
and fulfill human rights. To protect rights, states must enact “laws that create
mechanisms to prevent violation [of all human rights] by the state authorities
and non-state actors.”\textsuperscript{85} These are positive obligations, as they require behavior
by the state, mainly to prevent third parties like firms from violating human
rights. Laws that prevent domestic or sexual violence are examples of the state
protecting rights stipulated in the UDHR. The duty to respect human rights
requires states to refrain from interfering with or curtailing enjoyment of human
rights. For example, the state cannot torture, tolerate unfair trials, or prevent

\textsuperscript{80} UDHR. Articles 23-24. 1948.
\textsuperscript{81} There is general consensus in the academic and legal communities that firms most
directly impact the economic, social, and cultural rights of individuals and have
more limited, indirect, contact with political and civil human rights. For more on this
subject see Orend’s Human Rights: Concept and Context (1971) and the work of the
University of Minnesota’s Human Rights Library Online, among others.
\textsuperscript{82} UDHR. 1948.
\textsuperscript{83} OHCHR. International Human Rights Law.
\textsuperscript{84} Abeyesekera, S & Bello, L. "Obligations of States and Nonstate Actors, Module 9."
\textsuperscript{85} UNFPA. "The Human Rights Based Approach." The Human Rights-Based Approach:
individuals from educating themselves. According to the United Nations Population Fund, “to fulfill [the] right[s] means to take active steps to put in place institutions and procedures, including the allocation of resources to enable people to enjoy the right.” Therefore, states must provide remedy to a faulty trial or intervention in situations of torture. While the state is not obligated to directly provide the necessary services, they must make resources available and provide legal guarantees to those whose rights have been violated. In other words, states must be the providers of a “last resort” that can be utilized for full enjoyment with ease at any time.

The Human Right to an Adequate Standard of Living

Article 25, section 1 of the UDHR states, “Everyone has the right to a standard of living adequate for the health and well-being of [themselves] and of [their] family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.” This single clause protects several economic and social human rights under the umbrella of an adequate standard of living. Food, clothing, housing, and medical care and access to an appropriately robust social safety net when necessary, all social rights, are defined by the UDHR as

---

86 Abeyesekera, S & Bello, L. "Obligations of States and Nonstate Actors, Module 9."
87 UNFPA.
88 Abeyesekera, S & Bello, L. "Obligations of States and Nonstate Actors, Module 9."
89 UDHR. Article 25. 1948.
important components of an adequate standard of living.\textsuperscript{90} Acknowledging the importance of individual access to livelihood underscores the economic right to participate in the market while also emphasizing the state responsibility protect, respect, and fulfill the right to an adequate standard of living if one cannot be accessed through the market alone.

These components, and the state of well-being derived from their sum, can be attained in one of two general ways, private procurement, public assistance or a combination of both. Private procurement means through the market, by the exchange of one good, typically money, for the desired necessity. Public assistance, or obtaining the bundle of goods outside the market system from the state or social services, occurs when a market system does not exist or an individual cannot secure all the required goods through the market system and the state undertakes the difference as they are compelled to by international law.\textsuperscript{91}

While the UDHR stipulates individuals have a right to an adequate standard of living and all the components of it, it does not specify how they must be provided only that the responsibilities attached to it ultimately rest with states.\textsuperscript{92} The duty to fulfill human rights requires the allocation of resources to ensure individuals enjoyment of human rights and access to remedy should the right be violated by the state, or another third party. This means that in a market system, a social safety net and the ability to participate in free exchange are both

\textsuperscript{90} UDHR. 1948.
\textsuperscript{91} UDHR. Articles 23-24. 1948.
\textsuperscript{92} Abeyesekera, S & Bello, L. "Obligations of States and Nonstate Actors, Module 9."
appropriate and required, as are laws that adequately protect against infringement by third parties.\footnote{UDHR. Articles 23-34. 1948.} This again leaves two options, private procurement or public assistance.

Minimum wage legislation is a good example of state-generated infrastructure to protect and fulfill human rights while a social safety net also serves to the fulfill responsibility. In a capitalist society, the right to an adequate standard of living is primarily fulfilled in the market rather than directly by the state. To fulfill its obligations, the state regulates the market as to ensure that individuals can achieve an adequate standard of living without violation by third parties. One of these regulations is a minimum wage. In theory, a minimum wage law ensures that employed individuals earn a wage that affords them an adequate standard of living. Though again, in theory, an artificially set minimum wage it may lead to more unemployment.\footnote{Adams, Scott, and David Neumark. "The Economic Effects of Living Wage Laws A Provisional Review." \textit{Urban Affairs Review} 40.2 (2004): 210-245.}

This unintended outcome of minimum wage legislation draws attention to another way states fulfill the human right to an adequate standard of living. The UDHR requires states to provide a safety net to supplement the income an individual earns through the market if it is below the amount necessary to afford an adequate standard of living or they are unable to participate in the market.\footnote{UDHR. Articles 23-25. 1948.} Public assistance can be in the form of income transfers like Electronic Benefit Transfer (EBT) cards, gifts in kind that provide a service like health care, and

---

\footnote{UDHR. Articles 23-34. 1948.}
\footnote{UDHR. Articles 23-25. 1948.}
vouchers or subsidies for housing, education, or other needs. While this does aid in the fulfillment of the right to an adequate standard of living, it does not prevent other actors from violating this right. As I show in this chapter, neither does the existing minimum wage regulation. This indicates the state has no met its human rights responsibilities.

The enactment of legislation intended to protect, respect, or fulfill the human right to an adequate standard of living does not automatically ensure states have met their obligations. While the United States government provides an arguably sufficient safety net and has a federal minimum wage law, it does not comprehensively protect or fulfill the human right to an adequate standard of living. The duty to protect clearly articulates there must be mechanisms in place to ensure third parties cannot violate human rights and the fulfillment of a right requires not only access to enjoyment but remedy and recourse in the event of a violation as well. In this section, I will argue firms can violate the right of employees to an adequate standard of living while meeting the legal requirements of the state even in the presence of a social safety net and minimum wage law. This indicates the state has failed to meet its human rights obligations, specifically to protect and fulfill human rights. It does not provide the necessary protection against violations perpetrated by third parties, and as

97 Volumes of work are devoted to the role of the social safety net in American society, the nexus of the welfare state and individual rights, and public assistance’s role in meeting the states human rights responsibilities, as it is a complex discussion. For more on this subject see the work of J. Donald Moon, specifically Responsibility, Rights, and Welfare: The Theory of the Welfare State (1988); Reich’s “Individual rights and social welfare: the emerging legal issues” 1964.
no laws are broken individuals do not have access to remedy or recourse through the state. I conclude states must amend or add to existing regulations to sufficiently meet its internationally recognized human rights responsibilities.

In order to participate in capitalism, an individual must have means to trade in the market, or currency. These means are generally earned through employment in the form of wages, though it can also be amassed through investment, inheritance, or other spontaneous ways like lottery. In the free market system, individuals work and earn a salary. This salary allows them to purchase the goods they need or want. Under the market system, the human right to an adequate standard of living is primarily filled through exchange. Therefore, individuals must be able to secure an adequate standard of living through the market through income in the form of salary or public assistance. States are also required to regulate the market to prevent violations by other actors, like firms. To ensure individuals have access to an adequate standard of living through the market with or without public assistance, states often legislate a minimum wage rate as well as provide social services to those who qualify.

**Identifying Human Rights Governance Gaps**

In a market system, the state’s infrastructure is insufficient if an adequate standard of living is not provided to all or if firms can legally violate the right. The state also fails if the infrastructure in place does not meet its intended goals. This may occur not just because individuals have too little income, but also
because they are not free to use the resources they have to the fullest. The existing legislation meant to protect, respect, and fulfill the right to an adequate standard of living is unsatisfactory because firms can impede their worker’s access to an adequate standard of living without violating the law.

States often rely on minimum wage legislation to meet their duty to fulfill the human right to an adequate standard of living. However, a minimum wage does not comprehensively ensure firms are unable to violate their employees right to an adequate standard of living. An adequate standard of living in the United States can be defined as the most recently available per capita income from the US Census Bureau.98 99 The per capita income from 2008-2012 was $28,051.100 This is just above 50% of $53,046, the median income from the same period.101 The current minimum wage legislation requires an hourly rate of $7.25 for most workers.102 103 The annual salary of a full-time minimum wage

98 In this thesis, an adequate standard of living is simply adequate. It is not intended to be an indication of comfort or prevent poverty.
99 There is significant discussion regarding the measurement of an adequate standard of living and the difference between an adequate and living wage. Some economists argue 20% above the federal poverty line is an adequate standard of living, while others disregard any delineation between adequate and the more living wage rate. For more on this, and various measures of adequacy see the work of Stephanie Luce [“Living Wage Policies and Campaigns: Lessons from the United States” (), Fighting for a Living Wage (2004), The Living Wage: Building a Fair Economy (1998)]; Adams and Neumark [“The Economic Effect of Living Wage Laws: A Provisional Review” 2004]; Fairris and Reich [“The Impacts of Living Wage Policies: Introduction to the Special Issue of Industrial Relations” (2005)] and Waltman’s The Case for a Living Wage (2004).
101 United States Census.
102 “Minimum Wage Laws in the States - Wage and Hour Division.”
employee who works 40 hours a week, 52 weeks a year is $15,080. This is nearly $13,000 below the income necessary for an adequate standard of living. The current minimum wage rate is insufficient to provide an adequate standard; therefore individuals must work more than 40 hours a week at or above the minimum wage to access an adequate standard of living. A firm violates this right if it acts in a way that prevents employees from doing so.

For example, consider a hypothetical large international retailer, Tramwal. Tramwal employs over 1.4 million store workers in the US. The average full-time employee earns just above the minimum wage at $15,576.08, more than the 133% maximum percent of the federal poverty line cut off to receive most means-tested public assistance, but not enough to access an adequate standard of living without additional income. This is not a violation of human rights on the part of the firm, but rather the result of the state's failure

---

103 Disabled people, tipped workers like wait staff and parking attendants, and people less than 20 years of age, are exempt from the minimum wage and can be paid less than $7.25 an hour regardless of the firm they are employed by. The minimum wage for tipped employees is $2.13, while there is not minimum wage for disabled workers. (Waltman, 2004). This is an example of the state’s policy failure to protect, respect, and fulfill the human right to an adequate standard of living. Individuals in these three categories cannot seek work elsewhere to ensure an adequate standard of living because the exemption is valid across the market. While there is certainly an argument to be made that this is another governance gap, it is separate from the kind of violation this chapter focuses on. For more discussion on this topic see Hernandez, “Employer Attitudes Towards Workers with Disabilities and their ADA Employment Rights: A Literature Review” 2000; Stein “Disability human rights” 2007.

to meet its obligations, as long as Tramwal’s actions do not prevent workers from securing additional income through non-coercive exchange. If Tramwal's actions prevent workers from reasonably accessing an adequate standard of living though, it is directly violating its employee’s rights.

A full-time non-manager position at Tramwal is 34 hours a week, six hours less than the national standard. This should allow employees, part- or full-time, the ability to secure additional employment. However, Tramwal recently adopted a new, computer-based scheduling system to increase efficiency. The program schedules a specific number of workers for each shift based on predicted customer traffic as to maximize customer experience and minimize costs to the firm. This number updates on a weekly basis, causing a weekly change in employee schedules. As a result, workers do not have predictable work hours and cannot commit to shifts at a second job elsewhere. Tramwal’s behavior is actively restricting the mobility of labor and therefore their ability to reasonably access an adequate standard of living.

The firm is violating the human rights of employees, but Tramwal’s actions are squarely within the law. Workers are paid above the minimum wage and there is no policy that directly prohibits individuals from holding more jobs. Employees can also work overtime, though it is rarely offered. Nevertheless, Tramwal’s behavior prevents workers from reasonably accessing an adequate standard of living. No laws are broken, indicating the state does not adequately protect against human rights violations perpetrated by third parties. Additionally, there are no means of legal recourse for employees because the
firm is meeting its legal obligations. This implies the state is also not meeting its obligation to fulfill the human right to an adequate standard of living. Therefore, the state must implement additional mechanisms to meet these responsibilities.

At first glance, it seems Tramwal is not truly limiting the mobility, and therefore access to an adequate standard of living, of its workforce. In theory employees can vacate their position at Tramwal in favor of a higher paying job or one with at least a more predictable schedule that would allow for additional employment if they so choose. However, minimum wages workers do not always have this luxury. A low paying job without the ability to secure additional, necessary income is still preferable to no income at all. The reality is that poor workers cannot afford to be unemployed, even for a short period of time. Unemployment benefits are tied to a percentage of previously earned income.\(^\text{105}\) If an individual is not making enough to secure an adequate standard of living, receiving financial support less than this amount fails to ensure enjoyment of the human right. Tramwal’s actions do not break any existing laws so there is no available remedy for individuals as the public assistance offered would be insufficient. Therefore the state is not meeting its responsibility to fulfill human rights. Further more, the lack of any mechanisms to successfully prevent Tramwal’s behavior indicates the state is not protecting the human right to an adequate standard of living either.

It could also be argued that there is nothing preventing employees from earning additional income through daily labor or the informal labor market. For example, an individual who works at Tramwal stocking inventory with an inconsistent schedule could utilize an employment agency to earn supplemental income, or advertise their services for odd jobs on flyers around town. However, it is likely this individual has commitments outside of work like transporting family members to and from work or school, preparing meals, and other important family related tasks. The unpredictability of their Tramwal schedule has already complicated completing their personal responsibilities. Expecting this individual to further stress their limited time in an attempt to access an adequate standard of living is unreasonable.

**Market Forces & The Inability of Firms to Act Alone**

In this section, I argue firms cannot reconcile their role to maximize profit with remedying legal human rights violations that occur in the process of doing so. Market forces and antitrust laws prevent firms in a capitalist system from remedying human rights violations without additional state action.\(^{106}\) Additionally, the state obligation to protect human rights requires effective mechanisms to ensure third party actors, like firms, cannot violate or impede

human rights. The ability of firms to violate employees right to an adequate standard of living within the regulatory framework in place implies the state is failing to meet its obligation to protect human rights. Furthermore, since the actions are not against the law, there is no recourse available for individual's whose human right to an adequate standard of living has been violated by a firm that would result in a change in firm behavior to prevent future violations. The lack of avenues for remedy indicates the state has also failed to meet the fulfillment element of its human rights obligations.

While it is the firm's policies that result in the human rights violation, Tramwal is not ultimately responsible or obligated to or capable of providing remedy to its workers. The goal of the firm is to increase efficiency and decrease costs to maximize profit. The behavior limiting workers access to an adequate standard of living is simply the firm attempting to maximize its profit. It is the job of the state to ensure laws are adequate and the firm’s job to follow them. By tracking customer traffic and generating work schedules on a weekly basis based on this data, Tramwal is able to pay the exact labor costs necessary. The firm does not lose money in extraneous labor costs for unneeded customer support or does it lose sales as a result of being understaffed. Tramwal is following the laws of the state while also successfully meeting its responsibility to maximize profit by increasing efficiency and decreasing costs. The violations

107 OHCHR, What are Human Rights.
109 Abeyesekera, S. & Bello, L. "Obligations of States and Nonstate Actors, Module 9."
that occur are the result of governance gaps supported by the state’s failure to meet its obligations.

The firm’s primary intention to maximize profit prevents it from remedying the human rights violations on its own without additional state support. The agile scheduling platform that keeps workers from securing additional non-coerced and legal employment to afford an adequate standard of living keeps Tramwal retail costs low. Without the program, Tramwal would be more likely to over pay in labor costs, resulting in an increase in prices.¹¹⁰ This price increase would prevent the firm from being as competitive as possible in the market and therefore result in the firm failing to meet its goal of profit maximization.¹¹¹ The price increase could so dramatically reduce revenue that the firm is forced to dissolve.¹¹² While this would remedy Tramwal’s violation, it would leave many unemployed and fail to prevent other firms from committing the same violation, as it does not fill the governance gap.

Tramwal could also attempt remedy the violation and still keep the scheduling system by increasing all workers, part and full time, to a living wage. However, the result would be the same. The wage increase would be passed on to consumers through price increases that would have a negative effect on Tramwal’s earnings and profits.¹¹³ By paying more than necessary in wage costs, the firm would still not meet its obligations to maximize profit. The ability of competitors to provide substitute or identical goods at lower cost would drive

¹¹⁰ Colander, D. 2010.
¹¹¹ Colander, D. 2010.
¹¹² Colander, D. 2010.
¹¹³ Colander, D. 2010.
Tramwal out of business. Again, it would nullify Tramwal’s violation but result in increased unemployment and not prevent other firms from violating the same human right, as the governance gap would remain intact.

Additionally, it is logical for the firm to assume the existing state regulation adequately protects, respects, and fulfills human rights. The state is recognized internationally as the actor primarily responsible for human rights obligations.\textsuperscript{114} The state is responsible for the interests of the people and crafting legislation to protect and benefit it.\textsuperscript{115} For example, the state successfully meets its responsibilities to ensure freedom from slavery, the right to own property, and freedom of expression and religion.\textsuperscript{116 117 118} This indicates the state has the capability to sufficiently meet its human rights responsibilities. Only firms that adequately meet the primarily responsibility of profit maximization are able to exist in the market.\textsuperscript{119} Therefore it is logical for a firm to assume a state failing to protect and further the interests of its citizens would not remain intact. The law should ensure firms can legally maximize profit in ways that do not violate human rights. Given that the state does already regulate the market, firms must be able to assume that operating with the legal framework in place also means acting in a way that does not violate the human rights of its workers. The state does have legislation in place to protect individuals from human rights violations by firms like the minimum wage

\textsuperscript{114} OHCHR, International Human Rights Law.  
\textsuperscript{115} OHCHR, What are Human Rights. 
\textsuperscript{116} UDHR. Article 4. 1948. 
\textsuperscript{117} UDHR. Article 7. 1948. 
\textsuperscript{118} UDHR. Articles 18-19. 1948. 
\textsuperscript{119} Colander, D. 2010.
requirements. The firm is charged with participating in exchange and earning a profit. It is not the job of the firm to ensure the legal framework it exists within appropriately protects, respects, and fulfills human rights. This is the responsibility of the state as it should be. The firm cannot be expected to do the job of the state, nor can the state be expected to efficiently do the job of the firm.

For Tramwal to effectively remedy the human rights violation without additional legal requirements or sacrificing itself to the invisible hand of the market it would have to persuade all firms to voluntarily change their behavior as well. While increasing all employee wages to a living wage would still bring an increase in price for consumers it would be consistent across the market and would not result in the dissolution of a single firm for taking the task on alone. However, this is illegal. Antitrust law forbids price fixing by cartels. Collaborating to increase the cost to consumers across the board as a means of self-preservation violates these terms by forming a private cartel. Private cartels have been illegal in the United States since the early 20th century. Unless the government participates in the cartel, making it public, the firms are violating antitrust laws. The required presence of the state to sanction the firm’s remedy to human rights violation further implies that the existing state-sponsored infrastructure fails to adequately meet its obligation to protect,

---

120 OHCHR, International Human Rights Law.
121 The Antitrust Laws.
123 The Antitrust Laws.
124 The Antitrust Laws.
respect, and fulfill human rights. It also proves that for effective change to take place, the state must act.

The only organ of society with the power to regulate the market in a way as to shelter firms from bankruptcy as a result of remedying human rights violations is the state. The main of objective of the state is to protect and further the interests of the people, not the market. Ensuring the market facilitates only free and open exchange is vital to those interests so state intervention in this scenario is necessary and appropriate. This ability is largely why the state is recognized as the primary protector of human rights. The minimum wage laws and social assistance programs are attempts by the state to meet its obligation to protect, respect, and fulfill the human right to an adequate standard of living within a capitalist system. However, firms are still able to violate this right while meeting their legal obligations to the state. Firms are able to restrict the mobility of labor through efficiency measures without violating legal standards. This prevents employees from reasonably securing an adequate standard of living. This indicates the state's obligation to protect human rights is insufficiently met. As the firm does not break any laws, there is no state-provided recourse for workers and therefore the responsibility to fulfill human rights is also inadequately met. This shows the state is not fulfilling its human rights duties as the legal system still allows for human rights violations.

\[125\text{ OHCHR. What are Human Rights.}\]
How the State Can Meet Its Obligations

Firms are unable to legally remedy human rights violations that occur as a result of a governance gap in a capitalist system without succumbing to market forces. This implies states are not adequately protecting individuals from human rights violations by third parties, particularly firms. As no laws are broken, individuals do not have access to recourse in these scenarios, indicating the state responsibility to fulfill human rights is also unmet. Therefore, it is the obligation of the state to eliminate governance gaps that allow human rights violations. This chapter focused on the ability of firms to violate workers right to an adequate standard of living by acting in a way that prevents them from reasonably accessing an adequate standard of living. It used the scheduling practices of a hypothetical firm, Tramwal, which prevents workers who make less than the amount necessary to access an adequate standard of living from having a consistent and predictable work schedule. As a result, individuals cannot easily secure additional employment that provides stable income. This impedes their access to an adequate standard of living but does not violate any of the regulations intended to protect, respect, and fulfill the states obligation to their right.

The presence of governance gaps and the states responsibilities to human rights under international law requires the state to reshape existing legislation or supplement it to ensure firms cannot their employees right to an adequate standard of living. There are policies, aside from a raising the minimum wage to

---

126 OHCHR. International Human Rights Law.
a living wage, which could accomplish this. For example, the state could
formalize definitions of full- and part-time work hours in a way that requires
individual work schedules to remain consistent on a quarterly, or yearly basis.
This would enable employees who cannot secure an adequate standard of living
with income from one position to reasonably secure supplemental employment
or income. Doing so would reduce the number of individuals reliant on public
assistance, which is in the interest of the state as means to reaching full
employment.¹²⁷

The existence of governance gaps that allow firms to legally violate
human rights indicate the state does not meet its obligations to universally
protect, respect, and fulfill these rights. Human rights and their associated duties
are defined by internationally recognized agreements including the
International Bill of Human Rights. These documents and the larger
international human rights regime should fill any gaps left by individual state’s
legislation. Clearly, it does not. In the next chapter, I will consider how and why
international human rights agreements can coexist with governance gaps that
violate their terms.

¹²⁷ Full employment is the level of unemployment at which all those who are willing
and able to work are fully employed. Full employment is above 0% unemployment
because not every individual is willing or able to participate in the job market. 0%
unemployment would also have a significant negative effect on price stability and
Chapter Two
Intentional Governance Gaps

Polycentrism & The International Human Rights Regime

In the last three decades, capitalism has largely succeeded in demonstrating the faults of alternative economic systems. The elimination of trade barriers and advances in communication and transportation has further globalized trade and allowed firms to relocate means of production to wherever costs are lowest. Firms now produce goods in one jurisdiction, are headquarteried in another and sell to consumers across the globe. They have their own governance systems and must also comply with the regulatory expectations where they are doing business. The legal obligations of firm in the state they are headquartered in compared to where means of production is are often contradict one another, especially in the case of human rights. This polycentrism can, and as chapter one argues, often does result in governance gaps. For example, The Children’s Place is a children’s clothing retailer headquartered in the United States, though much of the production takes place overseas. Child labor is a common occurrence in much of Southeast Asia where a

131 Backer, 2014.
significant percentage of the firm’s manufacturing occurs, but is strictly prohibited in the US. The Children’s Place must reconcile these contradictory terms with the expectations of its customer base and the economic realities of the garment industry.132

This polycentricism is further magnified by the diffusion of the supply chain.133 Firms often outsource production to independent factories and suppliers and are not directly responsible for the day-to-day operations surrounding their products.134 Determining responsibility for costly violations if they occur is difficult as a result.135 For example, in April of 2013, the Rana Plaza garment factory collapsed in Sakar, Greater Dhaka, Bangladesh.136 Over 1,120 people died and more than 2,100 were injured.137 The structure was built without proper building permits and factory managers forced many workers to come into work on the day of the collapse despite the building being closed by inspectors because of cracks in the foundation the day before.138 Garments and orders for well-known western companies including Wal-Mart, Joe Fresh, H&M, and The Children’s Place were found in the rubble. This raised questions about much responsibility those organizations have for the tragedy and specifically for

---

133 Backer, 2014.
137 Yardley, 2013.
138 Yardley, 2013.
working with a supplier not compliant with either local or corporate standards.\textsuperscript{139}

The collision between these governance systems highlights a need for a unifying code to effectively oversee human rights on a global scale.\textsuperscript{140} As Backer points out, several such documents exist.\textsuperscript{141} The aggregate form of these codes is referred to as the human rights regime.\textsuperscript{142} The UDHR and International Declaration of Human Rights are elements of this larger body of law articulated through the EU, UN, and similar organizations that intend to ensure human rights universally assured.\textsuperscript{143} However, these documents fail to alleviate contradictions and seem to only add to the number of collisions.\textsuperscript{144} The international human rights regime’s global reach should prevent governance gaps, but as chapter one clearly demonstrates, such gaps persist.

\section*{Chapter Overview}

This chapter looks at how and why the international human rights regime still permits human rights violations in the face of significant international human rights agreements. In theory, a global code of human rights would ensure universal application and protection of human rights. The International Bill of Human Rights does not meet this need though based on the existence of

\begin{footnotes}
\footnotetext[139]{Yardley, 2013.}
\footnotetext[140]{Backer, 2014.}
\footnotetext[141]{Backer, 2014.}
\footnotetext[142]{Yardley, 2013.}
\footnotetext[143]{Backer, L. 2014.}
\footnotetext[144]{Backer, L. 2014.}
\end{footnotes}
governance gaps. In Venezuela, Egypt, China and Russia strict government control of the press stifles freedom of expression and in the US, as I have shown, governance gaps allow firms to violate the human right to an adequate standard of living.\textsuperscript{145} 146 147 148 The global reach of this problem suggests the legal structures in place, even at the international level are inadequate and add to the proliferation of governance gaps. The sheer number of documents governing international human rights and the wealth of available knowledge and expertise on international law makes the probability of this area simply being overlooked is quite small. Each agreement fails in similar ways as not one effectively closes governance gaps.\textsuperscript{149} This indicates perhaps the failure is intentional on the part of the actors with the most at stake and primarily responsible for their drafting and ratification - states.

In the first section of this chapter, I will explore hard and soft law and the prevailing assumption as to why the differences between them consistently result in the use of soft law lacking in enforcement mechanisms and binding terms to create international human rights agreements. Abbott and Snidal’s “Hard and Soft Law in International Governance” figures predominantly into this analysis.\textsuperscript{150} I argue the clear preference for soft rather than hard international

---


\textsuperscript{146} “Egypt.” \textit{Egypt}. Committee to Protect Journalists, n.d. Web. 08 Apr. 2014

\textsuperscript{147} “China.” \textit{China}. Committee to Protect Journalists, n.d. Web. 08 Apr. 2014

\textsuperscript{148} “Russia.” \textit{Russia}. Committee to Protect Journalists, n.d. Web. 08 Apr. 2014


human rights law is not related to contracting costs but rather a direct result of the form’s lack of implementation mechanisms and binding terms. At the end of the section, I conclude this structure allows states to sign on to treaties without changing their behavior to meet human rights responsibilities they affirm or address governance gaps.

I then move on to a comparison of the failed Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (the Draft Norms) and it’s successor, the United Nations Guiding Principles on Business and Human Rights (UNGP). The work of Cole and Hathaway supports my textual analysis that posits only agreements that perpetuate the human rights status quo by omitting the two elements in question- binding terms and enforcement mechanisms- are ratified.151 152 The absence of any implementation requirements is widely recognized to be the cause of the continuation of governance gaps and treaty ineffectiveness. 153 154 155

I present the arguments of Bittle and Snider and Simons, who offer different perspectives as to why human rights law is based on voluntary agreements

despite its inability to close governance gaps in capitalism. \footnote{Bittle} \footnote{Simons} Bittle and Snider interpret the UNGP’s voluntary terms as its fatal flaw and an unintentional mistake while Simons argues it is the result of a structural inadequacy in the international legal system. \footnote{Bittle} \footnote{Simons} While I agree with these initial observations that recognize voluntary terms in international human rights law as a key issue, I suggest it is the result of states refusing to take up hard international rights law or support binding soft law with enforcement measures and is a symptom of a larger problem. I conclude arguing the continuous ratification of ineffective human rights agreements is a direct result of states’ disinterest in human rights and unwillingness to meet their obligations to universally protect, respect, and fulfill those rights.

**Hard and Soft Law, An Overview**

Abbott and Snidal offer a detailed survey of hard and soft law on the international stage in “Hard and Soft Law in International Governance.” \footnote{Abbot, K \& Snidal, D. 2000.} It puts forth a clear analysis of the two forms and engages with the assertion that agreements fall on a spectrum between hard and soft rather than a strict dichotomy of one or the other. \footnote{Abbot, K \& Snidal, D. 2000.} Their framework is based on the obligation, precision, and delegation and implementation. \footnote{Abbot, K \& Snidal, D. 2000.} **Explain what these mean.**
Hard law is consistent in its strength across all three dimensions as it is a legally binding obligation that is precise or can be made precise through adjudications or the issuance of detailed regulations. It also clearly delegates authority for interpreting and implementing the law. Soft law is weakened across one or more of these dimensions, but is still stronger than a political arrangement. The terms contracting and transaction costs are also used to describe the variance between soft and hard law in relation to these three dimensions. Abbott and Snidal argue that as strength, and therefore effectiveness, increases, so do contracting costs. Contracting costs are the sum of the loss of time and money that occur over the course of the bargaining process. This includes travel fees, the payment of legal experts, and even the cost of paper and pens for meetings. Contracting costs also include the loss of ground to reach necessary compromise among actors. Transaction costs are the value of the resources spent on determining and implementing delegation and enforcement measures after ratification. Abbott and Snidal posit that contracting costs and transaction costs are inversely related. The high contracting costs of hard law from strong obligation, precision, and implementation dimensions decrease the transaction costs. Predetermining the specifics of implementation before enacting the document increases material to be covered before ratification and

---

therefore contracting costs, but reduces the number of resources that must be allocated to coordinating implementation after ratification and cuts transaction costs as a result.\footnote{Abbot, K & Snidal, D. 2000.}

In this section I will apply Abbott and Snidal’s comparison of hard and soft international law’s benefits and drawbacks specifically in the context of human rights treaties. I will argue the continual use of soft law is an intentional decision on the part of states to avoid codifying enforceable human rights responsibilities that would require changes in their behavior to meet the existing obligation to universally protect, respect, and fulfill human rights, disguised by public concerns regarding contracting costs.

**Hard Law and Human Rights**

Hard law is primarily used for single state-based governance because its inherently high contracting costs rise as the number of stakeholders and actors increase; more voices mean more interests. This then requires more compromises.\footnote{Abbot, K & Snidal, D. 2000.} This is particularly relevant in the case of international human rights agreements and the concern is used to remove hard human rights law as a viable option. The UN has 195 member states with at least 195 official positions already tasked with balancing the many interests of their constituents.\footnote{“UNESCO Member States.” Member States. UNESCO, n.d. Web. 08 Apr. 2014. <http://www.unesco.org/new/en/member-states/countries/>.} There is not a uniform understanding of what it means to universally meet the state responsibility to protect, respect, and fulfill human rights. Some states,
particularly those with a religion-based legal system, interpret their human rights obligations in a way that contradicts the terms of the UDHR and systematically oppresses specific groups of individuals.\textsuperscript{174} 175 For example, in some states women do not have equal access to education under the law or in practice, or the right to own property.\textsuperscript{176} 177 In other, largely secular, states, this does not occur with the same frequency.\textsuperscript{178} 179 Without a unified definition of terms to start from, it is stipulated a compromise on the delegation and enforcement aspects of hard law is too unlikely to seriously consider.\textsuperscript{180} Precise obligations would require significant compromise among actors and result in hefty contracting costs.\textsuperscript{181} Considering negotiations are non-binding and sovereign nations can walk away at any point, it is argued there is little appeal in attempting this approach.\textsuperscript{182}

As a result, international agreements largely fall under the category of soft law.\textsuperscript{183} This includes the UDHR and other components of the International Declaration of Human Rights. Hard law does not easily lend itself to international

\begin{tabular}{l}
\textsuperscript{174} Cole, W. 2009. \\
\textsuperscript{176} Bunch, C. 1990. \\
\textsuperscript{177} McDougal, Myres S., Harold D. Lasswell, and Lung-chu Chen. "Human Rights for Women and World Public Order: The Outlawing of Sex-Based Discrimination." \textit{Am. J. Int'l L.} 69 (1975): 497. \\
\textsuperscript{178} This comparison is not intended to indicate secular nations are free of any sex and gender discrimination, rather to point out the more explicit nature of female oppression in states that do not provide equal access to education and legally limit the personal freedom of female and female-identifying individuals. \\
\textsuperscript{179} Bunch, C., 1990. \\
\textsuperscript{180} Abbott and Snidal. 2002. \\
\textsuperscript{181} Abbot, K & Snidal, D. 2000. \\
\textsuperscript{182} Abbot, K & Snidal, D. 2000. \\
\textsuperscript{183} Abbot, K & Snidal, D. 2000.
\end{tabular}
agreements with many signatories and perspectives, particularly because it requires a shared recognition of terms.\textsuperscript{184} While both hard and soft law must have at least some strength of obligation and precision, it is especially vital in hard law.\textsuperscript{185} Therefore, there must be an accepted definition of terms to draft the document and ensure a uniform interpretation of responsibilities and expected actions.\textsuperscript{186} This criterion prevents the creation of hard international human rights law because there is not a global commitment by states to human rights and their universal protection, respect, and fulfillment. The unequal protection of a free press and freedom of expression and the use of various characteristics like sex and gender identity to discriminate underscore this point.\textsuperscript{187} \textsuperscript{188}

While contract costs do exist with any agreement, they are particularly high in hard law. This is the result of the high cost of violations, the negotiation process, and the potential for infringement on sovereignty by requiring states to compromise on terms they feel strongly about.\textsuperscript{189} Hard law, as Abbott and Snidal defines it and others concur, includes clear terms for delegation of responsibilities, implementation and enforcement with avenues for recourse when terms are not met.\textsuperscript{190} As a result, states will not ratify hard law unless they genuinely intend to abide by its terms, which makes compromise vital. In the case of human rights, perspectives are so disparate that states claim compromise

\textsuperscript{184} Abbot, K & Snidal, D. 2000.
\textsuperscript{185} Abbot, K & Snidal, D. 2000.
\textsuperscript{186} Abbot, K & Snidal, D. 2000.
\textsuperscript{187} Bunch, C. 1990.
\textsuperscript{188} McDougal, M et Al. 1975.
\textsuperscript{189} Abbot, K & Snidal, D. 2000.
\textsuperscript{190} Abbot, K & Snidal, D. 2000.
is impossible. Unwilling to risk the consequences of violation for not conforming to an agreement, states simply remove hard law as an option.\textsuperscript{191}

However, the same characteristics that make hard law generally unappealing for international use also make it a somewhat enticing tool for international human rights law specifically. Implementation plans and hard law in general can demonstrate reliability and trust while also minimizing transaction costs, as the delegation of enforcement terms is already determined in the agreement.\textsuperscript{192} This means there is less responsibility on individual actors to create implementation plans.\textsuperscript{193} Essentially all that is left to do after ratification is to follow the terms. Previously agreed upon enforcement approaches reduce the potential for an uneven application of the law. As I will discuss later in this chapter, current human rights treaties lack strong enforcement mechanisms in an attempt to garner support for ratification. However, the terms of the agreement are left largely unenforced after approval as governance gaps remain. Determining how human rights will be enforced, and by who, before ratification would make the documents more effective.

Hard law also strengthens the credibility of commitments actors by creating opportunities for recourse through an independent judiciary.\textsuperscript{194}

Ensuring access to remedy that does not require individuals to rely only on the

\textsuperscript{191} Potential consequences for violations largely depend on the specific agreement and severity of the violation. However, they include indictment and prosecution by at The Hague, economic sanctions like tariffs, trade restrictions, withholding of foreign aid or investment or military action like no fly-zones.
\textsuperscript{192} Abbot, K & Snidal, D. 2000.
\textsuperscript{193} Abbot, K & Snidal, D. 2000.
\textsuperscript{194} Abbot, K & Snidal, D. 2000.
same system that is failing to meet its obligations strengthens the faith in the commitments made in an agreement, as an unbiased third party will verify them. In the context of human rights, providing a mechanism of relief independent from the perpetrator for those whose human right to freedom of expression is violated provides a measure of safety and reassurance. The strong commitment signaled by the enforcement mechanisms also serves as an opportunity for actors to formally commit to normative values.\textsuperscript{195} For example, the Civil Rights Act, a hard law, certified the US government’s belief to racial integration by outlawing segregation and committing to enforcing the law wherever it was violated.\textsuperscript{196} If the agreement had been ratified as soft law without any means of implementation or clear obligations, it would have been significantly less effective and considered a thinly veiled signal of disdain for the civil rights movement. A hard international human rights law would present the same opportunity on a global scale, however there is not international support for such an agreement.\textsuperscript{197}

**Soft Law and Human Rights**

Abbott and Snidal’s discussion of soft laws benefits for drafting international agreements suggests it is more conducive to crafting a human

\textsuperscript{195} Ibid. Abbot, K & Snidal, D. 2000.


rights document. However I argue the effectiveness of the documents structured in this way is limited or non-existent.

The flexibility of obligations and imprecision of soft law can allow actors to interpret terms of an agreement in whatever manner they desire. States have a strong preference for this approach regarding human rights, as it does not require them to alter their current behavior, even if it does not adequately meet the obligation to protect, respect, and fulfill the human rights of individuals. This also facilitates compromise and mutually beneficial cooperation when actors have different priorities or circumstances, making it most welcoming to non-state actors or states with a wide spectrum of goals. Given the multiple and often contradictory understanding of internationally recognized human rights, this is flexibility is appealing for states in human rights agreements.

Soft law also offers states an opportunity to learn the consequences of an agreement without completely committing to it and lowers the perceived costs if it evolves harder law later. States can implement various interpretations of an agreement with differing degrees of strength while still meeting their obligation to the terms of the document. For example, the UDHR stipulates access to education as a human right. Applying Abbott and Snidal’s framework, the imprecise nature of this obligation allows states to determine what the

203 UDHR, Article 26. 1948.
appropriate minimum level of education is, how education will be administered and if it will be different by gender, class, or age, while still successfully claiming to meet its obligations. Under this approach, states are not required to align their human rights decisions with other states. For example, in the United States, education must be equally accessible for all genders, but in Afghanistan significantly fewer girls are able to attend school than boys. Soft human rights agreements allow these disparities to be considered as variation of social values.

Abbott and Snidal’s framework can be used to make the case for soft human rights law seem logical and compelling. However, soft law cannot adequately eliminate human rights governance gaps. When discussing human rights law, states may argue protecting, respecting, and fulfilling the human rights of all genders equally contradicts their cultural values and doing so would violate revered religious principles. However, existing international human rights law and responsibilities require the universal application of rights as an innate characteristic of human rights. Hardening those agreements would require dissenting states to alter their behavior in a way they are not willing to do. Using a soft agreement, like the UDHR, avoids this conversation and entirely and allows states to interpret terms as they see fit without consequences as the terms are non-binding and vague enough to be interpreted by states as is the


case with the human right to an adequate standard of living. This again allows states that are uninterested in comprehensively meeting responsibilities to sign on to the document without committing to any action.

The perspective that a weak human rights treaty is better than none at all supports the use of soft law to create compromise rather than failed attempts at unity around hard law. The multiple interpretations of human rights and their associated responsibilities is a major obstacle to enacting hard human rights law, but it is not only related to the impact on contracting costs. It is not the disinterest in compromise that prevents hard human rights law. As the proliferation of governance gaps despite international human rights agreements suggests, states do not engage in hard human rights agreements because there is not a global commitment to the universal protection, respect, and fulfillment of human rights. States are not interested in the enforcement of their human rights responsibilities. Soft law, specifically soft law without enforcement mechanisms and binding language allows for the creation of documents that do not require states to meet these obligations. As a result, international human rights continue to add to collision and leave governance gaps intact.

For soft law to be effective, it must be applied equally to all relevant actors.207 There is little consistency in the application of human rights laws, underscoring the need for stronger regulation with an independent judiciary responsible for enforcement. Existing human rights accords are often violated, though only certain violations result in negative consequences for the

---

perpetrators. For example, The Republic of Belarus’ Ministry of Foreign Affairs’ “Human Rights Violations in Certain Countries in 2012” detailed hundreds of human rights abuses in 25 countries including the US, the UK, Finland, Netherlands, Canada and Switzerland. The explicit intention of the report was to draw attention to human rights violations by countries that regularly accuse other states of human rights violations and enact sanctions against them, but rarely if ever are on the receiving end of such decrees. While these violations may not be as well-publicized as those in developing countries, they are not actively hidden away either. This report underscores that the existing soft law agreements do not adequately enforce the human rights obligations and may allow more powerful states to penalize weaker actors for human rights abuses while not meeting responsibilities themselves.

Effective soft human rights law requires a shared understanding of what rights are guaranteed, what it means to violate human rights and who is responsible for their protection, promotion and fulfillment. The examples I have provided argue such an understanding does not exist at this time, despite a significant number of attempts to articulate these terms. Soft law does not elicit the same level of commitment to the terms of an agreement as hard law and therefore relies on a shared trust. At this time, there is little evidence to

suggest a great deal of trust between international actors or even a shared recognition of human rights as a priority.\textsuperscript{212}

The proliferation of international soft human rights law is not truly the result of the relatively high contracting costs of hard law. Given the clearly defined state responsibility to protect, respect, and fulfill, precise obligations supported by precedent would be easy to determine, as they already exist in the International Declaration of Human Rights. The true deterrent to hard law are the existence of multiple interpretations of human rights and the unwillingness to recognize universal human rights. States that do not already honor the universal protection, respect, and fulfillment of human rights has no desire to do so. This assertion is supported by a lack of enforcement measures and persistence of governance gaps despite a sizable arsenal of human rights treaties. This is why nearly every major international human rights agreement lacks enforcement measures. States do not consider universal human rights a priority and do not want to expose themselves to sanctions by failing to adhere to an enforced treaty.

While it may be the preference of states, soft law without enforcement mechanisms or binding terms is not in the best interest of human rights. The polycentrism that has been spurred by globalization underscores this point. Existing documents do nothing to alleviate governance gaps or the collision of systems that cause them.\textsuperscript{213,214} For example, no international soft law provides a

\textsuperscript{212} Cole, W., 2012.  
\textsuperscript{213} Delaney et. Al., 2013.
financial subsidy for firms to prevent or remedy a violation of the human right to an adequate standard of living. As argued in chapter one, additional state mechanisms are necessary to prevent firms from sacrificing themselves to the market in an attempt to remedy rights violations. No international law provides this support and so the gaps remain. Continuing to sacrifice the protection, respect, and fulfillment of human rights to simplify the negotiation process will continue to support governance gaps and violations. The inalienable, indivisible, universal nature of human rights requires a binding, enforceable agreement the strength of hard law. While it may be messy, reaching an agreement on terms for human rights could result in a significant improvement of state’s meeting responsibilities.

**The Draft Norms and the Guiding Principles**

The use of soft law allows states to sign onto agreements without implementing changes to meet human rights obligations or close governance gaps. Governance gaps, as I argue in chapter one, allow firms to violate human rights while meeting their legal obligations to the state. This indicates the state has failed to meet its human rights responsibilities, specifically to protect and fulfill rights. The last section ended with the suggestion the creation of ineffective human right agreements is intentional on the part of the state. The

rejection of the Draft Norms and approval of the UNGP, as well as the work of Cole, Hathaway, and others further substantiate this argument.\textsuperscript{215, 216, 217}

In this section, I will compare the Draft Norms to the UNGP to argue the Draft Norms was rejected because it contained enforcement mechanisms with an independent judiciary and required firms to independently ensure human rights as defined by the UDHR in their sphere of influence regardless of state law. Cole and Hathaway’s discussions of the effectiveness and structure of ratified international treaties substantiate this argument.\textsuperscript{218, 219, 220} If the Draft Norms had been ratified, firms would be required to universally meet human rights obligations even if the state legal structures collided with the UDHR’s terms. The enforcement mechanism would have independently filled governance gaps regardless of the state’s desire to take action. I argue states with human rights governance gaps would risk their economic security by not meeting their obligations to human rights. As chapter one shows, market forces would prevent firms from being capable of remedying human rights violations, and would therefore leave the state for one that is compliant with its internationally recognized human rights responsibilities. I assert the underlying motivation for the rejection of the Draft Norms and all similar treaties is a state aversion to the comprehensive enforcement of human rights responsibilities.

\textsuperscript{215} Cole, W. 2012.
\textsuperscript{216} Cole, W. 2009.
\textsuperscript{217} Hathaway, O. 2002.
\textsuperscript{218} Cole, W., 2012.
\textsuperscript{219} Cole, W., 2009.
\textsuperscript{220} Hathaway, O. 2002.
In 1973, the United Nations created the Commission on Transnational Corporations to study the impact of transnational corporations on development and international relations.\textsuperscript{221} The goal of the group was to draft a code of conduct for corporations, but it was unable to reach agreement on the project and dissolved in 1994.\textsuperscript{222} In 1998, the United Nations Sub-Commission on the Promotion and Protection of Human Rights reestablished the working group with the intention of codifying standards for the human rights obligations of firms.\textsuperscript{223} The Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (the Draft Norms) was submitted for consideration and ratification in 2003.\textsuperscript{224} While the Draft Norms received support from non-governmental organizations like Amnesty International, states and firms voiced significant opposition to the document and it was ultimately rejected in 2004.\textsuperscript{225} In 2005, United Nations Secretary General Kofi Annan appointed Professor John Ruggie as United Nations Special Representative on Business and Human Rights.\textsuperscript{226} Three years later, Ruggie presented the first draft of what would become the UNGP.\textsuperscript{227} The final version was unanimously endorsed by the United Nations Human Rights Council in 2011.

\begin{thebibliography}{99}
\textsuperscript{222} Deva, S and Bilchitz, D. 2013.
\textsuperscript{223} Deva, S and Bilchitz, D. 2013.
\textsuperscript{224} Deva, S and Bilchitz, D. 2013.
\textsuperscript{225} Deva, S and Bilchitz, D. 2013.
\textsuperscript{226} Deva, S and Bilchitz, D. 2013.
\textsuperscript{227} Deva, S and Bilchitz, D. 2013.
\end{thebibliography}
and is the first global standard on the relationship between firms and human rights.\textsuperscript{228}

While their inverse trajectories may suggest otherwise, the Draft Norms and UNGP are remarkably similar documents.\textsuperscript{229} They recognize the same international human rights documents as the minimum definition of human rights, and discuss largely overlapping subject areas.\textsuperscript{230} However, they differ in two significant ways. The Draft Norms included binding obligations and enforcement mechanisms while the UNGP did not. As a result, the Draft Norms effectively eliminated human rights governance gaps that arise in the normal operations of firms, while the UNGP fails to address them. The approval of the UNGP over the Draft Norms supports the argument that states intentionally avoid binding human rights treaties to prevent the full enforcement of their human rights responsibilities.

The UNGP’s "Protect, Respect, Remedy" model states, it is the state’s duty to protect "against human rights abuses through appropriate policies, regulation, and adjudication," and the responsibility of firms to respect human rights, and "act with due diligence to avoid infringing on [them] and address adverse impacts." States and firms share a joint responsibility to ensure access to effective remedies "for victims of corporate-related abuse, judicial and non-

\textsuperscript{228} Deva, S and Bilchitz, D. 2013.
\textsuperscript{229} For full text, see appendix.
\textsuperscript{230} Both documents primarily rely on the UDHR and ILO definitions of human rights.
judicial.” Sections 11 through 14 address the specific scope and requirements of the “respect pillar” of the UNGP’s model. This includes an articulation of the responsibilities of corporations in respecting human rights as defined by the UDHR, and offers potential minimum reporting and remediation expectations.

Sections 11-14 are as follows:

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

12 The responsibility of business enterprises to respect human rights refers to internationally recognized human rights- understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organization’s Declaration on Fundamental Principles and Rights at Work.

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

14 The responsibility of business enterprises to respect human rights applies to all enterprises regardless of their size, sector, operational context, ownership and structure. Nevertheless, the scale and complexity of the means through which enterprises meet that responsibility may vary according to these factors and with the severity of the enterprise’s adverse human rights impacts.

This framework actively allows for governance gaps by relying on voluntary rather than binding terms. Under the UNGP, firms are expected to voluntarily avoid infringing on human rights despite market forces pushing them to maximize profits as effectively as legally possible. The lack of an

---

obligation means only select firms will consider following the guidelines at the potential of a significant cost to their competitiveness and potential dissolution, as argued in chapter one. The result of the UNGP asking firms to “seek to prevent or mitigate adverse human rights impacts” instead of requiring them to do so is the continuance of governance gaps in areas where state law does not adequately protect or fulfill human rights. This allows firms to violate human rights while maximizing profit as Tramwal does in chapter one.233

Conversely, the Draft Norms provides the legal support firms need in the form of binding obligations to prevent human rights violations without exposing themselves to disproportionate risk in the market.234

A. General Obligations
1. States have the primary responsibility to promote, secure the fulfilment of, respect, ensure respect of, and protect human rights recognized in international as well as national law, including assuring that transnational corporations and other business enterprises respect human rights. Within their respective spheres of activity and influence, transnational corporations and other business enterprises have the obligation to promote, secure the fulfilment of, respect, ensure respect of, and protect human rights recognized in international as well as national law.235

E. Respect for National Sovereignty and Human Rights
10. Transnational corporations and other business enterprises shall recognize and respect applicable norms of international law; national laws; regulations; administrative practices; the rule of law; the public interest; development objectives; social, economic, and cultural policies including transparency, accountability, and prohibition of corruption; and authority of the countries in which the enterprises operate.

11. Transnational corporations and other business enterprises shall not offer, promise, give, accept, condone, knowingly benefit from, or demand a bribe or other improper advantage. Nor shall they be solicited or expected to give a bribe or other improper advantage to any government, public official, candidate for elective post, any

member of the armed forces or security forces, or any other individual or organization. Transnational corporations and other business enterprises shall refrain from any activity, which supports, solicits, or encourages States or any other entities to abuse human rights. They shall further seek to ensure that the goods and services they provide will not be used to abuse human rights.

12. Transnational corporations and other business enterprises shall respect civil, cultural, economic, political, and social rights, and contribute to their realization, in particular the rights to development; adequate food and drinking water; the highest attainable standard of physical and mental health; adequate housing; privacy; education; freedom of thought, conscience, and religion; and freedom of opinion and expression; and refrain from actions which obstruct or impede the realization of those rights.\textsuperscript{236}

As the above excerpt shows, the Draft Norms requires rather than asks firms to adhere to the UDHR regardless of state law. Stating firms are “obligated to promote, secure the fulfillment of, respect, ensure respect of, and protect human rights recognized in international as well as national law” makes it explicitly clear the UDHR exists above and beyond state laws.\textsuperscript{237} This is an example of international law clarifying collision or governance gaps. This difference in language closes governance gaps by requiring all firms to maximize profit under the same conditions as opposed to some firms incurring higher costs in an attempt to prevent or remedy human rights violations and eventually succumbing to the invisible hand of the market as a result. It eliminates the need for a cartel and allows firms to innovate to determine how to best maximize profit within the newly defined parameters of the market.

The impact of voluntary versus binding terms is easily illustrated by comparing the Draft Norms and UNGP’s language regarding discrimination in the work place. For example, article 23 UDHR forbids discrimination in hiring or

\textsuperscript{236} Draft Norms, Section E, part 10-12.
\textsuperscript{237} DN A part
wage rate practices.\textsuperscript{238} Therefore, the Draft Norms directly firms to not engage in
discrimination in hiring or treatment based on health status, marital status, race, color, language, religion, political opinion, sex and sexual orientation on the part of firms.\textsuperscript{239} This puts a direct obligation on firms, regardless of state laws to meet human rights. As a result all firms must maximize profit in the same way even if individual states differ in their discrimination policies. Under the UNGP though, firms must only respect the anti-discrimination laws of the state.\textsuperscript{240} This means firms can pay specific groups of individuals less than others for the same work if the state does not actively recognize them as a protected group.\textsuperscript{241} \textsuperscript{242} While the UNGP asks firms not to engage in this practice, there is no obligation for them not to. The logic here is faulty. No profit-maximizing firm would pay more than necessary for labor by hiring workers that are entitled to higher wages than they are legally required to pay other groups. If a firm operates in this way in a free market they would fail because it would drive the prices of their goods higher.

\footnotesize

\textsuperscript{238} UDHR, Article 23. 1948.

\textsuperscript{239} "B.Right to Equal Opportunity and Non-Discriminatory Treatment
2. Transnational corporations and other business enterprises shall ensure equality of opportunity and treatment, as provided in the relevant international instruments and national legislation as well as international human rights law, for the purpose of eliminating discrimination based on race, colour, sex, language, religion, political opinion, national or social origin, social status, indigenous status, disability, age (except for children who may be given greater protection), or other status of the individual unrelated to the inherent requirements to perform the job, or complying with special measures designed to overcome past discrimination against certain groups." Draft Norms, 2003.

\textsuperscript{240} Ruggie, J. 2011.

\textsuperscript{241} Ruggie, J. 2011. Part III, section B, article 26- commentary.

\textsuperscript{242} Ruggie, J. 2011. Part I, section B, article 3- commentary.
than competitors who do not engage in the practice.\textsuperscript{243} It is therefore in the economic interest of the firm to violate human rights under the UNGP to survive in a market system. In the Draft Norms though, the text clearly allocates responsibility to respect this human right directly on to all firms, equally. This provides the legal support discussed in chapter one that is necessary for eliminating governance gaps by requiring profit-maximizing behaviors to respect internationally recognized human rights, at minimum.

The most obvious difference between the Draft Norms and the UNGP results from the Draft Norms’ inclusion of enforcement terms and the UNGP’s clear omission of them. The Draft Norms devotes significant verbiage to issues of implementation, enforcement and delegation. Section H, articles 15 through 19 clearly states the minimum implementation obligations of firms in meeting responsibilities to human rights.\textsuperscript{244} These sections require the creation and dissemination of internal governance codes in accordance with the Draft Norms, inclusion of the Norms into all, “…contracts or other arrangements and other dealings…”\textsuperscript{245} and periodic monitoring of compliance by the United Nations as well as and other mechanisms in existence and those yet to be formed.\textsuperscript{246} Section H also requires states to, “…establish and reinforce…” appropriate framework responsible for monitoring implementation of the Norms by firms as well as

\textsuperscript{244} Draft Norms, Sections H. 2003.  
\textsuperscript{245} Draft Norms. Section H, article 15. 2003.  
\textsuperscript{246} Draft Norms. Section H, article 16. 2003.}
enforcement by national courts and tribunals. This addition recognizes the important role of states in protecting and fulfilling human rights and enforcing the Draft Norms without shifting focus away from firms. This final requirement also explicitly fills the protection and fulfillment gap highlighted in chapter one by requiring the implementation of additional legal mechanisms.

The UNGP intentionally disregards implementation requirements and enforcement mechanisms to garner support from states and encourage the voluntary cooperation from firms it is built upon. Without any enforcement or implementation mechanisms, the UNGP has no depth in the third dimension of law, delegation and implementation, as defined by Abbott and Snidal. The same understanding of these dimensions suggest the implementation and delegation mechanisms present in the Draft Norms appropriately strengthen the Draft Norms without a complete hardening of the agreement.

As I have already illustrated, the voluntary nature of the UNGP, or its weakness along the obligation dimension as defined by Abbott and Snidal, deeply undermines the terms of the agreement. The non-binding responsibilities leave existing governance gaps intact. In a capitalist system, this prevents firms from remedying legal violations that occur through profit maximization. Firms looking to prevent human rights abuse would need to spend more than their competitors. This would, as argued in chapter one, require an increase in the price of goods and make the firm less competitive and more susceptible to

---

fail. The lack of enforcement measures in the document results in the same conflict as that recreated by the voluntary terms.

The inclusion of enforcement in the Draft Norms provides the state support firms need to address human rights issues. The binding nature of its obligations allows firms to remedy human rights obligations without failing in the market. It also furthers the universal realization of human rights by requiring firms to act regardless of state failures, or face negative consequences. This would require the recognition of human rights by states at the risk of economic upheaval. The obligation of firms to act when states fail increases costs to firms that operate in states that fail to meet human rights responsibilities. To maximize profits, firms would need to relocate to states that embrace their human rights responsibilities. The spread of global capitalism makes this relatively simple and worthwhile for firms.\(^{249}\) For states to maintain the number of firms operating means of production in their jurisdiction in this scenario, they would need to comprehensively assume their human rights responsibilities. This would significantly further the global application of human rights and effectively eliminate human rights governance gaps in capitalism.

However, the Draft Norms was rejected by states in favor of a document that does not require a change in behavior.\(^{250}\) The UNGP’s voluntary terms penalizes firms willing to remedy state human rights failures in a capitalist system by subjecting them to increase risk. The lack of legal scaffolding would

\(^{249}\)Backer, L. 2014.
\(^{250}\)Deva, S and Bilchitz, D. 2013.
require firms to voluntarily outspend competitors to remedy human rights abuses. This would not likely occur. The vocal support for the UNGP and impassioned rejection of the Draft Norms suggests state are deeply adverse to the universal implementation of human rights, especially considering that the Draft Norms placed no binding terms on states.\textsuperscript{251} \textsuperscript{252} This suggests states are actively opposed to human rights obligations being met, even when it requires nothing of them.

**Substantiating The Claim of Intentionality**

There is significant scholarship that supports the argument that states are disinterested in furthering the universal application and fulfillment of human rights.\textsuperscript{253} \textsuperscript{254} \textsuperscript{255}

In “Hard and Soft Commitments to Human Rights Treaties, 1966-2000,” Cole uses quantitative analysis to examine what determines how fully a state will commit to individual treaties within the international human rights regime. Hir’s analysis suggests that, “rates of treaty membership are shaped more by a

\textsuperscript{251} Deva, S and Bilchitz, D. 2013.
\textsuperscript{252} After the rejection of the Draft Norms and submission of the UNGP for public comment, over 100 civil service and non-governmental organizations published an open letter voicing their concern over the structural differences between the documents. A copy of this letter can be found here <http://www.escr-net.org/sites/default/files/Joint_Civil_Society_Statement_on_the_draft_Guiding_Principles_on_Business_and_Human_Rights.pdf>.
\textsuperscript{253} Cole, W. 2009.
\textsuperscript{254} Cole, W. 2012.
\textsuperscript{255} Hathaway, O. 2002.
treaty’s implementation provisions than by its substantive content.” The results also indicate rates of treaty membership vary by type of commitment. Hard, or harder, law generates lower levels of membership than softer treaties. This correlation is explored further in “Human Rights as Myth and Ceremony? Reevaluating the Effectiveness of Human Rights Treaties, 1981-2007.” The analysis finds that stronger commitments with optional enforcement mechanisms are associated with improved human rights practices over those that lack any implementation measures at all. The lack of binding treaties with mandatory enforcement measures made repeating the regressions for further comparison impossible. Cole’s findings also indicate the rate of treaty membership among Muslim countries, whose general interpretation of the UDHR is more limited than the dominant Western view, is positively correlated with softness of commitment. Cole’s research supports my argument that states are disinterested in binding treaties with required enforcement mechanisms. The positive correlation between number of Muslim countries that sign a treaty and the weakness obligations also substantiates my claim that states whose interpretation of human rights responsibilities contradicts the terms of the International Bill of Rights, particularly the UDHR, are unwilling to modify their position to further the universal realization of human rights.

---

Oona Hathaway’s “Do Human Rights Treaties Matter?” is an earlier and more comprehensive study of the same questions posed by Cole. In the analysis, Hathaway notes that at first glance there appears to be a relationship between treaty ratification and the human rights rating of a state. Countries that have ratified more treaties have higher human rights scores. However, countries with poorer human rights ratings are sometimes more likely to have ratified individual treaties than those with higher rankings.\textsuperscript{262} Deeper analysis depicts an even more pessimistic view of treaty effectiveness. Evidence suggests weaker obligations entice countries with lower scores and that the high number of ratified agreements is the result of an equally high number of weak treaties.\textsuperscript{263} According to the data, countries with the worst human rights ratings are as likely to have joined a treaty forbidding the behavior they perpetrate, as they are to not have ratified it.\textsuperscript{264} For example, 50\% of states in which acts of genocide have occurred had previously ratified treaties against it.\textsuperscript{265} This suggests ratification does not impact state behavior.

Approaching Cole and Hathaway’s research as in dialogue with one another rather than as completely independent reduces the potential for lurking or confounding variables. On its own, Hathaway’s results suggest treaty ratification has little to no effect on a state meeting its human rights obligations, or even a negative effect.\textsuperscript{266} These findings could be considered evidence of the

\footnotesize{\textsuperscript{262} Hathaway, O. pg. 1976-8. 2002.  
\textsuperscript{263} Hathaway, O. 2002.  
\textsuperscript{265} Hathaway, O. pg.1981. 2002.  
\textsuperscript{266} Hathaway, O. pg. 1976-8. 2002.}
general ineffectiveness of international treaties. However, when considered in conversation with Cole's findings that indicate treaties without enforcement mechanisms garner significantly more support, especially by states with interpretations of human rights that are in conflict with the UDHR, it suggests it is not a flaw inherent in all treaties but rather the structure that is consistently preferred for ratification by states. This substantiates my argument that soft human rights law is intentionally used by states to build support for purposefully ineffective treaties.

Bittle and Snider and Simons work is also concerned with the impact of voluntary terms on treaty effectiveness, specifically as it applies to the UNGP, and recognizes it as a symptom of a larger concern. Bittle and Snider argue the UNGP is flawed because the voluntary nature of its terms conflict with driving forces of capitalism. I have demonstrated this assertion in chapter one in my textual analysis of the UNGP. However, the authors argue the lack of binding language is the result of the document’s overall failure to recognize the immense role of profit maximization in firm's decision making processes. I find this conclusion to be suspect. The UNGP does not include the exact elements that resulted in its predecessor’s demise- enforcement mechanisms and binding terms. The lack of these components is recognized what deems the UNGP ineffective. It is more likely that the absence of the enforcement mechanisms and binding language was an intentional choice to gain support from states and other

stakeholders who lobbied against the Draft Norms than a misunderstanding of relatively basic economic theory by the well-informed author. Considering the rejection of the Draft Norms in the context of the larger body of ratified human rights treaties and the rejection of the Draft Norms, arguing the UNGP is unintentionally ineffective misses the clear indications suggesting otherwise.

Simons offers a different perspective in “International Law’s Invisible Hand and the Future of Corporate Accountability for Violations of Human Rights.” Ze argues the UNGP’s framework, which Ruggie argues eliminates governance gaps, does not in fact achieve this nor does it address the system that perpetuates these gaps. 269 270 While I agree with this initial perspective, Simons argues the structure of the international legal system, specifically the insertion of international financial institutions, like the IMF and World Bank, into developing countries perpetuates a disregard for corporate human rights violations. I disagree with the implicit assertion that firms are capable of exercising such complete control over the international community as to comprehensively prevent binding human rights agreements. Simons uses the same definition of governance gaps as originally suggested by Ruggie and accepted by Delany et al which I argue in chapter one does not consider the status of states’ responsibilities to protect, respect, and fulfill human rights. 271

270 Simons, P. 2012.
While Simons is right to draw attention to the international legal system, the blame is misdirected. There has been a lack of enforcement of human rights obligations since the UDHR’s ratification in 1948; it is not exclusive to documents that look to define the relationship between firms and human rights. As I have argued throughout this chapter, and provided evidence to support, states have consistently avoided treaties with binding terms and enforcement mechanisms.

One could argue that the rejection of the Draft Norms, which placed obligations on firms, substantiates Simons’ argument. However, as economic analysis indicates, the binding nature of the Draft Norms used firms as an intermediary for enforcing the human rights obligations of states. Requiring firms to actively fill the governance vacuums created the failures of the state increases the firm’s costs to operate in states with inadequate human rights protections. This incentivizes moving means of production to states that more fully meet their obligations, and therefore requires states to move more quickly towards the universal application of human rights. States rejected the Draft Norms, not firms. In fact, states are the only category of actors to participate in the ratifying or rejection of every document in the international human rights regime. This suggests it is states, not firms, who avoid binding, enforceable human rights documents.
Conclusion

The Guiding Principle’s approval over the Draft Norms, which the example shows respects the universal and inalienable nature of all human rights, suggests states do not consider human rights obligations a priority. Soft law without obligation and enforcement mechanisms supports varied interpretations of human rights that result in both the systematic and spontaneous deprivation of rights through governance gaps and state-executed discrimination. This is not an effective means of articulating or enforcing state’s human rights obligations. Allowing states to interpret rights as they see fit does not ensure the responsibility to protect, respect, and fulfill all individual’s rights is taken seriously but rather allows states to cherry pick the rights or individuals they find most convenient or favor.

The continuation of governance gaps is the result of states desire to keep structural failures in place and avoid human rights responsibilities. Virtually all international human rights law is soft, despite the inability of the particularly preferred interpretation of the form to authoritatively require a change in behavior.\(^{272}\) The Draft Norms and UNGP allocate the same responsibilities to actors as recognized by other international laws, yet the Draft Norms was rejected and as a result, deemed a failure by its author.\(^{273}\) The chief differences

\(^{272}\) Hathaway, O. 2002.
between the documents are in the application of blanket obligations to firms and enforcement mechanisms in the Draft Norms and the absence of both in the UNGP. The Draft Norms circumvents states and requires firms to respect human rights regardless of state’s behavior. This provides the necessary market cover for firms to remedy human rights violations caused by governance gaps in a capitalist system. The UNGP suggests firms respect human rights, knowing market forces will prevent them from doing so.

Cole and Hathaway’s analyses confirm the determining factors for treaty support is voluntary terms and a lack of enforcement mechanisms despite such agreements being ineffective at furthering human rights.\textsuperscript{274 275 276} Nothing in any functioning legal system bars either of these elements, as they are a vital component of hard law. Their continued commission is an active choice by those making the decisions- states. The cause of governance gaps is clear from states continued preference for enforcement-free, voluntary soft law. States do not favor the universal enforcement of their human rights obligations.

In my third and final chapter, I will briefly consider the theoretical implications of the state’s disdain for the realization of universal human rights and alternative governance options. I will then revisit firm’s potential moral obligations to human rights before introducing a systems approach to identify opportunities to motivate the global community to prioritize internationally defined human rights.

\textsuperscript{274} Cole, W. 2009.  
\textsuperscript{275} Cole, W. 2012.  
\textsuperscript{276} Hathaway, O. 2002.
CHAPTER THREE

Moving Forward

Overview

As the previous two chapters argue, states have obligations to human rights that are currently unfulfilled, and the international agreements presently available do not adequately ensure implementation and enforcement of measures to fill these gaps. A comparison of the Guiding Principles and Draft Norms as well as analysis on the defining elements of human rights treaties indicate international human rights agreements intentionally lack enforcement mechanisms and binding terms. This proliferates the existence of governance gaps and allows states to continue avoiding their human rights responsibilities.

The evidence suggests states are disinterested in meeting their responsibility to universally protect, respect, and fulfill human rights. This chapter will briefly discuss the implications of international disregard for human rights before asserting firms have a moral obligation to participate in securing universal human rights. I then moving on to consider how a systems thinking approach, as presented by Donella Meadows, can be used to identify leverage points for firms to motivate states to prioritize human rights.
**Why Human Rights Matter**

History indicates that state sanctioned violations of human rights can quickly escalate from small-scale micro-aggressions to larger forms of legalized oppression. Approved in 1947, scholars often assert that the UDHR was an attempt at a global response to The Holocaust and World War II\(^\text{277}\,\text{278}\). The preamble of the document expressly states “disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind...”\(^\text{279}\) There is no shortage of examples demonstrating the implications of human rights abuses, but articulating the importance of rights aside from this is difficult.

While it is easy to say when one is oppressed, we are all oppressed, this statement does not adequately convey the intangibility of why the universal protection, respecting, and fulfillment is the most urgent priority. The UN


\(^{278}\) The UDHR includes several specific articles that directly invalidate the Nuremburg Laws. The Nuremburg Laws were the legal framework from which the Third Reich based all subsequent actions. The Reich Citizenship Law, enacted on September 15, 1935, stripped Jews of German citizenship and created the distinction between “Reich citizens” and “nationals”\(^\text{278}\). Article 15 of the UDHR states, "Everyone has the right a nationality. No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality." The articles are also careful to extend equal protection to all inhabitants of a State, not just citizens or legal residents. The Law for the Protection of German Blood and German Honor, enacted September 15, 1935, dissolves existing marriages between Jews and German citizens, outlaws future marriages, and among other actions, forbade Jews from employing female German citizens or “kindred blood” as domestic servants\(^\text{278}\). Article 16 of the UDHR protects the right of male and female individuals of proper age to marry regardless of race, nationality, or religion and to have that marriage/family unit protected by society and the State

\(^{279}\) UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III)
Charter states the goals of the UN to be the promotion of social progress and a better standard of living in larger freedom. This is reaffirmed in the UDHR, The Declaration of the Right to Development, and many other UN documents. The explicit recognition of the need for constant improvement in the human experience in these documents best conveys the importance of human rights. Humanity has the innate desire to move forward, expand its horizons and progress. These goals cannot be met without the full realization of human rights. The positive correlation between human rights and economic, social, and political development is well documented; indicating the states refusal to meet its human rights obligations directly impedes this ascent.

One World, One Government

The statist answer to ensure universal application of human rights is to create some sort of world government, capable of enforcing the human rights obligations of states, firms, and individuals. This is appealing at first but riddled

---

281 UDHR, Preamble. 1948.
with serious, unavoidable problems.\textsuperscript{285} One body with the ability to enforce human rights obligations across borders with limited outside influence could offer a remedy to individual states general disregard for human rights concerns. Having one centralized power would alleviate contracting and transaction costs, as defined by Abbott and Snidal, because states and firms would be forced into cooperation and innovation with a pre-existing independent judiciary body charged with enforcing the agreement. This would prevent the use of these concerns from impeding progress.

However, it is not difficult to imagine the negative implications of such a wide-reaching and powerful centralized governing force. While the UN does set some precedent for a similarly structured organization, the enforcement capabilities of this so-called world government make it quite unique. There would be great potential for abuse as without proper checks and balances the organization could easily oppress and marginalize groups intentionally, and unintentionally. The emphasis on individual rights above all would complicate matters concerning justice, group rights, and the provision public goods.\textsuperscript{286}


\textsuperscript{286} Public Goods are both non-excludable and non-rivalrous in consumption. This means the cost of keeping individuals who do not contribute towards the good is prohibitive and private firms cannot compete to provide it. National defense is a commonly referenced example of a public good. A world governance system that focuses exclusively on individual rights would face significant challenges in providing public goods, which are often considered necessary to meet human rights
Additionally, a singular body responsible for human rights would be a bureaucratic nightmare, likely unable to respond to pressing concerns or implement change quickly.

Coordinating this body would also be a logistical nightmare. In order for its power be recognized, states would need to collectively acknowledge its authority, which would not be likely if their sovereignty was disregarded or perceived to be. It is also unlikely as the necessity for the body arises from the states disinterest in meeting human rights obligations. It would be easy, if not inevitable, for the perception of high sovereignty costs of globally enforced human rights to lead to the destruction of the organization all together. There has yet to be a strong enough incentive for states to prioritize human rights and the creation of an additional authoritative body would not remedy this. There is no indication states would react to this global governance system any differently than attempts to codify hard human rights law. There are also more menial concerns, such as allocating funds for the organization, the election or appointment of representatives, and determining the location and exact structure of the body.

Hardening existing UN human rights agreements could be a promising alternative. The language and conditions are already in place and enjoy some significant support, but the inclusion of effective implementation and enforcement mechanisms would be unpopular and require a radical

restructuring of the UN that would likely not enjoy the same support. Like a world governance system, hardening existing agreements would still require some level of buy-in from state actors. Given the unwillingness to construct hard human rights law to begin with, it is unlikely the necessary state support would be there.

The Moral Obligation of the Firm

A state’s failure to protect, respect, or fulfill the human rights of individuals does not negate the existence of those rights or allow other organs of society, like firms, to violate them. In this section I will build on Klaus Leisinger’s “must dimension of societal responsibility” to argue that even when governance gaps allow firms to legally violate human rights, a moral obligation remains.287

For a firm to participate in the market, it must comply with all relevant state laws and regulatory requirements. This includes statutes intended to protect, respect, and fulfill the human rights to an adequate standard of living and freedom from discrimination in hiring practices, even if they insufficiently meet these standards. The firm’s adherence to these tenants indicates the firm’s recognition of the “must” or legal dimension societal responsibility.288 Lesinger argues that by meeting these obligations, firms participate in the fulfillment of


economic, social, and cultural rights. Under “normal circumstances”, the law adequately meets the states human rights obligations and prevents firms from violating human rights. However, as argued in chapter one, these normal circumstances are uncommon as governance gaps allow firms to legally violate human rights. In this scenario, Leisinger argues firms should, “go beyond the “must” dimension to the “ought” dimension.” To protect and ensure human rights just as the Draft Norms call for, Lesinger uses UDHR to substantiate this claim.

Paragraph six of the UDHR Preamble states, “…every individual and organ of society…shall strive…to promote respect for these rights and freedoms and by progress measures, national and international, to secure their universal and effective recognition and observance…” I argue the strength of this moral obligation to act is a function of the specific organ’s proximity to the violation and its ability to drive states to protect, respect and fulfill specific human rights through normal action. For example, firms have a strong moral obligation to promote respect for its employees right to an adequate standard of living by acting in a way that does not prevent them from accessing a living wage. This obligation is stronger than that of an individual because firms can instate policies that protect or impede this goal through its normal actions of contracting labor and more readily influence regulation of the market. As Cragg argues in Business and Human Rights, the relationship between states and firms

---

290 Leisinger, K. 2006.
292 UDHR, Preamble. 1948.
has evolved to a more equitable distribution of power in the last thirty years.\textsuperscript{293} Firms are now more capable of shaping their regulatory environment through lobbying, bargaining, and negotiation than before because they can more easily move from state to state, making states more eager to craft hospitable regulation.\textsuperscript{294} States now need to more actively court the interests of firms to secure the presence of means of production within their jurisdiction and demonstrate their superiority as opposed to another states.\textsuperscript{295}

The current approach for enforcing states’ obligations to human rights is inadequate, as it does not address the underlying obstacle to success—the state’s lack of genuine concern for human rights.\textsuperscript{296} Many organizations, like Amnesty International, International Labor Organization, Human Rights Watch, and others, focus on changing the hearts and minds of world leaders to make human rights a priority by “naming and shaming” abusers.\textsuperscript{297} The proliferation of governance gaps indicates this has not been effective in generating sustained positive change. Therefore, an alternative avenue must be pursued.

The existing human rights agreements are all attempts to change the system generating human rights violations by introducing a new element, regulation, rather than cultivating change from within. The inability of any of

\textsuperscript{294} Cragg, W. 2010.
\textsuperscript{295} Cragg, W. 2010.
\textsuperscript{296} See Chapter Two.
these documents to be truly successful, despite some variation in their strength in the dimensions of obligation, precision, and implementation, suggests it is not just the legislation that is defective. It implies rather that the defect lies within the system it is attempting to regulate. For governance gaps to be eliminated and the legally permissible human rights violations by firms to cease, a change must occur within the system.

**Firms as Agents of Systems Change**

While firms may be economically incapable of remedying their human rights violations in a market system without state support, they are not exempt from leveraging their strengths to motivate states to act. Economic growth and stability are major concerns for every state regardless of their stage of development. States need firms to facilitate and participate in exchange for this to occur. If human rights and the elimination of governance gaps is a priority for firms, it will become one for states as well.

Aspects of industry that are priorities for firms, like infrastructure, regulatory requirements, human capital and technology are often made priorities for the state as well. For example, firms in the United States have identified a shortage of human capital in math and science as a weakness that complicates a firm’s ability to expand and succeed. In response, the state has prioritized science, technology, and math education at all levels through the

---

common core curriculum and special programs to engage students, incentives for firm-sponsored or supported job training programs, and committed to facilitate more partnerships between the state and firms to support innovation. Firms must encourage the state to prioritize human rights in the same way by placing more emphasis on human rights in their own corporate governance policies and decision making processes. Making human rights an urgent concern for business would make it an urgent concern for states.

The Systems Thinking and Change Approach

A system is composed of interrelated parts or structures that produce a unique pattern of behavior over time to achieve a specific outcome. Systems can be natural, like the solar system, or designed like states and firms. Systems thinking is based on the idea that individual aspects of a system, whether planets, governmental agencies, or departments within a firm, are best understood in the context of their relationships to other system components and that understanding the relationship between structure and behavior is vital to understanding how the system works. Robert Pirsig’s *Zen and the Art of Motorcycle Maintenance* illustrates this point.

“If a factory is torn down but the rationality which produced it is left standing, then that rationality will simply produce another factory. If a revolution destroys a government, but the systematic patterns of thought that produced that government are

---

299 “Educate to Innovate.”
left intact, then those patterns will repeat themselves. . . . There’s so much talk about the system. And so little understanding.”  

A system is more than the sum of its parts and may exhibit, “adaptive, dynamic, goal-seeking, self-preservation, and sometimes evolutionary behavior.” Distinguishing between a system and completely independent but similar elements can be difficult. Donella Meadows suggests answering the following questions to determine if you are examining a system or “just a bunch of stuff:

- Can you identify parts? ... and
- Do the parts affect each other? ...and
- Do the parts together produce an effect that is different from the effect of each part on its own? ... and perhaps
- Does the effect, the behavior over time, persist in a variety of circumstances?”

If you are able to answer yes to each of these questions, you are looking at a system. Meadows uses the relatively simple idea of a forest, made up of trees, dirt, air, animals, and other elements as an example. The interconnections or relationships that hold these elements together are, “the physical flows and chemical reactions that govern the tree’s metabolic processes— the signals that allow one part to respond to what is happening in another part.” The purposes or functions of a system can best be discerned by watching the system behave rather than from rhetoric or stated goals.

---

According to this framework, the international human rights regime is clearly a system. It is made up of parts, for example the United Nations, regional interstate associations and economic agreements like the EU and NAFTA, states and various intergovernmental agencies or departments, firms, civil service organizations, world and business leaders, activists, and other individuals. These parts do affect each other in a variety of ways, as argued in chapters one and two, and produce an effect that is different from the effect of the individual elements on their own. The state makes laws that govern behavior, for example outlawing slavery. On its own, the law has no effect unless there are people or organizations to follow them. Outlawing slavery impedes individuals and firms from utilizing slave labor and enslaving individuals. The intent of criminalizing the behavior is to remove both the behavior, and the elements of it, from society. In this example, the law intends to remove slave labor and slavery. Finally, as long as the law exists, this effect persists overtime and in a variety of circumstances.

The purposes or functions of a system do not always match the outcome.\textsuperscript{308} The international human rights regime is an example of a system that’s intentions and outcomes are divergent. The system’s purpose is to ensure social progress and the improvement of well-being for all of humanity, however it is not performing this function effectively.\textsuperscript{309} International agreements fail to enforce human rights obligations because actors do not see human rights as a

\textsuperscript{308} Meadows, D. 2008.
\textsuperscript{309} UDHR. 1948.
priority and refuse to sign documents that bind states to recognizing right’s universal nature. Governance gaps leave rights unprotected, disrespected, and unfulfilled. This allows for them to be further violated by other organs of society, like firms, while still meeting all legal obligations to the state.\textsuperscript{310} Firms operating in a capitalist market are then unable to remedy the violations without state additional support that does not materialize. As a result, individuals are deprived of their human rights with no means of remedy.

**Utilizing Leverage Points**

The relationship between states and firms is a natural leverage point, as defined by Donella Meadows in *Places to Intervene in a System* that must be used to generate systems change.\textsuperscript{311} In this section I will argue that for human rights to be recognized by states as an urgent matter, actors involved with existing state priorities, especially firms, must uphold their moral obligation to human rights and utilize a systems change approach to motivate the state to meet its responsibility to protect, respect, and fulfill human rights.

In order for human rights to be universally respected, protected, and fulfilled, the current system needs to be made effective. The first step in

\textsuperscript{311} Meadows, Donella H. "Places to Intervene in a System." *Whole Earth* 91 (1997): 78-84.
changing a system is identifying leverage points that can affect the outcome.\textsuperscript{312}

In “Leverage Points: Places to Intervene in a System,” Meadows lists twelve general opportunities for driving systems change.\textsuperscript{313} \textsuperscript{314} The difficulty of implementing change through these leverage points is reflected in the descending order, with the most complex intervention locations at the bottom of the list and the most accessible at the top.\textsuperscript{315} However, the more difficult the change the greater the impact it will have on the system. “The mindset or paradigm of which the systems- its goals, structure, rules, delays, parameters- arises” is the second to last point Meadows lists.\textsuperscript{316} It requires changing the founding ideas or augmenting the perspective the system is built from. In the case of human rights, this includes the state’s consideration of human rights as unimportant and governance gaps as a way of supporting firms. It is also a prime leverage point for firms to exact pressure upon to motivate states to universally protect, respect, and fulfill human rights.

\begin{itemize}
\item \textsuperscript{312} Meadows, D. 1997.
\item \textsuperscript{313} Meadows, D. 1997.
\item \textsuperscript{314} “12. Constants, parameters, numbers (such as subsidies, taxes, standards).11. The sizes of buffers and other stabilizing stocks, relative to their flows.10. The structure of material stocks and flows (such as transport networks, population age structures).9. The lengths of delays, relative to the rate of system change.8. The strength of negative feedback loops, relative to the impacts they are trying to correct against.7. The gain around driving positive feedback loops.6. The structure of information flows (who does and does not have access to information).5. The rules of the system (such as incentives, punishments, constraints).4. The power to add, change, evolve, or self-organize system structure.3. The goals of the system.2. The mindset or paradigm out of which the system — its goals, structure, rules, delays, parameters — arises.1. The power to transcend paradigms.” Meadows, D. 1997.
\item \textsuperscript{315} Meadows, D. 1997.
\item \textsuperscript{316} Meadows, D. 1997.
\end{itemize}
Coming Together: A Case Study in Systems Change

If firms make the protection, respecting, and fulfillment of human rights an urgent concern for business by incorporating stricter minimum requirements for the environments they operate in, states will consider their human rights responsibilities as part of a larger economic plan. BSR (Business for Social Responsibility), a not-for-profit membership based organization has been successful in guiding firms and states through these conversations. \(^{317}\) Firms, civil society organizations, and states meet separately and together to discuss where their interests overlap and how these shared goals can be met most efficiently. \(^{318}\)

For example, stakeholders recently convened in Myanmar to discuss the development of garment manufacturing, often seen as first step in economic advancement because it requires few skills and little complex technological resources. \(^{319}\) American based firms were particularly concerned with the potential for child labor, as publicized child labor negatively impacts brand reputation. \(^{320}\) Like with many other Southeast Asian countries though, child labor is a fact of life in Myanmar. \(^{321}\) NGOs were also interested in preventing child labor, but without further limiting access to employment and economic and social mobility. \(^{322}\) The state wants to encourage industry, but does not have the infrastructure in place to educate the entire population of children to provide a


\(^{318}\) BSR. “About BSR.”


\(^{320}\) BSR. “Collaborative Initiatives Overview.”

\(^{321}\) BSR. “Collaborative Initiatives Overview.”

\(^{322}\) BSR. “Collaborative Initiatives Overview.”
mechanism for aiding in the elimination of child labor. Recognizing the overlap in their goals, firms agreed to sign contracts with factories that would agree to hire only individuals over 15 years of age and implement clear enforcement policies. This compromise recognized the limitations of the state’s existing education infrastructure and economic and social realities within the state while moving towards human rights fulfillment. With financial and logistical support from firms, NGOs would partner with the Ministry of Education to develop public elementary schools. The introduction of move industry will hopefully in turn speed up economic develop and better equip the state to realize its human rights obligations.

This kind of interaction requires actors to already understand the obligations of firms, states, and NGOs, and thus the groundwork must be laid before it can be effective. By considering goals, strengths, and weaknesses, BSR was able to facilitate the identification of key leverage points for change and begin the process of implementing those changes. As a result, much needed economic development will begin in Myanmar while simultaneously building stronger education infrastructure to reduce the necessity of child labor for survival.

This is not an easy process, nor does it generate immediate progress. In the case of Myanmar, the state is actively courting industry and is willing to incorporate its wishes into its planning process. While Myanmar may be

---

323 BSR. “Collaborative Initiatives Overview.”
324 BSR. “Collaborative Initiatives Overview.”
325 BSR. “Collaborative Initiatives Overview.”
especially interested in engaging industry, all capitalist states desire corporate investment both foreign and domestic. This presents a unique opportunity for firms to motivate state action, particularly in eliminating governance gaps that allow firms to legally violate human rights.

Human rights are only viable if they are fulfilled on a largely non-discriminatory, global scale. Given that firms have the ability to violate human rights, they also have the obligation to fulfill them even if it requires action beyond legal obligations set by the state.

**Conclusion**

It is clear from state’s unwillingness to certify any documents that involve exact, enforceable requirements that must be met regarding their protect, respect, and fulfill obligations that human rights are not a true priority to states. States are primarily responsible for human rights, but the obligation does not rest of them alone. It is easier to talk about human rights violations in the abstract and simply wish them away than it is to identify and implement legitimate options for progress, especially given the complex nature of the system. However, there is no more pressing concern then the failure of states to respect, protect, and fulfill human rights. While firms cannot and should not be responsible for remedying human rights violations alone, the UDHR clearly states every organ of society, and in fact every individual, has an obligation to

---

ensure the human rights of others. When the human rights of an individual or group of individuals are violated, the rights of everyone are put at risk.
Restatement of Argument

Under international law, states must protect, respect, and fulfill internationally recognized human rights.\textsuperscript{327} The duty to respect is a positive obligation requiring the state to create mechanisms to ensure individual’s rights are not violated by third parties including state and non state actors, while respecting human rights means to refrain from engaging in or support actions that infringe on human rights.\textsuperscript{328} To fulfill human rights, states must take steps to enable universal enjoyment of human rights and provide access to remedy and recourse when human rights are violated.\textsuperscript{329}

While the UDHR stipulates every organ of society shares in human rights obligations, the primarily responsibility rests with the state.\textsuperscript{330} When the state fails to meet its human rights commitments, governance gaps are created which

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{329} OHCHR. What are Human Rights.
\end{itemize}
\end{footnotesize}
allow other organs of society to violate human rights.\textsuperscript{331} This thesis specifically discusses examples of human rights violations by firms that are within the legal framework put in place by the state, focusing on behavior of firms that prevent individuals from reasonably accessing an adequate standard of living, which is protected by the 25\textsuperscript{th} article of the UDHR.\textsuperscript{332}

The International Bill of Human Rights, which the UDHR is a component of, is a collection of internationally recognized soft law that contributes to the body of documents known as international human rights regime.\textsuperscript{333} These global codes should eliminate governance gaps at the state level but fail to do so because they lack enforcement mechanisms and binding terms. This allows states to interpret obligations in whatever way is most conducive to their preference regarding human rights. A brief economic analysis confirms that in a capitalist system, firms are unable to reconcile unfulfilled human rights and profit maximization without additional state support. The proliferation of governance gaps and legal human rights violations indicates states fail to meet their responsibility to protect, respect, and fulfill human rights.

Some scholars posit international law primarily exists in this soft form because the contracting costs of hard law are too high to facilitate compromise

\footnotesize{\textsuperscript{333} Backer, Larry Catá. “Governance Polycentrism--Hierarchy and Order Without Government in Business and Human Rights Regulation.” Available at SSRN(2014).}
among international actors.\textsuperscript{334} It is the position of this thesis that implementation tools and non-voluntary terms are absent from existing human rights agreements simply because states do not consider the universal protection, respect, and fulfillment of human rights to be a priority. A textual analysis of the rejected Draft Norms and approved Guiding Principles and more generalized quantitative survey of ratified human rights documents substantiate this argument.

The Draft Norms and UNGP affirm the existing allocation of responsibilities to organs of society regarding the same body of human rights. However, the Draft Norms includes enforcement mechanisms and binding language for firms and states while the UNGP does not. As a result, the Draft Norms furthered the full realization of human rights while the UNGP does not. The UNGP’s approve over the Draft Norms in conversation with other presented evidence suggests states are opposed to ratifying documents that provide means of closing governance gaps and ensuring the universal enjoyment of human rights. This assertion is supported by several previous surveys of human rights agreements that identify a negative correlation between binding terms and enforcement mechanisms and the number of states supporting and eventually ratifying a treaty.\textsuperscript{335 336 337} Perspectives that attribute this lack of obligations and

\begin{itemize}
\end{itemize}
implementation requirements to a misunderstanding of the driving forces of capitalism or a flaw inherent to the international legal system are discussed before arguing the purposeful omissions are a tactic used by states to avoid the universal application of human rights.  

The final chapter considers the implications of a global community unconcerned with human rights and alternative governance structures to ensure the universal implementation of human rights. It then revisits the moral obligations of firms to human rights before applying a systems approach to analyze the international human rights regimes and identify how firms can motivate states into meeting their obligations to protect, respect, and fulfill human rights.

**Areas for Further Study**

This thesis is by no means a comprehensive assessment of the intricate relationship between firms, states, and human rights. The offered analysis applies only to firms operating within capitalist state that fails to meet its obligation to protect, respect, and fulfill human rights. It does not consider the obligations and impacts of firms on human rights in alternative economic models

---


or those with more complete and adequate regulation. Additionally, individual rights are emphasized in this argument with little attention devoted to communal interests. Therefore, it is unlikely this perspective adds much to discussions based on non-Western, community-oriented societies. There are several references to alternative interpretations of human rights that do not propose their universal application. While it is the position of this author that moral relativism only allows for the contextualization of human rights abuses, others may and do disagree. Therefore, an approach to this discussion that attempts to reconcile alternative interpretations of human rights is a worthwhile and necessary endeavor.

There is also no integration of environmental, reparative, or substantive justice issues in this thesis. A coherent discussion of the obligations of states and firms in supporting these processes would be beneficial to all.

In the third chapter, there is a brief mention of the impact of human rights on social, political, and economic development. This area of study is becoming increasingly popular both in and outside the academic community. Contributions from scholars like Amartya Sen, Martha Nussbaum and others have reached across disciplinary silos to encourage positive and normative dialogue. Sen's human capabilities approach has been likened to a systems framework for development that integrates traditional economic concerns with the expansion of human rights. Exploring the ability of firms to take a more direct and active role in the development process would be an interesting and
fruitful area of discussion with the potential to shape both human rights
governance and the construction and implementation of development policies.

Finally, this project argues states do not meet their human rights
obligations because they do not wish to. Again, this is only one perspective that
does not and cannot consider all factors in a state’s decision-making process.
Further examination into why states do not prioritize human rights
responsibilities would add to the conversation and help identify avenues for progress. It is also important to realize there is a significant financial cost to comprehensively meeting its human rights obligations. Not all states can afford to protect, respect, and fulfill all human rights of all individuals, but this does not mean those individuals are less entitled to their rights. Determining how the international community can best come together to aid one another for its collective betterment is perhaps one of the pressing concerns and should be treated as such.
Bibliography

Editors
Professor Richard Adelstein, J.D, Ph.d
Anya Morgan
Sarah Crystler
Alyson R. Feldman-Piltch, MLS, MIS
Cassandra R. Garvin
Julian E. Purkiss

Primary Sources


UN General Assembly, Declaration on the Right to Development: resolution / adopted by the General Assembly, 4 December 1986, A/RES/41/128


United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI


Secondary Sources


<http://www1.umn.edu/humanrts/edumat/IGHIP/circle/modules/module9.htm>


When Human Rights ‘Responsibilities’ become ‘Duties’: The Extra-territorial Obligations of States that Bind Corporations


<http://www.ohchr.org/EN/ProfessionalInterest/Pages/InternationalLaw.asp>


APPENDIX

1. The Universal Declaration of Human Rights

2. Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises With Regard to Human Rights

3. United Nations Guiding Principles on Business and Human Rights

Due to length, the United Nations Charter and International Bill of Human Rights are not included in this appendix. Citation information can be found in the bibliography.
Universal Declaration of Human Rights

Preamble

Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world, Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people,

Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law, Whereas it is essential to promote the development of friendly relations between nations,

Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom,

Whereas Member States have pledged themselves to achieve, in cooperation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms, Whereas a common understanding of these rights and freedoms is of the greatest importance for the full realization of this pledge, Now, therefore, The General Assembly, Proclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.

Article 1
All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

Article 2
Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a
person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

**Article 3**
Everyone has the right to life, liberty and security of person.

**Article 4**
No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.

**Article 5**
No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

**Article 6**
Everyone has the right to recognition everywhere as a person before the law.

**Article 7**
All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

**Article 8**
Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

**Article 9**
No one shall be subjected to arbitrary arrest, detention or exile.

**Article 10**
Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

**Article 11**
1. Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defense.

2. No one shall be held guilty of any penal offence on account of any actor omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.
Article 12
No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

Article 13
1. Everyone has the right to freedom of movement and residence within the borders of each State.
2. Everyone has the right to leave any country, including his own, and to return to his country.

Article 14
1. Everyone has the right to seek and to enjoy in other countries asylum from persecution.
2. This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.

Article 15
1. Everyone has the right to a nationality.
2. No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.

Article 16
1. Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.
2. Marriage shall be entered into only with the free and full consent of the intending spouses.
3. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

Article 17
1. Everyone has the right to own property alone as well as in association with others.
2. No one shall be arbitrarily deprived of his property.

Article 18
Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

Article 19
Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart
information and ideas through any media and regardless of frontiers.

**Article 20**
1. Everyone has the right to freedom of peaceful assembly and association.
2. No one may be compelled to belong to an association.

**Article 21**
1. Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.
2. Everyone has the right to equal access to public service in his country.
3. The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections, which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

**Article 22**
Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

**Article 23**
1. Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.
2. Everyone, without any discrimination, has the right to equal pay for equal work.
3. Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.
4. Everyone has the right to form and to join trade unions for the protection of his interests.

**Article 24**
Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay.

**Article 25**
Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.
Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.
Article 26
Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit. Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace. Parents have a prior right to choose the kind of education that shall be given to their children.

Article 27
1. Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.
2. Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

Article 28
Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.

Article 29
1. Everyone has duties to the community in which alone the free and full development of his personality is possible.
2. In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.
3. These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.

Article 30
Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.
Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights


2. In its resolution 2002/8 of 14 August 2002 the Sub-Commission requested that the Working Group’s report (E/CN.4/Sub.2/2002/13), and the annexed Draft Norms be widely circulated in the expectation that comments will be taken into account when the draft is considered by the Working Group at its meetings during the Sub-Commission’s fifty-fifth session in July-August 2003, as well as by the Sub-Commission, and “in the further expectation that the working group will submit a draft in the light of comments already received and to be received by the Sub-Commission for plenary consideration at the fifty-fifth session.”

3. In its resolution 2002/8, the Sub-Commission also requested that the Working Group, and in particular the authors of the Draft Commentary for the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights [Draft Commentary] continue working on the Draft Norms and Draft Commentary, so that the Commentary may serve as a reference for the practical interpretation and further development of the Draft Norms and may be submitted to the Working Group and to the Sub-Commission at the fifty-fifth session in July-August 2003.

4. Various versions of the Draft Norms were disseminated as widely as possible, so as to encourage governments, intergovernmental organizations, nongovernmental organizations, transnational corporations, other business enterprises, unions, and other interested parties to provide any suggestions, observations, or recommendations. The Working Group received a number of comments as a result of these requests and also received useful comments at a seminar 6-7 March 2003 at the Office of the High Commissioner for Human Rights, OHCHR - Palais Wilson, Geneva, Switzerland. All of the comments were considered at a meeting of the Working Group on 8 March 2003. The present version takes into account all of the comments received by the Working Group and represents a consensus of the Working Group in the expectation that the draft and other proposals will be discussed at the public meetings of the Working Group to be held in connection with the 55th session of the Sub-
Commission and in the further expectation that the Working Group will submit the Norms for consideration by the Sub-Commission’s 55th session 28 July – 15 August 2003 at the Palais des Nations, Geneva, Switzerland.

NORMS ON THE RESPONSIBILITIES OF TRANSDANTIONAL CORPORATIONS AND OTHER BUSINESS ENTERPRISES WITH REGARD TO HUMAN RIGHTS

PREAMBLE

Bearing in mind the principles and obligations under the United Nations Charter, in particular the preamble and Articles 1, 2, 55, and 56, inter alia, to promote universal respect for, and observance of, human rights and fundamental freedoms,

Recalling that the Universal Declaration of Human Rights proclaims a common standard of achievement for all peoples and all nations, to the end that Governments, other organs of society, and individuals shall strive by teaching and education to promote respect for human rights and freedoms and by progressive measures to secure their universal and effective recognition and observance, including equal rights of women and men and the promotion of social progress and better standards of life in larger freedom,

Recognizing that even though States have the primary responsibility to promote, secure the fulfilment of, respect, ensure respect of, and protect human rights, transnational corporations and other business enterprises, as organs of society, are also responsible for promoting and securing the human rights set forth in the Universal Declaration of Human Rights,

Realizing that transnational corporations and other business enterprises, their officers, and their workers are further obligated to respect generally recognized responsibilities and norms in United Nations treaties and other international instruments such as the Convention on the Prevention and Punishment of Genocide; the Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment; the Slavery Convention and the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery; the International Convention on the Elimination of All Forms of Racial Discrimination; the Convention on the Elimination of All Forms of Discrimination against Women; the International Covenant on Economic, Social and Cultural Rights; the International Covenant on Civil and Political Rights; the Convention on the Rights of the Child; the four Geneva Conventions of 12 August 1949 and two Additional Protocols for the protection of victims of war; the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms; the Rome Statute of the International Criminal Court; the United Nations Convention Against Transnational Organized Crime; the Convention on Biological Diversity; the
International Convention on Civil Liability for Oil Pollution Damage; the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment; the Rio Declaration on the Environment and Development; the World Summit on Sustainable Development Plan of Development; the International Code of Marketing of Breast-milk Substitutes of the World Health Assembly (WHA); the Ethical Criteria for Medical Drug Promotion, and Health for All Policy for the twenty-first century of the World Health Organization (WHO); the United Nations Education, Scientific, and Cultural Organization Convention Against Discrimination in Education; conventions and recommendations of the International Labour Organization (ILO); the Convention and Protocol relating to the Status of Refugees; the African Charter on Human and Peoples’ Rights; the American Convention on Human Rights; the European Convention on Human Rights; the Charter on Fundamental Rights of the European Union; the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions of the Organization for Economic Cooperation and Development (OECD); and other instruments,

Taking into account the standards set forth in the International Labour Organization Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, and the ILO Declaration on Fundamental Principles and Rights at Work,

Aware of the Organisation for Economic Co-operation and Development Guidelines for Multinational Enterprises and its Committee on International Investment and Multinational Enterprises;

Further aware of the U.N. Global Compact initiative which challenges business leaders to “embrace and enact” nine basic principles with respect to human rights, including labour rights and the environment,

Conscious of the ILO Committee on International Investment and Multinational Enterprises; the interpretation of standards by the ILO Governing Body Sub-Committee on Multinational Enterprises of the Committee on Legal Issues and International Labour Standards, the ILO Committee of Experts, the Conference Committee on the Application of Standards, and the Declaration Expert-Advisors; as well as the ILO Committee on Freedom of Association which has named business enterprises implicated in States’ failure to comply with ILO Conventions No. 87 concerning the Freedom of Association and Protection of the Right to Organize and No. 98 concerning the Application of the Principles of the Right to Organize and Bargain Collectively, and seeking to supplement and assist their efforts to encourage transnational corporations and other business enterprises to protect human rights,

[Further conscious of the Commentary for the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to
Human Rights and finding it a useful interpretation and elaboration of the standards contained in the Norms,

Taking note of global trends which have increased the influence of transnational corporations and other business enterprises – and particularly transnational corporations -- on the economies of most countries and in international economic relations; and the growing number of other business enterprises which operate across national boundaries in a variety of arrangements resulting in economic activities beyond the actual capacities of any one national system,

Noting that transnational corporations and other business enterprises have the capacity to foster economic well-being, development, technological improvement, and wealth as well as have the capacity to cause deleterious human rights impacts on the lives of individuals through their core business practices and operations, including employment practices, environmental policies, relationships with suppliers and consumers, interactions with governments, and other activities,

Noting also that new international human rights issues and concerns are continually emerging and that transnational corporations and other business enterprises often are related to these issues and concerns, such that further standard-setting and implementation are required at this time and in the future,

Acknowledging the universality, indivisibility, interdependence, and interrelatedness of human rights, including the right to development, that entitles every human person and all peoples to participate in; contribute to; and enjoy economic, social, cultural, and political development in which all human rights and fundamental freedoms can be fully realized,

Reaffirming that transnational corporations and other business enterprises, their officers, and their workers have, inter alia, human rights obligations and responsibilities and that these human rights norms will contribute to the making and development of international law as to their responsibilities and obligations,

Solemnly proclaims these Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights and urges that every effort be made so that they become generally known and respected:

A. General Obligations

1. States have the primary responsibility to promote, secure the fulfilment of, respect, ensure respect of, and protect human rights recognised in international as well as national law, including assuring that transnational corporations and other business enterprises respect human rights. Within their respective spheres of activity and influence, transnational corporations and other business
enterprises have the obligation to promote, secure the fulfilment of, respect, ensure respect of, and protect human rights recognized in international as well as national law.

B. Right to Equal Opportunity and Non-Discriminatory Treatment

2. Transnational corporations and other business enterprises shall ensure equality of opportunity and treatment, as provided in the relevant international instruments and national legislation as well as international human rights law, for the purpose of eliminating discrimination based on race, colour, sex, language, religion, political opinion, national or social origin, social status, indigenous status, disability, age (except for children who may be given greater protection), or other status of the individual unrelated to the inherent requirements to perform the job, or complying with special measures designed to overcome past discrimination against certain groups.

C. Right to Security of Persons

3. Transnational corporations and other business enterprises shall not engage in nor benefit from war crimes; crimes against humanity; genocide; torture; forced disappearance; forced or compulsory labour; hostage-taking; extrajudicial, summary or arbitrary executions; other violations of humanitarian law; and other international crimes against the human person as defined by international law, in particular human rights and humanitarian law.

4. Security arrangements for transnational corporations and other business enterprises shall observe international human rights norms as well as the laws and professional standards of the country or countries in which they operate.

D. Rights of Workers

5. Transnational corporations and other business enterprises shall not use forced or compulsory labour as forbidden by the relevant international instruments and national legislation as well as international human rights and humanitarian law.

6. Transnational corporations and other business enterprises shall respect the rights of children to be protected from economic exploitation as forbidden by the relevant international instruments and national legislation as well as international human rights and humanitarian law.

7. Transnational corporations and other business enterprises shall provide a safe and healthy working environment as set forth in relevant international instruments and national legislation as well as international human rights and humanitarian law.
8. Transnational corporations and other business enterprises shall provide workers with remuneration that ensures an adequate standard of living for them and their families. Such remuneration shall take due account of their needs for adequate living conditions with a view towards progressive improvement.

9. Transnational corporations and other business enterprises shall ensure the freedom of association and effective recognition of the right to collective bargaining by protecting the right to establish and, subject only to the rules of the organization concerned, to join organizations of their own choosing without distinction, previous authorization, or interference, for the protection of their employment interests and for other collective bargaining purposes as provided in national legislation and the relevant ILO conventions.

E. Respect for National Sovereignty and Human Rights

10. Transnational corporations and other business enterprises shall recognize and respect applicable norms of international law; national laws; regulations; administrative practices; the rule of law; the public interest; development objectives; social, economic, and cultural policies including transparency, accountability, and prohibition of corruption; and authority of the countries in which the enterprises operate.

11. Transnational corporations and other business enterprises shall not offer, promise, give, accept, condone, knowingly benefit from, or demand a bribe or other improper advantage. Nor shall they be solicited or expected to give a bribe or other improper advantage to any government, public official, candidate for elective post, any member of the armed forces or security forces, or any other individual or organization. Transnational corporations and other business enterprises shall refrain from any activity which supports, solicits, or encourages States or any other entities to abuse human rights. They shall further seek to ensure that the goods and services they provide will not be used to abuse human rights.

12. Transnational corporations and other business enterprises shall respect civil, cultural, economic, political, and social rights, and contribute to their realization, in particular the rights to development; adequate food and drinking water; the highest attainable standard of physical and mental health; adequate housing; privacy; education; freedom of thought, conscience, and religion; and freedom of opinion and expression; and refrain from actions which obstruct or impede the realization of those rights.

F. Obligations with regard to Consumer Protection

13. Transnational corporations and other business enterprises shall act in accordance with fair business, marketing, and advertising practices and shall take all necessary steps to ensure the safety and quality of the goods and
services they provide, including observance of the precautionary principle. Nor shall they produce, distribute, market, or advertise potentially harmful or harmful products for use by consumers.

G. Obligations with regard to Environmental Protection

14. Transnational corporations and other business enterprises shall carry out their activities in accordance with national laws, regulations, administrative practices, and policies relating to the preservation of the environment of the countries in which they operate as well as in accordance with relevant international agreements, principles, objectives, responsibilities, and standards with regard to the environment as well as human rights, public health and safety, bioethics, and the precautionary principle; and shall generally conduct their activities in a manner contributing to the wider goal of sustainable development.

H. General Provisions of Implementation

15. As an initial step towards implementing these Norms each transnational corporation or other business enterprise shall adopt, disseminate, and implement internal rules of operation in compliance with the Norms. Further, they shall periodically report on and take other measures fully to implement the Norms and to provide at least for the prompt implementation of the protections set forth in the Norms. Each transnational corporation or other business enterprise shall apply and incorporate these Norms in their contracts or other arrangements and dealings with contractors, subcontractors, suppliers, licensees, distributors, or natural or other legal persons that enter into any agreement with the transnational corporation or business enterprise in order to ensure respect for and implementation of the Norms.

16. Transnational corporations and other businesses enterprises shall be subject to periodic monitoring and verification by United Nations, other international, and national mechanisms, already in existence or yet to be created, regarding application of the Norms. This monitoring shall be transparent, independent, and take into account input from stakeholders (including nongovernmental organizations) and as a result of complaints of violations of these Norms. Further, transnational corporations and other businesses enterprises shall conduct periodic evaluations concerning the impact of their own activities on human rights under these Norms.

17. States should establish and reinforce the necessary legal and administrative framework for assuring that the Norms and other relevant national and international laws are implemented by transnational corporations and other business enterprises.

18. Transnational corporations and other business enterprises shall provide prompt, effective, and adequate reparation to those persons, entities, and
communities that have been adversely affected by failures to comply with these Norms through, *inter alia*, reparations, restitution, compensation, and rehabilitation for any damage done or property taken. In connection with determining damages, and in all other respects, these Norms shall be enforced by national courts and/or international tribunals if appropriate.

19. Nothing in these Norms shall be construed as diminishing, restricting, or adversely affecting the human rights obligations of States under national and international law. Nor shall they be construed as diminishing, restricting, or adversely affecting more protective human rights norms. Nor shall they be construed as diminishing, restricting, or adversely affecting other obligations or responsibilities of transnational corporations and other business enterprises in fields other than human rights.

I. **Definitions**

20. The term “transnational corporation” refers to an economic entity operating in more than one country or a cluster of economic entities operating in two or more countries – whatever their legal form, whether in their home country or country of activity, and whether taken individually or collectively.

21. The phrase “other business enterprise” includes any business entity, regardless of the international or domestic nature of its activities, including a transnational corporation; the corporate, partnership, or other legal form used to establish the business entity; and the nature of the ownership of the entity. These Norms shall be presumed to apply, as a matter of practice, if the business enterprise has any relation with a transnational corporation, the impact of its activities is not entirely local, or the activities involve violations of the right to security as indicated in paragraphs three and four.

22. The term “stakeholder” includes stockholders, other owners, workers, and their representatives, as well as any other individual or group that is affected by the activities of transnational corporations or other business enterprises. The term “stakeholder” shall be interpreted functionally in light of the objectives of these Norms and include indirect stakeholders when their interests are or will be substantially affected by the activities of the transnational corporation or business enterprise. In addition to parties directly affected by the activities of business enterprises, stakeholders can include parties which are indirectly affected by the activities of transnational corporations or other business enterprises such as consumer groups, customers, governments, neighbouring communities, indigenous peoples and communities, nongovernmental organizations, public and private lending institutions, suppliers, trade associations, and others.

23. The phrases “internationally recognized human rights” and “international human rights” include civil, cultural, economic, political, and social rights, as set
forth in the International Bill of Human Rights and other human rights treaties, as well as the right to development and rights recognized by international humanitarian law, international refugee law, international labour law, and other relevant instruments adopted within the United Nations system.
Human Rights Council
Seventeenth session
Agenda item 3
Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development

Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie

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

A/HRC/17/31

Summary
This is the final report of the Special Representative. It summarizes his work from 2005 to 2011, and presents the “Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework” for consideration by the Human Rights Council.
GE.11-
A/HRC/17/31
Contents

<table>
<thead>
<tr>
<th>Paragraphs</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Introduction to the Guiding Principles</td>
<td>1-16</td>
</tr>
</tbody>
</table>
Introduction to the Guiding Principles

1. The issue of business and human rights became permanently implanted on the global policy agenda in the 1990s, reflecting the dramatic worldwide expansion of the private sector at the time, coupled with a corresponding rise in transnational economic activity. These developments heightened social awareness of businesses’ impact on human rights and also attracted the attention of the United Nations.

2. One early United Nations-based initiative was called the Norms on Transnational Corporations and Other Business Enterprises; it was drafted by an expert subsidiary body of what was then the Commission on Human Rights. Essentially, this sought to impose on companies, directly under international law, the same range of human rights duties that States have accepted for themselves under treaties they have ratified: “to promote, secure the fulfilment of, respect, ensure respect of and protect human rights”.

3. This proposal triggered a deeply divisive debate between the business community and human rights advocacy groups while evoking little support from Governments. The Commission declined to act on the proposal. Instead, in 2005 it established a mandate for a Special Representative of the Secretary-General “on the issue of human rights and transnational corporations and other business enterprises” to undertake a new process, and requested the Secretary-General to appoint the mandate holder. This is the final report of the Special Representative.

4. The work of the Special Representative has evolved in three phases. Reflecting the mandate’s origins in controversy, its initial duration was only two years and it was intended mainly to “identify and clarify” existing standards and practices. This defined the first phase. In 2005, there was little that counted as shared knowledge across different stakeholder groups in the business and human rights domain. Thus the Special Representative began an extensive programme of systematic research that has continued to the present. Several thousand pages of documentation are available on his web portal (http://www.business-humanrights.org/SpecialRepPortal/Home): mapping patterns of alleged human rights abuses by business enterprises; evolving standards of international human rights law and international criminal law; emerging practices by States and companies; commentaries of United Nations treaty bodies on State obligations concerning business-related human rights abuses; the impact of investment agreements and corporate law and securities regulation on both States’ and enterprises’ human rights policies; and related subjects. This research has been actively disseminated, including to the Council itself. It has provided a broader and more solid factual basis for the ongoing business and human rights discourse, and is reflected in the Guiding Principles annexed to this report.

5. In 2007, the Council renewed the mandate of the Special Representative for an additional year, inviting him to submit recommendations. This marked the mandate’s second phase. The Special Representative observed that there were many initiatives, public and private, which touched on business and human rights. But none had reached sufficient scale to truly move markets; they existed as separate fragments that did not add up to a coherent or complementary system. One major reason has been the lack of an authoritative focal point around which the expectations and actions of relevant stakeholders could converge. Therefore, in June 2008 the Special Representative made only one recommendation: that the Council support the “Protect, Respect and Remedy” Framework he had developed following three years of research and consultations. The Council did so, unanimously “welcoming” the Framework in its resolution 8/7 and providing, thereby, the authoritative focal point that had been missing.

6. The Framework rests on three pillars. The first is the State duty to protect against human
rights abuses by third parties, including business enterprises, through appropriate policies, regulation, and adjudication. The second is the corporate responsibility to respect human rights, which means that business enterprises should act with due diligence to avoid infringing on the rights of others and to address adverse impacts with which they are involved. The third is the need for greater access by victims to effective remedy, both judicial and non-judicial. Each pillar is an essential component in an inter-related and dynamic system of preventative and remedial measures: the State duty to protect because it lies at the very core of the international human rights regime; the corporate responsibility to respect because it is the basic expectation society has of business in relation to human rights; and access to remedy because even the most concerted efforts cannot prevent all abuse.

7. Beyond the Human Rights Council, the Framework has been endorsed or employed by individual Governments, business enterprises and associations, civil society and workers’ organizations, national human rights institutions, and investors. It has been drawn upon by such multilateral institutions as the International Organization for Standardization and the Organization for Economic Cooperation and Development in developing their own initiatives in the business and human rights domain. Other United Nations special procedures have invoked it extensively.

8. Apart from the Framework’s intrinsic utility, the large number and inclusive character of stakeholder consultations convened by and for the mandate no doubt have contributed to its widespread positive reception. Indeed, by January 2011 the mandate had held 47 international consultations, on all continents, and the Special Representative and his team had made site visits to business operations and their local stakeholders in more than 20 countries.

9. In its resolution 8/7, welcoming the “Protect, Respect and Remedy” Framework, the Council also extended the Special Representative’s mandate until June 2011, asking him to “operationalize” the Framework – at is, to provide concrete and practical recommendations for its implementation. This constitutes the mandate’s third phase. During the interactive dialogue at the Council’s June 2010 session, delegations agreed that the recommendations should take the form of “Guiding Principles”; these are annexed to this report.

10. The Council asked the Special Representative, in developing the Guiding Principles, to proceed in the same research-based and consultative manner that had characterized his mandate all along. Thus, the Guiding Principles are informed by extensive discussions with all stakeholder groups, including Governments, business enterprises and associations, individuals and communities directly affected by the activities of enterprises in various parts of the world, civil society, and experts in the many areas of law and policy that the Guiding Principles touch upon.

11. Some of the Guiding Principles have been road-tested as well. For example, those elaborating effectiveness criteria for non-judicial grievance mechanisms involving business enterprises and communities in which they operate were piloted in five different sectors, each in a different country. The workability of the Guiding Principles’ human rights due-diligence provisions was tested internally by 10 companies, and was the subject of detailed discussions with corporate law professionals from more than 20 countries with expertise in over 40 jurisdictions. The Guiding Principles addressing how Governments should help companies avoid getting drawn into the kinds of human rights abuses that all too often occur in conflict-affected areas emerged from off-the-record, scenario-based workshops with officials from a cross-section of States that had practical experience in dealing with these challenges. In short, the Guiding Principles aim not only to provide guidance that is practical, but also guidance informed by actual practice.

12. Moreover, the text of the Guiding Principles itself has been subject to extensive consultations. In October 2010, an annotated outline was discussed in separate day-long sessions with Human Rights Council delegations, business enterprises and associations, and civil society groups. The
same document was also presented at the annual meeting of the International Coordinating Committee of National Human Rights Institutions. Taking into account the diverse views expressed, the Special Representative then produced a full draft of the Guiding Principles and Commentary, which was sent to all Member States on 22 November 2010 and posted online for public comment until 31 January 2011. The online consultation attracted 3,576 unique visitors from 120 countries and territories. Some 100 written submissions were sent directly to the Special Representative, including by Governments. In addition, the draft Guiding Principles were discussed at an expert multi-stakeholder meeting, and then at a session with Council delegations, both held in January 2011. The final text now before the Council is the product of this extensive and inclusive process.

13. What do these Guiding Principles do? And how should they be read? Council endorsement of the Guiding Principles, by itself, will not bring business and human rights challenges to an end. But it will mark the end of the beginning: by establishing a common global platform for action, on which cumulative progress can be built, step-by-step, without foreclosing any other promising longer-term developments.

14. The Guiding Principles’ normative contribution lies not in the creation of new international law obligations but in elaborating the implications of existing standards and practices for States and businesses; integrating them within a single, logically coherent and comprehensive template; and identifying where the current regime falls short and how it should be improved. Each Principle is accompanied by a commentary, further clarifying its meaning and implications.

15. At the same time, the Guiding Principles are not intended as a tool kit, simply to be taken off the shelf and plugged in. While the Principles themselves are universally applicable, the means by which they are realized will reflect the fact that we live in a world of 192 United Nations Member States, 80,000 transnational enterprises, 10 times as many subsidiaries and countless millions of national firms, most of which are small and medium-sized enterprises. When it comes to means for implementation, therefore, one size does not fit all.

16. The Special Representative is honored to submit these Guiding Principles to the Human Rights Council. In doing so, he wishes to acknowledge the extraordinary contributions by hundreds of individuals, groups and institutions around the world, representing different segments of society and sectors of industry, who gave freely of their time, openly shared their experiences, debated options vigorously, and who came to constitute a global movement of sorts in support of a successful mandate: establishing universally applicable and yet practical Guiding Principles on the effective prevention of, and remedy for, business-related human rights harm.
Annex

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

General principles
These Guiding Principles are grounded in recognition of:
(a) States’ existing obligations to respect, protect and fulfil human rights and fundamental freedoms;
(b) The role of business enterprises as specialized organs of society performing specialized functions, required to comply with all applicable laws and to respect human rights;
(c) The need for rights and obligations to be matched to appropriate and effective remedies when breached.

These Guiding Principles apply to all States and to all business enterprises, both transnational and others, regardless of their size, sector, location, ownership and structure. These Guiding Principles should be understood as a coherent whole and should be read, individually and collectively, in terms of their objective of enhancing standards and practices with regard to business and human rights so as to achieve tangible results for affected individuals and communities, and thereby also contributing to a socially sustainable globalization.

Nothing in these Guiding Principles should be read as creating new international law obligations, or as limiting or undermining any legal obligations a State may have undertaken or be subject to under international law with regard to human rights.

These Guiding Principles should be implemented in a non-discriminatory manner, with particular attention to the rights and needs of, as well as the challenges faced by, individuals from groups or populations that may be at heightened risk of becoming vulnerable or marginalized, and with due regard to the different risks that may be faced by women and men.

I. The State duty to protect human rights

A. Foundational principles

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

Commentary

States’ international human rights law obligations require that they respect, protect and fulfil the human rights of individuals within their territory and/or jurisdiction. This includes the duty to protect against human rights abuse by third parties, including business enterprises. The State duty to protect is a standard of conduct. Therefore, States are not per se responsible for human rights abuse by private actors. However, States may breach their international human rights law obligations where such abuse can be attributed to them, or where they fail to take appropriate steps to prevent, investigate, punish and redress private actors’ abuse. While States generally have discretion in deciding upon these steps, they should consider the full range of permissible preventative and remedial measures, including policies, legislation, regulations and adjudication. States also have the duty to protect and promote the rule of law, including by taking measures to ensure equality before the law, fairness in its application, and by providing for adequate accountability, legal certainty, and procedural and legal transparency. This chapter focuses on preventative measures while Chapter III outlines remedial measures.

2. States should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations.
Commentary

At present States are not generally required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction. Nor are they generally prohibited from doing so, provided there is a recognized jurisdictional basis. Within these parameters some human rights treaty bodies recommend that home States take steps to prevent abuse abroad by business enterprises within their jurisdiction.

There are strong policy reasons for home States to set out clearly the expectation that businesses respect human rights abroad, especially where the State itself is involved in or supports those businesses. The reasons include ensuring predictability for business enterprises by providing coherent and consistent messages, and preserving the State’s own reputation.

States have adopted a range of approaches in this regard. Some are domestic measures with extraterritorial implications. Examples include requirements on “parent” companies to report on the global operations of the entire enterprise; multilateral soft-law instruments such as the Guidelines for Multinational Enterprises of the Organization for Economic Cooperation and Development; and performance standards required by institutions that support overseas investments. Other approaches amount to direct extraterritorial legislation and enforcement. This includes criminal regimes that allow for prosecutions based on the nationality of the perpetrator no matter where the offence occurs. Various factors may contribute to the perceived and actual reasonableness of States’ actions, for example whether they are grounded in multilateral agreement.

B. Operational principles

General State regulatory and policy functions

3. In meeting their duty to protect, States should:

(a) Enforce laws that are aimed at, or have the effect of, requiring business enterprises to respect human rights, and periodically to assess the adequacy of such laws and address any gaps;

(b) Ensure that other laws and policies governing the creation and ongoing operation of business enterprises, such as corporate law, do not constrain but enable business respect for human rights;

(c) Provide effective guidance to business enterprises on how to respect human rights throughout their operations;

(d) Encourage, and where appropriate require, business enterprises to communicate how they address their human rights impacts.

Commentary

States should not assume that businesses invariably prefer, or benefit from, State inaction, and they should consider a smart mix of measures – national and international, mandatory and voluntary – to foster business respect for human rights.

The failure to enforce existing laws that directly or indirectly regulate business respect for human rights is often a significant legal gap in State practice. Such laws might range from non-discrimination and labour laws to environmental, property, privacy and anti-bribery laws.

Therefore, it is important for States to consider whether such laws are currently being enforced effectively, and if not, why this is the case and what measures may reasonably correct the situation.

It is equally important for States to review whether these laws provide the necessary coverage in light of evolving circumstances and whether, together with relevant policies, they provide an environment conducive to business respect for human rights. For example, greater clarity in some areas of law and policy, such as those governing access to land, including entitlements in relation to ownership or use of land, is often necessary to protect both rights-holders and business enterprises.

Laws and policies that govern the creation and ongoing operation of business enterprises, such as corporate and securities laws, directly shape business behaviour. Yet their implications for human rights remain poorly understood. For example, there is a lack of clarity in corporate and securities law regarding what companies and their officers are permitted, let alone required, to
do regarding human rights. Laws and policies in this area should provide sufficient guidance to enable enterprises to respect human rights, with due regard to the role of existing governance structures such as corporate boards. Guidance to business enterprises on respecting human rights should indicate expected outcomes and help share best practices. It should advise on appropriate methods, including human rights due diligence, and how to consider effectively issues of gender, vulnerability and/or marginalization, recognizing the specific challenges that may be faced by indigenous peoples, women, national or ethnic minorities, religious and linguistic minorities, children, persons with disabilities, and migrant workers and their families.

National human rights institutions that comply with the Paris Principles have an important role to play in helping States identify whether relevant laws are aligned with their human rights obligations and are being effectively enforced, and in providing guidance on human rights also to business enterprises and other non-State actors.

Communication by business enterprises on how they address their human rights impacts can range from informal engagement with affected stakeholders to formal public reporting. State encouragement of, or where appropriate requirements for, such communication are important in fostering respect for human rights by business enterprises. Incentives to communicate adequate information could include provisions to give weight to such self-reporting in the event of any judicial or administrative proceeding. A requirement to communicate can be particularly appropriate where the nature of business operations or operating contexts pose a significant risk to human rights. Policies or laws in this area can usefully clarify what and how businesses should communicate, helping to ensure both the accessibility and accuracy of communications.

Any stipulation of what would constitute adequate communication should take into account risks that it may pose to the safety and security of individuals and facilities; legitimate requirements of commercial confidentiality; and variations in companies’ size and structures.

Financial reporting requirements should clarify that human rights impacts in some instances may be “material” or “significant” to the economic performance of the business enterprise.

The State-business nexus

4. States should take additional steps to protect against human rights abuses by business enterprises that are owned or controlled by the State, or that receive substantial support and services from State agencies such as export credit agencies and official investment insurance or guarantee agencies, including, where appropriate, by requiring human rights due diligence.

Commentary

States individually are the primary duty-bearers under international human rights law, and collectively they are the trustees of the international human rights regime. Where a business enterprise is controlled by the State or where its acts can be attributed otherwise to the State, an abuse of human rights by the business enterprise may entail a violation of the State’s own international law obligations. Moreover, the closer a business enterprise is to the State, or the more it relies on statutory authority or taxpayer support, the stronger the State’s policy rationale becomes for ensuring that the enterprise respects human rights.

Where States own or control business enterprises, they have greatest means within their powers to ensure that relevant policies, legislation and regulations regarding respect for human rights are implemented. Senior management typically reports to State agencies, and associated government departments have greater scope for scrutiny and oversight, including ensuring that effective human rights due diligence is implemented. (These enterprises are also subject to the corporate responsibility to respect human rights, addressed in Chapter II.)

A range of agencies linked formally or informally to the State may provide support and services to business activities. These include export credit agencies, official investment insurance or guarantee agencies, development agencies and development finance institutions. Where these agencies do not explicitly consider the actual and potential adverse impacts on human rights of beneficiary enterprises, they put themselves at risk – in reputational, financial, political and potentially legal terms – for supporting any such harm, and they may add to the human rights challenges faced by the recipient State.
Given these risks, States should encourage and, where appropriate, require human rights due diligence by the agencies themselves and by those business enterprises or projects receiving their support. A requirement for human rights due diligence is most likely to be appropriate where the nature of business operations or operating contexts pose significant risk to human rights.

5. **States should exercise adequate oversight in order to meet their international human rights obligations when they contract with, or legislate for, business enterprises to provide services that may impact upon the enjoyment of human rights.**

Commentary

States do not relinquish their international human rights law obligations when they privatize the delivery of services that may impact upon the enjoyment of human rights. Failure by States to ensure that business enterprises performing such services operate in a manner consistent with the State’s human rights obligations may entail both reputational and legal consequences for the State itself. As a necessary step, the relevant service contracts or enabling legislation should clarify the State’s expectations that these enterprises respect human rights. States should ensure that they can effectively oversee the enterprises’ activities, including through the provision of adequate independent monitoring and accountability mechanisms.

6. **States should promote respect for human rights by business enterprises with which they conduct commercial transactions.**

Commentary

States conduct a variety of commercial transactions with business enterprises, not least through their procurement activities. This provides States – individually and collectively – with unique opportunities to promote awareness of and respect for human rights by those enterprises, including through the terms of contracts, with due regard to States’ relevant obligations under national and international law.

**Supporting business respect for human rights in conflict-affected areas**

7. **Because the risk of gross human rights abuses is heightened in conflict-affected areas, States should help ensure that business enterprises operating in those contexts are not involved with such abuses, including by:**

(a) Engaging at the earliest stage possible with business enterprises to help them identify, prevent and mitigate the human rights-related risks of their activities and business relationships;

(b) Providing adequate assistance to business enterprises to assess and address the heightened risks of abuses, paying special attention to both gender-based and sexual violence;

(c) Denying access to public support and services for a business enterprise that is involved with gross human rights abuses and refuses to cooperate in addressing the situation;

(d) Ensuring that their current policies, legislation, regulations and enforcement measures are effective in addressing the risk of business involvement in gross human rights abuses.

Commentary

Some of the worst human rights abuses involving business occur amid conflict over the control of territory, resources or a Government itself – where the human rights regime cannot be expected to function as intended. Responsible businesses increasingly seek guidance from States about how to avoid contributing to human rights harm in these difficult contexts. Innovative and practical approaches are needed. In particular, it is important to pay attention to the risk of sexual and gender-based violence, which is especially prevalent during times of conflict. It is important for all States to address issues early before situations on the ground deteriorate. In conflict-affected areas, the “host” State may be unable to protect human rights adequately due to a lack of effective control. Where transnational corporations are involved, their “home” States therefore have roles to play in assisting both those corporations and host States to ensure that
businesses are not involved with human rights abuse, while neighboring States can provide important additional support.

To achieve greater policy coherence and assist business enterprises adequately in such situations, home States should foster closer cooperation among their development assistance agencies, foreign and trade ministries, and export finance institutions in their capitals and within their embassies, as well as between these agencies and host Government actors; develop early-warning indicators to alert Government agencies and business enterprises to problems; and attach appropriate consequences to any failure by enterprises to cooperate in these contexts, including by denying or withdrawing existing public support or services, or where that is not possible, denying their future provision.

States should warn business enterprises of the heightened risk of being involved with gross abuses of human rights in conflict-affected areas. They should review whether their policies, legislation, regulations and enforcement measures effectively address this heightened risk, including through provisions for human rights due diligence by business. Where they identify gaps, States should take appropriate steps to address them. This may include exploring civil, administrative or criminal liability for enterprises domiciled or operating in their territory and/or jurisdiction that commit or contribute to gross human rights abuses. Moreover, States should consider multilateral approaches to prevent and address such acts, as well as support effective collective initiatives.

All these measures are in addition to States’ obligations under international humanitarian law in situations of armed conflict, and under international criminal law.

**Ensuring policy coherence**

8. States should ensure that governmental departments, agencies and other State-based institutions that shape business practices are aware of and observe the State’s human rights obligations when fulfilling their respective mandates, including by providing them with relevant information, training and support.

*Commentary*

There is no inevitable tension between States’ human rights obligations and the laws and policies they put in place that shape business practices. However, at times, States have to make difficult balancing decisions to reconcile different societal needs. To achieve the appropriate balance, States need to take a broad approach to managing the business and human rights agenda, aimed at ensuring both vertical and horizontal domestic policy coherence.

Vertical policy coherence entails States having the necessary policies, laws and processes to implement their international human rights law obligations. Horizontal policy coherence means supporting and equipping departments and agencies, at both the national and sub-national levels, that shape business practices – including those responsible for corporate law and securities regulation, investment, export credit and insurance, trade and labour – to be informed of and act in a manner compatible with the Governments’ human rights obligations.

9. States should maintain adequate domestic policy space to meet their human rights obligations when pursuing business-related policy objectives with other States or business enterprises, for instance through investment treaties or contracts.

*Commentary*

Economic agreements concluded by States, either with other States or with business enterprises – such as bilateral investment treaties, free-trade agreements or contracts for investment projects – create economic opportunities for States. But they can also affect the domestic policy space of governments. For example, the terms of international investment agreements may constrain States from fully implementing new human rights legislation, or put them at risk of binding international arbitration if they do so. Therefore, States should ensure that they retain adequate policy and regulatory ability to protect human rights under the terms of such agreements, while providing the necessary investor protection.

10. States, when acting as members of multilateral institutions that deal with business-related issues, should:
(a) Seek to ensure that those institutions neither restrain the ability of their member States to meet their duty to protect nor hinder business enterprises from respecting human rights;
(b) Encourage those institutions, within their respective mandates and capacities, to promote business respect for human rights and, where requested, to help States meet their duty to protect against human rights abuse by business enterprises, including through technical assistance, capacity-building and awareness-raising;
(c) Draw on these Guiding Principles to promote shared understanding and advance international cooperation in the management of business and human rights challenges.

Commentary
Greater policy coherence is also needed at the international level, including where States participate in multilateral institutions that deal with business-related issues, such as international trade and financial institutions. States retain their international human rights law obligations when they participate in such institutions. Capacity-building and awareness-raising through such institutions can play a vital role in helping all States to fulfil their duty to protect, including by enabling the sharing of information about challenges and best practices, thus promoting more consistent approaches. Collective action through multilateral institutions can help States level the playing field with regard to business respect for human rights, but it should do so by raising the performance of laggards. Cooperation between States, multilateral institutions and other stakeholders can also play an important role. These Guiding Principles provide a common reference point in this regard, and could serve as a useful basis for building a cumulative positive effect that takes into account the respective roles and responsibilities of all relevant stakeholders.

II. The corporate responsibility to respect human rights

A. Foundational principles

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

Commentary
The responsibility to respect human rights is a global standard of expected conduct for all business enterprises wherever they operate. It exists independently of States’ abilities and/or willingness to fulfil their own human rights obligations, and does not diminish those obligations. And it exists over and above compliance with national laws and regulations protecting human rights.
Addressing adverse human rights impacts requires taking adequate measures for their prevention, mitigation and, where appropriate, remediation. Business enterprises may undertake other commitments or activities to support and promote human rights, which may contribute to the enjoyment of rights. But this does not offset a failure to respect human rights throughout their operations. Business enterprises should not undermine States’ abilities to meet their own human rights obligations, including by actions that might weaken the integrity of judicial processes.

12. The responsibility of business enterprises to respect human rights refers to internationally recognized human rights – understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organization’s Declaration on Fundamental Principles and Rights at Work.

Commentary
Because business enterprises can have an impact on virtually the entire spectrum of internationally recognized human rights, their responsibility to respect applies to all such rights. In practice, some human rights may be at greater risk than others in particular industries or
contexts, and therefore will be the focus of heightened attention. However, situations may change, so all human rights should be the subject of periodic review.

An authoritative list of the core internationally recognized human rights is contained in the International Bill of Human Rights (consisting of the Universal Declaration of Human Rights and the main instruments through which it has been codified: the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights), coupled with the principles concerning fundamental rights in the eight ILO core conventions as set out in the Declaration on Fundamental Principles and Rights at Work. These are the benchmarks against which other social actors assess the human rights impacts of business enterprises. The responsibility of business enterprises to respect human rights is distinct from issues of legal liability and enforcement, which remain defined largely by national law provisions in relevant jurisdictions.

Depending on circumstances, business enterprises may need to consider additional standards. For instance, enterprises should respect the human rights of individuals belonging to specific groups or populations that require particular attention, where they may have adverse human rights impacts on them. In this connection, United Nations instruments have elaborated further on the rights of indigenous peoples; women; national or ethnic, religious and linguistic minorities; children; persons with disabilities; and migrant workers and their families. Moreover, in situations of armed conflict enterprises should respect the standards of international humanitarian law.

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

Commentary
Business enterprises may be involved with adverse human rights impacts either through their own activities or as a result of their business relationships with other parties. Guiding Principle 19 elaborates further on the implications for how business enterprises should address these situations. For the purpose of these Guiding Principles a business enterprise’s “activities” are understood to include both actions and omissions; and its “business relationships” are understood to include relationships with business partners, entities in its value chain, and any other non-State or State entity directly linked to its business operations, products or services.

14. The responsibility of business enterprises to respect human rights applies to all enterprises regardless of their size, sector, operational context, ownership and structure. Nevertheless, the scale and complexity of the means through which enterprises meet that responsibility may vary according to these factors and with the severity of the enterprise’s adverse human rights impacts.

Commentary
The means through which a business enterprise meets its responsibility to respect human rights will be proportional to, among other factors, its size. Small and medium-sized enterprises may have less capacity as well as more informal processes and management structures than larger companies, so their respective policies and processes will take on different forms. But some small and medium-sized enterprises can have severe human rights impacts, which will require corresponding measures regardless of their size. Severity of impacts will be judged by their scale, scope and irremediable character. The means through which a business enterprise meets its responsibility to respect human rights may also vary depending on whether, and the extent to which, it conducts business through a corporate group or individually. However, the responsibility to respect human rights applies fully and equally to all business enterprises.

15. In order to meet their responsibility to respect human rights, business enterprises
should have in place policies and processes appropriate to their size and circumstances, including:
(a) A policy commitment to meet their responsibility to respect human rights;
(b) A human rights due-diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights;
(c) Processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute.

Commentary
Business enterprises need to know and show that they respect human rights. They cannot do so unless they have certain policies and processes in place. Principles 16 to 24 elaborate further on these.

B. Operational principles

Policy commitment
16. As the basis for embedding their responsibility to respect human rights, business enterprises should express their commitment to meet this responsibility through a statement of policy that:
(a) Is approved at the most senior level of the business enterprise;
(b) Is informed by relevant internal and/or external expertise;
(c) Stipulates the enterprise's human rights expectations of personnel, business partners and other parties directly linked to its operations, products or services;
(d) Is publicly available and communicated internally and externally to all personnel, business partners and other relevant parties;
(e) Is reflected in operational policies and procedures necessary to embed it throughout the business enterprise.

Commentary
The term “statement” is used generically, to describe whatever means an enterprise employs to set out publicly its responsibilities, commitments, and expectations. The level of expertise required to ensure that the policy statement is adequately informed will vary according to the complexity of the business enterprise's operations. Expertise can be drawn from various sources, ranging from credible online or written resources to consultation with recognized experts. The statement of commitment should be publicly available. It should be communicated actively to entities with which the enterprise has contractual relationships; others directly linked to its operations, which may include State security forces; investors; and, in the case of operations with significant human rights risks, to the potentially affected stakeholders. Internal communication of the statement and of related policies and procedures should make clear what the lines and systems of accountability will be, and should be supported by any necessary training for personnel in relevant business functions. Just as States should work towards policy coherence, so business enterprises need to strive for coherence between their responsibility to respect human rights and policies and procedures that govern their wider business activities and relationships. This should include, for example, policies and procedures that set financial and other performance incentives for personnel; procurement practices; and lobbying activities where human rights are at stake. Through these and any other appropriate means, the policy statement should be embedded from the top of the business enterprise through all its functions, which otherwise may act without awareness or regard for human rights.

Human rights due diligence
17. In order to identify, prevent, mitigate and account for how they address their adverse human rights impacts, business enterprises should carry out human rights due diligence. The process should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how
impacts are addressed. Human rights due diligence:
(a) Should cover adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships;
(b) Will vary in complexity with the size of the business enterprise, the risk of severe human rights impacts, and the nature and context of its operations;
(c) Should be ongoing, recognizing that the human rights risks may change over time as the business enterprise’s operations and operating context evolve.

Commentary
This Principle defines the parameters for human rights due diligence, while Principles 18 through 21 elaborate its essential components.
Human rights risks are understood to be the business enterprise’s potential adverse human rights impacts. Potential impacts should be addressed through prevention or mitigation, while actual impacts – those that have already occurred – should be a subject for remediation (Principle 22).
Human rights due diligence can be included within broader enterprise risk-management systems, provided that it goes beyond simply identifying and managing material risks to the company itself, to include risks to rights-holders.

Human rights due diligence should be initiated as early as possible in the development of a new activity or relationship, given that human rights risks can be increased or mitigated already at the stage of structuring contracts or other agreements, and may be inherited through mergers or acquisitions.

Where business enterprises have large numbers of entities in their value chains it may be unreasonably difficult to conduct due diligence for adverse human rights impacts across them all. If so, business enterprises should identify general areas where the risk of adverse human rights impacts is most significant, whether due to certain suppliers’ or clients’ operating context, the particular operations, products or services involved, or other relevant considerations, and prioritize these for human rights due diligence.

Questions of complicity may arise when a business enterprise contributes to, or is seen as contributing to, adverse human rights impacts caused by other parties. Complicity has both non-legal and legal meanings. As a non-legal matter, business enterprises may be perceived as being “complicit” in the acts of another party where, for example, they are seen to benefit from an abuse committed by that party.

As a legal matter, most national jurisdictions prohibit complicity in the commission of a crime, and a number allow for criminal liability of business enterprises in such cases. Typically, civil actions can also be based on an enterprise’s alleged contribution to a harm, although these may not be framed in human rights terms. The weight of international criminal law jurisprudence indicates that the relevant standard for aiding and abetting is knowingly providing practical assistance or encouragement that has a substantial effect on the commission of a crime.

Conducting appropriate human rights due diligence should help business enterprises address the risk of legal claims against them by showing that they took every reasonable step to avoid involvement with an alleged human rights abuse. However, business enterprises conducting such due diligence should not assume that, by itself, this will automatically and fully absolve them from liability for causing or contributing to human rights abuses.

18. In order to gauge human rights risks, business enterprises should identify and assess any actual or potential adverse human rights impacts with which they may be involved either through their own activities or as a result of their business relationships. This process should:
(a) Draw on internal and/or independent external human rights expertise;
(b) Involve meaningful consultation with potentially affected groups and other relevant stakeholders, as appropriate to the size of the business enterprise and the nature and context of the operation.

Commentary
The initial step in conducting human rights due diligence is to identify and assess the nature of the actual and potential adverse human rights impacts with which a business enterprise may be involved. The purpose is to understand the specific impacts on specific people, given a specific context of operations. Typically this includes assessing the human rights context prior to a proposed business activity, where possible; identifying who may be affected; cataloguing the relevant human rights standards and issues; and projecting how the proposed activity and associated business relationships could have adverse human rights impacts on those identified. In this process, business enterprises should pay special attention to any particular human rights impacts on individuals from groups or populations that may be at heightened risk of vulnerability or marginalization, and bear in mind the different risks that may be faced by women and men.

While processes for assessing human rights impacts can be incorporated within other processes such as risk assessments or environmental and social impact assessments, they should include all internationally recognized human rights as a reference point, since enterprises may potentially impact virtually any of these rights. Because human rights situations are dynamic, assessments of human rights impacts should be undertaken at regular intervals: prior to a new activity or relationship; prior to major decisions or changes in the operation (e.g. market entry, product launch, policy change, or wider changes to the business); in response to or anticipation of changes in the operating environment (e.g. rising social tensions); and periodically throughout the life of an activity or relationship.

A/17/1731

To enable business enterprises to assess their human rights impacts accurately, they should seek to understand the concerns of potentially affected stakeholders by consulting them directly in a manner that takes into account language and other potential barriers to effective engagement. In situations where such consultation is not possible, business enterprises should consider reasonable alternatives such as consulting credible, independent expert resources, including human rights defenders and others from civil society.

The assessment of human rights impacts informs subsequent steps in the human rights due diligence process.

19. In order to prevent and mitigate adverse human rights impacts, business enterprises should integrate the findings from their impact assessments across relevant internal functions and processes, and take appropriate action.

(a) Effective integration requires that:
(i) Responsibility for addressing such impacts is assigned to the appropriate level and function within the business enterprise;
(ii) Internal decision-making, budget allocations and oversight processes enable effective responses to such impacts.

(b) Appropriate action will vary according to:
(i) Whether the business enterprise causes or contributes to an adverse impact, or whether it is involved solely because the impact is directly linked to its operations, products or services by a business relationship;
(ii) The extent of its leverage in addressing the adverse impact.

Commentary

The horizontal integration across the business enterprise of specific findings from assessing human rights impacts can only be effective if its human rights policy commitment has been embedded into all relevant business functions. This is required to ensure that the assessment findings are properly understood, given due weight, and acted upon.

In assessing human rights impacts, business enterprises will have looked for both actual and potential adverse impacts. Potential impacts should be prevented or mitigated through the horizontal integration of findings across the business enterprise, while actual impacts—those that have already occurred—should be a subject for remediation (Principle 22).

Where a business enterprise causes or may cause an adverse human rights impact, it should take the necessary steps to cease or prevent the impact.
Where a business enterprise contributes or may contribute to an adverse human rights impact, it should take the necessary steps to cease or prevent its contribution and use its leverage to mitigate any remaining impact to the greatest extent possible. Leverage is considered to exist where the enterprise has the ability to effect change in the wrongful practices of an entity that causes a harm.

Where a business enterprise has not contributed to an adverse human rights impact, but that impact is nevertheless directly linked to its operations, products or services by its business relationship with another entity, the situation is more complex. Among the factors that will enter into the determination of the appropriate action in such situations are the enterprise’s leverage over the entity concerned, how crucial the relationship is to the enterprise, the severity of the abuse, and whether terminating the relationship with the entity itself would have adverse human rights consequences.

The more complex the situation and its implications for human rights, the stronger is the case for the enterprise to draw on independent expert advice in deciding how to respond. If the business enterprise has leverage to prevent or mitigate the adverse impact, it should exercise it. And if it lacks leverage there may be ways for the enterprise to increase it. Leverage may be increased by, for example, offering capacity-building or other incentives to the related entity, or collaborating with other actors.

There are situations in which the enterprise lacks the leverage to prevent or mitigate adverse impacts and is unable to increase its leverage. Here, the enterprise should consider ending the relationship, taking into account credible assessments of potential adverse human rights impacts of doing so.

Where the relationship is “crucial” to the enterprise, ending it raises further challenges. A relationship could be deemed as crucial if it provides a product or service that is essential to the enterprise’s business, and for which no reasonable alternative source exists. Here the severity of the adverse human rights impact must also be considered: the more severe the abuse, the more quickly the enterprise will need to see change before it takes a decision on whether it should end the relationship. In any case, for as long as the abuse continues and the enterprise remains in the relationship, it should be able to demonstrate its own ongoing efforts to mitigate the impact and be prepared to accept any consequences – reputational, financial or legal – of the continuing connection.

20. In order to verify whether adverse human rights impacts are being addressed, business enterprises should track the effectiveness of their response. Tracking should:
(a) Be based on appropriate qualitative and quantitative indicators;
(b) Draw on feedback from both internal and external sources, including affected stakeholders.

Commentary
Tracking is necessary in order for a business enterprise to know if its human rights policies are being implemented optimally, whether it has responded effectively to the identified human rights impacts, and to drive continuous improvement.

Business enterprises should make particular efforts to track the effectiveness of their responses to impacts on individuals from groups or populations that may be at heightened risk of vulnerability or marginalization.

Tracking should be integrated into relevant internal reporting processes. Business enterprises might employ tools they already use in relation to other issues. This could include performance contracts and reviews as well as surveys and audits, using gender-disaggregated data where relevant. Operational-level grievance mechanisms can also provide important feedback on the effectiveness of the business enterprise’s human rights due diligence from those directly affected (see Principle 29).

21. In order to account for how they address their human rights impacts, business enterprises should be prepared to communicate this externally, particularly when concerns are raised by or on behalf of affected stakeholders. Business enterprises whose operations or operating contexts pose risks of severe human rights impacts should report
formally on how they address them. In all instances, communications should:
(a) Be of a form and frequency that reflect an enterprise’s human rights impacts and that are accessible to its intended audiences;
(b) Provide information that is sufficient to evaluate the adequacy of an enterprise’s response to the particular human rights impact involved;
(c) In turn not pose risks to affected stakeholders, personnel or to legitimate requirements of commercial confidentiality.

Commentary
The responsibility to respect human rights requires that business enterprises have in place policies and processes through which they can both know and show that they respect human rights in practice. Showing involves communication, providing a measure of transparency and accountability to individuals or groups who may be impacted and to other relevant stakeholders, including investors.
Communication can take a variety of forms, including in-person meetings, online dialogues, consultation with affected stakeholders, and formal public reports. Formal reporting is itself evolving, from traditional annual reports and corporate responsibility/sustainability reports, to include online updates and integrated financial and non-financial reports.
Formal reporting by enterprises is expected where risks of severe human rights impacts exist, whether this is due to the nature of the business operations or operating contexts. The reporting should cover topics and indicators concerning how enterprises identify and address adverse impacts on human rights. Independent verification of human rights reporting can strengthen its content and credibility. Sector-specific indicators can provide helpful additional detail.

Remediation

22. Where business enterprises identify that they have caused or contributed to adverse impacts, they should provide for or cooperate in their remediation through legitimate processes.

Commentary
Even with the best policies and practices, a business enterprise may cause or contribute to an adverse human rights impact that it has not foreseen or been able to prevent.
Where a business enterprise identifies such a situation, whether through its human rights due diligence process or other means, its responsibility to respect human rights requires active engagement in remediation, by itself or in cooperation with other actors. Operational-level grievance mechanisms for those potentially impacted by the business enterprise’s activities can be one effective means of enabling remediation when they meet certain core criteria, as set out in Principle 31.
Where adverse impacts have occurred that the business enterprise has not caused or contributed to, but which are directly linked to its operations, products or services by a business relationship, the responsibility to respect human rights does not require that the enterprise itself provide for remediation, though it may take a role in doing so.
Some situations, in particular where crimes are alleged, typically will require cooperation with judicial mechanisms.
Further guidance on mechanisms through which remediation may be sought, including where allegations of adverse human rights impacts are contested, is included in Chapter III on access to remedy.

Issues of context
23. In all contexts, business enterprises should:
(a) Comply with all applicable laws and respect internationally recognized human rights, wherever they operate;
(b) Seek ways to honour the principles of internationally recognized human rights when faced with conflicting requirements;
(c) Treat the risk of causing or contributing to gross human rights abuses as a legal
remedy.

Commentary
Although particular country and local contexts may affect the human rights risks of an enterprise’s activities and business relationships, all business enterprises have the same responsibility to respect human rights wherever they operate. Where the domestic context renders it impossible to meet this responsibility fully, business enterprises are expected to respect the principles of internationally recognized human rights to the greatest extent possible in the circumstances, and to be able to demonstrate their efforts in this regard.

Some operating environments, such as conflict-affected areas, may increase the risks of enterprises being complicit in gross human rights abuses committed by other actors (security forces, for example). Business enterprises should treat this risk as a legal compliance issue, given the expanding web of potential corporate legal liability arising from extraterritorial civil claims, and from the incorporation of the provisions of the Rome Statute of the International Criminal Court in jurisdictions that provide for corporate criminal responsibility. In addition, corporate directors, officers and employees may be subject to individual liability for acts that amount to gross human rights abuses.

In complex contexts such as these, business enterprises should ensure that they do not exacerbate the situation. In assessing how best to respond, they will often be well advised to draw on not only expertise and cross-functional consultation within the enterprise, but also to consult externally with credible, independent experts, including from governments, civil society, national human rights institutions and relevant multi-stakeholder initiatives.

24. Where it is necessary to prioritize actions to address actual and potential adverse human rights impacts, business enterprises should first seek to prevent and mitigate those that are most severe or where delayed response would make them irremediable.

Commentary
While business enterprises should address all their adverse human rights impacts, it may not always be possible to address them simultaneously. In the absence of specific legal guidance, if prioritization is necessary business enterprises should begin with those human rights impacts that would be most severe, recognizing that a delayed response may affect remediability. Severity is not an absolute concept in this context, but is relative to the other human rights impacts the business enterprise has identified.

III. Access to remedy

A. Foundational principle
25. As part of their duty to protect against business-related human rights abuse, States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy.

Commentary
Unless States take appropriate steps to investigate, punish and redress business-related human rights abuses when they do occur, the State duty to protect can be rendered weak or even meaningless.

Access to effective remedy has both procedural and substantive aspects. The remedies provided by the grievance mechanisms discussed in this section may take a range of substantive forms the aim of which, generally speaking, will be to counteract or make good any human rights harms that have occurred. Remedy may include apologies, restitution, rehabilitation, financial or non-financial compensation and punitive sanctions (whether criminal or administrative, such as fines), as well as the prevention of harm through, for example, injunctions or guarantees of non-repetition. Procedures for the provision of remedy should be impartial, protected from
corruption and free from political or other attempts to influence the outcome.
For the purpose of these Guiding Principles, a grievance is understood to be a perceived injustice evoking an individual’s or a group’s sense of entitlement, which may be based on law, contract, explicit or implicit promises, customary practice, or general notions of fairness of aggrieved communities. The term grievance mechanism is used to indicate any routinized, State-based or non-State-based, judicial or non-judicial process through which grievances concerning business-related human rights abuse can be raised and remedy can be sought.
State-based grievance mechanisms may be administered by a branch or agency of the State, or by an independent body on a statutory or constitutional basis. They may be judicial or non-judicial. In some mechanisms, those affected are directly involved in seeking remedy; in others, an intermediary seeks remedy on their behalf. Examples include the courts (for both criminal and civil actions), labour tribunals, National Human Rights Institutions, National Contact Points under the Guidelines for Multinational Enterprises of the Organization for Economic Cooperation and Development, many ombudsperson offices, and Government-run complaints offices.
Ensuring access to remedy for business-related human rights abuses requires also that States facilitate public awareness and understanding of these mechanisms, how they can be accessed, and any support (financial or expert) for doing so.
State-based judicial and non-judicial grievance mechanisms should form the foundation of a wider system of remedy. Within such a system, operational-level grievance mechanisms can provide early-stage recourse and resolution. State-based and operational-level mechanisms, in turn, can be supplemented or enhanced by the remedial functions of collaborative initiatives as well as those of international and regional human rights mechanisms. Further guidance with regard to these mechanisms is provided in Guiding Principles 26 to 31.

B. Operational principles

State-based judicial mechanisms
26. States should take appropriate steps to ensure the effectiveness of domestic judicial mechanisms when addressing business-related human rights abuses, including considering ways to reduce legal, practical and other relevant barriers that could lead to a denial of access to remedy.

Commentary
Effective judicial mechanisms are at the core of ensuring access to remedy. Their ability to address business-related human rights abuses depends on their impartiality, integrity and ability to accord due process.
States should ensure that they do not erect barriers to prevent legitimate cases from being brought before the courts in situations where judicial recourse is an essential part of accessing remedy or alternative sources of effective remedy are unavailable. They should also ensure that the provision of justice is not prevented by corruption of the judicial process, that courts are independent of economic or political pressures from other State agents and from business actors, and that the legitimate and peaceful activities of human rights defenders are not obstructed.
Legal barriers that can prevent legitimate cases involving business-related human rights abuse from being addressed can arise where, for example:
• The way in which legal responsibility is attributed among members of a corporate group under domestic criminal and civil laws facilitates the avoidance of appropriate accountability;
• Where claimants face a denial of justice in a host State and cannot access home State courts regardless of the merits of the claim;
• Where certain groups, such as indigenous peoples and migrants, are excluded from the same level of legal protection of their human rights that applies to the wider population.
Practical and procedural barriers to accessing judicial remedy can arise where, for example:
• The costs of bringing claims go beyond being an appropriate deterrent to unmeritorious cases and/or cannot be reduced to reasonable levels through government support, ‘market-based’ mechanisms (such as litigation insurance and legal fee structures), or other means;
States can play a helpful role in raising awareness of, or otherwise facilitating access to, such

against human rights abuse by business enterprises. However, some have also dealt with the failure of a State to meet its duty to protect against human rights abuse by business enterprises.

Another category comprises regional and international human rights bodies. These have dealt culturally appropriate and rights

stakeholder group. They are non-business enterprises. Other stakeholders include individuals from groups or populations at heightened risk of vulnerability or marginalization.

The parties to business-related human rights claims, such as in their financial resources, access to information and expertise. Moreover, whether through active discrimination or as the unintended consequences of the way judicial mechanisms are designed and operate, individuals from groups or populations at heightened risk of vulnerability or marginalization often face additional cultural, social, physical and financial impediments to accessing, using and benefiting from these mechanisms. Particular attention should be given to the rights and specific needs of such groups or populations at each stage of the remedial process: access, procedures and outcome.

State-based non-judicial grievance mechanisms

27. States should provide effective and appropriate non-judicial grievance mechanisms, alongside judicial mechanisms, as part of a comprehensive State-based system for the remedy of business-related human rights abuse.

Commentary

Administrative, legislative and other non-judicial mechanisms play an essential role in complementing and supplementing judicial mechanisms. Even where judicial systems are effective and well-resourced, they cannot carry the burden of addressing all alleged abuses; judicial remedy is not always required; nor is it always the favoured approach for all claimants. Gaps in the provision of remedy for business-related human rights abuses could be filled, where appropriate, by expanding the mandates of existing non-judicial mechanisms and/or by adding new mechanisms. These may be mediation-based, adjudicative or follow other culturally-appropriate and rights-compatible processes – or involve some combination of these – depending on the issues concerned, any public interest involved, and the potential needs of the parties. To ensure their effectiveness, they should meet the criteria set out in Principle 31. National human rights institutions have a particularly important role to play in this regard. As with judicial mechanisms, States should consider ways to address any imbalances between the parties to business-related human rights claims and any additional barriers to access faced by individuals from groups or populations at heightened risk of vulnerability or marginalization.

Non-State-based grievance mechanisms

28. States should consider ways to facilitate access to effective non-State-based grievance mechanisms dealing with business-related human rights harms.

Commentary

One category of non-State-based grievance mechanisms encompasses those administered by a business enterprise alone or with stakeholders, by an industry association or a multi-stakeholder group. They are non-judicial, but may use adjudicative, dialogue-based or other culturally appropriate and rights-compatible processes. These mechanisms may offer particular benefits such as speed of access and remediation, reduced costs and/or transnational reach. Another category comprises regional and international human rights bodies. These have dealt most often with alleged violations by States of their obligations to respect human rights. However, some have also dealt with the failure of a State to meet its duty to protect against human rights abuse by business enterprises.

States can play a helpful role in raising awareness of, or otherwise facilitating access to, such options, alongside the mechanisms provided by States themselves.
29. To make it possible for grievances to be addressed early and remediated directly, business enterprises should establish or participate in effective operational-level grievance mechanisms for individuals and communities who may be adversely impacted.

Commentary
Operational-level grievance mechanisms are accessible directly to individuals and communities who may be adversely impacted by a business enterprise. They are typically administered by enterprises, alone or in collaboration with others, including relevant stakeholders. They may also be provided through recourse to a mutually acceptable external expert or body. They do not require that those bringing a complaint first access other means of recourse. They can engage the business enterprise directly in assessing the issues and seeking remediation of any harm.

Operational-level grievance mechanisms perform two key functions regarding the responsibility of business enterprises to respect human rights.

- First, they support the identification of adverse human rights impacts as a part of an enterprise’s on-going human rights due diligence. They do so by providing a channel for those directly impacted by the enterprise’s operations to raise concerns when they believe they are being or will be adversely impacted. By analyzing trends and patterns in complaints, business enterprises can also identify systemic problems and adapt their practices accordingly.

- Second, these mechanisms make it possible for grievances, once identified, to be addressed and for adverse impacts to be remediated early and directly by the business enterprise, thereby preventing harms from compounding and grievances from escalating. Such mechanisms need not require that a complaint or grievance amount to an alleged human rights abuse before it can be raised, but specifically aim to identify any legitimate concerns of those who may be adversely impacted. If those concerns are not identified and addressed, they may over time escalate into more major disputes and human rights abuses.

Operational-level grievance mechanisms should reflect certain criteria to ensure their effectiveness in practice (Principle 31). These criteria can be met through many different forms of grievance mechanism according to the demands of scale, resource, sector, culture and other parameters.

Operational-level grievance mechanisms can be important complements to wider stakeholder engagement and collective bargaining processes, but cannot substitute for either. They should not be used to undermine the role of legitimate trade unions in addressing labour-related disputes, nor to preclude access to judicial or other non-judicial grievance mechanisms.

30. Industry, multi-stakeholder and other collaborative initiatives that are based on respect for human rights-related standards should ensure that effective grievance mechanisms are available.

Commentary
Human rights-related standards are increasingly reflected in commitments undertaken by industry bodies, multi-stakeholder and other collaborative initiatives, through codes of conduct, performance standards, global framework agreements between trade unions and transnational corporations, and similar undertakings.

Such collaborative initiatives should ensure the availability of effective mechanisms through which affected parties or their legitimate representatives can raise concerns when they believe the commitments in question have not been met. The legitimacy of such initiatives may be put at risk if they do not provide for such mechanisms. The mechanisms could be at the level of individual members, of the collaborative initiative, or both. These mechanisms should provide for accountability and help enable the remediation of adverse human rights impacts.

Effectiveness criteria for non-judicial grievance mechanisms
31. In order to ensure their effectiveness, non-judicial grievance mechanisms, both State-based and non-State-based, should be:

(a) Legitimate: enabling trust from the stakeholder groups for whose use they are intended, and being accountable for the fair conduct of grievance processes;

(b) Accessible: being known to all stakeholder groups for whose use they are intended, and providing adequate assistance for those who may face particular barriers to access;

(c) Predictable: providing a clear and known procedure with an indicative timeframe for
about its design and performance can help to ensure that it meets their needs, that they will use

Commentary
A grievance mechanism can only serve its purpose if the people it is intended to serve know about it, trust it and are able to use it. These criteria provide a benchmark for designing, revising or assessing a non-judicial grievance mechanism to help ensure that it is effective in practice. Poorly designed or implemented grievance mechanisms can risk compounding a sense of grievance amongst affected stakeholders by heightening their sense of disempowerment and disrespect by the process.

The first seven criteria apply to any State-based or non-State-based, adjudicative or dialogue-based mechanism. The eighth criterion is specific to operational-level mechanisms that business enterprises help administer.

The term “grievance mechanism” is used here as a term of art. The term itself may not always be appropriate or helpful when applied to a specific mechanism, but the criteria for effectiveness remain the same. Commentary on the specific criteria follows:

(a) Stakeholders for whose use a mechanism is intended must trust it if they are to choose to use it. Accountability for ensuring that the parties to a grievance process cannot interfere with its fair conduct is typically one important factor in building stakeholder trust;

(b) Barriers to access may include a lack of awareness of the mechanism, language, literacy, costs, physical location and fears of reprisal;

(c) In order for a mechanism to be trusted and used, it should provide public information about the procedure it offers. Timeframes for each stage should be respected wherever possible, while allowing that flexibility may sometimes be needed;

(d) In grievances or disputes between business enterprises and affected stakeholders, the latter frequently have much less access to information and expert resources, and often lack the financial resources to pay for them. Where this imbalance is not redressed, it can reduce both the achievement and perception of a fair process and make it harder to arrive at durable solutions;

(e) Communicating regularly with parties about the progress of individual grievances can be essential to retaining confidence in the process. Providing transparency about the mechanism’s performance to wider stakeholders, through statistics, case studies or more detailed information about the handling of certain cases, can be important to demonstrate its legitimacy and retain broad trust. At the same time, confidentiality of the dialogue between parties and of individuals’ identities should be provided where necessary;

(f) Grievances are frequently not framed in terms of human rights and many do not initially raise human rights concerns. Regardless, where outcomes have implications for human rights, care should be taken to ensure that they are in line with internationally recognized human rights;

(g) Regular analysis of the frequency, patterns and causes of grievances can enable the institution administering the mechanism to identify and influence policies, procedures or practices that should be altered to prevent future harm;

(h) For an operational-level grievance mechanism, engaging with affected stakeholder groups about its design and performance can help to ensure that it meets their needs, that they will use
it in practice, and that there is a shared interest in ensuring its success. Since a business enterprise cannot, with legitimacy, both be the subject of complaints and unilaterally determine their outcome, these mechanisms should focus on reaching agreed solutions through dialogue. Where adjudication is needed, this should be provided by a legitimate, independent third-party mechanism.