

# *The Impact of the UN Guiding Principles on Business Attitudes to Observing Human Rights*

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## **Abstract**

*This contribution discusses business attitudes to human rights obligations and how the United Nations Guiding Principles on Business and Human Rights (UNGPs) have affected them. These are best understood historically through a number of periods. The first, between the mid-1970s and the end of the 1980s, coincides with intergovernmental organization-based codifications relevant to corporate social responsibility. Business representatives were highly defensive towards extensive international legal obligations not only in relation to human rights but to corporate social responsibility (CSR) more generally. This was followed by a period of ‘voluntarism’. By the 1990s, businesses had accepted that there could be a link between their operations and human rights violations but continued to reject binding legal duties. Instead, businesses opted for voluntary codes of conduct based on individual corporate, or sectoral, initiatives. It was out of this period that the UN Global Compact emerged. ‘Voluntarism’ continues into the third period, the era of the UNGPs. The UNGPs can be characterized by ‘institutionalized voluntarism’ achieved through the framework for business and human rights represented by the UNGPs. Each period will be examined followed by a concluding section that considers business attitudes to an emerging fourth period that introduces legal obligations through mandatory due diligence laws.*

**Keywords:** business and human rights, corporate social responsibility, human rights, multinational enterprises, UN Guiding Principles

## I. INTRODUCTION

The tenth anniversary of the United Nations Guiding Principles on Business and Human Rights (UNGPs) demands a stocktaking. The UNGPs were the first ever business and human rights instrument formally adopted by an intergovernmental organization (IGO). They came in the wake of increased consciousness of how business and, in particular multinational enterprises (MNEs) or transnational corporations (TNCs) in the language of

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<sup>¶</sup> Conflicts of interest: The author declares none.

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the UNGPs, had an impact on the human rights of individuals, groups and communities in which they operated.<sup>1</sup> This contribution to the special issue takes on the question of business attitudes to human rights obligations and how the UNGPs have affected them.

Business attitudes to human rights obligations can be best understood historically, contrasting a number of periods. The first period, between the mid-1970s and the end of the 1980s, roughly coincides with the three initial IGO-based codifications relevant to corporate social responsibility (CSR): the United Nations Draft Code of Conduct on Transnational Corporations (UN Draft Code), the International Labour Organization Tripartite Declaration of Principles on Multinational Enterprises and Social Policy, first adopted in 1977 (ILO Tripartite Declaration), and the Organisation for Economic Cooperation and Development Guidelines on Multinational Enterprises, first adopted in 1976 (OECD Guidelines). Only one, the UN Draft Code, expressly included a human rights provision applicable to TNCs. In this period, a period of ‘business defensiveness’, business representatives were, on the whole, hesitant towards extensive international obligations not only in relation to human rights but to legal expressions of CSR more generally. This early era was followed by a period of ‘voluntarism’. By the 1990s, businesses had come to accept that there could be a link between their operations and human rights violations but rejected any notion of binding legal duties in the field. Instead, businesses opted for voluntary codes of conduct based on individual corporate, or sectoral, initiatives. It was out of this period that the UN Global Compact emerged. ‘Voluntarism’ continues into the third period of this study, the era of the UNGPs. The UNGPs can be said to be characterized by ‘institutionalized voluntarism’ achieved through the framework for business and human rights represented by the UNGPs. Each period will be examined followed by a concluding section that considers business attitudes to an emerging fourth period that introduces mandatory legal obligations.

## II. THE PERIOD OF BUSINESS ‘DEFENSIVENESS’

The original approach of business to human rights is closely tied up with the first international attempts to codify corporate social responsibilities in international codes of conduct between the mid-1970s and through the 1980s.<sup>2</sup> As noted, the UN Draft Code is the only one that included a general provision concerning corporate respect for human rights. The OECD Guidelines did not introduce a Guideline on human rights until the

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<sup>1</sup> United Nations ‘Guiding Principles on Business and Human Rights’ (2011) at [https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr\\_en.pdf](https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf) (accessed 29 March 2021). For analysis of how this came about, see Peter Muchlinski ‘Human Rights and Multinationals: Is There a Problem?’ (2001) 77:1 *International Affairs* 31, <http://www.jstor.org/stable/2626552>.

<sup>2</sup> These included the general UN Draft Code (note 5 below) and OECD Guidelines (note 3 below) and sector specific codes including the ILO Tripartite Declaration (note 4 below), the United Nations Conference on Trade And Development (UNCTAD) Set of Principles on Restrictive Business Practices 1980, available at <https://unctad.org/topic/competition-and-consumer-protection/the-united-nations-set-of-principles-on-competition> (accessed 29 March 2021), the UNCTAD Draft Code of Conduct on Technology Transfer, available at <https://unctad.org/system/files/official-document/psiteipcm5.en.pdf> (accessed 29 March 2021) and the World Health Organisation International Code of Marketing of Breast-milk Substitutes 1981, available at [https://www.who.int/nutrition/publications/code\\_english.pdf](https://www.who.int/nutrition/publications/code_english.pdf) (accessed 29 March 2021).

2011 revision,<sup>3</sup> while the ILO Tripartite Declaration originally covered only labour rights and relations. The 2017 revision adopted a human rights due diligence standard, reflecting the influence of the UNGPs upon its content.<sup>4</sup>

The UN Draft Code states in paragraph 13:

‘Transnational corporations should/shall respect human rights and fundamental freedoms in the countries in which they operate. In their social and industrial relations, transnational corporations should/shall not discriminate on the basis of race, colour, sex, religion, language, social, national and ethnic origin or political or other opinion. Transnational corporations should/shall conform to government policies designed to extend equality of opportunity and treatment.’<sup>5</sup>

The human rights provision appears not to have caused much difficulty. The key points of division concerned the legal status of the Draft Code, the role of international minimum standards of treatment in protecting TNCs and the content of specific guarantees for investors.

Business representatives were involved in the drafting process through attendance at meetings of the Intergovernmental Working Group established by the Commission on Transnational Corporations, the body charged with the Code negotiations.<sup>6</sup> The International Chamber of Commerce (ICC) was the leading business representative.<sup>7</sup> During the UN Draft Code negotiations, business representatives focused, above all, on ensuring that no legally binding norms emerged.<sup>8</sup> The strategy was to use the 1976 OECD Guidelines, adopted as a deliberate counter to any future UN Code, as the benchmark.<sup>9</sup> The OECD Guidelines were the product of a tripartite drafting process, involving governmental representatives and two advisory committees composed of business and trade union representatives, allowing for more business influence over their content.<sup>10</sup> The OECD Guidelines provided a model negotiating text reflecting the limits of what MNEs would accept. Unsurprisingly, the original OECD Guidelines offered few

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<sup>3</sup> See OECD ‘Guidelines on Multinational Enterprises’ (Paris: OECD, 2011) at <http://www.oecd.org/daf/inv/mne/48004323.pdf> (accessed 29 March 2021). See further Peter T Muchlinski, *Multinational Enterprises and the Law*, 3rd edn (Oxford: Oxford University Press, 2021) 574–77.

<sup>4</sup> International Labour Organization ‘Tripartite Declaration of Principles on Multinational Enterprises and Social Policy’ (Geneva: ILO, 2017) at [https://www.ilo.org/wcmsp5/groups/public/—ed\\_emp/—emp\\_ent/—multi/documents/publication/wcms\\_094386.pdf](https://www.ilo.org/wcmsp5/groups/public/—ed_emp/—emp_ent/—multi/documents/publication/wcms_094386.pdf) (accessed 29 March 2021). See further Muchlinski, *ibid.*, chapter 13.

<sup>5</sup> ‘Draft United Nations Code of Conduct on Transnational Corporations’ (1983 version), <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2891/download> (accessed 29 March 2021) or (1983) 22 *International Legal Materials* 192.

<sup>6</sup> See ‘Information Paper on the Negotiations to Complete the Code of Conduct on Transnational Corporations’ (1983) 22 *International Legal Materials* 177, para 11. See generally Karl Sauvant ‘The Negotiations of the United Nations Code of Conduct on Transnational Corporations: Experience and Lessons Learned’ (2015) 16 *Journal of World Investment and Trade* 11.

<sup>7</sup> See John Robinson, *Multinationals and Political Control* (Aldershot: Gower, 1983) 217.

<sup>8</sup> See Jens Martens, *Corporate Influence on the Business and Human Rights Agenda of the United Nations* (Aachen/Berlin/Bonn/New York: Misereor, Brot für die Welt, Global Policy Forum, June 2014), <https://www.globalpolicy.org/home/221-transnational-corporations/52638-new-working-paper-corporate-influence-on-the-business-and-human-rights-agenda-of-the-un.html> 7.

<sup>9</sup> See Robinson, *note 7*: 117 and 217.

<sup>10</sup> See Robinson, *ibid.*, 204–12 and 217.

significant restraints on corporate freedom, focusing on voluntary corporate cooperation with states in their socio-economic policies, and reinforced the international law minimum standard of protection for foreign investors and their property.<sup>11</sup>

The general mood among business towards formal guidelines in the 1980s was summarized in a contemporary account by John Robinson:

‘Multinational companies, seeing themselves as sandwiched between a receding market and expanding government intrusion into it, prefer by and large to caricature such requirements as a mixture of bureaucratic meddling, left-wing ideology and trade union pressures – bad in themselves, worse in combination and worst of all when launched in an economic crisis ... The international business programme of the 1980s thus tends to include a position of blanket defence against any new business standards, rather than allowing an appraisal of individual measures on their merits.’<sup>12</sup>

By the end of the 1980s MNEs could be more relaxed. The revolution in global economic policy towards what we now call ‘neoliberalism’ was under way, especially in the UK and US, whose governments were instrumental in ending the Code negotiations in 1992.<sup>13</sup> In addition, revival of a UN Code on TNCs was restricted by institutional reorganization which saw the New York-based bodies responsible for the Code negotiations, the UN Centre and Commission on Transnational Corporations, being wound up and replaced by a new body established under the auspices of the United Nations Conference on Trade and Development (UNCTAD) in Geneva: the Division on Investment, Technology and Enterprise (DITE). This was to act as a think-tank focused on making developing country economies more attractive to foreign investment.<sup>14</sup> That said, DITE (now the Division on Investment and Enterprise, DIAE) has remained concerned about the economic and social impacts of MNE investment in the Global South and, to that extent, has kept the idea of a balance between corporate rights and obligations in international norms alive.

### III. THE PERIOD OF ‘VOLUNTARISM’

The 1990s started out with little change in corporate attitudes. By the end of the decade, corporations were actively addressing how to ensure that their operations were human rights compliant. The key factor in this change was increased public awareness of corporate involvement in gross violations of human rights. Two cases in particular stand out as game changers: the campaign against corporate investment in South Africa during the apartheid era and the damaging revelations of Shell’s

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<sup>11</sup> See Peter T Muchlinski. *Multinational Enterprises and the Law*, 2nd edn (Oxford: Oxford University Press, 2007) 658–60.

<sup>12</sup> *Ibid*, 226

<sup>13</sup> See Sauvant, *note 6*: 54–55.

<sup>14</sup> See Peter T Muchlinski *Multinational Enterprises and the Law*, 3rd edn (Oxford: Oxford University Press, 2021) 115–116.

involvement in human rights violations in the Niger Delta. Equally, some business leaders began to address corporate human rights violations. Of particular note is the establishment of the Amnesty International UK Business Group (AI Business Group) under the leadership of the late Sir Geoffrey Chandler, a former Shell executive, who was a pioneering voice in the business and human rights movement of the 1990s.

The initial reluctance of firms to venture into human rights territory was motivated by the view that they should not become embroiled in local politics, a stance supported by paragraph 15 of the UN Draft Code which covered 'non-interference in internal political affairs'. A typical viewpoint was given by the chair of Anglo-American Tobacco responding to a 1993 Amnesty report on torture in China, circulated to companies doing business in China by the AI Business Group: 'we operate worldwide and we do not comment on such matters as human rights violations. It is inappropriate for us to do so, particularly as the environment in which we operate is so variable'.<sup>15</sup>

This approach was echoed by firms reluctant to engage with the apartheid regime of South Africa. By contrast the anti-apartheid movement, from its inception in the 1960s, specifically focused on business investment in South Africa and the extent to which foreign firms should take an active and vocal stance against apartheid. This was not straightforward as the struggle was suffused by 'Cold War' rivalry, with the African National Congress seen as a terrorist organization supported by Soviet money and that South Africa, while racist, was seen as a Western ally.<sup>16</sup> Despite this political context, the anti-apartheid movement was notable for the pressure it exerted on Western MNEs to engage against segregation and even to divest from South Africa, as numerous US-based universities, municipalities, pension funds and state legislatures did during the 1970s and 1980s.<sup>17</sup>

A significant development was the Sullivan Principles of 1977, named after their originator, Reverend Leon Sullivan, the first African-American to become a non-executive board member when, in 1971, he joined the board of General Motors.<sup>18</sup> The Sullivan Principles represent the first voluntary corporate human rights instrument requiring firms to report on their human rights practices, in this case desegregation of their workplaces and improving the lives of Black and other non-White South Africans.<sup>19</sup> The underlying logic of the Sullivan Principles assumed that it was acceptable for firms to continue to invest in South Africa, while funding good public works and encouraging

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<sup>15</sup> Quoted in Sir Geoffrey Chandler, 'The Amnesty International UK Business Group: Putting Human Rights on the Corporate Agenda' (2009) 33 *The Journal of Corporate Citizenship* 29, 31; <http://www.jstor.org/stable/jcorpciti.33.29>.

<sup>16</sup> See Olivia B Waxman 'The U.S. Government Had Nelson Mandela on Terrorist Watch Lists Until 2008. Here's Why', *Time* (18 July 2018), <https://time.com/5338569/nelson-mandela-terror-list/> (accessed 29 March 2021); Andy McSmith 'Margaret Thatcher branded ANC "terrorist" while urging Nelson Mandela's release', *The Independent* (9 December 2013), <https://www.independent.co.uk/news/uk/politics/margaret-thatcher-branded-anc-terrorist-while-urging-nelson-mandela-s-release-8994191.html> (accessed 29 March 2021).

<sup>17</sup> See Gay W Seidman 'Monitoring Multinationals: Lessons from the Anti-Apartheid Era' (2003) 31:1 *Politics & Society* 1, 11. doi: 10.1177/0032329203254861

<sup>18</sup> See Paul Lewis, 'Leon Sullivan, 78, Dies; Fought Apartheid', *The New York Times* (26 April 2001), <https://www.nytimes.com/2001/04/26/world/leon-sullivan-78-dies-fought-apartheid.html> (accessed 29 March 2021)

<sup>19</sup> See 'The Sullivan Principles' (1977), <https://www.bu.edu/trustees/boardoftrustees/committees/acstri/principles/> (accessed 29 March 2021).

desegregation in the workplace, which served in practice to uphold the regime. Activists favoured outright divestment and Reverend Sullivan eventually agreed, resigning from the board that oversaw the Principles.<sup>20</sup> Events overtook the Sullivan Principles as corporations increasingly pulled out of South Africa in the late 1980s, when the political and security situation deteriorated, and US and other state-mandated economic sanctions began to bite, and by the eventual introduction of democratic government after the election of 1994.<sup>21</sup>

It was also during the 1990s that NGOs began to raise public awareness by highlighting cases of corporate human rights abuses. A key case concerned the human rights impacts of oil company operations on the Ogoni people in the Niger Delta in the 1990s.<sup>22</sup> This proved a turning point for Shell, the company at the forefront of criticism.<sup>23</sup> Shell came under scrutiny following the execution of Ogoni author and environmental activist, Ken Saro-Wiwa, and eight others, wrongly accused of murder by the Nigerian authorities. A coalition of environmentalists, human rights activists and churches joined in criticism of Shell's failure to intervene in the case. Institutional shareholders in the UK, including public employee pension funds and religious organizations, also called for reforms of the company's corporate governance.

Shell responded with a radical overhaul of its corporate governance systems to ensure that it was more responsive to CSR concerns. In stark contrast to the earlier statement by the chair of Imperial Tobacco, the CEO of Shell at the time, Mark Moody-Stuart, opined that the commercial and social obligations of the company could not be separated:

'You can't divorce the two. People sometimes try to do that. They say, all this societal stuff is woolly, we should stick to commerce. The two are absolutely linked ... These soft issues are really business issues, because we are part of society, and members of society are our customers. So, our impact on society really matters commercially.'<sup>24</sup>

Shell entered a dialogue on how to reform its social responsibility strategy with Sir Geoffrey Chandler and the AI Business Group. The result was, in 1997, the first Shell public statement that it accepted corporate responsibilities for human rights. Shell's Statement of General Business Principles now included a responsibility to respect the human rights of employees and 'to express support for fundamental human rights in line

<sup>20</sup> Seidman, note 17, 19. See too UN Draft Code of Conduct, note 5, para 14 entitled 'Non-collaboration by transnational corporations with racist minority regimes in southern Africa' which also advocated divestment.

<sup>21</sup> Seidman, *ibid.*, at 19–21. On sanctions, see Bill Keller, 'THE WORLD; South Africa Sanctions May Have Worked, at a Price', *New York Times* (12 September 1993), <https://www.nytimes.com/1993/09/12/weekinreview/the-world-south-africa-sanctions-may-have-worked-at-a-price.html> (accessed 29 March 2021).

<sup>22</sup> A key document is Human Rights Watch, *The Price of Oil: Corporate Responsibility and Human Rights Violations in Nigeria's Oil Producing Communities* (HRW Index No. 1-56432-225-4 January 1999), <https://www.hrw.org/legacy/reports/1999/nigeria/nigeria0199.pdf> (accessed 29 March 2021).

<sup>23</sup> See Anne T Lawrence 'The drivers of stakeholder engagement: reflections on the case of Royal Dutch/Shell' in J Andriof, S Waddock, B Husted, and SS Rahman (eds.), *Unfolding Stakeholder Thinking: Theory, Responsibility and Engagement* (Abingdon: Greenleaf Publishers, 2002, republished Routledge, 2017) 185 on which this paragraph draws.

<sup>24</sup> Quoted Lawrence, *ibid.*, 190.

with the legitimate role of business'.<sup>25</sup> Shell's current position is to support the UNGPs and the human rights due diligence principle they embody.<sup>26</sup>

This case study echoes other corporate experiences in this period when many firms began to adopt voluntary corporate codes of conduct that included respect for human rights.<sup>27</sup> Also significant was the adoption, by Amnesty International, of its International Human Rights Principles for Companies in January 1998.<sup>28</sup> Until then, Amnesty was dedicated to the protection of civil and political rights against state interference.<sup>29</sup> The decision to add corporations to Amnesty's agenda stressed that human rights should no longer be compartmentalized but defined as an integrated whole including economic, social and cultural rights over which corporate actors have significant impacts. Amnesty's Principles also mark the inclusion, in addition to the state, of privately owned corporations as bearers of human rights responsibilities. Business would now find it much harder to say that they owed no responsibilities in this area.

Human rights 'voluntarism' found its institutional recognition in the adoption of the UN Global Compact in 2000.<sup>30</sup> Unlike the environment of suspicion that surrounded the negotiations over the UN Draft Code on TNCs, the process leading towards the Global Compact involved greater partnership between the UN and business. Led by the initiatives of the Secretary-General, the late Kofi Anan, the UN forged a new relationship with business based on a balance between corporate rights to free trade and investment and a corresponding commitment by business to further core UN standards in human rights, the environment, labour rights and anti-corruption.<sup>31</sup> While voluntary, membership of the Global Compact does carry the potential sanction of placement on a 'grey list'. Once enrolled, firms have a duty to make an annual report the Communication on Progress. Failing to communicate progress on an annual basis results in a downgrading of participant status from active to non-communicating. Participants who do not communicate progress for two years in a row are expelled and the UN Global Compact publishes their name.<sup>32</sup> That said, the UN Global Compact 'does not police or enforce the behaviour or actions of companies. Rather, it is designed to

<sup>25</sup> Quoted Chandler, note 15,32. See too Shell, *Shell General Business Principles* (2014 revision), [https://www.shell.com/about-us/our-values/\\_jcr\\_content/par/relatedtopics.stream/1572622107415/f3e59c06223516799f4a2d5fe63b824839f3a4f3/shell-general-business-principles-2014.pdf](https://www.shell.com/about-us/our-values/_jcr_content/par/relatedtopics.stream/1572622107415/f3e59c06223516799f4a2d5fe63b824839f3a4f3/shell-general-business-principles-2014.pdf) (accessed 29 March 2021).

<sup>26</sup> See Shell Global, 'Human Rights', <https://www.shell.com/sustainability/transparency/human-rights.html#iframe=L3dlYmFwcHMvU3VzdGFpbmFiaWxpdHlfcmlVwb3J0XzlwMTkx> (accessed 29 March 2021).

<sup>27</sup> One of the best-established examples is the Levi Strauss & Co *Terms of Engagement: Labor* <http://levistrauss.com/wp-content/uploads/2017/12/TOE.pdf> (accessed 29 March 2021). On corporate codes of conduct see further OECD 'Codes of Corporate Conduct: Expanded Review of their Contents', OECD Working Papers on International Investment, 2001/06 (Paris: OECD Publishing, 2001), <http://dx.doi.org/10.1787/206157234626> (accessed 29 March 2021). On the use of corporate codes as guides to legal obligations in national law see Anna Beckers, *Enforcing Corporate Responsibility Codes: On Global Self-Regulation and National Private Law* (Oxford and Portland, Oregon: Hart Publishing, paperback edn, 2018).

<sup>28</sup> Amnesty International (AI) Human Rights Principles for Companies (ACT 70/001/1998

1 January 1998), <https://www.amnesty.org/en/documents/act70/001/1998/en/> (accessed 29 March 2021) and see further AI, 'Corporations' at <https://www.amnesty.org/en/what-we-do/corporate-accountability/> (accessed 29 March 2021).

<sup>29</sup> Amnesty International, *ibid.*, 1998, 5–6.

<sup>30</sup> UN Global Compact, <https://www.unglobalcompact.org/> (accessed 29 March 2021).

<sup>31</sup> See Martens, note 8: 8–9.

<sup>32</sup> See UN Global Compact FAQs, <https://www.unglobalcompact.org/about/faq> (accessed 29 March 2021).

stimulate change and to promote corporate sustainability and encourage innovative solutions and partnerships'.<sup>33</sup>

#### IV. THE PERIOD OF 'INSTITUTIONALIZED VOLUNTARISM'

By the beginning of the twenty-first century, the movement towards business responsibility for human rights gained further traction. More cases of corporate human rights abuses came to light through legal processes, notably under the US Alien Tort Claims Act (ATCA), and through the emergent 'foreign direct liability' claims then brought predominantly in common law jurisdictions.<sup>34</sup> Equally, following on from the UN Global Compact, calls for a more normative UN instrument were being made before the UN Human Sub-Commission on the Promotion and Protection of Human Rights, which led to the UN Norms on the Responsibilities of TNCs with Regard to Human Rights, and their successor, the UNGPs, both discussed further below. In this period the main aim of business has been to accept voluntary responsibility for human rights but avoid full legal liability. The theme of 'partnership' over human rights and business initiated in the UN Global Compact continues to this day. It is at the core of the UNGPs. The term 'institutionalized voluntarism' appears to capture the difference that the UNGPs have made to the business and human rights debate. While the UN Compact offers a very basic system of corporate dialogue about human rights, the UNGPs seek to affect the decision-making system of the firm, and establish certain expectations on states, to further corporate human rights observance. As such, 'institutionalized voluntarism' is a compromise between greater procedural commitments to control human rights risks in business operations, possibly reinforced by national legal obligations, but stopping short of full international legal liability for human rights abuses.

By introducing the due diligence-based corporate responsibility to respect human rights, the UNGPs expect businesses to carry out a new type of human rights risk assessment to help avoid human rights violations or mitigate and remedy violations that have arisen. Alongside this the state duty to protect involves preventative measures, covered in the first section of the UNGPs, and adjudication and punitive measures, covered under access to remedy.<sup>35</sup> Preventative measures encompass a wide range of issues including corporate regulation, relations between business and the state and the conduct of domestic and international governmental policies.<sup>36</sup> Thus while the UNGPs do not impose legally binding duties on business they are also not 'law free' to the extent that the state duty to protect envisages binding national laws to control corporate

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<sup>33</sup> Ibid.

<sup>34</sup> See further Sarah Joseph, *Corporations and Transnational Human Rights Litigation* (Oxford: Hart Publishing, 2004); Halina Ward, *Governing Multinationals: The Role of Foreign Direct Liability* 1 (Chatham House Briefing Paper No. 18, 2001), <https://www.chathamhouse.org/sites/default/files/public/Research/Energy,%20Environment%20and%20Development/roleoffdl.pdf> (accessed 29 March 2021). For more recent developments, see Muchlinski, note 14: 306–14 and 585–97.

<sup>35</sup> See John Gerald Ruggie, *Just Business: Multinational Corporations and Human Rights* (New York: W.W. Norton & Company, 2013) 85–86.

<sup>36</sup> See UNGPs, note 1, Principles 3–10.

human rights abuses and binding judicial remedies under the access to remedy pillar. Furthermore, the access to remedy pillar covers not only legal but non-legal remedies and aims to develop new forms of institutional grievance mechanisms that engage the business with key stakeholders who are at risk of suffering human rights harm from its operations. Thus, in all these respects, the UNGPs create a new institutional environment for the development of more effective corporate observance of human rights, albeit one still rooted in corporate ‘voluntarism’.

The drafting process that led to the UNGPs was undertaken by Professor John Ruggie who had also steered the UN Global Compact to adoption. He describes his approach as ‘principled pragmatism’ involving a commitment to strengthening the promotion and protection of human rights as it related to business with a commitment to what works best to change the lives of the people affected.<sup>37</sup> This involved a multi-stakeholder consultation process in which business representatives would play a significant role.<sup>38</sup>

It is clearly arguable that business interests ensured that the UNGPs would focus only on the business process by which human rights risks could be identified, avoided, mitigated and remedied.<sup>39</sup> What the UNGPs did not do was establish a framework of binding international obligations for business or any international forum before which victims could bring claims against business actors. This is in contrast to the earlier attempt to adopt a UN code on business and human rights, the UN Norms on the Responsibilities of TNCs with Regard to Human Rights (UN Norms).<sup>40</sup> In 1998 the United Nations Sub-Commission on the Promotion and Protection of Human Rights established a Working Group on the Working Methods and Activities of Transnational Corporations. This was entrusted with drafting the UN Norms, the first detailed attempt to define corporate human rights obligations in an international instrument.<sup>41</sup> Although non-binding, the UN Norms sought to place these obligations on a legal footing by deriving them from the norms applicable to states under existing international human rights instruments and the fact that, in the words of the UN Norms, ‘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’. The UN Norms were never formally adopted.<sup>42</sup>

<sup>37</sup> See Ruggie, note 35, xliii–xlvi.

<sup>38</sup> On multi-stakeholder approaches to corporate responsibility standards see further Peter Muchlinski, ‘The Changing Nature of Corporate Influence in the Making of International Economic Law: Towards “Multistakeholderism”’ (2021) *European Yearbook of International Economic Law* (forthcoming).

<sup>39</sup> See for a detailed analysis, see Martens, note 8: 11–18.

<sup>40</sup> United Nations, ‘Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights’ (UN Doc. E/CN.4/Sub.2/2003/12/Rev.2 of 26 August 2003), <https://digitallibrary.un.org/record/501576?ln=en> (accessed 29 March 2021).

<sup>41</sup> See further David Weissbrodt and Muria Kruger ‘Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights’ (2003) 97 *American Journal of International Law* 901; Amnesty International, *The UN Human Rights Norms for Business: Towards Legal Accountability* (London: Amnesty International, 2004); David Kinley and Rachel Chambers ‘The UN Human Rights Norms for Corporations: The Private Implications of Public International Law’ Sydney Law School Research Paper No. 07/06; *Human Rights Law Review*, vol 2, 2006; SSRN: <https://ssrn.com/abstract=944153> (accessed 29 March 2021); David Kinley and Junko Tadaki, ‘From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law’ (2004) 44 *Virginia Journal of International Law* 931 (2004).

<sup>42</sup> See further Kinley and Tadaki, *ibid*, 948–49 and UN Commission on Human Rights, ‘Report on the Sixtieth Session Decision 2004/116’ (UN Doc. E/CN.4/2004/L.11/Add.7 22 April 2004) point (c), [https://ap.ohchr.org/documents/alldocs.aspx?doc\\_id=9780](https://ap.ohchr.org/documents/alldocs.aspx?doc_id=9780).

There is little doubt that business opposition to the UN Norms was instrumental in their non-adoption.<sup>43</sup> Indeed, upon taking up the mandate to draft the UNGPs, John Ruggie noted that the UN Norms had become the object of a divisive debate between the business community, which objected to the ‘privatization’ of responsibilities from states to corporations, and NGOs, who claimed the UN Norms filled a regulatory gap by creating new binding obligations on corporations.<sup>44</sup> He added that the lack of international legal personality for corporate actors prevented them having direct international law obligations, and that, apart from certain narrowly drawn responsibilities in international criminal law, corporations had no existing international human rights obligations as most human rights instruments were voluntary and addressed to states.<sup>45</sup> A further objection was that the UN Norms failed to distinguish adequately between state and corporate obligations making unclear the line between the primary duty of the state, and the secondary duty of the corporation, to respect human rights.<sup>46</sup> Consequently, the task of analysing the relationship between business and human rights had to start afresh. The eventual result was the UNGPs.

The non-binding corporate responsibility to respect human rights has been criticized. In particular, the lack of a legally binding duty to protect, respect and fulfil human rights on the part of corporations has led some to view the UNGPs as inadequate.<sup>47</sup> Both perspectives are understandable: voluntary commitments to observe human rights can be subject to corporate whim in the absence of legal sanction for violations; equally, for John Ruggie to have insisted on legally binding norms for businesses would have led, in all probability, to failure.<sup>48</sup> The important question is what to do with the corporate responsibility to respect from here.<sup>49</sup> Does it need real legal teeth and how is business going to react?

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<sup>43</sup> See Martens, note 8, 10–11.

<sup>44</sup> See Ruggie, note 35, ‘Introduction’, xvii; Justine Nolan ‘Mapping the movement: the business and human rights regulatory framework’ in Dorothée Bauman and Justine Nolan (eds.), *Business and Human Rights: From Principles to Practice* (Abingdon: Routledge, 2016) 32, 42. See further SRSRG, *Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, (U.N. Doc. E/CN.4/2006/97, 2006), para 69, <http://www1.umn.edu/humanrts/business/RuggieReport2006.html> (accessed 29 March 2021).

<sup>45</sup> SRSRG, *Interim Report*, *ibid*, paras 60–65. On the international legal obligations of corporations see further Markos Karavias, *Corporate Obligations under International Law* (Oxford: Oxford University Press, 2013); Peter T Muchlinski, ‘Corporations in International Law’ in *Max Planck Encyclopaedia of Public International Law* (June 2014), <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1513> (accessed 29 March 2021).

<sup>46</sup> See further Ruggie, note 35, 47–55.

<sup>47</sup> See for example Surya Deva and David Bilchitz, ‘The human rights obligations of business; a critical framework for the future’ in Surya Deva and David Bilchitz (eds.), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge: Cambridge University Press, 2013) 1; Surya Deva, ‘Treating human rights lightly: a critique of the consensus rhetoric and language employed by the Guiding Principles’, *ibid*: 78; and David Bilchitz, ‘The Ruggie Framework: An Adequate Rubric for Corporate Human Rights Obligations?’ (2010) 12 *SUR - International Journal on Human Rights* 199.

<sup>48</sup> See Muchlinski, note 14: 584.

<sup>49</sup> On which see generally the contributions in Cesar Rodriguez-Garavito (ed.), *Business and Human Rights: Beyond the End of the Beginning* (Cambridge: Cambridge University Press, 2017). See too on the relationship between ‘hard’ and ‘soft law’ in the development of corporate human rights obligations Barnali Choudhury, ‘Balancing Soft and Hard Law for Business and Human Rights’ (2018) 67 *International and Comparative Law Quarterly* 961.

## V. 'BEYOND VOLUNTARISM'

As noted, since the UNGPs were adopted in 2011 they have been criticized for their lack of strong legal liabilities for business. Equally, the trend towards national legal liability for business violations of human rights has continued, albeit unevenly. Thus, while claims under ATCA have been severely limited by recent decisions of the US Supreme Court, in other jurisdictions such claims have been accepted as admissible, although the tendency has been towards out of court settlement once jurisdiction has been granted.<sup>50</sup> These developments have been further reinforced by the adoption of laws based on human rights due diligence, the most notable of which is the French Corporate Duty of Vigilance Law of 2017.<sup>51</sup> In all these trends can be encapsulated in the phrase 'beyond voluntarism'.

The title of this section is borrowed from a key report on business and human rights published in 2002 by the International Council on Human Rights Policy.<sup>52</sup> It concluded that voluntary codes and non-official means of monitoring compliance should be complemented by international legal rules and legal accountability as voluntary approaches would remain ineffective and contested on their own.<sup>53</sup> Today there is an increasing momentum towards the realization of this conclusion. In particular, mandatory national due diligence laws require companies of a certain size to submit due diligence reports on their activities on pain of a penalty for non-compliance. A significant number of companies support mandatory due diligence laws, as indicated by the extensive list of supporting companies produced by the Business and Human Rights Resource Centre.<sup>54</sup>

On the other hand, evidence also exists that companies do not live up to their avowed support for human rights due diligence in practice. For example, the Corporate Human Rights Benchmark Report for 2020, surveying the human rights disclosures of 229 global

<sup>50</sup> See *Nevsun Resources Ltd v Araya* 2020 SCC 5 at <https://www.canlii.org/en/ca/scc/doc/2020/2020scc5/2020scc5.html> (accessed 29 March 2021) where the Canadian Supreme Court held that Eritrean claimants had standing to sue Nevsun Resources, a Canadian mining corporation, for alleged breaches of their fundamental human rights while conscripted, by Eritrean government agencies, to work at a mine controlled by Nevsun's local subsidiary. For detailed summary and analysis see Peter Muchlinski, 'Corporate Liability for Breaches of Fundamental Human Rights in Canadian Law: *Nevsun Resources Limited v Araya*' (2020) series 2, vol 1, no 3 *Amicus Curiae* 515, <https://journals.sas.ac.uk/amicus/article/view/5182> (accessed 29 March 2021). See too *Okpabi and others (Appellants) v Royal Dutch Shell Plc and another (Respondents)* [2021] UKSC 3 where the UK Supreme Court accepted that a UK parent company had a case to answer concerning the extent of its responsibility for acts of its Nigerian subsidiary that allegedly caused harm to the claimants. See further *Vedanta Resources PLC and another v Lungowe and others* [2019] UKSC 20; Marilyn Croser, Martyn Day, Mariëtte van Huijstee and Channa Samkalden 'Vedanta v Lungowe and Kiobel v Shell: The Implications for Parent Company Accountability' (2020) 5 *Business and Human Rights Journal* 130; doi:10.1017/bhj.2019.25.

<sup>51</sup> Loi no. 2017-399 du 27 Mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre, <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000034290626&categorieLien=id>. (accessed 29 March 2021). See further Business and Human Rights Resource Centre (BHRRC), 'Mandatory Due Diligence' at <https://www.business-humanrights.org/en/big-issues/mandatory-due-diligence/> (accessed 29 March 2021).

<sup>52</sup> International Council on Human Rights Policy, *Beyond Voluntarism: Human Rights and the Developing International Legal Obligations of Companies* (Versoix, 2002), SSRN: <https://ssrn.com/abstract=1551200> (accessed 29 March 2021).

<sup>53</sup> *Ibid.*, 159.

<sup>54</sup> BHRRC, 'List of large businesses, associations & investors with public statements & endorsements in support of mandatory due diligence regulation', <https://www.business-humanrights.org/en/latest-news/list-of-large-businesses-associations-investors-with-public-statements-endorsements-in-support-of-mandatory-due-diligence-regulation/> (accessed 29 March 2021).

companies, concludes that, against the backdrop of the COVID-19 pandemic and the increased risks of corporate human rights violations that this entails, ‘only a minority of companies demonstrate the willingness and commitment to take human rights seriously. Looking at the automotive companies assessed for the first time in 2020, the results are unequivocal: with an average total score of 12%, the lowest a sector has achieved since the benchmark was first published in 2017.’<sup>55</sup>

This mirrors the evidence of compliance with the UK Modern Slavery Act’s reporting provisions.<sup>56</sup> According to a 2017 survey by the Chartered Institute of Procurement and Supply (CIPS), 34% of organizations required by law to complete a Modern Slavery Act report failed to do so. CIPS also found that a large proportion of the businesses surveyed had few or no policies in place. Only 45% of organizations provided any training to their staff to help them spot modern slavery, while 42% mapped their supply chains to better understand their risks. As a result, ‘only 6% of supply chain managers under the Act’s remit are absolutely certain there is no slavery in their supply chain’. The survey concludes that ‘the industry does acknowledge that further legislative pressure is needed to goad them into action’.<sup>57</sup> In an independent review of the Modern Slavery Act, undertaken by Frank Field MP, Maria Miller MP and Baroness Butler-Sloss, it was recommended that the Act be reformed with mandatory annual modern slavery reports attached to the annual company report and failure to comply being made an offence under the Company Directors Disqualification Act 1986.<sup>58</sup> In January 2021, the British government announced the introduction of financial penalties for firms not complying with their reporting requirements under the Modern Slavery Act, as part of a set of measures designed to help ensure that British organizations, whether public or private sector, are not complicit in, or profiting from, the human rights violations against the Uyghur Muslims in the Chinese province of Xinjiang.<sup>59</sup>

Companies that support mandatory due diligence do so for a number of reasons. In particular, existing due diligence reporting requirements are perceived as inefficient, ineffective and incoherent and lacking in legal certainty and clarity.<sup>60</sup> In addition, new legal duties in this area could be of benefit. According to a recent survey of business attitudes to due diligence:

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<sup>55</sup> World Benchmarking Alliance, *Corporate Human Rights Benchmark Report 2020*, <https://www.corporatebenchmark.org/2020-results> (accessed 29 March 2021)

<sup>56</sup> Modern Slavery Act 2015 s 54 at <https://www.legislation.gov.uk/ukpga/2015/30/section/54/enacted> (accessed 29 March 2021).

<sup>57</sup> CIPS, ‘One in three businesses are flouting Modern Slavery legislation – and getting away with it’ (CIPS News 6 September 2017), <https://www.cips.org/en-gb/who-we-are/news/one-in-three-businesses-are-flouting-modern-slavery-legislation-and-getting-away-with-it/> (accessed 29 March 2021).

<sup>58</sup> Frank Field MP, Maria Miller MP and Baroness Butler-Sloss, *Independent Review of the Modern Slavery Act Second Interim Report: Transparency in Supply Chains* (22 January 2019) at <https://www.gov.uk/government/publications/modern-slavery-act-2015-review-second-interim-report> (accessed 29 March 2021).

<sup>59</sup> UK Foreign Office Press Release, ‘UK Government announces business measures over Xinjiang human rights abuses’ (12 January 2021), <https://www.gov.uk/government/news/uk-government-announces-business-measures-over-xinjiang-human-rights-abuses> (accessed 29 March 2021).

<sup>60</sup> See Lise Smit, Claire Bright, Irene Pietropaoli, Julianne Hughes-Jennett and Peter Hood, ‘Business Views on Mandatory Human Rights Due Diligence Regulation: A Comparative Analysis of Two Recent Studies’ (2021) 5 *Business and Human Rights Journal* 261.

‘Benefits cited include the potential for regulation to level the playing field; the leverage that a non-negotiable standard will afford companies in their global operations; the usefulness of a single harmonized standard (particularly at EU-level); and the power of the collective standard to address systemic issues that individual companies are unable to solve by themselves.’<sup>61</sup>

Thus, for a number of operational reasons businesses may find regulation useful. However, that is not the same as saying that businesses accept that they should be legally liable to victims for human rights violations caused by their business practices.

Businesses will continue to resist any extension of liability beyond a procedural liability for failure to exercise reasonable due diligence reporting. In this connection it is very unlikely that business will ever accept strict liability for human rights infringements and will continue to resist claims based on breaches of a tort, or human rights, based duty of care by using procedural and doctrinal arguments to delay and/or thwart legal claims. Most commonly these arise in relation to jurisdiction and the existence of parent company liability for the acts of a subsidiary or liability for subcontractors in a global production chain.<sup>62</sup>

In addition, business has begun to raise the issue of ‘safe harbour’ provisions in new mandatory due diligence laws and in the revised draft of the proposed UN business and human rights treaty.<sup>63</sup> Such a provision would exempt a business from all legal actions upon proof that it had met the ‘safe harbour’ requirements by carrying out a valid and complete human rights due diligence assessment in accordance with the requirements of the law. This differs from a due diligence-based defence that does not protect against the making of a claim but rests on showing that the claimant has failed to make their case. Normally, the safe harbour would not exempt intentional or gross violations of human rights. The inclusion of such a defence must be done carefully so as to avoid firms using due diligence as a ‘tick-box’ exercise to sidestep legal claims as opposed to a means for effectively avoiding human rights violations.<sup>64</sup>

Finally, regarding the proposed UN business and human rights treaty, the ICC believes that the most constructive way forward is by further operationalizing the UNGPs through national initiatives.<sup>65</sup> On the other hand, the ‘ICC still remains unconvinced that a treaty-based approach can be truly effective in dealing with the web of complex interrelationships between business and human rights.’<sup>66</sup> The ICC advocates taking a pause from the treaty debates, to consider whether the revised draft is actually moving in the right direction and whether a review of alternative approaches, including in relation to

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<sup>61</sup> Ibid, 269.

<sup>62</sup> See further Muchlinski, *note 14*: 594–97, and Muchlinski, *note 50*.

<sup>63</sup> See further Lise Smit and Claire Bright, ‘The concept of a “safe harbour” and mandatory human rights due diligence’ (CEDIS Working Papers No.1. December 2020), <http://cedis.fd.unl.pt/blog/project/the-concept-of-a-safe-harbour-and-mandatory-human-rights-due-diligence-2/> (accessed 29 March 2021).

<sup>64</sup> Ibid.

<sup>65</sup> ICC Briefing, ‘The United Nations Treaty Process on Business and Human Rights’ (26 October 2020), <https://iccwbo.org/content/uploads/sites/3/2019/10/icc-issues-brief-on-un-treaty-process-finalb.pdf> (accessed 29 March 2021)

<sup>66</sup> Ibid.

structure and areas of focus, is more appropriate.<sup>67</sup> This position is influenced by the view that a binding international treaty, containing a comprehensive international legal liability regime for human rights violations, would pose an unacceptable legal risk for MNEs and their sub-contractors. Indeed, the ICC sees this as a backward step, reminiscent of the politically charged era of the debates over the UN Norms, and one that is not justified under international law when so many states still do not impose human rights obligations directly onto businesses.<sup>68</sup>

## VI. CONCLUSION

This historical overview shows that business attitudes to human rights obligations have changed markedly since the first mention of corporate human rights obligations in the UN Draft Code. Businesses now accept that, in principle, they do have responsibilities to avoid, mitigate and remedy human rights violations caused by their operations as expressed through the UNGPs. However, they are still far from accepting a general legal liability for violating human rights as shown, in particular, by opposition to court claims in many jurisdictions and doubts over the proposed UN business and human rights treaty. As for mandatory due diligence laws, while businesses appear to accept that they will have to live with this development, the precise extent of duties imposed by such laws remains open to contestation. The emphasis will be on limiting the risk of general legal liability through stress on procedural obligations that include ‘safe harbour’ rules. These will offer business certainty and allow for the precise calculation of human rights risks without fear of incrimination. In this way a narrative of corporate compliance with human rights can emerge without the risk of costly legal liability.

Whether this compromise will last or be replaced by full corporate legal liabilities for human rights violations remains to be seen. For example, in the recent decision in *Nevsun Resources v Araya*, the acceptance, in principle, by the Supreme Court of Canada that the Canadian courts have jurisdiction over human rights-based claims against a Canadian parent mining corporation for the acts of its overseas subsidiary, suggests that the door is open to such argument.<sup>69</sup> Equally, the current negotiations over a new UN treaty on business and human rights include discussion of how a binding human rights obligation on business will look.<sup>70</sup> Even if this instrument is never adopted, the debates will offer further detailed analysis of what binding human rights obligations for businesses look like, creating a ‘model’ for further deliberation and evolution. Finally, changing political realities suggest continued traction for calls to introduce human rights liability for business both at the national and international levels. In particular, the recent demand that pharmaceutical firms supply vital medicines and vaccines in the light of the current

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<sup>67</sup> Ibid.

<sup>68</sup> See ICC, ‘Response of the international business community to the “elements” for a draft legally binding instrument on transnational corporations and other business enterprises with respect to human rights’ (20 October 2017), <https://iccwbo.org/content/uploads/sites/3/2017/10/business-response-to-igwg-draft-binding-treaty-on-human-rights.pdf> (accessed 29 March 2021).

<sup>69</sup> See note 51.

<sup>70</sup> See further Muchlinski, note 14, 599–604.

COVID crisis, and the impacts on climate change and global heating of business operations, provide a contemporary backdrop against which mere 'voluntarism' might be seen as an unacceptable avoidance of responsibility.

Thus, while a major shift towards full national and international legal liability in the near future remains unlikely, the conditions for moving towards this end certainly exist and may result in future legal change 'beyond voluntarism' towards 'mandatory compliance'. Businesses may have little choice if they are to retain their legitimacy in the eyes of the states and communities in which they invest and, additionally, among their home states which are under increasing social and political pressure not to remain indifferent to the human rights impacts of their corporations abroad.