Keynote Address: International Standard-Setting on the Human Rights Responsibilities of Business

David Weissbrodt

Recommended Citation

Available at: http://scholarship.law.berkeley.edu/bjil/vol26/iss2/1

This Article is brought to you for free and open access by the Law Journals and Related Materials at Berkeley Law Scholarship Repository. It has been accepted for inclusion in Berkeley Journal of International Law by an authorized administrator of Berkeley Law Scholarship Repository. For more information, please contact jcera@law.berkeley.edu.
Keynote Address:
International Standard-Setting on the Human Rights Responsibilities of Businesses

By
David Weissbrodt*

It is a great honor to be invited to my alma mater to speak at this conference highlighting the human rights responsibilities of transnational corporations and to be selected to receive this year's Stefan A. Riesenfeld Award for my contributions in the field of international law.

It is particularly appropriate that this conference relating to the human rights obligations of transnational corporations is associated with Professor Riesenfeld. The human rights community and I are personally indebted to Stefan Riesenfeld for his contribution to the leading human rights precedent of *Filár-
tiga v. Peña Irala. As a beginning law professor, I filed an amicus brief in that case for Amnesty International. Much more influential, however, was Professor Riesenfeld’s brief for the U.S. State Department, which supported using the Alien Torts Statute to bring human rights suits in U.S. courts. As a result of Riesenfeld’s groundbreaking brief and the resulting Fildtiga decision, this statute is now being used to sue corporations for their human rights abuses.

This afternoon, I would like to contribute to our discussion by touching on five subjects: First, why should there be international concern about corporate social responsibility and human rights? Second, what international human rights standards can be interpreted to apply to business? Third, what international standards apply directly to business? Fourth, what contributions do the U.N. Sub-Commission Norms make to human rights standard-setting for business? And fifth, what contribution is the U.N. Special Representative to the Secretary-General making and how will the Sub-Commission Norms fare in that context?

I. WHY SHOULD THERE BE INTERNATIONAL CONCERN ABOUT CORPORATE SOCIAL RESPONSIBILITY AND HUMAN RIGHTS?

Efforts to promote corporate social responsibility acknowledge both the positive and potentially negative consequences of business activity. Corporations are active in some of the most dynamic sectors of the national and world economies. They bring new jobs, technology, and capital, and are capable of exerting a positive influence on fostering development by improving living and working conditions. At the same time, however, companies may abuse human rights by employing child laborers, discriminating against certain groups of employees such as union members and women, attempting to repress independent trade unions thereby discouraging the right to bargain collectively, failing to provide safe and healthy working conditions, and limiting the broad dissemination of appropriate technology and intellectual property. These companies also dump toxic wastes, and their production processes may have negative consequences for the lives and livelihoods of neighboring communities.

Whether one perceives businesses as critical for the prosperity and economic success of the community or focuses upon the problems they may cause, there is certainly no doubt that companies are powerful forces in this beautiful

1. 630 F.2d 876 (2d Cir. 1980).
3. See, e.g., Khulumani v. Barclay Nat’l Bank, Ltd., 504 F.3d 254 (2d Cir. 2007); Sarei v. Rio Tinto, PLC, 487 F.3d 1193 (9th Cir. 2007), reh’g granted, 499 F.3d 923 (9th Cir. 2007); Doe I v. Unocal Corp., 403 F.3d 708 (9th Cir. 2005). See also Barnali Choudhury, Beyond the Alien Tort Claims Act: Alternative Approaches to Attributing Liability to Corporations for Extraterritorial Abuses, 26 NW. J. INT’L L. & BUS. 43 (2005); Emeka Duruigbo, The Economic Cost of Alien Tort Litigation: A Response to Awakening Monster: The Alien Tort Statute of 1789, 14 MINN. J. GLOBAL TRADE 1 (2004).
Bay Area, throughout this country, and around the world. The 300 largest corporations account for roughly one-quarter of the world's productive assets. For example, one automobile company's sales in a single year are greater than the gross national product of 178 countries, including Malaysia, Norway, Saudi Arabia, and South Africa. Transnational corporations (TNCs) hold ninety percent of all technology and product patents worldwide and are involved in seventy percent of world trade. TNCs directly employ ninety million people (of whom some twenty million live in developing countries) and produce twenty-five percent of the world's gross product. The top 1,000 TNCs account for eighty percent of the world's industrial output. Not only are these companies economically powerful, but they have the mobility and capacity to evade national laws and enforcement, because they can relocate or use their political and economic clout to pressure governments to ignore corporate abuses.

International human rights standards, such as those promulgated by the U.N., are increasingly important to achieving corporate social responsibility. The need for such international standards is especially visible as the global economy becomes more complex. Considering the ideology of profit maximization which subordinates all other considerations to . . . maximizing shareholder value[,] . . . temptations exist in business organizations of all kinds . . . to cut corners with regard to the environment, employees, producers, communities, third-world nations, and other stakeholders impacted by their policies and operations.

In the absence of clear international standards articulating the human rights obligations of individual businesses, it is likely that temptations of short-term profit maximization may outweigh the benefits of socially responsible behavior.

5. Id. at 2.
8. UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT (UNCTAD), WORLD INVESTMENT REPORT 2001 at 9.
9. Claudio Grossman and Daniel D. Bradlow, Are We Being Propelled Towards a People-Centered Transnational Legal Order?, 9 AM. U. J. INT'L & POL'Y 1, 8 (1993) ("The fact that they have multiple production facilities means that [transnational corporations] can evade state power and the constraints of national regulatory schemes by moving their operations between their different facilities around the world.").
11. Id.
12. Id.
Corporations themselves can benefit in a number of ways when they act in a socially responsible manner. For example, a corporation might benefit by attracting and retaining a higher-quality workforce, by increasing the job satisfaction of its employees, by receiving an improved reputation among consumers, and by protecting the value of its trademark and reputation.\(^{13}\) Although increasing responsibility may not lead to an increase in short-term profits, TNCs may benefit in the long run by staying ahead of new, stricter regulations and by attracting investment from concerned investors.\(^{14}\) Further, because of its global nature, business can promote the protection of human rights because it possesses “the capability to reach across borders and to get people who may not otherwise work together to do so.”\(^{15}\) Business may be in the position to “damper fires leading to violence simply by providing economic opportunity[.]” provided it does so without “sow[ing] the seeds for resentment and violence.”\(^{16}\)

II.
WHAT INTERNATIONAL HUMAN RIGHTS STANDARDS CAN BE INTERPRETED TO APPLY TO BUSINESS?

Given their importance in the world, it is really remarkable that corporations have not received more attention for their contributions to the evolution of international law and international human rights law in particular. International law and human rights law have principally focused on protecting individuals from violations by governments. There has been increasing attention, however, devoted to individual responsibility for war crimes, genocide, and other crimes against humanity, based on the Nuremberg tribunals in the 1940s,\(^{17}\) the criminal tribunals established in the 1990s for the former Yugoslavia\(^{18}\) and Rwanda,\(^{19}\) and the International Criminal Court,\(^{20}\) which has now been accepted by 106


\(^{14}\) Id. at 576.


\(^{16}\) Fort, supra note 15, at 323.


\(^{20}\) Rome Statute of the International Criminal Court, UN Doc. A/CONF. 183/9 (July 17, 1998) (entered into force July 1, 2002). The International Criminal Court has jurisdiction only over natural persons (including corporate officers), but not over legal persons, such as corporations. Id.
nations, although unfortunately not the United States.21

Since businesses are comprised of individuals, these legal responsibilities would apply to business people as well. For example, in the trials of Nazi leaders following World War II, German industrialists were convicted of charges relating, inter alia, to the use of slave labor and for designing and producing poison gas used in the concentration camps of the Third Reich.22 Further, the extension of legal responsibilities provides support for the application of international human rights law not only to states, but also to non-state actors, including individuals and businesses, as well as armed opposition groups.

Some human rights treaties and other law-making instruments may be interpreted to apply to businesses. Most prominently, one can find a relevant passage in the Universal Declaration of Human Rights,23 the primary non-treaty instrument that in 1948 first established an authoritative, worldwide definition of human rights. While the Universal Declaration principally focuses on the obligations of states, it also mentions the responsibilities of individuals and "every organ of society," which includes businesses.

Human rights treaties also can be interpreted to apply indirectly to businesses. For example, under the International Covenant on Civil and Political Rights,24 a treaty that has been ratified by 160 nations including the United States, each State party: "undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the pre-

---


While the Farben organisation, as a corporation, is not charged under the indictment with committing a crime and is not the subject of prosecution in this case, it is the theory of the prosecution that the defendants individually and collectively used the Farben organisation as an instrument by and through which they committed the crimes enumerated in the indictment. All of the members of the Vorstand or governing body of Farben who were such at the time of the collapse of Germany were indicted and brought to trial.

8 Trials of War Criminals Before the Nuremberg Military Tribunals 1108 (1952).


sent Covenant . . .”  

Accordingly, if a corporation endangers the rights of an individual, the State has a duty to ensure respect of human rights and thus to use due diligence to take preventative action.

Some other U.N.-based treaties, such as the International Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Elimination of All Forms of Discrimination against Women, specify state responsibility for the misconduct of any “persons, group or organization” or even of “any person, organization or enterprise.”

III.
WHAT INTERNATIONAL STANDARDS APPLY DIRECTLY TO BUSINESS?

In addition to these treaty and non-treaty standards that focus principally on governments and may be interpreted to apply, at least indirectly, to businesses, the OECD, ILO, UN, Social Accountability International, and other organizations have directly addressed the responsibilities of companies. For example, in 1976 the Paris-based Organization for Economic Cooperation and Development (OECD) established Guidelines for Multinational Enterprises, and updated them in 2000 to promote responsible business conduct consistent with applicable laws. However, the OECD Guidelines mentioned human rights only once in a single paragraph. In 1977 the International Labor Organization (ILO) developed its Tripartite Declaration of Principles Concerning Multinational Enterprises, which calls upon businesses to follow the relevant labor conventions and recommendations, and which were updated in 2006.

Since the 1980s, concerns of civil society and an emerging concern of companies themselves for social responsibility have led hundreds of companies and several industry associations to adopt voluntary codes of conduct. This number has increased as many corporations, including those that have been the targets of protests and boycotts, have come to see the economic value inherent in

25. Id. Art. 2.


adopter policies.\textsuperscript{31} Some publicly spirited business organizations, such as Social Accountability International, the International Business Leaders Forum, and the Business Leaders Initiative on Human Rights have developed voluntary principles and educational activities, such as SA 8000, applicable to a broad range of companies. SA 8000, for example, focuses principally on the need for a safe and healthy work environment and other labor standards. There are now 1,373 SA 8000 certified facilities.\textsuperscript{32}

In January 1998, at the World Economic Forum in Davos, U.N. Secretary-General Kofi Annan proposed a “Global Compact” of shared values and principles.\textsuperscript{33} The original Global Compact asked businesses to voluntarily support and adopt nine very succinctly expressed core principles, which are divided into categories dealing with general human rights obligations, standards of labor, and standards of environmental protection. In 2004 the Global Compact added a tenth core principle on corruption.\textsuperscript{34} These principles represented increased attention to the responsibilities of corporations in international law and international economic relations. Some scholars have even argued that the Global Compact reflects the increased influence of TNCs in international law making.\textsuperscript{35} The new U.N. Secretary-General Ban Ki-moon endorsed the Global Compact a few days after he took office in January 2007.

Several U.N.-based institutions have also adopted fragmentary corporate responsibility standards, limiting their procurement to companies that protect, for example, the environment (UNHCR), do not engage in child labor (UNICEF), do not promote cigarettes (WHO), and do not engage in corrupt business practices (World Bank). If these standards were adopted more consistently, they could yield quite a powerful influence on corporate social responsibility.

\begin{itemize}
  \item \textsuperscript{31} Surya Deva, Sustainable Good Governance and Corporations: An Analysis of Asymmetries, 18 GEO. INT’L ENVTL. L. REV. 707, 728 (2006).
  \item \textsuperscript{32} Social Accountability Accreditation Service, Certified Facilities List, http://www.saasaccreditation.org/certfacilitieslist.htm.
  \item \textsuperscript{34} The Ten Principles of the U.N. Global Compact, http://www.unglobalcompact.org/aboutthegc/thetenprinciples/index.html. The principles are that businesses should: (1) support and respect the protection of internationally proclaimed human rights within their sphere of influence; (2) make sure they are not complicit in human right abuses; (3) uphold the freedom of association and the effective recognition of the right to collective bargaining; (4) eliminate all forms of forced and compulsory labor; (5) abolish child labor; (6) eliminate discrimination in respect of employment and occupation; (7) support a precautionary approach to environmental challenges; (8) undertake initiatives to promote greater environmental responsibility; (9) encourage the development and diffusion of environmentally friendly technologies; and (10) work against all forms of corruption, including extortion and bribery.
\end{itemize}
IV.
WHAT CONTRIBUTION DO THE U.N. SUB-COMMISSION NORMS MAKE TO HUMAN RIGHTS STANDARD-SETTING AS TO BUSINESS?

In August 2003, twenty-six human rights experts from twenty-six nations around the globe who were then members of the U.N. Sub-Commission on the Promotion and Protection of Human Rights unanimously approved the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights. The Sub-Commission Norms provide that:

States have the primary responsibility to promote ... and protect human rights recognized in international as well as national law, including ensuring 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 ... and protect human rights recognized in international as well as national law.

This core provision of the Sub-Commission Norms addresses an issue that not only was considered in preparing the Norms, but also arose in preparing the ILO, OECD, and Global Compact guidelines, that is, whether these standards apply only to TNCs or to all businesses. On the one hand, most media attention has focused on the activities and misdeeds of major corporations, such as Blackwater, Enron, Parmalat, Union Carbide (Dow Chemical), and Worldcom. Further, as I mentioned earlier, TNCs have the mobility and power to evade national laws and enforcement because they can relocate or use their political and economic clout to pressure governments to ignore corporate abuses. It was likely this sort of thinking which led the organizers of today's conference to focus on transnational corporations. On the other hand, if one applies human rights standards only to TNCs, such differential treatment could be considered


37. Id. at para. 1.

38. Paragraph 11 of the ILO Tripartite Declaration provides that "[m]ultinational and national enterprises, wherever the principles of this Declaration are relevant to both, should be subject to the same expectations in respect of their conduct in general and their social practices in particular." ILO, Tripartite Declaration, supra note 29, at para. 11.

39. "Multinational and domestic enterprises are subject to the same expectations in respect of their conduct wherever the Guidelines are relevant to both." OECD Guidelines for Multinational Enterprises, Revision 2000, supra note 28, at paras. 1-4 (emphasis omitted).

40. The Global Compact is aimed at "businesses," rather than multinational or domestic enterprises in particular. The Ten Principles of the U.N. Global Compact, supra note 34.


INTERNATIONAL STANDARD-SETTING
discriminatory. Further, it is not easy to define a transnational corporation and there is a risk that sophisticated corporate lawyers, such as those trained here at Berkeley Law, will be able to structure any business so as to avoid the application of international standards designed only for TNCs.

Accordingly, the Sub-Commission Norms apply not only to TNCs but also to national companies and local businesses in that each will be responsible according to "their respective spheres of activity and influence." The U.N. Sub-Commission Norms further apply to subsidiaries and suppliers. This approach balances the need to address the power and responsibilities of TNCs and to level the playing field of competition for all businesses, while not being too burdensome on very small companies.

Although there is a very important educational value in voluntary company codes, such policies can be posted on the Web one day and taken down the next. They are often very vague with regard to human rights commitments and generally lack mechanisms for assuring continuity or implementation. For example, only approximately 150 corporations have mentioned human rights in their respective company codes. The Global Compact has been a great success in encouraging about 3,700 companies to join, but there remain about 67,000 other transnational corporations which have not yet joined. Such voluntary initiatives as SA 8000 and Valore Sociale in Italy play an extremely important role in encouraging corporate social responsibility for those companies that join and as to which there is far more implementation and monitoring than the Global Compact.

The U.N. Sub-Commission Norms, however, are still necessary to supplement existing international standards because they apply to all companies—not just those companies that agree to participate. It is also important to develop standards that carry the imprimatur of the United Nations.

In addition, the Sub-Commission Norms have the most comprehensive approach to human rights, requiring TNCs and other business enterprises to respect: the right to equality of opportunity and treatment; the right to security of persons; the rights of workers, including a safe and healthy work environment and the right to collective bargaining; international, national, and local laws and the rule of law; a balanced approach to intellectual property rights and responsibilities; transparency and avoidance of corruption; the right to health as well as other economic, social, and cultural rights; other civil and political rights, such as the freedom of movement; consumer protection; and environmental protection.

With respect to each of those subjects, the Sub-Commission Norms princi-


Published by Berkeley Law Scholarship Repository, 2008 9
pally reflect, restate, and refer to existing international standards, but apply them not only to governments but directly to businesses. The Norms are consistent with the progressive development of international law in applying standards not only to states for which they were primarily drafted, but also to individuals, armed opposition groups, and other non-state actors.

While they apply to all states and companies, the Sub-Commission Norms are not legally binding but are similar to many other U.N. declarations, principles, guidelines, and standards that interpret existing law and summarize international practice without reaching the status of a treaty. The Sub-Commission Norms do, however, include some basic implementation procedures by: (1) anticipating that companies will adopt their own internal rules of operation to assure the protections set forth by the Norms; (2) indicating that businesses are expected to assess their major activities in light of the Norms; (3) subjecting companies’ compliance with the Norms to independent and transparent monitoring that includes input from relevant stakeholders; (4) calling for reparations or other compensation in cases where the Norms have been violated; and (5) calling upon governments to establish a framework of application of the Norms.

The Norms were transmitted to the U.N. Commission on Human Rights—then the parent body of the Sub-Commission. The 2004 session of the Commission welcomed the Sub-Commission Norms and asked for a report from the High Commissioner for Human Rights, but at the same time noted that the document, as a draft before the Commission, did not on its own have any legal status. Simultaneously, however, the Commission recognized for the first time in its history that corporate social responsibility and human rights belong on the human rights agenda of the United Nations.

V. WHAT CONTRIBUTION IS THE U.N. SPECIAL REPRESENTATIVE TO THE SECRETARY-GENERAL MAKING?

At its 2005 session, the Commission adopted a resolution welcoming the High Commissioner’s report that in an extraordinarily balanced fashion identified precisely the same number of criticisms of the Sub-Commission Norms as it found positive attributes. The Commission also called for the appointment by the Secretary-General of a Special Representative on the issue of human rights.


and transnational corporations and other business enterprises. (You might note the similarity between the name of the norms and the title of the new post.) Secretary-General Kofi Annan appointed Professor John Ruggie, who had been the principal drafter of the U.N. Global Compact, to serve as the Special Representative for “an initial period of two years,” and then his mandate was extended for one more year until this Spring 2008. The Special Representative of the Secretary General (known as the SRSG) was expected, inter alia, to “identify and clarify standards of corporate responsibility and accountability for transnational corporations and other business enterprises with regard to human rights.”

Meanwhile, the fifty-three member Commission on Human Rights has been replaced by a new forty-seven member Human Rights Council, and the procedural appendages (including thematic rapporteurs) of the Commission, such as the SRSG, were transferred to the Council that was elected in May 2006 and had its first meeting in June. The new Council has had a lot to do in establishing its procedures, organizing itself, and replacing the twenty-six member Sub-Commission with a new eighteen-member Advisory Committee. Thus, the Council is devoting some time to begin handling substantive matters such as the human rights responsibilities of business. The SRSG has however produced several initial reports as well as an October 2007 article in the American Journal of International Law.

Although in his first interim report the SRSG noted the Sub-Commission Norms and made a positive and generally balanced contribution to the international understanding of the relationship between human rights and business, the SRSG in his 2007 article stated that the “business community, represented by the International Chamber of Commerce and the International Organization of Employers, was firmly opposed.” In drafting the Norms, the Sub-Commission did reach out to, and received some input from individual companies and the international business community, including the organizations mentioned in the SRSG’s article. Certainly, input from the business community is


helpful, since their contributions would make it more likely that international standards will influence their actions. It is not surprising, however, that these organizations representing large corporations have been more cooperative with the SRSG as he raised criticisms of the Sub-Commission Norms. These international business organizations—reflecting the most hard-line big corporate perspective—oppose any standards that are not voluntary. The International Chamber of Commerce initially even opposed the idea of the voluntary Global Compact.

The SRSG also argued that the Sub-Commission Norms “embodied sources of conceptual as well as factual confusion, with potentially deleterious consequences for the realization of human rights.” The SRSG’s criticisms reflect a misunderstanding of the role of soft law principles in international law as distinguished from treaties.

According to the SRSG, although the Sub-Commission Norms enumerated rights that are particularly relevant to business, the list of rights also included many that “states have not recognized or are still debating at the global level.” In fact, the Norms summarize the principles of international human rights law relevant to each paragraph. For example, paragraphs three and four of the Norms summarize the principles of humanitarian law relevant to corporations, stating:

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, or 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 entities shall observe international human rights norms as well as the laws and professional standards of the country or countries in which they operate.

Those two provisions derive most prominently from the Geneva Conventions, the Statute of the International Criminal Court, the Code of Conduct


54. Id. at 825.

55. Norms, supra, note 36, paras. 3-4.


for Law Enforcement Officials, and the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, which in turn have been applied to oil, mining, and other extractive industry companies in the Voluntary Principles on Security and Human Rights. SRSG Ruggie’s concern seems to rely on a contention initially presented by the International Chamber of Commerce in which he argued that:

In several instances, and with no justification, the Norms end up imposing higher obligations on corporations than states, by including as standards binding on corporations instruments that not all states have ratified or have ratified conditionally, and even some for which states have adopted no international instruments at all.

The Sub-Commission Norms, of course, do not constitute a treaty and therefore cannot bind either states or corporations in the same way that treaties are binding once they are ratified. If, however, one wanted to identify the humanitarian law principles most applicable to both state and non-state actors, the Geneva Conventions, the ICC Statute, the Code of Conduct for Law Enforcement Officials, the Basic Principles on Firearms, and the Voluntary Security Principles are the most relevant. United Nations drafters regularly follow this approach of borrowing provisions from one instrument to develop another. This approach to borrowing language is not at all uncommon. It should also be noted that the Sub-Commission carefully consulted the International Committee of the Red Cross to make sure that these provisions of the Norms were consistent with humanitarian law.

Further, the Norms clearly declare in the first paragraph that states, not corporations, have the primary responsibility to promote and protect human rights. If one were to take the SRSG/International Chamber of Commerce argument seriously and insist on universal ratification of every provision, it would disal-

63. See DAVID WEISSBRODT, FIONNUALA NI AOLAIN, JOAN FITZPATRICK, & FRANK NEWMAN, INTERNATIONAL HUMAN RIGHTS LAW, POLICY, AND PROCESS (forthcoming 4th ed.) (manuscript, chapter 2 at 4, on file with author) (noting that treaty language generally “has a long pedigree as it is usually adopted or at least heavily relied upon in future instruments. Its long-term use ideally strengthens the effect of and understanding about what the provisions are designed to accomplish”).
low the development of any non-treaty instrument on this or any other subject. It would have even made it impossible to draft and get approved the Universal Declaration of Human Rights.

The SRSG also argues that the Sub-Commission Norms could “undermine corporate autonomy, risk taking, and entrepreneurship.” SRSG Ruggie believes that TNCs should be forced to assume the obligations of the government only when they perform state functions. Since states are afforded a certain amount of discretion in meeting their human rights obligations, imposing on TNCs the “full range of duties ... directly under international law by definition reduces the discretionary space” allowed in pursuit of human rights norms. Additionally, the SRSG says that shifting the human rights burdens of weak governments onto private corporations would “undermine domestic political incentives to make governments more responsive and responsible to their own citizenry.”

In fact, the Sub-Commission Norms are meant to strengthen the hands of governments by giving them clear standards to which they can refer in dealing with powerful corporations. As a result, all governments, weak and strong, will be better able to protect their residents from the abuses of non-state actors, such as businesses. Businesses will also benefit from the leveling of the competitive playing field provided by the Sub-Commission Norms.

As I mentioned earlier, paragraph one of the Sub-Commission Norms, places secondary responsibility on corporations, stating:

Within their respective spheres of activity and influence, transnational corporations and other business enterprises have the obligation to promote ... and protect human rights recognized in international as well as national law.

The SRSG has criticized the concept of “spheres of influence” because it has “no legal pedigree,” and the distinction between primary and secondary duties was not elaborated upon by the Sub-Commission Norms. It is ironic that Ruggie attacks the concept of “spheres of influence” because it derives from the Global Compact which he drafted for the U.N. Secretary-General. The Sub-Commission Norms do add “spheres of activity and influence,” so as to take into account not only the external impact of businesses on surrounding communities, suppliers, and customers, but also the consequences upon the health and safety of employees.

65. Id.
66. Id.
67. Id.
68. Norms, supra note 36, para. 1.
70. See supra note 34.
The SRSG noted that TNCs generally are organized in networks, which results in the divestment of a certain amount of direct control. 71 These networks, which consist of parent corporations, subsidiaries, and suppliers, operate in numerous countries, and as the size of the network grows, they become more difficult for the parent to monitor. 72 Generally the purchase of goods from a supplier is considered an arm's-length exchange, and even a parent and its subsidiary are considered to be distinct legal entities. Each separate entity in a large network is governed by the laws of the countries in which it operates, but the SRSG argues that the TNC as a network is not governed by international law. The move to establish global legal standards to govern TNCs, SRSG Ruggie states, seeks to alter this "foundational fact." 73

This criticism of the Sub-Commission Norms seems to ignore the tremendous diversity in power that some companies, such as Microsoft and Wal-Mart, can wield over their suppliers and business partners. Also, the SRSG fails to note that the Norms apply to all businesses whether they are transnational corporations, suppliers, customers, or other business enterprises. The Norms require a company to inquire into the conduct of the companies with which it does business, but not further up or down the supply chain, except to the extent of their influence. As the Commentary to the Norms explains with regard to the primary and secondary influence of businesses:

The obligation of transnational corporations and other business enterprises under these Norms applies equally to activities occurring in the home country . . . of the transnational corporation or other business enterprise, and in any country in which the business is engaged in activities . . . . Transnational corporations and other business enterprises using or considering entering into business relationships with contractors, subcontractors, suppliers, . . . . or natural or other legal persons that do not comply with the Norms shall initially work with them to reform or decrease violations, but if they will not change, the enterprise shall cease doing business with them. 74

Further, SRSG Ruggie argues that the international legal principles expressed in the Sub-Commission Norms diverged from the "actual state of international law regarding business and human rights." 75 The SRSG specifically discussed differences relating to: the duty of states to protect against third-party abuses of rights, 76 the growing potential of businesses to be held liable for international crimes, 77 a norm of customary international law establishing direct cor-

72. Id.
73. Id. at 824.
75. Ruggie, supra note 49, at 827.
76. Id. at 828.
77. Id. at 830.
porate responsibility for human rights abuses;\textsuperscript{78} and "an expanding universe of self-regulation in the business and human rights domain."\textsuperscript{79}

The Sub-Commission Norms represent an effort to develop a restatement of international human rights and related principles with regard to business. They are the most comprehensive of such standards that currently exist. SRSG Ruggie has criticized the Norms' characterization as a restatement, noting that its legal principles were "contested by business and . . . academic observers."\textsuperscript{80} The SRSG cites the International Chamber of Commerce and two academics for this proposition while ignoring the dozens of favorable academic comments the Norms have received by legal and other academic scholars.\textsuperscript{81} Indeed, when the Sub-Commission Norms were submitted for review by the German Government to the highly respected Max Planck Institute, the Norms were found to be consistent with the prevailing trends of international law.\textsuperscript{82} They were vetted by the relevant international institutions, for example, the International Committee of the Red Cross as to humanitarian law and the ILO as to labor standards. Additionally, Ruggie seemed to be unaware that restatements do not merely describe the law "as it presently stands or might plausibly be stated by a court[,]"\textsuperscript{83} but they have served to achieve progressive reform in the law.

In his discussion on the current state of international law regarding TNCs and human rights, the SRSG favorably mentions several soft law initiatives including the Global Compact,\textsuperscript{84} the ILO, the OECD, the Fair Labor Association,\textsuperscript{85} the Extractive Industries Transparency Initiative,\textsuperscript{86} the Kimberly Process

\begin{thebibliography}{99}
\bibitem{78} Id. at 832.
\bibitem{79} Id. at 835.
\bibitem{80} Id. at 827.
\bibitem{82} Letter from Rüdiger Wolfrum, Co-Director, Max Planck Institute to Christian Lindemann (Nov. 18, 2003) (on file with author).
\bibitem{84} UN Global Compact Home Page, http://www.unglobalcompact.org.
\end{thebibliography}
Certification Scheme,\textsuperscript{87} the Voluntary Principles on Security and Human Rights, and the Equator Principles,\textsuperscript{88} but did not mention SA 8000 until the supplemental report of December 2006. The SRSG concludes, however, that "[a]lthough each has weaknesses that require improvement, the relative ease and speed with which such arrangements can be established, and the flexibility with which they can operate, make them an important complement to the traditional state-based treaty-making and soft law standard-setting process."\textsuperscript{89}

I agree in this respect with the SRSG and I would add that like the Sub-Commission Norms, the Global Compact, the Kimberly Certification Scheme for avoiding blood diamonds, and the other initiatives mentioned by the SRSG have promulgated soft law instruments. Unlike the Sub-Commission Norms, however, the other soft law instruments are voluntary and not universal in application or substance. Further, these other initiatives generally lack effective implementation measures. The Sub-Commission Norms apply to all businesses to the extent of their activities and influence, and since no opt-in is required, no one may opt out. Further, the Norms represent the most comprehensive collection of standards applicable to all businesses, providing more detailed explication of the brief phrases in the Global Compact, and extending those principles into other areas like consumer rights, for example. The Sub-Commission Norms also recommend implementation measures not found in most of the other voluntary soft law standards.

The SRSG concluded his report by enumerating a number of guiding principles that bear specifically on the role of voluntary standards acceptable to the big business community. First, any strategy addressing the human rights responsibilities of businesses "needs to strengthen and build out from the existing capacity of states and the states system to regulate and adjudicate harmful actions by corporations, not undermine it."\textsuperscript{90} Second, "the focal point in the business and human rights debate needs to expand beyond establishing individual corporate liability for wrongdoing."\textsuperscript{91} To this end, soft law arrangements such as the Kimberly Process represent an "important innovation" because they attempt to create a process that is focused on prevention rather than assignment of liability.\textsuperscript{92} Finally, SRSG Ruggie notes that "any successful regime needs to motivate, activate, and benefit from all of the moral, social, and economic rationales that can affect the behavior of corporations," and should provide "incentives as well as punishments, identify[] opportunities as well as risks, and build[] social movements and political coalitions that involve representation from all the rele-

\textsuperscript{89} Ruggie, \textit{supra} note 49, at 835.
\textsuperscript{90} Id. at 838.
\textsuperscript{91} Id. at 839.
\textsuperscript{92} Id.
vant sectors of society.”

Beyond the voluntary human rights principles that the SRSG prefers, however, there is a tremendous demand in civil society for a comprehensive set of standards governing the conduct of international business, which go beyond voluntary codes of conduct like the Global Compact. For example, in November 2007 an open letter, signed by over 200 civil society groups around the world, was sent to SRSG Ruggie, expressing the need to develop international standards as to the conduct of international businesses. Further, the broad dissatisfaction of the NGO human rights community extends not only to his failure to develop standards, but also to his failure to follow the approach of other U.N. thematic procedures in highlighting human rights abuses by the business community.

VI.
CONCLUSION

In conclusion, the Sub-Commission Norms have revived the global discussion on the need for international human rights standards for businesses. They have set forth the most comprehensive collection of international standards and implementation mechanisms, which sets the current high watermark for such efforts. It is most likely that significant progress will be made in developing standards when there is another major incident like the disastrous chemical spill at Bhopal that will make evident the need for standards like the Norms. In the meantime, some companies, such as a large mobile phone company, are using the Sub-commission Norms as a contract requirement for suppliers and subcontractors. Some nongovernmental organizations, such as Amnesty International, are using the Norms and/or their content as a basis for assessing the conduct of businesses. The Special Representative of the Secretary-General was supposed to develop standards, but has instead attempted to derail the standard-setting process and bow to the corporate refusal to accept any standards except voluntary codes.

I am pleased to have been part of this process and am very happy to report that many others are continuing this, as-yet incomplete, work. Indeed, while I am honored to receive the Stefan A. Riesenfeld Award today for my contributions to international law, I believe that my work as to the human rights responsibilities of businesses is still incomplete. Of course, Professor Riesenfeld was blessed by ninety useful years to make his many contributions, so this award may be an indication that I have some more time. Meanwhile, I encourage all of

93. Id. at 839-40.
you to get involved in this effort to hold businesses responsible for their international human rights obligations.