

BUSINESS AND HUMAN RIGHTS: SEIZING THE OPPORTUNITY*EMPRESAS E DIREITOS HUMANOS: APROVEITANDO A OPORTUNIDADE***Steven R. Ratner***

RESUMO: Este artigo resultou da palestra magna proferida pelo Professor Steven Ratner na ocasião da inauguração do Centro de Direitos Humanos e Empresas, da Faculdade de Direito da UFRGS e da Escola de Direito da Unisinos, que ocorreu no âmbito do “I Seminário Internacional de Direitos Humanos e Empresas: hermenêutica para um mundo transnacional”, organizado pelo Programa de Pós-Graduação em Direito da UFRGS, em parceria com o Programa de Pós-Graduação em Direito da Unisinos, por meio virtual, nos dias 24 a 26 de agosto de 2020. O autor oferece uma visão geral dos desenvolvimentos em direitos humanos e empresas (“BHR”) na última década, isto é, uma noção das reações a eles de diferentes partes interessadas e um roteiro de o que está por vir para um maior desenvolvimento do campo.

PALAVRAS-CHAVE: Empresas. Direitos humanos. Princípios em Direitos Humanos e Empresas. Direito internacional público. Justiça Global.

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ABSTRACT: This article comes from the keynote speech given by Professor Steven Ratner on the occasion of the inauguration of the Center for Human and Business Rights, in the Faculty of Law of UFRGS and the Unisinos Law School, which took place within the scope of the “I International Seminar on Business and Human Rights: hermeneutics for a transnational world”, organized by UFRGS Postgraduate Program in Law, in partnership with Unisinos Postgraduate Program in Law, through virtual means, from August 24 to 26, 2020. The author offers an overview of the developments in business and human rights (“BHR”) in the last decade, a sense of the reactions to them from different stakeholders, and a roadmap of what lies ahead for further development of the field.

KEYWORDS: Business. Human rights. Guiding Principles on Business and Human Rights (UNGPs). Public international law. Global justice.

It’s a great pleasure to be here to open your conference on business and human rights and to help inaugurate your new center here in Porto Alegre. I would like to start by congratulating Professors Lima Marques, Morosini, Frizzo Bragato, and Saldanha on this event and the establishment of a new center, Brazil’s first academic center devoted to the study of business and human rights (“BHR”). The decision to devote your time and resources to this center is a tribute to their hard work and will give a greater voice to stakeholders in Brazil in the global debates on BHR.

The timing of this initiative is at the core of my remarks today, because the last decade has witnessed a confluence of developments in BHR that make it among the most consequential areas of public international law, international economics, and global justice to be studying

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today. I would like to offer an overview of those developments, a sense of the reactions to them from different stakeholders, and a roadmap of what lies ahead for further development of the field. My hope is that some of these ideas may prove of interest to those watching these remarks that they will prove a basis for future work here in Porto Alegre.

I.

For the many stakeholders concerned about the impact of business activity on human rights, the last decade has been a whirlwind of norm-making. The flurry began in 2011 with the issuance by the UN Special Rapporteur on Business and Human Rights, John Ruggie, of his long-awaited Guiding Principles on Business and Human Rights (UNGPs).¹ The UNGPs were the product of several years of consultations with business leaders, NGOs, governments, and various experts; and they offered an accessible, yet nuanced and flexible, approach to BHR based on three pillars that Ruggie had developed and that are familiar to many of you.

-- Pillar I reaffirmed states' duties under human rights law to protect individuals against violations by private actors, including business entities – a notion well accepted in international human rights law that owes its origin to the Inter-American Court's *Velásquez Rodríguez* judgment of 1988.² The Court has reasserted this duty under the American Convention in *Ximenes-Lopez v. Brazil* by recognizing the state's obligation to supervise private health institutions,³ and just this year ruled in *Lhaka Honhat v. Argentina* that the state was responsible for failing to prevent logging, grazing, and fencing by private actors that led to the violation of the economic and social rights of indigenous peoples.⁴

-- Pillar II asserts a “responsibility” of all business enterprises to respect human rights, in the sense of not violating them. This responsibility applies regardless of a business's size or sector – from Facebook to a logging company in Brazil; from H&M clothing to a sports team building a new stadium. While not a legal duty, it is a standard of conduct now well accepted.

¹ UNITED NATIONS OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS. *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*. UN Doc. HR/PUB/11/04, 2011.

² INTER-AMERICAN COURT OF HUMAN RIGHTS. *Velásquez Rodríguez Case*. Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 4. July 29, 1988.

³ INTER-AMERICAN COURT OF HUMAN RIGHTS. *Ximenez-Lopez v. Brazil*. Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 149. July 4, 2006.

⁴ INTER-AMERICAN COURT OF HUMAN RIGHTS. *Indigenous Communities of Lhaka Honhat Association (Our Land) v. Argentina*, Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 400. Feb. 6, 2020.

The UNGPs also spell out resultant duties of conduct and result. Business is required to engage in due diligence to identify activities of its own or its business partners – suppliers, contractors, even customers – that could violate human rights; and they are required to end any of their own conduct that does so as well as undertake efforts to eliminate such conduct by their business partners, including through the use of their leverage.

-- Pillar III promotes the centrality of a remedy for all business-related violations of human rights, emphasizing the primacy of formal judicial remedies but also noting the importance of non-judicial remedies like official ombudspersons, OECD National Contact Points, and even internal corporate remedies.

The UNGPs received the endorsement of the Human Rights Council that same year.⁵ Beyond this green light by governments, they also received wide praise from business leaders and many NGOs, even as other civil society groups criticized them as too weak.

II.

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While the UNGPs may not be the Rio Mantaro for modern BHR, they are certainly its Manaus. In less than a decade, they have resulted in a wave of law-making and standard-setting at the national, international, and corporate level. Acting under Pillar I, a number of states that host multinational companies have increased their regulation of their companies operating abroad. Thus, laws in Australia, France, the UK, and elsewhere require companies to carry out due diligence as a way of determining their exposure to and involvement with human rights violations – transforming the responsibility under Pillar II into a domestic law duty.⁶ States have also proposed or inserted clauses into bilateral or other international investment agreements reasserting duties of companies to follow domestic law on the environment, corruption, labor, and other areas, as well as international standards.⁷ Unfortunately, Latin

⁵ HUMAN RIGHTS COUNCIL. *Res. 17/4*. July 6, 2011.

⁶ See, e.g., Modern Slavery Act 2018 (Cth) (Austl.); Loi 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre [Law of 2017-399 of March 27, 2017 on the duty of vigilance for parent companies and ordering companies], *Journal Officiel De La République Française* [J.O.], Mar. 27, 2017; Modern Slavery Act 2015, ch. 30 (2015) (U.K.).

⁷ See, e.g., Model Text for the Indian Bilateral Investment Treaty, arts. 11-12. Available at: <https://dea.gov.in/sites/default/files/ModelBIT_Annex_0.pdf>. Access: 21 dec. 2020.

America has not been a major player in these efforts. Only Colombia and Chile have issued National Action Plans on BHR,⁸ with Argentina and several other states beginning such efforts.⁹

At the international level, the OECD has issued various guidelines for companies, in particular in the extractive industries, on how to implement their responsibilities under Pillar II.¹⁰ Looking beyond the state, we have also seen a plethora of multi-stakeholder initiatives by states, companies, and NGOs to set forth standards in certain industries. These include the Extractive Industries Transparency Initiative, the Bangladesh Accord, and the International Code of Conduct for Private Security Service Providers.¹¹ And some initiatives have been undertaken by corporations alone or acting through business groups. Among the most interesting are sporting organizations like the International Olympic Committee (IOC) and Fédération Internationale de Football Association (FIFA), which face accusations of abusive labor practices against both players and those constructing the facilities for mega-sporting events such as the Olympics and the World Cup.¹²

But let us not forget Pillar III. As for a judicial remedy, while victims of business-related conduct have still had little success in the domestic courts of many developing states, they have had a small number of significant victories in the home states of multinationals. While Esther Kiobel's lawsuit against Shell may have failed in the United States after the Supreme Court rejected extraterritorial application of the Alien Tort Statute,¹³ it is proceeding in the Netherlands under Dutch law.¹⁴ The UK Supreme Court upheld jurisdiction to hear a case by Zambian citizens harmed by copper mine discharges against Vedanta Resources;¹⁵ and the Canadian Supreme Court has done the same regarding a case by Eritreans against Nevsun

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⁸ *Chile and Colombia, National Action Plans on Business and Human Rights*. Available at: <<https://globalnaps.org/country/chile/>> and <<https://globalnaps.org/country/colombia/>>. Access: 28 dez. 2020.

⁹ *Countries, National Action Plans on Business and Human Rights*. Available at: <<https://globalnaps.org/country/>>. Access: 21 dec. 2020.

¹⁰ *See, e.g., OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas, 2010*. Available at: <<http://www.oecd.org/daf/inv/mne/OECD-Due-Diligence-Guidance-Minerals-Edition3.pdf>>. Access: 21 dec. 2020.

¹¹ *Who We Are, EXTRACTIVE INDUSTRIES TRANSPARENCY INITIATIVE*, Available at: <<https://eiti.org/who-we-are>>. Access: 21 dec. 2020; *About, ACCORD ON FIRE AND BUILDING SAFETY IN BANGLADESH*. Available at: <<https://bangladeshaccord.org/about>>. Access: 21 dec. 2020; *About Us, INT'L CODE OF CONDUCT ASSOCIATION*, Available at: <<https://icoca.ch/about/>>. Access: 21 dec. 2020.

¹² INTERNATIONAL OLYMPIC COMMITTEE. *Host City Contract: Principles – Games of the XXXIII Olympiad in 2024, 2017*; FIFA HUMAN RIGHTS ADVISORY BOARD. *Fourth Report by the FIFA Human Rights Advisory Board*. Jan. 2020.

¹³ *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013).

¹⁴ *Kiobel v. Royal Dutch Shell*, C-09-540972-HA ZA 17-1048, Hague District Court, May 1, 2019, English translation at <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2019:6670>.

¹⁵ *Vedanta Resources PLC v. Lungowe* [2019] UKSC 20.

Mining concerning forced labor.¹⁶ On the arbitration front, the Bangladesh Accord, set up in the wake of the Rana Plaza factory catastrophe, led to an arbitration between a Bangladeshi union and a European apparel purchaser that was ultimately settled;¹⁷ and new rules have been formulated specifically for BHR disputes.¹⁸

But what is different today about BHR is not limited to laws, policies, or even court cases. Rather, the process of international discourse has fundamentally changed. Businesses, governments, and human rights NGOs are speaking to each other – and sometimes past each other – but using an argumentative strategy grounded in the UNGPs. The Human Rights Council has become the institutional focal point for these interactions, including through the Working Group on Human Rights and Transnational Corporations and an enormous annual forum in Geneva. Websites like the Business and Human Rights Resource Center post updates on developments from around the world.¹⁹ Consulting groups like SHIFT, and now many law firms, give advice to companies on how to rethink their work in order to demonstrate that they are doing what Pillar II expects.²⁰ Shareholders are investing as never before in ESG funds, one of whose criteria is a company's human rights policy.²¹

Indeed, the penumbra of the UNGPs challenges doctrinal categories within international law. They cannot be neatly fit in some traditional box called international human law but show how many fields of international law are linked – not fragmented.

-- For practitioners and scholars of international investment law, the current efforts to change bilateral investment treaties in order to preserve a state's policy space have a new momentum and normative grounding in Pillar I. Indeed, the foundations of international investment law as oriented solely to investor protection are now being questioned. In the recent *Urbaser* case concerning a Spanish water utility in Argentina, an investor-state arbitral tribunal

¹⁶ *Nevsun Resources Ltd. v. Araya*, 2020 S.C.C. 5 (Feb. 28, 2020).

¹⁷ *IndustriALL Global Union v. [Redacted]*, Termination Order, PCA Case No. 2016-36 (Per. Ct. Arb. July 17, 2018); Press Release, Permanent Court of Arbitration, Bangladesh Accord Arbitrations (July 17, 2018). Available at: <<https://docs.pca-cpa.org/2018/07/20180717-Press-Release-No.-2-ENG.pdf>>. Access: 21 dec. 2020; ROSS, Alison. Second Dispute Under Bangladesh Accord Settles. *Global Arbitration. Review*, Jan. 23, 2018. Available at: <<https://globalarbitrationreview.com/second-dispute-under-bangladesh-accord-settles>>. Access: 21 dec. 2020.

¹⁸ *The Hague Rules on Business and Human Rights Arbitration*. Available at: <<https://www.cilc.nl/project/the-hague-rules-on-business-and-human-rights-arbitration/>>. Access: 21 dec. 2020.

¹⁹ *Latest News*, BUS. & HUM. RTS. RES. CTR. Available at: <<https://www.business-humanrights.org/en/latest-news>>. Access: 21 dec. 2020.

²⁰ See, e.g., SHIFT. Available at: <www.shift.org>. Access: 21 dec. 2020.

²¹ Pippa Stevens, *ESG Index Funds Hit \$250 Billion as Pandemic Accelerates Impact Investing Boom*, CNBC (Sept. 2, 2020). Available at: <<https://www.cnbc.com/2020/09/02/esg-index-funds-hit-250-billion-as-us-investor-role-in-boom-grows.html>>. Access: 21 dec. 2020.

invoked the UNGPs to find a duty on foreign investors not to violate human rights.²² In the *Bear Creek Mining* arbitration brought against Peru by a Canadian company, one arbitrator found the mining company significantly at fault for its failed investment due to its refusal to consult with indigenous peoples as required under a convention of the International Labour Organization.²³ And investor-state tribunals have refused to hear cases where the investor claimant committed serious misconduct, such a bribery or other serious violations of local law.²⁴ So corporate duties are now a key part of international investment law.

-- For students of international environmental law, debates over climate change now invoke the UNGPs as setting a standard for business.²⁵ Just as business is seen as having a responsibility to protect human rights, it is also seen as having one not to harm the environment.

A few decades ago, the constructivist strand of international relations theory developed the idea of a norm cascade, where one big idea spreads and grows across multiple norm-setting sites globally.²⁶ Certainly, the last decade surely represents such a cascade when it comes to BHR. And if ever a U.N. document had made that mystical journey from policy to soft law, it is the UNGPs.

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III.

So much for the glass being half full. For many stakeholders, the UNGPs have proved not enough, in at least four key senses.

First, as a non-binding instrument, the UNGPs place no new obligations on states or corporations under international law or domestic law. While some states have turned Pillar II

²² Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic, ICSID Case No. ARB/07/06, Award. Dec. 8, 2016. Available at: <<https://www.italaw.com/cases/1144>>. Access: 21 dec. 2020.

²³ *Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB/14/21, Partial Dissenting Opinion of Professor Philippe Sands. Nov. 30, 2017. Available at: <<https://www.italaw.com/cases/2848>>. Access: 21 dec. 2020.

²⁴ *World Duty Free Company v. Republic of Kenya*, ICSID Case No. ARB/00/7, Award. Oct. 4, 2006. Available at: <<https://www.italaw.com/cases/documents/3281>>. Access: 21 dec. 2020.

²⁵ *See, e.g.*, Framework Principles on Human Rights and the Environment, in Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, Jan. 24, 2018, UN Doc. A/HRC/37/59, paras. 22, 35.

²⁶ FINNEMORE, Martha; SIKKINK, Kathryn. International Norm Dynamics and Political Change. *International Organization*, Cambridge/MA, v. 52, n. 4, p. 887-917, 1998.

responsibilities into legal duties or provide meaningful remedies through state-based judicial and non-judicial means, most have not.

Second, although the basic duty to protect in Pillar I is now accepted by most states as flowing from international human rights law, the precise contours of that duty are still subject to disagreement. The UNGPs lay out possibilities for domestic regulation, but they do not make clear which regulations are required for a state to meet its duty to protect. Most notably, the UNGPs do not take a position on a key legal issue: Whether a home state of a company must regulate its activities beyond the state's borders, a position on which academic and NGOs continue to disagree. So, while some states regulate corporate behavior abroad, and even open their courts to lawsuits for conduct abroad, the UNGPs do not set a single standard.

Third, because, as I noted, Pillar II applies to all companies regardless of size or industry, it was drafted to give companies flexibility on how to carry out due diligence, and also on how to mitigate violations by suppliers, distributors, and others with whom they have business relationships. Critics point out, while companies are supposed to use their leverage with business partners, the UNGPs do not provide clear guidance on when a company should cut off ties with those partners and just provides them with an excuse to delay hard decisions.²⁷ Indeed, a friend who provides advice to companies said that the UNGPs were fairly useless in telling companies exactly what to do with a business partner that is violating human rights.

Fourth, the UNGPs lack any institutional mechanism to evaluate states' or companies' performance. While one organization, SHIFT, has published useful studies on company due diligence policies, the Human Rights Council does not have any review mechanism.

These shortcomings are real, but they are also not surprising. Ruggie quite deliberately sought to gain significant multi-stakeholder support for the UNGPs after the rejection by capital-exporting states and many companies of the U.N.'s prior attempt at standard-setting, the 2003 Norms on the Responsibilities of Transnational Corporations.²⁸ As a result, they exhibit all three dimensions of soft law – (1) they are not legally binding, (2) their provisions are imprecise on key issues, and (3) they do not delegate enforcement to a true control

²⁷ RIGHTS AND ACCOUNTABILITY IN DEVELOPMENT. *Principles Without Justice: The Corporate Takeover of Human Rights*. Mar. 2016.

²⁸ RUGGIE, John Gerard. *Just Business: Multinational Corporations and Human Rights*. New York: W. W. Norton & Company, 2013, ch. 3.

mechanism.²⁹ They are not a thick and hard regime, and critics rightfully ask whether, without more, we can expect states or companies to protect those vulnerable to corporate abuses.

Layered on these criticisms is a more fundamental concern, pronounced by some governments, civil society groups, unions, and academics, that corporations simply cannot be trusted to improve their human rights practices, and that global capitalism is too strong a force to prevent a race to the bottom. The failures of the Kimberley Process regarding conflict diamonds, the limited effectiveness of the Extractive Industries Transparency Initiative when it comes to corruption, the continued abusive labor practices despite FIFA and IOC Codes, and the failure of social media companies to prevent their platforms from being used by governments to target political opponents are merely the tip of the iceberg to those skeptical about any possibilities for serious due diligence and remediation by corporations.³⁰ For every company that even claims to be taking the UNGPs seriously, countless seem unaware or uninterested in it.

IV.

In response to all of these criticisms, in 2014, a group of developing states long skeptical of transnational business enterprises prevailed upon the Human Rights Council in Geneva to create an Open-Ended Intergovernmental Working Group. It has a mandate to “elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises.”³¹ But the resolution creating the Working Group passed by a slim plurality and was opposed by the European Union and the United States.³² Under the chairpersonship of Ecuador, the Working Group produced its first draft for discussion in 2018, a significantly revised second draft in July 2019, and

²⁹ REISMAN, W. Michael. The Concept and Functions of Soft Law in International Politics. In: BELLO, Emmanuel G; AJIBOLA, Bola A. (Eds.). *Essays in Honour of Judge Taslim Olawale Elias*. V. 1. Leiden: Brill, 1992, p. 135 e ss; ABBOTT, Kenneth W; SNIDAL, Snidal. *Hard and Soft Law in International Governance*. *International Organization*, Cambridge, v. 54, n. 3, p. 421 – 456, 2000.

³⁰ See, e.g., *Why We are Leaving the Kimberley Process – A Message from Global Witness Founding Director Chairman Gooch*, GLOB. WITNESS (Dec. 3, 2011). Available at: <<https://www.globalwitness.org/en/archive/why-we-are-leaving-kimberley-process-message-global-witness-founding-director-charmian-gooch/>>. Access: 21 dec. 2020; *Extracting Oil, Burying Data*, ECONOMIST. Feb 25, 2012, <https://www.economist.com/international/2012/02/25/extracting-oil-burying-data>. Available at: <<https://www.globalwitness.org/en/archive/why-we-are-leaving-kimberley-process-message-global-witness-founding-director-charmian-gooch/>>. Access: 21 dec. 2020

³¹ HUMAN RIGHTS COUNCIL. Res. 26/9, U.N. Doc. A/HRC/RES/26/9. July 14, 2014.

³² HUMAN RIGHTS COUNCIL. Res. 26/9, U.N. Doc. A/HRC/RES/26/9. July 14, 2014.



another in August 2020. The draft treaty does four things: (1) it elaborates on the rights of victims of business-related human rights violations; (2) it obligates states to regulate companies operating on their territory for compliance with human rights law; (3) it requires states to provide civil and criminal liability for natural and legal persons carrying out business activities; and (4) it sets up a standing treaty body, akin to those in other human rights treaties, to monitor and improve compliance.³³

As might be expected, leading business organizations, and many of the states from which they hail, continue to oppose the treaty process. The essence of their complaint is that the process and the resultant drafts undercut the compromise among stakeholders that they argue is reflected in the UNGPs, ultimately stifling transnational business and economic development.³⁴

V.

So that takes us to the present day, with its three core features: a foundational soft law document with a framework that has garnered widespread support precisely due to its open-textured nature; a patchwork of governmental, corporate, NGO, and other approaches to implementing that framework, from legally binding at one end to corporate window-dressing and public relations on the other; and a pushback from states and other stakeholders convinced that we can do better, and that corporations and states should do more.

And those three features are at the core of why I call this an opportunity to seize. But by seize, it is important to distinguish between cynical approaches and committed ones. Corporations interested only in the short-term bottom line have already begun the cheap talk that they think is all that is needed – slick websites of their corporate policies, but no real changes on labor rights, interaction with local communities, protection of whistle-blowers, and creation of remedies.

³³ U.N. OPEN-ENDED INTERGOVERNMENTAL WORKING GROUP CHAIRMANSHIP. Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises, Second Revised Draft. June 8, 2020. Available at: <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/OEIGWG_Chair-Rapporteur_second_revised_draft_LBI_on_TNCs_and_OBEs_with_respect_to_Human_Rights.pdf>. Access: 21 dec. 2020.

³⁴ See, e.g., Joint business response to the revised Draft legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises. *Revised Draft Treaty*, Oct. 2019. Disponível em: <<https://www.ioe-emp.org>>. Acesso em: 21 dec. 2020.

I would like instead to talk about the opportunities for those who see the project of BHR as a serious one, as one with important ethical and justice-oriented dimensions. Indeed, lawyers, in whatever role they play, need to recognize, and, if necessary, challenge their own ethical assumptions or commitments as they interpret existing law and propose new law. For me, the BHR agenda is a small but meaningful step toward a more just world, insofar as those most vulnerable to harm from corporate conduct receive the protection that they are due. It demands changes to laws that privilege business over human rights. Of course, it is not a replacement for structural changes to the international economic order under the rubric of international distributive justice.

Engaging with BHR from any professional vantagepoint involves moral judgments and decisions. One such judgment is about the meaning of collusion – how close does a corporation have to get to a human rights violation in order to trigger duties on it do distance itself from it? Another equally important judgment is about the right division of responsibilities for the protection of human rights among governments, corporations, individuals, and other actors.³⁵ Corporations should not replace governments as duty-holders, any more than individuals should. But the reality of their negative human rights impacts and the inabilities of some governments to protect their populations means they should have some responsibilities and duties. How much is the question that all those working on this issue will need to grapple with. Those convinced that corporations are primarily a force for good, on the one hand or a source of harm, on the other, will probably have pretty simplistic views on these two questions. Those, like me, who see corporations as enormously diverse in their capacities, intentions, and impacts will struggle with the harder questions of what is both reasonable and fair to expect of them. Can the answer for a tech company making software purchased by governments to spy on people be the same as for a logging company in the Amazon? At a certain level of generality, yes, but beyond that there is no single answer.

While I am not an expert on Brazil's challenges, my sense from reading several accounts – including that of the U.N. Working Group on Business and Human Rights that visited Brazil in 2015 –³⁶ is that they are significant, and not simply because of the current government. I

³⁵ RATNER, Steven. International Law and Political Philosophy: Uncovering New Linkages. *Philosophy Compass*, Wiley Online Library, Dec. 18, 2018, p. 1.

³⁶ Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises on its Mission to Brazil, U.N. Doc. A/HRC/32/45/Add.1. May 12, 2016.



cannot compete with the 32 recommendations that the Working Group gave after its visit, so I will instead offer some ideas and opportunities, no more than that, for different actors who can contribute to better corporate behavior in the area of human rights. I also hope these ideas might form the basis for projects of research, education, teaching, and advocacy by your new center.

-- (1) For lawyers in the corporate world: Whatever sector your client works in, and despite perhaps ignorance or even suspicions of some of your clients, it is important for you to know the new legal landscape and learn about the UNGPs; explain to the executives the benefits from compliance with them; and devise policies to integrate them into companies' decision-making processes and make the companies' practices transparent to the public. This process should extend to encouraging your company to join or form multi-stakeholder initiatives.

-- (2) For those working in human rights NGOs: It is important for you to deploy and invoke this new legal architecture in response to corporate misconduct and governmental refusals to prevent or respond to it. If you find allies in government or business who want companies to do better, I hope you will engage them. Relations with companies need not be adversarial. For example, community-based mediation, has also been shown to build bridges between business and communities.³⁷ If the state has been captured by business so as to prevent meaningful regulation, then naming and shaming will be one component of a long-term strategy. More litigation at the Inter-American Court might spur states to take their duties more seriously.

-- (3) For policymakers: For Brazil, it seems imperative to begin serious work on a National Action Plan on BHR. This will require policymakers to think about whether the current legal structure provides adequate regulation of business for their human rights impacts and remedies for violations. The regulatory framework includes Brazil's policies on export financing and insurance for firms operating abroad as well as the content of any obligations to foreign investors in Mercosur or elsewhere. This will require looking at best practices from other states, seeking advice from experts.

-- (4) For the academy: Future work in BHR will involve a collaboration across multiple disciplines – law, economics, business, political science, ethics, and others. It should not be

³⁷ GANSON, Brian; WENNMANN, Achim. *Business and Conflict in Fragile States: The Case for Pragmatic Solutions*. Abingdon, UK: Routledge, 2015, p.165-200.

confined to those teaching or doing research in international human rights. I would identify the following areas as particularly pressing for academic and scientific inquiry:

1. A mapping of the particular industries and companies that create negative human rights impacts in Brazil and Latin America. While scholars and activists have focused on particular violations, for example against indigenous peoples in the Amazon and other large-scale development projects, a more comprehensive map of the vulnerabilities in Brazil would be useful. These would of course include high tech, private security, and other industries.

2. A compilation of legislation, regulation, treaties, and domestic and regional caselaw that regulate corporate behavior in the area of human rights, along with an analysis of their effectiveness and the reasons for it, deploying both quantitative analysis and qualitative research. A modest start would be to start with one particular sector with a particularly negative record when it comes to human rights.

3. Research into the permissibility under international law and domestic constitutional law of regulation of companies for their activities abroad, along with the development of legislative proposals for this end. These findings might find their way into international agreements so that foreign companies operating in Brazil, and Brazilian companies operating abroad, will be more aware of their duties.

4. Greater inquiry into the most effective remedies for victims of business and human rights violations. The traditional model of remedies, whereby the state pays damages or undertakes structural changes after losing a case in domestic or international court is obviously important, but such cases take a long time and may not help victims. If scholars can study nonjudicial methods, from arbitration to corporate remedies, they may discover that they provide a more timely and realistic remedy than lawsuits. As noted, mediation has much to offer as a way to address victim concerns.

5. Philosophical inquiry into the responsibilities of companies and states in the BHR space. I hope those working in political and legal philosophy will put their talent to thinking about the role of business as both a violator and enforcer of human rights.³⁸ They should also consider the meaning of collusion, and relationships of business' roles to those of the state, which is also both an enforcer and violator of human rights. How the two should

³⁸ RATNER, Steven S. Survey Article: Global Investment Rules as a Site for Moral Inquiry. *The Journal of Political Philosophy*, Wiley Online Library, v. 27, n. 1, 2019, p. 107-135.



share responsibility for protecting rights, and the responsibility for each if the other violates those rights, are at the heart of the theoretical issues surrounding business and human rights. Such theoretical work can inform legislation and corporate policy.

So now is a great time for your new center. With not too much difficulty, you will find collaborators in other parts of the world, allowing you to share Brazil's experiences with them and their experiences with you. Just as Brazil has shown itself a pioneer on other human rights issues, from LGBT rights to the right to health, so too can we hope for great contributions in the area of business and human rights.

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