August 16, 2011 draft

The Ruggie Rules: Applying Human Rights Law to Corporations

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In 2005, when John Ruggie was appointed as the Special Representative of the U.N. Secretary-General (SRSG) on human rights and transnational corporations and other business enterprises, the application of human rights law to corporations was highly contested. Lines of battle had formed between human rights groups and corporations over many issues, including whether corporations have, or should have, direct obligations under human rights law. At stake was more than the rhetorical advantage advocates might obtain from being able to accuse corporations of legal as well as moral misconduct. Clarification of corporate responsibility could determine whether corporations are subject to legal remedies for violating human rights law, including in the many suits brought against them under the Alien Tort Statute (ATS), a U.S. law that allows aliens to seek monetary damages for torts committed in violation of international law.[1]

This chapter examines the relationship between John Ruggie's work as the SRSG and the evolution of corporate obligations under human rights law. At the outset, two points should be emphasized. First, this focus excludes many aspects of Ruggie's mandate, which extended beyond legal issues. Second, Ruggie's ability to shape international law was severely limited. His mandate did not (and could not) authorize him to create new legal norms. Still, human rights law was intrinsic to the challenges he faced and to the solutions he proposed, and his work sheds light on several important legal questions.

The chapter first analyzes Ruggie's response to the most fundamental legal issue presented to him: does the entire body of human rights law apply directly to corporations? Rejecting the approach taken by a group of UN experts two years earlier, Ruggie answered the question with an emphatic negative. International law supports his position; indeed, the opposite view is legally untenable. By itself, however, his restatement of existing law would not have

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[1] The statute provides jurisdiction to U.S. courts for "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350.

Electronic copy available at: http://ssrn.com/abstract=1916664

quelled the controversy over the relationship of human rights law and corporations. But Ruggie did not stop there. He offered a new Framework and Guiding Principles that attempt (1) to elaborate the legal duties of states to protect against human rights abuses by regulating corporate conduct, and (2) to set out responsibilities for corporations that are not binding but that nevertheless provide a basis for monitoring and remediating corporate misconduct. Many chapters in this book critique the Guiding Principles from various points of view. Here, I look at their complicated relationship with human rights law, examining both how the Principles draw on existing law and whether they prepare the ground for the law to recognize direct corporate duties in the future.

Second, the chapter discusses three narrower issues: (a) Even if corporations are not bound by the body of human rights law, are they at least obliged to refrain from committing particularly heinous abuses that are defined as international crimes? (b) When can corporations be complicit in *state* violations of human rights law? and (c) Does the state duty to protect extend extraterritorially, to actions by corporations outside the territory of their home state? International law does not yet provide a definitive answer to any of these questions. This chapter describes Ruggie's positions: (a) corporations may be liable for committing international crimes; (b) corporations can be complicit in a state violation if they knowledgeably assist in its commission, even if they did not intend the violation to occur; and (c) the state duty to protect does not extend extraterritorially, although states should nevertheless encourage corporations to respect human rights abroad. These positions will help to inform, although they will certainly not end, the ongoing debate over how international law should address corporate abuses of human rights.

I. The Application of Human Rights Law to Corporations: From Draft Norms to Guiding Principles

Governments hoped that John Ruggie would quiet the controversy over the application of human rights law to corporations in part by clarifying the existing law. To that end, the Human Rights Commission asked that, as part of his mandate, he describe the human rights norms that apply to corporations, both those that apply directly and those that apply indirectly through states' obligations to protect against corporate abuses.[2] One difficulty in carrying out this task

[2] *See* Human Rights Commission Res. 2005/69, ¶ 1(a).

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was that in many respects the law was not settled. As Ruggie pointed out in his first report to the Commission, the standards were often not already there, waiting to be recorded and implemented, but were rather still in the process of being socially constructed. "Indeed," he noted, "the mandate itself inevitably is a modest intervention in that larger process."[3]

Even where the law seemed relatively clear, the effort to describe it was complicated by the recent proposal by another UN human rights body of Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights.[4] The Sub-Commission on the Promotion and Protection of Human Rights, a group of nominally independent experts operating under the auspices of the Human Rights Commission, had proposed the Draft Norms to the Commission in 2003.[5] The Norms had contributed to the controversy over the relationship of corporations and human rights by suggesting that human rights law already did apply directly to corporations – a position welcomed by many human rights advocates and strongly opposed by many corporations. As Ruggie told the Commission in his first report, it was difficult to have a discussion about the application of human rights standards to corporations without reprising the earlier debates over the Norms, which had ended in stalemate between their proponents and their critics.[6]

At the outset of his mandate, then, Ruggie had to decide how he would address the Norms and, more broadly, the approach to corporate duties that they represented. As the first of the following sections explains, human rights law as a whole so clearly does not apply directly to corporations that he had little choice but to reject the Norms as a restatement of existing law. His real challenge, as the second section discusses, was to reach that conclusion without abandoning the application of human rights law to corporations entirely, thereby alienating those working to bring human rights to bear on corporate misconduct. In response, Ruggie proposed a

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[3] Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, ¶ 54, UN Doc. E/CN.4/2006/97 (Feb. 22, 2006) (hereafter 2006 Interim Report).

[4] Sub-Commission on the Promotion and Protection of Human Rights, Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, UN Doc. E/CN.4/Sub.2/2003/12/Rev. 2 (2003) (hereafter Draft Norms). For the Sub-Commission's commentary on the Norms, see Commentary on the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, UN Doc. E/CN.4/Sub.2/2003/38/Rev. 2 (2003). For a description by one of the principal drafters of the Norms, see David Weissbrodt & Muria Kruger, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights,* 97 Am. J. Int'l L. 901 (2003).

[5] Sub-Commission Res. 2003/16, UN Doc. E/CN.4/Sub.2/2003/L.11 at 52 (2003).

[6] 2006 Interim Report, *supra,* ¶ 55.

Framework and Guiding Principles that draw on human rights law extensively but do not explicitly redirect it at corporations, as the Norms did.

A. The Draft Norms as a Restatement of Human Rights Law

The Sub-Commission's Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises are written in the form of a human rights treaty that provides that virtually every human right gives rise to a wide range of duties on virtually every corporation. The first article states: "Within their respective spheres of activity and influence, transnational corporations and other business enterprises have the obligation to promote, secure the fulfillment of, respect, ensure respect of and protect human rights recognized in international as well as national law."[7] Later provisions refer to slightly more specific corporate duties in relation to non-discrimination, international crimes, labor rights, and other areas.[8]

Although the Draft Norms were written as if they set out binding obligations, as the product of a group of independent experts they could have no legal effect in themselves. Indeed, they could have no directly binding effect even if the Human Rights Commission had adopted them. Nevertheless, the Norms raised the possibility that they might shape the development of human rights law, either by serving as the basis for a later treaty or by providing a statement of the law around which interpretation and practice might coalesce. There were indications that the Sub-Commission intended the Norms to have the second effect: it described the Norms as reflecting current human rights legal standards applicable to corporations,[9] and it expressed its intention to monitor their implementation.[10]

The Norms were controversial not just because their proponents claimed that they restated existing international law. Many corporations undoubtedly opposed the Norms simply

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[7] Draft Norms, *supra*, ¶ 1. The Norms define "other business enterprise" to include "any business entity, regardless of the international or domestic nature of its activities." *Id.* ¶ 21.

[8] *Id.* ¶¶ 2-9.

[9] Sub-Commission Res. 2003/16 ("the Norms, as explicated by the Commentary, . . . reflect most of the current trends in the field of international law, and particularly international human rights law, with regard to the activities of transnational corporations and other business enterprises"). *See also* Weissbrodt & Kruger, *supra*, at 913 (describing the Norms as a "restatement of international legal principles applicable to companies").

[10] Sub-Commission Res. 2003/16, ¶¶ 5-7. By itself, monitoring of compliance with standards does not indicate whether the standards are legal (since non-legal standards may also be monitored), but it may help to promote the general practice necessary to support the requirements of customary international law. *See* Larry Cata Backer, *Multinational Corporations, Transnational Law: the United Nations' Norms on the Responsibilities of Transnational Corporations as a Harbinger of Corporate Social Responsibility in International Law*, 37 Colum. Human Rts. L. Rev. 287, 380-82 (2005) (suggesting that the Norms would affect customary international law through changing corporate behavior directly, bypassing the need for formal state consent).

because they feared that a new set of international corporate standards would lead to greater scrutiny of corporate behavior.[11] Nevertheless, the Norms' sweeping legal claims did provide their critics ammunition, because the claims had little support in the law. The Norms neither reflected the existing state of international human rights law nor justified the legal changes that would be necessary to give them life. Indeed, the proponents of the Norms sometimes seemed oblivious to the size of the revolution in international law that they were seeking to realize.

To begin with some basics: one of the major differences between human rights in moral and political rhetoric and human rights in the form of international law is the nature of the duty-holders. In morality and politics, human rights can give rise to duties on anyone and everyone. Human rights *law*, in contrast, places its obligations almost entirely on states. The two International Covenants, for example, the most important human rights treaties, make clear that the rights they set forth give rise to correlative duties on the part of the state parties to the Covenants.[12]

At a minimum, these duties require states to avoid interfering with human rights themselves. However, that is not all that human rights law requires. It has long been clear that human rights may be abused by non-state actors. Slavery, terrorism, and violence against women are among the countless historical and modern examples. International law does not ignore the threats that private actors pose to the enjoyment of human rights but, with very few exceptions, it does not directly impose duties on them to refrain from such abuses. Instead, it requires each state not only to *respect* human rights itself, but also to take steps to *protect* rights from interference by non-state actors. States are required not just to refrain from slavery, for instance, but also to bring about its "complete abolition" throughout their jurisdiction.[13]

Although the scope and nature of private duties under international law are still emerging, their general outline had become clear by the time John Ruggie began his work.[14] At the lowest

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[11] *See* David Kinley & Rachel Chambers, *The UN Human Rights Norms for Corporations: The Private Implications of Public International Law,* 6 Human Rights L. Rev. 447, 491 (2006).

[12] International Covenant on Civil and Political Rights (ICCPR), Arts. 2, 3, Dec. 16, 1966, 999 UNTS 171; International Covenant on Economic, Social and Cultural Rights (ICESCR), Arts. 2, 3, Dec. 16, 1966, 999 UNTS 3.

[13] Slavery Convention, Art. 2, Sept. 25, 1926; ICCPR, *supra,* Art. 8. *See also* Abolition of Forced Labour Convention (ILO 105), Arts. 1, 2, June 25, 1957, 320 UNTS 291 (requiring its parties not only not to use forced labor themselves, but also to suppress such labor and to take effective measures to secure its "immediate and complete abolition").

[14] The following several paragraphs draw on a more detailed account of private duties under human rights law in John H. Knox, *Horizontal Human Rights Law,* 102 Am. J. Int'l L. 1, 18-31 (2008). *See also* Jacob Katz Cogan, *The Regulatory Turn in International Law,* 52 Harv. Int'l L.J. 321 (2011) (examining the rise of indirect private duties in

level of involvement, international law may merely contemplate that states take action to protect human rights from abuse by private actors, without indicating what measures the states must take. For example, the International Covenant on Civil and Political Rights requires each state party "to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant."[15] Scholars and human rights bodies have interpreted the phrase "to respect and to ensure" as requiring in the first instance that the state avoid violating the rights itself, and in the second that it take action to protect the right by making it safe from loss or interference, including as a result of private action.[16] The same interpretive conclusion has been reached with respect to other human rights treaties, including regional agreements.[17] The generally accepted view is that the obligation on states is one of conduct, not of result. In other words, states have to undertake due diligence to ensure that human rights are protected from interference.[18] The level of due diligence required will vary from right to right and from case to case.

Without further specification of the state's duty to protect, the state has a great deal of discretion to decide for itself how to satisfy the duty. But international law often specifies the duty to protect a particular right in more detail, through international agreement[19] or the gradual elaboration of duties by human rights bodies, including the UN treaty bodies and the regional human rights tribunals, as they construe general legal obligations. For example, the treaty body charged with overseeing the Convention on the Elimination of Discrimination Against Women

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international law generally); Monica Hakimi, *State Bystander Responsibility,* 21 Eur. J. Int'l L. 341 (2010) (examining state duty to protect human rights).

[15] ICCPR, *supra,* Art. 2(1).

[16] Human Rights Committee, General Comment No. 31, *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant,* UN Doc. CCPR/C/21/Rev.1/Add.13 (2004); Sarah Joseph, Jenny Schultz & Melissa Castan, The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary 24 (2000); Manfred Nowak, U.N. Covenant on Civil and Political Rights: CCPR Commentary 36-38 (1993).

[17] *See, e.g.,* Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 12, *The Right to Adequate Food,* ¶ 15, UN Doc. E/C.12/1999/5 (1999) (interpreting the International Covenant on Economic, Social and Cultural Rights); Z v. United Kingdom, 34 Eur. H.R. Rep. 3, ¶ 73 (2002) (European Convention on Human Rights); Commission Nationale de Droits d'Homme et des Libertes v. Chad, Comm. No. 74/92, 2000 Afr. H.R.L. Rep. 66, 68, ¶ 20 (1995) (African Charter on Human and Peoples' Rights); Velasquez Rodriguez v. Honduras, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 172 (1988) (American Convention on Human Rights).

[18] General Comment No. 31, *supra,* ¶ 8; *Velasquez Rodriguez, supra,* ¶ 172; August Reinisch, *The Changing International Legal Framework for Dealing with Non-state Actors, in* Non-state Actors and Human Rights 37, 79 (Philip Alston ed., 2005).

[19] *See, e.g.,* Convention on the Elimination of All Forms of Racial Discrimination, Art. 5(f), Dec. 21, 1965, 660 UNTS 195; Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), Art. 13(b), Dec. 18, 1979, 1249 UNTS 13; Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (ILO 182), June 17, 1999, 2133 UNTS 161.

stated in 1992 that the general obligation the Convention places on states to take appropriate measures to eliminate discrimination against women includes a duty to address gender-based violence by non-state actors, and recommended specific measures state parties should take to that end.[20] The General Assembly endorsed that interpretation the following year.[21]

Of course, there is no bright line between *contemplation* and *specification* of private duties. Over time, private duties often tend to move from lesser to greater specification under international law, narrowing states' discretion as to how to impose such duties. All along this spectrum, international law addresses private actors only through the intermediate role of states, which retain the primary responsibility under international law. Very occasionally, however, international law *directly places* obligations on non-state actors. The most commonly accepted examples of such duties are imposed by international criminal law, and include the obligations not to commit genocide, war crimes, and crimes against humanity.[22] The Genocide Convention, for example, does more than require states to prosecute those accused of genocide; it specifically provides that "genocide . . . is a crime under international law."[23]

Even with respect to these crimes, the enforcement of the duty to refrain from committing them is left predominantly to national governments. But international law can and sometimes does go further, by *enforcing* duties directly, *e.g.*, through the International Criminal Court and other international criminal tribunals. The International Criminal Court has jurisdiction over the three crimes listed above, but only under limited circumstances: to be admissible, a case must concern a crime that was committed on the territory or by a national of a party to the Rome Statute (or a nonparty that has accepted the Court's jurisdiction) and that is not being investigated or prosecuted by a state with jurisdiction.[24]

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[20] Committee on the Elimination of Discrimination Against Women, General Recommendation No. 19, *Violence Against Women* (1992). The most active regional tribunal in the specification of indirect private duties is the European Court of Human Rights. For descriptions of its work in this area, see Andrew Clapham, Human Rights Obligations of Non-state Actors 349-420 (2006); Alistair Mowbray, the Development of Positive Obligations Under the European Convention on Human Rights (2004).

[21] Declaration on the Elimination of Violence Against Women, General Assembly Res. 48/104 (1993). *See also* Report of the Special Rapporteur on Violence Against Women, *Integration of the Human Rights of Women and the Gender Perspective: Violence Against Women; The Due Diligence Standard as a Tool for the Elimination of Violence Against Women*, ¶ 29, UN Doc. E/CN.4/2006/61 (2006) (arguing that customary international law now requires states "to prevent and respond to acts of violence against women with due diligence").

[22] Although for historical reasons international criminal law and human rights law are often treated as distinct fields, there is a great deal of overlap between them. In essence, international criminal law establishes direct private duties that correlate to particular human rights, especially the right to life. *See* Knox, *supra*, at 24, 27-31.

[23] Convention on the Prevention and Punishment of the Crime of Genocide, Art. 1, Dec. 9, 1948, 78 UNTS 277.

[24] Rome Statute of the International Criminal Court, Art. 17, July 17, 1998, 2187 UNTS 90.

As the degree of involvement by international law increases, from indirect contemplation and specification of private duties to direct placement and enforcement, the number of duties at each stage decreases. International law *contemplates* more private duties than it *specifies*, and it specifies many more duties than it directly *places* and *enforces*. As a result, private duties under international law form a kind of pyramid, with the lowest levels of involvement much larger than the higher levels. It may not be immediately evident why this should be so. Why does human rights law not directly place and enforce more private duties? Conversely, why are private duties not all at the lowest level of the pyramid, to be applied according to the discretion of states?

The answer to the first question is that international law lacks the practical and political capacity to impose more than a small number of duties directly on private actors. Practically, international legal institutions could not reproduce the vast domestic resources devoted to regulating private invasions of interests denominated as human rights by international law. For example, domestic legal systems already reprehend and try to prevent and punish murder, a gross infringement of the right to life. It would make no sense for international bodies to take on this task. And, politically, neither national governments nor the vast majority of their citizens would support the expansion of the authority and resources of international institutions that would be necessary for them to protect all human rights from private interference.[25] At the same time, there are powerful reasons not to leave private violations of human rights completely to domestic law. In some cases, the nominally non-governmental actor may be acting as if it were a government and should be treated accordingly. Even when the actor is clearly acting in a private capacity, domestic governments may be unwilling or unable to prevent it from interfering with others' human rights. There is a need, then, for international human rights law to play a role.

Taken together, these cross-cutting pressures have resulted in a very strong presumption in the practice of states that almost all international legal duties on private actors will be mediated through domestic law: that placement and enforcement even of specific duties will usually be through domestic procedures, not international ones. To overcome this presumption, it is not enough that a violation be particularly heinous. International law expects states, rather than international institutions, to prosecute even such abhorrent international crimes as torture and slavery. To warrant direct intervention by international institutions, violations must be

[25] The preference for local resolution of human rights issues where possible appears in many contexts, including through the requirement that claimants to human rights tribunals and quasi-tribunals first exhaust available local remedies. *See, e.g.*, Optional Protocol to the ICCPR, Art. 2, Dec. 16, 1966, 999 UNTS 302.

considered both of extraordinary international significance and extraordinarily ill-suited for domestic enforcement.

How do corporations fit in this pyramid of private duties? In some respects, quite easily. There is no difficulty in concluding that states have duties to regulate corporations, along with other private actors, to ensure the enjoyment of human rights. Some international agreements and human rights bodies specifically include legal as well as natural persons in setting out indirect duties. For example, the Convention on the Elimination of Discrimination Against Women requires its state parties "[t]o take all appropriate measures to eliminate discrimination against women by any person, *organization* or *enterprise*,"[26] and the treaty body charged with monitoring the Covenant on Economic, Social and Cultural Rights has stated that states' obligation to protect the right to water requires them to prevent third parties, including "individuals, groups, *corporations* and other entities," from interfering with the right.[27] In many other cases, there is no basis for excluding corporations from the scope of general legal obligations on states to protect against harm to human rights from private actors. It would be nonsensical, for example, to exclude corporations from the scope of the state duty to suppress slavery. In short, the private duties at the lower levels of the pyramid, from mere contemplation to more detailed specification of indirect duties, normally include corporations.

It is also clear that the highest level of the pyramid, duties enforced by international bodies, does not currently include corporations. Neither the International Criminal Court nor the criminal courts for Rwanda or the former Yugoslavia have jurisdiction to prosecute corporations. This absence does not exempt the human rights records of corporations from any oversight by international human rights bodies. In monitoring states' duties to protect against corporate and other private abuse of human rights, these bodies will necessarily examine cases in which corporate behavior interferes with human rights.[28] But the primary legal focus will be on the direct duties of states under international law, not the indirect duties imposed on corporations.

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[26] CEDAW, *supra,* Art. 2(3) (emphasis added). For equivalent language, see International Convention on the Rights of Persons with Disabilities, Art. 4(e), Dec. 13, 2006.

[27] CESCR, General Comment No. 15, *The Right to Water,* ¶ 23, UN Doc. E/C.12/2002/11 (2002). For many examples of similar statements, see Special Representative of the Secretary-General, *State responsibilities to regulate and adjudicate corporate activities under the United Nations core human rights treaties; an overview of treaty body commentaries* (addendum to the 2007 Mapping Report, *supra*), ¶¶ 18-38, UN Doc. A/HRC/4/35/Add. 1 (2007).

[28] *See, e.g.,* Report of the Special Rapporteur on the adverse effects of the movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights, UN Doc. A/HRC/12/26 (2009) (reviewing the effects of the shipbreaking industry on human rights).

The remaining question is whether corporations are subject to duties at the second-highest level of the pyramid -- that is, duties that international law directly applies but does not necessarily enforce. That question can be divided in two: (a) does the entire body of human rights law apply directly to corporations? and (b) if the answer to the first question is negative, are corporations nevertheless subject to the same direct duties as individuals – *i.e.,* the duties not to commit international crimes such as genocide? This Part of the chapter looks only at the first question, leaving the second question to the first section of Part II.

The short answer to the first question is No. There is no legal support for the proposition that the entire body of human rights law applies directly to corporations, any more than it applies directly to individuals or other non-state actors. Arguments that all human rights obligations apply directly to corporations (and other private actors) tend to overlook the distinction between direct and indirect duties. For example, it has been suggested that human rights treaties do not state which persons or entities have the duties that correspond to the rights, so the duties must apply to everyone.[29] This is simply incorrect. The International Covenants and later treaties make clear that their obligations apply directly to states, not to private actors.[30] There is no exception for corporations. Because the treaties are explicit on this point, proponents of direct duties often look to customary international law, citing the General Assembly's proclamation of the Universal Declaration of Human Rights as "a common standard of achievement for all peoples and all nations, to the end that every individual and organ of society . . . shall strive . . . to promote respect for these rights and freedoms and by progressive measures . . . to secure their universal and effective recognition and observance."[31] But the drafters of the Declaration did not intend this language to give rise to legal obligations on private actors. The drafters did not view the Declaration as legally binding at all, and they expected that the legal duties corresponding to its rights would later be imposed, by treaty, on *states* – as the Covenants eventually did.[32]

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[29] Jordan Paust, *Human Rights Responsibilities of Private Corporations*, 35 Vand. J. Transnat'l L. 801, 810 (2002).
[30] *E.g.,* ICCPR, *supra,* Art. 2(1); ICESCR, *supra,* Art. 2(1); Convention on the Elimination of All Forms of Racial Discrimination, Art. 2, Dec. 21, 1965, 660 UNTS 195; CEDAW, *supra,* Art. 2; Convention on the Rights of the Child, Art. 2(1), Nov. 20, 1989, 1577 UNTS 3; European Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 1, Nov. 4, 1950, 213 UNTS 221; American Convention on Human Rights, Art. 1(1), Nov. 22, 1969, 1144 UNTS 123. The African regional human rights treaty does include some private duties, but those duties are converse (*i.e.,* owed by the individual to the nation), rather than correlative (owed by the individual in respect of other individuals' human rights). African Charter on Human and Peoples' Rights, June 27, 1981, 1520 UNTS 217. *See* Knox, *supra,* at 14-18.
[31] Universal Declaration, *supra,* pmbl.
[32] *See* Knox, *supra,* at 30 n.133.

Although implementation of the Declaration is certainly relevant to customary international law, there is no evidence of a general custom directly applying the entire range of obligations under human rights law to private actors generally or to corporations specifically.[33]

As a result, the Sub-Commission's Draft Norms would have made a revolution in human rights law if they had been generally accepted. Instead, the government representatives on the Human Rights Commission declined to adopt them, stating that the Norms have "no legal standing" and instructing the Sub-Commission not to monitor them.[34] At the same time, the Commission kept the issue of human rights and corporations on its agenda. It requested the Office of the High Commissioner for Human Rights to prepare a report on human rights standards relating to corporations,[35] and, after considering that report in 2005, it decided to request the appointment of the SRSG. By refusing to adopt the Norms, the Human Rights Commission threw cold water on the proposition that corporations, unlike other private actors, were directly subject to the entire range of duties set out by human rights law. But the Commission did not explicitly discard the idea, and many human rights groups urged Professor Ruggie to use the Draft Norms as the starting point for his work.[36] As a result, as Ruggie noted, the debates over the Norms threatened to "shadow" his mandate.[37]

To remove that shadow, Ruggie made clear in his very first report, in February 2006, that he rejected the Norms. Predictably, his primary criticism was that they lacked support in international law. Referring to their "exaggerated legal claims and conceptual ambiguities," he called them "engulfed by [their] own doctrinal excesses."[38] The next year, in his full response to the Human Rights Commission's request to map the existing human rights law relating to corporations, he stated that human rights instruments generally do not "currently impose direct

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[33] *See* Jennifer Zerk, Multinationals and Corporate Responsibility: Limitations and Opportunities in International Law 276-77 (2006). Some international instruments, notably the UN Global Compact and the OECD Guidelines for Multinational Enterprises, do call on corporations to respect human rights, but those instruments do not purport to be legally binding.

[34] Human Rights Commission Dec. 2004/116 (2004).

[35] Report of the United Nations High Commissioner on Human Rights on the responsibilities of transnational corporations and related business enterprises with regard to human rights, UN Doc. E/CN.4/2005/91 (2005) (hereafter 2005 OHCHR report).

[36] John Gerard Ruggie, *Business and Human Rights: The Evolving International Agenda,* 101 Am. J. Int'l L. 819, 822 n. 17 (2007).

[37] 2006 Interim Report, *supra,* ¶ 55.

[38] *Id.* ¶ 59.

legal responsibilities on corporations."[39] As this section explains, Ruggie was on solid ground in concluding that the Norms had no legal basis. Human rights law does not generally apply directly to private parties, and he could not credibly have argued otherwise. But rejecting the Norms presented the next problem: what should Ruggie propose in their stead?

B. Rejecting the Norms in Favor of . . . What?

By itself, rejecting the Norms' attempt to apply human rights law directly to corporations could not end the controversy over corporations and human rights. Corporations had been implicated in terrible atrocities, and the demand that human rights standards be brought to bear on them would not disappear. Moreover, many proponents of direct duties for corporations understood quite well that the Norms were ahead of existing international law. They supported the Norms not as a restatement of current law, but rather as an effort to move international law in the direction of more direct duties on corporations. They could make a strong argument that relying on indirect corporate duties had proved to be grossly inadequate, since states routinely failed to comply with their duty to protect against corporate abuses.

One might ask why the legal status of the Norms (or other international standards for corporate responsibility) was worth disputing. Compliance with legal standards, especially *international* legal standards, and most especially international *human rights* legal standards, is often weak. Conversely, voluntary or "soft law" approaches to corporate social responsibility may change corporate behavior, as the vast literature on such approaches suggests. Rather than waste energy fighting over whether standards are legal in some abstract sense, why not focus on making corporate codes and other non-legal standards, such as the Global Compact, more effective, thereby causing the changes in corporate conduct that purportedly binding legal standards should, but often do not, produce?[40]

A full answer to this question would take another chapter, or book, but the abridged version is that proponents and opponents of legalization of international corporate standards believe that the issue is worth the fight because they recognize that legalization has real

[39] Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie: *Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts*, ¶ 44, UN Doc. A/HRC/4/35 (Feb. 19, 2007) (hereafter 2007 Mapping Report).

[40] As Ruggie himself noted, in the course of describing multi-stakeholder initiatives such as the Kimberley Process Certification Scheme, as soft law approaches "strengthen their accountability mechanisms, they also begin to blur the lines between the strictly voluntary and mandatory spheres for participants." *Id.* ¶ 61.

consequences.[41] Establishing that a norm is legal can change the "logic of appropriateness" that influences actors' behavior. Governments, corporations, and individuals may accept the norm as defining a value of their society or internalize it as part of the environment in which they act.[42] Of course, non-legal norms can affect this logic of appropriateness as well. But it is reasonable to believe that laws -- at least, laws adopted through procedures that are widely accepted as legitimate – are more likely to exert this kind of effect.

Apart from potentially changing actors' views of appropriate behavior, legal standards have instrumental consequences. They may trigger a stronger array of regulatory and remedial mechanisms than non-legal norms, making it more difficult for actors to avoid compliance.[43] This is obvious at the level of domestic law, but it is true at the international level as well. Human rights mechanisms, while weak, already exist to monitor and promote compliance with human rights norms, and they are guided by their understanding of human rights *law*. The United Nations treaty bodies and the regional tribunals established by human rights agreements apply *legal* standards. They regularly reject claims by individuals of human rights violations if the claims do not meet the legal requirements imposed by the agreement that they implement. These compliance mechanisms are very far from fully effective, but they do not apply at all to non-legal norms.

As the previous section explains, human rights law already does address *indirect* corporate duties pursuant to the state duty to protect. International mechanisms such as the treaty bodies and regional tribunals can therefore already speak to corporate abuses by examining states' compliance with their duty to protect against them. To some extent, the possibility of establishing direct corporate duties may be attractive because it could lead to increased attention from international bodies.[44] But the debate over the direct applicability of international human rights standards to corporations has been so intense in large part because of its implications for the availability of one legal mechanism, in particular: the U.S. Alien Tort Statute (ATS).

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[41] *See* Doreen McBarnet, *Corporate social responsibility beyond law, through law, for law: the new corporate accountability, in* The New Corporate Accountability: Corporate Social Responsibility and the Law 9, 25-27 (Doreen McBarnet, Aurora Voiculescu & Tom Campbell eds., 2007).

[42] *See* Martha Finnemore & Kathryn Sikkink, *International Norm Dynamics and Political Change,* 52 International Organization 887, 903 (1998). *See generally* James G. March & Johan P. Olson, Rediscovering Institutions: the Organizational Basis of Politics (1989).

[43] *See* Radu Mares, *Global Corporate Social Responsibility, Human Rights and Law: An Interactive Regulatory Perspective on the Voluntary-Mandatory Dichotomy,* 1 Transnational Legal Theory 221, 238-39 (2010).

[44] International Council on Human Rights Policy, Beyond Voluntarism: Human Rights and the Developing Legal Obligations of Companies 3 (2002)

Beginning in the late 1990s, plaintiffs have increasingly turned to the ATS as an avenue for suits against multinational corporations for human rights abuses. The ATS not only offers victims of human rights abuses the possibility of damages; under the U.S. system of contingent attorneys' fees, the prospect of damage awards allows plaintiffs to hire law firms with the resources necessary to bring expensive, lengthy suits against corporations with massive resources. But the ATS may be available only for violations of *direct* duties under international law.[45]

This situation presented Ruggie with an extraordinarily difficult political calculus. To develop a consensus on how to bring human rights law to bear on corporations, Ruggie had to propose an alternative to the Norms that addressed the desire for a robust application of human rights law to corporations but did not alienate the governments whose cooperation would be necessary to make the proposal effective. In legal terms, the central issue was whether Ruggie could draw on human rights law to develop stronger standards for corporate behavior without making claims (as the drafters of the Norms had) that exceeded the bounds of the law or threatened to develop it in ways that governments would not accept.

One possibility, which would have been popular with many human rights groups, was for Ruggie to take the position that even though the Norms were not an accurate reflection of the law as it currently exists, they should be viewed as the standard toward which the law should be striving, much as the Universal Declaration of Human Rights was an aspirational standard that became the basis for a legally binding set of obligations. Ruggie rejected this course of action. He criticized the Norms in terms that made clear he saw them as a poor model for the evolution of international law. He highlighted their "imprecision in allocating human rights responsibilities to States and corporations," pointing out that although corporations and states play very different roles in society, the Norms "articulate no actual principle for differentiating human rights responsibilities based on the respective social roles performed by States and corporations."[46] He expressed the concern that in the absence of such a principle, the allocation of responsibilities between states and corporations could turn on their respective capacities, "so

[45] Although this is a widespread view, it may be mistaken. It is possible to read the language of the ATS, which refers to torts "committed in violation of the law of nations," as including tortious actions taken in violation of *indirect* as well as *direct* duties imposed by international law. Including indirect duties would not open the door to vast numbers of claims, because the Supreme Court has limited the scope of claims to those for violations of international legal norms with no less "definite content and acceptance among civilized nations than the historical paradigms [such as piracy] familiar when [the ATS] was enacted" in the late eighteenth century. Sosa v. Alvarez-Machain, 542 U.S. 692, 732 (2004).

[46] 2006 Interim Report, *supra*, ¶ 66.

that where States are unable or unwilling to act the job would be transferred to corporations."[47] The result, Ruggie feared, would be to undermine corporate autonomy, reduce "the discretionary space" of governments to decide for themselves how best to secure the fulfillment of the economic, social, and cultural rights corporations may most influence, undermine efforts to make governments more responsible to their own citizens, and lead to "endless strategic gaming and legal wrangling" between governments and businesses over their respective responsibilities.[48]

Ruggie could try to salvage a set of direct corporate duties by more clearly delineating the respective responsibilities of states and corporations. However, any attempt to make the duties legally binding would have faced other obstacles. Negotiating human rights instruments is notoriously difficult, even when governments start with a clear agenda. The International Covenants that codify the rights in the Universal Declaration were adopted 18 years after the Universal Declaration and took another decade to enter into force. Even non-binding declarations typically take many years to complete, often because they are seen as potential first drafts of binding treaties. The negotiation of the Declaration on the Rights of Indigenous Peoples, adopted by the General Assembly in 2007, lasted more than twenty years; the General Assembly adopted guidelines on the right to a remedy and reparation in 2006 that were the result of over a decade of work; and negotiation began in 1984 on a declaration on human rights defenders that was finally adopted only in 1998. Moreover, governments had already rejected the Draft Norms, the previous effort to induce them to negotiate an instrument on human rights and corporations. If Ruggie had introduced another draft of a legally binding agreement, or even a non-binding declaration, it seemed likely to meet the same fate, and the effort could distract from other initiatives with more immediate benefits.[49]

Rather than draft an aspirational instrument, therefore, Ruggie took a different approach. He proposed a new Framework for Business and Human Rights in 2008, and Guiding Principles to implement the Framework in 2011, that are avowedly consistent with the law *as it is* rather than the law as it might someday be.[50] As the following paragraphs explain, he based the Framework and Guiding Principles on human rights law where he could. Where that was

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[47] *Id.* ¶ 68.
[48] *Id.*; *see* Ruggie, *supra,* at 826.
[49] *See* John Ruggie, *Treaty Road Not Travelled,* Ethical Corporation 42-43 (May 6, 2008).
[50] Special Representative of the Secretary-General, *Protect, Respect and Remedy: a Framework for Business and Human Rights,* UN Doc. A/HRC/8/5, ¶ 9 (2008) (hereafter 2008 Framework Report); Special Representative of the Secretary-General, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy' Framework,* UN Doc. A/HRC/17/31 (2011) (hereafter Guiding Principles).

impossible, he still drew on human rights law in creative ways that help to give the Framework and Guiding Principles clarity, substance, and weight.

The first principle of the Framework is the state duty to protect against human rights abuses by private actors, including corporations. Ruggie repeatedly emphasized in the strongest terms that this duty is an obligation imposed by existing human rights law.[51] Although in some respects the duty to protect reflects a relatively new understanding of the law, it has a strong legal pedigree and has been endorsed by human rights bodies, instruments, and scholars for years. Ruggie added a systematic elaboration of the duty in the context of corporate activity. He presented detailed reports on the jurisprudence of the UN treaty bodies interpreting the duty to protect in the context of corporate activity; he held a series of consultations with interested parties that built understanding of and support for the application of the duty to corporate conduct; and he translated the law, as informed by those consultations, into accessible Guiding Principles reflecting different aspects of the duty. In short, he helped to remove any remaining doubts that the duty to protect covers the activities of corporations, and he clarified how the duty operates. These are real achievements.

By themselves, however, they fell far short of what human rights advocates sought, which was the direct application of human rights law to corporations. In the second and third principles of his Framework, Ruggie tried to steer between the Scylla of overstating corporations' legal obligations and the Charybdis of excusing them from any obligations at all. The second principle brings his effort part of the way through the strait by stating that corporations have a "responsibility to respect" human rights law. By grounding this responsibility on *societal expectations* rather than human rights law,[52] Ruggie provided a less controversial basis for the responsibility, but at the potential cost of making it softer and more inchoate. He tried to address these weaknesses by drawing on human rights law.

First, he used human rights law to define the scope of the corporate responsibility to respect. He characterized the societal expectation on which the responsibility rests as being that corporations respect human rights *as they are set out in international law* – in particular, the

[51] *E.g.*, 2007 Mapping Report, *supra*, ¶ 18 ("In sum, the State duty to protect against non-State abuses is part of the very foundation of the international human rights regime. The duty requires States to play a key role in regulating and adjudicating abuse by business enterprises or risk breaching their international obligations.").
[52] 2008 Framework Report, *supra*, ¶ 9.

major human rights and labor conventions.[53] As noted above, earlier international initiatives such as the UN Global Compact and the OECD Principles had already stated that corporations have a responsibility to respect human rights, as had the OHCHR report on corporations and human rights.[54] But defining the rights as those contained in specific legal instruments provides more certainty than simply using the idea of human rights as a general moral foundation for their application to corporations. Second, the third pillar of the Framework tries to make the responsibility to respect more substantive by stating that states must establish effective legal remedies for human rights abuses by corporations.[55] Ruggie repeatedly emphasized that human rights law requires states to do so, as part of their duty to protect.[56]

Ruggie also gave his "responsibility to respect" more substance and weight by providing more detail as to what it includes. The Norms had been criticized for failing to explain which human rights corporations should be obliged to respect, instead opting to say only that corporations should respect *all* of them. After examining the issue himself, Ruggie agreed that "there are few if any rights business cannot impact – or be perceived to impact – in some manner. Therefore, companies should consider all such rights."[57] Instead of limiting the number of rights relevant to corporations, Ruggie tried to define the responsibilities of corporations relative to the rights. His Guiding Principles generally construe the responsibility to respect as meaning that corporations should avoid infringing on rights themselves.[58] A duty to respect human rights is less controversial, and perhaps easier to implement, than duties to *protect* and *fulfill* rights, which treaty bodies have used to urge states to take a broad range of affirmative actions. But under Ruggie's approach, the responsibility to respect is not just negative; it also includes positive due diligence obligations on corporations to "address adverse human rights impacts with which they are involved," including by trying to prevent or mitigate impacts that

[53] Guiding Principles, *supra*, ¶ 12.
[54] 2005 OHCHR Report, *supra*, ¶¶ 23, 30, 41.
[55] Guiding Principles, *supra*, ¶ 25. The Guiding Principles also encourage corporations to establish operational-level grievance mechanisms. *Id.* ¶ 29.
[56] 2008 Framework Report, *supra*, ¶ 82; Business and Human Rights: Towards operationalizing the "protect, respect and remedy" framework, ¶ 87, U.N. Doc. A/HRC/11/13 (2009); Guiding Principles, *supra*, ¶ 25.
[57] 2008 Framework Report, *supra*, ¶ 52. This conclusion is debatable. As I have argued elsewhere, general transfer of human rights from the governmental to the corporate context raises issues of overinclusion, because not all rights are obviously applicable to corporations, and of underinclusion, since not all types of corporate misconduct clearly implicate human rights. Knox, *supra*, at 41-42.
[58] Guiding Principles, *supra*, ¶ 11.

are directly linked to their operations, products, or services by their business relationships.[59] More specifically, it requires corporations to make high-level commitments to meet their human rights responsibilities, to carry out human rights impact assessments before beginning activities, to integrate human rights policies throughout their operations, and to monitor and audit their performance.[60]

Even as clarified in these respects, the responsibility to respect may still seem too vague to be of much concrete use. Human rights groups strongly criticized the Guiding Principles for not providing enough detail about corporations and governments' responsibilities.[61] The Principles leave many difficult issues to be addressed in the course of translating the responsibility to respect into specific obligations in specific contexts, as Samantha Balaton-Chrimes, Fiona Haines, and Kate Macdonald explain in their chapter in this book.[62] However, as they note, Ruggie had real political constraints on defining the responsibility to respect further. In order to attract the political support necessary for his proposal to move beyond the stalemate that he inherited, he may have felt that it was necessary to underspecify some aspects of corporate responsibilities.[63] Along the same lines, his careful use of human rights law to support and inform his proposal should be seen as an effort to insulate it from political criticism. The stronger the legal supports for his proposal, the less controversy it would attract. In this respect, he was successful: the Commission and Council adopted their annual resolutions on his work by consensus, and in 2011, the last of the resolutions unanimously endorsed the Guiding Principles and appointed a five-person working group to promote their dissemination and implementation.[64]

His reliance on human rights law was more than a political strategy to obtain governmental acceptance. It also helped to establish a platform for further development of state and corporate obligations under human rights law and policy. Although that development may occur in many ways, it seems probable that human rights advocates will continue to press for a legally binding instrument setting out a broader array of duties on corporations.[65] Indeed,

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[59] *Id.* ¶¶ 11, 13.
[60] *Id.* ¶¶ 15-20.
[61] Joint Civil Society Statement on the Draft Guiding Principles on Business and Human Rights (31 January 2011), *available at* http://www.fidh.org/Joint-Civil-Society-Statement-on-the-draft,9066.
[62] *See* Samantha Balaton-Chrimes, Fiona Haines & Kate Macdonald, *Contextualising the Business Responsibility to Respect: How Much Is Lost in Translation?*
[63] *Id.*
[64] Human Rights Council Res. 17/4, ¶¶ 1, 6(a), UN Doc. A/HRC/RES/17/4 (6 July 2011).
[65] The instrument could also address other issues, such as the extraterritorial scope of states' duty to protect, an issue discussed below.

Amnesty International and other human rights groups urged the Council to instruct the new working group to analyze "gaps" in legal protection against corporate abuses in order to prepare the ground for such an instrument.[66] Ruggie himself, in his closing statement to the Council, suggested that instead of seeking to negotiate an instrument on the entire range of issues concerning corporations and human rights, governments should clarify the law on a much narrower and (presumably) less controversial set of issues, concerning the application to corporations of prohibitions on particularly gross human rights abuses, amounting to international crimes.[67]

The Council did not accept either of these suggestions, which suggests that most of its member governments remain uninterested in negotiating new legal norms in this area. Are the Guiding Principles likely to change this dynamic? In particular, does the "responsibility to respect" create an embryonic legal obligation on corporations, which will later develop into hard law? If so, Ruggie may have influenced the law in a more subtle manner than reframing existing standards or urging that they develop in a particular direction. Under the guise of rejecting direct duties for corporations, he may have written a rough draft of such duties, much as the drafters of the Norms sought to do.

In principle, the responsibility to respect could make the transition to hard law either through customary international law or through treaty. To bind corporations directly as a matter of customary law, states would have to act consistently as if corporations were so bound, and states would have to do so on the basis of their understanding of their obligations under international law. One might imagine that implementation of the responsibility to respect might help to persuade governments and corporations to accept that corporations do have direct obligations under international law. But the mere implementation of the responsibility to respect as part of the Guiding Principles would not in itself constitute the necessary evidence of custom,

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[66] Amnesty International, *A Call for Action to Better Protect the Rights of Those Affected by Business-Related Human Rights Abuses* (14 June 2011), *available at* www.amnesty.org/en/library/asset/IOR40/009/2011/en/55fab4a5-fb8a-4572-93f3-67581b2dca45/ior40009201 1en.html; International Federation of Human Rights (FIDH), International Commission of Jurists (ICJ), Human Rights Watch (HRW), International Network for Economic, Social and Cultural Rights (ESCR-Net), Rights & Accountability in Development (RAID), Joint Civil Society Statement on Business and Human Rights to the 17th Session of the UN Human Rights Council (15 June 2011), *available at* www.escr-net.org/actions_more/actions_more_show.htm?doc_id=1605781.

[67] John G. Ruggie, *Presentation of Report to United Nations Human Rights Council* (30 May 2011), *available at* www.business-humanrights.org/media/documents/ruggie-statement-to-un-human-rights-council-30-may-2011.pdf. *See also* John G. Ruggie, *Recommendations on Follow-up to the Mandate* (11 February 2011), *available at* www.business-humanrights.org/media/documents/ruggie/ruggie-special-mandate-follow-up-11-feb-2011.pdf.

because such implementation would be consistent with the view of the Principles that Ruggie has expressed: that is, that they follow from the state duty to protect (which is based on international law) and the corporate responsibility to respect (which is not). In other words, implementation of the Principles, without more, would be consistent with human rights law *as it already is*, and would not be evidence of a *change* in human rights law to make corporations directly obligated by it.

Nevertheless, implementation of the Principles might change the political climate in ways that remove obstacles to the legal recognition of direct corporate duties. The more comfortable governments (and corporations) become with using human rights standards to judge corporate conduct, the more willing they might be to accept applying these standards directly, rather than through the intermediate step of national implementation. One could even imagine that corporations might start to agitate for such obligations at the international level, in order to protect themselves from differing national standards.[68]

If the political environment changed, governments and corporations might prefer that such direct obligations take the form of a new human rights treaty, rather than rely on the possibly slow and uncertain development of customary international law. (The development of a treaty with general acceptance could, of course, also provide evidence of the development of customary law.) In addition to further elaborating the state duty to protect against corporate abuses of human rights, such a treaty could set out direct duties on corporations. Those duties might well resemble not only the Guiding Principles, but also the nominally discredited Norms. In that case, it might indeed be possible to conclude, as some scholars have already said, "The Norms are dead, long live the Norms."[69] In this scenario, Ruggie's rejection of the Norms would eventually come to be seen as one of the great retreats in order to advance in the history of international law.

On the other hand, it is also easy to imagine that if the Guiding Principles are effectively implemented, the desire for direct corporate duties might decrease. Greater specification of the state duty to protect and the corresponding regulation, monitoring, and remediation of corporate conduct, if they do occur, will make corporations more accountable for their compliance with

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[68] *See* Mares, *supra,* at 255-64 (describing how experience with non-binding approaches to influencing corporate behavior may lead to corporate acceptance of, or even lobbying for, regulation).

[69] David Kinley, Justine Nolan & Natalie Zeral, *'The Norms Are Dead! Long Live the Norms!' The Politics Behind the UN Human Rights Norms for Corporations, in* The New Corporate Accountability, *supra,* at 459.

international legal norms without having to impose those obligations directly. Even a hypothetical corporate desire for more uniform standards could be addressed more feasibly through greater specification of state duties to protect. After all, the practical and political objections to adopting direct international legal obligations for private actors – the reasons why the top of the pyramid of private duties is thin – will continue to apply to the private duties of corporations as well. Ruggie's work does not overturn those reasons; it reinforces them. By emphasizing the state as the primary duty-holder under international human rights law, by warning against the potential for games-playing with duties if corporations are assigned them directly, and by trying to establish a workable system for improving corporate human rights performance that does *not* involve wholesale application of direct duties on private actors, Ruggie's Framework and Guiding Principles seem likely to continue to be seen as an alternative to, rather than a prototype for, direct corporate legal obligations.[70]

II. The Relationship Between Ruggie's Mandate and Other Legal Issues

As Part I of this chapter explains, human rights law as a whole does not apply directly to corporations, any more than it applies directly to other private actors. Other issues concerning the relationship between human rights law and corporate conduct are less clear, however. In his work as the SRSG, John Ruggie took positions on several of these issues, including the responsibility of corporations not to commit international crimes, the standard for corporate complicity in state violations of human rights, and the extraterritorial application of state duties to protect against corporate misconduct.

A. Are Corporations Bound Not to Commit International Crimes?

That the entire range of human rights obligations does not apply to corporations does not resolve whether corporations are subject to the relatively small number of duties that are placed directly on individuals. In terms of the pyramid of private rights, the question is whether the second-highest level of the pyramid, representing duties directly placed by international law, includes corporations as well as individuals. As noted above, these duties are defined primarily

[70] In that respect, it will be consistent with the development of private duties in other areas of international law, which are addressing private duties with greater specificity, but almost always through indirect rather than direct regulation. *See* Cogan, *supra.*

by international criminal law, and they include obligations not to commit genocide, war crimes, and crimes against humanity.

This issue is surprisingly difficult to answer definitively. On the one hand, it is easy to imagine (or to recall) that legal as well as natural persons can commit human rights atrocities, and logic suggests that they should all be subject to the same international standards. It seems strange, even repulsive, to suppose that the international norm that prohibits all individuals from committing genocide has nothing to say about corporations that participate in the same conduct.[71] On the other hand, the sources of international law that are generally cited for the existence of prohibitions on genocide and other international crimes do not explicitly refer to corporations, and some important sources limit their coverage to individuals. The Rome Statute establishing the International Criminal Court, for example, which provides for prosecutions (under certain conditions) of genocide, war crimes, and crimes against humanity, limits the jurisdiction of the Court to "natural persons,"[72] as do the instruments establishing the jurisdiction of the international criminal courts for Rwanda and the former Yugoslavia.[73] In this respect, they follow the precedent of the war crimes trials after the Second World War, none of which prosecuted corporations.[74]

However, the exclusion of legal persons from the jurisdiction of international criminal courts does not necessarily resolve the issue. As Part I of this chapter explains, there is a distinction between international *enforcement* and *placement* of private duties. There is no doubt that international law does not currently enforce duties not to commit international crimes against corporations, but that does not foreclose the possibility that international law nevertheless prohibits corporations from taking certain actions defined as international crimes. International law is an immature legal system whose enforcement mechanisms often lag behind its legislation. International criminal law prohibited genocide and other actions long before standing

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[71] *See* Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 157 (2d Cir. 2010) (Leval, J., concurring in judgment).
[72] Rome Statute, *supra,* art. 25(1).
[73] UN Security Council Res. 827, U.N. Doc. S/RES/827 (1993); UN Security Council Res. 955, U.N. Doc. S/RES/955 (1994).
[74] The two military charters for trials of war criminals appear to contemplate only prosecutions of individuals. Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Art. 6, Aug. 8, 1945, 82 UNTS 279; Charter of the International Military Tribunal for the Far East, Art. 5, Jan. 19, 1946. Historical evidence indicates that the Nuremberg prosecutors considered bringing actions against corporations under Control Council Law No. 10, which has somewhat broader language than the charters, although it, too, does not explicitly provide jurisdiction over corporations. In the event, no such prosecutions were attempted. *See* Jonathan A. Bush, *The Prehistory of Corporations and Conspiracy in International Criminal Law: What Nuremberg Really Said,* 109 Colum. L. Rev. 1094, 1098, 1149-60 (2009).

international courts were established to try those accused.[75] Even now, the courts that have been created do not have jurisdiction over every individual accused of committing the crimes. That a particular person does not fall within the jurisdiction of one of the courts therefore does not mean that the person did not commit an international crime. Similarly, the decision to exclude corporations from the jurisdiction of international courts does not necessarily exclude them from otherwise applicable prohibitions on their conduct.

The difficulty, again, is that the usual sources of such prohibitions do not refer explicitly to corporations. The Genocide Convention, for example, states that "[p]ersons committing genocide . . . shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals."[76] While it is possible to read the references to "persons" here and elsewhere in the Convention to include legal persons, the examples provided (rulers, officials, private individuals) make that interpretation harder to reach. More generally, international crimes have roots in customary international law, a field whose scope and sources lend themselves to dispute. To take one example: The Nuremberg tribunal hearing the case against executives of I.G. Farben, which worked closely with the Nazi regime, referred to Farben, not just the executives, as having violated international law.[77] Should this reference be treated as an authoritative statement of the scope of customary international law, or is the more important indication of the law the fact that the trial was of the executives, not the corporation? Scholars and judges disagree.[78]

Whether corporations have any direct duties under international law might seem to be of only academic interest as long as they are not subject to the jurisdiction of international criminal courts. But even in the absence of an international court able to enforce prohibitions on corporate criminal conduct, direct duties might trigger other legal mechanisms. The monitoring

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[75] To take one example, the Genocide Convention was adopted in 1948, fifty years before states agreed to create the International Criminal Court.

[76] Genocide Convention, *supra,* Art. IV.

[77] VIII Trials of War Criminals Before the Nuernberg Military Tribunals 1132-33, 1140 (1952).

[78] *Compare* Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility,* 111 Yale L.J. 443, 477-78 (2001), *and* Doe VIII v. Exxon Mobil Corporation, __ F.3d __, 2011 WL 26522384 (D.C. Cir. 2011) (citing *Farben* as support for direct corporate duties under customary law), *with* Brief of *Amicus Curiae* Professor James Crawford in Support of Conditional Cross-Petitioner 9 (June 23, 2010), on petition for a writ of certiorari in Presbyterian Church of Sudan v. Talisman Energy Inc., *and Kiobel, supra,* 621 F.3d at 134-36 (majority opinion) (emphasizing that the tribunal did not have jurisdiction over corporations). *See also* Flomo v. Firestone Natural Rubber Co., 643 F.3d 1013, 1017 (7th Cir. 2011); *Doe VIII v. Exxon Mobil, supra,* at __ (pointing to Allies' decision at the end of World War II to break up German corporations that had aided the Nazi regime as evidence that the corporations were viewed as having violated customary international law).

procedures under the purview of the Human Rights Council, for example, might be employed directly against corporations if they are subject to direct obligations. The U.S. Alien Tort Statute might be available for suits against corporations if they can be shown to commit a tortious violation of international law, as Part I explains. And the recognition of direct corporate duties under international law might help to prepare the way for stronger international enforcement, such as an amendment to the Rome Statute to expand its jurisdiction to include corporations.[79]

In his work as the SRSG, John Ruggie contributed to the debate over the applicability of international criminal standards to corporations by emphasizing that the strong trend is to subject corporations to the standards. His first report states that while human rights instruments do not generally impose duties directly on corporations, "emerging practice and expert opinion increasingly do suggest that corporations may be held liable for committing, or for complicity in, the most heinous human rights violations amounting to international crimes, including genocide, slavery, human trafficking, forced labor, torture, and some crimes against humanity."[80] His second report notes that the Rome Statute does not extend the jurisdiction of the ICC to corporations, but attributes that failure to "differences in national approaches," and states that "just as the absence of an international accountability mechanism did not preclude individual responsibility for international crimes in the past, it does not preclude the emergence of corporate responsibility today."[81] The report concludes that although corporate criminal responsibility "continues to evolve," there is already "observable evidence of its existence."[82]

In support of this position, Ruggie pointed to two factors of particular importance in shaping the development of direct corporate duties.[83] One is the growth of corporate responsibility for abuses of international law under domestic legal systems. He cited research by the Norwegian Institute of Applied Social Science (Fafo), which surveyed 16 countries to determine the remedies they provide in their domestic laws for grave breaches of international law by corporations.[84] Of the 16 countries, nine have fully incorporated the three crimes in the

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[79] France proposed such an extension during the negotiation of the Rome Statute, but it was not adopted. *See* Andrew Clapham, *The Question of Jurisdiction Under International Criminal Law over Legal Persons: Lessons Learned from the Rome Conference on an International Criminal Court, in* Liability of Multinational Corporations Under International Law 139 (Menno T. Kamminga & Saman Zia-Zarifi eds., 2000).
[80] 2006 Interim Report, *supra*, ¶ 61.
[81] 2007 Mapping Report, *supra*, ¶ 21.
[82] *Id.* ¶ 33.
[83] *Id.* ¶ 22.
[84] Anita Ramasastry & Robert C. Thompson, Commerce, Crime and Conflict: Legal Remedies for Private Sector Liability for Grave Breaches of International Law (2006), *available at* www.fafo.no/pub/rapp/536/536.pdf.

Rome Statute into their domestic laws, two others were in the process of doing so, and the remaining five all have legislation incorporating at least one of the crimes.[85] Because most of these countries provide for criminal liability for corporations as well as individuals, the effect is to subject corporations to domestic legal remedies for violation of international crimes.

Ruggie also emphasized the burgeoning U.S. jurisprudence under the ATS, which has been informed by "the expansion and refinement of individual responsibility" by the international criminal courts.[86] Courts construing the ATS have recognized that international law directly prohibits individuals from taking certain actions, including genocide and war crimes, and have found that such actions constitute torts in violation of the law of nations, within the meaning of the statute.[87] Since the late 1990s, they have extended this reasoning to cases seeking damages from corporations for human rights abuses. As his 2006 Report notes, although none of the ATS cases brought against corporations has yet resulted in a judgment in favor of the plaintiffs, some of the cases have resulted in settlements and many remain pending.[88]

Ruggie's observations about corporate liability for actions defined as international crimes may have helped forge the political consensus around his Framework and Principles. His statements that international prohibitions on genocide and these other grave human rights offenses do apply to corporations offset, to some degree, his rejection of the Draft Norms' position that all human rights obligations apply directly to corporations. Apart from this potential political effect, how accurate are Ruggie's views, and what influence are they likely to have on the development of the law?

The trends Ruggie described do not provide conclusive evidence that customary international law already binds corporations not to commit actions defined as international crimes, such as genocide and war crimes. The incorporation of penalties for such actions in the domestic law of some countries, as surveyed by the Fafo study, does not, by itself, show either

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[85] *Id.* at 15. The countries studied that provide for criminal corporate liability of some kind include Argentina, Canada, France, India, Indonesia, Japan, South Africa, the United Kingdom, and the United States. *Id.* at 13.
[86] 2007 Mapping Report, *supra,* ¶¶ 22-23; *see* 2006 Interim Report, *supra,* ¶ 62.
[87] *See, e.g.,* Kadic v Karadzic, 70 F.3d 232 (2d Cir. 1995).
[88] 2006 Interim Report, *supra,* ¶ 62. For a description of a settlement, see Ingrid Wuerth, *Wiwa v. Shell*: The $15.5 Million Settlement, 13 ASIL Insights 14 (2009). The many pending cases include *Sarei v. Rio Tinto, PLC*, 625 F.3d 561 (9th Cir. 2010) (alleging that Rio Tinto committed war crimes and crimes against humanity in the course of mining operations on Bougainville in Papua New Guinea); *Abdullahi v Pfizer, Inc.*, 562 F.3d 163 (2d Cir. 2009) (alleging that Pfizer carried out medical tests on Nigerian children without their consent); *In re South African Apartheid Litigation*, 617 F.Supp.2d 228 (S.D.N.Y. 2009) (alleging violations by many companies in connection with the *apartheid* regime in South Africa).

the consistent practice or the *opinio juris* necessary to evidence customary international law. When Ruggie published his description of ATS jurisprudence, the U.S. decisions generally assumed that corporations could be liable on the same grounds as individuals,[89] but since then the issue has given rise to intense disagreement between U.S. courts, with some denying and some defending the principle of corporate liability.[90] Even if the Supreme Court resolves the question as far as the ATS is concerned,[91] any interpretations the Court makes of international law could have only persuasive, not binding, effect outside the United States. But Ruggie was careful not to overstate the importance of the Fafo study or of the interpretations of international law by ATS courts. He merely pointed out that national courts were already able to impose criminal and civil liability on corporations for violations of international criminal standards, which is clearly true.

One might think that Ruggie's position arrived in good time to affect the outcome of the ATS debate. It is difficult to discern a clear influence, however. Although many briefs in ATS cases have referred to his work, they have often cited him incorrectly, as indicating that corporations do not have any direct obligations at all, on the basis of his statement in the 2007 Mapping Report that the international human rights instruments reviewed there do not impose direct legal responsibilities on corporations.[92] One lower court also made this mistake.[93] On the other hand, one of the appellate courts that found corporate liability under the ATS cited Ruggie

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[89] Decisions assuming that the ATS may reach corporate conduct without examining the issue separately from other types of non-state conduct include Doe v. Unocal Corp., 395 F.3d 932 (9th Cir. 2002), *vacated,* 395 F.3d 978 (9th Cir. 2003); Wiwa v. Royal Dutch Shell Petroleum Co., 226 F.3d 88 (2d Cir. 2000).

[90] Decisions holding that corporations may be liable include *Flomo, supra,* 643 F.3d at 1017-21; *Doe VIII v. Exxon Mobil, supra,* __ F.3d at __; Sinaltrainal v. Coca-Cola Co., 578 F.2d 1252, 1263 (11th Cir. 2009); Al-Quraishi v. Nakhla, 728 F. Supp. 2d 702, 753 (D. Md. 2010); In re XE Services Alien Tort Litigation, 665 F. Supp. 2d 569, 588 (E.D. Va. 2009). Decisions denying such liability include Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111 (2d Cir. 2010); Doe v. Nestle, S.A., 748 F.Supp.2d 1057, 1143-44 (C.D. Cal. 2010). To complicate matters, the issue of corporate liability under the ATS does not necessarily turn on whether corporations are directly liable under international law, both because courts could interpret the ATS to include indirect as well as direct duties, *see* note 45 *supra,* and because some courts have based corporate liability under the statute on their reading of U.S. law rather than international law. *See, e.g., Doe VIII v. Exxon Mobil, supra,* at __ ("domestic law, *i.e.,* federal common law, supplies the source of law on the question of corporate liability").

[91] In June 2011, the plaintiffs in *Kiobel,* one of the decisions denying corporate liability, requested the Supreme Court to review the decision. Petition for Writ of Certiorari, *available at* http://harvardhumanrights.files.wordpress.com/2011/06/kiobel-petition-for-writ-final-6-6-2011.pdf.

[92] *E.g.,* Presbyterian Church of Sudan v. Talisman Energy, Inc., 2010 WL 2568101, on petition for a writ of certiorari from the Supreme Court to the U.S. Court of Appeals for the Second Circuit (2010) (brief of amicus curiae Professor James Crawford); Presbyterian Church of Sudan v. Talisman Energy Inc., on petition for writ of certiorari (2010) (brief of amicus curiae Professor Malcolm N. Shaw); Sarei v. Rio Tinto PLC, 2009 WL 6023779 (9th Cir. 2009) (motion for leave to file amicus curiae brief of international law professors); Balintulo v. Daimler AG, 2009 WL 7768620 (2d Cir. 2009) (letter brief of amici curiae international law professors).

[93] *Doe v. Nestle, supra,* 748 F.Supp.2d at 1141.

correctly, as pointing out the extension of responsibility for international crimes to corporations under domestic law, including through the ATS.[94]

In any event, asking whether Ruggie's work will influence legal interpretations by domestic courts is probably the wrong way to evaluate his impact. Ruggie did not present his views as definitive scholarly conclusions on the current state of corporate direct duties under international criminal law. Rather than affecting the development of law directly, through making a legal argument, Ruggie's description of the trend toward greater potential corporate liability seems more likely to have the aim and effect of raising awareness of the *practical* consequences of this trend. Although the status of direct corporate responsibility under international law (and ATS jurisprudence) remains unclear, there is no doubt that the developments Ruggie outlines are, as he put it, "creating an expanding web of potential corporate liability for international crimes, imposed through national courts."[95]

Although he draws legal conclusions from this observation, his larger point is that corporations should be aware of the potential legal costs of behavior that could lead to accusations that they have violated these standards. If the U.S. Supreme Court eventually rejects corporate liability under the ATS, then one high-profile avenue of corporate accountability will disappear. But Ruggie's reports demonstrate that the ATS is far from the only potential source of grave consequences for corporations if they violate international standards for heinous human rights abuses such as genocide and crimes against humanity. Apart from the potential for civil liability based on other sources of domestic law, they are increasingly likely to find themselves subject to criminal prosecution for such actions in domestic courts around the world. His warning is designed to convince corporations that they need to take these and other international standards more seriously.

At the same time, this emphasis on the practical consequences of corporate liability under domestic law may turn out to affect not only corporate behavior, but also the long-term evolution of international law on this issue. His statements that the law is moving in this direction, and in particular his publicization of the Fafo study showing that many countries already provide for domestic responsibility for infringements of international criminal law, may help to provide evidence of the gradual accretion of practice relevant to customary international law. Moreover,

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[94] *Doe VIII v. ExxonMobil, supra,* __ F.3d at __.
[95] 2007 Mapping Report, *supra,* ¶ 22.

a greater understanding by states of the widespread responsibility of corporations for such crimes in the context of domestic legal systems might prepare the ground for an eventual amendment to the Rome Statute to expand the jurisdiction of the International Criminal Court to include corporations.

B. Corporate Complicity in State Human Rights Violations

Another outstanding issue concerns the potential responsibility of corporations that are implicated in state actions. States can be responsible for violations of international law when they are acting through or with corporations, but under what circumstances can corporations be responsible when they are acting for or with states? Again, this issue has come into focus in the context of litigation against corporations under the U.S. Alien Tort Statute. There, the debate has centered on whether the international standard for aiding and abetting an international crime requires a *mens rea* of knowledge of the principal action, or of intent to assist it.[96]

As the SRSG, Professor Ruggie came out firmly on behalf of the lower standard, of knowledge alone. In a detailed report on complicity, Ruggie reviewed the applicable jurisprudence of the international criminal tribunals and concluded, without qualification, that the cases "have required that the accused know the criminal intentions of the principal perpetrator, and that their own acts provide substantial assistance to the commission of the crime," but not that "the individual share the same criminal intent as the principal, or even desire that the crime occur."[97] He cited decisions of the international criminal courts for Rwanda and the former Yugoslavia, as well as by the Nuremberg tribunals, all of which construed customary international law.[98]

Ruggie's position on this issue seems well-supported by the relevant law. Still, the apparent clarity of the law is somewhat muddied by the language of the Rome Statute, which states that a person shall be criminally liable within the jurisdiction of the International Criminal Court "if that person . . . [f]or the *purpose* of facilitating the commission of such a crime, aids,

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[96] *See generally* Doug Cassel, *Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts,* 6 Nw. J. Int'l Human Rts. 304 (2008); Chimene Keitner, *Conceptualizing Complicity in Alien Tort Cases,* 60 Hastings L.J. 61 (2008).

[97] Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Clarifying the Concepts of "Sphere of Influence" and "Complicity,"* UN Doc. A/HRC/8/16, ¶ 42 (2008).

[98] *Id.* ¶¶ 42-44.

abets or otherwise assists in its commission or its attempted commission."[99] Although the ICC has not confirmed that this provision requires a finding of intent, it has influenced ATS litigation. In 2009, in *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, the Second Circuit Court of Appeals relied on it in holding that the international standard for aiding and abetting requires intent rather than knowledge.[100] The court acknowledged that other international criminal courts have employed the less stringent standard. Nevertheless, it decided that the Rome Statute showed that the knowledge standard does not command universal acceptance, which it believed that U.S. jurisprudence requires in order for a norm to be treated as customary international law.[101]

The importance of the *Talisman* decision to the evolution of international law should not be overstated. The influence of *Talisman* outside the jurisdiction of the Second Circuit is limited to the persuasive effect, if any, of the decision. Subsequent *amicus* briefs filed by legal experts strongly criticized the decision as misconstruing the Nuremberg precedents and disregarding other provisions of the Rome Statute that suggest that knowledge may also be an acceptable *mens rea*.[102] Most important, *Talisman* does not take into account that the Rome Statute can impose a stricter standard than that of customary international law without thereby changing customary international law.[103] On the basis of these arguments, the next appellate court to consider the question, the D.C. Circuit, rejected *Talisman* in favor of the knowledge standard.[104]

These decisions provide another opportunity to examine the relationship of Ruggie's work to the development of the law. The *Talisman* plaintiffs, as well as the *amicus* legal scholars, cited Ruggie in their briefs to the Supreme Court asking it to hear their appeal from the decision. They were able to draw not only on his general reports on corporate complicity, but

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[99] Rome Statute, *supra,* Art. 25(3)(c) (emphasis added).
[100] Presbyterian Church of Sudan v Talisman Energy, Inc., 582 F.3d 244 (2d Cir. 2009), *cert. denied*, 131 S. Ct. 79, 122 (2010). The *Talisman* court largely adopted a concurring opinion in an earlier case. *See* Khulumani v. Barclay National Bank Ltd., 504 F.3d 254, 275-77 (2d Cir. 2007) (Katzmann, J., concurring).
[101] *Talisman,* 582 F.3d at 259. *See* Flores v. Southern Peru Copper Co., 414 F.3d 233, 248 (2d Cir. 2003) ("[I]n order for a principle to become part of customary international law, States must universally abide by it.").
[102] *E.g.,* Brief of Amicus Curiae International Commission of Jurists, at 15-16, Presbyterian Church of Sudan v. Talisman Energy, Inc., on petition for a writ of certiorari from the Supreme Court to the U.S. Court of Appeals for the Second Circuit (2010) (citing Rome Statute, *supra,* Arts. 25(3)(d), 30).
[103] Brief of Amicus Curiae International Law Professors, at 17-20, Presbyterian Church of Sudan v. Talisman Energy, Inc., on petition for a writ of certiorari from the Supreme Court to the U.S. Court of Appeals for the Second Circuit, 2010 WL 1787371 (2010).
[104] *Doe VIII v. ExxonMobil, supra,* __ F.3d at __.

also his criticisms of the *Talisman* decision in particular.[105] In a speech shortly after the decision, Ruggie did not pull punches. He not only called the intent standard adopted by *Talisman* "against the weight of international opinion," he said that its outcome was "absurd" and pointed out that "as long as an I.G. Farben intended only to make money, not to exterminate Jews, [the intent standard] would make it permissible for such a company to keep supplying a government with massive amounts of Zyklon B poison gas knowing precisely what it is used for."[106] He said that the decision "demonstrates, if further demonstration were needed, . . . that we are far from a systemic solution to ensuring access to judicial remedy for individuals and communities affected by corporate-related abuse."[107]

The Supreme Court refused to hear the appeal from the *Talisman* decision and, although the D.C. Circuit did adopt the "knowledge" test, it did not rely on Ruggie's views. As stated in the previous section, however, examining his effect on any one case is not the best way to assess Ruggie's impact on the development of international law and policy. That impact, if it is felt, will take place over many years and in combination with many other factors. In this respect, *Talisman* illustrates a particular type of contribution that can be made by independent experts appointed to high-profile positions within the U.N. human rights system. Although they do not have the power to change the law, they can use their visibility to draw attention to specific developments and praise or criticize them in light of the applicable law as they construe it. Although their opinions have less weight than tribunals, they are freer than tribunals to act quickly and on their own initiative. Through their responses to specific situations, they may influence others' behavior and views of the law and, eventually, the law itself.

With occasional exceptions, such as his remarks on *Talisman,* Ruggie only rarely exercised this power. Rather than respond to specific situations, he usually concentrated on developing an overall approach to corporations and human rights. Now that the Human Rights Council has endorsed the Guiding Principles, the five-person working group appointed by the Council to promote them will likely devote more attention to examining their application to particular situations, continuing to try to bend the future development of the law in the directions Ruggie has outlined.

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[105] Petition for Certiorari, at 17 n.25, Presbyterian Church of Sudan v. Talisman Energy, Inc., 2010 WL 1602093 (2010); Brief of Amicus Curiae International Law Professors, *supra,* at 23-24.
[106] John G. Ruggie, Remarks for ICJ Access to Justice Workshop (Oct. 29, 2009), *available at* http://198.170.85.29/Ruggie-remarks-ICJ-Access-to-Justice-workshop-Johannesburg-29-30-Oct-2009.pdf.
[107] *Id.*

C. The Extraterritorial Scope of States' Duty to Protect Against Corporate Abuses of Human Rights

As Part I explains, international human rights law indisputably imposes a duty on states to protect against private abuses of human rights, including by corporations. Several aspects of the duty to protect remain unclear, however, including the degree to which the duty applies extraterritorially. Many of the corporations accused of the worst human rights abuses have done so in developing countries with ineffective legal systems. When the host country is unable or unwilling to comply with its duty to protect, do other states have an obligation to protect against these abuses?

The issue is usually not whether other states have the legal authority to exercise regulatory jurisdiction. While territory is the most important basis for jurisdiction,[108] international law recognizes other bases, of which nationality is the clearest and least contested.[109] Although corporate nationality can sometimes be difficult to establish,[110] most multinational corporations are identifiably based in countries that have effective legal systems. The key question is therefore not whether the home state (or any other state with a non-territorial basis for jurisdiction) *may* regulate corporations to prevent human rights abuses abroad, but whether human rights law *requires* it to do so.

Professor Ruggie examined this issue early in his mandate, holding expert consultations and conducting a thorough review of the commentaries of the treaty bodies charged with overseeing compliance with the major United Nations human rights agreements.[111] He concluded that the treaty bodies' guidance "suggests that the treaties do not require States to exercise extraterritorial jurisdiction over business abuse."[112] He stressed that the treaties do not *prohibit* states from doing so, and noted that "there is increasing encouragement at the

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[108] Report of the International Bar Association Task Force on Extraterritorial Jurisdiction 11 (2008); Restatement (Third) of Foreign Relations Law of the United States § 402, comment b (1987).
[109] *Id.* § 402(2); Oppenheim's International Law § 138 (Robert Jennings & Arthur Watts eds., 9th ed. 1992).
[110] Subsidiaries and supply chains raise complications. *See* Olivier de Schutter, *Extraterritorial Jurisdiction as a Tool for Improving the Human Rights Accountability of Transnational Corporations* 29-45 (2006), *available at* http://198.170.85.29/Olivier-de-Schutter-report-for-SRSG-re-extraterritorial-jurisdiction-Dec-2006.pdf.
[111] *See* State Responsibilities to Regulate and Adjudicate Corporate Activities Under the United Nations Core Human Rights Treaties: An Overview of Treaty Body Commentaries, ¶¶ 81-92, UN Doc. A/HRC/4/35/Add.1 (2007); Corporate Responsibility Under International Law and Issues in Extraterritorial Regulation: Summary of Legal Workshops, U.N. Doc. A/HRC/4/35/Add. 2 (2007).
[112] 2007 Mapping Report, *supra*, ¶ 15.

international level, including from the treaty bodies, for home States to take regulatory action to prevent abuse by their companies overseas."[113]

Ruggie's conclusion that the duty to protect does not extend extraterritorially is certainly defensible, and it is not without scholarly support.[114] Nevertheless, it attracted strong criticism, especially from human rights groups.[115] In particular, it can be criticized for paying insufficient attention to the differences in the language of human rights treaties on this point. Some treaties, like the International Covenant on Civil and Political Rights, include explicit jurisdictional limits.[116] The ICCPR requires each of its parties "to respect and to ensure to all individuals *within its territory and subject to its jurisdiction* the rights recognized in the present Covenant."[117] Under the most commonly accepted interpretation of this language,[118] a state's obligations extend extraterritorially only to those who are "subject to its jurisdiction," which has been construed as meaning within its "effective control."[119] Other agreements, however, such as the Genocide Convention, include no jurisdictional limit, which suggests that none should be implied.[120] Finally, some include language that arguably extends their duties extraterritorially. The most important agreement in this category is the International Covenant on Economic,

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[113] 2008 Framework Report, *supra,* ¶ 19.
[114] *E.g.,* de Schutter, *supra,* at 18-19; Zerk, *supra,* at 91.
[115] *E.g.,* January 2011 Joint Civil Society Statement, *supra.*
[116] Besides the ICCPR, see European Convention, *supra,* Art. 1; American Convention, *supra,* Art. 1(1).
[117] ICCPR, *supra,* Art. 2(1) (emphasis added). The word "and" might suggest that a state owes duties only to individuals who are both within its territory and subject to its jurisdiction. *See* Michael J. Dennis, *Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation*, 99 Am. J. Int'l L. 119, 122–25 (2005). The dominant interpretation, however, has been that the language should be read disjunctively, to require each party to respect and ensure the rights of those within its territory and those subject to its jurisdiction. *See* Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶ 111 (July 9); Thomas Buergenthal, *To Respect and to Ensure: State Obligations and Permissible Derogations, in* The International Bill of Rights 72, 74 (Louis Henkin ed., 1981); Theodor Meron, *Extraterritoriality of Human Rights Treaties,* 89 Am J. Int'l L. 78, 79 (1995).
[118] The word "and" might suggest that a state owes duties only to individuals who are both within its territory and subject to its jurisdiction. *See* Michael J. Dennis, *Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation*, 99 Am. J. Int'l L. 119, 122–25 (2005). The dominant interpretation, however, has been that the language should be read disjunctively, to require each party to respect and ensure the rights of those within its territory and those subject to its jurisdiction. *See* Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶ 111 (July 9); Thomas Buergenthal, *To Respect and to Ensure: State Obligations and Permissible Derogations, in* The International Bill of Rights 72, 74 (Louis Henkin ed., 1981); Theodor Meron, *Extraterritoriality of Human Rights Treaties,* 89 Am J. Int'l L. 78, 79 (1995).
[119] General Comment No. 31, *supra,* ¶ 10. *See Legal Consequences of the Construction of a Wall, supra,* ¶ 111; Dominic McGoldrick, *Extraterritorial Application of the International Covenant on Civil and Political Rights, in* Extraterritorial Application of Human Rights Treaties 41, 63-65 (Fons Coomans & Menno T. Kamminga eds., 2004).
[120] *See* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Hezegovina v. Yugoslavia), 1996 ICJ Rep. 595, 616 (July 11).

Social and Cultural Rights, which requires each of its parties "to take steps, individually *and through international assistance and co-operation*, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means."[121]

Although this language is arguably ambiguous, the Committee on Economic, Social and Cultural Rights, the body charged with overseeing compliance with the ICESCR, has long interpreted it as giving rise to extraterritorial obligations.[122] Since 1999, almost every one of its general comments on particular rights, including the rights to food, health, water, work, social security, and to take part in cultural life, includes a section on such obligations.[123] Although many of its statements have to do with duties to assist developing countries to meet their obligations, some speak directly to the extraterritorial application of the duty to protect. In particular, the Committee has stated that parties to the ICESCR should protect the rights to health, to water, and to social security by taking steps to influence those within their jurisdiction to respect the rights "in other countries."[124] More specifically, it has indicated that the ICESCR parties should take steps "to prevent their own citizens *and companies* from violating the right to water of individuals and communities in other countries."[125]

Ruggie took the position that through statements such as these, the Committee (and other treaty bodies) merely "seem to be encouraging States to pay greater attention to preventing corporate violations abroad."[126] Although it is possible that the Committee's occasional use of the term "should" in connection with states' duty to protect against extraterritorial abuses

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[121] ICESCR, *supra,* Art. 2(1) (emphasis added).
[122] CESCR General Comment No. 3, *The Nature of States Parties Obligations,* ¶ 14 (1990) ("[I]nternational cooperation for development and thus for the realization of economic, social and cultural rights is an obligation of all States. It is particularly incumbent upon those States which are in a position to assist others in this regard").
[123] *E.g.,* CESCR, General Comment No. 12, *The Right to Adequate Food,* ¶¶ 36-38, UN Doc. E/C.12/1999/5 (1999); General Comment No. 14, *The Right to the Highest Attainable Standard of Health,* ¶¶ 38-42, UN Doc. E/C.12/2000/4 (2000); General Comment No. 15, *The Right to Water,* ¶¶ 30-36, UN Doc. E/C.12/2002/11 (2002); General Comment No. 17, *The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author,* ¶¶ 36-38, UN Doc. E/C.12/GC/17 (2006); General Comment No. 18, *The Right to Work,* ¶¶ 29-30, UN Doc. E/C.12/GC/18 (2006); General Comment No. 19, *The Right to Social Security,* ¶¶ 52-58, UN Doc. E/C.12/GC/19 (2008); General Comment No. 21, *Right of Everyone to Take Part in Cultural Life,* ¶¶ 56-59, UN Doc. E/C.12/GC/21 (2009).
[124] General Comment No. 14, *supra,* ¶ 39; General Comment No. 15, *supra,* ¶ 33; General Comment No. 19, *supra,* ¶ 54.
[125] General Comment No. 15, *supra,* ¶ 33 (emphasis added). *See also* General Comment No. 19, *supra,* ¶ 54 (states "should extraterritorially protect the right to social security by preventing their own citizens and national entities from violating this right in other countries").
[126] 2007 Mapping Report, *supra,* ¶ 15 n.9.

indicates that it does not view its statements as describing binding obligations, that interpretation is undercut by the placement of the statements in a section of the general comments entitled "international obligations," and by the fact that the Committee sometimes uses language better suited for describing binding legal duties.[127] The Office of the High Commissioner for Human Rights has characterized the Committee's views, without caveat, as identifying several types of "extraterritorial obligations," including "*legal obligations* to . . . [t]ake measures to prevent third parties (e.g. private companies) over which they hold influence from interfering with the enjoyment of human rights in other countries."[128]

Of course, Ruggie was entitled to disagree with the Committee on this point, or to note that all states do not accept its position. The Committee's views are not legally binding, and developed countries have long disputed that they have extraterritorial obligations under the ICESCR, especially obligations to provide financial assistance.[129] But, in that case, it would have been more accurate to characterize the interpretations of the ICESCR consistently as disputed or unsettled, rather than indicating that the Covenant includes no binding extraterritorial obligations to protect.[130]

Moreover, even as he rejected the notion that current law imposes extraterritorial duties to protect, Ruggie could have done more to acknowledge the movement toward greater recognition of such duties. A report prepared for the SRSG by Olivier de Schutter, for example, agrees that the current state of the law does not clearly recognize extraterritorial duties to protect, but goes on to state, "This classical view may be changing, however, especially as far as economic and social rights are concerned. There is a growing recognition that the fact of the interdependency of States should lead to impose an extended understanding of State obligations, or an obligation on all States to act jointly in face of collective action problems faced by the

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[127] *E.g.*, General Comment No. 14, *supra*, ¶ 39 ("*To comply with their international obligations* in relation to article 12, *States parties have to* respect the enjoyment of the right to health in other countries, and to prevent third parties from violating the right in other countries, if they are able to influence these third parties by way of legal or political means, in accordance with the Charter of the United Nations and applicable international law.") (emphasis added).
[128] Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship Between Climate Change and Human Rights, ¶ 86, 99, UN Doc. A/HRC/10/61 (2009) (emphasis added).
[129] *See* Matthew Craven, *The Violence of Dispossession: Extra-Territoriality and Economic, Social, and Cultural Rights*, *in* Economic, Social and Cultural Rights in Action 71, 77 (Mashood A. Baderin & Robert McCorquodale eds., 2007).
[130] Ruggie did describe the law as unsettled in some of his reports, *e.g.*, 2008 Framework Report, *supra*, ¶ 19; 2009 Operationalizing Report, *supra*, ¶ 15. But, at the same time, he described the treaty bodies as suggesting that states are not required to regulate corporations extraterritorially. *Id.*

international community of States."[131] Apart from the statements by the Committee on Economic, Social and Cultural Rights, this trend is apparent in the work of many different human rights bodies, including other treaty bodies,[132] the Office of the High Commissioner for Human Rights,[133] and special rapporteurs working under the auspices of the Human Rights Council.[134]

Despite his narrow view of the legal obligations, Ruggie also contributed to that trend, by urging states to do more to prevent "their" corporations from abusing human rights abroad. His 2010 report to the Council states:

> Legitimate issues are at stake and they are unlikely to be resolved fully anytime soon. However, the scale of the current impasse must and can be reduced. To take the most pressing case, what message do States wish to send victims of corporate-related abuse in conflict affected areas? Sorry? Work it out yourselves? Or that States will make greater efforts to ensure that companies based in, or conducting transactions through, their jurisdictions do not commit or contribute to such abuses, and to help remedy them when they do occur? Surely the latter is preferable.[135]

The commentary to the Guiding Principles underscores that "[t]here are strong policy reasons for home States to set out clearly the expectations that businesses respect human rights abroad, especially where the State itself is involved in or supports those businesses."[136] And in his 2011 proposal that the Council follow up his mandate by, *inter alia,* working toward a legal instrument on the application to corporations of prohibitions on gross human rights violations, Ruggie suggested that the effort should particularly consider states' extraterritorial jurisdiction over corporations operating in conflict zones.[137] Again, the Council did not accept this suggestion.

In assessing Ruggie's position on this issue, it is again important to consider the political constraints that he faced. The Council's refusal even to begin a process of clarifying

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[131] de Schutter, *supra,* at 19.
[132] *See, e.g.,* Michael Wabwile, *Re-Examining States' External Obligations to Implement Economic and Social Rights of Children*, 22 Can. J.L. & Juris. 407, 425-28 (2009) (arguing that states' reports to the Committee on the Rights of the Child suggests growing acceptance of extraterritorial obligations).
[133] *See* OHCHR Report on the Relationship Between Climate Change and Human Rights, *supra,* ¶¶ 84-87, 99 (describing duty of international cooperation in relation to climate change).
[134] *See, e.g.,* Judith Bueno de Mesquita, Paul Hunt & Rajat Khosla, *The Human Rights Responsibility of International Assistance and Cooperation in Health, in* Universal Human Rights and Extraterritorial Obligations 104 (Mark Gibney & Sigrun Skogly eds., 2010) (describing the views of the special rapporteur on the right to health).
[135] Special Representative of the Secretary-General, Business and Human Rights: Further Steps Toward the Operationalization of the "Protect, Respect and Remedy" Framework, ¶ 47, UN Doc. A/HRC/14/27 (2010).
[136] Guiding Principles, *supra,* at 7. The commentary also reiterates that "[a]t present States are not generally required" to regulate the extraterritorial activities of businesses domiciled in their territory." *Id.*
[137] Ruggie, *Recommendations on Follow-up to the Mandate*, *supra,* at 4-5.

extraterritorial duties in conflict zones illustrates the difficulty of finding a consensus here. Developed countries have generally opposed extraterritorial human rights obligations, and developing countries may not always like the idea, either, in the context of a duty to protect (as opposed to a duty to assist). Olivier de Schutter states that "in general, it may be anticipated that control by the home States of the activities of transnational corporations will be resented as a limitation to the sovereign right of the territorial States concerned to regulate activities occurring on their territory, or as betraying a distrust of the ability of those States to effectively protect their own populations from the activities of foreign corporations."[138] If Ruggie believed that stronger statements of legal obligation would have been opposed from both richer and poorer countries, then he may have felt that he could go no further than emphasizing, as he did, that states have the authority to regulate the extraterritorial conduct of their companies and that they should exercise that authority more often. As so often in international law, legal changes in this regard may follow from changes in the practice of states, rather than *vice versa*.

III. Conclusion

The debate over the application of human rights law to corporations has never questioned that corporations can have enormous effects on the enjoyment of human rights or that they have been involved in massive human rights abuses. The difficulty has been to convert that understanding into workable legal standards. For many years, efforts at the United Nations to develop an effective approach either stayed at a level of abstract generality or devolved into fruitless debates. The appointment of John Ruggie was something of a high-stakes gamble that he could do what had not been done: bring some consensus out of this contested field. Over the course of his six-year mandate, he did not resolve every issue. Some questions remain unsettled, such as whether states have a duty to regulate the extraterritorial conduct of their corporations. On other issues, his views may not be accepted or implemented by all of the interested parties. Corporate abuses of human rights will undoubtedly continue.

But, after all, Ruggie was not given the impossible task of ending all disputes over the application of human rights standards to corporations, far less of ending all corporate infringements on human rights. His mandate was initially to clarify the standards of corporate responsibility with regard to human rights, then to develop an approach to those standards that

[138] de Schutter, *supra,* at 21.

could command general support, and finally to make operational the framework principles of corporate responsibility that he had developed. To a remarkable degree, that is exactly what he did. He took the legal framework that was emerging for private actors and carefully extended it to include corporations. He developed Guiding Principles on business and human rights that elaborate how this framework applies to corporations and include feasible, concrete ways to implement it. Most important, he built a consensus among governments, corporations, and (to a significant degree) advocacy groups around the basic elements of his approach. In light of the challenges he faced, those achievements must count as a great success.