

# **BUSINESS AND HUMAN RIGHTS AS LAW**

**TOWARDS JUSTICIABILITY OF RIGHTS,  
INVOLVEMENT, AND REMEDY**

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**Business and Human Rights as Law: Towards Justiciability of Rights, Involvement, and Remedy**

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# Chapter 1

## INTRODUCTION: TOWARDS JUSTICIABILITY

### A. THE EVOLUTION OF CORPORATE RESPONSIBILITY

On July 16, 2018, the United Nations Human Rights Council released the Zero Draft of a treaty to govern corporate human rights responsibility under the aegis of international human rights law.<sup>1</sup> The Zero Draft seeks to address lacunae in realizing international human rights “in the context of business activities of a transnational character”.<sup>2</sup> As a proposed instrument of international law, its novelty lies in a legally singular precept: “[B]usiness enterprises ... shall *respect* all human rights”.<sup>3</sup> But the Zero Draft’s overarching structure is conventional. The direct subjects of the treaty remain states. They are responsible for strengthening and enforcing corporate human rights liability; ensuring effective redress for victims of human rights abuse; and promoting more responsible corporate behaviour across global value chains.

The Zero Draft is not momentous in itself. The drafting process has been contentious and long.<sup>4</sup> It has received virtually no support from the United States or Europe.<sup>5</sup> The likelihood of the Zero Draft blossoming into international law in its current form is low. From a legal perspective, it is unlikely to “revolutionize the world of business and human rights”.<sup>6</sup> Rather than augury, the Zero Draft is striking as memorial. It testifies to the remarkable

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<sup>1</sup> United Nations, Human Rights Council, *Legally Binding Instrument to Regulate, in International Human Rights Law, The Activities of Transnational Corporations and Other Business Enterprises: Zero Draft* (July 16, 2018), online: <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/DraftLBI.pdf>.

<sup>2</sup> *Ibid.*, Art. 2.

<sup>3</sup> *Ibid.*, Art. 1 [emphasis added].

<sup>4</sup> Doug Cassel, “At Last: A Draft UN Treaty on Business and Human Rights” (August 2, 2018), online: Letters Blogatory <https://lettersblogatory.com/2018/08/02/at-last-a-draft-un-treaty-on-business-and-human-rights/>.

<sup>5</sup> *Ibid.*

<sup>6</sup> *Ibid.*

evolution of business and human rights — the social dimension of corporate responsibility<sup>7</sup> — from public relations art to legal science.

Less than a decade ago, respected legal scholars could safely find that corporate responsibility “does not appear to fit comfortably within a traditional legal setting” because law endeavours to “clarity and precision ... [in] seeking a definition of key terms and concepts or guidance on what constitutes acceptable forms of conduct”.<sup>8</sup> Corporate responsibility as a concept intrinsically lacked such virtues: it reflected an *ideal* of ethical behaviour embracing the interests of “stakeholders” beyond shareholders, but that ideal was subject to few shared metrics of right practice.<sup>9</sup> Indeed, even the term “stakeholder” was uncertain: “Possible definitions range from a narrow conception: ‘groups vital to the success and survival of a corporation,’ to a more expansive view: ‘individuals and groups who may affect or be affected by the actions, decisions, policies, practices or goals of an enterprise.’”<sup>10</sup>

Against this fluid and uncertain backdrop, the very legitimacy of corporate responsibility as a business concern was long questioned.<sup>11</sup> Milton Friedman famously wrote in *Capitalism and Freedom* that advocates of corporate responsibility are beholden to

a fundamental misconception of the character and nature of a free economy. In such an economy, there is one and only one social responsibility of business — to use its resources and engage in activities designed to increase profits so long as it stays within the rules of the game, which is to say, engages in open and free competition, without deception or fraud.<sup>12</sup>

This view rests on the assumption that respecting the views of non-owner stakeholders is antithetical to profit maximization, such that businesses who engage in corporate responsibility are fundamentally irrational. Its force breaks where conventional business pursuits are advanced by “ethical” corporate behaviour.

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<sup>7</sup> While “corporate responsibility” and similar terms such as ESG (environmental, social, and governance), corporate sustainability, corporate social responsibility, and corporate citizenship do not have a single, authoritative definition, they have traditionally been considered to include five elements: (1) voluntary action by a business (2) to address stakeholder concerns regarding the business’s (3) social, (4) economic, and (5) environmental impacts (Alexander Dahlsrud, “How Corporate Social Responsibility Is Defined: An Analysis of 37 Definitions” (2008) 15:1 Corp. Soc. Responsib. Environ. Mgmt. 1 at 4). Definitively resolving the definition of corporate responsibility is not relevant for this text, which is focused specifically on corporate human rights responsibility. We do assume, however, that corporate responsibility need not be voluntary and may be subject to regulation.

<sup>8</sup> Michael Kerr, Richard Janda & Chip Pitts, *Corporate Social Responsibility: A Legal Analysis* (Markham, ON: LexisNexis Canada, 2009) at 5.

<sup>9</sup> *Ibid.*, at 6-7.

<sup>10</sup> *Ibid.*, at 13.

<sup>11</sup> Corporate responsibility has multiple dimensions. The focus of this book is the “social” dimension; *i.e.*, the impact that a company can have on individuals and communities.

<sup>12</sup> Milton Friedman, *Capitalism and Freedom* (Chicago: University of Chicago Press, 1962) at 133.

The global risk (and opportunity) landscape for business related to corporate responsibility has evolved continuously since Friedman wrote those words. In the resource sector, for instance, community conflict is a material operational risk. A major mining project will lose approximately \$20 million per week of delayed production in the event of a shutdown; costs can accrue even at the exploration stage.<sup>13</sup> For consumer-facing brands, corporate responsibility-related business risks are arguably more reputational rather than operational, but they are nonetheless material. In recent years, media campaigns against an array of leading global companies have been fuelled by environmental impacts of palm oil production; child labour in cocoa farming; forced labour in electronics and seafood supply chains; health and safety failures in apparel supply chains; and sexual harassment in the workplace.

Investor expectations have evolved in tandem with the shifting risk landscape. The signatories of the Principles for Responsible Investment — at last count, 2,250 financial institutions representing over USD \$80 trillion in assets under management — commit to integrate corporate responsibility considerations into “investment analysis and decision-making processes”.<sup>14</sup> And in “Corporate Sustainability: First Evidence of Materiality”, a respected study that accepts Friedman’s dictum while challenging its underlying assumption, the authors conclude that “investments in material sustainability issues can be value-enhancing for shareholders”.<sup>15</sup> Marking the breadth and depth of evolving investor expectations, the CEO of BlackRock, the world’s largest investment manager, committed recently to a “new model of shareholder engagement” to drive better management of corporate responsibility issues across its portfolio.<sup>16</sup>

Applying Friedman’s dictum, the “rules of the game” have changed such that a rational, profit-maximizing business must increasingly embrace corporate responsibility as integral to its mission. But the evolving incentives for the rational business do not in themselves address the legal concerns of clarity and precision. They arguably only encourage business to cater to perception, to *appear* responsible to material stakeholders, without settling in any objective way what responsibility dictates. To the extent corporate responsibility rests on ineffable desires of undefined stakeholders, it may be

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<sup>13</sup> Rachel Davis & Daniel Franks, *Costs of Company-Community Conflict in the Extractive Sector* (2014) at 8, online: Harvard Kennedy School sites.hks.harvard.edu/m-rcbg/CSRI/research/Costs%20of%20Conflict\_Davis%20%20Franks.pdf.

<sup>14</sup> Principles for Responsible Investment, online: <https://www.unpri.org/pri/about-the-pri>. ESG issues, or environmental, social, and governance issues, are broadly similar to corporate responsibility concerns. The term just reflects different financial sector nomenclature.

<sup>15</sup> Mozaffar Khan, George Serafeim & Aaron Yoon, “Corporate Sustainability: First Evidence on Materiality” Harvard Business School Working Paper, No. 15-073 (March 2015) at 16, online: <http://nrs.harvard.edu/urn-3:HUL.InstRepos:14369106>.

<sup>16</sup> BlackRock, “Larry Fink’s Annual Letter to CEOs: A Sense of Purpose” (2018), online: <https://www.blackrock.com/corporate/investor-relations/larry-fink-ceo-letter>.

akin to marketing or public relations — a corporate imperative that is inherently beyond law's grasp.

The Zero Draft rejects this conception as anachronism. If legal penalties attach to corporate failure to respect human rights, respect itself must be *justiciable*. Justiciability is “the aptness of a question for judicial solution”,<sup>17</sup> which turns on “judicially discoverable and manageable standards for resolving it”.<sup>18</sup> For an expectation like respect to be justiciable, there must exist a legal basis to assess relevant issues such that “the law and the court are the proper frameworks for deciding the dispute”.<sup>19</sup> Any such legal basis is intrinsically at odds with ineffability.

The justiciability of the Zero Draft's subject matter means that the bases of legal liability must be discernible to law in form and content. In particular, any criminal and administrative sanctions must accord with the rule of law, which is the foundation of legitimate government and a bulwark against the arbitrary exercise of state power: “Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by rule of law.”<sup>20</sup> Rule of law is an ideal both cherished and debated.<sup>21</sup> We need not venture into the quagmire. At a minimum, the ideal is of “principled predictability”<sup>22</sup> to enable people to make reasoned decisions aware of the consequences.<sup>23</sup> To that end, laws are defined by certain formal features to ensure that they mean something in particular and that people can reasonably apprehend and act on that meaning: “[L]aws must be open, clear, coherent, prospective, and stable; legislation and executive action should be governed by laws with those characteristics; and there must be courts that impose rule of law.”<sup>24</sup>

The Zero Draft's form — bearing the imprimatur of international human rights law — aspires to legal content for the ideal of business respect for human rights. It stands in riposte to the presumed ineffability of corporate responsibility as legal discipline. The aims, structure and content of the Zero Draft endeavour

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<sup>17</sup> G. Marshall, “Justiciability” in A. Guest, ed., *Oxford Essays in Jurisprudence* (London: Oxford University Press, 1961) at 269, quoted in Lorne Sossin, *Boundaries of Judicial Review: The Law of Judicial Review in Canada* (Toronto: Thomson Reuters, 2012).

<sup>18</sup> *Baker v. Carr*, 369 U.S. 186 at 217 (1962).

<sup>19</sup> H.C. 910/86, *Ressler v. Minister of Defense*, 42(2) P.D. 441 at 488-89 (Israel).

<sup>20</sup> *Universal Declaration of Human Rights*, GA Res. 217(III), UNGAOR, 3d Sess., Supp. No. 13, U.N. Doc. No. A/810 (December 10, 1948), Preamble, online: <http://www.un.org/en/universal-declaration-human-rights/index.html>.

<sup>21</sup> See, e.g., Paul Craig, “Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework” (1997) Public Law 467 at 467; and Timothy A.O. Endicott, “The Impossibility of the Rule of Law” (Spring 1999) 19 Oxford J. Legal Stud. 1 at 1-2.

<sup>22</sup> Charles Sampford, “Reconceiving the Rule of Law for a Globalizing World” in Spencer Zifcak, ed., *Globalization and the Rule of Law* (New York: Routledge, 2005) 9 at 14.

<sup>23</sup> Joseph Raz, “The Rule of Law and its Virtue” (1977) 93 L.Q.R. 195 at 198.

<sup>24</sup> Timothy A.O. Endicott, “The Impossibility of the Rule of Law” (Spring 1999) 19 Oxford J. Legal Stud. 1 at 1-2.

instead to furnish the pursuit of corporate respect for human rights with the tools of objective and replicable reason, the hallmarks of a legal science. To realize human rights and ensure effective remedy, business respect for human rights should have a reality beyond the subjective perceptions of stakeholders. Legal responsibility cannot lie only in the eye of the beholder.

At a legal-conceptual level, the Zero Draft honours a civilizing of human rights, a translation of them from their public-sector origins into private-sector obligations. International human rights were conceived to bind states: “Their fundamental purpose was to guarantee the freedoms of individuals against the state with its vast powers of detention, expropriation and censorship; to mitigate the imbalance between two unequal parties: the public authority and individual.”<sup>25</sup> To apply directly as between private actors, the framework of international human rights law itself needed to be tailored to the institutional constraints of those actors. The Zero Draft reflects the results of that tailoring in distinct expectations of states and business. States bear “the obligations and *primary responsibility* to promote, respect, protect and fulfill human and fundamental freedoms”.<sup>26</sup> By contrast, businesses “shall *respect* all human rights, including by avoiding causing or contributing to adverse human rights impacts through their own activities and addressing such impacts when they occur”.<sup>27</sup>

In this last sentence lies the map to an uncharted legal domain. *Respect, cause, contribute, and adverse human rights impacts* are markers to conceive a fecund and expansive legal discipline straddling public and private; national and international; commercial reality and human dignity. The boundaries of this discipline were recently marked but are already well recognized. The Zero Draft itself, however, is merely commemorative, paying homage to a paradigm shift in corporate responsibility inspired and driven by the United Nations’ *Guiding Principles on Business and Human Rights* (“Guiding Principles”).<sup>28</sup> The Guiding Principles are the origin of *business respect for human rights* as a defined term with practical contours. That critical concept is the blueprint for the Zero Draft; a proliferating legal universe of business and human rights legislation and litigation; and a principled distinction between states and business as human rights duty-bearers under international law. The Guiding Principles are, therefore, the first cause of corporate

<sup>25</sup> Yoav Dotan, “The ‘Public’, the ‘Private’, and the Legal Norm of Equality” (2005) 20:2 C.J.L.S. 207 at 207.

<sup>26</sup> United Nations Human Rights Council, *Legally Binding Instrument to Regulate, in International Human Rights Law, The Activities of Transnational Corporations and Other Business Enterprises: Zero Draft* (July 16, 2018), Art. 1 [emphasis added], online: <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/DraftLBI.pdf>.

<sup>27</sup> *Ibid.*

<sup>28</sup> United Nations Office of the High Commissioner for Human Rights, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework* (New York and Geneva: United Nations, 2011), online: [https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf).

responsibility as a discipline with objective reality beyond the perceptions of stakeholders. It is in search of a justiciable approach to their meaning that the remainder of this book is devoted.

## 1. Understanding the Guiding Principles

The Guiding Principles are the authoritative standard on business and human rights. While (nominally) voluntary, they were unanimously endorsed by the UN Human Rights Council in 2011 and have since been widely embraced by governments, industry associations, businesses, international organizations and bar associations.<sup>29</sup> In 2016, the International Bar Association adopted and released the *IBA Practical Guide on Business and Human Rights for Business Lawyers* to help lawyers across the world understand their ethical and legal responsibilities to integrate the Guiding Principles in their client advice.<sup>30</sup>

The Guiding Principles reframe the social dimension of corporate responsibility in the language of rights. They are built on three “pillars”, conceived for the Guiding Principles to apply comprehensively to all states and business enterprises: (1) the state responsibility to protect human rights; (2) the business responsibility to respect human rights; and (3) the joint responsibility of the state and business to provide remedy.<sup>31</sup>

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<sup>29</sup> Yousuf Aftab, “The Intersection of Law and Corporate Social Responsibility: Human Rights Strategy and Litigation Readiness for Extractive-Sector Companies” (2014) 60 *Rocky Mt. Min. L. Inst.* 19-1 at s. 19.02; see also John F. Sherman, III, Shift Project, “The UN Guiding Principles for the Corporate Legal Advisor: Corporate Governance, Risk Management, and Professional Responsibility” (April 4, 2012) at 6. See Organisation for Economic Co-operation and Development, Directorate for Financial, Fiscal and Enterprise Affairs, Committee on International Investment and Multinational Enterprises, *The OECD Guidelines for Multinational Enterprises: Text, Commentary and Clarifications*, Doc. No. DAFFE/IME/WPG(2000)15/Final 2001 (October 31, 2001); International Finance Corporation, “Guidance Note 1: Assessment and Management of Environmental and Social Risks and Impacts” (January 1, 2012) at 16, online: [ifc.org/wps/wcm/connect/b29a4600498009cfa7fcf7336b93d75f/Updated\\_GN1-2012.pdf?MOD=AJPERES](http://ifc.org/wps/wcm/connect/b29a4600498009cfa7fcf7336b93d75f/Updated_GN1-2012.pdf?MOD=AJPERES); International Finance Corporation, “Performance Standard 1: Assessment and Management of Environmental and Social Risks and Impacts” (January 1, 2012) at 5, online: [ifc.org/wps/wcm/connect/3be1a68049a78dc8b7e4f7a8c6a8312a/PS1\\_English\\_2012.pdf?MOD=AJPERES](http://ifc.org/wps/wcm/connect/3be1a68049a78dc8b7e4f7a8c6a8312a/PS1_English_2012.pdf?MOD=AJPERES); Council of Europe, Committee of Ministers, 1197th Meeting of the Ministers’ Deputies, *Declaration of the Committee of Ministers on the UN Guiding Principles on Business and Human Rights* (2014); U.S. Department of State, “U.S. Government Approach on Business and Human Rights” (2013) at 3-4, online: [photos.state.gov/libraries/korea/49271/july\\_2013/dwoa\\_USG-Approach-on-Business-and-Human-Rights-updatedJune2013.pdf](http://photos.state.gov/libraries/korea/49271/july_2013/dwoa_USG-Approach-on-Business-and-Human-Rights-updatedJune2013.pdf); Foreign & Commonwealth Office, “Good Business: Implementing the UN Guiding Principles on Business and Human Rights” (September 4, 2013), online: [gov.uk/government/publications/bhr-action-plan](http://gov.uk/government/publications/bhr-action-plan).

<sup>30</sup> International Bar Association, *IBA Practical Guide on Business and Human Rights for Business Lawyers* (2016), online: <https://www.ibanet.org/LPRU/Business-and-Human-Rights-Documents.aspx>.

<sup>31</sup> United Nations Office of the High Commissioner for Human Rights, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and*



The first pillar, the state duty to protect human rights, is largely a restatement of international law.<sup>32</sup> The responsibility is defined by the scope of a state's jurisdictional control: "States must protect against human rights abuse *within their territory and/or jurisdiction* by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication."<sup>33</sup>

The second pillar, business responsibility to respect human rights, is the Guiding Principles' novel contribution to corporate responsibility. The novelty lies in a framework to understand the scope of business responsibility for human rights *as distinct from* the state responsibility for rights. While state responsibility is absolute and defined by jurisdiction, business responsibility is context sensitive and defined by corporate involvement in human rights impacts: "Business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved."<sup>34</sup>

The third pillar, access to remedy, implicates the public and private sectors. For business, the key requirement is to provide access to private dispute-resolution mechanisms focused on rights: "To make it possible for grievances to be addressed early and remediated directly, business enterprises should establish or participate in effective operational-level grievance mechanisms for individuals and communities who may be adversely impacted."<sup>35</sup> This pillar is noteworthy both for placing a dispute-resolution responsibility on business and for laying out its procedural parameters.

## 2. Business Respect for Rights Is a System

The Guiding Principles provide a language and analytical framework to understand the social dimension of corporate responsibility. Under the Guiding Principles, the responsibility of businesses to respect human rights includes: (1) a policy commitment; (2) a due diligence process; and (3) a

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*Remedy*" Framework (New York: United Nations, 2011), online: [ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](http://ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf).

<sup>32</sup> United Nations Human Rights Committee, *General Comment No. 31 [80]: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, U.N. Doc. CCPR/C/21/Rev.1/Add. 13 (May 26, 2004), online: <http://www.refworld.org/docid/478b26ae2.html>.

<sup>33</sup> United Nations Office of the High Commissioner for Human Rights, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework* (New York and Geneva: United Nations, 2011), GP 1 [emphasis added], online: [ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](http://ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf).

<sup>34</sup> *Ibid.*, GP 11.

<sup>35</sup> *Ibid.*, GP 29.

remediation process (including grievance mechanisms).<sup>36</sup> The core of this system is due diligence, which has a legally idiosyncratic meaning, to capture steps from assessment to disclosure. “The process should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed.”<sup>37</sup>

The whole system revolves around three core concepts: (1) rights — businesses are expected to respect all human rights, not just labour rights; (2) involvement — the rights impacts any individual business should address are those which the business causes, contributes to or to which it is directly linked; and (3) proportionality — the range of actions any individual business should take is proportional to the nature of the business and the severity of the human rights impact.

The Guiding Principles’ focus on system recognizes the critical institutional differences between states and businesses. While states are expected to “protect” human rights, businesses are responsible for “respecting” them. Respect is defined by corporate governance. In effect, businesses are held to a standard of best efforts. The quality of effort is judged against the strength of a company’s governance program. The Guiding Principles thereby translate amorphous corporate responsibility into a practical compliance structure familiar to business from the corruption, money-laundering, and health and safety contexts.

To illustrate:

- *Proportionality*: Guiding Principle 14 provides that the “means through which a business enterprise meets its responsibility to respect human rights will be proportional to, among other factors, its size”.<sup>38</sup> This tracks the guidance issued by the U.S. Department of Justice (“US DOJ”) regarding corruption compliance, which provides that corporate compliance programs should be tailored to the company’s size.<sup>39</sup>
- *Policy Commitment*: The Guiding Principles provide that businesses should have a policy commitment to respect human rights that is publicly available, reflected in operational policies and procedures, and communicated to all personnel.<sup>40</sup> The US

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<sup>36</sup> *Ibid.*, GP 15.

<sup>37</sup> *Ibid.*, GP 17.

<sup>38</sup> *Ibid.*, GP 14 Commentary.

<sup>39</sup> Criminal Division of the U.S. Department of Justice & Enforcement Division of the U.S. Securities and Exchange Commission, *A Resource Guide to the U.S. Foreign Corrupt Practices Act* (2012), online: <https://www.justice.gov/criminal-fraud/fcpa-guidance>; see also United States Sentencing Commission, Sentencing Guidelines §8B2.1 Commentary, online: <https://www.uscourts.gov/guidelines/2016-guidelines-manual/2016-chapter-8>.

<sup>40</sup> United Nations Office of the High Commissioner for Human Rights, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework* (New York and Geneva: United Nations, 2011), GP 14 and 16, online: [ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf).

DOJ advises companies to adopt a “code of conduct and related policies” that are accessible to all company personnel.<sup>41</sup>

- *Tone from the Top*: The Guiding Principles provide that the corporate human rights policy should be “approved at the most senior level of the business enterprise”.<sup>42</sup> The US DOJ advises that senior leadership articulate, adhere to and clearly communicate the policy to employees.<sup>43</sup> Both the Guiding Principles and the US DOJ recommend that the company set incentives and disincentives for personnel to embed the policy in practice.<sup>44</sup>
- *Due Diligence*: The Guiding Principles provide that due diligence “[w]ill vary in complexity” based on the nature of risks and the nature of the business.<sup>45</sup> The US DOJ notes that due diligence should be shaped by factors including the country and industry context.<sup>46</sup>
- *Remediation Processes*: The Guiding Principles emphasize the importance of remediation processes, including effective

<sup>41</sup> Criminal Division of the U.S. Department of Justice & Enforcement Division of the U.S. Securities and Exchange Commission, *A Resource Guide to the U.S. Foreign Corrupt Practices Act* (2012) at 57-58, online: [justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf](http://justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf); see also United States Sentencing Commission, Sentencing Guidelines §8B2.1 Commentary at §8B2.1(b)(1), online: <https://www.ussc.gov/guidelines/2016-guidelines-manual/2016-chapter-8>.

<sup>42</sup> United Nations Office of the High Commissioner for Human Rights, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework* (New York and Geneva: United Nations, 2011), GP 16, online: [ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](http://ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf).

<sup>43</sup> Criminal Division of the U.S. Department of Justice & Enforcement Division of the U.S. Securities and Exchange Commission, *A Resource Guide to the U.S. Foreign Corrupt Practices Act* (2012) at 57, online: [justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf](http://justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf); see also United States Sentencing Commission, Sentencing Guidelines §8B2.1 Commentary at §8B2.1(b), online: <https://www.ussc.gov/guidelines/2016-guidelines-manual/2016-chapter-8>.

<sup>44</sup> United Nations Office of the High Commissioner for Human Rights, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework* (New York and Geneva: United Nations, 2011), GP 16 Commentary, online: [ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](http://ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf); Criminal Division of the U.S. Department of Justice & Enforcement Division of the U.S. Securities and Exchange Commission, *A Resource Guide to the U.S. Foreign Corrupt Practices Act* (2012) at 57, online: [justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf](http://justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf). See also United States Sentencing Commission, Sentencing Guidelines §8B2.1 Commentary at §8B2.1(b), online: <https://www.ussc.gov/guidelines/2016-guidelines-manual/2016-chapter-8>.

<sup>45</sup> United Nations Office of the High Commissioner for Human Rights, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework* (New York and Geneva: United Nations, 2011), GP 17, online: [ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](http://ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf).

<sup>46</sup> Criminal Division of the U.S. Department of Justice & Enforcement Division of the U.S. Securities and Exchange Commission, *A Resource Guide to the U.S. Foreign Corrupt Practices Act* (2012) at 58-59, online: [justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf](http://justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf); see also United States Sentencing Commission, Sentencing Guidelines §8B2.1 Commentary at §8B2.1(a)(1), online: <https://www.ussc.gov/guidelines/2016-guidelines-manual/2016-chapter-8>.

operational-level grievance mechanisms.<sup>47</sup> The US DOJ highlights that there should be a confidential reporting and investigation mechanism that protects against retribution.<sup>48</sup>

### 3. Legal Implications of the Guiding Principles

For business, this structure and precision are the source of opportunity and risk. The opportunity lies in the ability to anticipate relevant risks to relevant stakeholders and address them systemically, rather than in an *ad hoc*, crisis-response fashion. The risk lies in the increased accountability that an objective framework provides for stakeholders and courts. Rights are unlike grievances in that they are independent of perception. They are clearly defined legal concepts that courts are willing and able to protect even where no one recognizes them as such. And the involvement terms — “cause”, “contribute”, and “directly linked” — are defined, or definable, concepts which must have consistent meaning if the Guiding Principles are to have any objective content.

At a conceptual level, the legal significance of the Guiding Principles lies in taming the subjectivity of corporate responsibility with a practical definition of “business respect for human rights”. The governance focus of respect underpins the justiciability of corporate human rights responsibilities. The Zero Draft makes one of these governance elements, human rights due diligence, a central tenet of corporate liability:

State Parties shall ensure in their domestic legislation that all persons with business activities of transnational character within such State Parties’ territory or otherwise under their jurisdiction or control shall undertake due diligence obligations throughout such business activities, taking into consideration the potential impact on human rights resulting from the size, nature, context of and risk associated with the business activities.<sup>49</sup>

The Guiding Principles’ legal imprimatur, however, reaches far beyond the Zero Draft. As we discuss in Chapter 2, the universe of legal risk related

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<sup>47</sup> United Nations Office of the High Commissioner for Human Rights, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework* (New York and Geneva: United Nations, 2011), GP 22 and 31, online: [ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf).

<sup>48</sup> Criminal Division of the U.S. Department of Justice & Enforcement Division of the U.S. Securities and Exchange Commission, *A Resource Guide to the U.S. Foreign Corrupt Practices Act* (2012) at 61, online: [justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf](https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf); see also United States Sentencing Commission, Sentencing Guidelines §8B2.1 Commentary at §8B2.1(b)(5)(c), online: <https://www.ussc.gov/guidelines/2016-guidelines-manual/2016-chapter-8>.

<sup>49</sup> United Nations, Human Rights Council, *Legally Binding Instrument to Regulate, in International Human Rights Law, The Activities of Transnational Corporations and Other Business Enterprises: Zero Draft* (July 16, 2018), Art. 9(1), online: <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/DraftLBI.pdf>.

to corporate human rights governance and impacts is significant and rapidly expanding. Legislatures are already experimenting with a range of measures to promote corporate respect for human rights — from mandatory disclosure to mandatory due diligence to public investigations. In litigation, a wave of transnational tort claims, consumer misrepresentation cases and shareholder class actions are testing the human rights standard of care for the reasonable multinational business. And an investor-state arbitral tribunal has recently held that “international law accepts corporate social responsibility as a standard of crucial importance for companies operating in the field of international commerce”.<sup>50</sup>

Virtually all of these developments are derived, directly or indirectly, from the Guiding Principles’ governance-based civilization of human rights. Their combined effect is to reconceive the reasonable business as one with a coherent system of policies, due diligence procedures, and remediation processes to address human rights impacts across its global value chain. Such a standard will have to be justiciable. To meet it, a business will need to be able to justify the strength of its human rights governance not only to stakeholders but to courts and regulators. The justification will turn on objectively defined benchmarks rather than opinion polls. And it will be subject to the rigours of legal examination designed to unearth imprecision, incoherence, and circularity.

## **B. THE JUSTICIABILITY CHALLENGE**

Herein lies the justiciability challenge for companies, courts, stakeholders, and counsel. While a Guiding Principles-inspired standard of care is gaining traction in law, the contours of that standard have not been subject to judicial review or even rigorous legal analysis. Indeed, there may be paradigm incompatibility between interpreting the Guiding Principles qua legally binding expectations and the Guiding Principles qua voluntary corporate responsibility standards. Law aspires to objective truth (or a close approximation) by applying clear, consistent, and principled reasoning to resolve differing perspectives on fact and consequence. A neutral, expert arbiter is the hallmark of just dispute resolution. By contrast, corporate responsibility as voluntary enterprise conceives of stakeholder legitimacy as both end and means. Truth is inevitably subjective. Stakeholder engagement is the only credible path to reconcile competing visions of reality. The Guiding Principles, as standards conceived to be assessed through reason-indifferent engagement, may therefore inherently resist law’s exclusive mode of reasoning.

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<sup>50</sup> *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No. ARB/07/26, Award (December 8, 2016) at para. 1195.

Such scrutiny is nonetheless urgent for two reasons. First, the Guiding Principles are increasingly being transposed directly into law. The Zero Draft is the most recent example, relying on “respect”, “adverse impact”, and “directly linked” as if they were terms of clear pedigree and established authority. Similarly, the mandate of the recently created Canadian Ombudsperson for Responsible Enterprise, with the power to conduct public investigations and recommend sanctions, is defined with reference to “the UN Guiding Principles on Business and Human Rights and the OECD Guidelines for Multinational Enterprises”.<sup>51</sup> Irrespective of whether they were designed to be legally binding or subject to legal analysis, the Guiding Principles have donned legal garb. They can no longer claim to occupy a world apart.

Second, even as voluntary corporate responsibility standards, the Guiding Principles are closely intertwined with law. Pillar I expressly reflects international human rights law. The Guiding Principles’ relevant human rights are defined in international legal instruments and authoritative commentary.<sup>52</sup> And the business responsibility to provide effective grievance mechanisms expressly parallels state responsibilities for non-judicial dispute-resolution mechanisms.<sup>53</sup> That is, even as voluntary standards driven by and towards stakeholder legitimacy, the Guiding Principles invite legal scrutiny because they are contingent on national and international law.

The practical difficulty for lawyers is that the Guiding Principles are built on legal penumbræ. Despite the manifest virtues in clarity, precision, and practicality of judging respect by governance, the subject matter and scope of the Guiding Principles are, from the perspective of law, terra nova(ish). Take human rights, the Guiding Principles’ *raison d’être*. As we discuss in Chapter 3, these are terms of art with specific and practical meanings under national and international law. But while they are framed as individual or group freedoms and claims, they are defined by limits on government action or imperatives to act. International human rights law may thus tell us whether a state can ban access to social media; it is less equipped to answer, however, when a social media company can ban a particular user. The justiciability challenge for designing and assessing Guiding Principles-based corporate governance programs in accordance with law starts at the very beginning: What is an adverse impact on human rights? Resolving it to a degree of legal clarity and certainty involves applying international human rights law in a principled and predictable fashion to an uncharted context, *viz.* as between private actors.

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<sup>51</sup> Global Affairs Canada, “Responsible business conduct abroad – Questions and answers” (last modified April 10, 2018), online: <http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/faq.aspx?lang=eng>.

<sup>52</sup> United Nations Office of the High Commissioner for Human Rights, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework* (New York and Geneva: United Nations, 2011), GP 12 Commentary, online: [ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](http://ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf).

<sup>53</sup> *Ibid.*, GP 31.

So too with involvement. As we discuss in Chapter 4, businesses are expected to identify and address those human rights impacts (1) they *cause*, (2) to which they *contribute*, and (3) those that are “*directly linked* to their operations, products or services by their business relationships, even if they have not contributed to those impacts”.<sup>54</sup> As with rights, none of these concepts is self-evident. Unlike with rights, however, there is not a clear body of law referenced by the Guiding Principles for businesses, courts, and stakeholders to apply in apprehending the involvement terms. In fact, the Guiding Principles implicitly reject legal or proximate causation by disavowing foreseeability: “Even with the best policies and practices, a business enterprise may cause or contribute to an adverse human rights impact *that it has not foreseen* or been able to prevent.”<sup>55</sup> Nevertheless, if the scope of corporate human rights responsibility is to have justiciable meaning, jurists will need to imbue these terms with precise and objective content. Otherwise, principled predictability will remain chimera.

We lay out these challenges not to suggest that we begin with a blank slate. Since the Guiding Principles were first endorsed, various institutions and individuals — including the drafters — have opined on what they mean in practice. Many of these opinions are, and will remain, compelling in the context of corporate responsibility as voluntary, stakeholder-driven enterprise. The rule of law, however, behooves us to be careful before transplanting wholesale assertions indifferent to legal reasoning. Paradigm incompatibility suggests that opinions conceived with stakeholder legitimacy as the *summum bonum* of corporate respect for human rights may ill serve a legal understanding aspiring to objective truth. That is, justiciability demands not only that we subject the Guiding Principles to transparent legal reasoning; we must do the same to *post hoc* commentaries on the Guiding Principles’ meaning, to ensure that they can legitimately bear the weight of legal conclusions. To proceed otherwise would risk undermining the rule of law by secreting in (albeit well-intentioned) feeling and instinct, which pave the path to the reign of arbitrariness.

### C. OVERVIEW OF THIS BOOK

This book applies legal method to address some of the core justiciability challenges in the Guiding Principles. The approach is in important ways speculative. The Guiding Principles are not law, and the emerging business and human rights legal standard of care has not been subject to judicial review. We are thus unable to survey directly applicable legal precedent. Our aim is nonetheless practical. We endeavour to a principled, transparent, and replicable method to unravel the concrete implications of the Guiding

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<sup>54</sup> *Ibid.*, GP 13 [emphasis added].

<sup>55</sup> *Ibid.*, GP 22 Commentary [emphasis added].

Principles qua source of law, for that is what all auguries suggest they are becoming.

Reflecting the speculative form of our practical enterprise, this book is premised on a simple thought experiment: imagine if the Guiding Principles, written exactly as they are, were subject to judicial review. That might be, for instance, through incorporation by reference in government acts, such as the Canadian Ombudsperson for Responsible Enterprise; reliance in an international treaty like the Zero Draft; consideration by an international investor-state tribunal as a fundamental principle of international commerce; or consensual adoption as the governing law in a dispute between private parties, such as in commercial or human rights arbitration. To some extent, the precise mechanism does not matter, because the conceptual consequence is the same: the Guiding Principles would need to be subject to “judicially discoverable and manageable standards”<sup>56</sup> to resolve interpretive disagreements. Even if this is speculative, considering justiciability before any of these mechanisms take hold is critical to ensure we do not blanket in law realms it cannot reach.

The resulting approach draws on principles from international human rights law, constitutional law, tort law, contract law, corporate law, and administrative law. We do not dive into the vast and deep doctrinal challenges within each discipline. Nor do we purport to offer authoritative and binding answers to what the Guiding Principles demand in every context. Our focus is method. We seek to illustrate how applying a legal method to interpreting the Guiding Principles can offer objectively justifiable issue- and context-specific guidance to companies, courts, legislatures, and stakeholders wrestling in good faith with the contours of business and human rights as a legal discipline.

We begin this book with a survey of the significant legal developments in the realm of business and human rights to show how the legal standard of care is evolving across jurisdictions. The remainder of the book then analyzes, in logical priority, three of the Guiding Principles’ foundational and omnipresent cruces: rights, involvement, and remedy.

Chapter 3, “Rights”, considers the practical meaning and limits of international human rights. We seek to answer, in particular, how to transpose the rights-related duties of states as public actors onto businesses as private actors, so as to give international human rights life in a purely private sphere. Resolving this challenge is critical to understanding the complete contours of “adverse human rights impacts”, to which all Guiding Principles governance is devoted.

Chapter 4, “Involvement”, focuses on the practical meaning of *cause*, *contribute*, and *directly linked*. These terms play the role in the private sphere that territory and jurisdiction do in the public sphere: they determine which adverse human rights impacts are the responsibility of any particular

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<sup>56</sup> *Baker v. Carr*, 369 U.S. 186 at 217 (1962).



business. They are also the first nodes on the decision tree to guide companies on how to respond to particular adverse impacts and to ground the legitimate expectations of states.

Chapter 5, “Grievance Mechanisms” and Chapter 6, “Rights-Compatible Remedy”, are devoted, respectively, to remedial process and remedial outcomes. Chapter 5 is built on extracts from a public assessment we conducted of an extremely complex and controversial operational-level grievance mechanism established by Barrick Gold in Papua New Guinea to address sexual violence by private security personnel. The extracts address, against the backdrop of a detailed real-world example, the justiciable meaning of terms like “legitimate”, “equitable”, “transparent”, and “stakeholder engagement”. Chapter 6 focuses on the objective legitimacy of particular remedial outcomes, whether provided through a grievance mechanism or otherwise. We endeavour to show how effective remedy under international law can be transposed in a principled and practical fashion into purely private relationships between business and stakeholders.

#### D. OUR INTERPRETIVE APPROACH

Given the generality of our thought experiment, we ground our analysis on the assumption that the Guiding Principles qua legal obligations should be subject to the same interpretive expectations as human rights norms. As John Tobin has noted: “Simply clothing an assertion about the content of an internationally recognized human right with the apparel of humanity may satisfy a moral or political urge, but it does not necessarily accord with the nature of the legal obligations actually assumed by a state under a human rights treaty.”<sup>57</sup> The cautionary note applies with equal vigour to the Guiding Principles as legal norms. We have thus sought a method that would enable any interested party to discern, with precision reasonable enough to ground a shared language, the meaning of the terms at the time of the Guiding Principles’ endorsement by the Human Rights Council.

Our launching point is Article 31 of the *Vienna Convention on the Law of Treaties* (“VCLT”): “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”<sup>58</sup> This article is a cornerstone of customary international law.<sup>59</sup> It is also accepted as foundational and

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<sup>57</sup> John Tobin, “Seeking to Persuade: A Constructive Approach to Human Rights Treaty Interpretation” (2010) 23 Harv. Hum. Rts. J. 1 at 2.

<sup>58</sup> *Vienna Convention on the Law of Treaties* (May 23, 1969), 1155 U.N.T.S. 331 (entered into force January 27, 1980).

<sup>59</sup> *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, Judgment of July 13, 2009, [2009] I.C.J. Rep. 213 at 47.

binding in the international human rights context.<sup>60</sup> Under the VCLT, the focus of the interpretive process should, as far as possible, be on the text, which is taken to reflect the intentions of those acceding to it: “[T]he starting point of interpretation is the elucidation of the meaning of the text, not an investigation *ab initio* into the intentions of the parties.”<sup>61</sup>

Privileging the objective meaning of the text over the subjective intentions of drafters or state parties is particularly important in human rights treaties, because their aim is not transactional.<sup>62</sup> It is, rather, to protect the inherent dignity of subjects of state jurisdiction and abuse of power by the very states party to the treaty.<sup>63</sup> Intention of particular parties may be dangerous to the extent it is idiosyncratic or at odds with the overarching intent of the protections. As a judge of the European Court of Justice noted in the context of treaty interpretation: “It is not, in actual fact, on the intentions of the contracting parties that agreement is reached, but on the written formulas of the treaties and only on that. It is by no means certain that agreement on a text in any way implies agreement as to intentions. On the contrary, divergent, even conflicting, intentions may perfectly well underlie a given text.”<sup>64</sup>

The VCLT’s textual focus, with an eye to coherence and respect for the treaty’s object, is mirrored in the Guiding Principles’ own interpretive guidelines:

These Guiding Principles should be understood as a coherent whole and should be read, individually and collectively, in terms of their objective of enhancing standards and practices with regard to business and human

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<sup>60</sup> *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law* (1999), Advisory Opinion OC-16/99, Inter-Am. Ct. H.R. (Ser. A) No. 16 at para. 114 (“This guidance is particularly relevant in the case of international human rights law, which has made great headway thanks to an evolutive interpretation of international instruments of protection. That evolutive interpretation is consistent with the general rules of treaty interpretation established in the 1969 Vienna Convention. ... human rights treaties are living instruments whose interpretation must consider the changes over time and present-day conditions.”); John Tobin, “Seeking to Persuade: A Constructive Approach to Human Rights Treaty Interpretation” (2010) 23 Harv. Hum. Rts. J. 1 at 19 (noting that the VCLT principles constitute the accepted norms of interpretation for international human rights treaties).

<sup>61</sup> “Draft Articles on the Laws of Treaties with Commentaries in Report of the International Law Commission on the Work of its Eighteenth Session” (U.N. Doc. A/CN.4/191) in *Yearbook of the International Law Commission 1966*, vol. 2 (New York: United Nations, 1966) at 220 (“the text [of a treaty] must be presumed to be the authentic expression of the intentions of the parties”).

<sup>62</sup> Alexander Orakhelashvili, “Restrictive Interpretation of Human Rights Treaties in the Recent Jurisprudence of the European Court of Human Rights” (2003) 14: 3 E.J.I.L. 529 at 535.

<sup>63</sup> *Ibid.*

<sup>64</sup> John Tobin, “Seeking to Persuade: A Constructive Approach to Human Rights Treaty Interpretation” (2010) 23 Harv. Hum. Rts. J. 1 at 23 (quoting from a speech by Judge Pierre Pescatore).

rights so as to achieve tangible results for affected individuals and communities, and thereby also contributing to a socially sustainable globalization.<sup>65</sup>

Our thought experiment therefore applies the following interpretive maxims throughout this book:

- (1) *Treat the text of each Guiding Principle and the Commentary as equally authoritative.* This maxim is derived from the suggestion that the Guiding Principles “should be understood as a coherent whole”.<sup>66</sup>
- (2) *Strive for consistency with the Guiding Principles’ overarching structure and objectives.* This maxim is drawn from the encouragement to read the Guiding Principles “individually and collectively, in terms of their objective”.<sup>67</sup>
- (3) *With an eye to ensuring voluntary respect for human rights, endeavour to practical, context-sensitive results.* We derive this maxim from two elements of the General Principles: (1) the Guiding Principles’ end is “enhancing standards and practices with regard to business and human rights so as to achieve tangible results for affected individuals and communities”; and (2) “[n]othing in these Guiding Principles should be read as creating new international law obligations”.<sup>68</sup>
- (4) *Privilege consistency with international human rights law.* This is drawn from the injunction that “[n]othing in these Guiding Principles should be read ... as limiting or undermining any legal obligations a State may have undertaken or be subject to under international law with regard to human rights”.<sup>69</sup>

We set down these maxims in the interests of transparency. As with the remainder of this book, we hope they too serve as the subject matter of legal debate as lawyers struggle to understand and shape the nascent *legal* discipline of business and human rights.

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<sup>65</sup> United Nations Office of the High Commissioner for Human Rights, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework* (New York and Geneva: United Nations, 2011) at 1, online: [ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](http://ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf).

<sup>66</sup> *Ibid.*

<sup>67</sup> *Ibid.*

<sup>68</sup> *Ibid.*

<sup>69</sup> *Ibid.*

