
1. From ‘business or human rights’ to ‘business and human rights’: what next?

Surya Deva

1. THE JOURNEY SO FAR

The interface between human rights and business is perhaps as old as the notions of ‘business’ and ‘rights’.¹ This interface is also inescapable because both human rights and business enterprises have a universal presence as well as relevance. However, the main thrust of the interface between human rights and business has been changing over the years. In my view, this evolution can be analysed in terms of three broad eras each with a distinct thrust: the ‘business *or* human rights’ era, the ‘business *and* human rights’ (BHR) era and the ‘business *of* human rights’ era.

Before I explain these three eras in this chapter, let me flag three points. First, the three eras described here do not have a strict separation. While these eras are sequential at least in their origin, they do not have a clear start or end point. The three eras now exist in parallel with a change in the dominant theme. For example, while currently the BHR era is dominating the scene, there may still be some voices vouching for the business or human rights era. Second, although the third era – the business of human rights – is still in its infancy, I expect this to gain traction and perhaps become more dominant in coming years. The basis of this prediction is discussed below. Third, while the debate continues about the relationship between BHR and CSR,² this debate does not capture fully how the interface of business and rights has evolved over years at a holistic level, rather than merely from a CSR or BHR lens. I think both CSR and BHR – and even RBC (responsible business conduct) – share the common starting point of corporations having responsibilities beyond their shareholders. However, key differences exist regarding the normative basis of corporate responsibilities, the nature and extent of these responsibilities, the process of identifying individuals and communities to whom responsibilities are owed, and the modus operandi of enforcing corporate responsibilities in cases of noncompliance.

¹ For an excellent account of how the operations of the British East India Company impacted people and their rights during the seventeenth and the eighteenth centuries, see William Dalrymple, *The Anarchy: The East India Company, Corporate Violence and the Pillage of an Empire* (Bloomsbury Publishing, 2019).

² See Chapter 2 in this Handbook. See also Chris Avery, ‘The Difference between CSR and Human Rights’ (August/September 2006), www.business-humanrights.org/sites/default/files/reports-and-materials/Avery-difference-between-CSR-and-human-rights-Aug-Sep-2006.pdf (accessed 18 December 2019); Florian Wettstein, ‘CSR and the Debate on Business and Human Rights: Bridging the Great Divide’ (2012) 22:4 *Business Ethics Quarterly* 739; Anita Ramasastry, ‘Corporate Social Responsibility versus Business and Human Rights: Bridging the Gap between Responsibility and Accountability’ (2015) 14 *Journal of Human Rights* 237.

Human rights embody important values of universal relevance. This collective understanding cannot be shaken by continued violations of human rights by both states and non-state actors in all world regions. Nor can it be shaken by certain political leaders dismissing or misappropriating the language of human rights, or some scholars rightly reminding us of the dangers inherent in both the overreach of human rights as well as their limits.³ Similarly, businesses in some form are present everywhere. In fact, one can hardly do anything nowadays without some assistance or contribution on the part of corporations.

Nevertheless, many scholars and business leaders long took the position that respecting human rights or performing social responsibilities was not the business of business. I will label this as the ‘business *or* human rights’ era. The famous Berle–Dodd debate in the early 1930s was illustrative of this era,⁴ in which Berle argued that corporations should exercise their power only for the benefit of their shareholders.

Berle’s views were taken forward forcefully by Milton Friedman,⁵ who famously argued that in a free market economy, the only social responsibility of business is to maximise profits for shareholders. More recent support for this line of thinking is offered by Elaine Sternberg.⁶ For her, the ‘*defining purpose of business is maximising owner value over the long term by selling goods or services*’⁷ and using ‘business resources for non-business purposes [social responsibility] is tantamount to *theft*’.⁸ I will suggest that the ‘shareholder primacy’ model is also rooted in the philosophy of the business *or* human rights era.

The views of Berle, Friedman and Sternberg did not go unchallenged.⁹ The validity of the shareholder primacy model too has been contested on legal, normative and practical grounds,¹⁰ and not many corporations would now claim – at least publicly – that their sole objective is to maximise profits irrespective of any adverse impact on society. Consequently, the business *or* human rights era has lost much of its steam, though traces of it can still be seen. For example, the continued overemphasis on the business case for human rights suggests that corporations

³ See, e.g., David Kennedy, ‘International Human Rights Movement: Part of the Problem?’ (2002) 5 *Harvard Human Rights Journal* 101; Eric Posner, ‘The Case against Human Rights’ (4 December 2014), www.theguardian.com/news/2014/dec/04/-sp-case-against-human-rights (accessed 18 December 2019); Dominique Clément, ‘Human Rights or Social Justice? The Problem of Rights Inflation’ (2012) 22 *International Journal of Human Rights* 155; Samuel Moyn, *Not Enough: Human Rights in an Unequal World* (Belknap Press, 2018).

⁴ Adolph A Berle, ‘Corporate Powers as Powers in Trust’ (1931) 44 *Harvard Law Review* 1049; E Merrick Dodd, ‘For Whom Are Corporate Managers Trustees?’ (1932) 45 *Harvard Law Review* 1145; Adolph A Berle, ‘For Whom Are Corporate Managers Trustees: A Note’ (1932) 45 *Harvard Law Review* 1365.

⁵ Milton Friedman, *Capitalism and Freedom* (Chicago University Press, 1962); Milton Friedman, ‘The Social Responsibility of Business Is to Increase Its Profits’, *New York Times Magazine* (13 September 1970), 33.

⁶ Elaine Sternberg, *Just Business: Business Ethics in Action*, 2nd edn (Oxford University Press, 2000).

⁷ *Ibid.*, 32 (emphasis in original).

⁸ *Ibid.*, 41 (emphasis in original).

⁹ For an analysis, see Surya Deva, *Regulating Corporate Human Rights Violations: Humanizing Business* (Routledge, 2012) 119–39.

¹⁰ See Paddy Ireland, ‘Company Law and the Myth of Shareholder Ownership’ (1999) 62 *Modern Law Review* 32; Jennifer Hill, ‘Visions and Revisions of the Shareholder’ (2000) 48 *American Journal of Comparative Law* 39; Beate Sjøfjell and Mark B Taylor, ‘Clash of Norms: Shareholder Primacy vs. Sustainable Corporate Purpose’ (2019) 13 *International and Comparative Corporate Law Journal* 40.

still need to justify demands to respect human rights in terms of profit maximisation.¹¹ But if human rights are merely tools to make more profit or avoid risk to corporations, why the pre-ference about corporations becoming more socially responsible? In fact, Friedman was critical of CSR being used as a cloak for actions that could be justified for corporate self-interest.¹²

Although the usage of the term 'business *and* human rights' has a more recent origin, the BHR era started taking root around the early 1970s.¹³ The UN Economic and Social Council's appointment of a Group of Eminent Persons in 1973 to study the impact of transnational corporations on economic development and international relations;¹⁴ the OECD and the ILO releasing soft norms outlining responsibilities of multinational enterprises in 1976 and 1977 respectively;¹⁵ the launch of the Sullivan Principle in 1977 to articulate the role of corporations in fighting apartheid in South Africa;¹⁶ and the 1984 Bhopal gas disaster, which killed thousands of people in India,¹⁷ incrementally but firmly grounded the BHR era. By the early 1990s, the BHR era had begun to gain prominence (including as a result of several high-profile cases under the Alien Tort Statute (ATS) as well as civil society advocacy and reports¹⁸), while the business *or* human rights era had begun to weaken significantly.

A distinctive component of the BHR era has been development of standards – the 'new rules of the game' – by states, international organisations, multi-stakeholder groups, corporations, industry associations, civil society organisations (CSOs), lawyer associations and academics to guide business behaviour. I will focus here only on the role of the United Nations (UN) in developing BHR-related standards. The UN's engagement with BHR standard setting could be divided into four distinct phases, each with a distinct approach. In the first phase, which lasted for about two decades (1974–92), the debate and disagreements revolved around 'rights versus responsibilities': while developing countries wanted to impose obligations on TNCs, developed countries' priority was to secure fair treatment rights for such companies in host states. This phase ended with the UN in 1992 suspending negotiations on the proposed Code of Conduct on Transnational Corporations.

¹¹ See John Morrison, 'The Business Case for Human Rights – Values, Expectations and Risk' (28 April 2011), www.ihrb.org/uploads/speeches/2011-4-28_IHRB_Speech_The_Business_Case_for_Human_Rights_%23U2013_Values_Expectations_and_Risk.pdf;

Michael Posner, 'Making the Business Case for Human Rights' (3 March 2015), <https://bhr.stern.nyu.edu/blogs/2018/12/22/making-the-business-case-for-human-rights> (accessed 18 December 2019); Gowri Kangeson, 'Arguing the Business Case for Respecting Human Rights' (4 November 2016), www.dlapiper.com/en/australia/insights/publications/2016/11/arguing-the-business-case-for-human-rights/ (accessed 18 December 2019).

¹² Friedman, 'The Social Responsibility of Business Is to Increase Its Profits'.

¹³ In Chapter 2 of this Handbook, Wettstein considers the 1970–95 period as a precursor to BHR.

¹⁴ 'The UN and Transnational Corporations' (Briefing Note 17 July 2009), www.unhistory.org/briefing/17TNCs.pdf (accessed 18 December 2019).

¹⁵ Deva, *Humanizing Business*, 80–2, 88–90.

¹⁶ 'The Sullivan Principles', <https://www.bu.edu/trustees/boardoftrustees/committees/acsr/principles> (accessed 18 December 2019).

¹⁷ Dominique Lapierre and Javier Moro, *It Was Five Past Midnight in Bhopal* (Full Circle Publishing Ltd, 2001).

¹⁸ See Institute for Human Rights and Business, *Building a Movement: Reflections on the History and Future of Business and Human Rights* (December 2019) 14–17, www.ihrb.org/uploads/reports/Building_a_Movement_Reflections_on_the_History_and_Future_of_Business_and_Human_Rights_-_IHRB.pdf (accessed 18 December 2019).

During the second phase (1998–2004), the discourse revolved around ‘voluntary versus binding’ regulations. One process resulted in the development of the 2003 Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights. The Norms were declared by the then Commission on Human Rights to have ‘no legal standing’. The voluntary process, on the other hand, resulted in the formal launch of the Global Compact in 2000, with nine principles in the areas of human rights, labour rights and the environment.¹⁹

The third phase was the mandate of Professor John Ruggie, the former Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises, which lasted six years (2005–11). Ruggie’s mandate was guided by ‘principled pragmatism’ and resulted in the Human Rights Council’s unanimous endorsement of the UNGPs in June 2011.²⁰

The fourth phase began in June 2014 with the Human Rights Council adopting a resolution to establish an open-ended intergovernmental working group ‘whose mandate shall be to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises’.²¹ This resolution created a ‘soft versus hard’ law cleavage – similar to the second phase – between the implementation of the UNGPs and a push to develop a binding instrument. Another strand of the approach during this phase has been the ‘conflict versus complementary’ relation between the UNGPs and the proposed treaty.

In standard setting during the BHR era, the UNGPs stand out: their contribution in pushing the BHR agenda is well-documented, including by the author of the UNGPs, Professor Ruggie.²² In addition to achieving alignment of standards and actions in line with a commonly accepted framework, the UNGPs have facilitated the socialisation of human rights norms among businesses, a prerequisite to ensuring corporate respect as well as corporate accountability for human rights. This progress, however, should not mask that not much has yet changed for the rightsholders on the ground. It also seems that even the human rights due diligence practice of major multinational corporations leaves much to be desired.²³ A 2018 report of the UN Working Group on Business and Human Rights also concluded that ‘the majority of business enterprises around the world remain unaware, unable or unwilling to implement human rights due diligence as required of them in order to meet their responsibility to respect human rights’.²⁴

¹⁹ A tenth principle related to anticorruption was added in 2004.

²⁰ For a critique, see Surya Deva and David Bilchitz (eds), *Human Rights Obligations on Business: Beyond the Corporate Responsibility to Respect?* (Cambridge University Press, 2013).

²¹ OHCHR, ‘Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights’, www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Pages/IGWGOntnc.aspx (accessed 18 December 2019).

²² See Chapter 3 in this Handbook. See also John G Ruggie, *Just Business: Multinational Corporations and Human Rights* (WW Norton & Company, 2013).

²³ For example, 49 per cent of the largest publicly traded 200 companies score 0 across all indicators related to human rights due diligence. Corporate Human Rights Benchmark, ‘2019 Key Findings’, www.corporatebenchmark.org/sites/default/files/2019-11/CHRB2019KeyFindingsReport.pdf (accessed 18 December 2019).

²⁴ ‘The report of the Working Group on the issue of human rights and transnational corporations and other business enterprises’, A/73/163, para 93.

A lack of tangible progress in corporations walking the walk on human rights due diligence has led to momentum building for mandatory legislation in Europe and others parts of the world.²⁵ Despite civil society advocacy, and reform options having been on the table for several years,²⁶ states have not shown a similar willingness to remove barriers to access to effective remedies and hold corporations accountability for human rights abuses. However, some recent court decisions have opened the door to hold parent corporations accountable for abuses committed by their subsidiaries, often in countries with bigger regulatory gaps.²⁷

2. WHAT NEXT: THE BUSINESS OF HUMAN RIGHTS?

While the BHR era is still dominating the interface between human rights and business, I will argue that a new era – that of the business *of* human rights – has started emerging. Corporations and industry associations have begun to co-opt the language of human rights to serve their business interests. I will describe below several developments and trends that are illustrative of this shift towards the business of human rights.

2.1 Birth of a New Industry

One by-product of the UNGPs has been the evolution of a new industry of consultants advising corporations on how to conduct human rights due diligence. Some of these consultants have even incorporated themselves as 'non-profit organisations'. Corporate executives are not generally trained to manage complex human rights issues and hence corporations might need some external advice on how to discharge their responsibilities under the UNGPs or other BHR standards. This demand for external expert advice has resulted in the mushrooming of a private industry which is becoming part of the problem in the process of solving another problem.

When BHR consultant organisations start (i) seeing the UNGPs or SDGs as a business opportunity, (ii) making a business case for human rights to secure buy-in from corporations, (iii) identifying salient human rights issues based on convergence of risk to people and risk to

²⁵ BHRRC, 'National & Regional Developments on Mandatory Human Rights Due Diligence', <https://www.business-humanrights.org/en/mandatory-due-diligence/national-regional-developments-on-mandatory-human-rights-due-diligence> (accessed 18 December 2019).

²⁶ See, e.g., Gwynne Skinner, Robert McCorquodale and Olivier De Schutter, *The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business* (ICAR, 2013); Amnesty International, 'Creating a Paradigm Shift: Legal Solutions to Improve Access to Remedy for Corporate Human Rights Abuse' (Amnesty International, 2017); 'Improving access to remedy in the area of business and human rights at the EU level: Opinion of the European Union Agency for Fundamental Rights', FRA Opinion–1/2017 (2017); 'OHCHR Accountability and Remedy Project', www.ohchr.org/EN/Issues/Business/Pages/OHCHRaccountabilityandremedyproject.aspx; UN Working Group on Business and Human Rights, 'Access to Remedy', www.ohchr.org/EN/Issues/Business/Pages/AccessToRemedy.aspx (accessed 18 December 2019).

²⁷ See, e.g., *Chandler v Cape* [2012] EWCA Civ 525; *Choc v Highbay Minerals Inc* 2013 ONSC 1414; *Vedanta Resources PLC v Lungowe* [2019] UKSC 20; *Esther Kiobel v Royal Dutch Shell PLC* [2019] ECLI:NL:RBDHA:2019:4233; *Nevsun Resources Ltd v Araya* 2020 SCC 5. See also Marilyn Croser et al, 'Vedanta v Lungowe and Kiobel v Shell: The Implications for Parent Company Accountability' (2020) 5:1 *Business and Human Rights Journal*, DOI: <https://doi.org/10.1017/bhj.2019.25>.

the business, (iv) competing for their share in the funding pie offered by states, development agencies and corporations, and (v) passing themselves off as CSOs to gain legitimacy, one can see that human rights-based approaches are no longer the guiding mantra for these consultants.

2.2 Corporate Influence in the UN

Corporate capture of the state and democracy is nothing new.²⁸ What is relatively newer is the influence of corporations – as compared to other non-state actors – over various BHR-related UN agencies and processes. The Global Compact provides an early example of this phenomenon.²⁹ In 2000, the UN issued Guidelines on a Principle-based Approach to the Cooperation between the United Nations and the Business Sector.³⁰ These Guidelines provide that UN partnerships with the private sector ‘should maintain the integrity of the United Nations, its independence and impartiality’, must advance UN goals and should not give an unfair advantage to any business entity or its products or services.³¹ The UN will engage with corporations that demonstrate a ‘commitment to respecting and implementing’ the UNGPs and will not engage corporations which ‘contribute to or are otherwise complicit in human rights abuses, tolerate forced or compulsory labour or the use of child labour’.³²

While these Guidelines look good on paper, their application in practice in guiding the UN engagement with the private sector does not give much confidence. For example, the OHCHR’s partnership with Microsoft should give the latter advantage over its competitors, not least because Microsoft will ‘develop advanced technology in the form of a dashboard – Rights View – that will provide the [OHCHR] teams an overview of the human rights situation in specific countries in order to better predict, analyse and respond to crisis’.³³ Moreover, the current cash-crunch at the UN agencies and the 2030 Agenda for Sustainable Development have made these UN agencies more anxious to forge partnership with the private sector, thus opening windows for corporations to influence UN processes. For example, in December 2016, the UN General Assembly by a unanimous vote agreed to grant the International Chamber of Commerce (ICC) observer status in the General Assembly.³⁴ The decision – hailed

²⁸ Dalrymple writes: ‘the East India Company probably invented corporate lobbying. In 1693 ... the EIC was discovered for the first time to be using its own shares for buying parliamentarians, annually shelling out £1,200 a year to prominent MPs and ministers.’ Dalrymple, *The Anarchy*, xxvii. See also Alyssa Katz, *The Influence Machine: The U.S. Chamber of Commerce and the Corporate Capture of American Life* (Spiegel & Grau, 2015); Camaren Peter et al, *Shadow State: The Politics of State Capture* (Wits University Press, 2018).

²⁹ See Surya Deva, ‘Global Compact: A Critique of UN’s “Public-Private” Partnership for Promoting Corporate Citizenship’ (2006) 34 *Syracuse Journal of International Law & Commerce* 107.

³⁰ OHCHR, ‘Guidelines on a Principle-Based Approach to the Cooperation between the United Nations and the Business Sector’, www.ohchr.org/Documents/Issues/Business/2.GuidelinesPrincipleBasedApproach.pdf (accessed 18 December 2019). These Guidelines were revised in 2009 and 2015.

³¹ *Ibid.*, paras 10, 11 and 14.

³² *Ibid.*, paras 15 and 16.

³³ OHCHR, ‘Partners’, www.ohchr.org/Documents/Issues/Business/4.Partners.pdf (accessed 18 December 2019). The UN’s partnership with Tencent is perhaps more worrying. Mary Hui, ‘The UN is partnering with China’s biggest surveillance software company’, <https://qz.com/1830789/un-partners-with-chinas-tencent-surveillance-software/> (accessed 2 April 2020).

³⁴ ‘Observer status for the International Chamber of Commerce in the General Assembly’, A/RES/71/156 (13 December 2016).

as 'unprecedented' even by the ICC³⁵ – was to 'give greater opportunities to the business community to contribute to the realization of the goals and programmes' of the UN.³⁶

The increasingly close partnership between the UN and the private sector gives corporations unprecedented access to influence all UN processes and agencies engaged with the BHR agenda. By way of comparison, it is worth noting here that the International Labour Organization (ILO) is a tripartite UN agency which engages not only states but also both employers and worker representatives³⁷ – thus giving trade unions a counter-balancing role against corporate lobbying. However, other UN agencies have not institutionalised such a tripartite model, and giving certain non-governmental organisations (NGOs) consultative status is not the same thing as interacting with civil society on the same footing as states.³⁸

2.3 Controlling the BHR Narrative

Corporations and industry associations are also proactively controlling and shaping the BHR discourse (including regulatory initiatives) in a way that is conducive to their business objectives. Businesses are creating the public impression of being leaders in respecting human rights, but without bringing any fundamental changes to their current business models. I will offer four illustrative examples to buttress this point. My first example is two letters written by Larry Fink, the Chief Executive Officer (CEO) of BlackRock, to CEOs of companies in which BlackRock invests trillions of dollars. In the 2018 letter, Fink wrote:

Society is demanding that companies, both public and private, serve a social purpose. To prosper over time, every company must not only deliver financial performance, but also show how it makes a positive contribution to society. Companies must benefit all of their stakeholders, including shareholders, employees, customers, and the communities in which they operate. Without a sense of purpose, no company, either public or private, can achieve its full potential. It will ultimately lose the license to operate from key stakeholders.³⁹

Fink followed this with a 2019 letter that reiterated the vision of 'sustainable, long-term growth and profitability' and asserted that '[p]rofits are in no way inconsistent with purpose – in fact, profits and purpose are inextricably linked', because companies 'that fulfill their purpose and responsibilities to stakeholders reap rewards over the long-term. Companies that ignore them stumble and fail.'⁴⁰ These two letters appear to be very forward-looking and visionary. However, serious doubts remain as to whether BlackRock is really walking the talk – for instance, after specific allegations that BlackRock is the world's largest investor

³⁵ 'ICC Granted UN Observer Status', 13 November 2016, <https://iccwbo.org/media-wall/news-speeches/un-general-assembly-grants-observer-status-international-chamber-commerce-historic-decision/>.

³⁶ A/RES/71/156.

³⁷ ILO, 'Tripartite Constituents', www.ilo.org/global/about-the-ilo/who-we-are/tripartite-constituents/lang--en/index.htm (accessed 18 December 2019).

³⁸ 'Basic Facts about ECOSOC Status', <http://csonet.org/?menu=100> (accessed 18 December 2019).

³⁹ BlackRock, 'A Sense of Purpose', www.blackrock.com/corporate/investor-relations/2018-larry-fink-ceo-letter (accessed 18 December 2019).

⁴⁰ BlackRock, 'Purpose & Profit', www.blackrock.com/corporate/investor-relations/larry-fink-ceo-letter (accessed 18 December 2019).

in deforestation of the Amazon in Brazil,⁴¹ BlackRock provided a brief, general and evasive response.⁴² Moreover, its human rights and labour standards policy makes no reference to any international standards and focuses only on its employees.⁴³

Second, in August 2019, Business Roundtable – perhaps taking its cue from Fink’s letters – issued a statement on the purpose of a corporation signed by 181 CEOs who commit to conduct business for the benefit of all stakeholders, rather than merely shareholders.⁴⁴ The statement, which is a direct response to growing demands to move away from the shareholder primacy model,⁴⁵ may suggest leading corporations committing to bringing a fundamental shift in their business model. However, it is remarkable that the statement does not use the term ‘rights’ or ‘human rights’ even once. Therefore, even if a shift were to take place in practice in future, it is unlikely to be rights-based.

Third, while almost all major corporations are supporting the UNGPs, some of these corporations as well as leading industry associations continue to resist any attempt made at the national or international level to impose binding obligations, even if those are in line with Pillar II of the UNGPs. Opposition to mandatory human rights due diligence legislation in Switzerland is a case in point.⁴⁶ Similarly, the International Organisation of Employers and other industry associations continue to adopt a binary position: while reiterating their commitment to fully implement the UNGPs, they question the need for a binding international instrument,⁴⁷ even if that might build on the UNGPs and may assist in their implementation.

Fourth, businesses also invoke concept frameworks such as the ‘smart mix’ of regulation, multistakeholderism and collaborative engagement to their advantage. While corporations support the need for a smart mix of measures, they continue to oppose binding regulations, without which there will be no real mix ever. Although smart mix is the favoured approach in the BHR field, it is puzzling that corporations want only binding rules in the domain of trade and investment. Moreover, one should ask a more fundamental question: the regulatory mix is smart for whom – for businesses or for rightsholders? Similarly, multistakeholderism is often employed to mask existing asymmetries of information, power, resources and influence among various stakeholders. Unless proactive steps are taken to address these asymmetries,

⁴¹ Friends of the Earth US, Amazon Watch and Profundo, ‘BlackRock’s Big Deforestation Problem’, <https://amazonwatch.org/assets/files/2019-blackrocks-big-deforestation-problem.pdf> (accessed 18 December 2019).

⁴² ‘Response from BlackRock’ (30 October 2019), www.business-humanrights.org/sites/default/files/documents/Response%20from%20BlackRock_0.pdf (accessed 18 December 2019).

⁴³ BlackRock, ‘Human Capital: Our Commitment’, www.blackrock.com/corporate/responsibility/human-capital (accessed 18 December 2019).

⁴⁴ Business Roundtable, ‘Statement on the Purpose of a Corporation’, <https://opportunity.businessroundtable.org/wp-content/uploads/2019/12/BRT-Statement-on-the-Purpose-of-a-Corporation-with-Signatures.pdf> (accessed 18 December 2019).

⁴⁵ See, for example, Frank Bold, ‘The Purpose of the Corporation Project’, www.purposeofcorporation.org/en and University of Oslo, ‘SMART: Sustainable Market Actors for Responsible Trade’, www.smart.uio.no/ (accessed 18 December 2019).

⁴⁶ See, e.g., BHRRC, ‘Companies Clarify Position on Swiss Mandatory Human Rights Due Diligence Initiative’, www.business-humanrights.org/en/companies-clarify-position-on-swiss-mandatory-human-rights-due-diligence-initiative (accessed 18 December 2019).

⁴⁷ ‘Joint Business Response to the Revised Draft Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises’, (October 2019), <https://www.ioe-emp.org/index.php?eID=dumpFile&t=f&f=145680&token=9dbcc1f8414128d575cd6bef9f36b84ec106a386> (accessed 18 December 2019).

corporations and their interests are likely to have an upper hand in what comes out of the multistakeholderism.

2.4 The Sustainable Development Goals (SDGs) Becoming a Business Opportunity

States expect the private sector to play a key role in realising the SDGs.⁴⁸ Businesses are called upon 'to apply their creativity and innovation to solving sustainable development challenges' and protect 'labour rights and environmental and health standards in accordance with relevant international standards and agreements'.⁴⁹ States also look towards the private sector, which is a key constituent of the Global Partnership for Sustainable Development,⁵⁰ to generate funds to implement the SDGs.

As compared to the Millennium Development Goals, the SDGs have a closer connection with human rights.⁵¹ Nevertheless, the UNGPs and the SDGs appear to be two siblings born four years apart with little connection. The UNGPs do not make any explicit connection between human rights (or human rights due diligence for that matter) and development, though development agencies and development finance institutions are expected to consider adverse human rights impacts of their activities.⁵² On the other hand, only paragraph 67 of the UN resolution on the SDGs makes a reference to the UNGPs, but without mentioning the term 'human rights' or underlining the importance of the corporate responsibility to respect human rights to the realisation of the SDGs.

This lack of coherence between the UNGPs and the SDGs contributed to corporations and some organisations presenting the latter as a business opportunity to the private sector. For example, in its 2017 report, *Better Business, Better World*, the Business and Sustainable Development Commission makes a business case for the Global Goals and notes: 'We make the case that businesses adopting this plan will transform their own prospects and could outperform those stuck in yesterday's economic game: *this is about return on capital, not just responsibility*.'⁵³ To counter the potential risk of the SDGs bringing back corporate philanthropy, the UN Working Group on Business and Human Rights issued ten recommendations reminding both states and businesses not to forget the relevance of 'protect, respect and remedy' framework.⁵⁴ However, in practice, many corporations seem to feel more comfortable

⁴⁸ UN General Assembly, 'Transforming Our World: the 2030 Agenda for Sustainable Development', A/Res/70/1, paras 39, 41 and 60.

⁴⁹ Ibid, para 67.

⁵⁰ Ibid, para 60; Goal 17.

⁵¹ Danish Institute for Human Rights, 'The Human Rights Guide to the Sustainable Development Goals' (2016), <https://sdg.humanrights.dk/en> (accessed 18 December 2019); Markus Kaltenborn, Markus Krajewski and Heike Kuhn, 'Introduction' in Kaltenborn, Krajewski and Kuhn (eds), *Sustainable Development Goals and Human Rights* (Springer Open, 2019) 1.

⁵² Commentary to Principles 4 and 7.

⁵³ Business and Sustainable Development Commission, *Better Business, Better World* (2017), 7, 12–14 (emphasis added), http://report.businesscommission.org/uploads/BetterBiz-BetterWorld_170215_012417.pdf (accessed 18 December 2019).

⁵⁴ 'The Business and Human Rights Dimension of Sustainable Development: Embedding "Protect, Respect and Remedy" in SDGs Implementation' (30 June 2017), www.ohchr.org/Documents/Issues/Business/Session18/InfoNoteWGBHR_SDGRecommendations.pdf (accessed 18 December 2019).

cherry-picking SDGs or indulging in SDG-washing,⁵⁵ rather than mitigating, preventing and remediating adverse human rights impacts of their activities. This shift is visible even on the UN Global Compact's website, with its ten principles disappearing from the top tabs on its website.⁵⁶

2.5 The Business Case for Human Rights

The over-emphasis on the business case for human rights by various actors, including UN agencies and governments, is problematic: this, in essence, makes corporate compliance with human rights norms dependent on economic interests. Supporting and standing up for human rights is much easier when doing so serves business interests. The real test for business commitment to human rights is in situations when corporations side with human rights even if doing so might not make economic sense by reducing risks, increasing profits or gaining competitive advantage.

3. WHAT OUGHT TO HAPPEN?

If the business of human rights era gains traction in coming years as per my analysis in the previous section, this would mean BHR end up becoming the 'new CSR'. To pre-empt such a possibility, several course-corrective steps must be taken to rescue BHR from corporate capture. Some of these steps are outlined below.

3.1 Taking Rights and Rightsholders Seriously

What do 'rights' really mean in BHR? If an interest is recognised as a (human) right, then this implies two things at the minimum: first, the relevant dutyholders have corresponding legally binding obligations, and second, the rightsholders are able to seek effective remedies for violations of such a right. However, the term 'rights' in BHR hardly means rights in this sense, both on paper and in practice.⁵⁷ While the voluntary versus binding dichotomy is not helpful, corporations must have legally binding and enforceable human rights obligations as a precondition for doing business. These obligations need not be tied exclusively to the traditional model of rule-making and rule-enforcement by the state.⁵⁸ Moreover, voluntary norms

⁵⁵ See Namit Agarwal, Uwe Gneiting and Ruth Mhlanga, *Raising the Bar: Rethinking the Role of Business in the Sustainable Development Goals* (Oxfam, 2017); PWC, 'New Global Goals: Are They Business Critical?', www.pwc.com/gx/en/services/sustainability/sustainable-development-goals/sdg-research-results.html; Adam Fishman, 'Responsible Business Report Finds High Risk of "SDG Washing"' (29 May 2018), <http://sdg.iisd.org/news/responsible-business-report-finds-high-risk-of-sdg-washing/> (accessed 18 December 2019).

⁵⁶ See 'United Nations Global Compact', www.unglobalcompact.org/ (accessed 18 December 2019).

⁵⁷ Hengeveld argues that 'corporate voluntarism is transforming rights into favors, replacing accountability with responsibility and advancing the false notion that corporations don't need binding obligations to bequeath the global marketplace with the "human face" Kofi Annan begged them for'. Maria Hengeveld, 'The UN Goes to Davos', *The Nation* (13 November 2019), www.thenation.com/article/un-davos-corporate/ (accessed 18 December 2019).

⁵⁸ See Surya Deva, 'Multinationals, Human Rights and International Law: Time to Move beyond the "State-Centric" Conception?' in Jernej Letnar Čerňič and Tara Van Ho (eds), *Human Rights and Business: Direct Corporate Accountability for Human Rights* (Wolf Legal Publishers, 2015) 27.

would still have a key role to play, as binding norms, for example, are slow to respond to new societal challenges.

Availability of effective remedies to the victims of business-related human rights abuses is another pre-condition of certain interests being labelled as rights, because rights without remedies do not mean much in practice. The UNGPs stress the important role of both states and businesses in realising effective remedies. As the UN Working Group on Business and Human Rights articulated in its 2017 report, effectiveness of remedies should be judged from the perspective of rightsholders, remedial mechanisms should be responsive to the diverse experiences and expectations of rightsholders, remedies should be effective both in terms of process and outcome, and affected rightsholders should be able to seek a 'bouquet of remedies' without any fear of victimisation.⁵⁹ Much more needs to be done to achieve these normative aspirations about access to justice.

Corporations should keep in mind not only all human rights, but also the holders of these rights. Human rights are not mere abstract aspirations; rather, they are vital to the dignity and development of real human beings. Keeping rightsholders on the radar should help corporate executives in overcoming business dilemmas and making correct decisions about human rights. Experiential learning by living with communities should enable corporate executives to make more informed decisions not merely about how they conduct human rights due diligence but also how they go about conducting business. They may also usefully employ the talisman offered by Gandhi in 1948. He wrote:

I will give you a talisman. Whenever you are in doubt or when the self becomes too much with you, apply the following test. Recall the face of the poorest and the weakest man whom you may have seen and ask yourself if the step you contemplate is going to be of any use to him. Will he gain anything by it? Will it restore him to a control over his own life and destiny? In other words, will it lead to Swaraj [freedom] for the hungry and spiritually starving millions? Then you will find your doubts and your self melting away.⁶⁰

If corporate executives start considering the impact of their decisions not on abstract groups of stakeholders but on real identified human beings at the bottom of their supply chains, then human rights due diligence will acquire an altogether new meaning. To take an illustration, there is a difference between reading a news report about an airplane crash in abstract and reading the same news report with knowledge that a close relative was on board the crashed flight.

Taking rights and rightsholders seriously would also entail protecting human rights defenders, who are facing increasing threats from both states and corporations.⁶¹ Apart from legal protection and building a global network of defenders, this will require a change in the current mindset: instead of considering CSOs and human rights defenders as opponents/adversaries/

⁵⁹ 'Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises', A/72/162 (18 July 2017).

⁶⁰ 'Gandhi's Talisman', www.mkgandhi.org/gquotes1.htm (accessed 18 December 2019).

⁶¹ BHRRRC, 'Business, Civic Freedoms & Human Rights Defenders Portal', www.business-humanrights.org/search-human-rights-defenders (accessed 18 December 2019).

critics, they should be seen as ‘critical friends’. In addition to some states, a few companies have started speaking up for human rights defenders.⁶² This should become the new normal.

3.2 Transforming the Current Model of Development

A hard reality is that the current model of (economic) development is not rights-based. States treat human rights as a ‘speed breaker to development’. States not only focus on rising up the ‘ease of doing business’ rankings – which do not consider human rights as a variable⁶³ – to attract foreign investment, but also label as ‘anti-development’ (and therefore ‘anti-national’) communities and CSOs resisting development projects.

Despite all the rhetoric about sustainable development, the current model of development is neither sustainable nor inclusive: there lies a significant difference between ‘talking’ sustainability and ‘doing’ sustainability. Development plans are drawn at the top level without meaningful input from individuals and communities. Similarly, impact assessment processes are mostly used in practice as a tick-box legitimacy tool to approve development projects. Some corporations practise a ‘divide and rule’ policy: they try to buy ‘social licence’ by offering incentives and rewards to some members of an affected community, thus triggering frictions and tensions within the community.

Unless this tension between human rights and development is resolved by transforming the current model of development, the BHR project will continue just to scratch the surface of the problem, with lip service being paid to newer challenges such as climate crisis and artificial intelligence. A starting point to achieve this transformation will be to institutionalise the people-centred development model in which plans and projects are formulated bottom-up by *participation of* – not *consultation with* – communities.

3.3 Fundamental Changes to the Role, Purpose and Operations of Corporations

BHR is essentially about reorienting the role and purpose of corporations in society. Shareholder primacy and profit maximisation continue to be the guiding mantra of doing business. In recent years, some changes have been made to corporate laws in several countries,⁶⁴ something which the UNGPs also remind states to do.⁶⁵ However, these changes have not been able to make fundamental structural changes so far. Let us consider one example. Section 172 of the UK Companies Act 2006 imposes a duty on directors to ‘have regard to’ various interests of non-shareholders while promoting ‘the success of the company for the benefit of

⁶² BHRRC, ‘Human Rights Defenders and Civic Freedoms Essential for Profitable Business, Say Major Companies’, www.business-humanrights.org/en/human-rights-defenders-and-civic-freedoms-essential-for-profitable-business-say-major-companies (accessed 18 December 2019).

⁶³ The World Bank, ‘Ease of Doing Business Rankings’, www.doingbusiness.org/en/rankings (accessed 18 December 2019).

⁶⁴ Surya Deva, ‘Sustainable Development: What Role for the Company Law?’ (2011) 8 *International & Comparative Corporate Law Journal* 76. See also Beate Sjøfjell and Benjamin J Richardson (eds), *Company Law and Sustainability: Legal Barriers and Opportunities* (Cambridge University Press, 2015).

⁶⁵ Principle 3(b) provides that states should ‘ensure that other laws and policies governing the creation and ongoing operation of business enterprises, such as corporate law, do not constrain but enable business respect for human rights’.

its members as a whole'. This and other changes in the UK corporate law, while a step in the right direction, have not been able to turn UK companies into socially responsible entities.⁶⁶

What is needed is a fundamental change in all legal norms that interact with corporations at various stages of doing business: from incorporation to the purpose of the corporation, listing regulations, board composition, director's duties, disclosure and transparency rules, procurement, mergers and acquisitions, accounting standards and allocation of liability within corporate groups. Businesses are undoubtedly specialised organs of society. However, this special status – which is a privilege conferred by the state rather than a right – should not be allowed to undermine collective societal goods such as human rights. In sum, the need of the hour is to reorient the role and purpose of the corporation from a profit maximising machine to an agent in service of society.

Bringing such a fundamental change would also allow us to move beyond the business case for human rights. There may be a business case for human rights in certain situations: human rights-friendly corporations can avoid reputational risk, save money and time in executing projects, attract more employees and investors, and tap into unique markets for their products or services. However, there is no universal, absolute or unqualified business case for human rights for all business enterprises operating in all sectors everywhere. Therefore, while the business case may be regarded as one of the 'push and pull' factors to humanise business, this should not be treated as *the* determinative factor.

Greater transparency is also needed with regard to how businesses interact with states, international organisations and CSOs. In the BHR era, the focus so far has been on transparency in relation to how corporations impact their stakeholders.⁶⁷ Similar transparency is required in relation to the state–business nexus: information should be disclosed about, for example, state–investor contracts, loans by development banks and international financial institutions, corporate donations to political parties and the hiring of (ex-)government officials by industry associations (as well as hiring of corporate executives by government agencies).

3.4 Creating a Full Range of Incentives and Disincentives

Considering that most corporate executives are rational actors, states should take the lead in providing a range of incentives and disincentives to encourage businesses to respect human rights and remediate adverse impacts. State agencies should also create an environment in which market forces could reward positive pro-human rights corporate behaviour, while shunning corporations which do not take seriously their responsibility to respect human rights.

As I have argued elsewhere,⁶⁸ multiple regulatory measures should be employed in a cumulative and coordinated manner at national, regional and international levels to deal with difficult regulatory targets. Doing so would also require the simultaneous use of both carrot and stick. In fact, voluntary measures in the form of carrots are more effective when they operate in the shadow of binding regulations as sticks. Incentives such as tax rebates, public recognition awards, low interest bank loans, preferential treatment in public procurement and

⁶⁶ See Nina Boeger and Charlotte Villiers (eds), *Shaping the Corporate Landscape Towards Corporate Reform and Enterprise Diversity* (Hart Publishing, 2018).

⁶⁷ See Radu Mares, 'Corporate Transparency Laws: A Hollow Victory?' (2018) 36:3 *Netherlands Quarterly of Human Rights* 189.

⁶⁸ Deva, *Humanizing Business*.

liberal export credit for overseas operations could be offered to those corporations that provide evidence of internalising human rights into their operations.

In addition to employing traditional disincentives in the form of civil, criminal and administrative penalties, newer forms of (dis)incentives should be utilised by states. For example, the UK Parliament's Joint Committee on Human Rights, in its 2017 report, recommended that the UK government 'should exclude companies that have not undertaken appropriate and effective human rights due diligence from all public sector contracts'.⁶⁹ Similarly, corporations which do not cooperate with state-based grievance mechanisms or which fail to respond to allegations raised by affected individuals and communities could be temporarily blacklisted from receiving state benefits.

Transparency regulations aimed at disclosure of non-financial information by corporations could enable various stakeholders to exert influence on corporate decisions having an impact on human rights. Consumers have a right to know about the safety gear and training provided to workers manufacturing their electronic gadgets, or the wage a worker received for stitching a pair of trousers sold for more than USD100. Investors should also know what happened to indigenous peoples displaced by a dam built from their money or whether their money is being used to detain asylum seekers (including small children).

3.5 Cost Allocation of Business Respect for Human Rights

More clarity is required about allocation of costs related to corporate compliance with human rights. Despite all the noise around the business case, the reality is that respecting human rights is a costly business. Conducting human rights due diligence, providing workers safe working conditions, offering maternity benefits to women employees, respecting indigenous people's right to 'free, prior and informed consent' and ensuring that effluents from factories do not pollute rivers – doing all this will cost money.

Who should bear the cost of taking steps to make the current business model human rights compatible? In my view, the cost of corporate respect for human rights should be borne by both internal and external actors. From an internal perspective, corporations should internalise the cost of 'knowing and showing' how they are respecting human rights into their operational expenses. Moreover, while conducting a cost-benefit analysis of competing options or projects, corporations should include in their assessment the cost of adverse human rights impacts on society. Therefore, a project which is economically cheaper from a corporate perspective might be expensive from a sustainability perspective.

Equally important will be for external stakeholders of corporations to bear the cost of businesses respecting human rights. For example, consumers should be willing to pay more for eating seafood not processed by workers operating in conditions approximating slavery. Similarly, investors should be ready to forego short-term or fast returns on their investment.

⁶⁹ House of Lords House of Commons Joint Committee on Human Rights, *Human Rights and Business 2017: Promoting Responsibility and Ensuring Accountability* (April 2017), 36, <https://publications.parliament.uk/pa/jt201617/jtselect/jtrights/443/443.pdf> (accessed 18 December 2019).

4. WHAT THE RESEARCH HANDBOOK COVERS

This section provides a brief overview of the main themes explored in this Research Handbook and the contributions made in different chapters.

Part I of the Handbook sets the scene by sketching a history and evolution of BHR. After this introductory chapter, Wettstein offers critical insights on the complex relationship between CSR and BHR. After outlining the main conceptual and practical differences between BHR and CSR, he suggests that the evolution of BHR could be seen as a critique of CSR. Amid uncertainty as to how the relation between CSR and BHR will unfold in future, Wettstein discusses three potential scenarios: (i) coexistence of CSR and BHR; (ii) co-optation of BHR by CSR frameworks; and (iii) replacement of CSR by BHR.

In the BHR era described above, the potential and limits of two regulatory tools have attracted most significant attention: the ATS and the UNGPs. Stephens takes us through the rise and fall of the ATS in the context of not merely well-known decisions under the ATS but also other non-ATS decisions (such as those related to pleadings and jurisdiction) and the wider international relations context. She highlights that although ATS litigation played an important role in the movement towards corporate human rights accountability, only a handful of cases are likely to survive in future, under the new interpretation of the statute adopted by the US Supreme Court in *Kiobel* and *Jesner*.

In his chapter, Ruggie explains not only the social construction of the UNGPs, but also the context within which he led the project of developing the UNGPs during 2005–11. In particular, he highlights some systemic factors that shaped the global economy and polity from the 1990s into the mid-2000s, the peak of the most recent wave of globalisation, and then compares two UN initiatives proposed to better protect human rights from corporate harm: the UN Global Compact of 2000 and the 2003 Draft Norms. Such a contextual analysis allows him to showcase what the UNGPs have been able to achieve so far in the BHR field and why.

Part II of the Handbook focuses on corporate human rights due diligence under the UNGPs and beyond. Taylor explores human rights due diligence in the overall normative framework set out by the UNGPs, including key concepts central to human rights due diligence such as the notions of respect, responsibility, risk and leverage. He also considers due diligence as a regulatory technique used in policy and law to encourage business respect for human rights in the context of transnational systems of production. The chapter engages with some of the critiques of human rights due diligence and suggests that the ways in which human rights due diligence will be regulated and enforced will display significant levels of diversity, though the core elements of due diligence are likely to remain at the heart of developments in the BHR field.

The chapter by Nolan and Frishling examines the use of human rights due diligence as a tool to address human rights abuses in the supply chain. After highlighting some of the emerging best practice standards, the two authors turn their attention to examining how human rights due diligence is being implemented and in turn exposing the gap between theory and practice. Nolan and Frishling argue that the continued reliance on social auditing as a primary tool for conducting due diligence is not likely to lead to better outcomes for the rights of supply chain workers and that more comprehensive and more legally-binding forms of human rights due diligence will be essential.

Rahim in his chapter discusses challenges in applying ILO's 'decent work' framework in the ready-made garment industry in Bangladesh. He highlights ongoing battles around wages, freedom of association and occupational health and safety, drawing a general conclusion that

progress has been slow to come about and sometimes quick to recede. Rahim recommends adopting a ‘new governance’ approach in which key stakeholders (both public and private) rely on each other and work together on strategies designed to reach the common goal of securing decent work.

In the final chapter in this Part on corporate human rights due diligence, Santos and Seck examine the use of risk assessment tools by the extractive industry and the relationship between environmental and social risk assessment and human rights due diligence tools. They consider the limitations of current practices, including the overly business-centric nature of human rights due diligence, as well as some lacunas in due diligence concerning environmental rights, gender equality and climate change.

Part III of the Handbook explores the role of states in protecting against human rights abuses by businesses, and in particular the types of regulatory tools and strategies that they could employ to discharge their obligation. Martin analyses the increased use of disclosure-based regulation being invoked in the US as well as in selected European jurisdictions such as the United Kingdom and France. Although this trend is likely to continue, she argues that the disclosure regime is at best a temporary stopgap measure that can lead to limited corporate change in the BHR field; at worst, disclosure may be used by corporations as a way to obtain a reputational advantage without actually making substantive changes.

Cassel suggests that one way to close an inherent ‘governance gap’ between territorially bounded states and transnational business is for states to exercise jurisdiction over and to regulate transnational business activities. He provides an overview of contemporary international legal norms and notes a burgeoning trend towards extraterritoriality: states are sometimes obligated to regulate extraterritorially, more often encouraged to do so, and very frequently permitted to do so. Cassel argues that if human rights are to be shielded from infringement by transnational business, present trends towards greater embrace by states of their transnational jurisdiction and responsibilities must continue.

Backer looks at the issue of state owned enterprises (SOE), through which the state engages in economic activities both as regulator and as producer. SOEs present regulatory difficulties due to their straddling of the barrier between state and business, particularly in light of the distinctions proposed by the UNGPs. This is further compounded by conceptual issues around what constitutes a SOE. Backer explores where and how SOEs fit into evolving BHR frameworks, and considers challenges for SOE accountability under these standards. Baker asserts that SOEs remain under-theorised within BHR literature – they represent something of a blind-spot within current BHR practice. He offers some recommendations as a way forward.

O’Brien and Martin-Ortega discuss the potential of public procurement to impact positively on human rights locally and across transnational supply chains. They argue that although the ‘state duty to protect’ under Pillar I of the UNGPs calls for states to fulfil their human rights obligations as an economic actor, including in the area of public procurement, relatively little attention to date has been paid by both states and BHR scholars to government purchasing. Drawing on examples from a range of jurisdictions, O’Brien and Martin-Ortega show how integrating human rights into public buying can impact positively on human rights of supply chain workers while also being financially and practically viable for purchasing institutions.

Part IV of the Handbook looks at the intersection of human rights (and international human rights law) with specialised areas of trade, investment and finance. Krajewski provides an overview of the relationship between trade agreements and human rights and addresses the question how potential conflicts between trade agreements and human rights agreements can

be addressed under public international law. He discusses two tools that have been employed to mitigate adverse effects of trade agreements on human rights: human rights clauses in trade agreements, and human rights impact assessments of trade agreements. Krajewski also analyses other reform options which could mitigate negative effects of trade agreements on human rights, that is, reform of new trade agreements, and the role of the proposed legally binding BHR instrument.

In their chapter, Coleman, Cordes and Johnson provide an overview of the interaction between international human rights law and the investment treaty regime. They highlight the challenges that arise from tension between international human rights law and international investment law, including the impact of the investment regime on the ability of host states to regulate and on access to justice for investment-affected rights holders. The authors also explore how human rights issues have been addressed by the investment regime to date – both recent developments in treaty drafting practice and responses to human rights argumentation by investment tribunals – and outline options for further reform of the international investment regime.

Bradlow and Fourie consider the primary sources of human rights obligations and responsibilities of multilateral development banks (MDBs), and then analyse selected independent accountability mechanism cases to draw some lessons about how the MDBs manage adverse human rights impacts of their operations. They argue that the MDB's record in dealing with the adverse human rights impacts of their projects is mixed and that there are significant costs, both to MDBs and their borrowers, of failing to adequately address these impacts. Since the MDBs' projects are similar to those undertaken by private financial institutions and contractors, understanding how the MDBs deal with human rights issues related to their operations can help deepen our understanding of the human rights responsibilities of these other actors.

Part VI of the Handbook gives dedicated attention to business-related heightened human rights risks faced by certain groups of people or arising because of the operating context. Černič investigates business responsibilities and obligations related to indigenous peoples' human rights. Indigenous peoples are particularly vulnerable to issues related to land and correlated environmental and economic, social and cultural rights. Against this background, Černič examines existing and emerging corporate obligations regarding indigenous peoples' human rights and explores legal and quasi-legal avenues for their enforcement.

Kolieb studies the somewhat neglected BHR area of children's rights in relation to business. After providing a historical overview of international children's rights (including under the widely-ratified Convention on the Rights of the Child), he assesses the treatment of children's rights by key BHR processes and instruments, including the UNGPs, and highlights some key child-rights issues impacted by business activities. The chapter also offers suggestions on how to mainstream children's rights into the BHR discourse and continuously improve businesses' respect and advancement of children's rights.

Van Ho analyses the business responsibility to respect human rights in 'complex environments', that is, in situations where there are widespread or systematic gross violations of international human rights law and serious violations of international humanitarian law. She examines the UNGP and scholarship on complex environments and then analyses pertinent findings from mechanisms engaged with 'transitional justice'. Van Ho argues that lessons from 'transitional justice' mechanisms suggest that the overarching context of a complex environment may make it impossible for a business to comply with its responsibility to respect human rights, in that 'mere presence' on a territory can, in fact, mean the said business con-

tributing to widespread and systematic violations of international human rights law and international humanitarian law. In such circumstances, the only means to realise the responsibility to respect is to leave the context, but local companies may not have this luxury. She grapples with this dilemma and calls for greater engagement of BHR discussions with transitional justice experiences.

Part VI of the Handbook focuses its attention on exploring opportunities and challenges concerning access to remedy and corporate accountability for business-related human rights abuses. Jägers looks at the role of information in ensuring access to effective remedies. She argues that the right to information can be considered a ‘gateway-right’: the lack of information on complex and opaque operational structures can make it difficult for victims of corporate human rights abuse to start legal proceedings against a multinational corporation. Against this background, Jägers explores the contours of the right to information under international human rights law and proposes a way forward to address the information disparities that hinder access to effective remedy in the BHR field.

Birchall reviews the role of CSOs and human rights defenders in ensuring corporate accountability. He discusses a wide variety of tactics used by CSOs (from engagement in multi-stakeholder regulation and intra-corporate consultancy and collaboration, through to exposing wrongdoing and organising protests) as well as some of the tactics used by businesses to weaken civil society participation. Birchall concludes with a discussion of the rationales and possibilities for more positive engagement by businesses in protecting the protectors of human rights as a matter of urgency.

Mares grapples with a critical question in his chapter: whether and under what conditions a parent company might be held accountable for human rights abuses in their global operations, including harms inflicted by its subsidiaries’ operations. He reviews the current situation as well as recent developments in terms of both law (company law, tort law, and other regulatory areas) and policy (soft law and national action plans on BHR). Mares argues that the emerging picture is one of stability: the resilience of the principle of legal separation over almost two centuries is remarkable, despite some notable developments. He examines options for regulatory reform but also puts them into perspective by explaining the resilience of the principle and its deep ramifications.

Van Huijstee and Wilde-Ramsing assess whether and to what extent non-judicial grievance mechanisms (NJGMs) can, should and do provide effective access to remedy for victims of business-related human rights abuses. After analysing the existing body of literature on NJGMs and mapping out the patchwork of NJGMs that currently exists, they discuss the available data on the actual performance of NJGMs and conclude that the performance of NJGMs in providing remedy is poor. Van Huijstee and Wilde-Ramsing recommend additional research into the effectiveness of NJGMs and suggest that the design of NJGMs needs to be improved so that they are better equipped to provide effective access to remedy for victims of business-related human rights abuse.

Cantú Rivera analyses the role of National Human Rights Institutions (NHRIs), including in providing adequate access to non-judicial remedy for victims, in the context of the international human right framework. He looks at a few case studies that reveal both possibilities and limits of NHRIs in fulfilling this expectation. Cantú Rivera concludes by considering the role given to NHRIs in the optional protocol to the proposed legally binding BHR instrument.

Kyriakakis considers the value of international criminal law for victims’ right to access effective remedies in cases involving atrocity, despite limits to the extent to which interna-

tional criminal law mechanisms can redress corporate human rights violation. She analyses what Pillar III of the UNGPs expects from criminal law in relation to access to remedy. Kyriakakis then explores the potential of international criminal law as a victim redress tool, taking into account recent developments within the field towards a more victim-centric approach, including the growing emphasis on victim reparations within international criminal institutions. She argues that international criminal law is a necessary, if only partial, part of the story for pursuing Pillar III objectives.

5. WHAT THE RESEARCH HANDBOOK DOES NOT COVER

In this final section, let me briefly outline what this Research Handbook does not cover. Considering the ever-expanding scope of BHR, there is hardly anything which does not have a connection to BHR – from rights to remedies, from trade to tax evasion, from pollution to privacy, from investment to artificial intelligence, from subsidiaries to supply chains, from disclosure to due diligence, from conflicts to climate change, from civil society to children, from public procurement to pollution, from finance to fishing, from gender to genetically-modified crops, from slavery to sustainability, from internet to indigenous peoples, from media to migration, from poverty to prisons, and from development to defenders. Hence, it was almost impossible for this Handbook (or any Handbook for that matter) to capture everything, or even all the key BHR topics.

There are certain issues which the editors had envisaged covering in the Handbook, but for one reason or another this did not happen. In terms of regulatory initiatives attempted, tried or tested so far, the Handbook focuses on two specifically: the ATS and the UNGPs. However, there is an ever-growing regulatory forest that deserves critical analysis. Apart from reviewing the contribution made by initiatives which could not be adopted (UN Code of Conduct for Transnational Corporations and the Draft Norms), it is desirable to assess the potential as well as the limits of the Global Compact, the OECD Guidelines on Multinational Enterprises and the ILO Tripartite Declaration in the post-UNGPs period. The same could be said about the proposed treaty,⁷⁰ mandatory human rights due legislation emerging in Europe,⁷¹ and numerous multi-stakeholder initiatives in the BHR field.⁷²

Readers of the Handbook can take solace in the fact that hardly any of the regulatory initiatives not discussed here have been able to trigger significant changes in how corporations are run. There are isolated patches of success in various regulatory initiatives being able to ensure that businesses respect human rights. Such patches are rarer in the domain of corporate accountability for human rights abuses: even promising court judgments in cases such as *Vedanta v Lungowe* and *Nevsun v Araya* do not automatically provide remedy to the affected

⁷⁰ See 'Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights', www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Pages/IGWGOnTNC.aspx (last accessed 5 October 2019).

⁷¹ See BHRRC, 'Mandatory Due Diligence', www.business-humanrights.org/en/mandatory-due-diligence (last accessed 5 October 2019).

⁷² See MSI Database, <https://msi-database.org/database> (last accessed 5 October 2019).

individuals and communities;⁷³ rather, they merely open a window for them to take a shot at seeking remedies.

Rightsholders are not a homogenous group and business activities affect – both positively and negatively – individuals and communities differently. Out of many such situations,⁷⁴ three concrete examples can be offered to illustrate this point: the impacts on indigenous peoples, children and women. As many natural resources are found in areas which have been inhabited by indigenous peoples for centuries, the extraction of these resources without their ‘free, prior and informed consent’ results in benefits for others but mostly harm – often irreversible – to indigenous peoples. Similarly, states as well as companies have not yet given serious thought to differentiated impacts on women and children.⁷⁵ For example, despite knowing that more than 70 per cent of modern slavery victims are women and girls, anti-slavery legislation enacted by the UK and Australia does not take any cognisance of this important fact.⁷⁶

This Handbook grapples with the unique situation of indigenous peoples and children. I was hoping to write a chapter on the gender dimensions of BHR, but could not do so given other commitments. However, I would strongly encourage readers to read the UN Working Group on Business and Human Rights’ report that I wrote to expound the gender dimensions of the UNGPs.⁷⁷ The report not only develops a three-step gender framework,⁷⁸ but also provides specific guidance for all 31 Principles of the UNGPs. I very much hope that this report will play a role in addressing the current gender-neutral approach in the BHR field.

While we have not been able to resolve major challenges in the BHR field that have been with us for decades (for example, the liability of a parent company for its subsidiary’s conduct, workers’ exploitation in supply chains, or an efficient system of providing effective remedies, especially in transnational cases), newer challenges are emerging which deserve closer scholarly attention.⁷⁹ The role of social media companies in interfering with democratic processes, spreading fake news, triggering serious crimes and misappropriating users’ data is a case in point. At the same time, how new technologies that underpin the Fourth Industrial Revolution – such as automation, artificial intelligence and biotechnology – will affect human rights adversely and what businesses should do to avert such effects are yet to be understood fully.

⁷³ [2019] UKSC 20; 2020 SCC 5.

⁷⁴ The impact of business activities is different and often disproportionate, for example, for migrants, internally displaced people, people with disabilities and persons of different sexual orientation.

⁷⁵ In terms of standards for children, see Committee on the Rights of the Child, ‘General comment No. 16 (2013) on State obligations regarding the impact of the business sector on children’s rights’ CRC/C/GC/16; ‘Children’s Rights and Business Principles’, <https://childrenandbusiness.org/> (last accessed 5 October 2019). For women, see the Women’s Empowerment Principles, www.empowerwomen.org/en/weps/about (last accessed 5 October 2019).

⁷⁶ Surya Deva, ‘Slavery and Gender-Blind Regulatory Response’, Cambridge Core blog (8 March 2019), <http://blog.journals.cambridge.org/2019/03/08/slavery-and-gender-blind-regulatory-responses/> (last accessed 5 October 2019).

⁷⁷ UN Working Group on Business and Human Rights, ‘Gender dimensions of the Guiding Principles on Business and Human Rights’, A/HRC/41/43 (23 May 2019), https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/41/43 (last accessed 5 October 2019).

⁷⁸ The three steps are gender-responsive assessment, gender-transformative measures, and gender-transformative remedies. *Ibid.*, 11.

⁷⁹ See Surya Deva et al, ‘Business and Human Rights Scholarship: Past Trends and Future Directions’ (2019) 4:2 *Business and Human Rights Journal* 201.

Similarly, the jury is still out as to whether existing BHR standards would be able to deal adequately with special aspects concerning climate change. While the human rights connections to climate change are clear and compelling, more clarity is required as to the individual responsibility of each business and what accountability would look like for business enterprises not mitigating adverse impacts on climate. Although this Handbook does not deal with such emerging challenges in the BHR field, I hope that other such volumes will fill this gap in the future.