Recently, we have seen signs of cracks in this consensus. A nascent effort by some countries and organizations to push for a treaty covering transnational companies and human rights is misplaced, and risks inhibiting progress.

Enacting an international treaty is not realistic due to the enormous complexities that would come with trying to create one framework to govern multiple countries with different legal systems, and different rules governing human rights issues and corporate behavior. It also likely would deny companies the ability to tailor policies to work inside a complex, global business operation. Moreover, there is no evidence to indicate that a new treaty would in any way alter the behavior of countries that already are signatories to a panoply of human rights treaties, yet that fall short in protecting human rights. Making progress now requires pragmatic steps, not another treaty. To that end, we should:

- Expose and educate more companies and their lawyers on the Guiding Principles, using real-world examples;
- Better coordinate the proliferation of overlapping initiatives and programs on business and human rights;
- Devote more focus to governments' duty to protect—always bearing in mind that corporations can complement, but never replace, the state's duty.

Moving forward with consensus-based initiatives in this manner may not bring about change as fast as all would like, and it may not always be smooth. But, as Professor Ruggie correctly concluded after years of study and consultations, such an approach is what will move us forward, not backward.

Remarks by Sara L. Seck*

The 2011 UN Guiding Principles on Business and Human Rights rest on three interrelated pillars: the state duty to protect, the corporate responsibility to respect, and access to remedy. Their normative content is described as lying:

> not in the creation of new international law obligations but in elaborating the implications of existing standards and practices for States and businesses; integrating them within a single, logically coherent and comprehensive template; and identifying where the current regime falls short and how it should be improved.[1]

The Guiding Principles thus offer a common ground from which to begin the work of implementation. A key piece of this is better understanding of the relationship between pillars.

Business Responsibility

The corporate responsibility to respect rights is described in the Commentary to Principle 11 as:

> a global standard of expected conduct for all business enterprises wherever they operate. It exists independently of States' abilities and/or willingness to fulfil their own human rights obligations, and does not diminish those obligations. And it exists over and above compliance with national laws and regulations protecting human rights.

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[1] Rep. of the Special Representative of the Secretary-General on the Issues of Human Rights and Transnat'l Corp. and Other Bus. Enter., *Guiding Principles on Business and Human Rights: Implementing the United Nations ''Protect, Respect and Remedy'' Framework*, at 5 (para. 14), UNHRC, 17th Sess., UN. Doc. A/HRC/17/31 (Mar. 21, 2011) (by John Ruggie).

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According to Principle 12, businesses are to respect all ''internationally recognized human rights''—in short, the International Bill of Rights (the Universal Declaration on Human Rights, the ICCPR, and IECESR) as well as the ILO's Declaration on Fundamental Principles and Rights at Work. Other rights may be implicated depending on the industry and country context, including those of indigenous peoples, the environment, women, and children. Recent reports by James Anaya in his capacity as Special Rapporteur on the rights of indigenous peoples are instructive both for their elaboration of the most vulnerable rights in the extractive industry context, and of the relationship between the state duty to protect and the business responsibility to respect.[2]

Some scholars and civil society groups have criticized the responsibility to respect for not reflecting the direct obligations of businesses under international human rights law, and for limiting the responsibility of businesses to only ''respect'' of rights. Without wading into these debates, the key is that the responsibility to respect exists irrespective of whether or not the host state is in compliance with its own obligations. As such, lawyers should be aware of the need to advise businesses of the existence of a layer of responsibility beyond pure host state domestic legal compliance.

The Commentary to Principle 17 notes that while human rights due diligence might reduce the risk of legal claims, it cannot be assumed to ''automatically and fully absolve'' a business ''from liability for causing or contributing to human rights abuses.'' Principle 23 suggests that compliance with the responsibility to respect should be treated as a legal compliance issue, particularly with regard to gross human rights abuses. This layer of ''international corporate social responsibility (CSR) law'' need not be understood as ''international law'' or even ''law'' for it to be meaningful; it could be seen as strategic business advice designed to secure and retain a social license to operate so as to avoid costly future problems for the business and investors, while—importantly—preventing rights violations. The extensive costs of social and environmental conflict in the resource extraction context have been well documented.[3] Under the Guiding Principles, understanding these risks from the perspective of the rights holder is vital.

In the resource extraction context, indigenous and community environmental rights including the right to water are often the source of local conflict and the suppression of environmental human rights defenders. With oil and gas development, local opposition may be supplemented by global concern over environmental rights violations stemming from climate harms. Procedural environmental rights are often identified as encompassing rights to information, to participate in decision-making and to access justice; including indigenous rights, these all may be articulated separately or together by industry guidance instruments of international CSR law.[4]

Compliance with the responsibility to respect might create conflict with host state law. However, for there to be a true conflict where compliance leads to a violation of host state law, the host state law would have to expressly mandate that business violate human rights. This undoubtedly arises in some contexts where states are intentionally violating rights themselves, most often, but not always, in conflict-affected areas. Such a situation should

[2] Rep. of the Special Rapporteur on the Rights of Indigenous Peoples, *Extractive Industries and Indigenous Peoples,* UNHRC, 24th Sess., UN Doc. A/HRC/21/41 (July 1, 2013) (by James Anaya).

[3] Daniel M. Franks et al., *Conflict Translates Environmental and Social Risk into Business Costs*, PROC. NAT'L ACAD. SCI. U.S.A. (2014), http://www.pnas.org/content/early/2014/05/08/1405135111.full.pdf+html.

[4] *See, e.g.,* UN Global Compact, *A Business Reference Guide: U. N. Declaration on the Rights of Indigenous Peoples*, (Dec. 2013), http://www.unglobalcompact.org/docs/issues_doc/human_rights/IndigenousPeoples/BusinessGuide.pdf.

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give business pause as to whether it is possible to operate in compliance with the spirit of the responsibility to respect. Most often, however, it is not a question of conflict, but rather of enabling rights respect in states lacking either governance capacity or the will to meet their own duty to protect.

State Duty

The state duty to protect is derived from existing international human rights law. It is described in foundational Principle 1:

> 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.

Principle 4 and related Commentary note that states should take additional steps to protect human rights when business enterprises are owned or controlled, or substantially supported by the state. Moreover, state-owned enterprises (SOEs) have an independent responsibility to respect rights. Yet it is often said that in practice few SOEs in the extractive industry comply with this responsibility. Nor do states easily enact legislation to make state support of transnational business operations conditional upon compliance with international CSR standards, due in part to fears of competitive disadvantage.[5]

A highly contested aspect of the state duty is its jurisdictional scope. According to Principle 2, ''States should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations.'' The Commentary identifies a lack of state practice implementing this duty despite strong policy reasons to do so. It is crucial to distinguish between the jurisdictional rules of public international law which permit greater state regulation and adjudication than is currently evident in state practice, and claims by international human rights lawyers that states are not only permitted to unilaterally regulate and adjudicate transnational corporate conduct, but are required to do so, particularly with regard to economic, social and cultural rights.[6] Whatever the truth, there is little evidence of state practice to date, with the exception of contexts in which a treaty exists, such as the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. Yet multilateral agreement does not emerge from nowhere; rather, unilateral state action often leads the way to global consensus, followed years later by implementation and domestic enforcement.[7]

In the extractive industries context, there is little evidence of state leadership, with the possible exception of attempts to require transparency of payments and to address the issue of conflict minerals, both challenged by some industry players in U.S. courts.[8] An attempt to legislate that Canadian extractive companies operating internationally and supported by the Canadian government comply with international CSR standards was defeated by industry—and government—backlash.[9]

[5] Sara L. Seck, *Canadian Mining Internationally and the UN Guiding Principles for Business and Human Rights*, 49 Can. Y.B. Int'l L. 51, 66–75 (2011) (discussing Canadian experience with Bill C-300).

[6] *See* ETO Consortium, http://www.etoconsortium.org/ (last visited May 15, 2014).

[7] Sara L. Seck, *Unilateral Home State Regulation: Imperialism or Tool for Subaltern Resistance?*, 46 Osgoode Hall L.J. 565 (2008).

[8] *See Dodd-Frank*, Revenue Watch Institute, http://www.revenuewatch.org/issues/dodd-frank (last visited May 15, 2014); Andrew Zajac, *SEC Conflict Minerals Rule Violates Freedom of Speech*, Fin. Post, Apr. 15, 2014, http://business.financialpost.com/2014/04/15/sec-conflict-mineral-rule-violates-freedom-of-speech-u-s-court-says/.

[9] Seck, *supra* note 5.

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It is not enough for businesses to claim that states must do more to protect rights. Business human rights policies must clearly articulate that the responsibility to respect rights includes the responsibility not to undermine the state duty to protect rights. And this responsibility must extend to access to state-based judicial remedy.

Access to Remedy: A Treaty?

According to Guiding Principle 25:

> As part of their duty to protect against business-related human rights abuse, States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy.

Principle 26 builds on the need for states to ensure the effectiveness of judicial mechanisms. Subsequent principles elaborate upon a role for non-judicial state-based and non-state-based grievance mechanisms, including company-level.

The U.S. Alien Tort Statute, considered an important tool for accessing transnational judicial remedy for egregious human rights violations, was recently curtailed in a U.S. Supreme Court ruling. Many amicus curiae briefs were submitted, including by lawyers representing businesses.[10] While some tort actions have succeeded or at least passed preliminary stages (such as the Canadian *Hudbay Minerals* case), the hurdles for accessing transnational judicial remedy remain impossibly high. In no case is this more clear than the *Chevron/Ecuador* dispute. The recent U.S. lower court's decision that finds the plaintiffs' attorneys guilty of fraud in procuring a judgment against Chevron from Ecuadorean courts does nothing meaningful to further resolution of the merits of the twenty-plus-year-old environmental pollution claims. These remain sidelined in what was described in an earlier ASIL *Proceedings* as ''a paradigm of complexity.''[11]

In frustration over the seeming inability of plaintiffs to access legal remedy—a forum willing and able to hear the substantive merits of a claim coupled with a forum willing and able to enforce a judgment—several states led by Ecuador and numerous civil society groups are pushing for the negotiation of a binding business and human rights treaty. This should not be surprising when attempts to use state law either to prevent or remedy harm are confronted by the power of industry lawyering. Whether legislation or lawsuit, business lawyers play a key role in arguments that courts and legislatures are overstepping their bounds, whether jurisdictionally acting ''extraterritorially'' (the ''e-word''), or otherwise undermining the ''business of business.''

To close the ''governance gaps of globalization'' will require implementation of the business responsibility to respect rights so as not to undermine the work of state legislatures and courts. The first step must be for corporate counsel and business law firms to grapple with how the business responsibility to respect rights interacts with their own professional responsibilities and ethical duties as lawyers. It may very well be that supporting the negotiation of a binding multilateral treaty—perhaps modeled in part on a civil liability convention such as that governing oil pollution at sea—would be in the best long-term interest of clients who seek both certainty and a level playing-field, if not justice.

[10] *See* amicus briefs available at SCOTUSblog, http://www.scotusblog.com/case-files/cases/kiobel-v-royal-dutch-petroleum/ (last visited May 15, 2014); *see* also John Ruggie, *Kiobel and Corporate Social Responsibility* (Sept. 4, 2012), http://www.hks.harvard.edu/var/ezp_site/storage/fckeditor/file/KIOBEL%20AND%20CORPORATE%20SOCIAL%20RESPONSIBILITY(1).pdf.

[11] *The Chevron-Ecuador Dispute: A Paradigm of Complexity*, 106 ASIL Proc. 415–28 (2012).

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