

Human Rights, Incorporated? Business & Human Rights in an Age of Neoliberalism

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Abstract

How can we understand the turn toward 'business and human rights' at the start of the new millennium? Why did this field of academic inquiry, policy development and legal practice emerge in the aftermath of the global financial crisis in 2008? And how might the field of business and human rights change the ways in which international lawyers theorize and practice international human rights law in the twenty-first century? These are the three central research questions that this thesis asks and seeks to answer. In so doing it provides a descriptive analytical critique of the emergence of 'business and human rights'.

Drawing on a close reading of United Nations archival records from the past forty years, the thesis explains the arrival of the field of 'business and human rights' through ongoing failed attempts by the Third World and its allies to regulate the conduct of transnational corporations. It situates its emergence in a series of struggles between state representatives, civil servants, business and civil society to reimagine the international economic order anew. The thesis then explores why those attempts fell short, what this might tell us about the primary *modus operandi* of the field as it is emerging today, and how it might still be imagined differently.

This thesis argues that the concept of 'embedded pragmatism' can help explain both the emergence of the field of business and human rights and its central methods and dynamics. 'Embedded pragmatism' refers to a mode of legal reasoning utilized by different actors to regulate the conduct of transnational corporations in the societies in which they operate. The descriptive move of embedded pragmatism collapses the distinction between legal (mandatory/state-regulating) and non-legal (voluntary/self-regulating) obligations. The normative move claims that this is of benefit to those most vulnerable to human rights abuse. By excavating the recent past and interrogating the basis upon which business and human rights has emerged, the thesis questions whether this collapse in distinction really *is* of benefit to the poor, the disenfranchised and the marginalized, or whether it instead gives rise to a technocratic form of human rights managerialism, and if so, what might be done about it.

The thesis is written at a time when increasing anxieties about our era of unrivalled capitalism have manifested within international legal scholarship. This has included scholars questioning the ontogenesis of international investment law since at least the 1970s and its relationship to the ongoing immiseration of many in the Third World (including the Third World which has manifested in the First). These anxieties are accompanied by a growing body of scholarship in human rights historiography assessing the relationship between the rise of human rights and the ascendance of neoliberalism since the 1970s. Although both bodies of scholarship touch peripherally on business and human rights, neither has considered its emergence as a significant area of research

inquiry. This thesis provides a timely intervention and corrective, first by giving an account of the emergence of the field and then by diagnosing why it operates as it does and positioning it within this wider frame. It argues that embedded pragmatism creates a dynamic in which managerialism is prioritized, but that the field can still be imagined differently.

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List of Acronyms

BHR Field	Field of Business & Human Rights
CESCR	Committee on Economic, Social and Cultural Rights
Code or Code of Conduct	The United Nations Code of Conduct on Transnational Corporations
CHR	Commission on Human Rights
Draft Norms or Norms	Draft Norms on the Responsibilities for Transnational Corporations and Other Business Enterprises with Regard to Human Rights
ECOSOC	Economic and Social Council
ESR	Economic and Social Rights
ESCR	Economic, Social and Cultural Rights
GPD	Global Public Domain
G-77	Group of 77 nations
HRIA	Human Rights Impact Assessment
HRC	Human rights Council
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
IHRL	International Human Rights Law
IIL	International Investment Law
MNE	Multinational Enterprise
NIEO	New International Economic Order
PSNR	Permanent Sovereignty over Natural Resources
SCHR	Sub-Commission on Human Rights
SRSG	Special Representative to the Secretary General
TNC(s)	Transnational Corporation(s)
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
UNCTNC	United Nations Commission on Transnational Corporations
UNGA	United Nations General Assembly
UNGC	United Nations Global Compact
UNGP Framework	The 'Protect, Respect and Remedy Framework' and the United Nations Guiding Principles on Business & Human Rights
UNGP(s)	UN Guiding Principle(s)
UK	United Kingdom
U.S.	United States of America
USSR	Union of Soviet Socialist Republics

Chapter 1: Human Rights, Incorporated? Business & Human Rights in an Age of Neoliberalism

'My life was a 'world' life – I lived the life of the human world...My work is for Asia, for Africa, for the new peoples.'

- Karl Polanyi, Letter to Be de Waard, 6 January, 1958¹

1.1 A short introduction to the intellectual puzzle of this thesis

How can we understand the turn toward 'business and human rights' at the start of the new millennium? Why did this field of academic inquiry,² policy development³ and legal practice emerge in the aftermath of the global financial crisis in 2008?⁴ And how might the field of business and human rights change how international lawyers theorize and practice international human rights law in the twenty-first century?

These are the three central research questions that I seek to answer in this thesis. In so doing, I provide a descriptive analytical critique of the emergence of 'business and human rights' as a social universe.⁵ I situate this emergence within 40 years of struggle at the United Nations ('UN'), during which groups of people sought to achieve consensus on how to regulate the conduct of the transnational corporation ('TNC') as a matter of international law.⁶

¹Cited in Karl Polanyi, *The Great Transformation* [1944] (Beacon Press, 2001) at xxi ['Polanyi (1944)'].

²See: Business and Human Rights Journal, which published its first volume with Cambridge University Press in 2016. Available online at: <https://www.cambridge.org/core/journals/business-and-human-rights-journal> [Accessed 04/05/2019]. [Hereafter, all references to websites are references to those which have been accessed as at this date].

³UNCHR, A/HRC/8/5 'Protect, Respect, Remedy: A Framework for Business & Human Rights' (7 April 2008) and A/HRC/17/31 'Guiding Principles on Business & Human Rights: Implementing the "Protect, Respect and Remedy" Framework' (21 Mar 2011) [each, a 'UNGP' and together, 'UNGPs']. [together, 'The UNGP Framework']. See also Chapters 2 and 5.

⁴Pierre Bourdieu (1987) 'The Force of Law: Toward a Sociology of the Juridical Field' 38(5) *The Hastings Law Journal* 814 [Bourdieu (1987)]. See also B.S. Chimni, *International Law and World Order: A Critique of Contemporary Approaches* (Cambridge University Press, 2018), 9-10 [Chimni (2018)].

⁵Bourdieu (1987), 816.

⁶These 'people' can invariably be described as: state actors, non-state actors, representatives of business associations, civil society representatives, social movements, trade unionists, Groups of Eminent Persons, Working Groups, special representatives (to the Secretary-General), special rapporteurs to the Commission on Human Rights (pre-2005) / Human Rights Council (post-2005), and international civil servants, amongst others. Throughout this thesis, I attempt to remain faithful to the archival record in characterizing who is making a claim and for what purpose. I have refrained from utilizing the word 'experts' because this is not always how the reports I have analyzed define the parties submitting the reports or speaking during proceedings. However, this term is perhaps the most accurate phrase for who (or what) has been my object of study. In this respect, see in particular, David Kennedy, *A World of Struggle: How Power, Law and Expertise Shape Global Political Economy* (Princeton University Press, 2016) [Kennedy (2016)].

This thesis is written at a time when international legal scholars have expressed increasing anxieties about our 'era of unrivalled capitalism'⁷. This has included scholars questioning the ontogenesis of international investment law since at least the 1970s and its relationship to the ongoing immiseration of many in the Third World (including the Third World which has manifested in the First).⁸ International legal scholars' anxieties are accompanied by a growing body of scholarship in human rights historiography assessing the relationship between the rise of human rights and the ascendance of neoliberalism since the 1970s.⁹ Although both bodies of scholarship touch peripherally on business and human rights, to date, neither has considered its emergence as a significant area of research inquiry.¹⁰

Paradoxically, the majority of scholars writing from within the field of business and human rights have paid scant attention to its recent history and relationship to growing inequality.¹¹ Most have preferred, instead, to focus on improving the technologies and methodologies that will allow business and human rights to flourish in the twenty-first century – both as an area of practice and in order to bring justice to the victims of human

⁷Susan Marks, 'Introduction' in Susan Marks (ed) *International Law on the Left: Re-examining Marxist Legacies* (Cambridge University Press, 2008), 1. See for example, Manfred Novak, *Human Rights or Global Capitalism: The Limits of Privatization* (University of Pennsylvania Press, 2018); Antonio Cassese (ed) *Realizing Utopia: The Future of International Law* (Cambridge University Press, 2012); Frédéric Mégret, 'The Anxieties of International Criminal Justice' (2016) 29 *Leiden Journal of International Law* 197.

⁸See in particular Muthucumaraswamy Sornarajah, *Resistance and Change in the International Law on Foreign Investment* (CUP 2015); John Linarelli, Margot E. Salomon, and Muthucumaraswamy Sornarajah, *The Misery of International Law: Confrontations with Injustice in the Global Economy*, (OUP 2018). See also, Chimni (2018).

⁹Samuel Moyn, *Not Enough: Human Rights in an Unequal World* (Belknap/Harvard University Press 2018) ['Moyn (2018)']; Julia Dehm, 'Highlighting inequalities in the histories of human rights: contestations over justice, needs and rights in the 1970s' (2018) *Leiden Journal of International Law* 871 ['Dehm (2018)']; Julia Dehm, 'A pragmatic compromise between the ideal and the realistic: Debates over Global Justice and Minimum Core Obligations in the 1980s' Forthcoming in Christian Olaf Christianson and Steven L.B. Jensen (eds) *Histories of Global Inequality: New Perspectives* (forthcoming) (Palgrave MacMillan 2019) [Dehm (2019)]; Umut Öszü, 'Neoliberalism and Human Rights: The Brandt Commission' (2018) 81(4) *Law and Contemporary Problems* 139. See also Susan Marks, 'Chapter 10: Four Human Rights Myths' in David Kinley, Wojciech Sadursky and Kevin Walton (eds) *Human Rights: Old Problems, New Challenges* (Edward Elgar, 2013) 217 ['Marks (2013)'].

¹⁰See Markos Karavias, *Corporate Obligations and International Law* (Oxford University Press, 2013), 82-83 [Karavias (2013)]. Note, however forthcoming: Andrew Sanger, *Corporate Liability for Human Rights Abuse: Hybrid Foundations in International and Domestic Law* (Cambridge University Press, 2019). See also Samuel Moyn, 'A powerless companion: Human Rights in the age of neoliberalism' (2014) 77 *Law & Contemporary Problems* 147, 167. [Moyn (2014)].

¹¹Uppendra Baxi, 'Chapter 12: Market Fundamentalisms and Human Rights' in *The Future of Human Rights* (OUP, 3rd Edn, 2008) ['Baxi (2008)'].

rights violations.¹² These scholars have largely eschewed theorizing the field, favouring instead a practitioner-oriented focus on achieving results.¹³

This thesis, therefore, provides a timely intervention and corrective, by weaving together three strands of scholarship that have remained strangely disconnected.¹⁴ The first strand is the work to trace the rise of the TNC in our contemporary legal moment and why this is accompanied by international law's ongoing failure to regulate TNC conduct directly.¹⁵ The second is to consider the claim to human rights' ascendance in our current age of neoliberalism, in light of ongoing critiques of how this ascendance diminishes attempts to decolonize international law and respond to inequality.¹⁶ Finally, the thesis provides a much-needed assessment of how the field of business and human rights delivers on its central claim to bring justice to victims, in light of ongoing struggles about the methods utilized to regulate the conduct of TNCs. At its most basic, this is a question of whether TNCs should be regulated using hard or soft law.¹⁷ However, as will be explained in greater detail throughout this thesis, the question answered here is less about the form of international law takes as it is the modes of legal reasoning utilized to give effect to that form.

By weaving these strands of argument together, I consider the emergence of the field of business and human rights in light of recent critiques about how human rights has

¹²See: César Rodríguez-Garavito (ed.) *Business and human rights: beyond the end of the beginning* (CUP 2017) ['Rodríguez-Garavito (2017)']; Surya Deva and David Bilchitz (eds) *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (CUP 2013) ['Deva/Bilchitz 2013']; Surya Deva and David Bilchitz (eds) *Building a Business & Human Rights Treaty: Context and Contours* (CUP 2017) ['Deva/Bilchitz (2017)']; Nadia Bernaz, *Business & Human Rights: History, Law & Policy – Bridging the Accountability Gap* (Routledge 2016); Dorothee Bauman-Pauly and Justine Nolan (eds) *Business & Human Rights: From Principles to Practice* (Routledge 2016); Jenna Bravo and Karin Martin *The Business and Human Rights Landscape* (CUP 2015); and Mahdev Mohan and Cynthia Morel, *Business & Human Rights in Southeast Asia: Risk and the Regulatory Turn* (Routledge 2014).

¹³See: Daniel Augenstein and Hans Lindahl (eds) 'Global Human Rights Law and the Boundaries of Statehood' (2016) 23(1) *Indiana Journal of Global Legal Studies* (Special Issue) 1 and the contributions to that volume. See also Karin Buhmann, *Power, Procedure, Participation and Legitimacy in Global Sustainability Norms: A Theory of Collaboration* (Routledge, 2017) ['Buhmann (2017)'].

¹⁴On the methodology of weaving, see Gina Heathcote, *Feminist Dialogues on International Law: successes, tensions, futures* (Oxford University Press, 2018) [Heathcote (2018)].

¹⁵See in particular, Sundhya Pahuja and Anna Saunders, 'Rival Worlds and the Place of the Corporation in International Law' in Dann and Jochen von Bernstoff (eds) *Decolonization and the Battle for International Law* (OUP, forthcoming in 2019). [Hereafter, 'Pahuja (2019)']. On the notion of a 'contemporary legal moment' in historiographical terms, see in particular, Duncan Kennedy, 'Three Globalizations of Law and Legal Thought: 1850 – 2000' in David Trubek and Alvaro Santos (eds) *The New Law and Economic Development* (Cambridge University Press, 2006) [Duncan Kennedy (2006)]. See also, Christopher Tomlins, 'The Presence and Absence of the Legal Mind: a comment on Duncan Kennedy's Three Globalizations' (2015) 78 *Law & Contemporary Problems* 1.

¹⁶Joseph Slaughter, 'Hijacking Human Rights: Neoliberalism, the New Historiography and the End of the Third World' (2018) 40 *Human rights Quarterly* 735 [Slaughter 2018] and footnote 10 above.

¹⁷Justine Nolan 'The corporate responsibility to respect human rights: soft law or not law?' in Surya Deva and David Bilchitz (eds) *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge University Press, 2013); Jennifer Zerk, *Multinationals and Corporate Social Responsibility: Limitations and Opportunities in International Law* (CUP 2006) ['Zerk (2006)'].

been incorporated into the so-called 'global political economy' in our current age of neoliberalism. Furthermore, I explain the role that international law and international legal reasoning have played in facilitating the field's inauguration and determining its parameters.

My central argument is that the emergence of business and human rights can be explained using the concept of embedded pragmatism. As further detailed in Section 1.5 below, 'embedded pragmatism' refers to a process by which the UN guides states and business enterprises regarding how to embed 'shared social values', as embodied in international human rights instruments, into the daily operations of corporations. This embedding is undertaken through a pragmatic evaluation about the harms which might attend to rightsholders in particular cases, under specific conditions and in particular time periods. Harm is calculated and evaluated both in terms of the severity and likelihood of the risks posed to rightsholders, as well as to the business itself.

'Embedded pragmatism' explains how the UN Human Rights Council attempts to promote the use of international law to regulate corporate and financial transactions to prevent and remedy human rights abuses committed in global supply chains. When extended beyond the UN's boundaries, it can be used to help explain the emergence of a novel market for virtue in human rights services, which now forms the basis of a new area of transactional legal work. Broadly speaking, this 'market for virtue' comprises a cottage industry in which corporate lawyers, human rights consultants and non-governmental organizations now compete for corporate clients' business, in order to undertake a vast array of risk management enterprises aimed at ensuring that business is able to measure, track, mitigate, and prevent human rights violations from occurring, as well as to establish systems in which victims of human rights violations can obtain remedies where such violations have occurred.¹⁸

Furthermore, this thesis argues that the relationship between human rights, inequality and Third World resistance bears directly upon the struggle to regulate corporate conduct during the period under investigation. The ultimate re-framing 'from regulating corporate conduct' to 'fostering corporate respect for human rights' in the processes analyzed in this thesis can best be understood while remaining cognizant of the dynamics of this external context. By illuminating the underlying reasons why this market for virtue came into existence, I ultimately argue that although more TNCs will engage in enlisting human rights services in years to come, they will not confront the relationality and systematicity of privilege and deprivation which global corporate and financial transactions maintain and perpetuate.¹⁹ This is because, although embedded pragmatism requires lawyers and managers to deliberate over the

¹⁸See in particular Chapter 5 of this thesis, especially pp.177-184.

¹⁹Ibid.

risks associated with the transactions the TNC is undertaking, these risks are only ever assessed in light of the demands of the extant economic order in which the TNC operates.

Before proceeding to explain the overall structure, limitations and contribution of this thesis, several theoretical and methodological clarifications are warranted. I will proceed in three steps. First, I will explain what I mean by the field of business and human rights ('BHR Field') – both what a field is and why 'business and human rights' is constitutive of one. Second, I will explain how international law has defined its encounter with the TNC, problematizing why this affects our understanding of the BHR Field and explaining how this will be treated in the following chapters, utilizing the concept of embedded pragmatism. Finally, I will touch on the primary historiographical debates in human rights which are informing this thesis. In so doing, I will explain how this thesis is in many respects written as a response to these debates while attempting to craft a close reading of specific international legal processes (and hence, a short international legal history) in its own right.²⁰

1.2 The constitution of a field: Business and Human Rights in the twenty-first century

What is meant by 'business and human rights' and how can it be explained as a 'juridical field'?²¹ Why should we conceive of business and human rights this way, and not simply as a novel policy area or international agenda item?²²

'Business and human rights' refers to an area of theory and practice constituted by practitioners and academics whose professional relationships are defined by the end-goal of ensuring that TNCs and other business enterprises respect human rights. In simple terms, 'respect for human rights' is an obligation to do no harm.²³ As a field, 'business and human rights' both inaugurates and configures the harm caused by business and names it as a human rights violation or abuse.²⁴ The extent to which harm is determined to be a human rights harm is partly contingent upon the relevant ethical or political inclinations of

²⁰See *infra*, at 1.6 below, for further description as to what I mean by a 'close reading'.

²¹Bourdieu (1987).

²²I have argued elsewhere that the business and human rights agenda emerged in 1999. This can be distinguished from its constitution as a field, which (as I argue in this thesis) emerges during the period 1972 – 2011. See Michelle Staggs Kelsall, 'From a Stark Utopia to everyday utopias' (2017) 60 *German Yearbook of International Law* 575, 583. In understanding how agendas are formed, I have relied primarily on the work of John W. Kingdon, *Agendas, Alternatives and Public Policies* (Pearson Education, 2nd edn, 1996).

²³See *infra*, Chapter 2, at Section 2.7.

²⁴Bourdieu (1987), 833. On the distinction between human rights abuse and human rights violations, see Andrew Clapham, 'Human Rights Obligations of Non-State Actors: Where are We Now?' in Fannie LaFontaine and François Larocque, *Doing Peace the Rights Way: Essays in Honour of Louise Arbour* (Intersentia, 2018), 11.

the practitioner or academic in question. The BHR Field is the site of contestation between a variety of versions of what harm is and how it should be prevented and remedied.²⁵

What defines those who constitute the BHR Field is their monopoly on the tools necessary for legal construction.²⁶ Practitioners and theoreticians, primarily comprising jurists, have naturalized the vocabulary of 'business and human rights'. They have then created from it a novel area of legal practice and juridical thought over which they claim to have primary control.²⁷ 'Jurists' here is utilized in the broadest sense of the term, to include: academics, policymakers, legislators, international civil servants and experts, human rights advocates, corporate lawyers, international lawyers, in-house legal/legal compliance officers and legal consultants, amongst others. Although the field primarily comprises jurists, it is not exclusively composed as such: business ethicists, management professionals and social scientists, amongst others, also join their ranks.

Although one can undoubtedly claim that the BHR Field had earlier inaugural moments, this thesis takes 16 June 2011 as comprising the constitutional 'big bang' of the business and human rights universe. It was on this day that the UN Human Rights Council ('HRC') unanimously endorsed both the 'UN Guiding Principles on Business & Human Rights' as well as the 'Protect, Respect and Remedy Framework' supporting it (together, the 'UNGP Framework').²⁸ As their primary author and chief protagonist, John Ruggie, has claimed, this marked the first time in the UN's history that states agreed to endorse a normative instrument which they themselves had not negotiated.²⁹ Although some jurists in the BHR Field contest the authority of the UNGP Framework, they undertake this contestation in response to developments arising from the UNGP Framework, rather than as a means of contesting the significance of its emergence.

Similarly, although there is a body of scholarship with much deeper roots in corporate accountability and corporate social responsibility ('CSR') dating back at least as far as the 1930s,³⁰ I argue that the BHR Field can be differentiated from these earlier attempts at regulating the corporation. This is because the UNGP Framework inaugurated an area of policy and practice within international law's institutional life that has created an internally coherent set of concepts and methods delineating it from private ordering (on the one hand) and adherence to municipal law (on the other). Although the BHR Field relies on these other bodies of law and regulation, its institutional moorings in international human rights law ('IHRL') distinguishes it from them. This makes the BHR Field

²⁵Bourdieu (1987).

²⁶Ibid.

²⁷Ibid.

²⁸See UNHRC, Press Release 'New Guiding Principles on Business and Human Rights Endorsed by the Council', 16 June 2011.

²⁹John Ruggie, 'Chapter 2: Hierarchy or Ecosystem? Regulating Human Rights Risks of Multinational Enterprises' in Garavito (2017), 46. ['Ruggie (2017)'].

³⁰Zerk (2006), 15.

'international' in its reach and formally 'universal' in its outlook in a manner that prior attempts to regulate corporate conduct did not achieve.

1.3 International Law's encounter with the transnational corporation

While the thesis argues that the UNGP Framework inaugurates the BHR Field, the central intellectual project is to understand *how* and *why* the BHR Field came into being and why there has been a turn toward business and human rights in the new millennium. In order to answer these questions, the thesis conducts a diagnosis of what epistemological work the UNGP Framework is doing that was not already being done through other attempts to regulate TNCs.³¹

In other words, what is it that the UNGP Framework provides that international law, in other forms, has not? Specifically, what methods or modes of legal reasoning does it attempt to bring into being? Why did state representatives endorse *this* instrument, in *this* form, and not others? What continuities can be found in successive attempts to regulate the TNC as a matter of international law, what discontinuities are present, and where do the points of contestation and struggle lie, vis-à-vis corporate respect for human rights? What might this tell us about the limits and potentialities of the BHR Field *as a field*? And how might the BHR Field be affecting international lawyers' understanding of IHRL, as a result? In answering the questions posed, the thesis considers specifically attempts to regulate the conduct of TNCs at the UN since the 1970s, and the struggles which arose because of these attempts. I explain the choice of periodicity (1970 – 2019) in Section 1.6 below.

The thesis primarily relies on archival sources at the UN to conduct its critique and inquiry. In addition to the UNGP Framework, I consider archival records from the drafting processes for the UN Code of Conduct on Transnational Corporations (the 'Code' or the 'Code of Conduct')³² and the Draft Norms on the Responsibilities for Transnational Corporations and Other Business Enterprises with Regard to Human Rights (the 'Norms').³³ In the final chapter of the thesis I gesture toward an analysis of the Zero Draft of the

³¹See Boaventura de Sousa Santos, *The End of Cognitive Empire: The Coming of Age of Epistemologies of the South* (Duke University press, 2018).

³²Annex VI: Draft United Nations Code of Conduct on Transnational Corporations (as of mid-1989) in Sidney Dell, *The United Nations and International Business* (United Nations Institute for Training and Research (UNITAR) 1990). See also, Code of Conduct on Transnational Corporations (1983) 22 International Law Materials 192.[together, 'Code of Conduct'].

³³ECOSOC, E/CN.4/Sub.2/2003/12(Rev.2) (30 May 2003) 'Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights' (30 May 2003) ['The Norms']. See also UNECOSOC, Sub-Commission on Human Rights, Resolution 2003/16 and David Weissbrodt and Maria Kruger (2003) 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises' 97(4) American Journal of International Law 901 ['Weissbrodt/Kruger (2003)'].

proposed Business & Human Rights Treaty.³⁴ Although each period of drafting and negotiation is distinct and undertaken in different parts of the UN system, there is in fact a direct relationship between all these processes. The Norms emerge at the Sub-Commission on Human Rights following the failure of the UN Commission on Transnational Corporations ('UNCTNC') to produce the Code partially in response to that failure.³⁵ The UNGP Framework emerges as a response to the failure of the Norms.³⁶ Similarly, negotiations for the Business & Human Rights Treaty emerge as a response to the advent of the BHR Field.³⁷

Throughout this thesis, I refer to each process as a 'telling instance', drawing from the work of Peter Fitzpatrick and Sundhya Pahuja in order to do so.³⁸ As Fitzpatrick has stated: 'The telling instance is a text or situation embedding a reiterative concern of the modern period.'³⁹ In my critical re-reading of these processes, each becomes a 'telling instance' of the struggle to determine the form of legal instrument governing the conduct of TNCs, the mode and methods utilized to give effect to that governance, upon what premises and for what ends. The 'reiterative concern' is the project of liberal governance, and its shift first, from the state to the TNC; and subsequently, from the TNC to transactions in the global supply chain.

The thesis is not, however, presented as an argument of causation: it does not attempt to show how successive failures ultimately led to the 'triumph' of the UNGP Framework and the emergence of the BHR Field. Rather, it provides a plausible narrative describing and critiquing why international law has, to date, failed to regulate the conduct of the TNC directly, what struggles and contestations have emerged through the attempts to regulate it and what has emerged in the UNGP Framework and the BHR Field in the absence of this direct regulation. In this respect, the analysis is primarily concerned with

³⁴UNHRC, A/HRC/40/48 'Report of the Open-ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights' (2/1/2019); and Open-ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights, 'Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises' Zero Draft (16/07/2018). See also Chapter 5.

³⁵UNCHR, Sub-Commission on the Prevention of Discrimination and the Protection of Minorities (later: the Sub-Commission on Human Rights) Res. 1997/11, 'The relationship between the enjoyment of economic, social and cultural rights and the right to development, and the working methods and activities of transnational corporations' (22/08/ 1997) (adopted without a vote), 1 ¶8. ['Norms Resolution'].

³⁶UNCHR, E/CN.4/2004/116 'Responsibilities of Transnational Corporations and other Business Enterprises with regard to Human Rights' (22/04/2004) 1 at ¶(c) (affirming that the Norms have 'no legal standing') and E/CN.4/2005/69 'Human Rights and Transnational Corporations and Other Business Enterprises' (20/05/2005), 1 at Preamble (recalling the work undertaken to date on the issue of Human Rights and Transnational Corporations and Other Business Enterprises).

³⁷See UNHRC, A/HRC/Res/26/9, 'Elaboration of an International Legally Binding Instrument with Respect to Human Rights' (14/07/2014), 1 ['BHR Treaty Resolution'].

³⁸See Peter Fitzpatrick, *Modernism and the Grounds of Law* (Cambridge University Press, 2001), 4 ['Fitzpatrick (2001)']; Sundhya Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (Cambridge University Press, 2011), 2 ['Pahuja (2011)'].

³⁹Fitzpatrick (2001), 4.

methods and technologies, as opposed to outcomes. The question I answer is *how* we can understand the emergence of the BHR Field with a specific focus on the *how*: i.e. the methods being utilized to create and sustain certain kinds of regulatory practices in each telling instance. It does not claim, however, to determine *why* the BHR Field is 'successful' *as a result* of other initiatives failing, although my critique may mean the reader draws their own conclusions regarding the same.⁴⁰

1.3.1 Defining the Transnational Corporation

Yet what exactly is a transnational corporation, and how does international law define it? Andrew Clapham notes that the term 'transnational corporation' emphasizes 'the fact that there is usually a single legal corporation operating in more than one country, with a headquarters and a legal status incorporated in the national law of the home state.'⁴¹ While legal systems determine the nationality of companies for various purposes, the term 'transnational' seeks to encompass the fact that a modern corporation may have headquarters in one state, legal incorporation in another state, shareholders predominantly in a third state and operations in any number of other states which affect people in yet more states. As such, it becomes clear that highlighting transnationality is essential to capture the phenomenon under discussion.

Clapham's analysis considers the transnationality of the corporation as defined by the borders established by states. A long view of the corporate form, however, finds that corporations pre-dated states and influenced *their* development. As Martti Koskenniemi has observed, 'relations between sovereigns cannot be usefully separated from the legal conditions and techniques whereby 'sovereignty' emerges and operates'.⁴² Vitoria and Kant taught widely on property and contract as well – yet those teachings have not been usefully read into international law, despite their potential significance.⁴³ As such, in its modern incantation, the TNC as a private, commercial endeavour can be linked to the colonial encounter, the emergence of the joint stockholder company and the subsequent shift from non-profit to for-profit companies in England and the United States during the late 18th century.⁴⁴

⁴⁰For a reading on why the UNGP Framework was successful see Buhmann (2017), for the most comprehensive account to date, utilizing a regulatory theory approach.

⁴¹Andrew Clapham, *Human Rights Obligations of Non-State Actors* (Oxford University Press 2006), 199 [Clapham (2006)].

⁴²Martti Koskenniemi, 'Law of Nations and the "Conflict of the Faculties"' (2018) 8(1) *History of the Present: law at the Intersection of Theory and History* 4, 6. [Koskenniemi (2018)] See also Martti Koskenniemi, 'Expanding Histories of International Law' (2016) 56 *American Journal of Legal History* 104.

⁴³Koskenniemi (2018), 6.

⁴⁴Yuven S. Avi Yonah, 'The Cyclical Transformations of the Corporate Form: A Historical Perspective on Corporate Social Responsibility' (2005) 30 *Delaware Journal of Corporate Law* 767, 771 [Yonah (2005)]. See also Samuel Williston, 'History of the Law of Business Corporations Before 1800' (1888) 2(3) *Harvard Law Review* 105.

While the thesis is cognizant of the deeper histories of the corporate form and may intermittently gesture towards them, due to space constraints I do not analyze this lengthier historical frame, its discontinuities and multiple origins, in any great depth. What is significant for the argument animating this thesis, however, is that the move toward the regulation of the TNC in the 1970s began as part of an attempt by the Third World and its allies to establish a New International Economic Order ('NIEO'). In this respect, the thesis does consider the claims provided in the context of the NIEO regarding the TNC's links to colonialism.⁴⁵ Chapter 3 will consider the claims of the NIEO in this respect and how they affect our understanding of the emerging BHR Field. Regulating the TNC formed part of an attempt to bring into being a new international law that would be reflective of, and responsive to, Third World concerns. Although several other authors have traced the path from NIEO to now, this thesis can be distinguished from their arguments in that it seeks to understand that journey while focusing specifically on the struggle over the characterization of the TNC (the question of form) and the instrument that would regulate it (the question of legality).⁴⁶ It is to these questions that I now turn.

1.3.2 Questions of Legality and Form: Balancing and Deferral

In each telling instance analyzed in this thesis, questions of legality and form remained contentious. The question of legality – or, the extent to which international law should be 'binding' upon TNCs – animated several of the debates considered herein.⁴⁷ Conversely, the question of the corporate form was consistently deferred or sidelined: somewhat ironically, parties could never agree what the TNC actually *was*, hence meaning that any attempt to regulate it ultimately became an attempt to regulate business activity *writ large*.

The thesis argues that international law's failure to recognize the TNC as an international legal subject provided the *raison d'être* of these debates.⁴⁸ In the absence of an agreed legal personality (or subject-hood), characterizations of the TNC were rooted in municipal law.⁴⁹ This was in part due to the legacy of the International Court of Justice's

⁴⁵See in particular, Jennifer Bair, 'Corporations at the United Nations: Echoes of the New International Economic Order?' (2015) 6(1) *Humanity: An International Journal of Human Rights, Humanitarianism, and Development* 159 [Bair (2015)]; Frederick I. Nixon, 'Controlling Transnationals? Political Economy and the Code of Conduct' (1983) *International Journal of the Sociology of Law* II; and Muchlinski (2007) 658 – 662. See also Chapter 3.

⁴⁶See in particular, Margot E. Salomon, 'From NIEO to Now and the Unfinishable Story of Economic Justice' (2013) 62(1) *International and Comparative Law Quarterly* 31; Note also Bair (2015).

⁴⁷For a recent discussion on the significance of the binding/non-binding debate in international law, see Jean D'Aspremont, 'Bindingness' in Singh/D'Aspremont (2019).

⁴⁸Rosalyn Higgins, 'Aspects of the Case Concerning Barcelona Traction, Light & Power Company Ltd' (1971) 11 *Vanderbilt Journal of International Law* 327 [Higgins (1971)].

⁴⁹The one exception to this is the views of civil society groups during the Norms process. See *infra* Chapter 3.

(‘ICJ’) decision in *Barcelona Traction, Light & Power Company*.⁵⁰ As Roslyn Higgins stated when analyzing the case in 1971:

To assume that because a municipal law creation, a company, is concerned, municipal law necessarily has to be applied where there are presently gaps in international law, is both to deny any law-developing role to the Court and to assume that the functions of international law are the same as those of municipal law.⁵¹

Clear evidence is found of characterizations of the TNC as grounded in municipal law in the documentary records analyzed in this thesis. As a result, endogenous conceptualizations of the corporation recur throughout. In some instances, the TNC is portrayed as being historically contingent. In others, parties characterized the TNC in accordance with ‘present day’ circumstances. Parties identify the TNC as either a real entity, an artificial entity or an aggregate of contractual relationships.⁵² These characterizations have recently been explored in Sundhya Pahuja’s work on the corporation in international law, from whom this thesis takes inspiration.⁵³

The real entity theory of the corporation views the corporation as neither the sum of its owners or the creation of the state, but as a separate entity controlled by its managers.⁵⁴ The artificial entity theory of the corporation views the corporation as essentially a creature of the state (or states): the corporation comes into existence only once the state has provided it with legal personhood to exist as an association of private actors.⁵⁵ Finally, aggregate theories of the corporation sees the corporation as an aggregate of contractual relationships between individual (natural and legal) persons, the most important of which is the contract between investors, shareholders and management.⁵⁶

The space created to imagine the corporate form both animates discussions about legality and creates a situation in which the definition of what is being regulated continues

⁵⁰*Barcelona Traction, Light and Power Company, Limited* (Belgium v Spain), Second Phase, ICJ Reports 1970, 3 (‘Barcelona Traction (1970)’). See however Judge Padilla Nervo, Separate Opinion at 250. See also, *infra*, Chapter 3.

⁵¹Higgins (1971), 331.

⁵²In her most recent work, Sundhya Pahuja has begun to explore these characterizations of the corporation. See Pahuja (2019), 9.

⁵³*Ibid.*

⁵⁴See Yonah (2005); Mark M. Hager, ‘Bodies Politic: The Progressive History of Organizational “Real Entity” Theory’ (1989) 50 University of Pittsburg Law Review 575; Gregory A. Mark, ‘The Personification of the Business Corporation in American Law’, (1987) 54 U. Chi L. Rev. 1441; Morton J. Horwitz, Santa Clara Revisited: The Development of Corporate Law Theory (1985-86) 88 West Virginia Law Review 173.

⁵⁵Yonah (2005); Harris (2006); David Millon, ‘Theories of the Corporation’ (1990) Duke Law Journal 201 [Millon (1990)].

⁵⁶Yonah (2005); Harris (2006). On the ‘nexus of the contracts theory’ of the corporation (which is a form of aggregate theory) see William W. Bratton, 74(3) ‘Nexus of Contracts Corporation: A Critical Appraisal’ (1988-89) Cornell Law Review 407; Frank Easterbrook and Daniel Fischel, ‘The Corporate Contract’ (1989) 89 Columbia Law Review 1416; Frank Easterbrook and Daniel Fischel, *The Economic Structure of Corporate Law* (Harvard University Press, 1991).

to be deferred. This is in part due to the different ends municipal corporate law and extant public international law intend to serve. As Higgins notes, 'Whereas the former is interested in the acquisition of ownership, contracts, concessions, collection of rates and taxes, the latter is concerned with the interrelationship of the persons carrying on the international commerce of a state with the public activities of the receiving state'.⁵⁷

As will be shown throughout this thesis, where international law is being advanced to protect the interests of either the state or social movements *against* the interests of the TNC, parties largely characterize it as being a real entity that needs to be controlled, a leviathan that should be tamed.⁵⁸ Where parties conceive of the TNC as subordinate to the authority of the state, it is usually characterized as being an artificial entity, capable of municipal regulation with only 'guidance' being sought at the international level. Finally, where parties primarily conceive of the TNC as an aggregate of contractual relationships, the primacy of contract law is advanced, and attempts are made to safeguard the rights of investors and shareholders when regulating the TNC's conduct.

The definition of the TNC is continuously deferred because parties cannot agree the answer to the question of form. This deferral is achieved through an ongoing attempt at characterizing the TNC in terms of its activities and effects. The question of legality is then answered by balancing the competing interests of different parties to each set of proceedings, which paradoxically are informed by their understanding of what the corporation *is*. The question of legality is continuously resolved by collapsing the distinction between legal (i.e. 'mandatory' or 'binding') and non-legal (i.e. 'voluntary' or 'non-binding') obligations. During each process, several struggles emerge. The thesis documents these struggles in Chapters 3 and 4, and then explains their significance for the emergence of the BHR Field in Chapter 5.

1.4 Recent Human Rights Historiography: Human Rights in an Age of Neoliberalism

As noted in Section 1.3, international law's failure to characterize the TNC as a subject remains central to understanding the turn toward 'business and human rights' at the UN. This is because the BHR Field emerged as a response to international law's failure to regulate the conduct of the TNC directly. However, a secondary strand of argument of equal importance to this thesis is why *human rights* became implicated in the regulation of corporate conduct in the final quarter of last century, and not another form of law or regulation. Contrary to what is most often asserted, despite the constant deferral of the

⁵⁷Higgins (1971), 332.

⁵⁸This phrase is borrowed from Sarah Joseph. Sarah Joseph, 'Taming the Leviathans: Multinational Enterprises and Human Rights' (1999) 42(6) Netherlands International Law Review 171.

definition of TNCs, state representatives did not dispute that TNCs had an obligation to respect human rights during the Code of Conduct negotiations.⁵⁹ As will be explained in detail in Chapter 3, disagreement did not centre on whether corporations *should* respect human rights but rather, whether human rights included support for the twin concepts of self-determination and a state's permanent sovereignty over its natural resources ('PSNR').

The thesis considers what role human rights plays in these earlier negotiations and subsequently, what role it comes to play through both the Norms process and the UNGP Framework. It draws from recent debates in human rights historiography to do so. Specifically, it draws from debates regarding the claim that human rights as we now know them emerged as a supranational body of law supported by an international movement in the mid-1970s.⁶⁰ The periodicity of this claim is important for this thesis, given that the thesis similarly analyzes developments from the 1970s – present day.

According to the claims made by the 'New Revisionist'⁶¹ school of legal historians, for whom Samuel Moyn remains the iconoclastic protagonist, prior syntheses of human rights history tracing its roots back to earlier periods can be dismissed as falling into 'teleology, tunnel vision and triumphalism'.⁶² For Moyn and his contemporaries, human rights did not exist as a transnational social movement until their 'breakthrough' moment, in the year when Amnesty International won the Nobel Peace Prize and Jimmy Carter declared human rights a key platform of the United States' foreign policy.⁶³ The New Revisionist school dismisses previous attempts by legal historians and international law scholars to craft a 'smooth teleology' beginning from the Enlightenment to present day. For Moyn, these amount to romanticized progress narratives that fail to perceive of the discontinuities and accidents in the development of human rights.⁶⁴

Chief amongst the claims utilized to support the 'breakthrough' thesis is the fact that in prior moments in which it is claimed the language of human rights was used, rights were advanced as part of a struggle against the state or colonialism. The French Revolution, the United States' Declaration of Independence or the anti-colonial movements of the post-World War II period remain the primary examples utilized in support of the birth of human rights. According to Moyn, however, the assumption that a progress

⁵⁹See Chapter 3.

⁶⁰Samuel Moyn, *The Last Utopia* (Harvard University Press, 2010). [Moyn (2010)]. For a good critique of Moyn's argument see Philip Alston, 'Does the Past Matter? On the Origins of Human Rights' (2013) 126(7) *Harvard Law Review* 2043. [Alston (2013)']. For an important critique and counterpoint, see however, Joseph Slaughter, 'Hijacking Human Rights: Neoliberalism, the New Historiography and the End of the Third World' (2018) 40(4) *Human Rights Quarterly* 734 [Slaughter (2018)]. See also Barbara Stark 'Why Genealogy Matters: Intercountry Adoption, International Human Rights and Global Neoliberalism' (2018) 51(1) *Vanderbilt Journal of International Law* 159.

⁶¹Alston (2013), 2063.

⁶²Moyn (2010), 311.

⁶³Moyn (2010), at 4.

⁶⁴Slaughter (2018), 735.

narrative can be crafted linking these earlier events to the 1970s misconstrues claims of what should rightly be considered struggles for self-determination, liberation or citizens' rights as human rights.⁶⁵ When rejecting claims that self-determination and citizens' rights can be framed as human rights, Moyn claims that human rights in the 1970s were animated by visions of a pragmatic, 'hardy utopia' that can be distinguished from the grander political projects of earlier periods.⁶⁶ In this respect, they were wedded to minimalist ideals and morality (as opposed to maximalist programmes and politics) in order to survive the harsh climate of the 1970s post-oil shock era. This leads to a contemporary choice for human rights lawyers and activists, regarding whether to maintain a minimalist program in support of preventing catastrophe or to prescribe instead a maximalist program of human rights managerialism with an expansive political vision to accompany it.

Two debates within human rights scholarship have emerged in response to this argument that are particularly significant for this thesis. First, as Susan Marks points out, when tracing the rise of human rights from the 1970s – present day, one can conclude that this rise has taken place during an era in which the neoliberal version of private capitalism was also in ascendance.⁶⁷ This critique recasts the rise of the pragmatic utopia afforded by human rights in tandem with the now familiar policy prescriptions of privatization, deregulation and state retreat from social provisions administered internationally by the World Bank, the International Monetary Fund and the World Trade Organization.⁶⁸ As Marks astutely observes, 'To its influential enthusiasts, then and now, *that* is the last utopia.'⁶⁹

Moyn has responded to this criticism by arguing that human rights attempt to secure sufficiency, not equality, and therefore cannot be charged with failing to alleviate inequality in a neoliberal age.⁷⁰ For Moyn, economic and social rights provide for a floor, not a ceiling, in response to the distribution of both opportunities and resources, be it within states or between them. He further argues that while the ascent of the human rights movement may have accompanied neoliberalism's rise, it did so as a 'powerless companion'.⁷¹ In this respect, returning to his thesis that rights provide a hardy utopia, Moyn documents how political dissidents pursued human rights as a form of a-political coalition-building that remained agnostic toward 'a socialist sequel to the critique of the socialist state'.⁷² Skeptical of the claims of both recent Marxist scholarship as well as

⁶⁵Moyn (2010), 84-119.

⁶⁶Moyn (2010), 121.

⁶⁷The argument is most forcefully and elegantly made by Susan Marks. See: Marks (2013).

⁶⁸Marks (2013), 8.

⁶⁹Marks (2013), 8.

⁷⁰Moyn (2018).

⁷¹Moyn (2014). See also Moyn (2018), 220 (for the claim that human rights may still yet become 'a powerful companion').

⁷²Moyn (2018), 180.

mainstream 'liberal' accounts of neoliberalism, Moyn further points out that neoliberalism 'often does massive work in diverse settings of argument, coming close through its overuse to functioning as a call for explanation rather than a real thing'.⁷³ I will return to why this argument is problematic below.

The second debate, of equal significance for this thesis concerns a critique of the New Revisionist's U.S.-centric approach to human rights. In this respect, the turn toward a 'search engine' mentality is criticized, including the practice of largely substantiating claims about the rise of human rights by relying on Google book databases (also known as n-gram searches) and archival records from the New York Times and other English media sources.⁷⁴ As Joseph Slaughter has asserted, the paucity of attention to non-English language news sources establishes a scenario whereby human rights is essentially 'hijacked' by claims that its universality can only be truly expressed and understood when given Western imprimatur.⁷⁵ According to Slaughter:

The late American and Western European "rediscovery" of human rights in the 1970s looks more like retrenchment and repossession – not dispensing human rights to the world, but taking them away from those who were already using them, dispossessing (once again) the wretched of the earth of their human rights...the story of human rights in the 1970s is part of the more general history of what Walden Bello called the "rollback" – "the [structural] re-subordination of the [Global] South" within a US-dominated global economy.⁷⁶

The question of what this new constitutional moment for human rights meant, and for what (or whose) values they stood is significant to my thesis for two reasons. First, this thesis argues that the relationship between human rights, inequality and Third World resistance bears directly upon the struggle to regulate corporate conduct during this period. The ultimate re-framing 'from regulating corporate conduct' to 'fostering corporate respect for human rights' in the processes analyzed in this thesis can best be understood while remaining cognizant of the dynamics of this external context. Unlike the Revisionist School, it argues that the 'hardy utopia' envisaged by human rights did more than simply act as a 'powerless companion' to assertions of privatization, deregulation and state retreat from social provision. Rather, throughout these telling instances, privatization, deregulation and state retreat from social provision is increasingly maintained and legitimated by those parties espousing the neoliberal virtues of the TNC and its capacity to protect individual and collective rights in the absence of states doing so.

⁷³Moyn (2014), 149.

⁷⁴Alston (2013). See further: Christopher McCrudden 'Human Rights Histories' (Review Article) (2015) 25(1) Oxford Journal of Legal Studies 179.

⁷⁵Slaughter (2018).

⁷⁶Slaughter (2018), 737 [Footnotes omitted].

1.4.1 Defining Neoliberalism (and Re-defining the Question)

It should be noted, at this point, that I use the term 'neoliberalism' purposively and not merely heuristically. In this respect the thesis defines neoliberalism with reference to a school of thought originating in the 1930s amongst jurists and economists (most notably, Friedrich Hayek and Hans Kelsen), in which the world is not conceived as 'a borderless world of markets without states, but a doubled world kept safe from mass demands for social justice and redistributive equality by the guardians of the economic constitution.'⁷⁷ International institutions -- notably, the International Monetary Fund,⁷⁸ the International Bank for Reconstruction and Development (now: the World Bank group)⁷⁹ and (from 1995 onwards) the World Trade Organization⁸⁰ – maintain this constitution in the post-World War II period. For my purposes, however, the question to be answered by this thesis is to what extent the UN bodies supporting human rights – namely, the ECOSOC and the HRC – continue to promote and maintain this 'double world' in their treatment of the TNC from the 1970s onwards. In my narrative, the most notable 'guardian' of neoliberalism in the international legal processes analyzed is the International Chamber of Commerce ('ICC'), though some of the independent experts engaged in the processes also make good contenders.⁸¹

I define neoliberalism as being 'a blueprint for globalism based on institutions of multi-tiered governance that are insulated from democratic decision-making'.⁸² This 'blueprint' attempts to structure and regulate a settlement between an international world of states, on the one hand, and a global economy, on the other. The public/private distinction, which has remained at the heart of public international law, continues to maintain this settlement.⁸³ The public world of states is divided from the private world of property and investment and these worlds continue to be regulated separately. In the case of the TNC, a neoliberal worldview allows for international law to regulate corporate conduct with reference to the public world of states and territory, while regulating corporate investment and property rights with reference to the private world of contractual relations. The 'age of neoliberalism' discussed herein is defined with reference to current

⁷⁷Quinn Slobodian *Globalists: The End of Empire and the Birth of Neoliberalism* (Harvard University Press, 2018), 16. [Slobodian (2018)].

⁷⁸International Monetary Fund, Articles of Agreement (22 July 1944) 33 UNTS 298.

⁷⁹International Bank for Reconstruction and Development, Articles of Agreement (25 December 1945), UNTS vol.II (1947), 134. See: Article 1 (Purpose).

⁸⁰On international law's separation between the political and the economic in the aftermath of World War II, see Pahuja (2011), especially at Chapter 2 ('Inaugurating a New Rationality'), 10-44.

⁸¹See 'Chapter 4: Human Rights' in Slobodian (2018), 121 - 145. See also Dominic Kelly, 'The International Chamber of Commerce' (2005) 10(2) *New Political Economy* 259 ['Kelly (2005)'].

⁸²Quinn Slobodian, *Globalists: The End of Empire and the Birth of Neoliberalism* (Harvard University Press, 2018), 5 ['Slobodian (2018)'].

⁸³The literature pertaining to the public/private distinction in international law (and why it is problematic) is too vast to be documented here. However, as seminal text, I would note as follows: Hilary Charlesworth and Christine Chinkin *The Boundaries of International Law: A Feminist Analysis* (Manchester University Press, 2000).

debates in human rights historiography and as such takes this to be from 1970s – present day. Although I consider this to be *an* age of neoliberalism, I do not take it to be *the* age of neoliberalism, hence openly admitting that this periodicity can be both expanded and reduced, depending on what one wishes to argue.⁸⁴

After a series of struggles regarding how to conceive of the TNC and how to regulate its conduct, the BHR Field is inaugurated to help maintain an extant international law and the extant international economic order that recalibrates alternative visions (including the NIEO) toward ensuring achieving a kinder, more responsive, globalization that maintains this public/private distinction. This is most symbolically evident in the recent re-tooling of the principles of the NIEO as a platform to maintain 'inclusive and equitable economic growth and sustainable development' by the UN General Assembly ('UNGA') in 2017.⁸⁵

Hence, the question being asked – whether human rights *caused* or was *complicit* in the rise of neoliberalism – is, from this thesis' perspective, the wrong question. Rather, the question is: to what extent does the cultural capture of human rights prevent international law from supporting *other* visions of an economic order, and how did it do that? The battle over whether the TNC and other business enterprises should respect human rights evidences the fact that human rights were increasingly utilized to support *one* version of an economic order at the expense of all other possibilities. The question then to ask is: what methods were used to legitimate that 'universalizing' vision and what does this tell us about the methods international human rights lawyers might think to use in the future?

Second (and related to this first argument) the thesis argues that, as a result of Western states' cultural capture of human rights discourse in the 1970s, whenever human rights *were* claimed by Third World states, and later, by Third and Fourth World representatives of social movements and non-governmental organizations at the UN, they were dismissed either as better dealt with in other international fora or too radical to be given any real attention. This was the case, even when the claims reiterated extant international law (yet threatened TNCs' economic interests). Perhaps indicative of how problematic this might seem in hindsight is the dominant stance taken by certain Western states on Southern Africa. Despite ongoing calls from the Third World to include a provision pertaining to disinvestment of TNCs in South Africa in the Code of Conduct, these repeated calls were considered 'too political' and consistently rejected.

In the 1990s, this was further compounded by the paradoxical assertion that human rights represented universally accepted 'shared social values' which the corporation

⁸⁴John Gray, for example, sees the age of neoliberalism as now over and for the world to have entered into an age of unpredictable capitalist anarchy. See John Gray, *False Dawn: The Delusions of Global Capitalism* (Granta Books, 3rd Edition, 2009) ['Gray (2009)'].

⁸⁵UNGA A/Res/71/236 (23/01/2017). The resolution was adopted by the General Assembly with 131 in favour and 49 against, with 4 abstentions.

could both embed and embody. This was despite ongoing claims first, from Third World states, and later, from NGOs and social movements, that the Coca-colonisation of their societies and communities should be avoided at all costs.⁸⁶

1.5 The Concept of Embedded Pragmatism

How then, does this thesis draw these three strands of argument together? What techniques and methodologies arise, when considering the way successive attempts to regulate the conduct of the TNC lead to the balancing (of competing interests) and the deferral (of the question of corporate form) in these negotiations? How can the disparate struggles of Third World states, (former) Soviet Bloc countries and Fourth World social movements, on the one hand, and countries that formed the Organisation of Economic Cooperation and Development ('OECD') (themselves not uniform in their views) and European non-governmental organizations and experts, on the other, be treated with clarity and nuance? What legal methods unite these processes (if any) and how were those methods deployed? How can this be determined, while keeping the claims being advanced distinct from them? And finally, what role does human rights (and international human rights law) play in these struggles?

As noted in Section 1.1, this thesis argues that the emergence of the BHR Field can be explained utilizing the concept of embedded pragmatism.⁸⁷ This concept was originally drawn from a diagnosis of what the drafters of the UNGP Framework claimed in the documentary record they were attempting to do.⁸⁸ The thesis then unearthed the sedimentary layers of this concept, assessing whether the archival record of previous telling instances evidenced any workings or presuppositions in common between these processes, as well as any discontinuities or ruptures between them. Each of these terms – embeddedness and pragmatism – require further explanation, to understand the concept's significance for this thesis. I shall therefore turn to explain each part separately before developing the explanatory value of embedded pragmatism.

1.5.1 The Concept of Embeddedness

The concept of embeddedness originates from the work of economic historian Karl Polanyi.

⁸⁶This is an oblique reference to the comments of Michael P. Boerner, United States Representative of the Code of Conduct negotiations, who observed the relevant provision in the Code of Conduct referring to TNCs being compatible with the values of host countries was known as the 'Coca-cola' clause. See also: Patricia Pope, 'Transnational Corporations: The United Nations Code of Conduct' (1979) 5 Brooklyn Journal of International Law 129, at footnote 59 (citing UN Press Release TNC/91 (8/02/1978)).

⁸⁷See also Kelsall (2017).

⁸⁸See *infra*, at Chapter 2.

Although utilized in legal scholarship, 'embeddedness' is not a legal term of art.⁸⁹ Despite gaining significant traction in debates within law and the social sciences, the term appears on only two pages of Polanyi's classic text *The Great Transformation*.⁹⁰ Polanyi utilizes embeddedness to distinguish between the market economy (as it emerged in the United Kingdom in the 19th century) from economic configurations based on reciprocity and redistribution.⁹¹ For Polanyi, the idea of a *laissez-faire* market turned on its head the institutional anchoring of the economy. 'Instead of the economy being embedded in social relations, social relations are embedded in the economic system'.⁹² As he further extrapolates:

In the vast ancient systems of redistribution, acts of barter as well as local markets were a usual but not more than a subordinate trait. The same is true where reciprocity rules: acts of barter are here usually embedded in long-range relations implying trust and confidence, *a situation which tends to obliterate the bilateral character of the transaction*.⁹³

As Jens Beckert ably explains, the core meaning of embeddedness for Polanyi is two-fold. First, markets are necessarily limited by institutional regulation. It is this regulation that connects them to the moral fabric of society. Unregulated markets cannot be more than 'a pathological form of organizing the fulfilment of adaptive functions in society and will lead to social *anomie*'.⁹⁴ Second, the term 'embeddedness' is not only an analytical term (to assess the extent to which a market is being regulated), it also describes a political or social reformist task. In this respect, in order to maintain the embeddedness of markets, fully social institutions, reflecting a complex alchemy of politics, culture and ideology (what I call 'shared social values' or 'legitimate social purpose') must operate in order to give effect to that regulation. In other words, embedding the economy remains a *dynamic* task. A society's laws and institutions must adapt to maintain the primacy of human and environmental welfare over that of any economic transaction.

⁸⁹For its recent use in legal scholarship of particular relevance to this thesis, see in particular Christian Joerges and Josef Falke (eds) *Karl Polanyi: Globalization and the Potential of Law in Transnational Markets* (Hart Publishing: 2011) [Joerges and Falke (2011)]. See also Michael Fakhri, 'Law as the Interplay of Ideas, Institutions and Interests: Using Foucault and Polanyi (sic) to Answer TWAIL Questions' (2008) 10(4) *International Community Law Review* 455 [Fakhri (2008)]; and Lorenzo Cotula, 'The New Enclosures? Polanyi, International Investment Law and the Global Land Rush' (2013) 34(9) *Third World Quarterly* 1605.

⁹⁰Polanyi (1944), 57 and 61. See also Gareth Dale, *Karl Polanyi: The Limits of the Market* (Polity Press 2010); Gareth Dale *Karl Polanyi: A Life on the Left* (Columbia University Press, 2016).

⁹¹Polanyi (1944), 57-8. See also Jens Beckert, 'The Great Transformation of Embeddedness: Karl Polanyi and the New Economic Sociology' Max-Planck-Institut für Gesellschaftsforschung, Discussion Paper 07/01 (January 2007) [Beckert (2007)]; and Claire Methven O'Brien, 'Chapter 13: The UN Special Representative on Business and Human Rights: Re-embedding or Dis-embedding Transnational Markets?' in Christian Joerges and Josef Falke (eds) *Karl Polanyi, Globalisation and the Potential of Law in Transnational Markets* (Hart Publishing, 2011), 323 [Methven O'Brien (2011)].

⁹²Polanyi [1944], 57.

⁹³Ibid. [My emphasis]

⁹⁴Beckert (2007), 8.

For Polanyi, the idea that a market could be truly 'free' from governmental regulation could never be sustained: it would lead to a 'stark utopia', assuring the destruction of both society and the natural environment.⁹⁵ Hence his injunction that *laissez faire* was planned.⁹⁶ Economic *laissez faire* was indicative of certain interests being reflected in the laws and regulations that governed the economy – interests that, in our contemporary moment, have been classed as reflecting a 'neoliberal' economic order.⁹⁷ This then leads to Polanyi's idea of the 'double movement' through which individuals, individually or collectively, take action in order to reinstate the economic system into the moral fabric of society. Law, then, becomes reflective of this dynamic. Law either represents the interests of those who benefit from the primacy of the market, those who are reacting against the market, or a compromise between the two.⁹⁸ This movement, between embedding and dis-embedding the economy, produces a double movement encapsulated in the struggles to enact laws reflecting parties' interests.⁹⁹

This idea of embeddedness explains how successive attempts to use international law to regulate the conduct of the TNC are framed in response to the rise of *laissez faire* policies governing the international economic order. In this respect, the embeddedness/dis-embeddedness dynamic is used to explain the relationship between claims made advocating for human rights to support economic *laissez faire* in the international economic order (made primarily by the US and the ICC), and claims made advocating for human rights to be maintained as a language of resistance to neoliberal policies to inaugurate a new vision of this order (primarily, though not exclusively being made by the Group of 77 states, social movements and non-governmental organizations representing the Third World).

In each successive legal process, the embeddedness/dis-embeddedness dynamic occurs at a different site of contestation.¹⁰⁰ During the Code negotiations, the site of contestation is the conceptualization of the state as both political and economic entity. Newly emerging states representatives' claims regarding the primacy of self-determination as a fundamental *human* right and PSNR for their peoples are pitted against those state representatives who wish to maintain both a conservative view of public international law's evolution, on the one hand, and the free flow of capital and labour across international borders, on the other.¹⁰¹

During the Draft Norms process, the site of contestation shifts from the state to the TNC itself. This struggle takes place primarily between Fourth World social movements,

⁹⁵Polanyi [1944], 3.

⁹⁶Polanyi [1944], 145 ('laissez faire itself was enforced by the state'.)

⁹⁷For this assessment (drawing on Polanyi's work) see: Gray (2009).

⁹⁸Fakhri (2008), Dale (2010).

⁹⁹Fakhri (2008).

¹⁰⁰The term 'site of contestation' here is taken from Pahuja (2011).

¹⁰¹See *infra*, at Chapter 3.

Third World non-governmental organizations and the ICC.¹⁰² The former conceive of the TNC as an entity that threatens human rights as much as it is capable of safeguarding them. The latter conceive of the TNC as 'a metaphor – a handy rhetorical device – connoting relationships between officers, directors, shareholders, creditors, customers, suppliers, and others involved in the production and sale process'.¹⁰³ As a result human rights and by extension, international human rights *law* were fundamentally linked to the facilitation of trade and investment: only through supporting *business* could human rights truly be realized across the globe.¹⁰⁴

In the final process, leading to the UNGP Framework, the struggle is then transposed onto the site of the global supply chain, through the inauguration of a system of polycentric governance that maintains the public/private distinction (between states and TNCs), on the one hand, but assumes this distinction can be collapsed, on a case-by-case basis, through the establishment of a 'global public domain' (or 'GPD'), on the other.¹⁰⁵ The thesis as a whole both documents these shifts and explores what they mean for the emerging BHR Field and for the theory and practice of IHRL.

The concept of 'embeddedness' is particularly apt to use, because the chief architect of the UNGP Framework, John Ruggie, draws from a Polanyian critique of the international economic order, both in his analysis of the structural causes precipitating a return to neoliberal *laissez-faire* (in the 1970s) and in his response to it when crafting the UNGP Framework twenty years later.¹⁰⁶ While I argue that Ruggie's analysis needs to be nuanced in important ways, the concept of embeddedness has important explanatory power for understanding the dynamics between states during the 1970s-1980s, non-governmental organizations and experts (during the late 1990s-early 2000s) and the subsequent inauguration of the BHR Field for which he was a primary progenitor in 2011.

For my purposes, then, the 'embeddedness/dis-embeddedness' dynamic describes the moves being made by various actors to use international law to give effect to distinct versions of the 'shared social values' underlying the international economic order. In each telling instance, a different battle takes place to determine what this purpose both is and should be.

¹⁰²See *infra*, at Chapter 4.

¹⁰³Charles R.T. O'Kelley, 'Coase, Knight and the Nexus-of-Contracts Theory of the Firm' (2012) Seattle University Law Review 35: 1247, 1249 [Hereafter, O'Kelley (2012)]. See also Thomas W. Joo, 'Contract, Property and the Role of the Metaphor in Corporations Law' (2002) 35 UC Davis Law Review 779. The nexus-of-contracts theory was first established by Charles Jensen & William H. Meckling in C. Jensen & William H. Meckling, 'Theory of the Firm: Managerial Behaviour, Agency Costs and Ownership Structure' (1976) 3 Journal of Finance and Economics 310. Jensen & Meckling relied on the work of Ronald Coase in determining this view.

¹⁰⁴See for example, UNCHR, E/CN.4/Sub.2/NGO 11 (19/07/2002); E/CN.4/Sub.2/NGO12(5/07/2002), 4.

¹⁰⁵John G. Ruggie 'Chapter 8: Taking Embedded Liberalism Global – The Corporate Connection' in John Gerard Ruggie (ed) *Embedding Global Markets: An Enduring Challenge* (Ashgate Publishing, 2008), 233 ['Ruggie (2008)'].

¹⁰⁶See *infra*, at Chapter 2.

1.5.2 The Concept of Pragmatism

The concept of pragmatism refers to the methodology animating the embeddedness/dis-embeddedness dynamic. While embeddedness is used to answer a 'what' question (namely: what kind of international economic order do the claims in the documentary record suggest international law is supporting or should support?), pragmatism answers the 'how' question (namely: how can international law be utilized to support a particular economic order?). Pragmatism refers to a mode of legal reasoning which describes how things are, and how they might still be, based on 'what works'. Pragmatic jurists draw their inspiration from philosophical pragmatism, though the juristic sensibility can be distinguished from it.

Philosophical pragmatism can be summarized crudely in the following way: (1) 'truth' is understood as contingent, specific, and attributable to a concept because a group of people agree that it makes sense and it can be evidenced empirically to make sense; (2) means are favoured over, or at the expense of, ends; (3) observation, study and scientific rationality can be usefully applied to moral and ethical questions; (4) human beings are inevitably committed to provisional (not conclusive) epistemological projects, due to our own fallibility.¹⁰⁷

Pragmatic jurists share a philosophical penchant for prioritizing what makes sense/what works, based on empirical evidence. They attempt to avoid the twin pitfalls of 'grand theory' and 'business as usual' anti-intellectualism when confronting legal questions, by applying a mode of reasoning that relies on a pastiche of both. Doctrinal legal reasoning can be combined with functionalism, natural law theory with formalism, in a heady mixture of styles and argumentative practices, provided fact-based particularism is always maintained. As David Kennedy argued twenty-five years ago, in the postwar period, international legal pragmatists:

have been ethical relativists and committed pluralists, who have approached problems functionally and purposively...Their products are the programs, budgets, rights, treaties, doctrines and commentaries, interventions, justifications and pedagogies we now know as the disciplines of international law, international relations and international institutions.¹⁰⁸

¹⁰⁷See in particular, William James *Pragmatism and the Meaning of Truth* (Harvard University Press, 1907); and Justin Desautels-Stein, 'Extraterritoriality, Antitrust and the Pragmatism Style' (2008) 22 *Emory Law Review* 499, 511 ['Desautels-Stein (2008)']. See also: Justin Desautels-Stein, 'Pragmatic Liberalism: The Outlook of the Dead' (2014) 55(4) *Boston College Law Review* 1041 ['Desautels-Stein (2014)']; Justin Desautels-Stein *The Jurisprudence of Style: A Structural History of American Pragmatism and Liberal Legal Thought* (CUP 2018).

¹⁰⁸David Kennedy, 'The International Style in Post-war Law and Policy' (1994) 7 *Utah Law Review* 18, 23. See also 'The Disciplines of International Law and Policy' (1999) 12 *Leiden Journal of International Law* 9. See further, however, David Kennedy, *The Dark Sides of Virtue: reassessing international humanitarianism* (Princeton University Press, 2004).

Like Kennedy, several international law scholars argue that pragmatism has animated jurisprudential thought in international law and international organizations in the past one hundred years. As Anthony Anghie describes it, lawyers and jurists laid the groundwork for pragmatism as a jurisprudential style and mode of legal reasoning in the early part of the twentieth century. In the League of Nations' mandate system, 'law asserted itself, not merely as a system of rules but as administration, as science.'¹⁰⁹ This coincided with legal realists' critique of 19th century formalism and progressive internationalists' rejection of positivism. In response to the horrors of World War I and the defective amorality of an international law divorced from society, the new international law of this period had to devote itself to furthering social goals and crafting a sociological jurisprudence. This was forcefully advanced by American jurists as a form of legal pragmatism.¹¹⁰

Additionally, Marti Koskenniemi and Balakrishnan Rajagopal have each argued that international law, practice and scholarship in the post-World War II period has been informed by doctrinal pragmatism. Although originating from American juristic thought, they further argue that it is not exclusively utilized by American jurists. For Koskenniemi, pragmatism enables jurists to preserve, on the one hand, the idealist illusion that law can and does play a role in the organization of social life among states (utopia), while on the other, to respond to realist criticisms that law is seen as distinctly secondary to power and politics (apology).¹¹¹ Rajagopal, on the other hand, has argued that, for Third World international lawyers during this period, pragmatism was seen as providing them with an opportunity to use the techniques and practice of international law and institutions to advance their nation-building projects. Yet paradoxically, pragmatism also played a major role in consolidating international institutions as apparatuses defining the social reality both of and within the Third World, largely divorced from their visions.¹¹²

Drawing from the work of these scholars, yet crafting a definition of its own, the thesis argues that pragmatism is the primary mode of legal reasoning advanced throughout the telling instances analysed in this thesis. I argue that pragmatism constrains any determination of how international law should regulate the conduct of the TNC in the following ways: (1) determining how to regulate the TNC remains contingent on an empirical analysis of its effects and activities; (2) a focus on fact-based particularism and the 'art of the possible' means any idea of what *is* possible is inherently conservative in

¹⁰⁹Anthony Anghie, *Imperialism, Sovereignty and the Making of International Law* (CUP 2006), 62-3. [Anghie (2006)'].

¹¹⁰Anghie (2006), 65-69.

¹¹¹Martti Koskenniemi, *The Politics of International Law*, (Hart Publishing 2011), especially at 14 and 62. [Koskenniemi (2011)]. See also Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law (1870 – 1960)* (CUP 2002), 399 [Koskenniemi (2002)']; and Martti Koskenniemi, *From Apology to Utopia* (CUP 2005) [Koskenniemi (2005)'].

¹¹²Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance* (CUP 2003), 31-33 [Rajagopal (2003)].

the literal, as opposed to the political, sense of this word; (3) process is favoured over outcomes; (4) any contestability of the description of what exists remains narrow; (5) any radically alternative structural account of the economic order is almost always opposed as being impractical; and (6) because it remains impossible to predict how the world is going to change, assessments on how international law can and should be incorporated into the conduct being regulated are made with a view that is short-term in orientation, or in the long-term systemic interests of the existing economic order.¹¹³

I will return to this definition throughout this thesis. Although pragmatism has these six defining characteristics, it manifests in different ways throughout the processes analysed and is not treated as a uniform response to legal problems. Rather, it is conceived as a set of practices or modes of reasoning underlying those responses.

1.5.3 The Concept of Embedded Pragmatism as it is utilized in this thesis

As noted at the start of this Chapter, this thesis utilizes the concept of embedded pragmatism to explain both the emergence of the BHR Field and the primary *modus operandi* underlying the field's constitution. 'Embedded pragmatism' refers to a mode of legal reasoning animating the way in which IHRL is used by different actors when determining how to regulate the conduct of the TNC in the societies in which it operates. Embedded pragmatism explains how different actors in these legal processes attempt to embed the international economic order with 'shared social values', as encapsulated in human rights, and to do so pragmatically. It also helps explain what the limits and possibilities of doing so are, and what this might tell us about the limits of this kind of reasoning for the BHR Field.

The descriptive move of embedded pragmatism is to collapse the distinction between legal (mandatory/state-regulating) and non-legal (voluntary/self-regulating) obligations. The normative move is to claim that this is of benefit to those most vulnerable to human rights abuse.¹¹⁴ In successive negotiations, the site at which this collapse takes place changes.

During the Code of Conduct negotiations, 'shared social values' are embodied in the liberal values of tolerance and non-interference in the internal affairs of states. The site of contestation remains the extent to which a TNC can voluntarily respect liberal values in a state that is itself, illiberal— notably, where the state is administering a system of

¹¹³For a powerful argument as to how customary international law has developed to fill gaps in the short-term interests of capitalist states or the long-term interests of the capitalist system, see Chimni (2018).

¹¹⁴For opposition to this claim see: Tara J. Melish, 'Putting Human Rights Back into the UN Guiding Principles on Business and Human Rights: Shifting Frames and Embedding Participation Rights' in Garavito (2017), 62. See further chapters 2 and 5.

apartheid. The struggle to determine this question is emblematic of the struggle between those states that want human rights to be utilized in support of self-determination and those who see rights as supportive of market fundamentalisms (and the liberal utopia they embody).

During the Norms process, 'shared social values' are embodied in extant IHRL, now conceived as embodying supranational 'universal' values. The site of contestation shifts to the institution of the TNC itself, and the extent to which it can and should respect, protect and fulfil the human rights in all the societies in which it operates. The struggle emerges between those that conceive of rights as belonging to a political community and those that conceive of rights as an externality to market transactions for which someone must bear the cost.

Once inaugurated as a 'global' practice through the UNGP Framework and in the BHR Field, embedded pragmatism shifts the burden of determining 'shared social value' from institutions to people engaged in transactions occurring within the international economic order. Such transactions are now no longer conceived as occurring within an international legal system but as part of a global supply chain. This shift creates an orchestration deficit, in which attempts to claim the human rights of those most vulnerable to abuse are no longer viewed as part of an established system of territorially-bound states but instead, manifest in a newly constructed global public domain.¹¹⁵ This shifts an understanding of human rights as emblematic of *the* public good (determined by a state-centred political collective committed to protecting rights) toward an interpretation of rights as reflective of *global* public goods (determined through supposedly value neutral techniques that coordinate economic activity between states and markets). This shifts the understanding of human rights as representative of values in a political community, toward human rights based on a 'value-neutral' economic allocation of scarce resources.¹¹⁶ Hence, because global public goods are seen to be reflective of goods which states must guarantee through global markets (in order to prevent market failure to provide them), the possibility of securing human rights for those most vulnerable to human rights abuse becomes more contingent and precarious than ever before.¹¹⁷

As will be shown in the chapters that follow, embedded pragmatism explains how successive attempts at the UN to regulate the conduct of TNCs have been successful, only insofar as they sustain a neoliberal economic order that maintains a segregation between the world of territory (governed by states), on the one hand, and the world of property (governed by investors), on the other. Attempts first, by Third World states and their allies

¹¹⁵See Daniel Augenstein (2016) 23(1) 'To whom it may concern: International human rights law as global public goods' *Indiana Journal of Global Legal Studies* 225, at 237 ['Augenstein (2016)']. See also Chapter 5.

¹¹⁶Augenstein (2016), 237.

¹¹⁷Augenstein (2016), 237.

and subsequently, by grassroots social movements, to utilize the language of human rights in support of alternative visions of an economic order have been unsuccessful in mobilizing human rights as a language of resistance.

The turn toward business and human rights through the unanimous endorsement of the UNGP Framework instead promotes the use of international law to prevent and remedy human rights abuses that are committed in global supply chains. It does so, by prioritizing corporate human rights due diligence practices that are able to reduce transaction costs within those supply chains. In keeping with a 'trade-related, market-friendly' view of human rights, the original drafters of the UNGP Framework argue that corporate human rights due diligence is anathema to human rights due diligence as understood as a public obligation of the state.¹¹⁸ Rather, it is a practice adopted by the TNC to maintain rights-friendly responses to situations in which rightsholders may be adversely affected by its operations.

As already noted at the start of this chapter, by illuminating the underlying reasons why the BHR Field came into existence, 'embedded pragmatism' predicts that although more TNCs and other business enterprises will engage in enlisting human rights services in years to come, it will not require them to confront the relationality and systematicity of privilege and deprivation that global corporate and financial transactions maintain and perpetuate.¹¹⁹ This is because, although embedded pragmatism requires jurists to deliberate over the risks associated with the transactions their clients are undertaking, pragmatism does not allow for the disruption of a dominant 'neo-liberal ideology which subscribes to a secular theology of market fundamentalism'.¹²⁰ This leads to decision-making processes in which the everyday, immediate concerns of workers, managers, and citizens are pitted against hopes for long-term change to the international economic order, and respecting human rights primarily becomes re-cast as a risk management exercise to safeguard those concerns.¹²¹

1.6 Limitations, Structure, Contribution and Originality

1.6.1 Thesis' Limitations

Considering the limitations of space and time with any research project, it is perhaps worth noting here what this thesis does not attempt to do. Although the thesis provides an analytical descriptive critique of the emergence of the BHR Field, it does not claim to have detected the 'essence' of the BHR Field. Nor does it attempt to claim that embedded

¹¹⁸Baxi (2005), 438. See also Chapter 3 of this thesis.

¹¹⁹Susan Marks, 'False Contingency' (2009) 62(1) Current Legal Problems 1, 14.

¹²⁰Baxi (2005), 438.

¹²¹See *infra*, Chapter 5 and 6.

pragmatism is the *only* concept which can explain the dynamics at play in the various processes that are analyzed, based on the documentary record reviewed.

To begin with, the analysis provided here largely steers clear of recent Marxist critiques of international law and the BHR Field, gendered and heteronormative critiques and post-colonial theory outside the international law scholarship, all of which would undoubtedly enrich the thesis and provide different critical perspectives. The choice not to do so was largely driven by a desire to focus specifically on a critique of the record on its own terms and to understand how the BHR Field constructs itself. In other words, a concerted effort was made to understand how international law was understood at the time of the proceedings as evidenced through the record itself.

Additionally, the choice of periodicity should be explained. The thesis attempts to analyze the documentary record from a contemporary legal moment in order to contribute to a broader body of scholarship that is concerned with understanding how current shifts in both the administrative practice at the UN, and the function and purpose of international law, have come about, what they mean and how they might yet change.¹²² Specifically, the thesis provides a close reading of the documentation pertaining to three separate but related attempts to create international law to regulate the TNC, in the hope that it might shed some light on why some modes of regulation are able to be maintained while others are not. A strong emphasis was placed on reviewing and critiquing the archival documentary records pertaining to the period in question, and to understanding both what was agreed and what remained contentious and ambiguous in that record.

The term 'close reading' here is meant to infer a critical account focused on description, which attempts to understand transformations in understandings of daily power relations – a modest, empirical and limited task, yet one which might help us to see the world anew.¹²³ As Anne Orford has noted (citing Michel Foucault), the work of philosophy today involves making those things visible that are already visible:

It has long been known that the role of philosophy is not to discover what is hidden, but to make visible what is visible, that is to say, to show that which is so close, which is so immediate, which is so intimately linked to us, that because of that we do not perceive it. While the role of science is to communicate that which we do not see, the role of philosophy is to make us see what we see.¹²⁴

The thesis is an attempt to *uncover*, *recover* and *discover* in the recent archival record of processes inaugurating the BHR Field that which is so intimately linked to it, it has been

¹²²Duncan Kennedy (2006), Desautels-Stein (2014). See also Kennedy (2016). Yet within international law, there is a growing body of scholarship written in this vein. See in particular, the authors named at footnote 10.

¹²³In Anne Orford, 'In Praise of Description' (2012) 25 *Leiden Journal of International Law* 609, 616. ['Orford (2012)'].

¹²⁴Michel Foucault 'La philosophie analytique de la politique', quoted in Orford (2012), 617.

taken for granted. In so doing, it hopes to contribute to ongoing debates about what the BHR Field can yet achieve and how (and whether) we might set out to achieve it differently.

1.6.2 Research Methods and Methodology

The thesis draws from a comprehensive review of archival records of international legal processes. It provides a critical re-reading of these processes. It pays close attention to the minutes of meetings, submissions from parties and iterative drafts of instruments from the following proceedings: (i) the Code of Conduct on (later: for) Transnational Corporations drafted by the Intergovernmental Working Group of the UN Commission on Transnational Corporations (1976 – 1992); (ii) the Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises (1997-2005); and (iii) the UNGP Framework (2005-2011). This is further supplemented by a review of historical accounts of the UN Global Compact as well as a review of the Zero Draft of the Business and Human Rights Treaty. For the review of the Code, this included a field trip to the UN Archives and Records Management Service in May 2016, where I reviewed records from thirty-eight folders pertaining to TNCs.¹²⁵ In addition to reviewing these archival records, I conducted interviews with eight 'elite' informants.¹²⁶ University ethics clearance was received prior to the conduct of all interviews. Interviews were only utilized to supplement the original analysis of the underlying concept of embedded pragmatism. They do not, however, form part of the findings included as evidence of the theory espoused in the thesis itself.

Both the review of the archives and the interviews were complemented with an additional review of UNGA Resolutions, expert's reports and speeches pertaining to the processes in question. Additionally, academic literature pertaining to both the archive and the central research questions being answered was comprehensively reviewed. This included remaining responsive to literatures that would better enable the thesis to reflect what was being found (and subsequently determined as significant) through the process of assembling and reading the archival record. Case law was read and reviewed only

¹²⁵The United Nations Arms and Records Management Services ('UN-ARMS') is located in Manhattan New York. Files were viewed between 12-26 of May, 2017.

¹²⁶Interview with Professor John Ruggie, Harvard Yard (Boston, Massachusetts) 16 May, 2017; Interview with Gerald Pachoud, former special adviser to John Ruggie (New York, New York (USA)), 25 May 2017; Interview with Mr Mark Hodge, former Executive Director of the Global Business Initiative on Human Rights (London, United Kingdom), 15 June 2017; Interview with Ms Caroline Rees, CEO and Founding Director, Shift New York (and former adviser to John Ruggie) (via Skype), 12 October 2017; Interview with Professor Surya Deva, Member of the UN Working Group on Business and Human Rights (via Skype), 28 July 2017; Interview with Mr John Morrison, former Executive Director for the Business Leaders' Initiative on Human Rights (London, United Kingdom), 2 November 2017; Interview with Khalil Hamdani (via Skype), former employee of the UN Centre for Transnational Corporations (Wednesday, 22 November 2017); and Interview with Scott Jerbi, former adviser to Mary Robinson, UN Office of the High Commissioner for Human Rights (Palais Wilson, Geneva, Switzerland) 27 November 2017.

insofar as it proved pertinent to understanding the archive to do so. As the thesis itself considers the *failure* of international law to regulate the conduct of the corporation directly, case law was deemed less significant to understanding these processes than were questions pertaining to the sources, and methods and processes of creating, international law.

Although the thesis has been inspired by existing approaches adopted by academics within international law, the author has continued to maintain an openness to the heterodox nature of international legal scholarship and is largely agnostic to existing schools of thought about international legal method.¹²⁷ In this respect the thesis has not attempted slavishly to follow any one methodology in its approach. It draws its greatest inspiration from scholars who can loosely be identified as adopting New Approaches to International Law as has been so articulated most recently by Professor B.S. Chimni.¹²⁸ In this respect, it primarily relies on the methods utilized by Anne Orford (documenting the work of international civil servants) and David Kennedy (understanding the 'background work' experts, considered as 'people with projects') in its treatment of the archival record it has assembled.¹²⁹ However, it is further informed by the scholarship of Third World Approaches to International Law ('TWAIL') and has benefited greatly from the approaches adopted by a number of scholars that identify as TWAIL, most notably, B.S. Chimni, Anthony Anghie and Rajagopal Balakrishnan.¹³⁰

1.6.3 Structure of the Argument of the Thesis

The thesis is divided into six chapters. Following on from this introduction, I provide a comprehensive analysis of the UNGP Framework as the foundational moment of the BHR Field in Chapter 2. I then move, in Chapters 3 and 4, to analyze the Code of Conduct negotiations and the Norms process. In Chapter 5, I then assess the system of polycentric governance the BHR Field now seeks to operationalize, providing examples of how and why this has shifted our understanding of human rights.

¹²⁷On this agnosticism, see in particular, Martti Koskenniemi, 'Letters to the Editors of the Symposium' (1999) 93(2) *American Journal of International Law* 351. See also the methods outlined in that Special Issue of the *American Journal of International Law*.

¹²⁸B.S. Chimni, *International Law and World Order: A Critique of Contemporary Approaches* (Cambridge University Press 2017), 246 - 300.

¹²⁹Anne Orford, *International Authority and the Responsibility to Respect* (CUP 2011). See in particular: Anne Orford, 'On international legal method' (2013) 1(1) *London Review of International Law* 166, as well as the other contributions to that Special Issue.

¹³⁰See B.S. Chimni, 'Third World Approaches to International Law: A Manifesto' (2006) 8(1) *International Community Law Review* 3; B.S. Chimni (2017); Rajagopal (2003).

1.6.4 Originality and Contribution to the Existing Debates

The thesis offers a new interpretation of the emergence of the BHR Field and its significance for the theory and practice of IHRL. It conducts a close reading of the contemporary legal processes which culminated in its emergence; discusses at length the struggles which emerged during these processes; critically analyzes the modes of legal reasoning that were evidenced in the documentary records; and situates these processes within contemporary debates in human rights historiography regarding the relationship between IHRL and neoliberalism. Drawing from existing literatures pertaining to international law, human rights historiography and the BHR Field itself, the thesis provides a diagnostic account and short conceptual history of how the field emerged. It does so, while remaining mindful of being reflexive in its approach and conscious of the limitations of the archive.

This contribution is offered with the hope of generating further debate as to the extent to which human rights has been, and continues to be, incorporated into the managerial practices of TNCs and other business enterprises, and what this incorporation might mean for the contemporary practice of IHRL. I also hope that further reflection on pragmatism as a dominant mode of legal reasoning will precipitate debate about alternatives to the pragmatic mindset, which now seems if not ubiquitous, at least generally accepted as emblematic of how one reasons as an international lawyer. Hence, the question posed in the thesis' title. Are human rights now being incorporated (into the managerial practice of corporations) and what are the ramifications of this incorporation? In our current age of neoliberalism, what might incorporation be achieving and whose values are being upheld? Additionally, what does it mean for the way in which international lawyers both theorize and practice international human rights law? My hope is that, by illuminating a short conceptual history of the emergence of the BHR Field, there might be pause for greater reflection on how we might still imagine the theory and practice of business and human rights differently.

Chapter Two – The End of the Beginning

What do these Guiding Principles do? And how should they be read? Council endorsement of the Guiding Principles, by itself, will not bring business and human rights challenges to an end. But it will mark the end of the beginning: by establishing a common global platform for action, on which cumulative progress can be built, step-by-step, without foreclosing any other promising longer-term developments.

- John Ruggie, addressing the Human Rights Council, 21 March 2011¹

2.1 A Common Global Platform for Action: Against the Norms

On 16 June 2011, in an unprecedented step, the UN Human Rights Council ('HRC') unanimously endorsed the Guiding Principles on Business and Human Rights ('UNGPs'). The UNGPs and the 'Protect, Respect and Remedy Framework' which preceded them, were developed over the course of six years by Professor John Ruggie, who in 2005 was appointed the Special Representative to the UN Secretary General on the issue of 'Human Rights and Transnational Corporations and Other Business Enterprises' ('SRSG').²

The SRSG's mandate began in the aftermath of a process to establish a set of binding international norms on TNCs and other business enterprises which, if successful, would have signalled international agreement on corporate human rights obligations.³ As such, he came into the fray of a politically charged debate about the correct standards of responsibility and accountability to apply to TNCs and other business enterprises with regard to human rights. According to the SRSG:

Advocates were fervently in favour of the Norms because the Norms proposed making these [human rights] obligations binding on companies directly under international law. Business vehemently opposed what it described as "the privatisation of human rights", transposing to companies obligations that they believed belonged to states. The proposal found no champions on the Commission, which declined to act on it.⁴

In April of 2005, Argentina (together with India, Nigeria, the Russian Federation and Norway) proposed a resolution to the sixty-first session of the (then) Commission on Human Rights ('CHR') requesting an SRSG to be appointed.⁵ At the request of the U.S. a recorded vote was taken on this resolution at the 61st session of the Commission. The

¹UNHRC, A/HRC/17/31, 'Guiding Principles on Business and Human Rights: Implementing the United Nations Protect, Respect and Remedy Framework' (21/03/2011) 12, ¶13 ['2011 Resolution'].

²See UNCHR, Res. 2005/69, 1 at ¶1.

³See *infra* Chapter 4. See also the definition of the Norms in Chapter 1 (at footnote 38).

⁴John G. Ruggie, *Just Business: Multinational Corporations and Human Rights* (Norton: 2013), xvii. ['Ruggie (2013)'].

⁵UNCHR, E/CN.4/2005/L.10/Add.17, (22/04/2005), at ¶ 72-76.

resolution was adopted by 49 votes in favour to 3 against, with one abstention.⁶ Australia, South Africa and the U.S. were opposed to the resolution.⁷

At the time, the CHR was undergoing major reform. The Economic and Social Council ('ECOSOC') established the CHR in 1946, in accordance with Article 68 of the Charter of the United Nations ('UN Charter').⁸ For nearly sixty years, it continued to remain at the forefront of the international human rights agenda, including amongst its credits drafting the Universal Declaration of Human Rights ('UDHR') and both the International Covenant on Civil and Political Rights ('ICCPR') and the International Covenant on Economic, Social and Cultural Rights ('ICESCR' and together, the 'International Bill of Rights').⁹ It also served as the UN's primary forum for states to establish and promote international human rights standards.¹⁰

By the new millennium, the CHR had seemingly fallen into disrepute.¹¹ In 2002, the U.S. became critical of the body, after it failed to win a seat on the CHR at the same time as Sudan became a member.¹² The following year, several international human rights organizations, including Human Rights Watch and Amnesty International, became outspoken critics of the CHR, with Human Rights Watch going so far as to call it a 'rights abusers club'.¹³

In March 2005, just one month before the CHR called for the SRSG's appointment, Secretary-General Kofi Annan determined in his report, *In Larger Freedom*, that:

As a result, a credibility deficit has developed, which casts a shadow on the reputation of the United Nations system as a whole. If the United Nations is to meet the expectations of men and women everywhere — and indeed, if the Organization is to take the cause of human rights as seriously as those of security and development — then Member States should agree to replace the Commission on Human Rights with a smaller standing Human Rights Council.¹⁴

The creation of the Human Rights Council ('HRC') was intended to 'accord human rights a more authoritative position, corresponding to the primacy of human rights in the Charter of the United Nations'.¹⁵ It formed part of a broader reform agenda within the United

⁶Ibid. ¶ 75.

⁷Ibid. ¶ 75.

⁸Article 68, Charter of the United Nations, (26 June 1945) 1 UNTS XVI (Hereafter, 'UN Charter').

⁹UN Doc. UNGA A/Res/217(III) 'International Bill of Rights – A Universal Declaration of Human Rights' (1948) ['UDHR']; UNGA, International Covenant on Civil and Political Rights (16 December 1966), 999 UNTS 171 ['ICCPR']; and UNGA, International Covenant on Economic, Social and Cultural Rights, 993 UNTS 3 ['ICESCR'] (together, the 'International Bill of Rights').

¹⁰UNGA, UN Doc. A/59/2005, 'Report of the Secretary-General, *In Larger Freedom: Towards Development, Security and Human Rights For All*', (21/03/2005) 45, ¶181. ('SG(2005)').

¹¹Steven Seligman 'Politics and Principle at the UN Human Rights Commission and Council (1992 – 2008)' (2011) 17(4) *Israel Affairs* 520, 521.

¹²Ibid.

¹³Ibid.

¹⁴SG(2005) 45, at ¶182-3.

¹⁵Ibid.

Nations that Annan had initiated in 1997 and which would continue until he left office.¹⁶ In his statements to the BBC at the time, Annan asserted that the HRC's work 'must mark a clean break from the past' and '[N]ever allow this Council to be caught up in political point-scoring or petty manoeuvre'.¹⁷

The UNGA acted swiftly to establish the HRC, which became one of its subsidiary organs. It was established by vote in April 2006 and its members were selected in May.¹⁸ Unlike the CHR, the HRC was to meet three times a year (as opposed to one); to comprise 47 members elected by secret ballot (CHR members comprised 53 Member States and had been selected by ECOSOC); and to have the power to draw up human rights reports on *all* Member States through the process of universal periodic review, starting with the HRC members themselves.¹⁹ Although the HRC's work was primarily to promote 'universal respect for human rights and fundamental freedoms for all, without distinction of any kind and in a fair and equal manner'²⁰ it was also given the power, amongst other things, to 'make recommendations to the General Assembly for the further development of international law in the field of human rights'.²¹

2.3 Shared Values, Embedded Liberalism and the Appointment of the SRSG

It was amidst this reform process that Annan, upon the request of the CHR, appointed John Ruggie to the position of SRSG. Special Representatives in the UN system are appointed to act as the Secretary-General's adviser and representative on specific situations. Historically, SRSGs have been appointed in response to threats to international peace and security, often taking office in the country where the UN has a field presence during an ongoing conflict.²² Although their role and function is not explicitly determined in the UN Charter, their responsibilities fall under Articles 97 and 98, through which they may be

¹⁶UNGA, A/51/950 (14/07/1997); See also Evan Fontaine Ortiz, 'The Role of Special Representatives of the Secretary-General and Resident Coordinators: A Benchmarking Framework for Coherence and Coordination within the United Nations System' Joint Inspection Unit, Geneva 2009 UN Doc. JIU/Rep 2009/9.

¹⁷BBC News - Paul Reynolds, World Affairs Correspondent, 'New Start for Human Rights at the UN?', 19 June 2006, available online at: <http://news.bbc.co.uk/1/hi/world/europe/5095174.stm>.

¹⁸UNGA, A/Res/60/251, (3/04/2006).

¹⁹Ibid.

²⁰Ibid, 2 at ¶ 2.

²¹Ibid, 2 at ¶ 5(b).

²²See Volker Lehman, 'Special Representatives of the Secretary-General' (Friedrich Ebert Foundation, New York, July 2007).

appointed on behalf of the Secretary General and act in his capacity, in order to make recommendations to the UNGA or the Security Council.²³

The new SRSG had served Annan as Assistant Secretary-General for Strategic Planning from 1997 - 2001. His duties included overseeing the establishment of the UN Global Compact ('UNGC'), an initiative he spearheaded with Georg Kell primarily aimed at TNCs. The UNGC created voluntary partnerships with organisations who were willing to support broader UN goals, and 'to bind their strategic and operative business activities to ten principles. The ten principles cover the areas of human rights, labour, environment, and the fight against corruption'.²⁴ Annan announced the establishment of the UNGC to the World Economic Forum in Davos in 1999, asking business leaders gathered at that forum to 'initiate a global compact of shared values and principles, which will give a human face to the global market.'²⁵

The SRSG was a key champion of the 'shared values and principles' Annan promoted.²⁶ A political science professor, he had come to pre-eminence advancing a theory of embedded liberalism,²⁷ which, in his own words, had 'become the dominant interpretation of the post-war international economy.'²⁸ The term 'embedded liberalism' referred to the work of political-economist Karl Polanyi, whose 1944 book, *The Great Transformation* distinguished between embedded and dis-embedded economic orders.²⁹

2.3.1 The Concept of Embedded Liberalism

As noted in Chapter 1, on Polanyi's reading of history, economic orders had always been embedded in the social fabric of the societies in which they operated.³⁰ The nineteenth century idea of a free market was not only new but also revolutionary. The idea that an economic order could be dis-embedded from social and political relations, first through

²³Article 97 of the UN Charter states that the Secretariat of the UN shall comprise a Secretary-General 'and such staff as the Organization may require'. Article 98 states that the Secretary-General shall act in this capacity in all meetings of, amongst other, the Security Council and the General Assembly.

²⁴Christian Voegtlin and N.M. Press, 'Global Governance: CSR and the Role of the UN Global Compact' (2014) *Journal of Business Ethics* 122 179, 181.

²⁵UN Office of the Secretary-General, 'Press Release: Secretary-General Proposes Global Compact on Human Rights, Labour, the Environment, in address to World Economic Forum in Davos', 15 February 1999, UN Doc. No. SG/SM/6881.

²⁶Compare UNGA Press Release SG/SM/6881, 'Secretary General Proposes Global Compact on Human Rights, Labour, Environment in Address to World Economic Forum in Davos' (1/02/ 1999) (including Annan's speech at Davos) to Ruggie (2008), 234. See also John G. Ruggie, 'Making Globalization Work for All: Speech to the G-20 Summit' (Keynote Address to the G-20 Ministers for Labour and Employment) (22/02/2017).

²⁷John G. Ruggie, 'International Regimes, Transactions and Change: Embedded Liberalism in the Postwar Economic Order' (1982) 36(2) *International Organization* 379 ['Ruggie (1982)'].

²⁸Rawi Abdelal and J. Ruggie, 'Chapter 7: The Principles of Embedded Liberalism – Social Legitimacy and Global Capitalism' in David Moss and J Cisternino (eds), (2009) *New Perspectives on Regulation* (The Tobin Project: Cambridge MA) at 152. [Hereafter, 'Abdelal/Ruggie (2009)'].

²⁹Polanyi [1944].

³⁰Abdelal/Ruggie (2009), 153.

national and subsequently global markets had no predecessor.³¹ Polanyi argued that the idea of the self-regulating market was a myth:

Our thesis is that the idea of a self-adjusting market implied a stark utopia. Such an institution could not exist for any length of time without annihilating the human and natural substance of society; it would have physically destroyed man and transformed his surroundings into a wilderness.³²

Instead, *laissez faire* economies were planned. As Polanyi put it, 'the road to the free market economy was opened and kept open by an enormous increase in continuous, centrally organized and controlled interventionism.'³³ For Polanyi, attempts to embed policies of economic *laissez faire* during this first period of globalisation (circa 1870 – 1914) had had serious political consequences and were ultimately unsustainable. The historically unprecedented relationship inaugurated between 'economy' and 'society' by the free market undermined both the constitutive elements of social life and the presuppositions of commodity production and exchange. As Nancy Fraser has noted, Polanyi's reading of history was that previously, markets had been mere accessories of economic life, and no such thing as a separate 'economy' existed.³⁴ In this respect production and distribution had been organized around non-economic institutions (kinship ties, community, religious groups) and subject to non-economic norms (religious, communal and legal), limiting what could be bought and sold, by whom and on what terms.³⁵

Drawing on Polanyi's work, the SRSG had theorised in 1982 that the international economic order in the post-World War II period relied upon a particular social bargain between states, which he termed 'the compromise of embedded liberalism'.³⁶ According to the SRSG, it was a compromise through which U.S. and European policymakers sought to legitimise states' domestic intervention into international markets to restore their legitimate social purpose.³⁷ In this respect, the international economic order was determined to be stable only insofar as the exercise of authority was fused with legitimate social purpose. 'Legitimate social purpose' was defined as being an interventionist programme of governmental social action predicated on securing domestic stability, as determined by the negotiators at the Bretton Woods Conference.³⁸

For the SRSG, the compromise of embedded liberalism 'set the stage for a new liberal economic order in the post-World War II period, different from that which had gone

³¹Abdelal/Ruggie (2009), 153.

³²Polanyi [1944], 3.

³³Ibid., 140.

³⁴Nancy Fraser, 'Can Societies Be Commodities All the Way Down? Post-Polanyian Reflections on Capitalist Crisis' (2014) 43(4) *Economy and Society* 541, 545. [Fraser (2014)].

³⁵Fraser (2014), 545.

³⁶Ruggie (1982) 393-398.

³⁷Abdelal and Ruggie (2009), 153.

³⁸Andrew Lang, 'Reconstructing Embedded Liberalism: John Gerard Ruggie and Constructivist Approaches to the International Trade Regime' (2006) 9(1) *Journal of International Economic Law* 81, 87. [Lang (2006)].

before'.³⁹ The regime created by the negotiations at Bretton Woods embedded the liberalism of freer trade within an 'interventionist program of governmental social action', since commonly referred to as the policy program of the post-War welfare state.⁴⁰

Yet the SRSg openly admitted it was not a compromise that suited everyone. In the SRSg's analysis, one of the 'external adjustment costs' of the embedded liberal compromise was the inter-stratum shifting of the cost of maintaining domestic stability from 'regime makers' to 'regime takers'.⁴¹ This meant that 'the compromise of embedded liberalism has never been fully extended to the developing countries'.⁴² While for the SRSg, this did not make the compromise fatal, he noted in 1982 that it may yet 'prove very nearly fatal for some of the poorer developing countries' – a point which he made absent further analysis as to why this might be problematic.⁴³ As Andrew Lang notes, this made for some 'deafening silences' in the embedded liberalism story: 'The story leaves out, in Dillon's words, 'vestiges of colonialism, global racism and a long past of global exploitation.''⁴⁴

According to the SRSg, the period of embedded liberalism lasted approximately forty years. It was followed by the rise of neoliberalism through which economic *laissez-faire* once again took hold and with it, 'the resurgent ethos of liberal capitalism'.⁴⁵ Twenty years later however, the SRSg's response to neoliberalism was not to call for the reinstitution of state-based intervention to secure domestic stability. Instead, as he stood before the HRC, he asserted instead:

...In the immediate post-Second World War era, the term "inter-national economy" was still an accurate spatial description of the prevailing reality: an economic order consisting of *external* transactions taking place among separate and distinct national markets, conducted at arm's length, which Governments could buffer effectively at the border by point-of-entry measures like tariffs, non-tariff barriers, exchange rates and capital controls - and which were constrained, as always, by the cost and capabilities of available communication and transportation technologies.

This picture contrasts with the most visible manifestation of globalization today: some 70,000 transnational firms, together with roughly 700,000 subsidiaries *and millions of suppliers spanning every corner of the globe*. There are no longer external arm's-length transactions...what once was external trade between national economies increasingly has become *internalized* within firms as global supply chain management, functioning in real time and directly shaping the daily lives of people around the world...

Today, the widening gap between global markets and the capacity of societies to manage their consequences may pressure political leaders to turn inward yet again, pulled by economically disadvantaged but politically empowered segments of their publics, as a result of which assertive nationalisms or intolerant fundamentalisms may emerge as the promised means for providing social protection. Embedding global

³⁹Lang (2006), 87.

⁴⁰Ibid., 87.

⁴¹Ruggie (1982), 414.

⁴²Ibid, 413.

⁴³Ibid., 414.

⁴⁴Lang (2006), 100. Quoting Sarah Dillon, 'A Farewell to Linkage: International Trade Law and Global Sustainability Indicators' (2002) 55(1) Rutgers Law Review 87, 152.

⁴⁵Ruggie (1982), 413.

markets in shared values and institutional practices is a far better alternative; contributing to that outcome is the broadest macro objective of this mandate. [My emphasis]⁴⁶

For the SRSG, the key to doing so remained in the emergence of a 'global public domain' ('GPD'), which he took to be 'an arena inhabited by various actors for whom the territorial state is not the cardinal organizing principle, as well as by states'.⁴⁷ This arena comprises an area of discourse, contestation and action organised around global rule-making – a 'transnational space' which permits the direct expression and pursuit of human interests, not merely those mediated by the State.⁴⁸

Here, the SRSG appeared to be departing from the Polanyian critique of *laissez faire* markets, arguing for the opposite of what Polanyi himself had thought necessary and possible to secure social welfare. It will be recalled that for Polanyi, the idea of a *laissez faire* market was itself a 'stark utopia'.⁴⁹ As such, assuming that a 'global market' could itself form the basis of constructing social relationships for any length of time did not make sense: it would lead to annihilating consequences.⁵⁰

For Polanyi, the logic underlying this argument rested on the distinction between real and fictitious commodities. The definition of a commodity here, is something that can be produced for sale on a market. Polanyi argued that land, labour and money are not commodities *per se*, because they were not originally produced for sale: that postulate was 'entirely fictitious'.⁵¹

In this respect, rather than having any intrinsic value as a commodity, land is only another name for nature, which is not procured by man; labour is only another name for human activity, which goes with life itself, and money is merely a token of purchasing power.⁵² That they subsequently became bought and sold on the free market had the effect of de-humanizing man and denigrating nature: for this, according to Polanyi, there had been no precedent in human history. This had the further effect of denying people as being *social* beings, which did not accord with pre-nineteenth century society or with non-Western societies' conception of what it means to be human: according to Polanyi, 'man acts so as to safeguard his social standing, his social claims, his social assets. He values material goods only insofar as they serve this end.'⁵³

⁴⁶UNHRC, E/CN.4/2006/97 'Interim Report of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises', (22 February 2006), 4-5, 6 ¶10-11, and 18. See also Ruggie (2008), 233.

⁴⁷Ruggie (2008), 241. See also Kelsall (2017) 590-91.

⁴⁸Ruggie, (2008), 241. See also Kelsall (2017), 590-91.

⁴⁹Karl Polanyi [1944], at 3.

⁵⁰Karl Polanyi [1944], at 71-80.

⁵¹Karl Polanyi [1944], at 76.

⁵²Karl Polanyi [1944], at 75-6. I am remaining true to Polanyi's words and not altering his use of the gendered term 'man'. I will return to this in Chapter 5.

⁵³Karl Polanyi [1944] at 60.

In his characterization to the HRC, however, the SRSG attributed 'shared values' not to the institutions that remained distinct from economic transactions (what Polanyi would argue remained in a mix of the family, religious organizations, community-based groups, local government and administration and professional relationships) but rather, to a set of transnational actors or constellation of actors who would spontaneously fulfil the role of closing governance 'gaps'.⁵⁴ In this respect, the need to embed the global market in shared values would require 'triggering the emergence of more inclusive forms of global governance'.⁵⁵

This underlined the SRSG's formulation of the UNGP Framework and ultimately determined the role assigned to states, on the one hand, and TNCs and other business enterprises, on the other. Furthermore, it explained the contours of a polycentric governance system which the SRSG would later explain could give effect to closing these gaps. The problem with this characterization is that it does not adequately characterise how to effect social integration and wealth distribution outside of, or distinct from, the global market itself. As Claire Methven-O'Brien has pointed out, this has the effect that embeddedness is identified with 'the rules and regulation of market *exchange*' quite distinct from Polanyi's concern with commodification and de-commodification as key components of re-embedding and dis-embedding strategies and practices.⁵⁶

The methodology he would use to frame the logic of this embeddedness would later be termed 'principled pragmatism'.⁵⁷ According to the SRSG, this required:

an unflinching commitment to the principle of strengthening the promotion and protection of human rights as it relates to business, coupled with a pragmatic attachment to what works best in creating changes where it matters most – in the daily lives of people.⁵⁸

This thesis uses the term 'embedded pragmatism' because this concept more accurately describes how modes of legal reasoning are being utilized, and for what purpose, in each successive legal process under analysis, including the process which led to the UNGP Framework. Law remains largely absent from Ruggie's characterizations (of both embedded liberalism and principled pragmatism). I argue that the concept of embedded pragmatism aptly describes how, by deploying pragmatic modes of reasoning, international law is being utilized to create a relationship between the prevailing economic order, as conceived by different parties, on the one hand, and the extent to which those parties agree that values can be agreed 'globally', on the other.

⁵⁴On the problematic nature of governance gaps, see in particular, Chimni (2018), 7-8 and 30.

⁵⁵Ruggie (2008), 232. [Emphasis in the original].

⁵⁶Methven O'Brien (2011), 346-7.

⁵⁷Ruggie (2013), xlii. See also OHCHR, Press Release, 'Principled Pragmatism is the Way Forward for Business and Human Rights', 7 June 2010.

⁵⁸Ruggie (2013), xlii. See also Ruggie (2017), 61.

In what follows, this thesis shows how the SRSG utilized IHRL to articulate his version of embedded pragmatism that ultimately became the underlying basis of UNGP Framework. In Chapter 5, there follows a further explanation as to how the system of polycentric governance in the UNGP Framework inaugurates embedded pragmatism and how this has shaped the BHR Field.

2.4 Defining the State's Role

The SRSG was initially appointed for a two-year period. According to Resolution 2005/69, he was to liaise closely with the Secretary-General of the UN Global Compact as well as to consult, on an on-going basis, with all stakeholders. The term 'stakeholders', as Ruggie described it, included:

States, international and regional organizations such as the International Labour Organization, the United Nations Conference on Trade and Development, the United Nations Environment Programme and the Organization for Economic Co-operation and Development, transnational corporations and other business enterprises, and civil society, including employers' organizations, workers' organizations, indigenous and other affected communities and non-governmental organizations.⁵⁹

The advice given to the SRSG from government representatives in Geneva was to 'avoid a train-wreck.'⁶⁰ Resolution 2005/69 stated his primary mandate was to clarify the correct standards of responsibility and accountability to apply to TNCs and other business enterprises regarding human rights. In addition, the SRSG was to: (a) elaborate on the role of states in effectively regulating and adjudicating the role of TNCs and other business enterprises with regard to human rights, including through international cooperation; (b) research and clarify the implications for TNCs and other business enterprises of concepts such as 'complicity' and 'sphere of influence'; (c) develop materials and methodologies for undertaking human rights impact assessments ('HRIAs') of the activities of TNCs and other business enterprises; and finally, (d) compile a compendium of best practices.⁶¹

In his first interim report to the HRC (which replaced the Commission on Human Rights in 2005), the SRSG rejected part (c) of his mandate on the grounds that it was beyond his time and there were resource constraints to develop such materials.⁶² He did, however, provide the Council with a report providing principles and characteristics of HRIAs

⁵⁹UNCHR, Res 2005/69 (20/04/2005) 3, para 3. ['Res 2005/69'].

⁶⁰UN SRSG, 'Remarks: Delivered at a Forum on Corporate Social Responsibility, Co-Sponsored by the Fair Labor Association and the German Network of Business Ethics', Bamberg, Germany (14/06/2006). Available online at: <https://www.business-humanrights.org/sites/default/files/reports-and-materials/Ruggie-remarks-to-Fair-Labor-Association-and-German-Network-of-Business-Ethics-14-June-2006.pdf>.

⁶¹Res 2005/69, 3 para 3.

⁶²UNHCR, E/CN.4/2006/97 (22/02/2006) 4, para 7. ['2006 Interim Report'].

for business, including a qualitative assessment of how HRIAs compare to environmental and social impact assessments.⁶³

What began as an initial mandate of two years eventually became a six-year process that 'evolved in three phases'.⁶⁴ During the first phase (April 2005 – February 2007), the SRSG would begin an extensive program of systematic research that would continue throughout his entire tenure. Reflecting the mandate's 'origins in controversy'⁶⁵, much of this phase comprised identifying and clarifying existing human rights standards and practices as they pertained to TNCs and other business enterprises. The SRSG interpreted the term 'standards' broadly. According to him, the Council's request to review such standards:

was not confined to legal standards that may impose direct or indirect obligations on companies, but was also meant to include the realms of *social* expectations and *moral* obligations.⁶⁶

Phase one included: assessing global patterns and sectoral and regional variations of business' recognition of human rights;⁶⁷ designing and implementing a survey of both UN Member States (on the one hand) to identify practices of identifying, regulating, adjudicating and otherwise influencing the role of corporations with respect to human rights, and of Global Fortune 500 companies (on the other) to consider their human rights policies and practices;⁶⁸ conducting four 'international' workshops (which took place in London, Oslo, Brussels, and New York, respectively) to address the issues of (i) government regulation of corporate human rights abuses,⁶⁹ (ii) corporate complicity in human rights violations,⁷⁰ (iii) the role of extraterritorial jurisdiction in improving the accountability of TNCs,⁷¹ and (iv) corporate human rights responsibility under international law;⁷² and finally, reviewing international human rights treaties to consider states'

⁶³UNHRC, A/HRC/4/74 (5/02/2007) ['HRIA Report 2007'].

⁶⁴UNHRC, A/HRC/17/31(21/03/2011), 2 at ¶ 4 ['2011 Report'].

⁶⁵ UNHRC, HRIA Report 2007, 2 at ¶ 4.

⁶⁶UNHRC, A/HRC/4/35/Add.4 (08/02/2007) 3, ¶1. ['A/HRC/4/35/Add.4']. [My emphasis].

⁶⁷UNHRC, A/HRC/4/35/Add.4, 3.

⁶⁸UNHRC, A/HRC/4/35/Add.3 (28/02/2007) ['A/HRC/4/35/Add.3'].

⁶⁹UNHRC, A/HRC/4/35 Add.2. (15/02/2007) para 2 ['A/HRC/4/35 Add.2'].

⁷⁰UNHRC, A/HRC/4/35 Add.2 para 3. This second workshop was held in Oslo and was hosted by the Council of Ethics for the Norwegian Government Pension Fund on 23-24 October 2006.

⁷¹A/HRC/4/35 Add.2, at ¶5. See also: 'Summary Meeting Report, Seminar of Legal Experts: Extraterritorial Legislation as a Tool to Improve the Accountability of Transnational Corporations for Human Rights Violations', available online at: <https://business-humanrights.org/sites/default/files/media/bhr/files/Extraterritorial-legislation-to-improve-accountability-legal-experts-seminar-Brussels-summary-report-3-4-Nov-2006.pdf>. ['De Schutter Experts Meeting (2006)'].

⁷²A/HRC/4/35 Add.2, para 5. The fourth workshop was held in New York at New York University on 17 November 2006. Professor Philip Alston and Mary Robinson were co-chairs of this workshop. The report to the Human Rights Council provides an addendum explaining the key discussions and findings from the meetings in Brussels and New York.

obligations to prevent and punish the commission of corporate abuses to third parties (the so-called 'horizontal' application of human rights).⁷³

In addition, a further two-dozen research papers would be compiled on the SRSG's behalf. He would also conduct regional consultations in Johannesburg, Bangkok and Bogotá, attend civil society consultations on all five continents and conduct two multi-stakeholder consultations with representatives from the extractive and financial services industries.⁷⁴ He also held discussions with all 'relevant multilateral institutions', hence suggesting that he had discussed the mandate, at a minimum, with representatives from the International Labour Organization, the UN Conference on Trade and Development, the UN Environment Programme and the Organization for Economic Co-operation and Development ('OECD'), as instructed by Resolution 2005/69. Reports of the meetings held, and the research conducted were all made publicly available on the SRSG's website.⁷⁵

2.5 Creating an Authoritative Standard

During the second and third phases of his mandate (May 2007 – June 2011), the SRSG would develop the UNGP Framework. Although he would conduct over fifty consultations throughout the life of his mandate, the SRSG had a core team of legal and political advisers whom he would later name in a memoir as assisting him most during this phase.⁷⁶

Together, they would craft responses to a vast array of actors and document in meticulous detail the meetings conducted as part of the SRSG's mandate.⁷⁷ Key to consensus-building, in this respect, was the SRSG's capacity to be responsive to a panoply of professionals from businesses, corporate law firms, human rights NGOs, employers' organizations, trade unions and international organizations.⁷⁸ The SRSG undertook this with a commitment that was admirable and single-focused: any form of contestation or desire to return to a more legalistic view of human rights was quietly yet conclusively dismissed. In this respect, any radically alternative structural account of the global economy was opposed as being too [N]ormative: what remained clear from the start of

⁷³UNHRC, A/HRC/35/4 Add.1 (13/02/2007), ['A/HRC/35/4 Add.1'].

⁷⁴UNHRC, A/HRC/4/35 (19/02 2007), 4, para 7. ['A/HRC/4/35'].

⁷⁵However, some of the documents from this website are now available through the Business and Human Rights Resource Centre's website. See www.business-humanrights.org.

⁷⁶Ruggie (2013), xiii. Notably, lawyers Rachel Davis (Australia), Vanessa Zimmerman (Australia), Gerald Pachoud (Switzerland), Andrea Shemberg (USA) Christine Bader (USA), John Sherman III (USA) and Lene Wendland (South Africa) were key to the SRSG's mandate. Caroline Rees, formerly of the United Kingdom's Foreign & Commonwealth Office, was also central to this mandate.

⁷⁷Most of the documentation is now publicly available on the Business and Human Rights Resource Centre's website. Note for example: 'Message by UN Special Representative John Ruggie, welcoming paper by Allens Arthur Robinson' (4 March 2008); 'Comment on the Joint NGO Statement on a Follow-on Mandate for Professor Ruggie' (28 May 2008); 'Business Leaders Initiative on Human Rights: Sessions on Partnerships between Business and Governments' Stockholm, 18 June 2008; 'New Online Forum for U.N. Business and Human Rights Mandate' (1 December, 2009 – New York & Geneva); All of which are available online at: <https://www.business-humanrights.org>.

⁷⁸Ibid.

the SRSG's mandate was that he had determined that any resemblance to the Norms should be avoided at all costs.⁷⁹

The SRSG had been asked to elaborate on the role of states in effectively regulating and adjudicating TNCs and other business enterprises with regard to human rights, including through international cooperation.⁸⁰ The reference to 'international cooperation' invoked Article 1(2) of the UN Charter, which specifically states that the purpose and principles of the UN is, *inter alia*, to achieve international cooperation in promoting and encouraging respect for human rights.⁸¹ His determinations in respect of this part of his mandate were subsequently reflected in Principles 1 through 10 of the UNGPs, comprising 'foundational' and 'operationalizing' principles for the state duty to protect against corporate human rights abuse. This became known as Pillar I of the UNGP Framework.

In addition, the SRSG was asked to identify and clarify standards of corporate responsibility for TNCs and other business enterprises regarding human rights.⁸² His determinations in this respect were reflected in Principles 11 through 24 of the UNGPs, which would come to be the 'foundational' and 'operationalizing' principles for the corporate responsibility to respect human rights. This would come to be known as Pillar II of the UNGP Framework.

The remaining UNGPs – Principles 25 to 31 – would eventually be grouped under the heading of 'Access to Remedy'. These principles would come to embody the obligations of States, on the one hand, and TNCs and other business enterprises, on the other, to ensure mechanisms were instituted through which those with a grievance following an alleged corporate human rights abuse could claim a remedy for that abuse. Principles 25 through 31 therefore comprised obligations upon *both* States and TNCs and other business enterprises.⁸³ The resulting principles came to be known as Pillar III of the UNGP Framework.

As already noted, the SRSG would argue that his approach throughout had been framed by principled pragmatism. For the SRSG, this amounted to insisting on 'viewing international law as a tool for collective problem-solving and not an end in itself'⁸⁴ which 'recognizes that the development of any international legal instrument requires a certain degree of consensus amongst states.'⁸⁵ He would later go on to argue that:

Before launching a treaty process its aims should be clear, there ought to be reasonable expectations that it can and will be enforced by the relevant parties and that it will turn out to be effective in addressing the particular problem(s) at hand. This suggests

⁷⁹Ruggie (2013), 54.

⁸⁰Res 2005/69, 3 at ¶13.

⁸¹UN Charter, Article 1.

⁸²Res 2005/69, at paragraph 1(a).

⁸³See Res. 2005/69, at paragraph (1)(b). See also A/HRC/35/Add.1 at footnote 8, where the SRSG defines 'adjudication' as 'judicial or other measures to punish to remediate abuse'.

⁸⁴Ruggie (2017), 59.

⁸⁵*Ibid.* 59

narrowly crafted international legal instruments for business and human rights – ‘precision tools’ as I call them – focused on specific governance gaps that other means are not reaching.⁸⁶

In other words, ‘carefully weighing what forms of international legalization are necessary, achievable, and capable of achieving practical results, all the while building on the GP’s foundation’.⁸⁷ The SRSG’s newfound concept of ‘principled pragmatism’ relied heavily on several assumptions. First, it assumed that the ‘consensus carpet’, as Surya Deva would later call it, would not preclude international law from being re-imagined to respond to the needs of the poorest and most vulnerable within the prevailing economic order.⁸⁸ As will be shown in the sections which follow, pragmatism assumed that international law could only be responsive to those needs by first obtaining this consensus. Second, it further assumed that the governance gaps being maintained by that order were not being maintained *intentionally*, rather than with a view to having them filled.⁸⁹ In this respect, although the UNGP Framework maintained it was ‘filling’ governance gaps, it still delineated between a state *duty* to protect, on the one hand, and a corporate *responsibility* to respect, on the other, at least in part to blur the distinction between law and non-law, in order to fill this gap with corporate self-regulation. As Upendra Baxi would later note:

If the pragmatic test is the benefit of masses of worst-off people, the question does arise whether the Guiding Principles are pragmatically superior to the mandatory Draft Norms. Do the former end, or at least begin to end, the regime of MNC impunity from human rights responsibilities? On this question even pragmatists, while practicing ‘principled pragmatism’, may differ. When they do, is theirs a principled disagreement?⁹⁰

In what follows, this thesis explains in detail the SRSG’s reasoning when crafting the UNGP Framework, and how the pragmatic choices made were ultimately in keeping with his determination to embed the GPD with ‘shared values’ as conceived primarily as being embodied in IHRL. Understanding how IHRL was utilized and supplemented by corporate law will be key to understanding the discussion in the chapters which follow.

2.6 Pillar I: The State Duty to Protect

2.6.1 States’ obligations to regulate and adjudicate

⁸⁶Ibid. 60.

⁸⁷Ibid. [My emphasis].

⁸⁸Surya Deva, ‘Business and Human Rights: Time to Move Beyond the Present?’ in Garavito-Rodriguez (2017), 67.a

⁸⁹See also Chimni (2018) on the role of modern customary international in filling these gaps and why it is problematic. See also Chapter 5.

⁹⁰Upendra Baxi, ‘Human Rights Responsibility of Multinational Corporations, Political Ecology of Injustice: Learning from Bhopal Thirty Plus’ (2016) 1 Business and Human Rights Journal 21, 35.

As noted in Chapter 1, embedded pragmatism gives rise to the idea of legal pastiche. In other words, embedding 'shared values' is undertaken through both a mix of legal forms (hard, soft) and a variety of legal approaches (positivist, realist, naturalist, policy-oriented) in order to justify international law's role in regulating the international economic order.⁹¹ The key features of pragmatism that are present when considering the legal processes under examination are that: (1) determining how to regulate the corporation remains contingent on an empirical analysis of its effects and activities; (2) a focus on fact-based particularism (as opposed to rules-based idealism) means any idea of what is possible remains inherently conservative; (3) institutionalizing process is favoured over securing outcomes; (4) any contestability of the description of what exists remains narrow; (5) any radically alternative structural account is opposed; and (6) because it remains impossible to predict how the world is going to change, assessments on how international law can and should be incorporated into the conduct being regulated are made with a view that is short-term in orientation, or in the long-term systemic interests of the existing economic order.⁹²

The pragmatic mode of legal reasoning became particularly evident in the methods the SRSG utilized to determine the parameters of the state duty to protect. First, the SRSG remained committed to determining how to regulate the TNC based on an empirical analysis of its 'effects' and 'activities'. This was clearly evidenced through the extensive use of social science survey methods to determine the parameters of Pillar II of the UNGP Framework, in addition to reliance on legal expert commentary regarding the corporate form. Additionally, as will be shown through the analysis which follows, a focus on fact-based particularism made the SRSG's assessment of what remained possible in framing the state duty to protect and the corporate responsibility to respect largely formalist and inherently conservative. Specifically, the SRSG maintained an allegiance to an interpretation of municipal corporate law, largely reflecting a conventional approach to Anglo-American jurisprudence. This was subsequently reflected in the way extraterritorial jurisdiction was incorporated into the UNGP Framework. It was then combined with a much more expansive view of the rights capable of being exercised by TNCs which he took to be reflective of the reality of globalization but which again, seemed largely U.S.-centric.

When determining the state's obligations to regulate and adjudicate TNCs, the SRSG primarily considered states' obligations: (i) within their own territory and/or jurisdiction; (ii) where alleged human rights abuses were taking place outside a state's jurisdiction - for the most part, extraterritorially; and (iii) in situations where human rights violations could potentially give rise to universal jurisdiction in relation to corporate complicity in international crimes. He primarily considered treaty law and Treaty Body commentaries,

⁹¹Koskenniemi (2010), 12.

⁹²See Chapter 1, at Section 1.5.2.

as well as taking advice from a number of international jurists.⁹³ Specifically, he received advice from Professors Andrew Clapham, Olivier De Schutter, Ralph Steinhardt, Muthucumaraswamy Sornarajah, Douglass Cassel, and Pierre d'Argent regarding international law.⁹⁴ Additionally, Professor De Schutter provided the SRSG with a brief detailing the extraterritorial obligations of TNCs with regard to human rights.⁹⁵ I will now consider each of (i) – (iii) in turn.

2.6.2 Obligations within the State's Territory and/or Jurisdiction

The SRSG determined that a state's duty to protect against corporate human rights abuses was derived from a general state duty to protect contained in international human rights conventions. The SRSG did not make explicit in his reports to the HRC how he determined the existence of this general duty to protect. Other than in the Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families,⁹⁶ and the Convention for the Protection of All Persons from Enforced Disappearances⁹⁷, there is no reference to a general state duty to protect an individual's human rights in either the International Bill of Rights or in any of the five other human rights conventions the SRSG reviewed.

There are, however, frequent references to the state's obligation to protect persons in the case of specific rights, as specific groups or for specific purposes. These include: equal protection before the law;⁹⁸ protection of the family;⁹⁹ protection of children;¹⁰⁰ witness protection;¹⁰¹ protection of health and safety in the workplace;¹⁰² special protection during pregnancy;¹⁰³ protection of specific racial or ethnic groups (to ensure equality and non-discrimination);¹⁰⁴ and security of the person and protection against violence and

⁹³See A/HRC/4/35 Add.2, ¶15 and De Schutter Experts Meeting (2006). See also 'Brief Amici of former UN Representative for Business and Human Rights, Professor John Ruggie Professor Philip Alston and the Global Justice Clinic at NYU School of Law in Support of Neither Party' in *Kiobel v Royal Dutch Petroleum* 569 U.S. 108 (2013), (explaining the international legal importance of his analysis). [Ruggie/Alston (2013)].

⁹⁴De Schutter Experts Meeting (2006), 9.

⁹⁵Olivier de Schutter, 'Report for SRSG re: Extraterritorial Jurisdiction – Extraterritorial Jurisdiction as a Tool for Improving the Human Rights Accountability of Transnational Corporations' (December 2006) [De Schutter (2006)].

⁹⁶International Convention on the Protection of the Rights of All Migrant Workers and Their Families (adopted 18 December 1990, entry into force 1 July 2003) 2220 UNTS 3.

⁹⁷International Convention for the Protection of All Persons from Enforced Disappearances (adopted 20 December 2006, entry into force 23 December 2010) 2716 UNTS 3.

⁹⁸Article 26, (ICCPR).

⁹⁹Article 23, (ICESCR).

¹⁰⁰Convention on the Rights of the Child (adopted 20 November 1989, entry into force 2 September 1990), 1577 UNTS 3 ['CRC']. See, *inter alia*, Preamble and Article 2(2), CRC.

¹⁰¹Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entry into force 26 June 1987) 1465 UNTS 85 ['CAT']. See Article 13.

¹⁰²Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, entry into force 3 September 1981) 1249 UNTS 13. [CEDAW] See Article 11(f).

¹⁰³*Ibid.* Article 11(2)(d) CEDAW.

¹⁰⁴Convention on the Elimination of All Forms of Racial Discrimination 660 UNTS 195. See Article 1(4), CERD.

bodily harm.¹⁰⁵ The one exception is the International Convention on the Rights of Persons with Disabilities, which does recognize in its preamble a general duty upon states to recognise 'the need to promote and protect the human rights of all persons with disabilities, including those who require more intensive support'.¹⁰⁶

Conversely, all the human rights conventions utilise a duty to protect to *limit* the rights of individuals: a state may reserve the right to restrict individual rights on the grounds of protection of national security, public order (*ordre public*), public health or morals. This provision is meant to provide both a shield and a sword, in that it seeks to limit both the purposes for which rights may be legitimately curtailed and the way this limitation may be legitimately imposed.¹⁰⁷

A duty to protect can be traced back to General Comment 12 (1999) of the Committee on Economic, Social and Cultural Rights ('CESCR'). In that Comment, the Committee noted:

The right to adequate food, *like any other human right*, imposes three levels or types of obligations on States Parties: the obligation to respect, to protect and to fulfil...the obligation to protect requires measures by the State to ensure that enterprises or individuals do not deprive individuals of their access to adequate food. [My emphasis]¹⁰⁸

This tripartite typology is attributed to the work of Asbjørn Eide, who acted as the UN's Special Rapporteur for the Right to Food in 1987. Eide described the obligations as follows: (1) the obligation to 'respect' requires states to abstain from violating a right; (2) the obligation to 'protect' requires states to prevent third parties from violating that right; and (3) the obligation to 'fulfill' requires the state to take measures to ensure that the right is enjoyed by those within the state's jurisdiction.¹⁰⁹

Despite only rare references to business enterprises in human rights treaties, the SRSG determined, relying on this interpretation, that nearly all the international human rights conventions implicitly required states to prevent corporate human rights abuse where such abuses take place on their territory.¹¹⁰

States were therefore obliged to: (i) regulate the acts of third parties, which may include business enterprises;¹¹¹ or (ii) take action which would be difficult to fulfil without the regulation or adjudication of third parties, including business enterprises.¹¹² Where a

¹⁰⁵ Article 5(b), CERD.

¹⁰⁶ Convention on the Rights of Persons with Disabilities 2515 UNTS 3 ['CRPD'] See Preamble at paragraph (j). (My emphasis).

¹⁰⁷ See debates in the CHR on this point, in particular E/CN.4/SR.235 (10/05/1951), 13.

¹⁰⁸ CESCR: General Comment 12 (Twentieth Session, 1999), (12/05/1999), 4, ¶15.

¹⁰⁹ Asbjørn Eide, UN Special Rapporteur for the Right to Food, 'The Right to Adequate Food as a Human Right', E/CN.4/Sub.2/1987/23 paras 67 – 69. Some authors claim this typology can be traced back to Henry Shue: *Basic Rights: Subsistence, Affluence and U.S. Foreign Policy* (Princeton University Press, 1992), 2.

¹¹⁰ A/HRC/4/35/Add.1, 12, para 16.

¹¹¹ A/HRC/4/35/Add.1, 12, para 16.

¹¹² A/HRC/4/35/Add.1, 12, para 17.

state failed to take action, it could be seen to have violated the human rights convention in question (assuming it were a party to it). However, a violation committed by the enterprise could not be attributed to the state unless the state itself was complicit in the acts in question. Hence, unlike the secondary rules of state attribution,

the duty to protect has been *interpreted by the treaty bodies* to be a substantive duty which will only be breached if the State fails to take steps to prevent and punish abuse. Where the State does act to fulfil its positive obligations by the adoption of all reasonable measures which could be expected in the circumstances but is still unable to prevent interference, it is unlikely to be considered to have breached any treaty obligations - it will not be held responsible for corporate abuse *per se*.¹¹³

Hence, the state duty to protect gave rise to an obligation of conduct (not of result). The UNGP Framework made further explicit that states had an obligation to enforce correlative duties between private actors to ensure that TNCs and other business enterprises respect the rights of others – be those ‘others’ employees, communities, or society as a whole.

In response to what the SRSG saw as ‘policy incoherence’, whereby states would keep their human rights obligations ‘apart from, or heavily discounted in, other policy domains that shape business practices, including commercial policy, investment policy, securities regulation and corporate governance’,¹¹⁴ the resulting UNGPs would seek to provide states with authoritative guidance as to how to recalibrate their legislative and adjudicative responsibilities. This included mandating that states should: (i) enforce existing laws requiring corporations to respect human rights, and periodically review such laws to determine their effectiveness;¹¹⁵ (ii) ensure other laws that governed business’ behaviour, such as corporations law, did not constrain business’ ability to respect human rights; (iii) provide guidance to business as to how to respect human rights through their operations; and (iv) encourage and, where appropriate, require business to report on its human rights impacts.¹¹⁶

The obligations upon the state would increase where it could be shown that a business was owned or controlled by the state or that it was operating in a conflict-affected jurisdiction. In the case of the former, states were called upon to take additional steps to *prevent* human rights abuse, hence reinforcing the obligations upon states as identified in General Comment 12 to respect, protect and fulfil human rights.¹¹⁷

¹¹³A/HRC/4/35/Add.1, 9, 12, para 8. [My emphasis]

¹¹⁴A/HRC/8/5 para 22.

¹¹⁵UNGP, para 3(a).

¹¹⁶UNGP, para 3(d).

¹¹⁷UNGP 4 (Commentary).

In respect of a state's obligations where a business is operating in a conflict affected jurisdiction, states should 'help ensure that business enterprises operating in those contexts are not involved with such abuses'.¹¹⁸ This includes through ensuring that existing legislative and adjudicatory measures are effective in addressing risks of business enterprises involvement in gross human rights violations. The obligation to ensure human rights protection is in addition to states' duties under international humanitarian law and international criminal law.¹¹⁹

Two aspects of this part of the UNGP Framework are worthy of note at this stage. First, as already noted, the SRSG delineated between 'Foundational' Principles, on the one hand, and 'Operational Principles' on the other. This evidenced what Martti Koskenniemi has termed human rights managerialism, *par excellence*. Managerialism here connotes an 'ideology' or a 'mindset' in which international institutions can be utilized to strategically determine and manage certain interests and values that are determined should be upheld by states.¹²⁰ The SRSG here evinced a commitment to restate international law as *law* (through the Foundational principles) and yet concurrently provide guidance to states as to how this should influence their *practice* (through the Operational Principles). As Koskenniemi has noted, this renders international law flexible, deformed and 'a tool in the toolbox of rule'.¹²¹

Second, the duty to protect leaves to states' discretion the extent to which they should prevent TNCs and other business enterprises from operating in a conflict-affected jurisdiction. In this respect, the UNGPs did not include any discussion of norms of *jus cogens* or their effect on the UNGP Framework. The terminology used in the UNGP Framework is 'gross human rights abuse', which conflates the legal term of art ordinarily describing the conduct of states (gross human rights violation) with descriptive term characterizing corporate conduct in this regard (corporate human rights abuse).¹²² The most a state could be expected to do in this regard would be to withdraw public support for a rights-abusing corporation, where it could be shown that 'it is involved with gross

¹¹⁸UNGP 7 (Commentary).

¹¹⁹UNGP 7 (Commentary).

¹²⁰Martti Koskenniemi, 'International Law: Constitutionalism, Managerialism and the Ethos of Legal Education' (2007) 1 EJLS 8, 18. Martti Koskenniemi, 'Constitutionalism as Mindset: Reflections on Kantian Themes about International Law and Globalisation' (2007) 8 Theoretical Inquiries in Law 9, 26; Martti Koskenniemi, 'The Politics of International Law – 20 Years Later' (2009) 20 EJIL 7, 15. See also Richard Clements, 'Managerialism: The Before, During and After the Fragmentation of International Law' (2017) Queen Mary Law Journal 1 ['Clements (2017)'].

¹²¹Martti Koskenniemi, 'Hegemonic Regimes' in Margaret Young (ed), *Regime Interaction in International Law: Facing Fragmentation* (CUP 2012) 305, 313. See also Clements (2017).

¹²²See John Knox 'The Ruggie Rules: Applying Human Rights Law to Corporations' in Radu Mares, *The UN Guiding Principles on Business & Human Rights: Foundations and Implementation* (Martinus Nijhoff 2012) 51, 72-78.

human rights abuses and refuses to cooperate in addressing the situation.¹²³ The approach adopted here was identified as being 'innovative and practical', in light of what states were willing to accept at the time.¹²⁴ Both these aspects of the UNGP Framework evidenced aspects of the pragmatism the SRSG was adopting that would become particularly clear when considering the issues of extraterritorial jurisdiction.

2.6.3 Obligations outside of a State's Territory or Jurisdiction

The SRSG assessed the extent to which states had an obligation to protect human rights outside of their territory and jurisdiction empirically. Regarding his analysis of international human rights treaties, he relied primarily upon the commentaries of the Treaty Bodies. He also held several workshops where the question of extraterritorial jurisdiction was extensively discussed.¹²⁵ This included discussion regarding the corporate form and its implications for a state's assertion of extraterritorial jurisdiction.

The extent to which a state party to an international human rights convention has jurisdiction in IHRL is determined with reference to that state's *de facto* authority or control over an individual. In this respect, it should not be confused with a state's capacity to exercise its prescriptive (legislative) and enforcement jurisdiction.¹²⁶ As has been noted by Marko Milanovic:

When it comes to human rights treaties – that notion [jurisdiction] refers to *a power which a state exercises over its territory and its inhabitants*. When the state obtains this power it must, with due diligence, fulfil its obligations to secure or ensure the human rights of all persons within its jurisdiction. This is a question of fact, of actual authority and control. Despite its name, it is not a legal competence, and it has absolutely nothing to do with that notion of jurisdiction in international law, which delimits the municipal systems of states.¹²⁷

The advice the SRSG obtained from experts seemed to suggest, however, that in the case of legal persons (as opposed to natural persons) the law was less clear. As De Schutter noted in his memorandum to the SRSG, no criteria had been established to determine the circumstances under which a legal person could be deemed to possess the nationality of a state claiming jurisdiction.¹²⁸ This reality was 'clearly disturbing', given the

¹²³UNGPs, Principle 7.

¹²⁴Ibid.

¹²⁵De Schutter Experts Meeting (2006). See also A/HRC/4/35 Add.2.

¹²⁶For detailed discussion on this point at the time of the SRSG's mandate, see Marko Milanovic (2008) 'From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties' Human Rights Law Review 8(3) 411 ['Milanovic (2008)']. See further: Marko Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles and Policy* (OUP 2011); Olivier de Schutter et al, 'Commentary on the Maastricht Principles on Extraterritorial Obligation of States in the Area of Economic, Social and Cultural Rights' (2012) 34 Human Rights Quarterly 1084.

¹²⁷Ibid. at 447 [My emphasis].

¹²⁸De Schutter (2006), 28.

importance of this question in resolving international conflicts pertaining to extraterritorial jurisdiction vis-à-vis TNCs' obligations.¹²⁹ The lack of criteria enabled states to claim both an ability to exercise jurisdiction and protest against regulations imposed on 'their corporations'.¹³⁰

During his 2006 meeting, experts further proposed three solutions to the problem of defining corporate nationality to overcome the formal legal separation of entities in a TNC.¹³¹ First, the SRSG could use the 'classic' or derivative liability approach of the parent-subsidiary relationship, in which the TNC was considered to be an artificial entity. When considered this way, the TNC is viewed as a creature of the state: the TNC is then the sum of its parts, as determined by its jurisdiction of incorporation.¹³² A TNC could only be held liable by 'piercing the corporate veil', which required a close examination of the factual relationship between a parent and its subsidiary in order to determine if the parent could be held responsible for the subsidiary's acts or omissions.¹³³ Hence, although a creature of the municipal law of the state, this precipitated a solution based on the economic reality of the TNC: law should base its solution on reality rather than mere forms.¹³⁴

Second, the TNC could be considered an integrated enterprise, in which the corporation was akin to a real entity. Here, the corporation is considered as separate not only from its individual members but also (in the case of subsidiaries) from the state of incorporation.¹³⁵ This gave rise to the absolute assumption that the subsidiary's acts were attributable to the parent.¹³⁶

Third, the parent company could be held directly liable only if it could be shown that it had failed to exercise due diligence in controlling the subsidiary's acts. This tended to view the parent company and its subsidiary in an aggregate relationship, in that the parent's duties were determined with reference to the actions of the collective of individuals comprising the corporation (in this case, managers and employees conducting due diligence), as opposed to the legal entity itself. Liability here was based only on the *actions* of the parent (and not omissions).¹³⁷

¹²⁹De Schutter (2006), 28.

¹³⁰De Schutter (2006), 28-29.

¹³¹De Schutter Experts Meeting (2006), 4-5.

¹³²Yonah (2005), 770.

¹³³*United States v. Better Foods* 524 U.S. 51 (1998) (*Held* that 'The corporate veil may be pierced and the shareholder held liable for a corporation's conduct when, inter alia, the corporate form would otherwise be misused to accomplish certain wrongful purposes'). See also *Berkey v. Third Ave R. Co.* 244 N.Y. 84, 95 (where the subsidiary is acting as the agent of the parent); and *Bowoto v. Chevron Texaco* 312 F. (Supp) 2d 1229 (N.D. Cal. 2004) (where Chevron was deemed to have held 'more than usual exercise of control over its subsidiary' by piercing the corporate veil). See also De Schutter (2006), 37-8.

¹³⁴De Schutter (2006), 38.

¹³⁵Yonah (2005), 789-80.

¹³⁶De Schutter Experts Meeting (2006) 8 ¶¶12-17. Yonah (2005), especially at 774-5. This is also referred to as the natural entity theory. See Millon (2006), 211-216.

¹³⁷*Ibid.*, 17 ¶55. Yonah (2005); Millon (2006) 220 - 226.

In responding to these suggestions, the SRSG emphasized the importance of strengthening state institutions 'in order to ensure that governance institutions keep pace with corporate globalization'.¹³⁸ Reiterating the primacy of corporate transactions and the expanding sphere of markets perpetuated with intra-firm trade, he would conclude that 'practical measures' were required in order to ensure victims have access to home country remedies. Nevertheless, 'market-based mechanisms' including the contractualizing of human rights requirements, should be considered.¹³⁹

His subsequent report to the HRC reflected a conservative reading of corporate liability. First, he acknowledged the ever-expanding sphere of corporate rights, due to the 2,500 bilateral investment treaties being in place globally. He then noted the problems associated with states implementing environmental and social protection legislation as a result, citing a European mining company's challenge toward South Africa's black empowerment laws as a case in point.¹⁴⁰ He then, however, argued that:

The legal framework regulating transnational corporations operates much as it did long before the recent wave of globalization. A parent company and its subsidiaries continue to be construed as distinct legal entities. Therefore, the parent company is generally not liable for wrongs committed by a subsidiary, even where it is the sole shareholder, unless the subsidiary is under close operation control by the parent that it can be seen as its mere agent.¹⁴¹

The reference to 'legal framework' here had a limited basis in international law and was clearly relying upon Anglo-American jurisprudence, following the most conservative approach put forward by the jurists he had consulted. As Robert McCorquodale and Penelope Simons have argued, there was, at the time of the SRSG's mandate, substantial state practice of extending national law to regulate the conduct of a state's nationals operating through foreign subsidiaries, in the areas of competition law, tax law, shareholder and consumer protection law, and anti-bribery and corruption. Additionally, a home state was entitled *indirectly* under international law to regulate any wholly owned subsidiary by requiring the parent to impose upon the subsidiary requirements through contract law.¹⁴²

Despite TNCs now being able to transcend borders in an ever-expanding global market, the state duty to protect remained territorially bound. The commentary on Principle 2 explained as follows:

¹³⁸Ibid., 17 ¶55.

¹³⁹Ibid., 12 ¶33.

¹⁴⁰*Piero Foresti, Laura De Carli and Others v. Republic of South Africa* (International Centre for the Settlement of Investment Disputes, Case No.ARB(AF)/07/1).

¹⁴¹UNHRC, A/HRC/8/5, 13-4.

¹⁴²Robert McCorquodale and Penelope Simons, 'Responsibility beyond borders: state responsibility for extraterritorial violations by corporations of international human rights law' (2007) 70(4) *Modern Law Review* 598, 615.

At present, states are not generally required under international human rights law to regulate the extraterritorial activities of business domiciled in their territory and/or jurisdiction. Nor are they generally prohibited from doing so, provided there is a recognized jurisdictional basis. Within these parameters some human rights treaty bodies recommend that home State take steps to prevent abuse abroad by business enterprises within their jurisdiction.¹⁴³

As Daria Davitti has since noted, the approach was highly conservative, and failed to consider the increasing expectation of Treaty Bodies that states would give effect to international cooperation to secure economic and social rights ('ESR').¹⁴⁴ The CESCR had issued General Comments in which the Committee sought to ensure that states take steps toward the full realization of ESR.¹⁴⁵ General Comment No.15 (Right to Water) for instance, states that 'steps should be taken by states parties to prevent their own citizens and companies from violating the right to water of individuals and communities in other countries'.¹⁴⁶ A similar statement is made in General Comment No.14 (Highest Attainable Standards of Health) in which it is determined that states should take steps to 'prevent third parties from violating the right [to health] in other countries, if they are able to influence these third parties by way of legal and political means.'¹⁴⁷

2.6.4 Corporate Complicity in Human Rights Violations: *Kiobel v Shell*

Finally, the SRSR considered the case of egregious human rights violations rising to the level of an international crime. In this regard, where a corporation was either complicit or directly involved in the commission of international crimes, the SRSR noted a state may exercise universal jurisdiction to adjudicate the alleged crimes. In this respect, and in response to paragraph (c) of his mandate, the SRSR did find, however, that the emerging body of international criminal law had created 'an expanding web of international corporate liability for international crimes', where a corporation could be seen to be complicit in, or to have conducted, such abuses.¹⁴⁸ He refuted the argument that the lack of a current international body for adjudicating corporate responsibility for these crimes pointed to the fact that such a responsibility did not exist, stating that 'just as the absence of an international accountability mechanism did not preclude individual responsibility for

¹⁴³UNGPs, Principle 1, 7.

¹⁴⁴Daria Davitti, 'Refining the Protect, Respect and Remedy Framework for Business and Human Rights and its Guiding Principles' (2016) 16 Human Rights Law Review 55. [Davitti (2017)].

¹⁴⁵Davitti (2017), 60.

¹⁴⁶CESCR, 'General Comment No. 15: The Right to Water (Articles 11 and 12 ICESCR)' (11-29/11/2002), ¶3, cited at Davitti (2017), 60.

¹⁴⁷CESCR, 'General Comment No.14: The Right to the Highest Attainable Standard of Health (Article 12 ICESCR)' (25/04- 12 /05/2000), ¶39 cited at Davitti (2017), 60.

¹⁴⁸A/HRC/4/35, 9, para 22. See also Ruggie/Alston (2013).

international crimes in the past, it does not preclude the existence of corporate responsibility today.¹⁴⁹

His analysis regarding corporate liability would later be utilized by the respondent company Shell (the 'Respondent') in the *Kiobel* litigation as evidence of the position that corporations could not be held liable under international law for the human rights violations alleged by Esther Kiobel and her fellow petitioners.¹⁵⁰ Mrs Kiobel brought a claim for damages against Shell (and its Nigerian subsidiary) under the United States' Alien Tort Statute (1789) after her husband was executed by the Nigerian government in 1995 in connection with widespread protests against pollution in the Niger Delta. Mrs Kiobel alleged that the Respondent had aided and abetted the Nigerian military in beating, raping, arresting and killing residents of Ogoniland as well as looting their property. The Respondent argued, *inter alia*, that 'international sources on the specific offences at issue refute corporate liability' and cited the SRSG's report to substantiate this claim.¹⁵¹

The SRSG, together with Philip Alston, would later submit an *amicus* brief to the Court arguing that the Respondent had taken the SRSG's findings out of context. He argued that the Respondents had relied solely on his analysis of human rights treaties and not on his discussion of international criminal law and the expanding web of liability to which he had pointed. The United States' Supreme Court would ultimately decide *Kiobel* based on other jurisdictional issues. Yet the UNGP Framework's construction of the question of extraterritorial jurisdiction largely affirmed the Respondent's view: whatever might be the case in the future, extraterritoriality in the UNGP Framework largely remained largely ambivalent to this form of liability.

2.7 Pillar II: The Corporate Responsibility to Respect

In contrast to his characterization of the state duty to protect, the SRSG determined that a separate but inter-related system had emerged as a result of globalization which governed the operations of TNCs. Unlike the state-based international order which had prevailed in the immediate aftermath of World War II, today's world was 'a *global* world wherein a variety of actors for which the territorial State is not the cardinal organizing principle have come to play significant public roles.'¹⁵²

It was in this new world that shared social values needed to be embedded. According to the SRSG, TNCs and other business enterprises operating within this parallel system were able to circumvent the jurisdictional boundaries of states and create instead 'network-based operating models involving multiple corporate entities spread across and

¹⁴⁹Ibid., at para 21.

¹⁵⁰Brief for the Respondents, *Kiobel v Royal Dutch Petroleum Co.*, No 10-1491 (U.S. Jan. 27 2012) 2,8,39.

¹⁵¹Ibid. 8.

¹⁵²E/CN.4/2006/92, para 9.

within multiple countries'.¹⁵³ This produced 'governance gaps', in which 'corporate-related human rights harm may occur, even when none may be intended'.¹⁵⁴ In this parallel domain, however, human rights obligations continued to have authority:

Whatever other differences may exist in the world, starting with the 1948 Universal Declaration human rights have been the only internationally agreed expression of the entitlements that each and every one of us has simply because we are human beings. Thus, *securing respect for human rights must be a central aim of governance at all levels, from the local to the global, and in the private sector no less than in the public.*¹⁵⁵

The SRSG was careful here to delineate his project from what he saw as the 'doctrinal excesses' of the Norms, which had come to have no legal standing.¹⁵⁶ The failure of the Norms, according to the SRSG, was in its attempt to 'take existing state-based human rights instruments and simply assert that many of their provisions now are binding on corporations as well.'¹⁵⁷ Yet if international human rights obligations were not directly attributable to TNCs and business enterprises, an alternative basis for the corporate responsibility to respect human rights needed to be determined.

In keeping with Pillar I (State Duty to Protect) of the Guiding Principles, Pillar II was similarly divided into Foundational (Principles 11 – 15) and Operational (Principles 16-24) principles. The foundational principles clarified the UNGPs: (i) applied to all businesses (and not solely TNCs); (ii) required business to respect human rights as encapsulated in the International Bill of Rights, regardless of its obligations under municipal law; and (iii) required businesses to have in place policies and processes to evidence this commitment to respect human rights. This included embedding a responsibility to respect human rights in the business itself, which should be evidenced in a policy commitment approved by the highest level of the business enterprise and made publicly available.¹⁵⁸ Yet unlike Pillar I, the SRSG specifically rejected any basis for grounding this responsibility in state-based international legal processes, determining instead solely to base his determinations regarding how to regulate the conduct of corporations on municipal corporate law.

2.7.1 Defining the Parameters of Responsibility

Unlike the basis for the state duty to protect, which the SRSG determined had become entrenched as a normative expectation of states within the UN Treaty Bodies' system, according to the SRSG, no analogous expectation of a corporate responsibility to respect human rights could be drawn from the Treaty Body commentaries. While the Treaty Bodies

¹⁵³A/HRC/8/5, 7, para 22.

¹⁵⁴A/HRC/8/5, 5, para 11.[My emphasis]

¹⁵⁵A/HRC/8/5, 7, para 19.[My emphasis]

¹⁵⁶A/HRC/8/5, 7, para 59. I will return to this in Chapter 4.

¹⁵⁷A/HRC/8/5, 7, ¶60.

¹⁵⁸UNGPs, Principle 16.

did, on occasion, reference corporate conduct and its ability to be attributed to the state (particularly insofar as it related to state-owned enterprises), the bodies failed to recognize any direct corporate human rights duties. Early on in his mandate, the SRSG held a meeting with international jurists in New York, Co-Hosted by Philip Alston and Mary Robinson (then former High Commissioner for Human Rights). Again, the SRSG relied upon expert opinion, largely from scholars from the North, regarding his framing of international law.¹⁵⁹ The SRSG noted that under the classic view of international law, there were a number of obstacles to determining direct corporate human rights responsibilities. These included:

a lack of state practice supporting such a development, likely resistance by states (especially states from the “Global South” *that are actively seeking foreign investment*), the difficulty in transposing existing defences to responsibility (such as state sovereignty) to TNCs, and problems with attributing international legal personality to corporations.¹⁶⁰

Nevertheless, this classic approach was seen by the SRSG and his advisors as somewhat oversimplifying the state of international law and failing to consider several key developments. This included: the sources of obligations for TNCs that can be distilled from customary international law; the developments in labour and environmental law which held TNCs directly accountable for human rights violations; and the already acknowledged existence of legal personality for non-state actors (albeit in limited circumstances).¹⁶¹ Furthermore, classic international law was said to ignore the importance of international soft law, including: public policy statements voluntarily adopted by Governments, such as the *OECD Guidelines for Multinational Enterprises* (‘OECD Guidelines’) and the International Labour Organization (ILO) *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy* (‘ILO Declaration’) in the *crystallization of standards*.¹⁶²

The ‘crystallization of standards’ would be a theme to which the SRSG returned in his reports to the HRC.¹⁶³ To a certain extent, the concept appeared to conflate the crystallization of customary international law norms, on the one hand, with the role of soft

¹⁵⁹Professor Nsongura Udombana (Nigeria) of the Central European University, Hungary was the only professor from outside of Europe, North America and Australia in attendance. Participants included: Professors Benedict Kingsbury, Steven Ratner, Ralph Steinhardt, and José Alvarez (from the USA), Professor Andrew Clapham (United Kingdom) and Professor David Kinley (Australia). See ‘Workshop on Attributing Corporate Responsibility for Human Rights Under International Law’ Co-Convened by New York University Center for Human Rights and Global Justice and Realizing Rights: The Ethical Justice Initiative (17 November 2006), 9. [‘NYU Workshop 2006’] Available online at: <https://www.business-humanrights.org/sites/default/files/media/bhr/files/Workshop-Corp-Responsibility-under-Intl-Law-17-Nov-2006.pdf>

¹⁶⁰A/HRC/4/35/Add.2, ¶11 [My emphasis].

¹⁶¹This view is affirmed in Clapham (2006) and Karavias (2013).

¹⁶²A/HRC/4/35/Add.2 at paragraph 12. [My emphasis].

¹⁶³See: A/HRC/35 ¶62; and A/HRC/8/5, 107.

law in determining and articulating voluntary standards, on the other. The SRSG defined soft law as comprising law that does not by itself create binding legal obligations. For the SRSG, 'it derives its normative force through recognition of *social expectations* by States and other key actors'.¹⁶⁴ Yet he further recognized that this did not preclude soft law instruments from containing elements that may come to form part of customary international law over time.¹⁶⁵

The term 'crystallization of norms' and 'crystallization of standards' appears to be utilized interchangeably, hence suggesting that the SRSG was in fact referring to the process by which emerging customary international law ('CIL') can eventually be derived from voluntary instruments.¹⁶⁶ For the SRSG, the role of the HRC should be one of standard-setter, through which the UN could lead 'intellectually, by setting expectations and aspirations', as opposed to relying on a centralized 'command and control' system to 'impose its will on the world'.¹⁶⁷

The question of whether the conduct of corporations can be considered to form part of customary IHRL continues to be debated. As noted by Markos Karavias, while human rights law has in principle addressed the conduct of states, 'international human rights instruments include textual reference to the duties of persons other than states, thus potentially encompassing corporations.'¹⁶⁸ This uncertainty has allowed for assertions in theory that both include and exclude corporations from the ambit of customary IHRL.¹⁶⁹

Beth Stephens argues that the reference to 'every organ of society' contained in the preamble to the UDHR is evidence of a material source of custom which binds corporations as well as states. She further asserts that multinational corporations are bound by the existing rules that bind all international actors, including the absolute prohibition against acts in violation of peremptory norms. For Stephens, this suggests that customary international law does create binding obligations upon corporations, at least insofar as it purports that certain norms must be universally adhered to (both by individuals and the state).¹⁷⁰

More recently, however, B.S. Chimni has argued that that the distinction between formal and material sources of custom maintained by the traditional view of CIL is maintained at the expense of denying the common roots of both sources of law in the European cultural and material conditions of the colonial era. For Chimni,

¹⁶⁴ A/HRC/4/35 ¶45. [My emphasis].

¹⁶⁵ A/HRC/4/35¶45, footnote 41.

¹⁶⁶ See, in particular, the SRSG's explanation of the UNGP Framework at A/HRC/4/35, ¶45-62.:

¹⁶⁷ A/HRC/4/35 ¶107.

¹⁶⁸ Markos Karavias (2013), 74.

¹⁶⁹ Ibid.

¹⁷⁰ Beth Stephens 'The Amoralism of Profit: Transnational Corporations and Human Rights' (2002) Berkeley Journal of International Law 45, 76-78.

The historical role of CIL has been to facilitate the functioning of global capitalist system by filling crucial gaps in the international legal system. These gaps relate to either short-term interests of capitalist states or the systemic interests of the global capitalist system.¹⁷¹

The thesis agrees with Chimni's analysis regarding the role of the gap-filling function afforded to CIL. It would only add further that this takes shape, in our current age of neoliberalism, at least in part through a commitment to embedded pragmatism and through techniques of human rights managerialism. Central to the idea that the UNGP Framework would enable the crystallization of norms was that managerial practice embodying those norms 'would become valued and deployed based on its ability to effectively and efficiently achieve pre-set policy goals.'¹⁷² In this respect, IHRL could become increasingly deployed through calculated strategies, to serve particular functions and for particular ends.¹⁷³

Additionally, and in keeping with the regulatory role which was attributed to the HRC in the formation of Pillar I of the UNGP Framework, it was envisioned that the HRC could bypass states and directly guide TNCs and other business enterprises through Pillar II. Yet although the SRSG determined the 'economic realm' inhabited by the corporation could not be one in which the corporation was a subject of international human rights obligations, the market was not a human rights-free vacuum either. The challenge became upon what basis to determine: (i) the *sources* of law or regulation that could be relied upon when determining how to characterize any corporate obligations or responsibilities; (ii) what *criteria* should be included to assess which human rights TNCs and other business enterprises were obligated to respect; and finally (iii) what a responsibility to 'respect' human rights meant for corporations, as a result of assessing the parameters in (i) and (ii).

2.7.2 Sources of Law and Regulation

The SRSG reviewed several secondary sources of international law – namely, soft law instruments – to assess the standard-setting role that existing soft law had come to play in regulating corporate human rights obligations. This largely guided the SRSG with respect to the *form* of obligation that corporations would agree to adhere. Secondly, he considered a primary source of municipal law: namely, corporate legislation in 39

¹⁷¹Chimni (2018), 4. See also B.S. Chimni, An Outline of A Marxist Course on Public International Law (2004) 17 Leiden journal of International Law 1; George Rodrigo Bandeira Galindo & Cesar Yip, 'Customary International Law and the Third World: Do Not Step on the Grass' (2017) 16 Chinese Journal of International Law 251

¹⁷²Clements (2017), 6.

¹⁷³Ibid., 6-7.

jurisdictions, to determine the *process* through which corporations would likely be able to evidence adherence to any obligations contained in such an instrument.

2.7.3 Soft Law and Self-Regulation

The SRSO reviewed soft law instruments that were divided into three categories. Namely:

the traditional standard-setting role performed by intergovernmental organizations; the enhanced accountability mechanisms recently added by some intergovernmental initiatives; and an emerging multi-stakeholder form that involves corporations directly, along with States and civil society organizations, in redressing sources of corporate-related human rights abuses.¹⁷⁴

In the first category, the SRSO considered the ILO Declaration and the OECD Guidelines.¹⁷⁵ As noted by Mary Footer, both the ILO Declaration and the OECD Guidelines can be characterized as early attempts to recognize a role for corporations to respect human rights in the conduct of their activities.¹⁷⁶ According to Footer, 'the ILO Declaration takes, as its starting point, the International Bill of Rights, the ILO Constitution and the ILO fundamental principles of freedom of expression and association'.¹⁷⁷ The Declaration further calls upon member governments of the ILO to ratify the ILO Conventions and further provided that members should apply ILO Recommendations pertaining to freedom of association, collective bargaining, elimination of discrimination, the prohibition of the worst forms of child labour and the prohibition on forced labour.¹⁷⁸

Similarly, the revised OECD Guidelines (of 2000) provided for a set of voluntary principles and standards which OECD countries adopted voluntarily, but which then became mandatory for MNEs operating both at home and in host state jurisdictions. The Guidelines included a provision with regard to human rights.¹⁷⁹ Although the OECD Guidelines did not include a definition for respect for human rights, the Guidelines made it clear that where corporate conduct and human rights intersected, MNEs were expected to play a role in their enforcement.¹⁸⁰ The SRSO noted that explicit reference by several governments and business associations to both these soft law instruments may mean that they eventually 'crystallize into harder forms'.¹⁸¹

¹⁷⁴A/HRC/4/35, at paragraph 46.

¹⁷⁵A/HRC/4/35, at paragraphs 47-51.

¹⁷⁶Mary E. Footer 'Bits and Pieces: Social and Environmental Protection in the Regulation of Foreign Investment' (2009) 18 Michigan State Journal of International Law 33, 58-9.

¹⁷⁷Ibid.

¹⁷⁸Ibid.

¹⁷⁹OECD, 'The OECD Guidelines: Text, Commentary and Clarifications' (31 October 2001) DAFFE/IME/WPG (2000) 15/FINAL ['OECD (2000)'].

¹⁸⁰OECD (2000) 12, ¶4. Compare with OECD, 'Guidelines for Multinational Enterprises (2011)' which includes the UNGP Framework in Chapter IV (Human Rights).

¹⁸¹A/HRC/4/35, ¶49.

In the second category, regarding the enhanced accountability mechanisms of some intergovernmental initiatives, the SRSG considered the role played by National Contact Points (NCPs) in the OECD system. Under this system, governments adhering to the OECD Guidelines are required to establish an NCP whose primary role is to further the effectiveness of the Guidelines. It does so by undertaking both promotional activities and handling inquiries and complaints pertaining to the non-observance of the guidelines by MNEs in specific instances.

Additionally, the use of human rights impact assessments ('HRIAs') by the International Finance Corporation ('IFC') was given as further evidence of human rights accountability.¹⁸² The IFC is part of the World Bank Group. Established in 1956, its primary function has been to work with the private sector in the Third World and facilitate the ongoing growth of emerging markets. In 2007-2008, it undertook to provide guidance to companies and business enterprises in receipt of loans from its facility regarding how HRIAs could be conducted, as evidence of their respect for human rights.¹⁸³

Finally, soft law instruments utilized by multi-stakeholder initiatives ('MSIs') were considered evidence of an emerging practice of voluntary global administrative rulemaking and implementation. While the SRSG acknowledged the limitations of complaints procedures within MSIs accountability processes, he determined the emergence of MSIs further evidenced the claim that international soft law could act to crystallize norms that regulated the behaviour of both states and TNCs:

In sum, the standard-setting role of soft law remains as important as ever to crystallize emerging norms in the international community. The increased focus on accountability in some intergovernmental arrangements, coupled with the innovations in soft law mechanisms that involve corporations directly in regulatory rulemaking and implementation, suggests increased State and corporate acknowledgment of evolving social expectations and a recognition of the need to exercise shared responsibility.¹⁸⁴

This informed the SRSG's characterization of the form of a corporate respect for human rights as being a responsibility, as opposed to a duty. This was consistent with a review of publicly available self-regulatory instruments of 320 companies that had human rights policies in place. According to the SRSG's research, except insofar as certain labour rights, occupational health and safety requirements and non-discrimination were mandated by domestic laws, companies almost inevitably considered human rights as forming part of their corporate *social* responsibility. Consistent with the international soft law instruments he had reviewed, responsibility was hence defined with reference to the

¹⁸²International Finance Corporation, Articles of Agreement (20 July 1956, as amended 27 June 2012) 264 UNTS 117.

¹⁸³IFC, International Business Leaders Forum and UNGC, 'Guide To Human Rights Impact Assessment and Management' (Updated 2011), available online at: www.ifc.org/hriam.

¹⁸⁴A/HRC/4/35, ¶62.

'societal expectations of business', as opposed to any 'binding' obligations under treaty law or CIL.¹⁸⁵

Adhering to this responsibility and meeting these expectations amounted to a standard of expected conduct that existed independently of legal obligations. Conduct in contravention of this responsibility could be directly attributed to TNCs and other business enterprises, irrespective of whether states themselves recognized it. Hence, unlike the state duty to protect, which only required that states regulate the conduct of TNCs and other business enterprises insofar as it pertained to preventing human rights harm to third parties, the conduct of TNCs and other business enterprises that contravened the corporate responsibility to respect human rights could be *directly attributable* to corporations themselves.

Hence, if the corporate responsibility to respect human rights eventually came to form part of CIL, human rights harms that TNCs caused or contributed toward could, at least in theory, result in a TNC being held directly responsible to the victim of the abuse. As is stated in UNGP 11:

The responsibility to respect human rights is 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. Addressing adverse human rights impacts requires taking adequate measures for their prevention, mitigation and, where appropriate, remediation.¹⁸⁶

There has been comparatively little consideration regarding what would amount to the emergence of the corporate responsibility to respect human rights as a norm of CIL.¹⁸⁷ Karavias has argued that the Janus face of the corporation, as both rightsholder and obligor, preclude the emergence of CIL obligations, despite attempts to frame them in terms of the UDHR.¹⁸⁸ Chimni, on the other hand, has more recently suggested that the rules of deliberative reason could be utilised to facilitate a post-modern approach to CIL.¹⁸⁹ For Chimni, this could include the practice of non-state actors as forming part of CIL.¹⁹⁰ UNGP 11 could have had the effect of becoming a means through which states and TNCs and other business enterprises were put on notice as to the emergence of a new norm in this regard. Yet, as will be discussed in greater detail in what follows, in the *administration* of this responsibility, the SRSG determined to reject an international legal characterization

¹⁸⁵Self-regulatory instruments were defined as the 'human rights standards that business itself adopted, triggered by its assessment of human rights-related risks and opportunities in the social and political environments in which it operates'. See A/HRC/4/35/Add.4, at paragraph 1.

¹⁸⁶UNGP 11, Commentary.

¹⁸⁷See however Karavias (2013), 69-73.

¹⁸⁸*Ibid.*, 175-85.

¹⁸⁹Chimni (2018), 38.

¹⁹⁰*Ibid.*

of it. This has ramifications for the delineation between the territorial duty to protect (on the one hand) and the market-based responsibility to respect (on the other).

2.7.4 Corporate Law

During the final phase of his mandate (2008 – 2011), the SRSG considered the extent to which existing corporate and securities law in 39 jurisdictions ‘encouraged’ companies to respect human rights.¹⁹¹ Twenty global law firms conducted this review on the SRSG’s behalf. The research comprised a series of survey questions aimed at determining the extent to which current state practice:¹⁹² (i) recognized the corporate form as being linked to a public purpose or a broader societal obligation;¹⁹³ (ii) identified director’s duties to non-shareholders and those outside the company;¹⁹⁴ (iii) determined human rights reporting to be mandatory;¹⁹⁵ and (iv) enabled stakeholders (defined as shareholders, institutional investors and other interested parties) to have the capacity to influence corporate decision-making with respect to human rights.¹⁹⁶ None of the jurisdictions surveyed required companies to declare any duty to society when publicly listing.¹⁹⁷

A key finding of the research was that, common to all jurisdictions was a focus on viewing human rights ‘impacts’ as part of a company’s broader risk management practices. According to the SRSG:

Common to all of the surveys was this simple message: where human rights impacts may harm *the company’s short or long term interests*, companies and their directors and officers may risk non-compliance with a variety of rules promoting corporate governance, risk management and market safeguards if these impacts are not adequately identified, managed and reported¹⁹⁸.

It was clear that state practice with regard to corporate law evidenced a strong emphasis on risk management as it pertained to the long-term profitability of the company. What was less clear was the extent to which a company should engage in risk management practices insofar as it pertained to diminishing the long-term risks of its operations to society. Although some jurisdictions required companies to recognize a duty to society upon incorporating, this was uncommon: only two jurisdictions (Indonesia and Finland) included corporate law provisions where an express or implied requirement for companies to incorporate with a lawful purpose that included acknowledgement of the

¹⁹¹ UN Doc A/HRC/17/31 Add.2, at Appendix II.,

¹⁹² The SRSG himself uses the term state practice and does not distinguish practice from *opinio juris* in his analysis. This may be because

¹⁹³ UN Doc. A/HRC/17/31 Add.2, para 29 – 50.

¹⁹⁴ UN Doc. A/HRC/17/31 Add.2, para 51-125.

¹⁹⁵ UN Doc. A/HRC/17/31 Add.2, para 126-163.

¹⁹⁶ UN Doc. A/HRC/17/31 Add.2, para 164-183. See also Appendix III for a full list of questions.

¹⁹⁷ UN Doc. A/HRC/17/31 Add.2, para 29.

¹⁹⁸ UN Doc. A/HRC/17/31 Add.2, at ¶205. [My emphasis].

constitutional protection of human rights could be inferred.¹⁹⁹ While other jurisdictions required that companies broadly respect 'public order', the inclusion of a duty to society when fulfilling this obligation does not, explicitly or implicitly, encompass a duty to respect human rights.²⁰⁰

Although a mandatory duty to respect human rights could not be ascertained from corporate law, the SRSG determined that risk management was primarily administered by companies through a combination of due diligence and both mandatory and voluntary reporting requirements. This then became the basis for the corporate responsibility to respect. It would include a positive, due diligence requirement, in addition to an obligation to communicate this to the company's internal and external stakeholders.²⁰¹ As the SRSG himself noted:

At the foundation of the [responsibility to respect] is *good risk management*. Indeed the Special Representative has recommended that to meet the responsibility to respect, companies undertake human rights due diligence. This process can be incorporated within broader enterprise risk-management systems, provided that it goes beyond simply identifying and managing material risks to the company itself, *to include risks to rights-holders*. Participants in the [research] have provided important guidance on the elements of human rights due diligence in keeping with responsible corporate governance.²⁰²

Hence, by combining both the IHRL obligations together with existing municipal corporate law obligations, the SRSG determined that a responsibility to respect human rights should include a due diligence obligation. Companies should minimise risks not only to the company itself, but to rights-holders, resulting from their operations. 'Rights-holders' included employees, shareholders, and investors, but it also included involuntary creditors, whose claim against the company would normally lie in tort and who usually had no chance to bargain with the company over the allocation of risk.²⁰³ In a departure from both existing municipal law and soft law guidance, the UNGP Framework sought to marry a company's obligations to manage commercial risks together with its responsibility towards broader society. As noted by Peter Muchlinski:

Thus its extension to human rights risks appears to be a novel departure as this is not a normal aspect of what is generally understood as commercial risks, in that, as the

¹⁹⁹UN Doc. A/HRC/17/31/Add.2, at paragraph 38. In Indonesia, incorporating companies must not have goals and objectives, or conduct activities that are contrary to the law, public order, or morality. This was said to include Law No.39 of 1999, whereby the Indonesian government has incorporated all of its international human rights obligations into domestic law. In Finland, companies have a general duty to comply with all laws, which the survey argued included human rights as included in the Finnish constitution.

²⁰⁰UN Doc A/HRC/17/31 Add. 2, at ¶39. Examples included France, China, Singapore and the United Kingdom.

²⁰¹Peter Muchlinski 'Implementing the New UN Corporate Human Rights Framework: Implications for Corporate Law, Governance and Regulation' (2012) 22(1) Business Ethics Quarterly 145, 146.[Muchlinski (2012)]

²⁰² UN Doc. A/HRC/17/31/Add.2, at ¶13. [My emphasis]

²⁰³Muchlinski (2012) 152.

SMSG points out, it requires a shift from considering the risk to the company to risk to potential victims of corporate action....The acceptance of such a duty may be said to constitutionalise concern over human rights impacts in the corporate psyche and culture.²⁰⁴

Due diligence also has an established basis in IHRL.²⁰⁵ As noted by Jonathan Bonnitcha and Robert McCorquodale, due diligence in international law 'functions primarily as a standard of conduct that defines and circumscribes state behaviour in relation to the conduct of third parties'.²⁰⁶ It had, by the time of the SMSG's mandate, already been established as playing an important role in extant IHRL in defining the state's obligations to prevent and respond to infringements of human rights by private actors within its territory or jurisdiction – as the SMSG himself acknowledged in formulating the state duty to protect. However, the SMSG would later reject this line of argument had any relevance in determining corporate HRDD, noting instead that the UNGPs were conceived as a 'polycentric transnational governance model' which sought to move beyond the 'conceptual shackles' of traditional IHRL by drawing upon the interests, engagement and capacities not only of states but also market actors and the intrinsic power of ideational and normative factors.²⁰⁷ This thesis will return to why the SMSG may yet have replaced one set of 'conceptual shackles' for another. However, the criteria for determining which human rights obligations to include in a due diligence process first need to be considered. It is to this that the thesis now turns.

2.7.5 Applicable Human Rights

In addition to reviewing the sources of international law and state practice pertaining to a corporate responsibility to respect human rights, the SMSG also conducted several empirical investigations into what was expected of companies, and what companies expected of themselves, with regard to respecting human rights. Namely, which human rights should companies be expected to respect, and how should selectivity be determined? The SMSG noted sampling biases within his research (in part because the sample sizes were so small).²⁰⁸ Nevertheless, he drew several inferences from his findings

²⁰⁴Ibid.

²⁰⁵See Sarah Joseph and Sam Dipnall, 'Scope of Application' in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds) *International Human Rights Law* (OUP 2018), 115.

²⁰⁶Jonathan Bonnitcha and Robert McCorquodale, 'The Concept of Due Diligence in the UN Guiding Principles on Business & Human Rights' (2017) 28(3) *European Journal of International Law* 899. ['Bonnitcha/McCorquodale' (2018)] See also *Velasquez Rodriguez v. Honduras* Judgment (Merits) 29 July 1988, ¶172; Kolkurova 'Due Diligence' in R Wolfrum (ed) *Max Planck Encyclopedia of Public International Law* (2010). See further Clapham (2006).

²⁰⁷John Gerard Ruggie and John F. Sherman, III 'The Concept of Due Diligence in the UN Guiding Principles on Business & Human Rights: A Reply to Jonathan Bonnitcha and Robert McCorquodale' (2017) 28(3) *European Journal of International Law* 922, 925 [Ruggie/Sherman (2017)].

²⁰⁸See A/HRC/4/35/Add. 3 para 68, and A/HRC/8/5/Add.2, commenting on the cases of alleged abuses analysed at para 6.

regarding both the role companies considered they played vis-à-vis the international human rights regime, as well as the societal expectations being placed upon them. Defining the corporate responsibility to respect human rights became about providing guidance to companies regarding how, and in what circumstances, they should be expected to prevent human rights harms in order to safeguard the shared social values of global markets. Shared social values were seen as evidenced primarily in the International Bill of Rights, being 'the only internationally agreed form of entitlements' for human beings.²⁰⁹

A review of three hundred and twenty cases of alleged corporate human rights abuses documented between 2005 and 2007 led the SRSG to conclude that firms from a broad range of sectors had been accused of human rights abuse covering the full range of human rights.²¹⁰ Additionally, there appeared to be an equal number of allegations from employees and contractors of corporations as there were from those living in communities affected by a business operation.²¹¹ This anecdotal evidence led the SRSG to conclude that the UNGP Framework should not include a catalogue of rights, but rather refer to core internationally recognized human rights. Companies should then determine a hierarchy of responsibilities based upon the severity and likelihood of an adverse human rights impact occurring from their operations. Hence UN Guiding Principle 24 states:

Where it is necessary to prioritise actions to address actual and potential adverse human rights impacts, business enterprises should first seek to prevent and mitigate those that are the most severe or where the delayed response would make them irremediable.²¹²

This schema relied upon TNCs and other business enterprises implementing a due diligence process across all operations that determined human rights risks to society. Due diligence was conceived as the primary mode through which companies could evince their commitment to shared social values as embodied in human rights. The SRSG rejected this characterization as being grounded in extant IHRL. Instead, 'societal expectations' would continue to reinforce corporate obligations:

To respect rights essentially means not to infringe on the rights of others – put simply, to do no harm. Because companies can affect virtually all internationally recognised rights, they should consider the responsibility to respect in relation to all such rights, although some may require greater attention in specific contexts. There are situations in which companies may have additional responsibilities – for example, where they perform certain public functions, or because they have undertaken additional commitments voluntarily. *But the responsibility to respect is the baseline expectation for all companies in all situations.*²¹³

²⁰⁹UNHRC, A/HRC/8/5.

²¹⁰UNHRC, A/HRC/5/Add.2 (23/05/2008).

²¹¹A/HRC/8/5/Add.2, para. 16.

²¹² UNGP 24.

²¹³A/HRC/8/5, para 24.

The combination of assessing self-regulatory and soft law instruments, in addition to reviewing allegations against corporations predominantly being brought by non-governmental organizations (on behalf of victims) enabled the SRSG to attain a certain level of legitimacy amongst both business and civil society. On the one hand, his research findings ensured that any subsequent regulatory guidance the HRC agreed would be based upon standards business had set for itself, through both policy commitments and managerial processes contained in publicly available documents. On the other, subsequent human rights responsibilities could be determined with reference to the actual human rights allegations brought by victims of corporate human rights abuse. In other words, while self-regulatory instruments and mandatory legal obligations would inform the standards set for implementing any responsibility to respect human rights, the views of civil society were included in determining the substantive human rights that were to be respected.

In the aftermath of the UNGP Framework, however, many NGOs and scholars would argue that the SRSG had not been responsive enough to victims, hence creating a weakness in the final pillar of the UNGP Framework, pertaining to remedy. It is to this final aspect of the SRSG's mandate that I now turn.

2.8 Pillar III: Access to Remedy

The final pillar of the UNGP Framework comprises six principles, which combine obligations requiring states to take appropriate steps toward, and TNCs and other business enterprises to establish or participate in, operationalizing grievance mechanisms. Consistent with the approach adopted throughout his mandate, the SRSG maintained that the state was primarily responsible for providing victims with this access: the foundational principle for this pillar states that States 'must take appropriate steps to ensure, through judicial, administrative, legislative and other appropriate means, that when such abuses occur within their territory and/or jurisdiction' that those affected have access to an effective remedy.²¹⁴

In coming to this conclusion, he considered both the Draft Articles on State Responsibility for Internationally Wrongful Acts ('ARSIWA') as well as the state's obligation to provide remedies under the international human rights treaties and regional human rights conventions.²¹⁵

2.8.1 State Responsibility

²¹⁴UNGP 25.

²¹⁵UNHRC, A/HRC/11/13 Add.1 (15/5/2009).

Despite being 'anything but innocent from a political point of view' and having a legacy marred by the colonial encounter, it is generally agreed that the law on State responsibility primarily comprises custom.²¹⁶ At its most rudimentary, CIL provides that if a state violated an obligation imposed by an international rule, it bore international responsibility for such violation. According to Antonio Cassese:

the customary rules on the legal consequences of wrongful acts were lumped together, both by States and by a number of publicists, with the substantive rules governing State behaviour, chiefly with the customary rules concerning the treatment of foreigners...This is because the customary rules crystallized as a result of disputes chiefly concerning the treatment by non-industrialized countries of nationals of industrialized countries²¹⁷

During the 19th century, State responsibility sought to govern a bilateral relationship between the national from a foreign State (the 'home' state) and the injured State ('host' state) and hinged on the responsibility of the home State for the individual wrongdoing of its officials, for which it had to make reparation. Hence, much of the early case law evidencing this custom relates to the treatment of 'foreigners' by the nationals of a host government.²¹⁸

In 2000, the International Law Commission decided to deal with the necessary distinctions and hierarchies (between bilateral relationships, on the one hand, and serious breaches affecting the international community, on the other) by outlining the widest category of States entitled to invoke responsibility by reference to 'obligations owed to the international community as a whole' (obligations *erga omnes*) on the one hand, and by inserting a series of references in the draft on peremptory norms (*jus cogens*) to indicate non-derogability on the other.²¹⁹

The report of the discussion of ILC in 2000 opened with the candid statement that the Commission moved from a codification of the law of State responsibility to 'constructing a system of multilateral public order'.²²⁰ The subsequent 'Draft Articles on State Responsibility for Internationally Wrongful Acts' adopted by the UNGA in 2001 to a large extent reflected extant international law, but attempted to develop the law in line with the Commission's view that it was constructing just such a system.²²¹

In considering the law on State responsibility, the SRSR noted that the remedial principles governing IHRL had come to be strongly influenced by ARSIWA and 'as a general

²¹⁶Philip Allott, 'State Responsibility and the Unmaking of International Law' (1988) 29(1) Harvard Journal of International Law 1, 3. See also Anghie (2006), 208 – 211.

²¹⁷Antonio Cassese, *International Law*, (OUP, 2nd edition) 242.

²¹⁸See Mexican-U.S. General Claims Commission in Thomas H. Youmans (USA) v United Mexican States (1926) 4 R.I.A.A. 110; Caire Claim: France v Mexico (1929) 5. R.I.A.A. 516.

²¹⁹Martti Koskenniemi, 'Solidarity Measures: State Responsibility as a New International Order?' (2002) British Yearbook of International Law 337, 342.

²²⁰*Ibid.*

²²¹UNGA A/Res/56/83 (28/01/2002).

rule, follow its emphasis on compensatory justice'.²²² Relying in particular on Article 31 of ARSIWA, the SRSG determined that states in violation of their international obligations were required not only to cease the offending conduct, but also to make full reparation for any damage, whether material or moral.²²³ Reparation may include individual reparations (compensation, restitution or satisfaction) or a combination of such forms.²²⁴ He further noted that ARSIWA sought, through this provision, to codify the 1928 decision of the Permanent Court of Arbitration in the *Chorzów Factory* case.²²⁵ In that decision, the court had determined (in the context of a claim between states) that it was a general principle of international law that 'any breach of an engagement requires an obligation to make reparation'.²²⁶ The Court further noted:

The essential principle ... is that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear ...²²⁷

The SRSG noted that ARSIWA was not punitive: the purpose of a remedy was to place a party in the situation they would have been in, had the injury not occurred.²²⁸ As noted by Rosalyn Higgins, the International Law Commission 'adopted responsibility for results requiring no *culpa*, for actions and omissions alike. The only requirement is causality.'²²⁹

In this respect, the law on State responsibility is a general law of wrongs, whose fundamental purpose is to ascertain whether there has been a breach by a State of an international obligation; what the consequences of the breach are, in terms of cessation and reparation; and who may seek reparations or otherwise respond to the breach, and in what ways.²³⁰ Although the ARSIWA determines situations in which conduct of an organ of a State or a non-state actor can be attributed to the State, it is silent on what constitutes an international obligation. States must rely on the *lex specialis* of international law governing the conduct in question in order to make this determination.

Similarly, in determining the basis for access to remedy under the UNGPs, the SRSG did not opt for a fault-based approach to remediation but instead created result-based guidance: once it has been established that a business-related human rights abuse has occurred upon a State's territory or within its jurisdiction, a State has a duty to

²²²UN Doc. A/HRC/11/13 Add.1, 2.

²²³ Ibid., 7.

²²⁴Ibid. See also Article 31, 'Draft Articles on the Responsibility of States for Internationally Wrongful Acts (with commentaries' 2001 Yearbook of the ILC II(2), as corrected.

²²⁵(1928) PCIJ (ser. A) no.17, as quoted in UN Doc. A/HRC/11/13 Add.1, at. 6.

²²⁶Ibid.

²²⁷ Ibid.

²²⁸A/HRC/11/13 Add.1, 8.

²²⁹Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (OUP, 1994) 161.

²³⁰James Crawford and Simon Olleson, 'The Character and Forms of International Responsibility' in Malcolm Evans (ed) *International Law* (OUP 5th Edn 2018), 443.

provide those affected with an effective remedy.²³¹ Insofar as it relates to internationally wrongful acts which are attributable to a State, UNGP 25 could be seen as amounting to an extension of Article 31 of ARSIWA to include specific situations in which a remedy is required for business-related human rights abuse that has occurred on a State's territory and/or within its jurisdiction – namely, in situations where a TNC or other business enterprise is complicit in the internationally wrongful conduct of a State.

The obligation to provide a remedy includes circumstances where a corporate entity incorporated in one jurisdiction is conducting operations in the jurisdiction of a foreign state, and business-related human rights abuses occur in the latter jurisdiction. According to UNGP 26, both States are encouraged to reduce legal barriers that prevent legitimate cases of business-related human rights abuse from being addressed. This includes 'ensuring the effectiveness of domestic judicial mechanisms' when addressing business-related human rights abuses' including considering ways to reduce legal, practical and other barriers where claimants face a denial of justice due to the inability to make a claim in both the home and host state.²³² Although this amounts to a requirement to ensure a domestic remedy for business-related human rights abuse, the implication for the law on State responsibility is that, where it is found that business-related human rights abuse may be attributed to a state, both the host state *and* the home state should provide victims of that abuse with access to a remedy.²³³

The provisions pertaining to remedy in the UNGP Framework, like the framework as a whole, focus on the *prevention* of human rights harm, hence determining how states and TNCs and other business enterprises should maintain systems which provide *access* to remedy, as opposed to assessing how or when a remedy should be made available. As Karavias notes:

Ultimately, the Guiding Principles are not grounded in a conception of responsibility as an *ex post facto* operation aimed at remedying the consequences of wrongful acts, but rather as an *ex ante* effort to establish standards of good corporate conduct that may contribute to the prevention of harmful outcomes.²³⁴

In this respect, an obligation to provide access to remedy must be distinguished from an obligation to provide remedies *per se*: the Guiding Principles do not provide the basis for determining what remedies should follow from corporate abuse *qua* the horizontal application of human rights law that can be attributable to the State, nor do they provide the basis for remedies when determining corporate complicity in human rights violations.

²³¹UNGP 24.

²³²UNGP 26.

²³³UNGP Framework, Guiding Principles 26.

²³⁴Markos Karavias, 'Shared Responsibility and Multinational Enterprises' (2015) 62(1) Netherlands International Law Review Vol 91, 114.

2.8.2 Human Rights Treaties

The SRSG also reviewed all eight international human rights conventions and the General Comments of Treaty Body Committees relating to remedial measures. He determined several strands in the Committees' approach most important of which were: (i) conducting prompt, fair and thorough investigations; (ii) providing access to prompt, effective and independent remedial mechanisms, established through judicial, administrative, legislative and other appropriate means; (iii) imposing appropriate sanctions, including criminalizing conduct and pursuing criminal investigations, where appropriate; and (iv) providing appropriate reparations, such as compensation, restitution and rehabilitation.²³⁵

The SRSG's report noted that not all human rights conventions contained specific provisions guaranteeing remedies. Of the eight conventions, only the International Covenant on Civil and Political Rights,²³⁶ the International Covenant on the Elimination of All Forms of Racial Discrimination,²³⁷ and the International Convention on the Rights of Migrant Workers and Their Families²³⁸ contained a general provision requiring states to provide both substantive and procedural remedy to victims of human rights violations in the case of a breach of convention rights.²³⁹ In this respect, IHRL as it pertains to remedies appears to have been heavily influenced by Treaty Bodies' interpretation of the conventions as well as the decisions of regional human rights courts. Karavias notes that effective remedy in the conventions is 'ancillary in character' and has primarily been included to 'deny the effect of national legislation granting immunity to public officials for acts in contravention of human rights treaties.'²⁴⁰

While this may be the case, it has not prevented the Treaty Bodies from making several recommendations to states in support of an obligation upon States to legislate against abuse of rights on their territories; impose adequate sanctions; and to ensure the existence of appropriate complaints mechanisms, even insofar as rights had been violated by third party private actors. Hence, even where the treaty does not specifically require the State to provide effective remedies, the treaty bodies commonly imply such an obligation, whether the primary perpetrator was a State or non-State actor.²⁴¹ In keeping with these findings, the resulting provisions in the UNGP Framework required that states ensure victims of business-related human rights abuse had access to an effective remedy.

²³⁵ UN Doc. A/HRC/11/13 Add.1 at 64-5.

²³⁶Article 2(3), ICCPR.

²³⁷Article 6, CERD.

²³⁸Article 83, ICRMW.

²³⁹A/HRC/11/13 Add. 1 at §12, 31 and 52.

²⁴⁰Karavias, at 30.

²⁴¹See for example CESCR General Comment No.9, 'The domestic application of the Covenant', 19th Session (1998), UN Human Rights Compilation at 55.

This implied that the state must consider both the procedural and substantive effectiveness of the remedy provided.

Several Treaty Bodies have further determined that certain at-risk groups should be given priority when determining access to remedies. In particular, Treaty Body commentary and recommendations had addressed the rights of employees,²⁴² state contractors,²⁴³ indigenous persons,²⁴⁴ and women²⁴⁵ specifically. In this respect, the resulting UNGP Framework would include a provision that states, when determining should consider both:

an individual's or a group's sense of entitlement, which may be based on law, contract, explicit or implicit promises, customary practice, or general notions of aggrieved communities.²⁴⁶

This focus was in keeping with more recent international human rights conventions that seek to prevent violations against specific *groups* of persons, as opposed to the international bill of rights, which maintains a focus on individuals. As has been noted by Frédéric Mégret in the context of the Disabilities Convention:

Even though the unity of rights captures a fundamental intuition, certain groups do need separate restatements of how rights apply to them, either because they have specific needs to enjoy their rights, different versions of the same rights, or possibly even slightly different rights.²⁴⁷

Hence, although referencing the International Bill of Rights as the foundation upon which the principles rested, the UNGP Framework did attempt to acknowledge the aspiration that rights would be tailored to the experiences of particular communities and groups.

2.8.3 Operational Level Grievance Mechanisms

Although the state was seen as primarily responsible for providing victims with access to remedy, the UNGP Framework did further recognize the significance of operational-level grievance mechanisms of TNCs and MSIs. In this respect, it was envisaged that both state-

²⁴²See e.g. CESCR Concluding Observations: Brazil E/C.12/1/Add.87, paras 22 & 45. See also OHCHR, 'State Responsibilities to Regulate and Adjudicate Corporate Activities Under the United Nations Core Human Rights Treaties: Individual Report on the International Covenant on Economic, Social and Cultural Rights, Report No.2', May 2007.

²⁴³See e.g. HRC, Concluding Observations: United States, CCPR/C/USA/CO/3/Rev.1, (18/12/2006) para 14; CESCR: Concluding Observations, Luxembourg, UN Doc. E/C.12/1/Add.86, 23 May 03), at paras. 20 and 32.

²⁴⁴See 'State Responsibilities to Regulate and Adjudicate Corporate Activities Under the United Nations Core Human Rights Treaties' (12/02/2007), para 18-36.

²⁴⁵See General Recommendation 19, 'Violence against women' and General Comment 18 of the HRC on the equality of rights of men and women.

²⁴⁶UNGP 25.

²⁴⁷Frédéric Mégret (2008) 'The Disabilities Convention: Human Rights of Person with Disabilities or Disability Rights?' *Human Rights Quarterly* 30(2), 494-516 at 497.

based and non-state-based grievance mechanisms would operate as an integrated system within each jurisdiction:

State-based judicial and non-judicial grievance mechanisms should form the foundation of a wider system of remedy. Within such a system, operational-level grievance mechanisms can provide early stage recourse and resolution. State-based and operational-level mechanisms, in turn, can be supplemented or enhanced by the remedial functions of collaborative initiatives as well as those of international and regional human rights mechanisms.²⁴⁸

Hence, like Pillars I and II combined, Pillar III attempted to determine an integrated system of responsibilities between States and TNCs and other business enterprises to provide access to remedy. Yet the resulting Pillar III would strongly be criticized for seemingly providing principles for access to remedy -- an obligation of conduct -- without attempting to define existing obligations of result.

The SRSB's focus on regulating the procedural aspects of states' obligations is consistent with what Jacob Katz Cogan has identified as the increasing reach of international law as a form of mediated law-making:

To be sure, the state still acts as an intermediary, so that some action must be taken at the national (and, depending on the system, the sub-national) level before the duties contemplated by these treaties and their enforcement are activated, yet *the discretion traditionally allowed to states by international law in the elaboration and application of international directives has narrowed substantially in many respects from what had been the norm*. International law, as one commentator has noted, is "reaching ever further into the domestic . . . process to *control how it operates*." [My emphasis].²⁴⁹

Consistent with Pillar I of the Framework, the SRSB would determine that states were primarily responsible for providing access to remedy in situations where corporate-related human rights abuse had occurred on their territory and/or within their jurisdiction. Although he would later be heavily criticized for conceding these limitations, his formulation was consistent with a conservative reading of both ARSIWA and the Treaty Bodies' interpretation of IHRL at the time. Despite this criticism, the significance of his focus at the time when the UNGP Framework was established was that it created a relationship between the HRC, states, and TNCs and other business enterprises, that was entirely novel. Not only would the HRC come to provide guidance to the state on how to implement the UNGP Framework, it could subsequently justify asserting its authority, as creator of that Framework, to both monitor and report on states' and business' progress in this respect. This would have significant ramifications for the way in which the corporate responsibility to provide remedies would later come to be conceptualized.

²⁴⁸UNGP 25.

²⁴⁹Jacob Katz Cogan, *The Regulatory Turn in International Law* (2011) 52(2) *Harvard International Law Journal* 322, 351 (ellipsis in the original, footnotes omitted) [My emphasis].

2.9 Conclusion to Chapter 2

In this Chapter, this thesis has sought to detail both the contours of the UNGP Framework and the modes of legal reasoning which led to its creation. In so doing, the thesis has evidenced how embedded pragmatism operated in this 'telling instance' and explained how it animated the processes which led to the UNGP Framework. It will be recalled that the descriptive move of embedded pragmatism is to collapse the distinction between legal (mandatory; state-regulated) and non-legal (voluntary; self-regulated) obligations. The normative move is to assert that this is of benefit to those most vulnerable to corporate human rights abuse.

In this Chapter, the thesis has evidenced the descriptive move of embedded pragmatism as being the collapse in distinction between the (legal) state duty to protect human rights, on the one hand and the (non-legal) corporate responsibility to respect human rights, on the other. By pragmatically attaining consensus on the UNGP Framework, this collapse in distinction is evidenced in two main ways. First, it is evidenced through the promise of institutionalizing HRDD processes in TNCs and other business enterprises to ensure that they respect human rights. This is undertaken by embedding a commitment to respect human rights within those enterprises, regardless of their obligations as a matter of law. This collapse in distinction is further supported by the institutionalization of a state duty to protect human rights. This duty makes explicit what was, at most, an implicit obligation in international human rights conventions – albeit one that may have achieved the status of CIL. In so doing, the distinction between legal and non-legal (interpretative) obligations is again, collapsed, in order to align state practice with what Human Rights Treaty Body experts and UN civil servants have determined is the ideal interpretation of those treaties. In keeping with the pragmatic mode of legal reasoning, this ideal interpretation is treated conservatively. Institutionalizing process is favoured over securing outcomes.

The normative move of embedded pragmatism was evidenced in this chapter through claims that the UNGP Framework attempts to prioritize the 'rights and needs of, as well as the challenges faced by, individuals from groups or population that may be at heightened risk of becoming vulnerable or marginalized'.²⁵⁰ I will return in Chapter 5 to revisit whether this normative claim can be substantiated in the polycentric governance system the UNGP Framework creates.

In his final session with the HRC, the SRSG would take the uncharacteristic step of requesting that it endorse the UNGP Framework. He recalls this moment later in a memoir:

²⁵⁰UNGP (General Principles), 1.

When I formally presented the Guiding Principles to the Human Rights Council and asked for its endorsement, the Algerian ambassador took to the floor to say that governments could not endorse a normative text that they did not negotiate themselves...I responded, with uncharacteristic passion, that I was old enough to have witnessed the collapse of repeated efforts by governments to negotiate a UN code of conduct for multinational corporations going back to the 1970s, some of which I knew the ambassador had been involved in earlier in his career. All had failed, I reminded the Council, because governments could not reach consensus. Here, you have an instrument you could have never negotiated yourselves, given the diverse and conflicting interests at stake. All stakeholder groups support it. So seize the opportunity, I urged. Endorse it, and then move on. They did.²⁵¹

For the SRSG, this endorsement constituted the 'end of the beginning':²⁵² a moment in which consensus had been reached regarding the role of states in regulating and adjudicating the responsibilities of TNCs and other business enterprises. The UNGP Framework represented 'a common global platform for action, on which cumulative progress can be built, step-by-step' without foreclosing longer term developments, both in practice and in law.²⁵³ As this thesis will show, how consensus was reached, and at what cost, requires further investigation. Nevertheless, the UNGP Framework would provide both a catalyst for additional developments in IHRL through which a BHR Field emerged where none had previously been. In this respect, at least, something new had begun.

²⁵¹Ruggie (2013) at p. xlix.

²⁵²UNHRC, A/HRC/17/31 ¶13.

²⁵³UNHRC, A/HRC/17/31 ¶13.

Chapter 3 - Beginnings: The United Nations Commission on Transnational Corporations and the Struggle to Develop a Code of Conduct

'Transnational corporations are poisonous flowers on the dung-heap of a dying capitalism.'

- The views enunciated by the socialist republics during Code negotiations, as quoted by Klaus A. Sahlgren, Executive Director, Centre for Transnational Corporations¹

3.1 The Code of Conduct for (or: on) Transnational Corporations

In this Chapter, the thesis revisits a moment in the recent institutional life of international law. Namely, the attempt by the UNCTNC to draft a Code of Conduct for (later: on) Transnational Corporations.² Work on the Code began in 1976 and was officially suspended by the UNCTNC in 1992.³ The Code was originally conceived as a multilateral instrument 'defining the entirety of relations between governments and TNCs'.⁴ Negotiations for the Code took place amidst parallel attempts to draft issue-specific codes of conduct for breast milk substitutes,⁵ consumer protection,⁶ transfer

¹Klaus A. Sahlgren, 'Scenes from my UN journey' in Martti Ahtisaari (ed) *Finns in the United Nations* (Finnish UN Association, 1996), 205.

²Annex VI: Draft United Nations Code of Conduct on Transnational Corporations (as of mid-1989) in Sidney Dell, *The United Nations and International Business* (United Nations Institute for Training and Research (UNITAR) 1990). See also, Code of Conduct on Transnational Corporations (1983) 22 International Law Materials 192 [together, 'Code of Conduct']. Parts of the draft produced herein are from the final draft as in Dell's text, unless otherwise indicated.

³UNGA A/47/446 (1992) Report of the President of the General Assembly at its forty-sixth session on a Code of Conduct on Transnational Corporations, which called for 'a fresh approach to the development of a legal framework for direct foreign investment'. See also the Draft Resolution proposed by Columbia on behalf of the G-77 in E/1993/30, Economic and Social Council, Report of the Commission on Transnational Corporations on its Nineteenth Session (5-15/04/1993), at 17.

⁴Karl Sauvant, 'The Negotiations of the United Nations Code of Conduct for Transnational Corporations: Experiences and Lessons Learned' 16 (2015) *The Journal of World Investment & Trade* 11, 19. See also Mia Mahmudir Rahim (ed), *Code of Conduct on Transnational Corporations: Challenges and Opportunities* (Springer 2019), 1-22.

⁵World Health Organization ('WHO'), *International Code of Marketing Breastmilk Substitutes* (1981) ISBN 92 4 154160 1; Sauvant (2015), 18.

⁶UNGA, A/Res/39/248 (9/04/1985; Sauvant (2015), 18.

of technology⁷ and illicit payments⁸ - all of which were pursued under its umbrella. The impetus for the Code came from two resolutions adopted by the UNGA during its Sixth Special session in 1974 to establish a New International Economic Order ('NIEO')⁹ as well as the Charter for Economic Rights and Duties of States ('CERDS').¹⁰

Like no initiative before it and arguably none since, the NIEO marked 'a sustained attempt' by the Group of 77 nations and the Non-Aligned Movement 'to craft a new international law that would facilitate resource redistribution in a world economy whose regulatory architecture had revealed itself to be fragile, if not obsolete.'¹¹ The Code marked the final chapter in this effort, but it was more of an afterword than a conclusion: by the time the ink had dried on the final draft of the Code in 1989, the '*real* new international economic order' - that of neoliberalism - had already come to dominate a variety of different legal responses to economic inequality.¹²

Most accounts detailing the turn toward business and human rights at the start of the new millennium have ignored this earlier attempt to regulate TNCs.¹³ Yet to ignore this attempt at regulating TNCs risks de-historicizing, de-politicizing and naturalizing ongoing debates about how international law should respond to the deleterious effects of a neoliberal economic order that began to take shape at that time and has now become largely taken for granted as 'the norm'.¹⁴ It also further implies that the BHR Field emerged as a result of universal backing for the laws and

⁷UNCTAD, Draft International Code of Conduct on the Transfer of Technology, 20 June 1985, TD/CODE/T47. The Code was never agreed.

⁸UNCTAD, International Investment Instruments: A Compendium, vols. I, II and III (New York and Geneva: United Nations) United Nations publications, Sales Nos. E.96.II.A.9, 10 and 11. The draft was put before the General Assembly in 1979, but the GA took no action. See Sauvart (2015), 19 and footnote 22.

⁹UNGA, A/Res/S-6/3201, (10/5/1974), at para 4(g); UNGA, A/Res/S-6/3202, (1/05/1974), at para V.

¹⁰UNGA, A/Res/39/3281(XXIX), (12/12/1974), Article 2. ['CERDS'].

¹¹Umut Özsu 'Chapter 17: Neoliberalism and the New International Economic Order: A History of 'Contemporary Legal Thought'' in Justin Desautels-Stein and Christopher Tomlins Searching for Contemporary Legal Thought (CUP 2017), 330, 332 [Özsu (2017)'].

¹²Ibid.

¹³The primary exception has been the work of Sundhya Pahuja on the corporation in international law. See in particular, Sundhya Pahuja, 'Corporations, Race and the Domestication of Race in International Law' in Duncan Bell (ed.) Empire, Race and Global Justice (CUP, forthcoming in 2019) available online at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3324846 ('Pahuja (2019)'); Sundhya Pahuja and Anna Saunders, 'Rival Worlds and the Place of the Corporation in International Law' in Dann and Jochen von Bernstoff (eds) Decolonization and the Battle for International Law (OUP, forthcoming in 2019), available online at: https://www.researchgate.net/profile/Sundhya_Pahuja/publication/322382006_Rival_Worlds_and_the_place_of_the_Corporation_in_International_Law/links/5a56bf8aa6fdcc30f86d5ed4/Rival-Worlds-and-the-place-of-the-Corporation-in-International-Law.pdf ('Pahuja and Saunders (2019)').

¹⁴Methven O'Brien (2011), 353.

policies governing economic liberalization – a claim that remains contested by many who see the neoliberal turn in both law and economics as contingent rather than necessary.¹⁵ In doing so, scholars in the BHR Field risk paying insufficient attention to a history of conflict and struggle in which the international economic order that the BHR Field now supports was not a *fait accompli*.¹⁶

In this thesis' critical re-reading of the Code negotiations, the question asked is not why the Code failed but rather, *how* did it fail? It does so, to keep alive 'a much wider, deeper and more inspired debate about international economic governance and how it could be imagined differently'.¹⁷ Particularly, I ask: How did parties to the Code negotiations envisage the relationship between states and TNCs? What remained most contested during the Code negotiations and what modes of legal reasoning were utilized to confront this contestation? And what role did human rights play in the Code negotiations?

I argue that the struggle to determine the parameters of the Code were fought on three different but interrelated planes: (1) a struggle to define what a transnational corporation *is* (the problem of form); (2) a struggle to determine the reference to, and applicability of, international law (the problem of legality); and finally (3) a less obvious, yet for my purposes, significant, struggle to determine what role human rights should play in the regulation of corporate conduct. This includes consideration of the extent to which gross violations of human rights committed by a state should prohibit corporations from investing in that state (the problem of social purpose).¹⁸

Drawing on the concept of embedded pragmatism advanced throughout this thesis, this Chapter argues that representatives of States and their counterparts in the international civil service attempted to respond to each struggle through a process of balancing and deferral. In this respect, negotiations are framed by attempts to balance the interests of parties and to defer difficult decisions until such time as they can no

¹⁵On the historical contingency of neoliberalism, see in particular Özsü (2017) and further, Ingo Venzke, 'Possibilities of the Past: History of the NIEO and the Travails of Critique' (2018) 20(3) *Journal of the History of International Law* 263; Nils Gilman, 'The New International Economic Order: A Reintroduction' (2015) 6 *Humanity: An International Journal of Human Rights, Humanitarianism and Development* 1; Ruth Gordon 'The Dawn of a New, New International Economic Order?' (2009) 72 *Law & Contemporary Problems* 131.

¹⁶Methven-O'Brien (2011), *supra*, note 18.

¹⁷Venzke (2018), 264.

¹⁸On (1) and (2), see 'Internal Memorandum from Sidney Dell to the Secretary-General of the United Nations re: Conclusion of the Special Session of the Commission on Transnational Corporations, 11-29 June 1984'(5 July 1984) EO/433, Folder No.S-1048-21, United Nations Archives and Records Management Service ('UNARMS') (Copy on file with the author). See also *contra* Bair (2015) and Sauvart (2015) but note that neither characterize this as an issue of definition and scope (although Dell's memo does). On (3), see Hamdani and Ruffing (2015).

longer be deferred. This is the primary *modus operandi* of pragmatism during this period, 'impoverished and unreflective' as it is in its search to determine what is useful and functional for 'real actors in concrete situations'.¹⁹ Determining how to regulate the TNC continued to remain contingent on an empirical analysis of its effects and activities. Yet paradoxically, determining which effects and activities were relevant required parties to agree to the definition of what it was. Radical accounts of the TNC are contested by several parties, depending on how they envision the international economic order.

The failure to agree the Code ultimately evinced a failure of states to determine: the form of the corporation states were regulating; the legality of the instrument that should be utilized to give effect to this regulation; and further, the extent to which socio-cultural objectives and values can *actually* be 'universally' agreed and constitutive of what it means to be human. Understanding these struggles provides an important precursor to assessing how human rights would attempt resolve this dissensus in the decades to follow.²⁰

3.2 TNCs & The New International Economic Order

The perceived threat of the TNC in the post-WWII period caused considerable concern to international lawyers and jurists in the 1970s. In the seminal corporation's case inaugurating that decade, *Barcelona Traction, Light and Power Company* ('*Barcelona Traction*') Justice Padilla Nervo polemically noted:

It is not the shareholders in those huge corporations who are in need of diplomatic protection; it is rather the poorer or weaker States, where the investments take place, who need to be protected against encroachment by powerful financial groups, or against unwarranted diplomatic pressure from governments who appear to be always ready to back at any rate their national shareholders, even when they are legally obliged to share the risk of their corporation and follow its fate...Perhaps modern international business practice has a tendency to be soft and partial towards the powerful and rich, but no rule of law could be built on such flimsy bases.²¹

For many statesmen and jurists from the Third World, Justice Nervo articulated a belief they shared: the TNC could be seen as nothing other than a 'real entity' from whom

¹⁹Koskenniemi (2010), 12.

²⁰See *infra* Chapters 4 and 5.

²¹*Barcelona Traction* (1970), 248 (Judge Padilla Nervo, Separate Opinion), 250. See also Karavias (2015).

they – and, to some extent, all states – were in need of protection.²² As Salvador Allende had proclaimed to the UNGA in 1972:

We are witnessing a pitched battle between the great transnational corporations and sovereign states, for the latter's fundamental political, economic and military decisions are being interfered with by worldwide organizations which are not dependent on any single State...In a word, the entire political structure of the world is being undermined. "Merchants have no country of their own. Wherever they may be they have no ties with the soil. All they are interested in is the source of their profits." Those are not my own words; they were spoken by Jefferson.²³

The idea of investigating the TNC gained momentum, in part fuelled by states in support of the NIEO. Borne out of a solidarity forged 'in institutional terms' through the Bandung Conference (1955),²⁴ the NIEO became a platform for redressing the balance within 'a profoundly inequitable international economy biased against the global south'.²⁵ As has already been noted in Chapter 2, the 'embedded liberal' compromise in the aftermath of WWII had placed a disproportional burden on developing countries. Domestic stability in industrialized countries had in part been won by externalizing the costs of adjustment programmes to the Third World.²⁶ Surfacing as it did amidst the oil crisis of 1973-74, the NIEO marked an attempt by the Third World and its allies to reflect broadly social liberal principles that went beyond the international Keynesianism of the post-War GATT and Bretton Woods economic order. As Nesadurai has noted, the NIEO package was qualitatively distinct from the status quo in that it sought 'to emplace Keynesian inspired principles of demand management and economic regulation, as well as social liberal inspired welfarist principles at the *international level*'.²⁷

At the heart of the NIEO's economic platform was: a demand for greater aid, debt relief, technology transfer and respect for Permanent Sovereignty over Natural Resources ('PSNR'), a specific right to development, the normalization of preferential

²²See Chapter 1, footnote 56.

²³'Address by Mr Salvador Allende', Summary Records of the 2096th Meeting of the UNGA, 4 December 1972, UN Doc. A/PV.2096 at ¶59. See also Pahuja/Saunders (2019), especially at 4-6.

²⁴Pahuja (2019). See also, Luis Eslava, Michael Fakhri and Vesuki Nesiah (eds) *Bandung, Global History and International Law: Critical Pasts and Pending Futures* (CUP 2017).

²⁵Bair (2015), 159.

²⁶Ruggie (1982), at 408. See also Lang (2006).

²⁷Helen E.S. Nesadurai, 'Bandung and the Political Economy of North-South Relations: Sowing the Seeds for Revisioning International Society' in See Seng Tan and Amitav Acharya (eds) *Bandung Revisited: The Legacy of the 1955 Asian-African Conference for International Order* (National University of Singapore Press, 2008) 68, 83. [Original emphasis]

and non-reciprocal treatment of Third World countries, the tight regulation of foreign investors and the stabilization of prices for raw materials and primary commodities.²⁸ The Third World had won some gains prior to 1973, most notably for my purposes, with the inclusion of PSNR as the foundational principle in both the ICCPR and the ICESCR.²⁹

Yet that gain had come at a cost. Although the original language proposed by Chile in both covenants had sought to claim PSNR as a human right claimed by newly emerging states against other states, the final provision required instead, that the right be exercised 'based on the principle of mutual benefit and [extant] international law.'³⁰ The reference to 'mutual benefit' attempted to dilute the provision by giving states a broad ambit to counter any claim from Third World states that they could unilaterally nationalize and expropriate foreign investment. Third World states would later claim the failure to recognize *full* permanent sovereignty over natural resources as an obstacle to the full realization of economic, social and cultural rights.³¹

The principle of PSNR is often considered the lynchpin of the NIEO and the centrepiece of the Third World's attempt to reclaim what it saw as rightfully its own.³² In a marked departure from understandings of sovereignty derived from the classic definition of statehood, international jurists of the Third World and the Soviet Bloc pressed for rights of ownership and free utilization of natural resources to be recognized between the 1960s – 1980s.³³ This was championed on the grounds that, for newly emerging states and peoples seeking self-determination, the right to resource exploitation was an indispensable part of redressing inequalities.

²⁸Öszu (2017), 333.

²⁹Common Article 1, ICCPR and ICESCR.

³⁰UNCHR, E/2256 Report of the Commission, E/2256 (14 April – 14 June 1952). The Chilean proposal read as follows: 'The right of peoples to self-determination shall also include permanent sovereignty over their natural wealth and resources. In no case may a people be deprived of its own subsistence *on the grounds of any rights that may be claimed by other states.*' [Emphasis added]. See also, James N. Hyde 'Permanent Sovereignty over Natural Resources' (1956) *The American Journal of International Law* 854. See also: Yogesh Tyagi, 'Permanent Sovereignty over Natural Resources' (2015) 4 *Cambridge Journal of International and Comparative Law* 588 (dating the emergence of PSNR as a concept to General Assembly Resolutions in 1962) ['Tyagi (2015)'].

³¹UNCHR, E/CN.4/1213 'Report on the Thirty-Third Session' (2 February – 5 March 1976), para 9. See also Dehm, (2018) 885.

³²Umut Öszu, 'Rendering Sovereignty Permanent? The Multiple Legacies of the New International Economic Order' (2016) *European Yearbook of International Economic Law* 1. See also Tyagi, (2015).

³³Article 1 of the Montevideo Convention on the Rights and Duties of States (1933) lays down the most widely accepted formulation of the criteria for statehood. See Montevideo Convention on the Rights and Duties of States (1933) 165 LNTS 19.

The inclusion of provisions calling for the regulation of TNCs in the Charter of Economic Rights and Duties of States (CERDS) was drafted in keeping with this central ethos.³⁴ The NIEO called for TNCs to be regulated in accordance with states' national laws and policies. Furthermore, it called for all states to ensure the non-intervention of TNCs into the domestic affairs of the host states in which they operated. Compensation upon expropriation of foreign investment was to be paid in accordance with the laws and regulations of the host state and should be 'appropriate' as opposed to 'just'.³⁵ This replaced the older standard as had been formulated by the Permanent Court of International Justice in the *Chorzów Factory* case and which had come to mean 'full compensation' of the value of the property taken in cases determined in the interwar period and the handful of post-WWII arbitral awards that had at that stage been determined.³⁶

CERDS was not looked upon favourably by several U.S.' representatives, who saw this, alongside calls from some of the more radical Third World states for restitution, as the basis for further reforming the post-war economic institutions, as 'conspiracy or lunacy' – both of which should be resisted.³⁷ The irony of this statement is perhaps not lost on the contemporary observer when considered as a counterpoint to the U.S. Central Intelligence Agency's own interventions to protect foreign owned private property that have more recently come to light.³⁸

³⁴CERDS, Article 2(1) states that: Every State has and shall freely exercise full and permanent sovereignty, including possession, use and disposal over its wealth, natural resources and economic activities. Article 2(2)(b) states that 'Each State has the right:(b) To regulate and supervise activities of transnational corporations within its jurisdiction and take measures to ensure that such activities comply with its law, rules and regulations and conform to its economic and social policies. Transnational corporations shall not intervene in the internal affairs of a host State. Every State should, with full regard to its sovereign rights, cooperate with other states in the exercise of the right set forth in this paragraph'.

³⁵Article 2(2)(c), CERDS.

³⁶*Factory at Chorzów* (Germany v Poland)(Indemnity) (1928) PCIJ (ser. A) No.17 (Judgment of Sept.13) This position was further affirmed in *Lena Goldfields Ltd v Russia* (Judgment of Sept 3, 1930) reprinted in 36 Cornell Law Review 42 (1950) 51; *Smith v Compañía Urbanization del Parque v Playa de Marineo*, 2 Review of International Arbitral Awards 915, 917-8 (Hale, sole arbitrator, 1929); *Shulfted Claim* (United States v Guatemala) 2 Review of International Arbitral Awards 1079, 1999 (Sisnett, sole arbitrator, 1936); *Saudi Arabia v Arabian American Oil Co.*, 27 International Law Reports 117 (Samser Hall, Badawi/Hassan, Abachy, arbitrators, 1958); *Sapphire International Petroleum Limit v National Iranian Oil Co.* (1963) 35 International Law Reports 136. For analysis on this point see also Patrick M Norton 'A Law of the Future or a Law of the Past? Modern Tribunals and the International Law of Expropriation' *The American Journal of International Law* (1991) 85(3) 474 [Norton (1991)'].

³⁷Nesadurai (2008), quoting Martin Bronfenbrenner, 'Predatory Poverty on the Offensive: The UNCTAD Record' (1976) 24(4) *Economic Development and Cultural Change* 825, at 831.

³⁸Pahuja (2019), 8.

By the mid-1970s, the widening gap between the incomes of Third World countries and the developed world was enormous. According to Franck and Munansungu, developed market-economy countries already enjoyed about two-thirds of the world's income.³⁹ By contrast, Third World economies housing almost 50 per cent of the world's population (excluding the People's Republic of China) received only one-eighth of the world's income.⁴⁰ The Secretary-General of the UN Commission on Trade and Development ('UNCTAD') reported that although real *per capita* income had increased from US\$2,000 to US\$4,000 per head in developed countries between 1953 and 1972, during the same period the increase had been to US\$300 (from US\$175) in the developing world.⁴¹ This had corresponded to an increase in the share of world trade for developed countries from 64.9% to 71.5%, while developing countries had a share of only 13% (excluding petroleum exporting countries). Although these figures were disputed in some quarters, the fact that growth was disproportionately benefiting the developed world was not.⁴²

In one register, the establishment of the UNCTNC was a response to this growing inequality. Although perceived largely as an afterthought to the NIEO - itself waning amidst disagreement between oil-producing and non-oil producing states as to how to give effect to its central platform - the resolution calling for its establishment placed a primacy on assisting the Third World to monitor and document the inner workings of the TNC.⁴³

Like the League of Nations before it, the UNCTNC embraced the discovery of interiority. As Anthony Anghie has noted, international jurists in the era of the League had sense that access to the interior of the state would 'revolutionise their discipline in much the same way that Joyce had revolutionised the novel and Freud had revolutionised our understanding of human nature'.⁴⁴ It was precisely through the Mandate system that international law and institutions had complete access to the

³⁹Thomas Franck and Mark M. Munansungu, 'The New International Economic Order: International Law in the Making?' Policy and Efficacy Studies No.6, (United Nations Institute for Training and Research, 1982) 3, at 20 ['Franck and Munansungu (1982)'].

⁴⁰Franck/Munansungu (1982), 20. See also Kamal Hossain, 'Introduction' in *Legal Aspects of the New International Economic Order* (Frances Pinter Publishers 1980).

⁴¹Franck/Munansungu (1982), 20.

⁴²Franck/Munansungu (1982), 20.

⁴³Öszo (2017), 341 and Salomon (2013). On the resolution calling for the UNCTNC, see ECOSOC E/5782, Resolution 1913 (LVII) 'The Impact of Transnational Corporations on the Development Process and International Relations', Resolution Adopted on the Report of the Special Intersessional Committee Convened Under Resolution 1908 (5 December 1974), UNESCOR Supp (No.5) 3 ['Resolution 1913(LVII)'].

⁴⁴Anghie (2006), 135.

interior of society.⁴⁵ Yet the UNCTNC's 'civilizing therapy' was not aimed at the interior of the sovereign state. Instead, it was squarely aimed at the TNC, which became the subject of studies;⁴⁶ reports and panel discussions with relevant groups;⁴⁷ technical cooperation and the of rendering advisory services (for states, regarding industry);⁴⁸ and ongoing exchanges of views amongst governmental; business; trade union; non-governmental; and consumer organizations.⁴⁹

If the ECOSOC is ever conceived as having a 'hey-day', the establishment of the UNCTNC and its early operations may very well be it. The UNCTNC was established pursuant to ECOSOC Resolution 1913 (LVII). It comprised 'high-level experts...reflecting the various fields of activity covered by the Commission'.⁵⁰ The 48-member Commission was directly elected by the Member States of ECOSOC: twelve members from Africa, eleven members from Asia, ten members from Latin America, ten from Western Europe and 'Other' states, and five from Eastern Bloc countries.⁵¹ Its proceedings began in 1975 and were finally completed in 1994.⁵²

By its second meeting, the UNCTNC had assembled an institutional machinery to service its primary aim and highest priority: the creation of a Code of Conduct for (later: on) Transnational Corporations. The Code was considered its *raison d'être*, given it garnered support from both the Third World and developed states, and (at least initially) no opposition from the socialist bloc.⁵³

Work to this end would proceed along two parallel but interrelated paths. On the one hand, it would assemble an information-gathering system *par excellence*, through the UN Centre on Transnational Corporations ('the Centre'). On the other, the Commission appointed an Intergovernmental Working Group ('IGWG') to undertake the task of producing drafts of the Code of Conduct.⁵⁴

The Centre had been created in November 1974 and was officially operational with the appointment of its first Executive Director, Klaus Sahlgren, in 1975. It was tasked with gathering, analysing and disseminating information on TNCs through the

⁴⁵Ibid.

⁴⁶Resolution 1913 (LVII), at ¶3(d).

⁴⁷Ibid.

⁴⁸Ibid.

⁴⁹Ibid., at para 3(b).

⁵⁰Ibid., at para 2.

⁵¹Ibid.

⁵²UNCTNC, E/1994/2 (2-11/05/1994).

⁵³Sauvant (2015), 20-21.

⁵⁴Sauvant (2015).

creation and maintenance of a comprehensive database.⁵⁵ In addition, it was charged with conducting research on the political, legal, economic and social aspects of TNCs (including in support of the Code of Conduct negotiations).⁵⁶ Finally, the Centre provided 'technical co-operation' programmes, upon request by Member States, in order to 'increase their negotiating capacity vis-à-vis transnational corporations'.⁵⁷ Technical co-operation was primarily financed by the UN Development Programme ('UNDP') from 1979 onwards.⁵⁸

The IGWG would meet during seventeen sessions, between 1976 and 1983, to compile the draft. The IGWG worked in tandem with the Centre to produce what the Commission hoped would eventually culminate in a multilateral framework supported by all UN Member States.

The centrepiece of the UNCTNC's work was undoubtedly the formulation of the Code. Despite its eventual limitations as a mere soft law instrument – a precursor, at best, to a treaty – the transformation of the scope and content of the Code over more than a decade 'aptly indexes the changing international climate, charting the reassertion of northern power' and the waning prospects of the NIEO.⁵⁹

It also indexes the rise of corporate power and the transformation in the role of the state.⁶⁰ In this respect, I agree with Jennifer Bair when she asserts that the Code negotiations evidence an ongoing attempt to protect the interests and prerogatives of the state as opposed to the interests of the individual -- as the move to regulate TNC through IHRL at the end of the 1990s would later attempt to do. It also evidences the beginning of a transformation in understandings of the state and its role in securing the welfare of its citizens.⁶¹ Furthermore, the failure of the Code negotiations evidences a struggle to redefine public international law in order to recalibrate the international economic order to redress economic inequality between

⁵⁵Tagi Segafi-Nejad (with John Dunning), *The UN and Transnational Corporations: From Code of Conduct to Global Compact* (Indiana University Press, 2008) [Segafi-Nejad (2008)].

⁵⁶1-12 March 1976 E/C.10/16, para 39.

⁵⁷UNCTNC, Third Session (Summary Record of 25TH Meeting), Comments of Mr Aissa (Algeria), E/C.10/SR.25 (2 May 1977), 2 para 7; as noted in Office of the Secretary-General, File No. S-1051/10/1/92/155 Organization Manual: Section T – A Description of the functions and organization of the United Nations Centre on Transnational Organizations, ST/SGB/Organization Section T/Rev.1 (28 June 1979), 2 (United Nations Archives and Records Management Services, New York)(on file with the author).

⁵⁸*Ibid.* 2.

⁵⁹Anthony Anghie 'Legal Aspects of the New International Economic Order' (2015) 6(1) *Humanity An International Journal of Human Rights, Humanitarianism and Development* 145.

⁶⁰*Ibid.*, at 154.

⁶¹Bair (2015), at 169.

states. For these reasons alone, understanding how the Code negotiations failed is worthy of our attention.

3.3 Defining the Corporation in the Code Negotiations: The Problem of Form

The question of the definition of a 'transnational corporation' remained highly contested and 'one of the most difficult tasks facing the Commission' in its formulation of the Code.⁶² By 1984, states were divided on questions of both form and substance: what constituted a TNC and what function the TNC actually served (whether it was for-profit, state-owned or a joint venture with the state) remained in dispute for the lifetime of the proceedings.⁶³

In part, the problem had pre-dated the UNCTNC itself. As Roslyn Higgins would later astutely observe, by refusing to acknowledge the corporation as a subject, international lawyers 'erected a prison of their own choosing and declared it to be an unalterable constraint'.⁶⁴ *Barcelona Traction* had not so much failed to acknowledge the subjectivity of the corporation as it had grounded the answer to that question in (Western) municipal law. As Higgins would argue, this created a situation in which the court's role in re-thinking the international status and effects of the corporation for the world it continued to inaugurate would remain stunted.⁶⁵

Similarly, the mandate of the Commission, established as it was to study the 'impact' of TNCs, placed the focus of the proceedings on determining its effects rather

⁶²UNCTNC, Commission on Transnational Corporations: Report on the Second Session (1-12 March 1976), E/5782, E/C.10/16, 5 at para 14; Polanyi [1944], 264-5.

⁶³The question of the definition of the transnational corporation was discussed during thirteen out of the UNCTNC's twenty meetings and formed the basis of a working group's discussions for its special session in 1983. See in particular, UNCTNC, E/C.10/6 (17-28/3/1975), 12 at paras 58-61; E/C.10/6 (17-28/03/1975), 12 at paras 62; E/C.10/32 (25/4 – 6/5 1977), 22 at paras 62-3; (16-26/05/1978), 27 at paras 122-124; E/C.10/59 (14-25/05 and 16-17/07 1979), 9-10 at paras 11-18, and 31-32 at paras 129-136; E/C.10/75 (23/06 – 4/07/1980) 31-2 at paras 99-105; E/C.10/92 (31/08 – 11/09 1981), 12-13 at paras 22-32; E/C.10/1982/19 (30/08 – 10/09 1982) 40 at paras 40-143; E/C.10/1983/S/5/Rev.1 (17-18/03 and 9-21/05 1983), 2 at para 4 and 22 at para 62 (noting that a Working Group was assembled during this session to discuss the definition, preamble and legal nature of the Code); E/C.10/1984/20 (17-27/05/1984), 15-18 at para 42-45; E/C.10/1985/19 Report on the Eleventh Session (10-19/04/1985), 19 at para 34; E/C.10/1986/19 (9-18/04/1986), 20-21 at para 41-46 and also E/C.10/1985/16 (7-16/04/1987), 23 at para 61-64, 46 at para 138. After this, the question of the definition (alongside the Code itself) became largely secondary to discussions on foreign investment.

⁶⁴Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (OUP 1994) 49.

⁶⁵Higgins (1970), 331.

than on developing international law.⁶⁶ The Group of Eminent Person's report ('GEP Report') calling for the UNCTNC's establishment had largely taken a Polanyian-styled view of the institutional separation between politics and economics, acknowledging from the outset that 'man's habitat, both spiritual and physical, is in danger of deterioration' at the hand of pursuing exclusively economic goals.⁶⁷ Yet rather than reasserting the political authority of states to define the multinational corporation ('MNC') in response, the GEP report wavered as to its treatment of what the corporation actually *was*. It moved between conceiving of the MNC (later, TNC) as an artificial entity - a creature operating within jurisdictional 'home' and 'host' countries as separate entities, governed by that state's law - and toward seeing it as a real entity, separate from its legal origins, and capable of operating outside the permission of any given nation:

Most of the problems connected with multinational corporations stem from their *distinctive transnational features in a world that is divided into separate sovereign states*...While Governments pursue a variety of economic and non-economic objectives to advance the welfare of their citizens, the chief goals of multinational corporations like those of all business enterprises, are profit and growth. *The differing objectives of nation-States and multinational corporations suggest that their respective decisions will not always be in harmony with each other.*⁶⁸

The GEP ultimately opted for a definition which was functional, and largely avoided the issue of having to exclude any business enterprise from the purview of the report. MNEs were, in its view, defined as 'enterprises which own and control production or service facilities outside the country in which they are based' and included state-owned, as well as co-operative enterprises.⁶⁹

The inclusion of state-owned and co-operative enterprises would prove contentious throughout the Code negotiations. For the USSR, the inclusion of state-owned enterprises in the definition of MNEs (later: TNCs) remained anathema to what the Code should achieve, because its primary *raison d'être* was to prevent the deleterious effects of private foreign investment in Third World countries. Similarly, the Group of 77 nations, a coalition of Third World countries that had formed at the

⁶⁶Resolution 1913 (LVII) was itself entitled 'The impact of transnational corporations on international relations'. The resolution itself focuses on the UNCTNC's capacity to determine TNC's effects on the international legal order, as well as in individual member states of the UN.

⁶⁷ECOSOC, 'Report of the Group of Eminent Persons to Study the Role of the Multinational Corporation' (1974) 13 I.L.M. 800, 801. ['GEP (1974)'] See also Polanyi [1944], 263-4.

⁶⁸*Ibid.*, 810-11. [My emphasis].

⁶⁹*Ibid.*, 807.

inauguration of UNCTAD, agreed that international law needed to regulate the TNC as a threat to sovereignty.

For the U.S., the exclusion of state-owned enterprises from the definition would result in Soviet economic advantage and would enable the U.S.S.R to increase its sphere of influence in the Third World. As such, the corporate form was not determined by whether it was public or private but rather, through its contractual form. It was supported by several OECD countries in its argument that any regulation of the TNC had to be tempered by fair and equitable treatment of foreign investors and prompt, adequate and effective compensation upon expropriation – principles which, it was argued, formed part of CIL.

As will be shown in the sections which follow, the former sought to utilize international law to embed the TNC, itself conceived as a vessel for international trade and investment, within the endogenous development goals of the state and the social institutions territorially bound by it. The latter sought to disaggregate the corporation and in so doing, utilize international law to dis-embed the TNC's interests from that of emerging sovereign states. The site of contestation becomes the sovereign state and its relationship to divergent visions of the economic order. The pragmatic response to this divergence is first, to narrow the contestability of the description of what exists (by focusing on the effects and activities of TNCs) and second, to utilize international law to create enough ambiguity in the text of the Code to oppose any radically alternative structural account of the international economic order. This becomes most apparent when considering the contested values that each economic order seeks to uphold. It is most clearly evidenced through the negotiation of the provisions pertaining to human rights and the non-collaboration with racist régimes in South Africa. Before turning to rights, however, this thesis will further consider questions of form and legality.

3.3.1 States' Perspectives on Corporate Form

From the moment negotiations for the Code began, States' perspectives on the TNC were clearly divergent. After the first meeting of the IGWG (charged with drafting the Code), Klaus Sahlgren would send an internal memo to Secretary-General Kurt Waldheim, stating that:

Even though, as was expected, the 48-member Intergovernmental

Working Group was not able to endorse in a committing manner the annotations of the Chairman, it is remarkable that it did agree to incorporate the Chairman's annotated outline in its report on the understanding that it would serve as the basis for future work. The fact that the different groupings did not submit their own proposals but rather agreed to work on the basis of papers prepared by the Centre and the Chairman and that the Working Group's report does not contain any brackets is, in my view, a significant achievement...⁷⁰

In early submissions to the Code negotiations, the IGWG fielded distinct views about the form of the corporation they should be regulating. The German Democratic Republic reiterated the principles contained in the CERDS and argued for 'controlling the activities of TNCs and subordinating their activities to the national jurisdiction of states.'⁷¹ Drawing on the idea that the TNC itself could neither be conceived as the sum of its owners or an extension of the host state, 'an effective curtailment of the neo-colonialist practices of transnational corporations', was conceived as 'a pre-requisite for establishing truly equitable international economic relations based on the principle of mutual advantage.'⁷²

Jamaica went even further in asserting states' sovereignty against the TNC. States should ensure TNCs and their direct affiliates 'operate as good corporate citizens and not act against the state objectives of host countries'.⁷³ Somewhat paradoxically (and departing from the views of many of its G-77 counterparts), Jamaica further asserted that this would include conforming 'in the case of apartheid' to the laws of *that* state, rather than the home state.⁷⁴ Ecuador stipulated that the Code should be addressed to TNCs to ensure they 'effectively participate in the process of development.'⁷⁵

Japan was of the view that the Code negotiations should proceed without a definition of the TNC. In a stroke of utmost pragmatism, work should proceed as such so delegates could learn through the process and experience of the Code's formulation how to define its object.⁷⁶

⁷⁰Inter-Office Memorandum, Klaus Sahlgren to U.N. Secretary-General, 13 May 1977, at 2. United Nations Archives and Records Management Services (UN-ARMS), File No. 0897/7/4 – Secretary-General Kurt Waldheim's Administrative Files (New York, New York), viewed from 13-26 May, 2017 (copy on file with the author).

⁷¹ECOSOC, E/C.10/19 'Transnational Corporations: Views and Proposals of States on a Code of Conduct: Report of the Secretariat' (30 December 1976), 7 at ¶23. ['VOS (1976)']. (considered at the Intergovernmental Working Group of the Whole of the Code of Conduct, First Session, 10-14 January 1977).

⁷²Ibid., 7 at para 23.

⁷³Ibid., 9 at para 40.

⁷⁴Ibid.), 9 at para 40.

⁷⁵Ibid., 5 at para 15.

⁷⁶Ibid., 11 at para 51.

Although the Soviet Union did not initially express a view, ongoing work on the Code would reveal it considered any definition to preclude publicly-owned and mixed enterprises. Although only named as a 'delegate' in the bland reports of the UNCTNC's proceedings, one can surmise that the view that TNCs were a 'specific socio-economic type of enterprises whose activities had given rise to the mandate of the Commission' likely came from the Soviet Union or its allies. According to this view 'enterprises of the socialist countries had nothing in common with transnational corporations'.⁷⁷

The UK adopted the GEP report's definition. Additionally, it maintained that the Code's purpose should be to secure effective international arrangements designed to promote TNC's contribution to 'national developmental goals and world economic growth'.⁷⁸ Additionally, extant international law needed to be conformed with, even as states required TNCs to conform to their national laws.⁷⁹ The U.S. went even further. It broadly agreed with the GEP report's definition of the TNC but noted that domestic enterprises as well as TNCs should be included, wherever possible. Additionally,

While host countries are free to regulate the operations of transnational corporations within their jurisdiction, international law and international agreements to which governments have subscribed should be respected.⁸⁰

The creation of an environment in which 'adequate international investment flows would be beneficial to all nations' was desirable.⁸¹ Regulatory schemes beyond the scope of national jurisdictions were 'impractical and undesirable'. Additionally, 'the principle of fair treatment of TNCs – equitable, non-discriminatory and in accordance with international law' was emphasized.⁸² In this regard, 'host countries should guarantee property rights, repatriation of profits, royalties and disinvestment, as well as the right to prompt, adequate and effective compensation in case of expropriation'.⁸³

The response of the Code's drafters to the question of corporate form was largely, to defer the question of what the TNC was and focus instead on its 'activities' and 'effects'. As states' representatives continued to debate the extent to which the TNC could be embedded within the social institutions of the nation state, international

⁷⁷UNCTNC, E/C.10/1982/18 'Report of the Eighth Session' (30/8-10/9 1982), 40, at para 142.

⁷⁸VOS (1976), 14 at para 72.

⁷⁹Ibid.

⁸⁰Ibid., 16 at para 88.

⁸¹Ibid.

⁸²Ibid.

⁸³Ibid.

civil servants continued maintain that they should proceeding with 'imagination and pragmatism', focusing all the while on the art of the possible.⁸⁴

Throughout the 1980s, the UNCTNC and its clerical counterpart in the Centre, produced a comprehensive body of work, documenting the 'effects' of TNCs in intimate detail. The Centre's output was vast: between 1975 to 1992 it produced a total of 265 publications – one for every month of its lifetime.⁸⁵ The UNCTNC proved to be a genuine source of information-gathering and Third World resistance, in that the UNCTNC engaged in critical research about TNCs and refused to bow to pressure from states that saw its work as detrimental to their corporations.⁸⁶ This was pragmatism, late twentieth century style: unlike the League of Nations, the UNCTNC was not concerned with challenging positivist ideas about international law or furthering particular social ends. Unlike the CHR, there was no agreed 'social purpose' or 'shared social value' throughout these proceedings. The 'universalism' of liberal values here embodied tolerance, diversity, openness and an agnosticism about moral truth – what Gerry Simpson has termed 'Charter liberalism'.⁸⁷ In this respect, reports evidence an ongoing attempt to mobilize instrumental management and bureaucratic process in order to achieve specific, measurable outcomes for states. The technology of technocracy tended to be prioritized by the Centre -- as civil servants marshalled against the common goal of harnessing the TNC to do the sovereigns' bidding.

Yet the Centre refused to bow to pressure and in this respect, sought to maintain a plurality of perspectives on what could be rendered a significant international concern worthy of the UNCTNC's consideration. Writing about their experience years later, Centre employees Khalil Hamdani and Lorraine Ruffing would assert that they raised public consciousness about South Africa; drew attention to TNCs on indigenous lands; and took on the world's transnational banks – to name a few projects. The Centre's activism 'ruffled feathers and there were consequences; but we joined the UN to make a difference, and in some respects, we did'.⁸⁸

Perhaps the most obvious evidence of the Centre's work came from its quinquennial surveys, each between 200 and 500 pages – which themselves became a litmus test for the Code negotiations. The first and second surveys included detailed sections on the nationalization of industry, including showing how nationalization did not always

⁸⁴UNCTNC, E/79/38/Rev.1 Intergovernmental Working Group (Code of Conduct) 'Report on the Fifth Session', 9 para 14.

⁸⁵Hamdani and Ruffing (2015), 49.

⁸⁶Ibid, 50.

⁸⁷Gerry Simpson, 'Two Liberalisms' (2001) 12 European Journal of International Law 537.

⁸⁸Hamdani and Ruffing (2015), 166-7.

lead to greater domestic control of industry by the host country.⁸⁹ By its final report, however, in 1988, the references to the NIEO and the Charter of Economic Rights and Duties of States had been replaced with language that embraced a new era, in which it noted that 'many public goals can best be achieved in a decentralized fashion, through market forces'.⁹⁰ The other 'last utopia' – that of neoliberalism – was clearly in ascendance, once again.⁹¹ In what John Braithwaite and Peter Drahos have identified as the 'most extreme example of forum-shifting [we have] ever seen',⁹² the UNCTNC was collapsed into the UNCTAD and has since often been 'written out of [the] history' of the UN, even by those adopting critical perspectives on the UN's engagement with TNCs.⁹³

Throughout the UNCTNC's proceedings, the question of the definition of the TNC remained an item on the agenda. In 1979, the UNCTNC noted at that all delegations agreed on the fundamental importance of the item since 'it was basic to the work of both the Commission and the Centre'.⁹⁴ By 1984, however, the question of definition had become contingent on state's views of the economic order to such a degree, that the idea of maintaining the primacy of TNCs was very nearly jettisoned, in favour of a universal definition of business enterprises. As Sidney Dell, the then Executive Director to the Centre would report to the Secretary-General at the time:

The breakthrough on Definitions was the result of a key move by the Netherlands which led to a new concession by the socialist countries. The Netherlands proposal consisted of a text that recognised two points: (a) that the Code *applies universally to all enterprises in all countries* having transnational characteristics; (b) that for the application of the Code 'it is irrelevant' whether or not the government considers that enterprises within its own country should be referred to as 'transnational corporations'. This formula was accepted by the socialist countries ad referendum, subject to corresponding agreement on all other outstanding issues.⁹⁵

⁸⁹Hamdani and Ruffing, 47. See also UNCTNC *Transnational Corporations in World Development: The Third Survey* (UN 1983) and *Transnational Corporations in World Development: The Fourth Survey* (UN 1988) and Tagafi-Nejad (2008) 98-100.

⁹⁰UNCTNC, *Transnational Corporations in World Development: Trends and Prospects* (United Nations, New York, 1988), 10. See also Hamdani and Ruffing (2015), 46.

⁹¹Andrew Gamble, (1999) 'The Last Utopia' *New Left Review* (July-August 1999) 117. See also Alexander E. Kentikelenis, Thomas H. Stubbs and Lawrence P. King, 'IMF Conditionality and Development Policy Space 1985 – 2014' *Review of International Political Economy* 23 (2016) 543.

⁹²John Braithwaite and Peter Drahos, *Global Business Regulation* (CUP 2000), 567.

⁹³Christopher May, 'Multinational Corporations in World Development 40 years on' (2017) 33(10) *Third World Quarterly* 2223, 2230.

⁹⁴UNCTNC, E/1979/38/Rev.1 (14-25/05/1979), 'Work related to a Definition of Transnational Corporations', para 130.

⁹⁵Interoffice Memorandum From Sidney Dell, Executive Director of the Centre for TNCs, to the Secretary-General (Jaiver de Pérez Cuéllar) EO/433, 5 July 1984, 1 (Folder S-1048-21-2-95-3), United Nations Archives and Records Management Service ('UNARMS') (copy on file with the author). [My emphasis] ['EO/433 Dell Memo'].

The result was a resort to universality that would, in some respects, presage the debates later animating the BHR Field.

3.4 The problem of Legality: CIL and the Code Negotiations

As I have argued in Chapter 1, the descriptive move of embedded pragmatism over the course of the past four decades has been to collapse the distinction between non-legal (voluntary, non-binding) and legal (mandatory, binding) obligations. As I noted in Chapter 2, in later decades, this collapse was framed as giving rise to a corporate obligation to respect human rights, through which corporations voluntarily agreed to an international responsibility to prevent harm in the societies in which they operate. This is said to be enforceable through a system of polycentric governance.⁹⁶

During the Code negotiations, the question of legality was important to states because the Code formed part of an attempt to reclaim the space to imagine international law anew. The 'collapse' between legal and non-legal obligations here was rather framed as a battle between competing world views as to what international was and could still be. The descriptive move of embedded pragmatism in this telling instance, is to create constructive ambiguity to mask that distinction. The normative move is to assert that this is desirable for all states engaged in the process.

The Group of 77 states envisioned that the Code would provide a basis for securing agreement on the minimum standards of conduct that TNCs would adhere to in terms of the environment; consumer protection; competition and restrictive business practices; taxation; and the transfer of technology.⁹⁷ To a certain extent, this could be seen as an attempt to de-commodify (or at the very least, *re-commodify*) land (through the environmental provisions) and labour in the form of securing PSNR and social welfare protections for states' citizens. Although parties largely failed to agree a definition of the TNC, the idea that the conduct of business itself could be regulated by international law seemed, at first glance, to be less contentious: both the International Chamber of Commerce ('ICC') and the Organization for Economic Cooperation and Development ('OECD') had already produced international standards

⁹⁶Ruggie, J.G. (2014), 5.

⁹⁷Code of Conduct, Sections 41-43 (Environment); 37-40 (Consumer Protection); 35 (Competition and Restrictive Business Practices); 34 (Taxation); and 36 (Transfer of Technology).

of conduct for their respective memberships to use, making the issue seem less fraught.⁹⁸

Despite the question of legality being determined by the GEP Report prior to the UNCTNC's establishment, 'even before the ink was dry, delegates were pulling it apart.'⁹⁹ And even before the institutional machinery had been put into place to support the Code negotiations, delegates had circulated position papers on the nature of the Code and its content to be discussed at the UNCTNC's first meeting. Further views were then solicited by the Secretary General in January, 1977, prior to the first meeting of the IGWG.

Based on the reports produced of the meetings for the UNCTNC, the question as to the legality of the Code appeared at its most heightened during the first,¹⁰⁰ sixth,¹⁰¹ seventh¹⁰² and fifteenth¹⁰³ sessions of the IGWG – the last of which included reviewing a draft Code which was tabled by Venezuela on behalf of the Group of 77 nations.¹⁰⁴ Despite 'exhaustive' discussions on the topic, the final determination as to the legality of the Code was 'by consensus, deferred to the concluding phase of the negotiations' and was still outstanding at the time the IGWG delivered its draft to the UNCTNC in 1983.¹⁰⁵

Key to the distinction being made was whether the Code itself could be considered a precursor to treaty or CIL and whether the Code should include protections for TNCs as investors. It is to these aspects of my thesis that we now turn.

3.4.1 A Fine Balance: State's Views on Legality

Although it has often been stated that the Third World sought to obtain a 'legally binding' instrument and developed states did not, the position of several States'

⁹⁸OECD, *Declaration on International Investment and Multinational Enterprises* (OECD, 1976). The Declaration included voluntary guidelines for MNEs that would later be updated and expanded (notably, in 2000 and again in 2011 to include respect for human rights); ICC, *Guidelines for International Investment* (ICC, 1972) in UNCTAD *International Investment Instruments: A Compendium* (UNCTAD 1996) vol III 273. See also Sauvant (2015) 27-30.

⁹⁹Hamdani and Ruffing (2015), 85.

¹⁰⁰UNCTNC E/C.10/31 (Third Session, 4/05/1977).

¹⁰¹UNCTNC E/C.10/46 (Fifth Session, 11/04/1979), 4 para.16 (noting 'At its sixth session, the Working Group concentrated its deliberations on the legal nature of a Code of Conduct').

¹⁰²UNCTNC E/C.10/46 (Fifth, Sixth and Seventh Sessions, 11/04/1979), 4-5.

¹⁰³UNCTNC, E/C.10/1982/6 (5/06/1982).

¹⁰⁴UNCTNC, E/C.10/1983/S/4 (21/01/1983) Draft Code of Conduct for Transnational Corporations – Proposed by Venezuela on behalf of the Group of 77 (22 May 1981).

¹⁰⁵United Nations Commission on Transnational Corporations: Information Paper on the Negotiations to Complete a Code of Conduct on Transnational Corporations.' (1983) 22 ILM 177, 185.

representatives were more nuanced than this would suggest. Third World states championed the primacy of the NIEO informing the proceedings and being the Code's *modus operandi*. In discussions pertaining to the 'Preamble' throughout the negotiations, the Group of 77 continued to champion this view.¹⁰⁶ Yet they recognized that as an international code, its legality would need to be evidenced through CIL. The problem became how CIL was determined, which, as Samuel Asante recalls, remained 'highly controversial' throughout the proceedings.¹⁰⁷ Yet the problem was less the source of law than its substantive content.¹⁰⁸

The Code provided an opportunity for newly emerging states to evidence how they anticipated TNCs should engage with endogenous development practice. In this respect, they did not agree that this should include the TNC determining how its proprietary interests were safeguarded.¹⁰⁹

It is perhaps more accurate to state that Third World countries wanted TNCs to be bound by the terms of an international instrument which states themselves could implement in keeping with their own national development policies. As such, they wanted the conduct of the corporation to be highly regulated, but the terms of foreign investment to remain very flexible and up to the state to determine. This would cause tensions during the negotiations after 1980, when it became clear that the Code would be both *on* and *for* TNCs, as several developed countries wanted provisions pertaining to the treatment of TNCs to be included in the Code.¹¹⁰

Latin American countries invoked the Calvo doctrine and argued that international law prescribed an international minimum standard beyond the obligation to accord to aliens the same treatment as to their nationals.¹¹¹ Initially, several Latin American countries argued that any attempt to utilize international law to regulate TNCs had to be balanced against states' interest to utilize them as '*real* mechanisms for progress'.¹¹² In this respect, the government of Ecuador recommended that the Code should 'be addressed to transnational corporations *only* and not the States

¹⁰⁶See in particular, UNCTNC E/C.10/46 (Fifth, Sixth and Seventh Sessions, 11/04/1979) 6 at para 24-26.

¹⁰⁷ Samuel K.B. Asante, 'Doctrinal differences on the Code' in Hamdani and Ruffing (2015), 91-2. [Asante].

¹⁰⁸*Ibid.*

¹⁰⁹*Ibid.*

¹¹⁰See submissions of Chile, Ecuador and Jamaica in UNCTNC E/C.10/19 (30/12/1976) ['E/C.10/19']. See also Sauvart (2015) ; and Asante, 91.

¹¹¹Asante, 91.

¹¹²*Ibid.*, 5, 13 ¶13-16.

themselves' to enable states to maintain 'the sovereign right to enact national laws to determine how the Code would be implemented'.¹¹³

Similarly, developed countries were not uniformly in support of the Code being a voluntary instrument. The Netherlands was ambivalent on the subject, arguing in favour of substance over form:

'[T]he Government of the Netherlands feels unable to give a definitive answer to the question of the Code's legal nature. Whether it is mandatory or voluntary is less important than its actual contents. The forms in which a voluntary code might be presented – international declaration or resolution, recommendation by a conference or by the General Assembly of the United Nations – do not have essential differences. All governments who vote in favour of any international recommendation have the moral duty to observe its regulatory provisions.'¹¹⁴

Switzerland and Japan also stressed the importance of the scope of application of the Code over the form it took, although both countries were ultimately in favour of guidelines which were not legally binding.¹¹⁵ Japan took the view that the Code should basically cover TNC's activities but should also contain provisions covering government policies (e.g. nationalization, taxation, anticorruption) to enable uniformity in the treatment of TNCs.¹¹⁶ This may in part have reflected the states' own desire to protect the interests of the *keiretsu* (Japanese TNCs), which are characterized by small, intra-group, cross-shareholdings coupled with strong coordinated management. Control over satellite companies of the *keiretsu* (which do not operate according to 'western' parent-subsidary relationships) is not exercised through formal voting rights but instead through managerial coordination.¹¹⁷ Switzerland favoured a Code that would enable governments to refrain, as much as possible, from intervening in the economic decisions of the private sector, preferring instead to use 'other methods to influence such decisions'.¹¹⁸

For their part, submissions from the U.S. and the UK made it clear from the outset of negotiations that the Code should be a 'voluntary' instrument, which would influence, rather than regulate, corporate behaviour. Furthermore, extant international law should be applied to any national laws and policies that states sought to use to

¹¹³Ibid., 5 15 ¶¶13-16.

¹¹⁴Ibid., 11-13, ¶¶ 54-65.

¹¹⁵Ibid., 3 ¶¶ 51-53 (Japan), 18 ¶¶97-106 (Switzerland).

¹¹⁶Ibid., 3 ¶¶51-52.

¹¹⁷Article 9, Law on Prohibition of Private Monopoly and Ensuring of Fair Trade (Anti-Monopoly Law), Law No.54 (1947)(Japan). See also Muchlinski (2007), 63-4.

¹¹⁸Muchlinski (2007) 18-19, ¶97-106 at 101.

regulate the TNC 'which should in turn be clearly stated and conform to [extant] international law'.¹¹⁹ The UK insisted that expropriation should be 'in accordance with the rules of international law' and compensation should amount to 'the market value of the investment appropriated'.¹²⁰

Neither state seemed to acknowledge the precariousness upon which their claims regarding international law were being made. As Theodore Kill has recently documented, the principle of fair and equitable treatment of investors (which the U.S. agitated for) did not arise from multilateral agreements negotiated under the auspices of the UN but rather, from the OECD (on the one hand) and the International Chamber of Commerce ('ICC') on the other. The OECD Draft Conventions on the Protection of Foreign Property ((1962) and (1967)) purported to ground the fair and equitable treatment provision in customary international law. Yet at the time, 'the idea that customary international law imposed an obligation to treat foreign commerce fairly and equitably emerged only in the 1950s and only among rich countries'.¹²¹ The OECD Convention was largely modelled on the Abs-Shawcross Draft Convention on Investments Abroad (1959). (The thesis will return to this Convention momentarily in my discussion of the International Chamber of Commerce).¹²²

Similarly, the UK's claim that TNCs investments should be compensated 'at market value' failed to consider a legacy of colonial abuse that many Third World states found themselves facing. As noted by Samuel Asante, a lawyer and employee of the Centre for TNCs at the time, the legacy of colonialism meant that many corporations continued to utilize the concession agreement as a form through which they could exercise 'a virtual assumption of sovereignty over a nation's natural resources'.¹²³ In colonial Africa, concessions for the purposes of exploiting minerals, timber and other natural resources had been granted by paramount chiefs or other 'native' authorities giving companies access and rights to *all* minerals found on the land for inordinately long terms – often between 40 and 100 years. According to Asante:

The consideration for these exclusive economic benefits was patently ludicrous. In many cases the companies paid a nominal rent of say, GBP150 for a whole concession, plus one or two bottles of rum...The traditional classification of the legal relationship between transnational corporations and the vital resources over which

¹¹⁹ E/C.10/19, 18-19.

¹²⁰ Ibid., 14, ¶72.

¹²¹ Theodore Kill, 'Don't Cross the Streams: Past and Present Overstatement of Customary International Law in Connection with Conventional Fair and Equitable Treatment' (2008) 106 Michigan Law Review 853, 880 [Kill (2008)].

¹²² Ibid.

¹²³ Samuel B. Asante, 'Restructuring Transnational Mineral Agreements' (1979) The American Journal of International Law 335.

they had acquired concessions was one of private ownership...The title to the natural resource passed to the transnational corporation at the point of extraction.¹²⁴

That the United Kingdom was now insisting upon 'market value' for the investments appropriated seemed to conveniently to forget this fact.

3.4.2 The Myth of International Contract Law, Law and Development & Basic Needs

The U.S.' position throughout the Code negotiations affirmed what Muthucumaraswamy Sornarajah has termed the 'myth' of international contract law.¹²⁵ As A.A. Fatouros would reiterate, the idea of international contract law reflected a significant doctrinal trend of the 1950s and 1960s perpetuated primarily (though not exclusively) by Western lawyers. The trend encompassed attempts at formulating international legal norms that would ensure the freedom of contract of investors in host states. Yet attempts to uphold the position had been in the minority.¹²⁶

This view was also upheld in a series of arbitral decisions determined in favour of TNCs during the late 1970s and early 1980s.¹²⁷ As Fatouros noted, international contract law sought to eviscerate the sovereignty of newly emerging states. It did so by wresting from their authority the capacity to determine investment disputes nationally. The paradoxical result of the creation of international contract law was to prevent a diversity of practice of states in the international system to crystallize into customary international legal norms. According to Fatouros:

Once international law is thus opened up, its vaunted diversity somehow disappears. The rules actually applied are those of traditional international law, at its strictest. But if the international law of contracts is identical in content with the international law of treaties, why is it necessary to stress the distinction? If the multiplicity of subjects and kinds of international law is to have any meaning, there has to be at least a possibility of variation in outcomes.¹²⁸

At the same time, however, other jurists argued for an emerging 'international law of development' which attempted to revoke or delegitimize certain legal principles

¹²⁴Ibid., 339.

¹²⁵Muthucumaraswamy Sornarajah 'The Myth of International Contract Law' (1981) 15(3) Journal of World Trade 187. See also R Brown, 'Choice of Law Provisions in Concession and Related Contracts' (1976) 39 Modern Law Review 625 at 632.

¹²⁶A.A. Fatouros, 'International Law and the Internationalized Contract', (1980) 74(1), 134, 135. ['Fatouros (1980)']. See also Kill (2008).

¹²⁷*Texaco Overseas Petroleum Co. & California Asiatic Oil Co. v Libyan Arab Republic* 17 ILM 1, 29 (1978) (Dupuy arb); *Kuwait and American Independent Oil Co.*, 66 ILR 519, 21 ILM 976 (1982) (Reuter, Sultan & Fitzmaurice arbs).

¹²⁸Fatouros (1980), 135.

and practice regarded by several Third World countries as being inimical to their needs for development.¹²⁹ Writing in 1976, Oscar Schachter argued that this new international law of development included a push to eliminate the 'international standard' of compensation for expropriated foreign property and to support the new conception of 'international entitlement to aid and preference based on need'.¹³⁰ This view found support in the International Law Commission, where it had been noted that the body of international law was growing to incorporate a 'duty to cooperate in the promotion of national and human *welfare*'.¹³¹ Schachter further asserted that:

The present rationale for international assistance and preferential treatment on the basis of need is more in keeping with premises of the modern welfare state – that is, to provide for the minimal human needs of the most disadvantaged segments of society...there is increased acceptance of the idea that specially disadvantaged countries such as land-locked states or former colonial territories or states dependent on a single commodity have special needs that entitle them to preferential treatment.¹³²

These two contrasting positions – one that was for contractual primacy and the other, for endogenous development – framed many of the debates about the nature of the TNC at UNCTNC. On the one hand, several representatives of Third World countries continued to maintain that the Code should be framed by the NIEO and CERD and as such, any right to compensation had to be determined by the state to be 'appropriate' and 'taking into account its relevant laws and regulations and all circumstances as the state considers pertinent'.¹³³ In keeping with the view that a state's endogenous development should remain paramount, this view maintained the primacy of the state's right to exercise its sovereign authority when determining how to both provide a TNC with compensation and to settle disputes. On the other hand, several states continued to maintain that foreign investment needed to be protected. This would become more evident as proceedings moved into the 1980s.

3.4.3 The View from Business: The International Chamber of Commerce

¹²⁹Oscar Schachter, *The Evolving International Law of Development* (1976) 15 *Columbia Journal of Transnational Law* 7 ['Schachter (1976)']. See also: H.J. Geiser, 'A New International Economic Order: Its Impact on International Law' (1978) 9 *Annals of International Studies* 97 ['Geiser (1976)'].

¹³⁰Schachter (1976), 10.

¹³¹[1971] II Y.B. International Law Commission (Part 2), 34-5. See also F.V. Garcia Armador 'The Proposed New International Economic Order: A New Approach to the Law Governing Nationalization and Compensation' (1980) 12 *Lawyer of the Americas* 1, 16.

¹³²Schachter (1976), 10.

¹³³CERDS, Article 2(1) and Article 2(2)(c).

In 1983, Jonathan Charney lamented the lack of business' engagement in the Code negotiations.¹³⁴ For Charney, the lack of business' participation in the Code's proceedings was a missed opportunity. The international community's failure to acknowledge both the economic power and to provide TNCs with a role in international law's development was sure to result in unnecessary costs to the international legal system.¹³⁵ Although business did not directly participate in the Code discussions, the International Chamber of Commerce ('ICC') participated as an observer throughout the UNCTNC's discussions for the entire period of its establishment.¹³⁶ In light of the importance of the ICC for the later processes under discussion, as well as the BHR Field as a whole, it is worth first outlining here who the ICC is and what their role had been in the UN's processes to date.

Role of the ICC in International Organizations

The ICC was established in 1919. Originally a network of nationally and locally-based chambers of commerce in the 19th century, it assumed the form of a federation of national-based chambers with a Paris-based secretariat in the aftermath of World War I.¹³⁷ During the 1920s, it employed eminent economists Friedrich Hayek, Ludwig von Mises, Gottfried Haberler and Fritz Machlup, all of whom historian Quinn Slobodian has recently credited with being neoliberal luminaries of the Geneva school.¹³⁸

During the interwar period, the ICC was instrumental in actively sponsoring and heavily contributing toward the Dawes Plan (brought into effect by the 1924 Treaty of London), under which Germany's failure to pay its World War I reparations debts were re-financed by American and British banks.¹³⁹ It had also heavily sponsored and was active in determining the outcomes of the 1927 World Economic Conference, under the auspices of the League of Nations. According to one anonymous observer, the ICC's 150-page report largely framed the debates of the proceedings, which subsequently led to the adoption of the world's first multilateral agreement on trade

¹³⁴Jonathan I. Charney, 'Transnational Corporations and Developing Public International Law' 1983 Duke Law Journal 748. ['Charney (1983)'].

¹³⁵*Ibid.*, 787.

¹³⁶Based on a review of the reports of the UNCTNC's annual proceedings from 1977 – 1992.

¹³⁷Slobodian (2018), 5.

¹³⁸Slobodian (2018), 5.

¹³⁹Kelly (2005), 260.

policy – the International Convention for the Abolition on Import and Export Prohibitions.¹⁴⁰

Somewhat ironically, it was the ICC's role in securing post-WWI reparations programmes and its high-profile status at the League that led to it adopting the tag line 'merchants of peace' during the interwar period, despite heavy reparations programmes later being attributed by several historians as a major contributing factor to WWII.¹⁴¹ During WWII, the ICC established a close working relationship with the UN. It attempted to safeguard the neoliberal ethos of its formative protagonists by attempt institutionalize the globalist ethos that would maintain the 'human right of capital flight'.¹⁴²

Hayek and his contemporaries believed that the global economy was not, nor should it be, self-regulating. Like Polanyi, the idea of a 'self-regulating' market was considered by these economists to be a myth, a stark utopia of national and global self-adjusting markets dis-embedded from political and social relations which could never sustain itself.¹⁴³ In this respect, they agreed with Polanyi that economic *laissez faire* was planned: 'the world economy would never reproduce itself without significant governmental effort'.¹⁴⁴

Yet unlike Polanyi, their vision of the role of institutions – and by extension, law – was not one in which law should ever be used as an instrument of the poor, the weak or those disadvantaged within a capitalist economy to restore a measure of humanity or social justice. As Slobodian argues, for Hayek, and the neoliberals that would follow in his footsteps, law should *encase* rather than embed the global economy in institutional relationships for the benefit of capitalist elites.¹⁴⁵ International organizations were an antidote, not a complement, to the welfare state. This was not a vision in which law effected a 'double movement', ensuring the weak could utilize law as an instrument to guarantee their democratic rights.¹⁴⁶ Instead, it was the vision of:

the development of a planet linked by money, information and goods where the signature achievement of the century was not an international community, a global

¹⁴⁰League of Nations, C.149.M.39 1928 II *International Convention for the Abolition of Import and Export Prohibitions and Restrictions*, November 8th, 1927 (Geneva, 16 March 1928).

¹⁴¹Kelly (2005), 261.

¹⁴²Slobodian (2018), 134.

¹⁴³Friedrich Hayek, *The Road to Serfdom*, (Routledge 1944) 239.

¹⁴⁴Slobodian (2018), 95.

¹⁴⁵Ibid. 5.

¹⁴⁶Polanyi [1944], 3.

civil society or the deepening of democracy, but an ever-integrating object called the world economy and the institutions designed to encase it.¹⁴⁷

Viewed from this perspective, democracy became a problem that needed to be managed. The idea that 'successive waves of clamouring masses' would be able to determine the course of their own history was palpably anxiety-inducing.¹⁴⁸ That they would be able to claim the *right* to do so, was further emblematic of the 'rabies democratica' that was spreading in the aftermath of WWII.¹⁴⁹ And, according to Slobodian, 'if neoliberal intellectuals spoke from the mountaintop, the ICC was its base.'¹⁵⁰

In this respect, the ICC continued to exercise its diplomatic muscle by being a participant at every stage of the attempt to create the International Trade Organization ('ITO') – the final (failed) piece of the Bretton Woods puzzle. The statement of opposition issued by U.S.' advisors which would have established the ITO, was 'a near carbon copy' of the ICC's 150-page report from 1927. The key demand made by the ICC, both in 1927 (and again by the U.S. in the 1940s), was one of negative integration, in which the importance of national boundaries would be radically and drastically reduced and sovereignty increasingly diminished.

For the ICC, overall growth of productivity, trade, investment and living standards throughout the world required that goods, capital and men could move and services could be exchanged with the greatest possible freedom from country to country. The point was not so much to safeguard big business by advocating for U.S. hegemonic stability: rather, it was to reduce the need for states altogether. According to Slobodian:

To blame U.S.' failure to ratify the ITO on the unwillingness of big business to give up its sovereignty neglects the fact that the ICC's position was not that the United States would lose too much sovereignty by participating in the ITO but that the ITO would not infringe *enough* on the sovereignty of its signatories.¹⁵¹

The distinction between property and territory was built through the ICC's International Code of Fair Treatment for Foreign Investments ('ICFTFI') – a precursor to today's IIL.¹⁵² The document was concerned entirely with the protection of the

¹⁴⁷Slobodian (2018), 17.

¹⁴⁸Slobodian (2018), 19 and 121-145.

¹⁴⁹Slobodian (2018), quoting Röpke, at 124.

¹⁵⁰Slobodian (2018), 129.

¹⁵¹Slobodian (2018), 133.

¹⁵²ICC, *International Code of Fair Treatment for Foreign Investments* (1949), *International Foreign Investment Instruments: A Compendium* (Vol.3 Non-Governmental Instruments) (UNCTAD 1996), 273 ['ICFTI'].

property of nationals. 'Nationals', however, were defined not as individuals but as *companies*, which were both juridical persons recognized as such by the law of a Party and associations, even if they did not possess legal personality.¹⁵³

In this respect, the ICC collapsed the distinction between a corporation being either a real entity established and run by its managers, or a legal entity created by the state. The corporation could be reduced to its associational forms, no matter how they manifested. It was essentially 'nothing more than a mass of contracts that various individuals have entered into for their mutual benefit'.¹⁵⁴ Article 6 of the ICFTFI stated as much, by prohibiting discriminatory treatment of foreign nationals in the following terms:

The High Contracting Parties shall not introduce any legislative or administrative provisions of a discriminatory character placing restrictions on:

- The nationality of the shareholders;
- The composition of the board of Director and the choice of Directors;
- The selection or introduction into their territories of such administrative, executive and technical officers of staff not nationals of those territories, as shall be deemed by the enterprises concerned to be requisite for their efficient operation.

In the case, however, enterprises directly concerned with national defence, special conditions may, if necessary, be imposed.¹⁵⁵

Additionally, corporations were to be granted civil rights not of the host state but of their home state, even if this gave them preferential status. This characterization of the corporation, as essentially an aggregate of contracts, would become significant in its submissions to the Draft Norms process decades later.

According to Slobodian, the ICC perceived the ICFTFI to be acting as a supplement to the UDHR and an antidote to the notion of exporting the welfare state writ large being championed therein.¹⁵⁶ It attempted to secure a *private* world of property that could be shielded from the *public* world of states. A capitalist Magna Carta in its own right, the IFTFCI attempted to put into place a bastion against Third World assertions of PSNR. Yet it did not result in multilateral agreement. The Abs-Shawcross agreement, proposed by George Abs, the head of Deutsche Bank and a member of the ICC, and Lord Shawcross, the United Kingdom's Attorney General, in 1956, which was largely based on ICFTFI, was ultimately rejected by the OECD.¹⁵⁷ Yet

¹⁵³Article 15, ICFTI.

¹⁵⁴Daniel R. Fischel, 'The Corporate Governance Movement' (1982) 35 *Vanderbilt Law Review* 1259, 1273.

¹⁵⁵Article 6, ICFTI.

¹⁵⁶Slobodian (2018) 136-7.

¹⁵⁷*Ibid.* See also Kelly (2005), 260.

the text of the ICFTFI (and the agreement) formed the basis for many of the bilateral investment treaties negotiated during the 1990s.

Views of the ICC on the Code and the Shifting Status of the Code

The Centre solicited the views of non-state actors for the IGWG's consideration. In this respect, business organizations favoured a voluntary instrument and trade unions supporting a legally binding Code. Like many Third World countries and the G-77's combined proposal, however, any legally binding instrument should provide a maximum amount of flexibility to government to regulate TNCs.¹⁵⁸

Perhaps not surprisingly, business organizations, including the International Chamber of Commerce, the International Organization of Employers, the Business Interest Advisory Council (of the OECD) and the Chamber of Commerce of the United States of America, largely favoured standardized international guidelines that would be voluntary and serve the purpose of increased foreign investment by corporations 'in the overall development context'.¹⁵⁹ Business favoured the use of the OECD Guidelines as a useful reference in drafting the Code of Conduct. The ICC noted in 1977, that because only 25 per cent. of total investment was in developing countries, 'the major part of industries to which a United Nations code would be applicable would be applicable is operating within developed market economies'.¹⁶⁰

On definition and scope, the ICC stressed that all TNCs – private, mixed and state-owned, should be included under the term used. The main reason given for adopting such a definition was to 'avoid discrimination and distortion between national corporations and transnational enterprises as well as between private and public sectors.'¹⁶¹ The Code should be 'voluntary in nature, non-binding in character and flexible enough to allow for different situations not only arising out of varying national legislation and practices but also out of different kinds of TNCs.'¹⁶²

Toward the end of the Code negotiations, the ICC made its position regarding the primacy of business most clear when advocating for ongoing presence of TNCs in South Africa. For the ICC:

¹⁵⁸ECOSOC, UNCTNC E/C.10/20 'Transnational Corporations: Views and Proposals of Non-Governmental Interests on a Code of Conduct' (30 December 1976), 15. ['E/C.10/20 (1976)'].

¹⁵⁹Ibid., 6 para 15.

¹⁶⁰Ibid., 7 para 23.

¹⁶¹Ibid.

¹⁶²Ibid., 8 para 32.

Conscious action by business leaders to improve the conditions of blacks in the workplace *strengthens the operation of a free market economy* and contributes to the political evolution of South Africa towards democracy.¹⁶³

For the ICC, the neoliberal *laissez faire* market would enable democracy, rather than democracy needing to be a precondition to market entry.

In 1984, with a full draft of the Code to hand, all states expressed the view that the utmost effort should be made to conclude negotiations and to adopt the Code 'without delay'.¹⁶⁴ Yet the UNCTNC's proceedings continued for another eight years without agreement being reached. For an additional two years, the UNCTNC maintained that delegates should prioritise 'not its legal form but the political commitment of all parties to it' and see it as 'an important step towards international economic cooperation'.¹⁶⁵ Yet by 1987, the tone had changed remarkably:

In his introductory remarks, the Executive Director of the United Nations Centre on Transnational Corporations recalled that the international debate on *foreign direct investment* and transnational corporations began with the creation of the Commission on Transnational Corporations *which was given the mandate, as its main priority, to establish an international framework in that area*. Noting the changes in attitude and policies of Government with respect to foreign direct investment flows to developing countries, he stressed the importance of concluding the code so that, among other things, countries desiring larger flows of foreign direct investment could obtain them.¹⁶⁶

The NIEO was becoming all but a distant memory. It was amidst the UNTNC holding its first and second sessions of hearings on TNCs in South Africa. It is to this final aspect of the Code that the thesis now turns.

3.4 The Question of Social Purpose

In the final part of this Chapter, the thesis turns to look specifically at the issue of corporate respect for human rights and how this was framed through the Code. The provision pertaining to human rights was agreed in a relatively short space of time. By the time the IGWG reported on its eighth session, in 1980, the Group had agreed both that provision and the clause pertaining to TNC's adherence to socio-cultural objectives

¹⁶³UNCTNC, E/C.10/1986/NGO 2 'Transnational Corporations in South Africa and Namibia: Public Hearings on the Activities of Transnational Corporations in South Africa and Namibia – Statement Submitted by the International Chamber of Commerce, a non-governmental organization in consultative status with the ECOSOC, Category I', 2, para 4.

¹⁶⁴E/C.10/1984/20 'Report on the Tenth Session', 18 para 40.

¹⁶⁵E/C.10/1985/19 'Report on the Eleventh Session' 20 para 38; E/C.10/1986/19 'Report on the Twelfth Session' 20 para 41-2.

¹⁶⁶E/C.10/1987/16 'Report on the Thirteenth Session' (7-16 April 1987) 23, para 62.

and values.¹⁶⁷ Yet, despite the impetus for the human rights provision having originally come in part from states' dissenting the racist minority régime in southern Africa, this latter provision continued to be highly contested.¹⁶⁸ The key issue that states remained unable to agree was whether the Code should reflect a commitment to TNCs progressively reducing their holdings in southern Africa and refrain entirely from business activities in Namibia.

The worldviews on rights were broadly delineated into two opposing camps: those who saw rights vis-à-vis TNCs as essentially and only civil and political in their import, and those who wanted to extend rights to include the inalienable right of peoples to self-determination and PSNR – most notably, in southern Africa.

This had not been a schism that had played out in other parts of the UN. As Samuel Moyn has clearly documented, South Africa had long since been marginalized on the grounds of post-war apartheid.¹⁶⁹ The first major sign of things to come had occurred as early as 1946, when India petitioned the General Assembly on the grounds of racial discrimination against citizens of Indian origin. Much to the chagrin of Jan Smuts, who was 'shocked to see the liberal internationalism he had long championed' including in the preamble of the UN Charter he had written, South Africa would become marginalized and isolated at the UN, as a deluge of General Assembly and Security Resolutions would turn into successive cases before the International Court of Justice.¹⁷⁰

Although all states recognized that the apartheid regime was committing atrocities, there was no agreement as to how (or whether) the Code should reflect a commitment that TNCs disinvest from operations in southern Africa. This was because there was no agreement reached as to how rights should be prescribed in order to prohibit TNC's collaboration with racist régimes.

This is significant for two reasons. First, it brings into focus that there was no fundamental disagreement regarding the claim that TNCs *should* respect human rights in the 1970s. Even as early as 1977, states' representatives were willing to concede that TNCs had a responsibility to respect human rights above any legal obligations to adhere to the laws and regulations of the jurisdictions in which they operated.¹⁷¹ This calls into question the novelty of the 'consensus' achieved decades later. Although the

¹⁶⁷UNCTNC, E/C.10/62 (9/06/1980), 11 para 52 and 'Annex (Concluded Provisions)' at 2.

¹⁶⁸ECOSOC, UNCTNC, E/C.10/62 (4/05/1977) 16 para 21.['FSR (1977)'].

¹⁶⁹Moyn (2010), 95.

¹⁷⁰Ibid.

¹⁷¹FSR (1977) 8.

manner and modes through which the UNGP Framework propose to evidence corporate respect for human rights are arguably novel, that TNCs should respect human rights was not in dispute in these earlier negotiations.¹⁷²

Second, and more importantly, however, the divergent emphases placed on rights, by Western states and the Group of 77, evidenced these states' different perspectives on the function and purpose of the human rights system. For Western states, rights safeguarded civil and political rights and freedoms and guaranteed that states (and by extension, private corporations) preserve anti-discrimination policies, extending equality of opportunity and treatment to citizens. For the Group of 77, however, these rights did not remain distinct from the collective rights of self-determination and PSNR, but rather, were in addition to them.

As Julia Dehm has ably shown, in other forums at the UN as late as 1977, the NIEO and PSNR were being pursued by Third World states in order to secure economic, social and cultural rights ('ESCR').¹⁷³ If the ICC saw the ICFTFI as its supplement to the UDHR, then the NIEO was the Third World's supplement and precondition to ESCR's realization and combatting inequality.¹⁷⁴ Hence, while Samuel Moyn argues that the UN had long since become a moribund gatekeeper of human rights norms – transferred as they had been, to a middle class in the West, hankering to be keepers of the flame – ongoing attempts by the Third World to argue for rights to be reconceived differently further complicates this story.¹⁷⁵

For Western states, on the other hand, human rights was not the language through which claims to address substantive inequalities between states were being articulated or addressed. Nor did it provide a basis upon which either the profit motives of the TNC nor the delinquency of a state could be subordinated to human rights as a higher normative order. This was framed by Western states as an issue of jurisdictional competence: even though member states agreed that corporations should respect human rights and the situation in southern Africa constituted an egregious human rights violation, they did not agree that the UNCTNC was the appropriate forum through which to address these concerns nor that the Code of Conduct for TNCs an appropriate instrument through which to address this issue. Hence, even although member states largely condemned South Africa's actions as an egregious human rights

¹⁷²Ibid.

¹⁷³Dehm (2018).

¹⁷⁴Dehm (2018), 886.

¹⁷⁵Moyn (2010), 47; Stephen Hopgood, *Keepers of the Flame: Understanding Amnesty International* (Cornell Press 2006).

violation *politically*, the OECD countries refused to allow for provisions in the Code to be so specific as to include the issue of southern Africa.

Instead, human rights were being utilized to argue for just the opposite: the Sullivan principles, a voluntary corporate social responsibility instrument developed for companies by African-American preacher Leon Sullivan in 1977, was utilized as a justification by the United States for the ongoing presence of U.S. firms in South Africa.¹⁷⁶ The Sullivan Principles provided that 'firms took part in far-reaching commitments of corporate social responsibility toward preventing human rights violations, spurred by a desire to deflect growing calls for divestment from that country'.¹⁷⁷ By 1987, Reverend Sullivan pronounced the principles a failure and disassociated himself from their use.¹⁷⁸ The U.S. government enacted legislation in support of sanctions in South Africa in 1986.¹⁷⁹

What becomes apparent through a close reading of the development of the Code provisions, is that, in so far as the regulation of TNCs was concerned, human rights were not considered to embody the social values of an 'international community' of states, nor were they considered in 'world ordering' terms in the manner they would later come to be claimed in the 1990s.¹⁸⁰ Social values remained firmly in the hands of the state itself to determine.

3.5 Our values are not shared values

As I sought to show in Sections 3.2 - 3.4 of this chapter, ways of understanding the function of the transnational corporation were largely viewed along two distinct lines at the UNCTNC. On the one hand, the TNC was defined and considered as a set of proprietary or contractual relations, for which international law could be utilized to better govern a so-called 'nexus of contracts' between the state and the corporation –

¹⁷⁶Reference to the Sullivan principles is made by two delegations, one of which is the U.S., as late as 1989. See UNCTNC, E/1989/28/16/Rev.1 (5-14/04/1989) para. 85 See also UNCTNC, E/C.10/1988/16 31 (6-15/04/1988) para 61.

¹⁷⁷Douglas Cassel, 'Corporate Initiatives: A Second Human Rights Revolution' (1996) 19 Fordham International Law Journal 1963, 1970-71.

¹⁷⁸Compare Leon Sullivan, 'Agents for Change: The Mobilization of Multinational Companies in South Africa' (1983) Law and Policy in International Business 427 [Sullivan (1983)] with James B. Stewart, 'Amandla! The Sullivan Principles and the Battle to End Apartheid in South Africa' 2011 96(1) The Journal of African American History 62, 83.

¹⁷⁹See also UNCTNC, E/C.10/1988/16 'Report on the Fourteenth Session' (6-15 April 1989) 31, ¶61. Comprehensive Anti-Apartheid Act (1986) (United States) 100 Stat. 1986.

¹⁸⁰See Christian Tomuschat, 'Obligations Arising for States Without or Against their Will' (1993-IV)241 Recueil des Cours 195, 216.

itself considered to be a constituted by managers, directors, shareholders and investors.¹⁸¹ On the other hand, however, the TNC was seen as a real entity in its own right. Claims made about the transnational corporation in this respect considered the corporation from the perspective of its ongoing *impact* as an institution in the society in which it was operating, and the extent to which it created an enclave to secure its own interests.

From this perspective, the corporation could not be reduced to private contractual relationships with the state but, rather, was operating under its own political calculus, and against the interests of the state. Through ongoing claims in support of the principle of PSNR, several Third World states sought to argue that the TNC had its own motives, largely seen as deleterious to development and that could be advanced independent from any state itself. Although Third World jurists and their counterparts at the UNCTNC considered the corporation in this manner during the Code negotiations, their concerns echoed those of European countries in the decades following WWII. As early as 1967, Jean-Jacques Servain Schreiber had argued that the story behind the success of U.S. companies in Europe was not the level of U.S. foreign direct investment but rather, the level of *European* investment in American companies based in Europe.¹⁸² This brought with it the possibility of cultural change and technological innovation unparalleled in any earlier era in U.S.-European history, because it introduced the primacy of U.S. business methods into transactions that were considered distinct from the state.¹⁸³ Yet it also threatened to enable the motivations of the corporation to become paramount in trade and investment relationships between states.

This latter view, characterizing the corporation as having political purchase, was further evidenced through states' concerns regarding the corporation's capacity to impact upon the values and traditions of the societies in which they operated. Far from being solely a party to an agreement with the state, whose benefit or detriment to a society was cast in economic terms, the corporation's capacity to influence a country's social development was further acknowledged and seen as a threat by several countries. In its 1974 report calling for the establishment of the UNCTNC, the

¹⁸¹For further explanation of the 'nexus of contracts' theory and the distinction between this and conception of the corporation as a social institution as a matter of U.S. law, see in particular William T Allen, 'Our schizophrenic conception of the business corporation' (1992) 14 Cardozo Law Review 261.

¹⁸²Jean-Jacques Servain Schreiber, *The American Challenge* (Hamish Hamilton Limited London: 1968), 8-26.

¹⁸³*Ibid.*, 8-26.

Group of Eminent Persons had noted that several states were concerned with the non-economic impact of the multinational corporation in this manner:

The non-economic impact [of the multinational corporation] is frequently as important as or even more important than the economic impact. The effect of multinational corporations on the social institutions and cultural values of host countries may be especially striking if the tenor, tradition and stage of development of these countries differ considerably from those of the home countries. *The very cultural identity and entire social fabric may be at stake, especially if multinational corporations attempt to transplant their own models of social development to the host country.*¹⁸⁴

Despite contrasting views of the function and purpose the transnational corporation served, and disparate attempts to cast its obligations as either public/developmental or private/transactional in other parts of the Code, there was little to no disagreement surrounding the corporate obligation to adhere to the socio-cultural objectives of the host state. Agreement was reached on the inclusion of this provision swiftly. The Chairman of the IGWG, Sten Niklasson, tabled the provision at the group's first meeting, which read as follows:

- Adherence to socio-cultural objectives and values
Compatibility of activities of transnational corporations with the socio-cultural objectives and values of host countries and co-operation by transnational corporations with Governments of host countries with a view to ensuring that no alien elements which might adversely affect the cultural identity of host countries be transplanted.¹⁸⁵

The provision included in the Code itself largely reflected this original formulation and contained no square brackets (other than those referring to the legality of the instrument itself). By 1980, the IGWG had determined that it should read as follows:

Adherence to socio-cultural objectives and values

6. Transnational corporations should/shall respect the social and cultural objectives, values and traditions of the countries in which they operate. *While economic and technological development is normally accompanied by social change*, transnational corporations should/shall avoid practices, products or services which cause detrimental effects on cultural patterns and socio-cultural objectives as determined by governments. For this purpose transnational corporations should/shall respond positively for requests for consultations from governments concerned.¹⁸⁶

¹⁸⁴UNDESA, E/5500/Rev.1/ST/ESA/6, 34.

¹⁸⁵UNCTNC, E/C.10/31 (4/05/1977), 8 para 2.

¹⁸⁶UNCTNC, E/C.10/62 (9/06/1980), 1 at para 6.[My emphasis].

Press releases from the UN note that there was initially some disagreement as to what constituted an 'alien element'.¹⁸⁷ For its part, the United States was concerned that the term suggested corporations were necessarily bad: the qualifying statement in the final provision sought to address this by emphasizing that some social change may be inevitable.¹⁸⁸ Yet neither the United States nor any other delegation suggested that states' values could in fact be shared with, or similar to, that of the TNC itself. Conversely, there was no attempt to argue that the International Bill of Rights constituted universal *values* that were shared by states and corporations, despite an oblique reference to the latter having been included in the Universal Declaration of Human Rights itself.¹⁸⁹ How then, did the provisions pertaining to human rights identify what rights *were* (if not supranational universal values) and what did this mean for the characterization of a corporate respect for human rights in the Code?

3.6 Respect for human rights in the Code of Conduct

3.6.1 An international cause célèbre

The initial impetus to include a human rights provision in the Code of Conduct came amidst widespread condemnation, both at the General Assembly and the Security Council, against the racist apartheid regime in South Africa and its illegal occupation of the territory of Namibia.¹⁹⁰ By its second session in April 1977, the IGWG had tabled an inclusion of the human rights provision in the Code, noting that it should include a reference to 'non-collaboration with racist minority régimes, particularly in southern Africa, in line with Security Council Resolutions'.¹⁹¹

As one South African legal scholar had noted earlier that decade, the situation in south-West Africa had become 'the international cause célèbre' of the twentieth century.¹⁹² By 1977, South Africa was a pariah state at the UN. Both the UNGA and the Security Council had continued to condemn the government's actions over the course of three decades, both within the territory itself and with regard to what would

¹⁸⁷UN Press Release TNC.103 (31/03/1978) cited in Patricia Pope 'Transnational Corporations – The United Nations Code of Conduct' 5 Brooklyn Journal of International Law 129, 12-13.

¹⁸⁸*Ibid.*, 12-13.

¹⁸⁹*Ibid.*, 12-13.

¹⁹⁰See: UNGA 3111(XXVIII) 12 December 1973 and 31/146 and 31/152 of 20 December 1976; and UNSCR 385(1976).

¹⁹¹UNCTNC E/C.10/31 (18/04 – 4/05 1977), para 21.

¹⁹²John Dugard, *The South-West Africa / Namibia Dispute: Documents and Scholarly Writings on the Controversy Between South Africa and the United Nations* (University of California Press: 1973), xi.

come to be determined as its illegal occupation of Namibia.¹⁹³ As the acknowledged successor to the League of Nations, the General Assembly had unilaterally terminated South Africa's mandate in South-west Africa in 1966 – a decision which was later affirmed by the Security Council in Resolution 264.¹⁹⁴

In 1971, in its sixth decision on South-west Africa, the International Court of Justice issued an Advisory Opinion on the legal consequences for states of the Security Council's actions. The Court determined by a 13:2 majority that South Africa was under 'an obligation to withdraw its administration immediately and put an end to its occupation of the Territory'.¹⁹⁵ It was the first time that the Court had received a request of this kind from the Security Council.

The Court's decision considered the legal consequences of the Security Council's resolution.¹⁹⁶ In so doing, it considered, *inter alia*, both: (i) Member States' obligation to comply with Security Council and General Assembly Resolutions with regard to South Africa's actions in Namibia, and (ii) the extent to which South Africa's policy of apartheid constituted a human rights violation.

With regard to the former, the Court determined, by 11 votes to 4, that UN Member States were 'under obligation to recognize the illegality of South Africa's presence in Namibia and the invalidity of its acts on behalf of, or concerning, Namibia and to refrain from any acts and in particular any dealing with the Government of South Africa implying recognition of the legality of, *or lending support or assistance to such presence and administration*'.¹⁹⁷

Regarding the latter, the Court made it clear that, in so far as human rights did form part of the object and purpose of the UN charter:

131. Under the Charter of the United Nations, the former Mandatory had pledged itself to observe and respect, in a territory having an international status, *human rights and fundamental freedoms for all without distinction as to race. To establish instead, and to enforce, distinctions, exclusions, restrictions and limitations exclusively based on grounds of race, colour, descent or national or ethnic origin which constitute a denial of fundamental human rights is a flagrant violation of the purposes and principles of the Charter*.¹⁹⁸

At the time the decision was issued, publicists were divided as to whether the human

¹⁹³For a brief history of the Security Council and General Assembly resolutions issued during this period, see Namibia (SW Africa) Advisory Opinion [1971] ICJ Reports 58, 44-45 at ¶84-6.

¹⁹⁴SCR 264 (1969) 'The situation in Namibia' (20 March 1969).

¹⁹⁵[1971] ICJ Reports 58, para 133.

¹⁹⁶[1971] ICJ Reports 58, para 133.

¹⁹⁷Ibid. [My emphasis]

¹⁹⁸[1971] ICJ Reports 58, ¶131. [My emphasis] ('S.Africa Advisory Opinion').

rights provisions in the Charter could impose legal obligations upon Member States.¹⁹⁹ According to Manley O' Hudson, a jurist associated with U.S. legal realism and pragmatism and the first chairman of the International Law Commission from 1949-1952, the Charter did not in any way impose a legal obligation on UN Member States to respect human rights and fundamental freedoms. Rather, human rights were an aim to be achieved.²⁰⁰ This view was supported by Hans Kelsen as late as 1966.²⁰¹ Conversely, Hersch Lauterpacht had argued that to say that the human rights provisions in the Charter were no more than a statement of principle was 'no more than a facile generalization'. Any view of the Charter as being devoid of an obligation on Member States to respect human rights and fundamental freedoms would be 'destructive of both the legal and moral authority of the instrument as a whole.'²⁰² In reaching this conclusion, Lauterpacht was particularly mindful of Article 56 of the Charter, through which Member States pledged to take 'joint and separate action in cooperation with the United Nations for the achievement of the purposes set forth in Article 55' which itself included respect for human rights and fundamental freedoms.²⁰³

The ICJ's decision appeared to leave no doubt that, in the Court's view, the Charter did impose legal obligations upon Member States to respect human rights and fundamental freedoms. The two dissenting opinions, issued by Judges Gros and Fitzmaurice, did not dispute the Court's findings under paragraph 131.²⁰⁴ Although not a binding opinion, both the Security Council and the General Assembly subsequently adopted resolutions in which further affirmed the opinion of the Court, that Member States should 'refrain from any acts and in particular any dealings with the Government of South Africa implying recognition of the legality of, or lending support or assistance to, such presence and administration' in Namibia.²⁰⁵

¹⁹⁹For a good overview of the distinct positions of different scholars, see Egon Schwelb 'The International Court of Justice and the Human Rights Clauses of the Charter' (1972) *American Journal of International Law* 66(2) 337. ['Schwelb (1972)'].

²⁰⁰Manley O'Hudson, 'Integrity of International Instruments' (1948) 42 *American Journal of International Law* 105. See also 1949 I.L.C. Yearbook 178, 25th Meeting, par. 6. See also Schwelb (1972), 337-339.

²⁰¹*Ibid.*, 338.

²⁰²Hersch Lauterpacht, *International Law and Human Rights* (Steven & Sons, 1950) 147-149, reproduced in Schwelb (1972), 339.

²⁰³*Ibid.*

²⁰⁴See UNGA 2275 'Situation in South Africa Resulting from the Policies of Apartheid' (29 November 1971) and UNGA 2923 E (XXVII) 'Situation in South Africa Resulting from the Policies of Apartheid' (15 November 1972); and SCR 311 (1972) (France abstaining).

²⁰⁵S.Africa Advisory Opinion, 131.

3.6.2 Provisions in the Code

From the moment they formed part of the Code, human rights were closely associated with self-determination and, more specifically, with preventing racial discrimination and prohibiting corporations' collaboration with 'racist minority régimes'.²⁰⁶ At IGWG's second session, several delegates made it clear that 'in the context of respect by transnational corporations for human rights and fundamental freedoms the annotation should refer to non-collaboration with illegal racist minority regimes particularly in southern Africa, in line with relevant United Nations Security Council resolutions'.²⁰⁷ By the time of the IGWG's 1983, the provisions read as follows:

Respect for Human Rights and Fundamental Freedoms

13. Transnational corporations should/shall respect human rights and fundamental freedoms in the countries in which they operate. In their social and industrial relations, transnational corporations should/shall not discriminate on the basis of race, colour sex, religion, language, social, national and ethnic origin or political or other opinion. Transnational corporations should/shall conform to government policies designed to extend equality of opportunity and treatment.

Non-collaboration by transnational corporations with racist minority régimes in southern Africa

14. In accordance with the efforts of the international community towards the elimination of *apartheid* in South Africa and its continued illegal occupation of Namibia,

[(a) Transnational corporations shall progressively reduce their business activities and make no further investment in South Africa and immediately cease all business activities in Namibia;

(b) Transnational corporations shall refrain from collaborating directly or indirectly with that regime especially with regard to its racist practices in South Africa and illegal occupation of Namibia to ensure the successful implementation of United nations resolutions in relation to these two countries.]

[Transnational corporations operating in southern Africa:

(a) Should respect the national laws and regulations adopted in pursuance of Security Council decisions concerning southern Africa;

(b) Should within the framework of their business activities engage in appropriate activities with a view to contributing to the elimination of racial discrimination practices under the system of *apartheid*.]²⁰⁸

The Code's human rights provision went further than the ICJ's opinion from 1971, in determining the human rights obligations that TNCs should respect in this regard. Rather than reiterating the language of the CERD or Article 55(c) of the UN Charter, the provision included in the final text in 1983 largely emulated the text of Article 2 of

²⁰⁶E/C.10/31 (18/04 - 04/05 1977), 16 ¶21.

²⁰⁷Ibid.

²⁰⁸Code of Conduct [Emphasis in the original]. The text is the same as at the final draft in 1989.

the Universal Declaration of Human Rights, including a prohibition against discrimination on the grounds of 'social, national and political or other opinions', in addition to discrimination on the basis of race, colour, sex, religion, language or national and ethnic origin.²⁰⁹

It did not go so far as to include, however, 'social origin, property, birth or other status'. The inclusion of this text in the Universal Declaration of Human Rights had originally been proposed by the Sub-Commission on the Prevention of Discrimination and Protection of Minorities in November, 1947.²¹⁰ It was subsequently proposed by a Representative of the Commission on the Status of Women that this text be included in the Draft Covenant on Human Rights in order to make it abundantly clear that the wording of the Covenant applied equally to men and women, regardless of socio-economic status.²¹¹

Its exclusion in the Code further reiterated the clause sought to safeguard anti-discrimination measures which could amount to safeguarding civil and political rights, but which would not require the TNC to consider the socio-economic status of persons with whom it had industrial and social relations. As such, discrimination on grounds of caste (in India), for example, did not need to be considered. Although U.S. corporations had been known to tamper with traditional caste patterns in India, there was anecdotal evidence to suggest they did not wish to maintain anti-discrimination policies where to do so conflicted with business' success.²¹² Furthermore, the exclusion of this provision meant that indigenous persons' rights to land could also be ignored.²¹³

Third, the inclusion of both industrial and *social* relations in this provision affirms that States acknowledged that corporations had a social responsibility to respect human rights in the countries in which they operated. This extended the obligations of corporations beyond management and workers for the corporation (in

²⁰⁹UDHR, Article 2 reads: 'Everyone is entitled to all the rights and freedoms set forth in this Declaration without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.'

²¹⁰William A. Schabas, *The Universal Declaration of Human Rights, The travaux préparatoires Vol.1* (October 1946 – November 1947), xciv.

²¹¹UNCHR E/CN.4/SR.153 'Statement by the Representative of the Commission on the Status of Women' (19/04/ 1950), 3 at ¶2. For a further explanation of the meaning of this provision see also CESCR E/C.12/GC/20 General Comment 20: Non-discrimination in Economic, Social and Cultural Rights (Article 2, paragraph 2, of the International Covenant on Civil and Political Rights), (2 July 2009) at ¶24-35.

²¹²W. Joseph Jr Dehner, 'Multinational Enterprises and Racial Non-Discrimination: United States Enforcement of an International Human Right' (1974) 15 Harvard International Law Journal 71, 84-5.

²¹³Hamdani and Ruffing (2015), 169-70.

industrial relations) to include the relationships between the TNC and those external to the TNC itself.

Although the provision pertaining to human rights was agreed swiftly, States could not agree the anti-apartheid provision for the Code. This disagreement was further reflected throughout the Commission's proceedings, as member states of the G-77 routinely called for resolutions denouncing the apartheid regime, reaffirming right to PSNR and Western countries either abstained from or registered votes in opposition to them.²¹⁴ The main point of disagreement between states regarding the Code was whether the instrument should include corporate disinvestment from South Africa and Namibia. Again, the pragmatic methods adopted by the UNCTNC and the Centre enabled the competing interests to be debated, but not resolved.

The campaign against apartheid at the UN had spanned several decades and included calling for an embargo on arms, oil, sports and investment to the country.²¹⁵ Although the UK, the UK and other Western states repeatedly voted against or abstained from these resolutions at the General Assembly and the Security Council, they would eventually be obliged to implement these sanctions at the behest of their domestic legislatures.²¹⁶ Hence, despite a wide range of strategic and economic interests, almost every international organization and state – including the UN, the Commonwealth, the European Community, Britain, France, Germany, Japan and the United States – had adopted economic and military sanctions against South Africa by 1987.²¹⁷

As with all other substantive provisions in the Code, the Commission and the IGWG relied upon a comprehensive information system developed by the Centre to make assessments regarding its response to the apartheid regime. Between 1977 and 1987, the Centre meticulously documented and reported on transnational corporate activity in South Africa. This included conducting corporate surveys of TNCs operating

²¹⁴Refer to footnote 64 of this Chapter. Resolutions were proposed by the G-77 in all of these meetings of the UNCTNC, and routinely vetoed by Western European states (France, Germany, U.K.) and the U.S. Canada, Italy, Japan, the Netherlands and Sweden often abstained. See also Hamdani and Ruffing (2015), 178.

²¹⁵See for example SCR. 282 (1970); and G.A. Res 2671 A-F (Dec. 8, 1970) 25 U.N. GAOR Supp 28 (Doc. A.8028) (in which the General Assembly urges all states 'to terminate all military, economic, technical and other cooperation with South Africa', 34 para 7).

²¹⁶Hamdani and Ruffing (2015), 167. In the case of the United States, sanctions would be imposed by the Comprehensive Anti-Apartheid Act (1986), PL 99-440, U.S. Statutes at Large 100. Congress overrode the veto of President Ronald Reagan by overwhelming margins (313 to 83 in the House of Representatives and 78 to 21 in the Senate). See also Audie Klotz, 'Norms Constituting Interests: Global Racial Equality and U.S. Sanctions Against South Africa' (1995) International Organization 49(3) 451 [Hereafter, Klotz (1995)].

²¹⁷Klotz (1995), 451.

in South Africa and Namibia, requesting information on their policies and employment practices and collating a list of TNCs who continued to operate in strategic sectors in the country, as well as those who had divested their operations.

The Centre's reports showed a decidedly mixed report of state's legislative responses to South Africa. Furthermore, disinvestment decisions by companies in the early 1980s had primarily been motivated by business reasons and did not specifically relate to companies particularly wanting to terminate investment in South Africa: the British Steel Corporation, The Chloride Group Plc, and Dunlop, for instance, all cited business decisions (such as preferred share changes and new share issues) for their divestment of shares in subsidiary companies, and not the apartheid regime. Despite this disinvestment, the South African economy expanded between 1979 and 1981 and several sectors of the economy experienced increased foreign investment.²¹⁸

Despite ample evidence produced by the Centre to show that the supply of capital and technology by Western multinational corporations was contributing significantly to the South African regime's repressive military and economic capabilities, Western states continued to assert that the Commission was not the appropriate forum through which to consider a resolution in support of economic sanctions.²¹⁹ Furthermore, the Code was considered by these states as being an inappropriate instrument through which to agree to corporate disinvestment in the country. This was even though the ICJ had already affirmed Member States' obligations to uphold Article 55(c) of the UN Charter during their engagement with the UN (regardless of which part of the organ they engaged with) and acknowledgement by several delegations as early as 1980 that the system of apartheid had been characterized by the international community as a 'crime against humanity'.²²⁰

Yet it was not that Member States disagreed with the proposition that apartheid constituted a breach of a norm of *jus cogens* for which states had public international law obligations. The problem became simply how this 'public' element should be provided for (if at all) in the Code. In this respect, the focus on the individual as the centre of IHRL prevented states from considering economic sanctions in human rights terms.

For the G-77 countries, the problem was not individual, but systemic, and human rights became a poor handmaiden in advance of their cause. Hence, despite ongoing

²¹⁸See e.g. UNCTNC E/C.10/1983/10 (3/05/1983), 9-10. ['South Africa Report (1983)']. This was the sixth report issued by the Centre on South Africa.

²¹⁹South Africa Report (1983). See also Hamdani and Ruffling (2015), 165-168.

²²⁰UNCTNC, E/C.10/75 ('Fifth Session Report') ¶84.

attempts by the G-77 to push for corporate disinvestment in South Africa and condemnation and isolation of the minority white apartheid regime, at no stage was the regime's actions described as a violation of human rights in the draft resolutions condemning South Africa. They did, however, repeatedly reference the 'inalienable right of oppressed people to self-determination and permanent sovereignty over their natural resources'²²¹. In this sense the difference Moyn points out (between human rights and the right to self-determination) may in fact be more semantic than real.

Conversely, the arguments against economic sanctions were advanced on several grounds during the Commission's proceedings, including respecting human rights through voluntary codes. Several Western states argued that sanctions may have the effect of impoverishing the entire population and making the conditions of life worse for victims of the apartheid regime, rather than better. Second, given the complexity of imposing sanctions and the likelihood that sanctions may prolong the life of the regime rather than bring about its demise, refraining from sanctions had to be considered a serious concern. Third, sanctions may have had an impact on industries that harm the sanctioner's own interests.

Finally, at least insofar as it related to U.S. TNCs, the decline of U.S. corporate activity under the direct territorial jurisdiction of the U.S. in the 1970s may have undermined the capacity of the U.S. government to extend sanctions to the foreign operations of U.S. TNCs. By this time, the increase in U.S.-based TNC affiliates in industrial and industrializing countries in Europe (as well as elsewhere) meant that a combination of allied acceptance of extraterritorial controls as well as voluntary corporate *cooperation* was considered more effective than sanctions *per se*, which may have been largely ignored by these companies.²²²

As such, rather than providing that corporations should disinvest from South Africa, so the argument went, they should instead contribute to the elimination of racial discrimination by providing employment to black, coloured and native South Africans, continuing to foster black African trade union movements and ensuring the minimum wage paid to non-white South Africans supported an adequate standard of living for those employees.

Outside of the Commission, both Ronald Reagan and Margaret Thatcher denounced sanctions as 'immoral and utterly repugnant',²²³ the latter being quoted in

²²¹See E/C.10/75, 2 para 2.

²²²Kenneth A. Rodman, 'Sanctions at Bay? Hegemonic decline, multinational corporations, and U.S. economic sanctions since the pipeline case' (1995) *International Organization* 49(1) 105.

²²³'Reagan on Apartheid' *The New York Times* news archive, 23 July 1986.

the press as saying that sanctions were a 'crime against free-trade'.²²⁴ The U.S. foreign policy of constructive engagement with South Africa between 1980-84 sought to maintain a conciliatory stance toward the apartheid regime which was resoundingly criticized by black South African Bishop Desmond Tutu as early as 1981, who warned that 'a United States decision to align itself with the South African government would be an unmitigated disaster for both South Africa and the United States'.²²⁵ Similarly, South African scholars saw the policy as 'an act of choice – of moral choice' between South Africa and its domestic policies and the rest of the world.²²⁶ For its part, however, the U.S. did not see the two as mutually exclusive, at least insofar as it related to American business interests. In a speech given to the General Assembly in September 1984, President Reagan argued:

[t]he United States considers it a moral imperative that South Africa's racial policies evolve peacefully but decisively toward a system compatible with basic norms of justice, liberty, and human dignity. I'm pleased that American companies in South Africa, by providing equal employment opportunities, are contributing to the economic advancement of the black population.²²⁷

Both the Sullivan Principles and the European Community's Code of Conduct for Subsidiaries, Branches or Representation in South Africa had attempted to do this since the late 1970s and were discussed at the Commission.²²⁸ In keeping with the alignment between anti-discrimination and human rights that was articulated in the Code, the Sullivan Principles attempted to put an end of racial discrimination in the workplace in South Africa, by ensuring multinational corporations committed to 'equal pay for equal work, training for advancement of blacks, promotion of blacks to all levels of company operations, the recognition of representative black and integrated registered and unregistered unions, and the empowerment of the black worker for peaceful change'.²²⁹ Several States, including the United States, continued to assert the relevance and significance of the Sullivan Principles as late as 1989.

²²⁴Richard Dowden, 'How Margaret Thatcher helped end apartheid – despite herself' *The Guardian*, 10 April 2013.

²²⁵Sanford J. Ungar and Peter Vale, 'Why Constructive Engagement Failed' (Winter, 1985) 64(2) *Foreign Policy* 234, 245.

²²⁶N. Chabani Manganyi, 'The Washington-Pretoria Connection: Is There a Black Perspective?' in *The United States and South Africa: Continuity or Change?* (Johannesburg: South Africa)

²²⁷Ronald Reagan, Address to the 39th Session of the United Nations General Assembly, New York, New York, 24 September 1984 (Ronald Reagan Library: Major Speeches 1964 – 1989), available online at: <https://www.reaganlibrary.gov/sspeeches/92484a>

²²⁸See Section 3.4 and footnote 160 of this thesis for the Sullivan Principles. On the EC's Code of Conduct, see UNCTNC, E/1984/18 'Tenth Session Report' (17-27/04/1984) ¶52.

²²⁹Sullivan (1983), 430-1.

What becomes clear when considering the documentary record, is that corporate respect for human rights could be justified as both an avenue in support of ongoing corporate engagement with the racist apartheid regime, or to put an end to the regime altogether. Rights could both be utilized in support of, and against, Member States' responses to apartheid and mobilized convincingly by opposing views to rally toward their cause. To some extent, this can be explained by complicating the 'smooth teleology' that Samuel Moyn creates in his understanding of the human rights 'big bang' in 1977.²³⁰ Ironically, while Moyn asserts that the 'new' human rights, being the supranational discourse that had with Jimmy Carter's foreign policy concerns at the end of that decade was a 'break' from past attempts tying rights to the nation state, this fails to account for the 'the immeasurable complicated interactions among innumerable historical agents that contribute to the various commitments that people call human rights'.²³¹ That complication existed, even still, in the 1970s-80s and with the UN.

In this respect human rights themselves were seen as inherently pragmatic: they became the clarion call for both the G-77 and Western states in supporting their respective causes, but rights themselves could not provide a means through which to determine how to reconcile these respective ends.

This further explains the absence of rights being construed as indicative of 'social values' which Member States shared, either as an 'international community' or together with TNCs, during this period. At least insofar as they were being considered in these proceedings, respect for human rights and fundamental freedoms were considered both distinct from social values and dependent upon them: on the one hand (for the G-77 states), human rights were a bastion in support of post-colonial sovereignty; on the other (for the OECD countries), respect for human rights continued to be advanced as a means to facilitate trade and foreign investment, even where the state itself could be shown to be a gross violator of the same.

The former treated the TNC as a foreign power, whose intrusion into a society should be prohibited where it could be shown that doing so would risk further subordinating individuals and peoples to the will of a pariah state. The latter treated the TNC as a saviour, able to secure the working conditions and livelihoods of oppressed peoples even where the state itself was unwilling or unable to do so. Social value for the former, was created by the peoples themselves. For the latter, however,

²³⁰Moyn (2010), 1-23.

²³¹Slaughter (2018) 737.

'social value' could be attributed to the corporation, and by extension, the markets in which it operated: provided the corporation itself was committed to the norms of 'equality, non-discrimination and justice', it did not need to be precluded from operating anywhere.²³² As Seymour J Rubin, a United States representative to the Commission would state: 'the prescriptions cast in terms of human rights are what one might call the theology of the NIEO, but like fundamental church dogma, it does not call for much attention when such practical issues as concessional aid or regulation of TNCs are the matters at hand'.²³³

3.7 Conclusion to Chapter 3

Fundamental disagreement between Member States on the role of international law in regulating the behaviour of TNCs became apparent during the Code negotiations. Yet although it may be tempting to conclude that disagreement led to the interests of powerful Western states being safeguarded wholesale, the reality was, in fact, much messier.²³⁴

As I have illustrated in this Chapter, failure to reach agreement on both the Definition of the TNC and Scope of the Code essentially meant there was no agreement as to what was being regulated. As a result, the Code negotiations became an extended exercise in balancing and deferral: there was no way in which the attempt to determine how to regulate the TNC through studies and debates could not resolve the intransigence of states in this multilateral fora. By the time of the Commission's meetings in 1987, it was already becoming clear that the possibility of a legally-binding Code had been completely jettisoned and the NIEO was a distant memory.²³⁵

The role afforded to human rights in these debates was kept to a minimum: even though debates continued to rage at the UNCTNC regarding PSNR, the battle to consider this as a human right had been lost in the decades preceding the Commission's establishment and did not feature here as a right but instead as forming part of the preamble for the Code which itself was never agreed. Similarly, although the situation in South Africa was characterized as a crime against humanity during the

²³²Sullivan Principles (1977) (The principle pertaining to justice was added in 1984).

²³³Seymour J Rubin 'Economic and Social Rights and the New International Economic Order' (1986) *American University Journal of International Law and Policy* 1(1) 67, 81.

²³⁴Based upon a review of 31 folders of UN archives, comprising 275 documents, at the UN Archives and Records Management Service, New York, USA, from 13 – 26 May, 2017. (Archives on file with the author).

²³⁵UNCTNC, E/C.10/1987/16 Report on the Thirteenth Session, (7-16/04/ 1987), 23 at ¶62.

Commission's proceedings, and Member States continued to voice dissent toward South Africa's actions, the ongoing delineation between civil and political *rights*, on the one hand, and economic, social and cultural *regulation*, by the OECD countries, meant that TNCs' respect for human rights were ultimately cast as purely safeguarding civil and political rights, in keeping with U.S. and U.K. interests.

Although many disagreements could largely be cast along North/South lines, with the socialist countries seemingly ambivalent to the Code's development while claiming that TNCs 'were poisonous flowers on the dung-heap of a dying capitalism',²³⁶ several breakthroughs were made that transcended this dichotomy and added further nuance to the debates. For instance, countries, such as the Netherlands, were able to bridge the divide on several definitions for the Code including by securing agreement on which enterprises should be included in the definition of TNCs to placate the Soviet bloc.²³⁷ This did not, however, result in final agreement on this issue.

In reality, international law came out of these proceedings as only able to chart a midway path between consent and consensus.²³⁸ In their attempts to resolve conflicts pragmatically, representatives of States could neither agree to draft an instrument to which they could be bound nor evidence agreement 'voluntarily' through a General Assembly resolution, which may in time, form part of CIL. Writing to the Secretary-General in 1984, following a special session in which the UNCTC had attempted to obtain broad Member State support for the Code, then Executive Director of the Centre, Sidney Dell, noted:

On international law, it was recognized that there existed a fundamental difference of opinion between the OECD countries and the developing countries on the relationship between international law, including customary international law, and the Code. It was also agreed by *all sides* that the only way of dealing with this matter was to employ language that was *sufficiently ambiguous to be interpreted differently by the various groups*. Although the need for ambiguity was *generally recognized*, the search for a formula was unsuccessful. Numerous drafts were considered, but all were viewed by one group or another as compromising its *fundamental position of principle*...²³⁹

The question to which this gives rise, then, is not (or not solely) how or why international law safeguarded the interests of the powerful, but rather, what the

²³⁶Klaus A. Sahlgren, 'Scenes from my UN Journey' in: Marti Ahtisaari (ed) *Finns in the United Nations* (Finnish UN Association 1996) 205.

²³⁷EO/433/Dell Memo, 2.

²³⁸On the distinction between consent and the formation of custom as international jurists during this period considered it, see in particular, Anthony D'Amato, 'The Concept of Human Rights in International Law' (1982) 82 *Columbia Law Review* 1110, 1117-8. Compare: Franck and Munansangu (1982).

²³⁹EO433/Dell Memo, 2 [My emphasis].

inability to reach agreement evidenced about how the creation of international law, even in its softest forms, was being understood. That the intent and purpose of international law should be to provide enough flexibility for all parties to interpret the Code's provisions *differently*, rather than to settle on an *agreed* interpretation of provisions, became apparent during the Code negotiations. In this respect, the role assigned to international law was not to secure agreement or consensus, but to enable dissent to co-exist. The failure of the Code negotiations was as much due to states' incapacity to facilitate multiple interpretations of the Code as it was due to a lack of agreement between the parties.

That States were unwilling to compromise on 'fundamental positions of principle' further showed that human rights were not being utilized as the *lingua franca* of universally agreed values or principles during these negotiations. Yet it also showed fundamental disagreement regarding what economic order international law should be utilized to support. Social values were considered as derived from a variety of sources, which rights could be utilized to justify, but were not themselves grounds upon which rights *per se* became justified. As such, human rights became a pragmatic alternative to the 'values' that prioritized free trade and foreign investment, on the one hand, and anti-colonial sovereignty and self-determination, on the other. The extent to which they could remain so would be tested in the decade to follow.

Chapter 4: Normative [In]coherence? The Norms on the Responsibilities of TNCs and Other Business Enterprises and the Struggle to Tame the Transnational Corporation

When the apologists of pragmatism pronounce the end of ideology, or history, or utopia, they do not mark the triumph of human rights; on the contrary, they bring human rights to an end. The end of human rights comes when they lose their end.

- Costas Douzinas, *The End of Human Rights*, 2000¹

4.1 A Bottom-up Process: The Universal 'Value' of Human Rights

In this Chapter, the thesis considers the emergence of the Norms on the Responsibilities of TNCs and Other Business Enterprises with regard to Human Rights.² Originally conceived as a new code of conduct to replace the efforts at the UNCTNC, the Norms were the culmination of six years' research, contestation and debate at the Sub-Commission on Human Rights ('SCHR') in the CHR. They were eventually rejected by the CHR, which proclaimed in 2005 that they had no legal standing.³ I argue that the emergence of the Norms and their failure to be adopted provides a 'telling instance' in the turn toward business and human rights worthy of consideration, for several reasons.

First, in one register, the Norms constituted a 'bottom-up' process. The drafting was undertaken solely by non-state actors: states did not call for the instrument.⁴ As such, the Norms process evidenced an example of a *micro*-act of resistance, in that social movements asserted authority from *within* the UN to re-frame IHRL as a language in support of their struggles.⁵ It is important to be careful when making this claim, in light of the fact that non-governmental organizations at the UN may be state-appointed, hence meaning the claims made by social movements may not be representative of the grassroots organizations they claim to represent.⁶ However, in

¹Costas Douzinas, *The End of Human Rights* (Oxford: Hart 2000), 380.

²Chapter 1, footnote 38.

³Chapter 1, footnote 41.

⁴In this respect, I borrow from the work of Rajagopal (2003). See also James T. Gathii, 'Neoliberalism, Colonialism and International Governance: De-centering the International Law of Governmental Legitimacy' (2000) 98 Michigan Law Review 1996; Note however Kennedy on experts, Kennedy (2016).

⁵See Rajagopal (2003), 277 - 284.

⁶On this, see Olivier de Frouville, 'Chapter 2: Domesticating Civil Society at the United Nations' in Pierre-Marie Dupuy and Luisa Vierucci (eds) *NGOs in International Law: Efficiency in Flexibility?* (Edward Elgar 2008). Note *contra* Steve Charnowitz, 'Two Centuries of Participation: NGOs and International Governance' (1996) 18 Michigan Journal of International Law 183. See

the absence of evidence to the contrary, the thesis has taken the view that the claims made are worthy of consideration.

Second, the Norms process took place following a period in which human rights critiques of economic inequality were reaching their apex at the CHR and the General Assembly.⁷ A flurry of activity in the immediate post-Cold War period, culminating in the Vienna World Conference on Human Rights, would bring to the fore the political schism between so-called 'Asian' and 'Western' values. It would also precipitate a momentary shift in focus toward Asian states pushing for a strengthened emphasis on economic and social rights and the right to development. Paradoxically, it was accompanied by the emergence of the Washington Consensus, a term coined in 1989 by U.K economist John Williamson to articulate agreement amongst mainstream economists on the primary policy prescriptions that could be utilized to stimulate Third World economic growth and alleviate debt.⁸ The latter meant that a right to development soon came to be characterized instead as development *and* human rights.⁹

During the period between 1993 – 1999, (human) rights and (economic) development would converge as policy discourses. This was accompanied by a shift in rights guaranteeing equality of *outcome* (substantive rights) to instead being characterized as guaranteeing equality of *opportunity* (procedural rights).¹⁰ This shift, from ends to means (or: outcome to opportunity) further heralded a loss in the idea of rights as emblematic of *the* public good (a political project), and their re-conceptualisation as *global* public goods (an economic project) in the years to follow.¹¹ Understanding what the Norms claimed to symbolize, in this context, further explains what the UNGP Framework does not.

Third, unlike the Code of Conduct that preceded it and the UNGP Framework that came after it, the primary site of contestation during the Norms process was the TNC itself. This attempt at acknowledging the TNC as a subject of international law

also ECOSOC Resolution 1996/31 'Consultative Relationship between the United Nations and non-governmental organizations' (25 July 1996).

⁷See Julia Dehm 'Righting Inequality: Human Rights Responses to Economic Inequality in the United Nations' (forthcoming 2019 in *Humanity: An International Journal on Human Rights, Humanitarianism and Development*)(copy on file with the author). [Hereafter, Dehm (2019a)].

⁸John Williamson, *A Short History of the Washington Consensus* (2009) 15 *Law & Business Review of the Americas* 7, 14.[Williamson (2009)]

⁹See Sundhya Pahuja 'Chapter 10: Rights as Regulation: The Integration of Development and Human Rights' in Bronwen Morgan (ed) *The Intersection of Rights and Regulation: new Directions in Sociolegal Scholarship* (Routledge: 2006) 167 [Pahuja (2006)].

¹⁰Dehm (2019a).

¹¹Augenstein (2016). See also Pahuja (2006) and Pahuja (2011), 172-254.

was radical and unprecedented. It also gave rise to fundamentally different kinds of pragmatism emerging in response to the corporate form.

During the Norms process, an attempt was made to enhance the security and well-being of socially, economically and civilizationaly vulnerable peoples and communities throughout the world.¹² Writing shortly after the Norms process had concluded, Upendra Baxi noted:

What makes the Norms, and the Commentary, precious is the now-proclaimed *zero tolerance* for egregious forms of business conduct and practices that transgress human rights and constantly reproduce human rights violations.¹³ [My emphasis]

As such, understanding the emergence of the Norms, and why they failed, enables us to consider further the limits of the UNGP Framework and embedded pragmatism as inaugurated by the BHR Field. Yet doing so also signals how the system of polycentric governance envisaged by that Field might still be imagined differently.

4.2 A revolutionary move

4.2.1 Opportunity vs Outcome: Human Development, Structural Adjustment and the Privatization of Human Rights

The Draft Norms were tabled by a working group of the SCHR in 1999.¹⁴ However, the original impetus for considering the human rights responsibilities of TNCs and other business enterprises came from a series of reports drafted by Danilo Türk, at the time a Slovenian diplomat and Special Rapporteur on Economic, Social and Cultural Rights.¹⁵ Between 1988 and 1992, Türk produced four reports looking specifically at making economic, social and cultural rights ('ESCR') better represented within the overall framework of the CHR. This formed part of a process attempting to strengthen the recognition of ESCR both at the UN and within the Bretton Woods institutions.¹⁶

Although not specifically mentioning TNCs, Türk's reports extensively considered the issue of the privatisation of human rights.¹⁷ This was in addition to

¹²Upendra Baxi, *The Future of Human Rights* (OUP, Third Edn, 2008), 381. [Baxi (2008)].

¹³Upendra Baxi 'Market Fundamentalisms: Business Ethics at the Altar of Human Rights' (2005) *Human Rights Law Review* 5(1) 1, 2 [Baxi (2005)].

¹⁴SCHR E/CN.4/Sub.2/1999/9 (12/08/1999), para 26.

¹⁵CHR, E/CN.4/Sub.2/1989/19 ['Türk (1989)'], E/CN.4/1990/19 ['Türk (1990)'], E/CN.4/1991/17 ['Türk (1991)'], and UN Doc. E/CN.4/Sub.2/1992/16 ['Türk (1992)']. See also Dehm (2019a), 15-16.

¹⁶Türk (1992) ¶202.

¹⁷Türk (1992) 26-7 ¶¶97-105; Türk (1991), 25-30 especially ¶¶79-84.

extensive analysis on the use of indicators to assess the progressive realization of these rights. He also considered the impact of structural adjustment programs attached to the conditionalities of loans from the World Bank and the International Monetary Fund ('IMF') on realising ESCR, particularly in the Third World.¹⁸ As Julia Dehm has documented, Türk's reports reflected concerns about the growing income inequality between states and the underlying dynamics driving it.¹⁹

At the same time, the Washington Consensus, a series of policy prescriptions which had originated from economic analysis of Latin American 'success' stories in the 1980s, was being utilized by the Bretton Woods institutions in the latter half of the 1980s-early 1990s in a manner that further exacerbated economic inequality *within* states.²⁰ It described ten policy measures undertaken by the Bretton Woods Institutions (amongst others) broadly aimed at institutionalizing economic *laissez faire* in Third World countries through institutionalizing structural adjustment programs ('SAPs').²¹ It did so by further marginalizing and impoverishing the poorest in Third World countries and reducing their human rights protections.²² This orthodoxy had sought 'to shrink the role of the state dramatically, privatise as much as possible and drastically increase market exposure at both national and international levels'.²³ This had in part been achieved through the 'privatisation' of human rights with the imposition of 'user fees' for traditionally free services; the theme of 'cost recovery'; and the institutionalization of a system of targeted subsidies replacing broader welfare entitlements.²⁴

A sea-change occurred in the 1990s against the Washington consensus. As the 1980s came to be seen as the lost development decade, the end of the Cold War precipitated a new wave of thinking amongst economists as to how to eradicate poverty.²⁵ As the 1990s progressed, the link between development and human rights was further strengthened within development circles, with two competing perspectives on rights vying and modifying this consensus in policy thinking. These could broadly be described as Latin American neo-structuralism and East Asian Development and

¹⁸Türk (1990) 54-56, ¶¶176 – 194.

¹⁹Dehm (2019a), 15-16.

²⁰Türk (1991) 17-59, ¶¶ 49-206; Dehm (2019a), 15-16.

²¹Williamson (2009), 13. See also Celine Tan *Governance through Development, Poverty Reduction Strategies, International Law and the Disciplining of Third World States* (Routledge 2012).

²²Dehm (2018), 9-10. Note *contra* Williamson (2009), 10.

²³Pahuja (2006), 172.

²⁴Türk (1992), 27 at ¶100.

²⁵Charles Gore, 'The Rise and Fall of the Washington Consensus as a Paradigm for Developing Countries' (2000) 28(5) World Development 789 [Gore (2000)].

came to be known in some circles as the 'Southern consensus'.²⁶ Dehm identifies this shift also taking place at the CHR as evidenced in the reports of Special Rapporteurs Asbjørn Eide and José Bengoa during this period.²⁷ Human rights – and in particular – civil and political rights – came to be reflective of 'shared values' which remained important to embed in order to ensure economic growth improved the everyday lives of people.

As Sundhya Pahuja has shown, these two camps could broadly be cast as pro-private property/pro-commodities advocates and pro-welfare advocates, respectively.²⁸ The former situated the problem of poverty in the lack of poor people's access to the formal economy in the countries where they resided. The poor were not poor because they were incompetent or less worthy, but because they were only privy to informal work and were precluded from accessing markets due to corrupt and bureaucratic governments. As such, protecting human rights could be located in the expansion of the poor's access to markets: international institutions (and by extension, international law) should mediate this access by circumventing the authority of the state and facilitating democratic access to markets. Law here, is utilized to institutionalize the poor's right to access by creating a formal system of property relations that radically expand the commodification of land and labour.²⁹

The latter asserted that rights had intrinsic merit as being emblematic of certain substantive values, giving those values normative relevance as indicators of development.³⁰ The strongest proponent of this position was Amartya Sen, whom the SRSRG would later reference as inspiring his view of the UNGP Framework.³¹ The capabilities approach, which was championed at the UNDP from the start of the 1990s, attempted to shift the focus from the *outcomes* of development, which until then had been quantified in terms of a state's capacity to buy and sell commodities, toward a focus on the *opportunities* created by development and an ability to create avenues toward human flourishing.

The problem arose that while the capabilities approach provided a philosophical justification in support of human agency and pluralistic notions of the public good, the

²⁶Gore (2000), 795-6.

²⁷Dehm (2019). See also CHR E/CN.4/Sub.2/1994/21; and SCHR, E/CN.4/Sub.2/1998/8.

²⁸Pahuja (2006), 174.

²⁹Pahuja (2006), 174 -176.

³⁰Ibid.

³¹See Amartya Sen, *Commodities & Capabilities* (OUP 3rd Edn 1999); Elements of a Theory of Human Rights' (2002) 32 Philosophy and Public Affairs 319; 'Human Rights and the Limits of Law' (2006) 6 Cardozo Law Review 27.

politics of adopting this approach did not allow for that agency or pluralism to remain intact. As Pahuja notes, Sen elevates the qualities attached to his approach by 'universalising' attachments to the liberal values of freedom, tolerance and heterodoxy.³² For Sen, the *homo politicus* of the Third World becomes divorced from his political and historical context.³³ Furthermore, when administered by international institutions, this political valency was significantly reduced. Both the Bretton Woods Institutions and the UNDP increasingly tied this approach to technical, measurable, indicators of good governance, which sought to recalibrate local qualitative understandings of the public good (i.e. the general interest that all members of a political collective hold in common), to *global* public goods that presuppose the terms upon which goods are distributed as being through global markets. This would later have significant implications for our understanding of the UNGP Framework.

Ongoing shifts toward privatizing the state's capacity to deliver human rights only further exacerbated this tendency, because the capabilities approach could then be utilized to enable some states to characterize their contribution toward development as a means of *facilitating* economic and social rights, rather than having to commit to the realization of these rights in any real terms.

At the same time as this development orthodoxy was emerging, the United States engaged the OECD in the pursuit of a comprehensive investment instrument from 1991 - 1998. In what came to be known as the Multilateral Agreement on Investment ('MAI'), the United States wanted the OECD to adopt a state-of-the-art investment agreement with high standards of liberalisation, investor protection and dispute settlement procedures. It is not this thesis' purpose to engage in a lengthy discussion regarding the negotiations of the OECD, given the thesis confines its critique and analysis to the processes and modes of legal reasoning which led to the UNGP Framework.

However, it is worth noting that the MAI sought to extend investor protections in a number of ways that would come to be radically opposed by civil society organizations. This included: requiring that, where host states expropriated the property of investors, they compensated them for both direct and indirect takings (reducing the host state's capacity to regulate the investor's capacity to make profits); granted investors special rights to challenge national decisions concerning the

³²Pahuja (2006), 178.

³³Pahuja (2006), 185.

observance of the MAI; and reducing host state's policy space to pursue economic planning in support of national investors.

The MAI's failure can be attributed in part to its misreading of a growing international orthodoxy regarding the nature of transnational economic interactions in an increased era of privatisation and deregulation. The emerging discourse of the 1990s no longer placed issues of ownership and control at centre stage, in which governmental power to regulate business had to be reduced. As such, it was not free private enterprise's legitimacy *per se* but its legitimacy as 'a polluter, an abuser of market power, a corruptor of state officials and a potential accomplice in violations of fundamental human rights' that was increasingly being challenged. The MAI's complete inability to recognise this challenge, and the backlash from civil society that resulted, was at least one reason for its demise.³⁴

4.2.2 The Struggle over the Symbolic Meaning of Human Rights

In August 1998, the UN Sub-Commission on the Promotion and Protection of Human Rights ('SCHR') established a working group on the working methods and activities of TNCs (the 'Working Group'). The Working Group comprised five regional experts, representing Africa, Asia, Latin America, Eastern Europe and 'Western' countries. The Norms were drafted by these experts over the period 1999 – 2004, during which time the Working Group produced four drafts. At each iterative stage of the process, what would become the 'Norms' would be entitled a 'Code of Conduct' (2000), 'Principles' (2002) and 'Guidelines' (2003), respectively.³⁵

The Norms themselves comprised 19 sections and included the: right to equal opportunity and non-discriminatory treatment; right to security of persons; rights of workers; respect for national sovereignty and human rights; obligations with regard to consumer protection; obligations with regard to environmental protection; and general provisions of implementation.³⁶ Although States were acknowledged to have the primary responsibility for promoting, securing the fulfilment of, and respecting human rights, TNCs and other business enterprises were required to promote, ensure the fulfilment of, respect, and ensure the respect of and protect human rights in international as well as national law, throughout their spheres of activity and influence.

³⁴Sol Piciotto, 'A Critical Assessment of the MAI' in Sol Piciotto and Ruth Mayne (eds) *Regulating Business Beyond Liberalization* (Palgrave MacMillan 1999).

³⁵Muchlinski (2003), 136.

³⁶*Ibid.*, 139.

As Peter Muchlinski has noted, this meant that TNCs and other business enterprises could potentially be responsible under six different types of documents as sources of applicable standards: legally binding treaties and other instruments; non-binding guidelines adopted by international organizations; industry or commodity group initiatives; framework agreements between TNCs and workers' organizations; self-imposed company code of conduct or union model guidelines.³⁷

Legal scholars in the BHR Field have advanced two primary arguments explaining what the Norms intended to achieve. On the one hand, scholars argue that the Norms marked an historic departure with past attempts to regulate TNCs at the UN.³⁸ According to this line of argument, drafting a legal instrument which directly attributed human rights responsibilities to TNCs was considered nothing short of a revolutionary move.³⁹ For many of these scholars, this had been supported by self-imposed codes of conduct and other private-led initiatives that had gained increasing prominence promoting corporate social responsibility ('CSR') throughout the 1990s.⁴⁰ Nevertheless, the Norms were not merely an extension of CSR. Instead,

the development and continued support for the *Norms*, and the ideas they embody, by important sectors of civil society and the international law establishment, illustrate the development *in fact* of a mechanics of interplay between national, international, public, and private law systems in allocating and competing for regulatory power. The regularization and institutionalization of these mechanics evidence transnational law coming into its own as a separate field of power.⁴¹

Hence, despite their purported flaws, the Norms are conceived in this reading as 'an imperfect step in the right direction'.⁴² They revived 'the hope for establishing a legally binding international regime of corporate responsibility for human rights

³⁷Ibid., 139.

³⁸See Douglass Cassel, 'Corporate Initiatives: A Second Human Rights Revolution?' (1996) *Fordham International Law Journal* 1963 [Hereafter, Cassel (1996)]; Surya Deva, 'UN Human Rights Norms for Transnational Corporations: An Imperfect Step in the Right Direction?' (2003) *ILSA Journal of International and Comparative Law* 10, 493 [Hereafter, Deva (2003)]. Larry Cata Backer, 'Multinational Corporations, Transnational Law: The United Nations' Norms on the Responsibilities of Transnational Corporations as a Harbinger of Corporate Social Responsibility in International Law (2006) 37 *Columbia Human Rights Law Review* 287 [Hereafter, Cata Backer (2006)].

³⁹Cassel (1996) at 1963.

⁴⁰The literature detailing the rise in corporate codes of conduct during the 1990s is vast. See for example, Wesley Cragg *Ethics Codes, Corporations and the Challenge of Globalization* (Edward Elgar: 2005); Rhys Jenkins, Ruth Pearson and Gill Seyfang, *Corporate Responsibility and Labour Rights: Codes of Conduct in the Global Economy* (Earthscan/Taylor & Francis: 2002); See also Zerk (2006).

⁴¹Cata Backer (2006), 288.[Original emphasis].

⁴²Deva (2004).

violations'.⁴³ They were also seen as symbolizing the coming of age of transnational law as a field, combining Jessup's pragmatism from the 1950s with Jenks' call to reconsider international law's existing structure and framework anew.⁴⁴ According to many of these critiques, however, the Norms were not normative enough: although they referenced international human rights instruments, they did not define specifically the human rights responsibilities of TNCs and as a result, did not do enough to clarify disputed questions about their obligations in the international legal order.⁴⁵

On the other hand, far from marking a departure with previous attempts to regulate corporations at the UN, it has also been argued that the Norms were in fact *too* normative. According to this line of argument, they attempted to transpose onto the field of human rights what had become a growing angst at the epochal transformation of globalization taking place at the end of the twentieth century.⁴⁶ Yet they did so in a manner that reverted to command-and-control methods of international regulation. This meant that like their predecessor in the UN Code of Conduct the process largely alienated representatives of TNCs. It did so, by prioritizing the claims made by resistance-oriented NGOs and their allies to the detriment of the instrument and by extension, the law-making process itself.⁴⁷

Writing with the benefit of over a decade's hindsight, and critiquing the Norms using a novel form of regulatory analysis, Karin Buhmann has argued that they failed to gain either state consent or to build consensus between state and non-state actors. Instead, the Norms too readily adopted procedures that resembled earlier attempts at drafting international instruments and failed to garner sufficient support from the international business community.⁴⁸ For Buhmann, the failure of the Norms came as a result of the drafters' inability to establish legitimacy with the one non-state actor constituent community, i.e. TNCs, which were expected to implement the instrument

⁴³Deva (2004), 524.

⁴⁴Philip C. Jessup, *Transnational Law* (Yale University Press 1956); and C. Wilfred Jenks, 'The Scope of International Law' (1954) 31 *British Yearbook of International Law* 1.

⁴⁵Detlev F. Vagts, 'The UN Norms for Transnational Corporations' (2003) 16(4) *Leiden Journal of International Law* 795; Ilias Bantekas, 'Corporate Social Responsibility in International Law' (2004) 22 *Boston University International Law Journal* 309, 311-312.

⁴⁶The term epochal transformation is an oblique reference to the work of Saskia Sassen. See Saskia Sassen, *Territory, Authority, Rights: From Medieval to Global Assemblages* (Princeton University Press, 2006).

⁴⁷David Kinley and Junko Tadaki, 'From Walk to Talk: The Emergence of Human Rights Responsibilities for Corporations at International Law' 44 (2004) *Vanderbilt Journal of International Law* 931.

⁴⁸Buhmann (2017), at 45-48.

itself.⁴⁹ This was the Norms' fatal flaw and ultimately, sounded its death knell. As the SRSR would later proclaim, it would inevitably lead to 'Normicide'.⁵⁰

While both these strands of argument are useful when assessing the Draft Norms' limitations, they do so largely without paying attention to the dynamics of resistance that animated the process itself. Instead, they start from the assumption that any such resistance is an aberration that needs to be fixed or ignored. In so doing, these arguments fail to consider the struggle over the symbolic meaning of rights encapsulated in the attempt to create the Norms, preferring to view the SCHR as an institution that functionally embodies legal rationality, and any attempt to re-imagine IHR as an aberration not worthy of meaningful consideration.⁵¹

Perhaps the most elucidating argument against these perspectives to date has been the work undertaken by Upendra Baxi to show how the Norms attempted to 'construct the alphabet, grammar and the library of business ethics in a new human rights genome project!'.⁵² Yet while Baxi's work is written with a sensitivity toward the attendant risks associated in doing so, he pays little attention to the modes of resistance that can be evidenced in the documentary records of the submissions drafted at the SCHR.⁵³ This thesis offers a corrective in this respect, and now turns to consider how these narratives of resistance emerged by analyzing the documentary records of the SCHR's proceedings.

4.3 The Norms Process

The Working Group tasked with drafting the Norms met over seven sessions, between 1999 and 2003.⁵⁴ It received in excess of forty written submissions and held six sessions to undertake the drafting process, in addition to holding additional meetings of experts.⁵⁵ The submissions were received in accordance with ECOSOC Resolution 1996/31 which replaced Resolution 1296 (XLIV) as the resolution determining the principles applied in establishing consultative relations between the UN and NGOs. The

⁴⁹Buhmann (2017), at 48.

⁵⁰John Ruggie, (2013), 158.

⁵¹Rajagopal (2003), especially at 163-230.

⁵²Baxi (2008), 445.

⁵³Baxi (2008), especially at Chapter 1.

⁵⁴UN Doc E/CN.4/Sub. 2/Dec.1999/101, Sub-Commission Decision 1999/01, 'Establishment of a Sessional Working Group on the Working Methods and Activities of Transnational Corporations' (Unedited version).

⁵⁵Based on my review of archived folders, available online through the United Nations Office of the High Commissioner for Human Rights: <http://ap.ohchr.org/documents/gmainrec.aspx>.

Resolution does not distinguish between the kinds of civil society organizations that can achieve consultative status, other than to state that such organizations should have aims and purposes which are 'in conformity with the spirit, purposes and principles of the Charter of the United Nations'.⁵⁶

Balakrishnan Rajagopal has argued that due to the chequered history of the Third World with human rights, both of which were invented as epistemological categories at the end of WWII, human rights run the risk of undermining the agency of the social movements involved in Third World resistance.⁵⁷ They also risk equating any attempt to secure human rights protection for or on behalf of the 'Third World' as being a grand discourse of emancipation and liberation supported by those movements, without empirically assessing the extent to which they were in fact welcomed by them.⁵⁸

While this thesis remains cognizant of these concerns, it argues that the Norms process remains worthy of consideration. This is because, although it is often assumed that major international non-governmental organizations played a large part in the Draft Norms process, in reality, the two most well-known human rights INGOs – Amnesty International and Human Rights Watch – did not make written submissions during the process and only joined the SCHR's open sessions in 2003.⁵⁹ The NGOs who did contribute written submissions largely represented self-proclaimed social movements from Latin America, the Third World and some lesser known human rights NGOs from Europe and the USA.

These were: the International League for the Rights and Liberation of Peoples; Indian Movement 'Tupaj Amaru' and the Indigenous World Association; Society for Threatened Peoples; North-South XXI; Europe Third World Centre; the American Association of Jurists; Pax Romana; the Commission for the Defence of Human Rights in Central America; the Service of Peace and Justice in Latin America; the World Confederation of Labour; Centro de Estudios Europeos, Fondation Danielle Mitterand; the International League for the Rights and Liberation of Peoples; the Union of Arab Jurists; the Womens International League for Peace and Freedom; International Education for Development; Movement Against Racism and for Friendship Amongst Peoples; World Peace Council; Human Rights Advocates; the National Heritage

⁵⁶ECOSOC Resolution 1996/31, at Principle 2.

⁵⁷Rajagopal (2003), 173.

⁵⁸Ibid.

⁵⁹See UNCHR, E/CN.4/Sub.2/2003/13 'Report of the sessional working group on the working methods and activities of transnational corporations on its fifth session' (6 August 2003) 4, at para 7 and compare to previous sessions.

Institute; International League for Human Rights; and the Federation of Cuban Women.⁶⁰ Additionally, the ICC and the International Organization of Employers issued statements toward the end of the Norms process.⁶¹

In the following section, I have critiqued the approaches presented in these submissions as broadly evincing three different perspectives toward the Norms. In each instance, self-proclaimed social movements and non-state actors took differing views as to the role that human rights should play in regulating the TNC and how the Norms should be crafted as a result. Consistent with the dominant sensibility advanced in international organizations in the post-WWII period, each position utilizes elements of the pragmatic style when framing its claims.

As this thesis noted in Chapter 1, this thesis argues that pragmatism constrains any determination of how international law should regulate the conduct of the corporation in the following ways: (1) determining how to regulate the corporation remains contingent on an empirical analysis of its effects and activities; (2) a focus on fact-based particularism and the 'art of the possible' means any idea of what *is* possible is inherently conservative (in the literal, as opposed to the political, sense of this word); (3) process is favoured over outcomes; (4) any contestability of the description of what exists remains narrow; (5) any radically alternative structural account of the economic order is almost always opposed (as being impractical); and (6) because it remains impossible to predict how the world is going to change, assessments on how international law can (and should) be incorporated into the conduct being regulated can only be reasonably made with a view that is short-term in orientation, or in the long-term systemic interests of the existing economic order. Unlike pragmatism as evidenced in the documentary record of the UNCTNC prior to it, and the UNGP Framework that would follow, actors engaged in the Norms process did not yield so completely to adopting a unified approach to the underlying epistemology animating international law's creation. Based on a critical re-reading of the documentary record,

⁶⁰NGO statements were submitted in some instances as groups. See: UNCHR E/CN.4/Sub.2/2002/NGO/29 (15/07/2003); E/CN.4/Sub.2/2000/NGO 7 (21/07/2000); E/CN.4/Sub.2/2000/NGO/6 (10/07/2000); E/CN.4/Sub 2/1999/NGO/14 (28/06/1999); E/CN.4/2005/NGO 237, (9/03/2005); E/CN.4/Sub.2/1998/NGO5 (20/07/1998); E/CN.4/2001/NGO/148 (16/02/2001); and E/CN.4/Sub.2/2002/NGO 6 (19/07/2002); E/CN.4/Sub 2/1999/NGO/14 (28/07/1999); E/CN.4/Sub/1998/NGO 12 (20/07/1998).

⁶¹ICC/IOE 'Joint Views of the ICC and IOE on the draft 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises – Full Report UN Norms (2004)' (on file with the author). [ICC/IOE(2004)] See also SCHR E/CN.4/SUB.2/2003/NGO/44 (29/07/2003).

this thesis identifies three distinct approaches emerging. They are (i) the critical approach; (ii) the CSR approach; and (iii) the economic approach. Critical pragmatism, as it emerges in this process, acknowledges the co-constitution of knowledge in both scientific and non-scientific forms. While this gestures toward enabling a radical alternative structural account of the economic order, it continues to rely on extant international law and the state to historicize its claim. CSR pragmatism favours including human rights as a social responsibility (of the TNC), as opposed to being solely a legal responsibility (of the state) or a moral responsibility (of all people). And economic pragmatism prioritizes applying economic theory to international legal questions. It is to these aspects of my thesis that I now turn.

4.3.1 Critical pragmatism

Several submissions to the Norms process considered the Norms as an opportunity to mobilize human rights as a language of resistance. As such, they focused on advancing claims utilizing a critical approach to pragmatism. The term critical pragmatism is borrowed from scholarship 'exploring the critical potential of pragmatism as a legal framework that can be used to articulate interests of less powerful social groups'.⁶²

As Celestine Nyamu has argued, a critical pragmatist's approach endeavours to create more room for voice and agency of marginalized social groups. It does so by developing opportunities presented by plural normative orders and challenging the constitutional frameworks of municipal legal systems to incorporate intersectional approaches to the way that framework operates.⁶³ At the international level, critical pragmatism offers an approach which is sensitive to diverse normative orders and forms of knowledge. The co-constitution of scientific and non-scientific forms of knowledge becomes possible, because 'the art of the possible' is determined with reference to the power differential between parties.

Critical pragmatism focuses specifically on the context in which modes of legal reasoning are being applied. 'Context' here is not simply the familiar competition between the universal (formalism) and the particular (realism): rather context gives

⁶²Celestine Nyamu, 'How Should Human Rights and Development Respond to Cultural Legitimization of Gender Hierarchy in Developing Countries' (2000) 41 Harvard International Law Journal 381, 409.

⁶³Ibid.

rise to being cognizant of the legacies of power and oppression underlying any legal instrument created.⁶⁴

When claims were made in this way, the TNC again took on a life of its own. The TNC is described as a being in the world, an entity with capacities to act that defy regulation or steer it for the TNC's own purposes, and most often to the detriment of states in the Global South. The closest approximation in corporate theory to these ways of knowing the TNC is to conceive of it as a 'real' entity.⁶⁵ Yonah argues that the real entity theory in corporate law often underpins the analysis in court decisions where the values of the corporation itself are prioritised over that of its shareholders or where courts favour the corporation choosing the jurisdiction from which to issue its shares.⁶⁶ It has also recently become more prevalent in writings about the TNC, as it becomes hard to identify to which state a multinational 'belongs'.⁶⁷

In submissions to the Norms process, the Norms were portrayed as an opportunity through which scientific and non-scientific forms of knowledge could be co-constituted to resist colonial forms of subordination that actors believed remained present in the TNC's form. In these submissions, the language of human rights was utilized to push back against an over-reliance on the state as the essential instrument of social change.⁶⁸ This was coupled with a belief that the Norms could act as a kind of manifesto for the creation of mechanisms and structures that would utilise IHRL to secure the utopian promise of the UDHR.

Critical pragmatism is most strongly represented in the statements produced by the Indian Movement Tupaj Amaru ('Tupaj Amaru'). Over the course of the three years, Tupaj Amaru forcefully urged the SCHR to produce a Code of Conduct that would respond to the 'increasingly decisive role TNCs played in the process of globalization of the world economy'.⁶⁹ For the Tupaj Amaru, in answering the question as to the necessity of the Code:

In our days, no economic, social and cultural problem, whatever its size and importance, escapes the voracity of the (TNCs), true webs that entangle the

⁶⁴Martha Minow and Elizabeth V. Spelman, 'In Context' (1990) 63 Southern California Law Review 1597, 1601. See also: Mari J Matsuda 'Pragmatism Modified and the False Consciousness Problem' (1990) 63 Southern California Law Review 1763; Margaret J Radin 'The Pragmatist and the Feminist' 63 Southern California Law Review 1699.

⁶⁵Yonah (2005), 808-9.

⁶⁶Ibid. See also *Paramount Communications Inc v. Time Inc* 571 A.2d (Del. 1969) at 1150 (where the Delaware Court of Chancery Supreme Court upheld the directors of Time acting in the long-term interests of the company, as opposed to the short-term interests of shareholders).

⁶⁷Muchlinski (2003).

⁶⁸Rajagopal (2003), 14. See also Richard Falk, Balakrishnan Rajagopal and Jacqueline Stevens, *International Law and the Third World: Reshaping Justice* (Routledge Cavendish 2008).

⁶⁹UNCHR, E/CN.4/Sub.2/2002/NGO 21, 3 ¶1.

production and distribution of goods and services, capital accumulation, mobility and business closures, massive layoffs, speculation in the stock market, causing financial crises with serious consequences for peace and security.

For its vast and complex universe, for its supranational powers, the TNCs, solidly embedded in all the basic spheres of the world economy, including in the United Nations system itself, behave in an anarchic manner, without morality or ethics. More than ever they are omnipresent in the lands and territories of indigenous peoples and they covet all.⁷⁰

Tupaj Amaru attempts to replace the purported normative universality of human rights with the descriptive particularity and immensity of the economic, social and cultural problems for which it believes TNCs are responsible. For them, the TNC is itself entwined in all aspects of the global economy to which a Code of Conduct should respond. Not all its statements, however, solely focused on non-legalistic evidence for the claims being made: in other statements to the SCHR, the Tupaj Amaru recalled the Calvo doctrine as early evidence of Latin American claims toward 'investment regulation in general and the taking of foreign property in particular' as a matter of domestic regulation for states. They also cited the Code of Conduct negotiations as evidence of 'controversial disputes over the past 30 years' serving a bitter lesson for developing countries of their negotiating capacity when it comes to TNCs.⁷¹

The TNC is perceived as having supranational powers and is simultaneously 'omnipresent', taking on a *supernatural* presence, in the lands and territories of indigenous peoples. Land and territory here, is not tied to jurisdiction but to communal habitation. In Polanyian terms, there is an urgency to the claim being made that attempts to evoke the dis-embeddedness of the global economy being perpetuated by the TNC, the latter of which is seen to enable false commodities to continue to be exchanged with an unbridled passion and solely in pursuit of profit. Human rights provide a response to this 'stark utopia' that should, in effect, prevent the TNC from becoming an agent for its realization.⁷²

In the case of Tupaj Amaru's statements, there is no attempt to prioritize or organize competing claims as to what a TNC *is* in order to conform to scientific rationality. The truth of what the TNC is, is instead captured through the experience of it – as a web, as a passionate colonizer, as an omnipresence in indigenous lands. In this respect, the approach is consistent with pragmatism. It focuses on the TNC's

⁷⁰UNCHR, E/CN.4/Sub.2/2002/NGO 21 3, at ¶13-15.

⁷¹UNCHR, E/CN.4/2000/NGO6 1, ¶3 (for the Calvo doctrine), 4 at ¶16 (for the United Nations 'Code of Conduct').

⁷²Polanyi [1944], 3.

activities and effects, and seeks to co-constitute non-scientific and scientific forms of knowledge to enact practices of resistance from within international organizations. Yet it does so, to advance a 'zero tolerance' approach to the deleterious effects of the TNC and while being mindful of legacies of abuse.

Similarly, early statements provided to the process by the International League for the Rights and Liberation of Peoples (the 'ILRLP') can be seen to attempt to hold the TNC to account in alternate structures and judicial processes other than those sanctioned by the official institutions and systems supporting international law.⁷³ These statements evince a concern with conceiving of the TNC as again, de-linked from territory and creating conditions which, for the ILRLP are 'analogous to the social conditions which existed in Europe and North America in the 19th century' but are 'imposed everywhere and in all times by "wild" capitalism i.e. capital not counterbalanced by workers' resistance'.⁷⁴ The ILRLP reports on human rights claims being advanced against the garment and sportswear industries at the Permanent Peoples' Tribunal in Brussels – a tribunal established in 1979 to hear claims 'from peoples subject to injustices of any kind'.⁷⁵ In so doing, according to ILRLP, 'the Tribunal claims to fill a void in the international judicial order in the field of the rights of national communities or ethnic minorities'.⁷⁶

By invoking history here, the ILRLP attempts to transcend the distinction between North and South by instead focussing on class and gender analysis, which further reiterates why the TNC needs to be considered as distinct from the state. Here, the problem is not considered to be solely one of TNCs from 'the West' exploiting workers from Africa, Asia and Latin America, but rather the political economy of capitalism exploiting workers wholesale.⁷⁷ The ILRLP asserts that the weakening of trade unions, the generalized violations of workers' rights and the exploitation of women and their discrimination in the workplace are the primary evils that companies operating in these industries can be said to bring about.⁷⁸ Several other non-state actors also voiced their dissent against the TNC in similar terms.⁷⁹

⁷³UNCHR, E/CN.4/2001/NGO/148 Written Statement Submitted by the International League for the Rights and Liberation of Peoples, (16 February, 2001). ['ILRLP 2001'].

⁷⁴ILRLP (2001), 3.

⁷⁵ILRLP (2001), 4.

⁷⁶ILRLP (2001), 4.

⁷⁷ILRLP (2001), 3-4.

⁷⁸ILRLP (2001), 3-4.

⁷⁹See: UNCHR, E/CN.4/2001/NGO 186; E/CN.4/Sub.2/2002/NGO10, 2 at para 3 – 8.

Borrowing from the work of Boaventura de Sousa Santos, I have identified this position as loosely being defined as 'post-abyssal' in its orientation toward international law. For De Sousa Santos, the 'abyssal line', present in law and other disciplines, prioritises scientific modes of reasoning to the exclusion of all other ways of knowing. He determines this kind of exclusion as belonging to epistemologies of the North. For him, an abyssal line is created between:

legal and illegal and between scientific, theological and philosophical knowledges. This invisible distinction operates between metropolitan societies and colonial societies. For the last five centuries this abyssal line has been there and it has been so strong that the world has been divided into this side of the line and the other side of the line. All of our theories have been based and developed on the experiences from this side of the line.⁸⁰

Similarly, Sundhya Pahuja identifies the cuts and erasures produced by international law, in order for it to *be* law: the cut (or delineation) is the boundary line of international law's founding categories or definitional truths.⁸¹ Pahuja's meta-theoretical position is an important counterpoint to De Sousa Santos' work, in that she identifies within international law itself the same tendency that De Sousa Santos argues has been present in the history of Western thought for half a millennium.⁸²

In my reading of the Draft Norms process, critical pragmatism describes the attempt made by several actors to erase the line between forms of knowledge that are prioritized as rational and scientific and those which are ignored as being irrational and unscientific. Consistent with the methodology of pragmatism as it emerged in international organizations, however, this approach is characterized by an absolute rejection of the paramountcy of scientific claims to 'truth' and a commitment toward evidence-based particularism.⁸³

However, critical pragmatism rejects claims of simply pursuing 'what works' in the short-term and refuses to remain constrained by existing forms of technocratic managerialism. Instead, it remains committed to re-imagining the world anew, to thinking beyond the confines of what is evidenced solely through existing law and legal forms and to incorporating intuitive forms of knowledge that are not confined to the jurisprudence created by courts or the networked contractual arrangements of

⁸⁰Ibid. See also Boaventura De Sousa Santos, *The End of Cognitive Empire: The Coming of Age of Epistemologies of the South* (Duke University Press, 2018). [Hereafter, De Sousa Santos (2018)].

⁸¹Pahuja (2011), 27.

⁸²Both authors' work has been influenced by the writings of Jacques Derrida, from whom the ideas of 'the cut' and 'the abyss' originate.

⁸³Ibid.

individual actors.⁸⁴ In this respect, critical pragmatism is a form of resistance that seeks to incorporate new forms of knowing and understanding the TNC.

Human rights, in this reading, are emphasized as being rights to 'identity, territory, some form of autonomy and alternative conceptions of modernity and development'.⁸⁵ This form of alternative conception of human rights is most often either romanticized or given subordinate status by international lawyers, who have been accused of engaging in a double move of appropriation and invisibility.⁸⁶ As Rajagopal has noted, at one level, resistance is often appropriated as empirical evidence of the triumph of human rights – that finally a 'western' democratic revolution is sweeping the world. Yet at another level, the praxis of these movements is largely ignored.⁸⁷

During the latter half of the drafting process, non-state actors evidencing this approach consistently rejected the development of the Norms, claiming the Working Group had replaced its focus on the TNC, as a stand-alone entity requiring regulation, with the regulation of TNCs *and other business enterprises*. This was perceived as heralding a distinct shift, from viewing the TNC as a real entity, toward perceiving it instead as the sum of its contractual relationships. Doing so was considered deleterious for human rights as a language of resistance, because it reduced the normative import of the instrument being created largely to what could be regulated by the state or with the 'voluntary acceptance' of private persons. Additionally, it limited the extent to which the power imbalance between the TNC, as a distinct entity in its own right, and those who worked for it, or came into contact with it, could be acknowledged. This was particularly so for workers, for whom it was claimed:

To include workers (who have no decision-making power in the heart of the enterprise and often have not even a negotiating power) amongst those who are responsible is a way of diluting or deviating from the issue of civil and penal responsibility to transnational corporation as legal persons...⁸⁸

The Working Group's inability to maintain its focus on 'transnational corporations, as a worldwide specific phenomenon of enormous economic, social, and political significance, with evident effects upon the enjoyment of human rights on a

⁸⁴See Chapter 1, s.1.5.2.

⁸⁵Rajagopal (2003), 166.

⁸⁶See for example Thomas Franck, 'The Emerging Right to Democratic Governance' (1992) 86 *American Journal of International Law* 46.

⁸⁷Rajagopal (2003), 166.

⁸⁸UNCHR E/CN.4/Sub.2/2002/NGO/9 (19/07/2002) 3, ¶17.

planetary scale⁸⁹ was considered to be normatively disingenuous. It reduced the Norms to a set of declaratory principles, hence enabling TNCs to avoid human rights duties. It was also descriptively 'a backward step' that 'intended to ignore the whole of IHRL currently in force'.⁹⁰ Perhaps presciently, this was perceived as amounting to a way of ensuring that TNCs were considered no different to ordinary business enterprises.⁹¹

Despite these protests, however, elements of this approach remained influential upon the Draft Norms. Specifically, the final text of the Draft Norms did attempt to conceptualize the corporation as being distinct from the state, and having its own 'sphere of influence'. As Baxi notes, despite not having any precise juridical articulation, the concept of a 'sphere of influence' gave rise to five primary duties that TNCs and other business enterprises were obliged to uphold.⁹² These included: (1) the responsibility to 'use due diligence' such that their activities do not contribute to 'human abuses'; (2) to prohibit business enterprises from 'directly or indirectly' benefiting from abuses of which they are aware; (3) to conduct certain kinds of due diligence, including conducting human rights impact assessments, in order to avoid complicity in human rights abuse; (4) to refrain from activities that would undermine the rule of law and promote and ensure the respect for human rights; and (5) to use their influence to help promote and ensure respect for human rights.⁹³

It is unclear from the documentary record, whether the concept of a corporation's sphere of influence, as articulated in the Draft Norms, sought to use the term in the sense Durkheim used the term – that is, to acknowledge the corporation as an institutional form which itself had become a source of occupational ethics and law.⁹⁴ David Weissbrodt's explanation of the use of the term suggests, however, that the Working Group primarily intended that corporations be obliged to consider the extent and nature of their obligations depending on their size and capacity to uphold human rights responsibilities.⁹⁵

As Baxi notes, the distinction between, and maintenance of, a commitment toward the eradication of both *human* abuse and *human rights* abuse in the final text

⁸⁹Ibid. 2, ¶4.

⁹⁰Ibid. 3, ¶2.

⁹¹Ibid., 2 ¶3.

⁹²Baxi (2008), 448-9.

⁹³Ibid., 449.

⁹⁴On the former, see Emile Durkheim, *The Division of Labour in Society* (Preface to the Second Edition, 1902), 19.

⁹⁵Weissbrodt/Kruger (2003) 912 at Chapter 1, footnote 38.

of the Draft Norms exhibited a 'phenomenological approach to human/social suffering' which 'rests, at the end of the day, on a distinctively intuitive moral anthropology.' Furthermore, it was grounded in an attempt to prevent corporations from being able to secure unjust enrichment from their operations.⁹⁶ For Baxi, the Draft Norms' acknowledgement of both direct and indirect bases upon which human beings could experience suffering, and the attempt to hold corporations directly accountable in this regard, was itself an 'heroic feat'.⁹⁷

4.3.2 The CSR approach as embedded pragmatism

A second way in which advocates of the Norms maintained their utility was to determine their primary purpose complimenting to existing government regulation. As such, the Norms would enable the CHR to act as neutral facilitator between states and TNCs.⁹⁸ Viewed from this perspective, the Norms process should lead to the adoption of a global code of corporate social responsibility ('CSR') that was voluntarily assumed by TNCs and coordinated and facilitated by states, with the CHR playing a minimalist, functional role.

This reading of the Norms prioritised designating social responsibilities to TNCs alongside legal responsibilities. Hence, human rights responsibilities became an extension of CSR. This view largely maintained the idea of embedded pragmatism as evidenced by representatives of several states during the UNCTNC process. According to this view, agreement on the conduct of TNCs throughout the Code process allowed for the rights exercised by those engaged in the ownership and control of foreign direct investment to remain subordinate to the 'legitimate social purpose' of that investment as determined by states. During the UNCTNC's process, several Third World states argued that 'legitimate social purpose' should be framed with reference to the goals of the NIEO. In this respect, human rights did not amount to 'shared social values': instead, human rights safeguarded states' capacity to secure their sovereign right to exist. For the G-77 nations, human rights and self-determination were intimately linked, and IHRL should be utilized in support of decolonisation in all its forms, the most evident example being South Africa.

⁹⁶Baxi (2008), 450.

⁹⁷Ibid.

⁹⁸See in particular: SCHR E/CN.4/Sub.2/2000/SR.11 (23/01/2001) Comments of Mr Shiokawa (International Association of Democratic Lawyers), 4 at para 5, Comments of Ms Poncini (International Federation of University Women), 8 at para 29-35, Comments of Mr Le Blanc (Franciscans International) at para 45;

During the Norms process, non-state actors adopting the CSR approach similarly argued that the SCHR should draft an instrument that would reinvigorate states' attempts to curtail the negative effects of the international trade and financial system. By securing multilateral agreement on how states should intervene to prevent TNCs either being complicit in human rights violations or responsible for corporate human rights abuse, IHRL could be utilised as a novel form of regulating corporate social responsibilities.⁹⁹ This was unprecedented: although a proliferation of standards for corporate conduct existed by the end of the 1990s, the vast bulk of instruments remained outside the sphere of work covered by IGOs and virtually none of them related to human rights. While the OECD had included, by this stage, a human rights provision in its Guidelines for Multinational Enterprises, they offered 'little more than moral force', in that the major method of enforcement was 'through the shame of non-adherence'.¹⁰⁰

Yet, in keeping extant international law, no attempt was made to re-imagine the parameters through which human rights could or should operate. In a written statement submitted by North-South XXI, for instance, the NGO asserted that:

The Sub-Commission must ask itself why the only regulatory measures with any impact are *national in origin*: the curtailment of Microsoft monopoly by the United States Government, for example, or the spanner thrown into the proposed negotiations on the proposed Multilateral Agreement on Investment...

...The Sub-Commission certainly has no way of reversing the order of things. It is nonetheless equipped, if Member States have the *political will* needed, to alert world opinion...to the *social* realities spawned by globalization...¹⁰¹ [My emphasis]

When evidenced in the documentary record, the CSR approach to pragmatism assumes that a state can determine endogenously to what extent TNCs should be serving legitimate social purposes in accordance with their domestic laws. In this respect, there was no attempt to equate IHRL with being distinct from the will of states or capable of giving effect to resistance *against* state-centred authority.¹⁰² In this respect, the CSR approach is consistent with the approach adopted by Japan, Switzerland, Ecuador and Jamaica during the UNCTNC's proceedings. Unlike critical

⁹⁹See Zerk (2006) 243-297.

¹⁰⁰See Chapter 2, footnotes 183-4. See also Muchlinski (2003), 128.

¹⁰¹UNCHR E/CN.4/Sub.2/2000/NGO 10 (21/07/2000), 2.

¹⁰²For a recent critique, however, see Anita Ramasastry, 'Corporate Social Responsibility and Business & Human Rights: Bridging the Gap Between Responsibility and Accountability' (2015) 14 Journal of Human Rights 237.

pragmatism, there is no attempt to conceive of the TNC as distinct from the states in which its parent and subsidiary companies are incorporated.

However, unlike during the Code of Conduct negotiations, the CSR approach assumes that international organizations (and in this case, the CHR) can also further administer IHRL as an agreed international standard of conduct to which TNCs and other business enterprises should be held to account. In this respect, the CSR approach supplemented endogenous 'values' and government with the universal ideal of governance. In a departure from the 1970s code negotiations, human rights as embodied through social responsibilities were meant to provide a benign backdrop to the state. The CSR approach accommodated both 'pro-market' and 'anti-capitalist' positions. This because the unrestrained operation of TNCs in an increasingly under-regulated global economy, called for the creation of a global code of corporate social responsibility to both complement and further enhance domestic law and regulation.¹⁰³

The CSR approach is perhaps best articulated by Sir Geoffrey Chandler, the Founding Chair of the Amnesty International UK Business Group and former Director of Shell International:

The value of the Norms to business is that they distil, in a single comprehensive and authoritative document, *the international human rights principles applicable to the whole range of business responsibilities for all businesses*. Their authority derives from the fact that they reflect, in a manner which assists their operationalising by companies, the internationally agreed instruments of the UN Universal Declaration of Human Rights (UDHR), the Convention on the Rights of the Child, the core International Labour Organisation conventions, and the Human Rights Covenants on Civil and Political Rights as well as Economic, Social and Cultural Rights...

The Norms are not legally binding, other than for those issues, such as the prohibition of slavery, already the subject of international and national law. But because they represent the behaviour expected of corporations by the international community, they are, unlike the Global Compact, the ILO Declaration and the OECD Guidelines, *more than voluntary*. They provide a template against which corporations can measure their own codes and the basis for a level playing field so that the better performers are not undermined by the worse.¹⁰⁴ [My emphasis]

The focus remains on the TNC as a servant to the state, yet at the same time, depending on its size, the TNC was perceived as having administrative structures that were more akin to an international organization. This approach is most akin to the

¹⁰³Muchlinski (2003), 148-151.

¹⁰⁴Sir Geoffrey Chandler, Founder Chair, Amnesty International UK Business Group 1991-2001 and former Director of Shell International, 'Response to the Joint Views of the International Chamber of Commerce (ICC) and the International Organization of Employers ('IOE') on the United Nations Human Rights Norms for Companies' (April 2004), available online at: www.bhrrc.org.

artificial entity approach. As Yonah has argued, when CSR is viewed in this way, 'since it emphasizes the benefits of corporate existence derived from the state, an implicit contract can be inferred that it will help the state in mitigating harms that it causes even in the absence of international responsibility'.¹⁰⁵ The TNC is said to have powers and functions which are given to it by virtue of its place(s) of incorporation, rather than as a stand-alone (or: real) entity. The CSR approach centres on the regulation of human rights as a social responsibility and tends to view TNCs as entities created within certain jurisdictions: in other words, a TNC was 'an artificial being, invisible, intangible and existing only in contemplation of law'.¹⁰⁶

Muchlinski identifies a similar position emerging in the CSR and business ethics scholarship when determining the role played by international organizations as regulators of TNCs. Muchlinski identifies this position as being regulatory functionalist.¹⁰⁷ The term 'regulatory functionalism' refers to 'a tendency which encompasses many shades of political opinion, with the common feature of an acceptance of governmental regulation, and a degree of scepticism toward the market as an appropriate method for social and economic organization'.¹⁰⁸ The regulatory functionalist position includes both pro-market and anti-capitalist positions toward TNCs. Its primary feature is to maintain the primacy of the state in the creation of law and the maintenance of economic order. As such, it remains ideologically neutral toward the political authority exercised by the state. I would argue that, despite being 'ideologically neutral' toward the state, unlike the regulatory functionalist position, the CSR approach evidenced here attempted to maintain the primacy of the UN Charter and of liberal values. In this respect, and similar to the approach adopted by Sen (and later, Martha Nussbaum), the CSR approach assumed the instrument being drafted should focus less on determinative outcomes, which should be left to states, and more on facilitating *opportunities*.¹⁰⁹

Even strongly anti-capitalist resistance movements, who were against 'liberalism' and firmly denounced 'the unacceptable practices of TNCs', saw the role of international organizations as being to support the 'struggle to be waged by *states* against impunity' [My emphasis].¹¹⁰ The International Federation for Rural Adult

¹⁰⁵Yonah (2005), 814.

¹⁰⁶Marshall J. *Trustees of Dartmouth College* 17 U.S. at 557.

¹⁰⁷Muchlinski, (2003) 151.

¹⁰⁸Ibid. citing Martin Loughlin, *Public Law and Political Theory* (Oxford: Clarendon Press, 1992).

¹⁰⁹David A. Crocker 'Functioning and Capability: The Foundation of Sen's and Nussbaum's Development Ethic' (1992) *Political Theory* 584.

¹¹⁰UNHRC E/CN.4/2000/NGO 152, 2.

Catholic Movements, for instance, asserted that rights violations committed 'by TNCs' were 'more glaring and massive in the countries of the South' and yet saw the CHR's role as largely coordinating the activities of states against this oppression.¹¹¹ Views put forward by the International League for Human Rights also tend toward this view, by asserting that states have 'a responsibility to monitor transnational corporations' and to ensure 'extraterritorial jurisdiction in order to control them.'¹¹²

All three drafts of the Norms made it clear that states, not TNCs and business enterprises, should retain the primary responsibility to uphold human rights standards. Nothing contained within the Norms would diminish those obligations.¹¹³ Additionally, in keeping with the Code of Conduct developed by the UNCTNC, the Norms included provisions for respect for national sovereignty,¹¹⁴ obligations with regard to consumer protection,¹¹⁵ and obligations with regard to environmental protection, albeit in reduced form.¹¹⁶ Yet the first of these provisions included a reference to sovereignty in titular form only, with any reference to permanent sovereignty over natural resources wholly eviscerated from the draft. Although an early draft included a reference to 'self-determination', the final provision stated:

Respect for National Sovereignty and Human Rights

Transnational corporations and other business enterprises shall recognize and respect applicable norms of international law; national laws; regulations; administrative practices; the rule of law; the public interest; development objectives; social, economic, and cultural policies including transparency, accountability, and prohibition of corruption; and authority of the countries in which the enterprises operate.¹¹⁷

¹¹¹Ibid.

¹¹² UNCHR E/CN.4/Sub.2/2002/NGO 6 (19/07/2002), 12.

¹¹³See UNCHR, E/CN.4/Sub.2/WG.2/WP.1 'Principles Relating to the Human Rights of Companies' (25 May 2000), Annex 1; E/CN.4/Sub.2/2001/WG.1/WP.1/Add.1 'Draft Universal Guidelines for Companies, Addendum 1 (2001)' and E/CN.4/Sub.2/2001/WG.1/WP.1/Add.2 'Draft Universal Guidelines for Companies, Addendum 2 (2001)'; E/CN.4/Sub.2/2002/13 'Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights'; and E/CN.4/Sub.2/2003/12/Rev.2 'Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights' ['Draft Norms (2003)']. See also Muchlinski (2003), 137-8.

¹¹⁴'Part E – Respect for National Sovereignty and Human Rights'(ss.10-12), Draft Norms (2003). Compare: UNCTNC, U.N. Code of Conduct for Transnational Corporations (1983) 22 I.L.M. 192, s.6-7. [Code of Conduct (1983)].

¹¹⁵'Part F – Obligations with Regard to Consumer Protection' (ss.13), Draft Norms (2003). See also Code of Conduct (1989) – Consumer Protection ss.37-40.

¹¹⁶Part G – Obligations with Regard to Environmental Protection (ss. 14), Draft Norms (2003). See also Code of Conduct (1989) – Environmental Protection ss.41-43.

¹¹⁷'Part E – Respect for National Sovereignty and Human Rights' s.10, Draft Norms (2003). See also Code of Conduct (1989) – Respect for national sovereignty and observance of domestic laws, regulations and administrative practices, ss.6-9.

In this regard, 'respect for national sovereignty' in the Draft Norms in fact amounts to respecting the state's sovereign authority to legislate in accordance with extant international law and its own municipal law. Despite maintaining an emphasis on the primacy of the state, there was no reference to the territorial integrity or political sovereignty of the former, the oblique reference to the 'authority' of the host state seemingly replacing these legal terms of art for a more opaque reference, preceded by what can best be described as a list of good governance indicators.

In several respects, the CSR approach was an important precursor to the UNGP Framework. Although Ruggie would later claim that his first duty had been to 'kill the Norms',¹¹⁸ it is clear from a close reading of these submissions and the resulting document that several aspects of the Draft Norms and Commentary in fact informed the approach that was subsequently adopted, if only by providing the foundations on which the SRSB would create his own edifice.

The choice to maintain the primacy of the state in its newly formed 'good governmental' guise and to jettison a focus on TNCs to include instead 'TNCs and other business enterprises' may have seemed to many to provide much needed safeguards against states' violating the rights of their own peoples. Similarly, the hollowing out of the provisions pertaining to the state's endogenous right to determine its developmental processes in the name of 'human rights' could be seen to achieve this goal. Undoubtedly, this seemed like a good idea to well-intentioned human rights experts, in light of the onslaught of cases reaching courts in the United States and Europe, alleging corporate complicity human rights violations.¹¹⁹ Yet as will be seen in the following section, this momentary turn toward a CSR approach and regulatory functionalism would, in the final hour of the Norms process, be jettisoned for a different kind of pragmatism.

4.3.3 Economic pragmatism, neoliberalism and the ICC

In April of 2004, the International Chamber of Commerce ('ICC'), together with the International Organization of Employers ('IOE' and together with the ICC, the 'ICC/IOE') issued a 40-page statement (the 'Statement') strongly opposing the Draft Norms. The statement was issued shortly after the SCHR had itself approved the

¹¹⁸Ruggie (2013), 56.

¹¹⁹ICC/IOE (2004).

Norms and on the cusp of their submission to the CHR, where it was anticipated that they would be approved.¹²⁰

The Statement changed the terms of the debate the Draft Norms had originally engendered. The question the Working Group had asked itself had been what effects TNCs had on the enjoyment of human rights. The question the ICC/IOE now put to the Working Group (and by extension, the SCHR) was framed as the exact opposite. Namely, how would human rights affect TNCs?

In responding to this question, the ICC/IOE argued that human rights can only, and should only, be exercised, provided TNCs remained insulated from a world of 'indeterminate liability' caused by TNCs assuming international human rights obligations.¹²¹ They criticized the Draft Norms and the process that had led to them as lacking transparency and being decidedly anti-business, despite the ICC and IOE themselves being 'human rights organizations'.¹²² My interest here is less in the role played by the IOE in issuing this statement, although undoubtedly, there may be reasons to further investigate its role as an organization in proceedings at the UN. However, in light of its historic and evolving status in the development of international law, this thesis focuses here on the ICC.

Although it had largely refrained from commenting during the UNCTNC proceedings in drafting the Code of Conduct, the ICC enjoys the highest consultative status on the UN Economic and Social Council (ECOSOC) and has been an active participant in its proceedings in the post WWII period.¹²³ As already noted in Chapter 3, its influence on the evolution of international law (and in particular, the maintenance of the free trade regime in the post-WWII period) has been significant.

As already noted, the ICC's statement to the Draft Norms process turned the question being asked by the SCHR's Working Group on its head. The question the Working Group had asked itself throughout the drafting process had been: what effects do TNCs have on the enjoyment of human rights? The question the ICC (together with the IOE) now put to the Working Group was framed as the exact opposite. Namely: what effects will the enjoyment of human rights have on TNCs? And specifically: how would any effort toward securing ESCR affect the corporation's capacity to its conduct business?

¹²⁰Weissbrodt/Kruger (2003), 902.

¹²¹ICC/IOE (2004), 26.

¹²²Ibid.

¹²³Charney (1983), 787-8.

The Statement put forward three primary grounds for contesting the Draft Norms. First, it argued that the state was the only duty-bearer of international human rights obligations and TNCs and other business enterprises should have no direct responsibilities to uphold human rights. Second, it argued that the Draft Norms would legitimate the *vilification* of private actors by human rights activists, hence infringing upon the rights of corporations and business enterprises, likely leading to many businesses going bankrupt. Finally, it argued that the Draft Norms were calling for 'an extreme step' toward the privatisation of human rights that failed to consider the complexity of the volatility of the economy, and indeed – 'of life itself'.¹²⁴ In particular, the Statement focused on economic and social rights (ESRs), specifically considering both the progressive realization of these rights and the balancing decisions required by the state in order to give effect to them.

The first of these statements – that corporations are not directly responsible for human rights obligations – has since been critiqued by several international lawyers and scholars as the primary basis upon which the ICC/IOE's statement against the Draft Norms was unfounded. Several commentators have pointed out that this argument can be construed as being inaccurate as a matter of extant international law at the time the Statement was made.¹²⁵ Specific examples that have been given negating this premise are: the historical ban on the slave trade; acts of torture committed by private persons constituting violations of international humanitarian law; and prohibitions against business and their officers engaging in acts of genocide, to name a few.¹²⁶

The ICC/IOE Statement provides a detailed analysis of the reasons why economic and social rights must be: (i) determined utilizing 'balancing' decisions; (ii) considered as *end-goals* (i.e. obligations of 'future-results' which the state must achieve) rather than ends in themselves (i.e. obligations of conduct to which the state must comply); and (ii) realized only in relation to the state of a country's economy. What was under scrutiny in the Statement was the extent to which the Draft Norms, as an instrument drafted by the SCHR, sought to obfuscate these determinations or relegate them as secondary to what the ICC/IOE saw as amounting to 'political

¹²⁴ICC/IOE (2004), 31.

¹²⁵See in particular, Chip Pitts, 'Response to the ICC/IOE Concerns Regarding the UN Norms for Business' (March 2004) available online at: www.bhrrc.org See also, Karavias (2013), 163 – 196.

¹²⁶See, e.g., Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, Sept. 7, 1956, 266 UNTS 3, Art. 6 (making "persons" convicted of slave-related offenses liable to punishment) and Pitts (2004), 1.

targeting of private business persons' and the 'social sanction' of the 'vilification of other people'.¹²⁷

The rationale for the arguments is described pragmatically as being that a state should only take 'reasonable steps' toward the fulfilment of its obligations to protect ESR. As I have already explained throughout this thesis, embedded pragmatism as both a mode of reasoning and a technical device is devoted to instrumental management and attuned to real world problem-solving. The ICC/IOE's approach accorded with this form of pragmatism, by utilizing the hallmarks of this method to reinforce the institutional structure and limitations of the state. In the Statement's reading, what is reasonable 'is judged by the realities of the situation, including the State's resource capacities'.¹²⁸ For instance:

the right to work does not require the state to ensure that everybody has a job or is *actually paid a 'living wage'*. Instead, the duty is to take all *reasonable* measures to *create the conditions* in which people will be able to have employment, and to receive a good salary.¹²⁹

The Statement does not conflict with the concept of embedded pragmatism, either as espoused by the UNCTNC or those adopting the CSR approach during the Draft Norms process, in that it emphasizes the state's role in determining how conditions should be created in order to ensure human rights are enforceable within its jurisdiction. And while a state is only responsible *legally* for the enforcement of human rights within its own jurisdiction, the ICC/IOE (like those adopting the CSR approach) also acknowledge a *moral* responsibility for states to '*help promote* the realization of the rights of everyone world-wide' – in particular, that 'wealthier states must assist less-well-to-do ones'.¹³⁰

Where the ICC/IOE departs from the views of its contemporaries in the Norms process is in its characterization of the extent to which reasonable decision-making should be guided by empirical enquiry, or, more specifically, the extent to which IHRL and its enforcement should be guided by economic outcomes. In this respect, the Statement rejects deductive logic and universal moral truths (repeatedly lambasting the Norms for the 'vagueness' of the concept of human rights). It argues instead for an approach that is anti-foundational (rejecting the pull of ideas such as 'fairness' and 'justice' that 'utterly fail to do justice to the contribution of business to the well-being

¹²⁷ICC/IOE (2004), 30.

¹²⁸Ibid., 5.

¹²⁹Ibid., at 5 [My emphasis].

¹³⁰Ibid., 7.

of society'), contextual and economic. The term 'economic' here refers to arguments in favour of the feasibility and usefulness of making assumptions about how actors characterize their self-interest, as well as the superiority of cost-benefit analysis in gauging the transactions between such actors.¹³¹

The primacy of transactions is key to understanding how the ICC/IOE conceives of the role of business in protecting and promoting human rights. Both organizations saw themselves as 'human rights NGOs' and took offence at the idea that they were not supportive of human rights *per se*.¹³² Yet, in keeping with the neoliberal ethos which underlies the ICC's original *modus operandi* as 'merchants of peace', business transactions should be facilitated by human rights. Coincidentally, they referred to obligations to uphold economic, social and cultural rights as leading to 'the abyss'. According to the Statement:

As Professor Philip Alston has said, "One of the most striking features of the [ICESCR] is the vagueness of the normative implications of the various rights that it recognizes."¹³³ He has referred to the vagueness, or indeterminacy, of ICESCR rights as "the abyss." He has argued that it is necessary for the ICESCR Committee to define the "minimum core content" of each right -- the absolute minimum entitlement of each right, the universal standards below which no State can ever fall, regardless of the circumstances. But he has also said that this task is "infinitely" difficult.

Our concern here is not about the problem of defining the absolute minimum entitlements, but about the need for *balancing*, which is actually the heart of the "abyss" problem.¹³⁴

In the Statement, the problem posed by the Norms was that they did not take into account the need to determine the extent to which any decision as regards the enforcement of human rights requires both knowledge of the state's economy and a balancing of the rights of distinct rights holders. This included determining: (i) trade-offs between different categories of rights holders; (ii) balancing between different categories of rights; (iii) balancing between different rights holders holding the same right; and (iv) balancing over time (both for the same rights holders and between generations). If private actors (i.e. business enterprises) had to determine how to make these balancing decisions, they would be forced to engage in balancing and

¹³¹On economic pragmatism as it relates to legal theories of judicial determinations in the U.S., see in particular, Desautels-Stein (2008), 541. See also Richard Posner, 'Legal Pragmatism' (2004) 35 *Metaphilosophy* 147.

¹³²ICC/IOE (2004), 38.

¹³³Philip Alston, "Out of the Abyss: The Challenges Confronting the New U.N. Committee on Economic, Social and Cultural Rights," (1987) 9 *Human Rights Quarterly* 332, 351-2.

¹³⁴ICC/IOE, 7 and 20.

deferral – what the ICC called ‘tough decisions about trade-offs’, which, the ICC argued, would mean they would have to ‘act from the perspective of protecting themselves from sanctions for failure to act.’¹³⁵

The ICC/IOE admitted that business is likely to act from its own self-interest when determining how to enforce human rights obligations. In their view, this creates ‘an extraordinary, and ultimately, impossible burden’ on business. Furthermore, in keeping with an economic approach to pragmatism, the Statement goes on to reify ‘the economy’ and gesture toward the imperative of Pareto optimality when assessing how to distribute the states’ resources. According to the Pareto principle, efficiency is a state of allocation of resources from which it is possible to reallocate resources to make any one individual or preference criteria better off without making at least one individual or preference criteria worse off. For the ICC/IOE,

[T]he *economy* is the main reason why businesses (and Governments) do not pay salaries that are sufficient for people to meet their aspirations, and the economy, like life itself, is a *dynamic situation where problems are constantly arising*. Bankruptcies and slowdowns hit the businesses, while lay-offs, catastrophic illnesses, accidents, and family troubles plague the workers: all of these problems can cause a fall in the worker’s standard of living.

The volatility of the economy, and of life itself, is therefore another reason why the State’s fulfilment of its ICESCR duties is fundamental to enjoyment of an adequate standard of living. The State runs, or facilitates, various support services and safety-nets in order to help people cope with these problems. But the Sub-Commission privatizes human rights by placing the entire burden on private business persons. It has made no attempt to link the realities of the workers’ and the employers’ lives to the realities faced by States, and to the States’ human rights obligations.

In short, the realization of an adequate standard of living depends upon many factors, not on just the wages that the employer pays. What an individual business can do for its employees is dependant (sic) upon the state of the economy, and upon the entire complex of things that the State is doing in all of its laws and policies in order to create the best possible conditions.¹³⁶

Seen from this perspective, corporations were no more or less than the sum of the transactions comprising them: what a business can do in any situation (in this case, for its employees) is determinate upon the context in which the transaction is occurring, and the economy in which that business operates.¹³⁷ In keeping with a ‘nexus of contracts’ theory of the corporation, the ICC/IOE considers any attempt to hold corporations socially responsible for their actions as reifying the corporation itself,

¹³⁵Ibid. 23.

¹³⁶Ibid., 31.

¹³⁷Ibid. See also ICC/IOE Statement, at 8, and 22-23.

which is best perceived as facilitating a market. As was explained in Chapter 1, according to this view, the corporation itself is 'a metaphor – a handy rhetorical device – connoting relationships between officers, directors, shareholders, creditors, customers, suppliers, and others involved in the production and sale process'.¹³⁸ In this respect, the firm and the corporation are simply a different kind of market that serves as a focus for 'the conflicting objectives of individuals are brought into equilibrium within a framework of contractual relations'.¹³⁹

As a result, in its final analysis, human rights and by extension, international human rights *law* were fundamentally linked to the facilitation of trade and investment: only through supporting *business* could human rights truly be realized across the globe.¹⁴⁰ For the ICC/IOE, key to understanding businesses' role in accommodating human rights was to secure the promotion of business in order to realize the right to development and the ESRs that could then ensue from that development. For the ICC/IOE, what was good for business was ultimately good for society, because the promotion of business was essential to economic growth; raising standards of living; was essential to a state's operations; and diffused ideas that were important to good governance. In short, states should not ask what effect business was having on human rights, but what human rights were doing to secure business. The two were inextricably linked:

United Nations efforts to help reach these goals will need to include greater support for the business sector of society. The promotion of business activity is a primary means for realizing the right to development, and the specific human rights that depend for their fulfilment upon a country's level of development. While various intergovernmental organizations are already addressing business issues, UN human rights forums, like the Commission on Human Rights, should also contribute to the promotion of business. This includes, but is not limited to, protecting the rights of business enterprises, and protecting the human rights of the people who manage, work for, and own the businesses.¹⁴¹

4.4 The Failure of the Draft Norms Process Revisited

¹³⁸Charles R.T. O'Kelley, 'Coase, Knight and the Nexus-of-Contracts Theory of the Firm' (2012) Seattle University Law Review 35: 1247, 1249 [Hereafter, O'Kelley (2012)]. See also Thomas W. Joo, 'Contract, Property and the Role of the Metaphor in Corporations Law' (2002) 35 UC Davis Law Review 779. The nexus-of-contracts theory was first established by Charles Jensen & William H. Meckling in C. Jensen & William H. Meckling, 'Theory of the Firm: Managerial Behaviour, Agency Costs and Ownership Structure' (1976) 3 Journal of Finance and Economics 310. Jensen & Meckling relied on the work of Ronald Coase in determining this view.

¹³⁹Jensen & Meckling (1976), 311, as quoted in O'Kelley (2012), 1249.

¹⁴⁰See for example, UNCHR, E/CN.4/Sub.2/NGO 11 (19/07/2002); E/CN.4/Sub.2/NGO12(5/07/2002), 4.

¹⁴¹ICC/IOE (2004), 40.

The Norms were tabled by the CHR during its 2004 session. As Karin Buhmann notes, after various lobbying efforts by business organizations, including the ICC/IOE, as well as various civil society organizations in favour of the Norms, the CHR determined not to proceed to adopting the Norms at its session in 2004. Testifying to the level of disagreement on both the need for, and form of the international regulation of business within the CHR, the final paragraph of the CHR's 2004 resolution stated that the Draft Norms 'had not been requested by the Commission' and that 'as a draft proposal, [the document] has no legal standing'.

In the following year, as it called for the appointment of an SRSG to reconsider this issue, the CHR determined not to mention explicitly the Norms at all. The only remnants of the critical approach that remained on the agenda were that the terms 'sphere of influence' and 'complicity' would need to be revisited by the SRSG who ultimately took over this mandate.¹⁴²

The problems experienced in attempting to agree the Norms have often been framed in terms of the incoherence of the instrument itself; its logical inconsistency when framed as a matter of extant international law; and its incompatibility with corporations' needs and interests -- the latter of which, as the primary subjects of the instrument, should have been included as part of the drafting process at a much earlier stage. I have argued instead, that the problems were at once more fundamental and less clear cut than those conclusions would suggest.

First, the Norms exhibited fundamental disagreement as to the logic of 'coherence', and whether this should be evidenced in rational, scientific terms or as a manifesto exhibiting the dense inter-textuality of human rights, imagining human rights futures that departed from the ongoing state-centeredness of rights themselves. The Norms process failed on this score not because the Norms departed from state-centeredness but because they did so in the 'wrong' way. Rather than promising to facilitate free trade and the pursuit of ongoing investment, the Norms attempted instead, to recognize a networked conception of corporate governance, which relied on a distinctively intuitive moral anthropology that sought to eradicate from that network all forms of human rights abuse.

Second, the Norms failed, not because of a fundamental disagreement as to how international law could be made. Rather, disagreement centered upon what

¹⁴²See also Stepan Wood, 'Four Varieties of Social Responsibility: Making Sense of the 'Sphere of Influence' and 'Leverage' Debate via the Case of ISO 26000' Osgoode/CLPE Comparative Law and Political Economy Research Paper No. 14/2011.

economic order international law should be used to support. In this respect, the battle of the pragmatisms – critical, CSR and economic – evidenced three different perspectives on that order, and on international law. International law was considered a language of resistance to the prevailing economic order (critical); a liberal pluralist order in which states determined how to intervene (CSR); and finally, a neoliberal order, in which human rights would remain subordinate to free trade and international investment (economic), and democracy would be utilized to maintain the distinction between the public world of states and the private world of capital and investors. In short, to safeguard the 'human right of capital flight'.¹⁴³

The Working Group had assumed that the Norms would form no more than soft law, and possibly become an authoritative standard. It was not its intention to bend extant international law to its will. Rather, what the Working Group intended was precisely what would later be achieved through the UNGP Framework, namely that the Norms would act as an authoritative statement of extant IHRL as it pertained to TNCs and other business enterprises. This might later form the basis for treaty negotiations on the place of responsible business conduct and human rights in the international legal order. The Norms failed, not because of their intention to create international law but rather because of their intention to leave the door open for the emergence of customary international law that might begin to reimagine the economic order anew.

Finally, that the ICC and IOE, as key representatives of business and employers, were not engaged at an earlier stage in the Norms process was not the result of the drafters' failure to invite them.¹⁴⁴ As has been documented by several commentators since, corporations were engaged in the Draft Norms process, even if the ICC and the IOE were not.¹⁴⁵ In this respect, the ICC claimed to have opted out of the process, on the grounds that the organization 'objects to the principles on which the Norms were based and their overall approach'.¹⁴⁶ Therefore, it 'did not consider it appropriate or useful' that the organization participate in the drafting process.¹⁴⁷ Yet upon closer reading of its final submission to the SCHR, the appropriateness and utility of the process could only ever be supported if it ensured that human rights served business' interests.

¹⁴³Slobodian (2018), 95.

¹⁴⁴David Chandler, 'Response to the Joint Views of the International Chamber of Commerce ('ICC') and the International Organization of Employers ('IOE') on the United Nations Human Rights Norms for Companies', (April 2004), available online at: www.bhrrc.org.

¹⁴⁵Ibid.

¹⁴⁶Buhmann (2017), 47.

¹⁴⁷Ibid.

4.5 The UN Global Compact

In Chapter 2, I noted that the UN Global Compact was being inaugurated at the same time as the Norms were debated at the SCHR. It was at the World Economic Forum in Davos in 1999 that Annan announced the idea of a global compact, appealing to business to take up the challenge of responding to the volatility and uncertainty caused by global markets:

Our challenge today is to devise a similar compact on the global scale, to underpin the new global economy. If we succeed in that, we would lay the foundation for an age of global prosperity, comparable to that enjoyed by the industrialized countries in the decades after the Second World War.¹⁴⁸

Annan's appeal came at a time during which foreign direct investment was reaching its zenith. Despite the failure of the MAI, the vast majority of IIAs that are now in operation were negotiated in the 1990s.¹⁴⁹ At the same time, the deleterious effects of (twentieth century) TNCs operating in the Third World were again, becoming apparent: Nike sweatshops in Indonesia;¹⁵⁰ Shell's alleged complicity in the murder of peaceful activists in Nigeria;¹⁵¹ and Unocal's involvement in forced labour, wrongful death and imprisonment in Burma were just a few of the emblematic cases reaching the United States' courts, where claimants would allege companies had violated international human rights norms.¹⁵² It would culminate in the 'Battle for Seattle' at the World Trade Organization's meetings in November of that year, where approximately 40,000 protestors would assemble to voice their dissent toward economic globalization and the impact of corporations on job security, income equality and the chance of a better life for employees in both the developing and developed world.¹⁵³

¹⁴⁸Kofi Annan, Office of the Secretary-General, United Nations, Press Release SG/SM/6881, 'Secretary-General Proposes Global Compact on Human Rights, Labour and the Environment, in address to the World Economic Forum in Davos', 1 February 1999, available online at: <http://www.un.org/press/en/1999/19990201.sgsm6881.html>

¹⁴⁹For an overview of BITs, see W.M. Reisman and R.D. Sloane, 'Indirect Expropriation and its Valuation in the BIT Generation', 74 BYIL (2004) 115.

¹⁵⁰*Kasky v. Nike*, 27 Cal. 4th 939 (2002), cert. granted, 123 S. Ct. 817, and cert. dismissed, 123 S. Ct. 2254 (2003).

¹⁵¹*Doe v Unocal* 395 F.3d 932 (9th Cir. 2002).

¹⁵²*Kiobel v Royal Dutch Petroleum Co.*, 133 S.Ct. 1659.

¹⁵³Jackie Smith 'Globalizing Resistance: The Battle of Seattle and the Future of Social Movements' (2001) 6(1) Mobilization: An International Quarterly 1.

The UNGC created voluntary partnerships with organisations that were willing to support broader UN goals, and 'to bind their strategic and operative business activities to ten principles. The ten principles covered the areas of human rights, labour, environment, and the fight against corruption'.¹⁵⁴ Together with Annan, John Ruggie championed the UNGC as responding to 'the perils of globalization'. The ICC was supportive and in favour of the UNGC: as Dominic Kelly has documented, the ICC funded early meetings for the UNGC and continued to maintain allegiance to Annan's initiative. The UNGC was developed over an 18-month period through a process with Chief Executive Officers at companies recognised as being 'CSR leaders'. At the same time, 'a limited number of NGOs' were involved and invited 'at certain times to the general process'. Participation in the process established by the UNGC is entirely voluntary (there are no enforcement or quasi-enforcement mechanisms) and companies evidence their commitment to the principles contained in the Compact through voluntary reporting.

Karin Buhmann has argued that the UNGC was an early precursor to a shift in global rulemaking that intends to ensure the business sector forms a part of norm formulation and 'a change of law from the inside'. According to Buhmann, the UNGC demonstrated that Jonathan Charney's earlier arguments regarding the need to include business in the development of international law had been affirmed (albeit in a new, global form). For Buhmann, unlike the Norms, the UNGC demonstrated that 'a careful *selection* of non-state actors' in determining the formulation of rules pertaining to business' social responsibilities 'may strengthen rather than weaken the legitimacy of the resulting output'.

Yet, despite invoking history, Buhmann's argument, like Charney's before it, is somewhat ahistorical. Quite aside from the deeper colonial links between joint stock companies and their role in expanding international law's empire, it fails to consider the longstanding relationship between business associations that already did exist at the UN and had been continuing since the end of WWII. Although Buhmann does acknowledge that the TNCs had been engaged in international processes, she argued that their formal inclusion would 'strengthen the system of international law by recognizing the increasing power of TNCs'.¹⁵⁵ In this respect, Buhmann notes the prevailing economic, legal and political order 'has changed vastly' since the 1980s, yet

¹⁵⁴Christian Voegtlin and N.M. Press, (2014) 'Global Governance: CSR and the Role of the UN Global Compact' *Journal of Business Ethics*, 122 pp. 179-191 at 181.

¹⁵⁵Buhmann (2017), 47.

she does not consider why merely advocating for compliance within that order might fail to respond to the very problems the UNGC aimed to address.

Unlike the Norms, the UNGC attempted to institutionalize regulatory practices within TNCs and other business enterprises that would enable respect for human rights to become part of the ordinary course of business. An alternative reading of the UNGC might have instead, found it lacking the potential for systemic change that human rights seek to bring about. If, instead of Jonathan Charney, she had relied on Mohamed Bedjaoui's reading of the economic, legal and political order at the end of the 1970s, her conclusions may have been very different:

The multinational firms can only be brought to reason by a thorough-going reform of that system, involving the institution of a new international economic order. Hitherto, all attempts to draw up an international code of behaviour or legislation have been converted into protective devices for transnational corporations which have, paradoxically enough, acquired in this way, a gloss of respectability...

Traditional international law has helped to make [Third World] independence a completely superficial phenomenon, beneath the surface of which old forms of domination survive and the economic empires of multinational corporations, and the powers that protect them, prosper.¹⁵⁶

As I have argued throughout this chapter, a transformation of rights occurred throughout the 1990s. The ongoing insistence of conceiving human rights as opportunity (as opposed to outcome) further enabled the *politics* of rights, emblematic of *the* public good, to be side-lined in favour of a technical, economic focus on rights that would come to see them as emblematic of *global* public goods. This was most clearly evidenced in the statements of the ICC during the Norms process, which showed that the question was, in business' view, no longer what business could do for human rights but rather, how human rights could be compatible with and facilitative of, the expansion of business. As will be shown in the Chapter which follows, once ensuring the ongoing primacy of the 'global economy' is at the heart of human rights, as the UNGC and the UNGP Framework intend to do, securing rights becomes wholly dependent on the dynamics of that economy. This has important consequences for what human rights is able to achieve and whose purposes it serves.

As Daniel Augenstein has observed, while this allows for ongoing recognition of the interdependencies of the production and consumption of public goods which have blurred the state-based distinction between 'domestic' and 'foreign' politics, it reduces

¹⁵⁶Mohamed Bedjaoui, *Towards a New International Economic Order* (UNESCO 1979) 39-40.

rights to the prevention of market failures.¹⁵⁷ Furthermore, it does not adequately provide for a process in which those most affected by such global assertions of state power can have a legitimate say in what constitutes the public good that is being protected at any given moment. It also further reduces human rights to transactional costs: the political valence of human rights is undermined by the assumption that dynamics of 'the economy' can settle any dispute regarding which rights should be protected, and for whose benefit, at any given time.

As such, although the UNGC was able to achieve 'legitimacy' in a manner that the Norms were not, that legitimacy came at a cost. As Koskeniemi observes, legitimacy is a mediate word, rhetorically successful only so long as it cannot be pinned down to either formal rules or moral principles.¹⁵⁸ In the case of the UNGC, legitimacy enabled rights to be stripped of their political power, and law to be conceived instead, as supporting the dynamics of a global economy whose politics was no longer questioned. The UNGC was about pedagogy and learning, not regulation. Yet it remained an early precursor for things to come.

Sundhya Pahuja has noted that in order for human rights to inhabit the space of politics, an aporia or gap must be left between human rights as symbol and (positive) human rights (law).¹⁵⁹ Yet as already noted in Chapter 2, closing governance gaps became the primary project of the UNGP Framework. Pahuja raises the concern that when rights become flattened or banalized in this way, the politics of comes out in different, more violent ways. The question then becomes, for what purpose and to what end does the UNGP Framework attempt to fill gaps? Does the project of closing governance gaps ensure that the rights of the most vulnerable are protected, or does it instead ensure protecting rights remains compatible, technical and manageable in a global economy? If so, whose rights are really being protected, and for what purpose? This thesis will return to these questions in the chapter which follows.

4.6 Conclusion to Chapter 4

In this Chapter, this thesis has argued that the story of embedded pragmatism was momentarily complicated during the Norms process, while civil society actors attempted a revolutionary move through their formulation of the Norms. The argument

¹⁵⁷Augenstein (2016), 5-6.

¹⁵⁸Martti Koskeniemi, 'Miserable Comforters: International Relations as New Natural Law' (2009) 15(3) *European Journal of International Relations* 395, 409.

¹⁵⁹Pahuja (2006), 190-1.

of Chapter 4 has been that the Norms were a bottom-up process led by civil society and academics who broadly fell into three camps.

The first camp attempted to inscribe onto TNCs responsibilities for human rights that would require them to take seriously the need to remedy human rights abuses, wherever and whenever they occurred. This camp used modes of reasoning that would allow for contestation, conflict and counter-movements to *persist* in their advocacy against the deleterious effects of the TNC in the neoliberal economic order. Critical pragmatists, as I have termed them, attempted to re-historicize the debate about TNCs and radicalize the manner in which TNCs were viewed. They did so by reasoning that the TNC was a *real* entity, whose powers needed to be curtailed and whose ability to cause human suffering should be seriously confronted. While they maintained a pragmatic focus on attempting to achieve the art of the possible, possibilities were anchored in the experience of social movements. This included those seeking to maintain the sanctity of the Earth; peoples' tribunals proceedings attempting to bring justice to exploited labourers; and the concerns of those who refused to assume the primacy of the scientific paradigm in understanding both human abuse and human rights abuse.

Viewed from this perspective, the principled utopia to which the Norms aspired would allow for contestation, critique and liability to open up by creating a standard of conduct that resistance movements and human rights advocates could utilize in support of their struggles. Human rights, in this reading, belonged to the disenfranchised, the poor, the illiterate. It was a call to action against a mainstream human rights discourse and its reproduction of state structures which failed to recognize a claim for liberty that was not cognizable within the apparatus of modernity.¹⁶⁰

The second camp instead, adopted what I have argued is a CSR approach that attempted to ensure that corporate *social* responsibilities existed alongside the corporation's legal responsibilities, as determined by each state and as part of the international order. This reading of the Draft Norms prioritised designating social responsibilities to TNCs alongside existing legal responsibilities. As such, human rights responsibilities became an extension of CSR. This view largely maintained the idea of the embedded pragmatism as evidenced by representatives of several states during the UNCTNC process. According to this view, agreement on the conduct of TNCs throughout the Code of Conduct process allowed for the rights exercised by those

¹⁶⁰Rajagopal (2003), 193.

engaged in the ownership and control of foreign direct investment to remain subordinate to the 'legitimate social purpose' of that investment as determined by states.

Yet ultimately, both of these views of the Norms were usurped by those in support of economic pragmatism. As I have argued in this Chapter, the problems experienced in attempting to agree the Norms have often been framed in terms of the incoherence of the instrument itself; its logical inconsistency in light of extant international law; and its incompatibility with corporations' needs and interests, which as the primary subjects of the instrument, should have been included as part of the drafting process at a much earlier stage. While these criticisms may be accurate, I have argued instead that a focus on the struggle to create the Draft Norms reframes the terms of this debate not as one about incoherence, illogicality, or a failure to engage. Instead, their failure is the result of far more fundamental disagreements as to the meaning and purpose of IHRL at the turn of the new Millennium and the extent to which the extant international economic order should define that meaning and purpose.

The failure of the Norms process provides as much an explanation as to the limitations of the UNGP Framework as it does its success. The Norms questioned the relationality and systematicity of privilege and deprivation that global corporate and financial transactions maintain and perpetuate: the UNGP Framework does not.¹⁶¹ Rather than challenging neoliberalism, the UNGP Framework attempts to bring a 'human face to the global market'. Where the Norms called for a radical re-thinking of the role of the corporation in societies, the UNGPs called for the filling of governance 'gaps' in a manner that is deeply ahistorical and fails to consider the central role extant international law has played in filling those gaps in favour of capitalist states in the past.

What then, does it mean if rights are utilized as a form of regulation, in the manner the UNGP Framework suggests? Does this give human rights the regulatory power to *re-embed* the global economy into political communities that remain distinct from it, through the emergence of a GPD? Will human rights act as a countermovement or precipitate a double movement in which companies' adherence to IHRL slows down the rate of change in the global economy, in order to ensure the prevention of human rights violations? Or, will rights as regulation provide corporations with the capacity to

¹⁶¹See in particular Susan Marks, 'Human Rights and Root Causes' (2011) 74(1) *Modern Law Review* 57.

accelerate their accumulation of wealth and resources by providing ongoing justification the creation of a 'market-friendly' environment for development? And what might the role of the business and human rights lawyer be, in this environment? These questions are taken up next in the next chapter.

Chapter 5 – After the End of the Beginning: Embedded Pragmatism and the Prospects and Perils of Polycentric Governance

‘We still live in a world where the colour of our skin not only gives a first impression, but a lasting one, that remains.’

- Angélica Dass, Humanae Project (28 March, 2016)¹

5.1 In Search of Ends: The Promise of Polycentric Governance

As noted throughout this thesis, in the UNGP Framework, the descriptive move of embedded pragmatism is to collapse the distinction between legal (mandatory/state-regulated) and non-legal (voluntary/self-regulating) obligations. The normative move is to claim that this is of benefit to those most vulnerable to human rights abuse and violations. In the last two chapters I mapped how attempts to create ‘binding’ law, whether as a precursor to custom or treaty or through the normative ambiguity of the Norms, were subsequently jettisoned in the UNGP Framework for an explicit conflation of the legal/non-legal dichotomy. Yet the thesis has also shown that attempts to create ‘new’ international law, aligned with the desire of Third World states or Fourth World social movements, were consistently rejected before the inauguration of the UNGP Framework. What then, does this conflation mean, and does it support those most vulnerable to corporate-related human rights abuse?

As David Kennedy has argued, the question of ‘legality’ has often enabled law’s role in distribution, inequality and conflict to remain unquestioned. If the question of legality is set aside, however, distribution, inequality and conflict can come to animate the debates regarding what law is doing and what it might yet still be able to do:

For the contemporary international lawyer, the problem of rules is not a problem. The legality of international law is not inherent in their norms but created in their use. As a result, everyone now speaks a loose jargon of principle and policy...Has international law devoured the political, or has politics turned international law into another language of interest? It remains impossible to tell.²

¹https://www.ted.com/speakers/angelica_dass [Accessed 4 May 2019].

²Kennedy (2016), 238.

In the BHR Field, the collapse in distinction between legal and non-legal obligations has to date, evidenced a consolidation in the relationship between business interests, development and human rights. The animating feature of this relationship remains the dominant reading of embedded pragmatism – now embodied in practices and modes of legal reasoning in a polycentric governance system.

Once inaugurated as a global practice through the UNGP Framework and in the BHR Field, embedded pragmatism shifts the burden of determining ‘shared social value’ from institutions to persons (both natural and legal) in transactions within the global economic order, which is now no longer conceived as regulated by an international system of states but instead, through a transactional global supply chain. As will be argued in this Chapter, this shift in focus creates an orchestration deficit, in which attempts to claim the human rights of those most vulnerable to abuse are no longer viewed as part of an established system of territorially-bound states but instead, manifest in a newly constructed GPD.³ To date, this deficit allows for the ongoing construction of the GPD largely favouring the short-term interests of TNCs and other business enterprises and the long-term interests of the existing economic order. To date however, the GPD remains undertheorized. Hence, the features of the GPD can still be imagined differently.

In this final Chapter, the thesis explores the emergence of the BHR Field, its overarching contours, and ongoing attempts to institutionalise embedded pragmatism through polycentric governance. It then asks whether the new market for virtue generated by the BHR Field evidences a form of ‘trade-related, market-friendly, human rights’ emerging to which human rights become relegated to risk assessment exercises.⁴ In the next, and concluding chapter, it will discuss what the ramifications of this might be for lawyers, who remain conscious of law’s express and implied role in legitimating inequality, in the twenty-first century.

5.2 The BHR Field as a Polycentric Governance System

5.2.1 Field Constitution – Part I: The Global Public Domain

The UNGP Framework received the unanimous endorsement of states at the CHR, on the grounds that ‘a common global platform for action’ had been constructed.⁵ For

³Ruggie (2008), 233.

⁴Baxi (2008), 412.

⁵Chapter 2, footnote 1.

Ruggie, the idea of a global platform brought with it the corresponding ideation of a system of polycentric governance. In Ruggie's characterization, polycentric governance maintains the public/private distinction but assumes this distinction can be collapsed through the establishment of the GPD. The GPD comprises an arena of discourse, contestation and action organised around global rule-making – a transnational space which permits the direct expression and pursuit of human interests, not merely those mediated by the state. Nevertheless, the state is still given a certain primacy within this domain. The GPD 'cannot substitute for effective action by the state but may help to produce it'.⁶ In this respect, the GPD is conceived as coming into being through the establishment of transnational governance networks.

Human rights NGOs and scholars initially opposed Ruggie's characterization of the UNGP Framework, on the grounds that it failed to understand a human rights approach to social change. Several vocal critics initially saw the UNGP Framework as a step backward for human rights, in large part because it appeared to rely predominantly on corporate good will to secure human rights for those most vulnerable to corporate human rights abuse.⁷ Tara Melish convincingly argues that this contestation is about two distinct theories of social change and the 'respective toolsets' required to advance them.⁸

According to Melish, polycentric governance is informed by social theories in which transnational governance actors in global society act in certain ways because they are socialized into certain behavioural patterns. The most effective way, then, to alter 'bad' behavioural patterns is to influence the shared cultural systems through which appropriate conduct is normatively defined in a given community.⁹ Melish asserts that this remains, essentially, a top-down process, which assumes elite engagement with human rights will result in normative buy-in over time. Once a

⁶John Ruggie, 'Reconstituting the Global Public Domain' (2004) 10(4) *European Journal of International Relations* 499, 506. Compare however: Ruggie (2014), 5-17. (The latter references the work of Abbott & Snidal in addition to the GPD, at footnote 11).

⁷See: FIDH et al, 'Joint Civil Society Statement on the Draft Guiding Principles on Business and Human Rights (3/3/2011); Christopher Albin-Lackey, Human Rights Watch 'Without Rules: A Failed Approach to Corporate Accountability' in *Human Rights Watch: 2013 World Report* (Human Rights Watch, New York); Surya Deva, 'Treating Human Rights Lightly: A Critique of the Consensus Rhetoric and the Language Employed by the UN Guiding Principles' in Deva/Bilchitz (2013) ['Deva (2013)']; and David Bilchitz, 'A Chasm Between Is and Ought? A Critique of the Normative Foundations of the SRSG's Framework and the Guiding Principles' in Deva/Bilchitz (2013) ['Bilchitz (2013)'].

⁸Tara J. Melish, 'Putting Human Rights Back into the UN Guiding Principles on Business and Human Rights: Shifting Frames and Embedding Participation Rights' in Rodriguez-Garavito (2017), 76 [Melish (2017)].

⁹*Ibid.*

tipping point is reached, conduct that was previously considered acceptable is then recast as harmful.¹⁰

For Melish, this characterisation is problematic. It fails to understand that genuine social transformation can only occur when affected individuals or communities themselves are given agency and voice to engage in decision-making processes that affect their lives. Like several international law theorists, Melish remains sceptical of the legitimacy-enhancing endeavour of regime-creation that embedded pragmatism seeks to bring about: for Melish, this brings with it the likelihood that voice and agency for those who most need it will become subsumed by powerful interests.

Several other BHR scholars similarly maintain the primacy of a bottom-up approach to the BHR Field. They argue that the problem with conceptualizing a polycentric governance system this way is that it fails to determine how this coordination can take into account the power disparities between transnational actors.¹¹ In this respect, the inability to obtain accurate knowledge on an identified human rights abuse and the possibility that the conduct of human rights due diligence ('HRDD') and reporting may have the potential to do more harm than good appears to be absent from Ruggie's characterization. Similarly, ensuring that rightsholders themselves are able to determine which rights to prioritise, and for what purpose, remains precariously absent from the UNGP Framework. This has been scholars' key criticism of the Framework's 'Access to Remedy' Pillar: although implicitly assuming that victims would be engaged in justice process, Pillar III largely provides for an anodyne set of prescriptions to enable states and business enterprises to institutionalize process, but it does little to guarantee outcomes. Chris Jochnick frames this as the distinction between the 'Human Rights' approach, which formally recognizes power asymmetry but remains ambivalent to it, and a 'human rights' approach, which believes that human rights are not compatible with these asymmetries.¹²

I would further add that embedded pragmatism risks compounding this asymmetry by creating markets through which those institutionalizing the Human Rights approach risk diluting human rights even further, by making them evermore

¹⁰Ibid.

¹¹See for example Deva (2013); Bilchitz (2013). See also Chris Jochnick, 'Shifting Power on Business and Human Rights: States, Corporations and Civil Society in Global Governance' in Rodriguez-Garavito (2017), 129 ['Jochnick (2017)']. More generally, see Tony Evans, 'Human Rights as Power/Knowledge' (2005) *Human Rights Quarterly* 27; Caroline Bettinger-Lopez et al 'Redefining Human Rights Lawyering Through the Lens of Critical Theory: Lessons for Pedagogy and Practice' (2011) *Georgetown Journal on Poverty Law and Policy* 18.

¹²Jochnick (2017), 132.

palatable and consumer-oriented. This is because the manner in which the UNGP Framework is administered determines that Human Rights can only ever be determined with reference to the 'art of the possible', and what remains possible to imagine is largely determined with reference to the *existing* economic order. In the case of HRDD, due diligence processes are then crafted in keeping with what the TNC or other business enterprise considers is a human rights harm. Hence, even if the goal is to shift normative behaviours amongst elites, that shift will only ever accord with the short-term interests of those elites, or the long-term interests of the capitalist system. This is because the conservatism of embedded pragmatism precludes Human Rights from being re-historicized and re-contextualized in a manner that remains mindful of legacies of past abuse and failure.

In many respects, the GPD and the polycentric governance system it inaugurates accords with the ideational links made by global administrative law ('GAL') scholars regarding the proliferation of law and legal forms.¹³ Many GAL scholars identify an emerging web of global norms designed to protect the rights and interests of a vast array of persons (both natural and legal).¹⁴ For GAL scholars, international organizations and other global administrative bodies now complement the state as a centre of regulatory authority, creating a web of international, regional, municipal, transnational, and soft, law which needs to be conceived as a whole.¹⁵ What is required is for jurists to identify the maladies and risks of global governance that emerge when powerful countries escape domestic structural checks and balances that have played an important role in safeguarding democratic deliberation and human rights within states – often referred to as a democracy deficit or in the need to re-frame deliberative democracy.¹⁶ As Eyal Benvenisti has noted, 'many [international organizations] function to increase the executive power of powerful States and increase the leverage of multinational corporations.'¹⁷

¹³See for example Eyal Benvenisti, *The Law of Global Governance* (Hague Academy of International Law, 2014) ['Benvenisti (2014)']. See also Sabino Cassese *Research Handbook on Global Administrative Law* (Edward Elgar 2016); Benedict Kingsbury, Megan Donaldson and Rodrigo Vallejo, 'Global Administrative Law and Deliberative Democracy' in Anne Orford and Florian Hoffman (eds) *Oxford Handbook of Legal Theory* (OUP, 2015) ['Kingsbury et al (2015)']; Benedict Kingsbury, 'The Concept of Law in Global Administrative Law (2009) 20 European Journal of International Law 23; Liam Murphy *What Makes Law: An Introduction to the Philosophy of Law* (CUP 2014).

¹⁴Benvenisti (2014); See also B.S. Chimni, 'Co-option and Resistance: Two Faces of Global Administrative Law' (2004) 37 NYU Journal of Law and Policy 799.

¹⁵Benvenisti (2014), 5.

¹⁶Kingsbury et al (2015), 5.

¹⁷Benvenisti (2014), 5.

Yet unlike GAL scholars, Ruggie and his contemporaries have seemed, to date, more concerned to support business interests rather than to challenge them.¹⁸ On the surface, this appears to be a distinction between international law and international relations: On the one hand, scholars in politics and business management argue that creating and maintaining normative structures, regimes and regulatory techniques which enable change, based on the assumption that all change embedded in shared social values as embodied in human rights will ultimately lead to change for the better. Jurists and business ethicists on the other hand, are concerned with how those structures function to ensure just and moral outcomes. Yet the split is not so easily maintained: if the intention is to create a polycentric governance system that operates to 'create change where it matters most – in the daily lives of people', then a focus on ends becomes just as important as creating the means to deliver them.¹⁹

5.2.2 Field Constitution – Part II: A Preliminary Cartography

Human Rights as Global Public Goods

As discussed in Chapter 4, during the 1990s, a shift occurred through which human rights and development became deeply implicated in one another, and a right to development was seemingly jettisoned once and for all in favour of a more palatable 'market-friendly' approach to human rights. In the early part of the new millennium, attempts were made to consolidate this link further, through the characterization of human rights as a global public good. In this regard, in the early part of the new millennium respect for human rights became intertwined with global public goods ('GPGs') and formed part of an institutional strategy, at the UN Development Program ('UNDP'), to combat contemporary problems facing states, both individually and collectively.²⁰

The definition of GPG – as being 'as goods with benefits to all countries, people and generations'²¹ – seems intuitively to include respect for human rights: the inherent

¹⁸See in particular, Buhmann (2017).

¹⁹Ruggie (2013), xlii.

²⁰See Augenstein (2016). See also Inge Kaul, Pedro Conceição, Katell Le Goulven and Ronald U. Mendoza, *Providing Global Public Goods: Managing Globalization* (OUP 2003) ['Kaul/Mendoza (2003)'].

²¹Kaul/Mendoza (2003). See also the more recent definition utilized by Kaul and Blondin as being goods whose benefits or costs have nearly universal reach or affecting anyone, anywhere. In Inge Kaul and Ronald Blondin, 'Global Public Goods and the United Nations', in Jose Antonio Ocampo, *Global Governance and Development* (Oxford University Press, 2016).

and indivisible qualities attributed to human rights are seen to make them of common interest to humanity. Yet this definition differs in several respects from the standard definition of public goods, in that a normative determination -- about what *should* be considered non-exclusive and non-rivalrous -- comes to form part of the definition of the good itself. In this respect, global public *goods* (including respect for human rights, financial stability and free trade) can be contrasted with global public *bads* (such as terrorism financing, climate change and the spread of communicable diseases). The former is considered ends that states want to achieve, the latter those ends that they wish to prevent. This is so, despite consent for these outcomes often being absent. Rather than achieving consensus through multilateral agreement or construing it through customary practice, determining which GPGs to prioritise most often bypasses law and is determined through non-consensual regulatory mechanisms, including international organizations representing 'club' groups of nations.²²

To take the example of clean air, a standard economic definition of clean air as a public good would state that this good is non-excludable, because its benefits cannot be confined to any single consumer, and non-rivalrous, because its consumption by one consumer does not exclude consumption by others.²³ This, however, presupposes a *pre*-political decision by the state to ensure clean air for all its citizens. Public goods therefore very quickly become an ideal type. When one considers a state determining whether or not a waste management facility should be allowed to pollute the air to the detriment of a residential community, for instance, it is not immediately apparent that the state will intervene to prevent market failure when clean air is no longer being provided.

For theorists of global public goods, inclusion of this normative element is a necessary requirement, because the classic definition of public goods fails to take into account that what is 'public' and what is 'private' are socially constructed and hence, subject to change over time.²⁴ In this respect, private goods are similarly only private based on societal choices to make them so: land, for example, is generally considered a private good in many municipal legal systems, the rights to which are enforceable

²²See Nico Krisch 'The Decay of Consent: International Law in an Age of Global Public Goods' (2014) *American Journal of International Law* 108(1), 1. See also Lauren R. Helfer 'Non-Consensual International Lawmaking' (2008) *University of Illinois Law Review* 71; Andrew T. Guzman (2012) 'Against Consent' 52 *Vanderbilt Journal of International Law* 747.

²³For further elaboration on the standard definition of public goods and its applicability to the global context, see Fabrizio Cafaggi and David D. Caron 'Global Public Goods Amidst a Plurality of Legal Orders: A Symposium' (2012) 23(3) *European Journal of International Law* 643 and related papers in that volume.

²⁴Kaul/Mendoza (2003), 81.

through sophisticated property rights regimes. Yet the same is not true for many indigenous communities, where land is communally owned and shared amongst multiple groups.²⁵

By extension, a 'global public good' relies upon socially constructed agreement of which goods should be considered of benefit to all countries, peoples and generations. In this regard, 'respect for human rights' cannot be seen as a pure public good, because although they are non-rivalrous and non-excludable in the abstract, human rights are politically contentious hence making their distribution subject to political opposition. As a result, Kaul et al argue that rights are sometimes treated as exclusive (and rivalrous) seeing as they are withheld from all or some population groups.²⁶ This makes it an example of a global public good for which Kaul et al argue there is growing policy attention is seen by some as evidence of an attempt to make the good less exclusive (or: *approaching* non-exclusivity) so that all people benefit from the good equally.²⁷ Yet despite this policy attention, determining how the costs of these distributional consequences should be allocated, and by whom, remains highly contested.

Corporate Respect for Human Rights as a Global Public Good

As noted throughout this thesis, the burden falling on TNCs and other business to respect human rights in the UNGP Framework was conceived as being a response to 'governance gaps' that emerged from 'real-time' transactions between corporate entities within global markets.²⁸ As such, ensuring the optimal efficiency of these markets (and by extension, preventing market failures to provide global public goods) was seen as a partial justification for the need for the UNGP Framework:

[M]arkets work optimally only if they are embedded within rules, customs and institutions. Markets themselves require these to survive and thrive, while society needs them to manage the adverse effects of market dynamics and produce the public goods that markets undersupply.²⁹

Here, public goods are understood in the economic sense of the term as noted above. In responding to the undersupply of global public goods, the UNGP Framework

²⁵Kaul/Mendoza (2003) at 85.

²⁶Kaul and Mendoza, 2003, footnote 9, at 106.

²⁷Kaul and Mendoza, 2003, at 81-87.

²⁸UNHRC, A/HRC/8/5

²⁹UNHRC, A/HRC/8/5, 3¶2.

reallocates their supply between states, TNCs and other business enterprises through the GPD. To date, this reallocation has taken the form of institutionalizing and juridifying the BHR Field in a manner that accords with the reallocation of corporate respect for human rights as set out in the UNGP Framework. In this regard, since cost allocation is increasingly framed in relation to a business enterprises' contractual obligations (i.e. its responsibilities to contractors in its global supply chain), parties can then determine, on a case by case basis, who is responsible for respecting human rights, in what manner and for what ends. As at the time of writing, in the GPD, respect for human rights is largely being allocated to TNCs and other business enterprises through the creation of obligations for these entities to conduct human rights due diligence in accordance with Pillar 2 of the UNGP Framework. In this respect, this thesis agrees with Jonathan Bonnitcha and Robert McCorquodale that human rights due diligence is at the heart of the UNGP Framework.³⁰ I would only further add that it currently maintains the pulse of the BHR Field.

Institutionalization of the BHR Field

'Institutionalization' refers to the ongoing act of creating and maintaining a monopoly on the expertise required by those that inhabit a field. Yet in Bourdieu's terms, it should not be determined with reference an idealized representation of a formalized group: rather, group formation is processual and takes place over time.³¹ In the aftermath of the UNGP Framework, institutionalization has primarily occurred at the international level through the HRC's establishment of a UN Working Group for Business and Human Rights (the 'BHR Working Group') and a Forum on Business and Human Rights which takes place annually in Geneva.³²

The primary function of the BHR Working Group is 'to promote the effective and comprehensive dissemination and implementation of the [UN] Guiding Principles' both at the inter- and intra-agency level (within the UN and other international organizations) as well as with Member States of the UN'.³³ Outside of the Office of the UN High Commissioner for Human Rights ('OHCHR'), perhaps the most significant development in this regard has been the OECD's inclusion, in its 2011 *Guidelines for*

³⁰Bonnitcha/McCorquodale (2017), 900.

³¹Bourdieu (1987); See also Yves Dezalay and Mikael Rask Madsen, 'The Force of Law and Lawyers: Pierre Bourdieu and the Reflexive Sociology of Law' (2012) 8 Annual Review of Law & Social Science 433, 442.

³²HRC, A/HRC/17/2 (2011) Res. 17/4, ¶6(a).

³³Ibid.

Multinational Enterprises provisions directly referencing the UNGP Framework.³⁴ This has enabled claimants to allege violations of human rights and corporate human rights abuse through the OECD's national contact point system that attempts to mediate disputes between MNEs and claimant communities in the countries in which OECD MNEs operate.³⁵

The BHR Forum, chaired by the BHR Working Group, supports the latter's efforts to 'discuss trends and challenges in the implementation of the UNGPs and promote dialogue and cooperation on issues linked to business and human rights'.³⁶ Since 2011, the BHR Working Group has met in 17 sessions and undertaken 7 country visits; issued 30 reports to the HRC and 8 reports to the UN General Assembly; and engaged in a plethora of multi-stakeholder initiatives with thematic focus on a variety of areas, including the effect of agro-industrial operations on indigenous communities; gender and human rights; international investment agreements and human rights, to name a few.³⁷

This institutionalization is further supported by the proliferation of guidance and regulatory instruments established to consolidate the work of the BHR Working Group.³⁸ Reference to the UNGP Framework has been included in a number of soft law and standard-setting instruments, including the International Labour Organization's Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy,³⁹ the OECD Guidelines⁴⁰ and the International Standards Organization's Social

³⁴See Chapter 2, footnote 162.

³⁵See Damiano Felice and Andreas Graf 'The Potential of National Action Plans to Implement Human Rights Norms: An Early Assessment with Respect to the UN Guiding Principles on Business and Human Rights (2015) 7(1) Journal of Human Rights Practice 40.

³⁶HRC A/HRC/17/2 (2011) Res. 17/4, ¶12.

³⁷See for example: UNGA A/73/163 (16/07/2018) and annual reports from the BHR Forum submitted to the United Nations General Assembly, available online at www.ohchr.org/EN/Issues/Business/Forum/Pages/2017ForumBHR.aspx. Documents pertaining to BHR Forum activities are available on this webpage (program of events, agendas, concept notes, etc).

³⁸See UNCHR A/HRC/Res/21/5 (16/10/ 2012); Note also OHCHR guidance as produced and available at: <https://www.ohchr.org/EN/Issues/Business/Pages/BusinessIndex.aspx> [Accessed 4/5/2019].

³⁹ILO, Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (March 2017), at ¶10(a). The Declaration was Adopted by the Governing Body of the ILO at its 204th Session (Geneva, November 1977) and amended at its 279th (November 2000), 295th (March 2006) and 329th (March 2017) Sessions. Reference to the UNGP Framework was incorporated during its 329th session.

⁴⁰See Chapter 2, at 2.7.3. Note also the production by the OECD of HRDD guidance: 'OECD Due Diligence Guidance for Responsible Conduct' (Paris 2018), incorporating the UNGP Framework.

Responsibility Guidance Standard.⁴¹ Additionally, the ICC has maintained ongoing, strong engagement with the UNGP Framework. It has continued to support its use by business, has publicly acknowledged the 'distinct and very different responsibilities' which have been 'made clear by the SRSG John Ruggie' and the maintained the need for business to address governance gaps in their respect for human rights.⁴²

Jurists (broadly defined) establish the ongoing parameters of technical competence and mastery that the BHR Field itself then inaugurates as pertaining to 'business and human rights'. This has primarily been evidenced at the international level through publications of reports to the UNGA, the HRC and OHCHR, which remain the primary administrators of the Field as a whole. The latter acts to produce guidance, tools, reports and ongoing submissions (to the UNGA) detailing emerging practice in the BHR Field. These instruments have continued to maintain the structural delineation of the UNGP Framework – protect, respect, remedy – which continues to act as the foundational blueprint for the emerging BHR Field. The OHCHR's recent Accountability and Remedy Project is a recent example of this. Guidance has been produced to further clarify the third pillar of the UNGP Framework and is in keeping with an ongoing attempt to pursue a mediated law-making role.⁴³

At the municipal level, states have adopted national action plans ('NAPs'). As at the date of writing, based on publicly available information provided by the OHCHR, twenty-one states have published NAPs which are submitted to the BHR Working Group. The vast majority of these NAPs have been submitted from European Union countries (sixteen in total). The remaining five countries include two other European countries – Norway and Switzerland – and the addition of Colombia, the U.S. and Chile.⁴⁴ NAPs evidence states' attempts at ensuring policy coherence with regard to their human rights obligations.⁴⁵

Additionally, a plethora of public-private partnerships, multi-stakeholder initiatives, and academic and civil society networks now claim to contribute, and be a part of, the BHR Field. A key interlocutor of this broader juristic network is the Business

⁴¹ISO 26000 *Guidance on Social Responsibility* (26 November 2010). The Guidance includes a chapter on human rights which has been fully aligned with the UNGP Framework. See Ruggie (2014), 11.

⁴²ICC Policy Statement 'ICC's Views on Business and Human Rights', 1, available online at: <https://iccwbo.org/publication/icc-views-on-business-and-human-rights/>.

⁴³Ibid.

⁴⁴See: <https://globalnaps.org> (Danish Institute for Human Rights, 2019) [Accessed 4 May 2019].

⁴⁵See Daniel Augenstein, Mark Dawson, Pierre Thielbörger, 'The UNGPs in the European Union: The Open Coordination of Business and Human Rights' (2018) 3(1) Business and Human Rights Journal (examining the implementation of NAPs in the EU) 1.

and Human Rights Resource Centre ('BHRRC') – a not-for-profit that existed prior to the UNGP Framework but has since become a key facilitator of the acquisition of knowledge of the Field. Originally established as a platform to mediate between individuals and communities' complaints, on the one hand, and companies alleged to have committed corporate human rights abuse, on the other, the BHRRC facilitates information about ongoing conflicts between companies and communities and their resolution through a plethora of mechanisms. It primarily acts as an interlocutor between expert knowledge constituted in the BHR Field's field of origin (almost exclusively, though not entirely, in the Global North – and primarily centred in Geneva and New York) and 'indigenous', 'local' or 'non-expert' knowledge that is, more often than not, obtained from its field of reception (almost exclusively, though not entirely, in the 'Global South').⁴⁶

Juridification of the BHR Field

At the same time, the BHR Field has begun to experience a juridification process, whereby courts and legislators (and the national level) and norm entrepreneurs (at the transnational and international level) create instruments and hand down judgments which jurists from the BHR Field claim as evidence of the need for their expertise. Again, this process remains reflexive and unstructured: what constitutes a BHR case is itself, determined on a case-by-case basis.

To date, juridification at the national level has primarily comprised states enacting legislation to give effect to human rights due diligence processes for companies of a certain size which operate in their jurisdictions. Additionally, cases pertaining to transnational tort litigation involving TNCs are now often considered by BHR jurists as being 'business and human rights' cases. Juridification at the transnational and international level has, to date, primarily been evidenced through the OECD national contact points (NCP) system, through which national contact points in OECD member and adhering countries handle grievances against OECD companies who have failed to meet the standards of the OECD Guidelines.⁴⁷

At the national level, legislation has been passed, largely increasing companies' due diligence and reporting obligations. Legislation in the UK, France, the United States and Australia has primarily centred on increasing transparency in company reporting

⁴⁶See: www.bhrrc.org [Accessed 4 May 2019].

⁴⁷See OECD Guidelines, Part II (1) 'National Contact Points', 68.

on certain aspects of the conduct of business in their supply chains. In the UK, the 2006 Companies Act was amended in 2016⁴⁸ to incorporate the provisions of the EU Non-Financial Reporting Directive (2014) (the 'Directive').⁴⁹ The primary architect of the Directive was UK Member of the European Parliament, Richard Howitt, who was strongly supportive of the UNGP Framework. The Directive applies to large public interest companies (including banks and insurance companies) with over 500 employees. It requires disclosure of information relating to human rights 'to the extent necessary for an understanding of the undertaking's development, performance, position and impact of its activity'.⁵⁰ Disclosure should include the company's policy and its outcomes, due diligence processes, principal risks and business relationships, products or services likely to cause adverse impacts, along with information about how those risks are managed.⁵¹

Both the 2016 amendment to the Companies Act and the Modern Slavery Act (2015) evidence regulatory reporting requirements expanding to take into account human rights issues and to strengthen company reporting on these issues.⁵² In the case of the Modern Slavery Act, companies with an annual turnover of GBP36 million are asked to publish an annual 'slavery and human trafficking statement' to disclose the steps the company has taken during that year to ensure that slavery and human trafficking is not taking place in any of its supply chains or in any part of its own business. Statements should be published (i.e. made publicly available) and approved at board level (or its equivalent).⁵³ The Act applies if a company is carrying on business, or a part of a business, in any part of the UK. The requirements are not, however, mandatory: the law utilizes a 'comply or explain principle', where a company can state that it has not taken any steps and refrain from issuing a statement should it determine it wishes to do so.⁵⁴

France's Law on the Duty of Vigilance remains the only legislation to date to institute a blanket requirement upon companies of a certain size to conduct due

⁴⁸Companies Act (2006) c46, as amended by Regulation 2016 No.1425 The Companies, Partnerships and Groups (Accounts and Non-Financial Reporting) Regulations 2016 (19 December 2016, entry into force 26 December 2016).['CAA 2016'].

⁴⁹Directive No 2014/95/EU (European Parliament & Council), amending 2013/34/EU as regards to Non-Financial Reporting and Diversity of Information by Certain Large Undertakings and Groups (22 October 2014) ['EUD 2014'].

⁵⁰Ibid. at Article 19(a)('Non-Financial Statement').

⁵¹Ibid.

⁵²Modern Slavery Act (2015), Ch 30, s.54.

⁵³Ibid., ss.54(4), 54(5) and 54(6).

⁵⁴Ibid.

diligence (or: due vigilance, as it is described in French).⁵⁵ The Law on the Duty of Vigilance, which was enacted in March 2017, requires French companies that employ in excess of 5,000 employees in France (or 10,000 employees in France and abroad) to 'develop, publish and effectively implement a 'vigilance plan' or 'duty of care plan' that includes 'reasonable measures to allow for risk identification and for the prevention of severe violations of human rights and fundamental freedoms'.⁵⁶ Parliamentary debates prior to the law's adoption evidence the fact that France is attempting to institutionalise human rights due diligence as contained in the UNGP Framework.⁵⁷

Similarly, in the United States and Australia, laws passed since 2010 have sought to increase the disclosure requirements of companies regarding their global supply chains. §1502 of the Dodd Frank Act applies to publicly listed companies in the United States that manufacture or contract to manufacture products where conflict minerals are necessary to the functionality or production of conflict minerals are defined as minerals that originate in the Great Lakes region of Africa.⁵⁸ Under §1502, the U.S. Securities and Exchange Commission ('SEC') required that issuers of shares in companies that fall into this category needed to conduct due diligence and in some instance, provide a Conflict Minerals Report to the SEC. It is, however, solely a reporting requirement and does not provide that companies should cease from sourcing conflict minerals (although in practice, this is what is occurring).⁵⁹ Australia's Illegal Logging Prohibition Regulation (2012) similarly includes a due diligence requirement requiring importers of regulated timber products to disclose information about the products being imported in their supply chain.⁶⁰

A series of cases before the UK, Dutch and Canadian courts, regarding extraterritorial claims for human rights abuses, also suggests that a duty of care and potential tortious liability for parent companies may be emerging since 2011, where it can be shown that their subsidiaries were responsible for these abuses and the parent publicly disclosed managerial responsibility for that subsidiary.⁶¹ The most recent case

⁵⁵Law No. 2017-339 of March 27th, 2017 (relating to the duty of vigilance of the parent company and companies), which amends the French Trade and Industry Code.

⁵⁶Art.L-225-102-4-I, French Trade and Industry Code.

⁵⁷*Ibid.*, at para 4.

⁵⁸Dodd Frank Wall Street Reform and Consumer Protection Act 124 Stat 1376 (July 21, 2010), amending §13(p) of the Securities Exchange Act (1934) 15 U.S.C. 78m. ['Dodd Frank Act'].

⁵⁹*Ibid.*, at 1(A).

⁶⁰Illegal Logging Prohibition Regulation (2012), Legislative Instrument No.271, 2012, §10.

⁶¹See *Recherches Internationales Quebec v. Camboir Inc* [1988] QJ No 2554, para 20 – 27, 28-100; *Choc v Hudbay Minerals Inc* (2013) ONSC 141 para 67-68; *Das v George Weston Ltd* (2017) ONSC 4129 paras 433-435, 538-540; *Eric Bariza Dooh of Goi and Others v. Royal Dutch*

in this respect has been *Vedanta Resources Plc and Another v. Lungowe and Others* ('Vedanta').⁶² In this case, a group of 1826 Zambian villagers have claimed that their health and farming activities have been damaged by the discharge of toxic matter from the Nchanga Copper Mine, which Vedanta's subsidiary Konkola Copper Mines, Plc ('KCM') operates. The question of managerial responsibility in this case hinged upon the extent to which the parent could 'take over, intervene, control, supervise or advise the management of the relevant operations.'⁶³

The UK Supreme Court ruled unanimously that the extent to which this occurs could inform the existence of a parental duty of care and nothing in the law pertaining to the parent-subsidary relationship would prevent an assessment of this duty. Although the court did not mention the UK's NAP or the UNGP Framework in its judgment, several jurists both during the case and since have situated this judgment within the BHR Field.⁶⁴ In all these recent cases, however, courts have maintained that a duty of care exists only in relation to the parent-subsidary relationship, rather than in regard to a TNC's supply chain. However, the Netherlands appears to be moving toward requesting greater disclosure from companies. In a recent decision in the Hague District Court is requesting that Shell Plc release confidential documents in a case brought before it by Mrs Kiobel.⁶⁵

At the same time, in what was widely interpreted as sounding a death knell on Alien Tort Claims Act litigation, the United States Supreme Court (Sotomayor, Ginsberg, Breyer and Kagan JJ dissenting) determined in *Jesner v. Arab Bank, Plc* ('Jesner') that foreign corporations could not be defendants in suits brought under that statute.⁶⁶ The Alien Tort Claims Act (1789) is a jurisdictional provision of the United States Code that reads 'The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a

Shell Plc and Others. See also: *Vedanta Resources Plc and Another v Lungowe and Others*, International Commission of Jurists and The Corporate Responsibility Coalition Limited, 'Draft Statement of Intervention' (Case No. A1/2016/2502&2504), ¶¶27-32.

⁶²[2019] UKSC 20.

⁶³*Ibid.*, at para 49.

⁶⁴See for example, Norton-Rose Fulbright, 'UK Supreme Court Clarifies Issues on Parent Company Liability in *Lungowe v Vedanta*' (April 2019), www.nortonrosefulbright.com; Laura Green, 'Corporate Responsibility for Human Rights Violations: UK Supreme Court Allows Zambian Communities to Pursue Civil Suit' *EJILTalk!* (24 April 2019), www.ejiltak.org.

⁶⁵Kate Hodal, 'Dutch Court will hear Widow's Case against the Death of the Ogoni Nine' *The Guardian* (1 May 2019) <https://www.theguardian.com/global-development/2019/may/01/dutch-court-will-hear-widows-case-against-shell-over-deaths-of-ogoni-nine-esther-kiobel-victoria-bera-hague>.

⁶⁶No. 16-499 138 S.Ct 1386.

treaty of the United States'.⁶⁷ In coming to its conclusion the majority judges determined that the question of corporate liability turned on whether there is 'a specific, universal and obligatory norm of liability for corporations in international law'.⁶⁸

In what can be construed as vindication of Judge Higgins' arguments in 1971 (as to the lost opportunity to develop international law in *Bar Celona Traction*) the majority distinguished between the liability of natural persons and legal persons under international law, arguing that international law had failed to recognize corporate responsibility for international crimes and therefore, did not recognise a specific, universal and obligatory norm of corporate liability more generally. In a stunning conflation of subjects and sources doctrine, for which Justice Sotomayor delivered a powerful dissent, the Court determined that Congress should be left to determine liability of corporations in this regard, and it was not for the Court to decide on issues which had significant foreign relations ramifications. In this regard, Justice Kennedy made the rationale for the majority decision abundantly clear when stating:

allowing plaintiffs to sue foreign corporations under the ATS could establish a precedent that discourages American corporations from investing abroad, including in developing economies where the host government might have a history of alleged human-rights violations, or where judicial systems might lack the safeguards of United States courts. And, in consequence, that often might deter the active corporate investment that contributes to the *economic development that so often is an essential foundation for human rights*.⁶⁹

As at the date of writing, the primary effect of institutionalization and juridification in the BHR Field has been to generate (and, in the case of *Jesner*, foreclose) the possibility for new legal work to emerge to address the needs created by the BHR Field's self-constitution. As such, because the dominant characterization of 'respect for human rights' in this newly emerging GPD is evidenced through HRDD, respect for human rights as a global public good is giving rise to a new 'market for virtue' in human rights services for those 'experts' who can provide TNCs and other business enterprises with the expertise required to conduct HRDD.

This market for virtue in the BHR Field can, to date, be seen as anecdotally evidenced through the creation of ongoing legal practice areas exclusively oriented toward 'business and human rights'; an increase in consultancy services offering

⁶⁷28 U.S.C. §1350 ATS.

⁶⁸Applying the test in *Sosa v. Alvarez-Machain* 542 U.S. 692 (incorrectly, in my view). See *Jesner*, Opinion of Kennedy J, 15.

⁶⁹*Jesner*, Opinion of Kennedy J, at 24.

HRDD, the conduct of human rights impact assessments, and the use and creation of other forms of technologies (indicators, benchmarks, frameworks, guidance notes) that companies can utilise to conduct HRDD.

In what initially appeared to be a departure from the UNGP Framework's orthodoxy, in September 2013, Ecuador proposed that the HRC establish an intergovernmental working group to negotiate a treaty instrument ('BHR Treaty'). The resolution was co-sponsored by Bolivia, Cuba, South Africa and Venezuela.⁷⁰ The HRC adopted the proposal on 26 June 2014, establishing an Open-ended Intergovernmental Working Group ('OEIWG') whose mandate is 'to establish an internationally binding instrument whose mandate is to regulate, in IHRL, the *activities* of TNCs and other business enterprises'.⁷¹ The BHR Treaty has been strongly supported by a coalition of human rights NGOs from across the world, now numbering over one thousand in total, many of whom were involved in the Norms process.⁷²

In July 2018, the OEIWG released a zero draft of the BHR Treaty which defines as the treaty's purpose 'to strengthen the promotion, protection and fulfilment of human rights in the context of business activities of a transnational character'.⁷³ Despite not mentioning the UNGP Framework, the BHR Treaty shares the prevailing orthodoxy of thought regarding business' regulation, in that it reduces business' obligations to their transactional commitments in a global supply chain. The BHR Treaty can, however, be read as a victims charter, in that it endeavours to re-situate supply chain management as largely within states' responsibility to secure remedies for victims, regardless of where they occur.⁷⁴ In this respect, it departs from the prevailing pragmatism in that it is more outcome focussed than process driven. Ironically, however, the BHR Treaty has reopened debates about hard (vs soft) law and the need for more law. For the most part, this has further reduced any systemic consideration of the root causes precipitating human rights harms in discussions in the BHR Field.⁷⁵

⁷⁰HRC, A/HRC/Res/26/9 (14 July 2014).

⁷¹Ibid. para 1.[My emphasis].

⁷²Legally Binding Instrument to Regulate, in International Human rights Law, the Activities of Transnational Corporations and Other Business Enterprises' (16/07/2018), available online at: <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/DraftLBI.pdf>

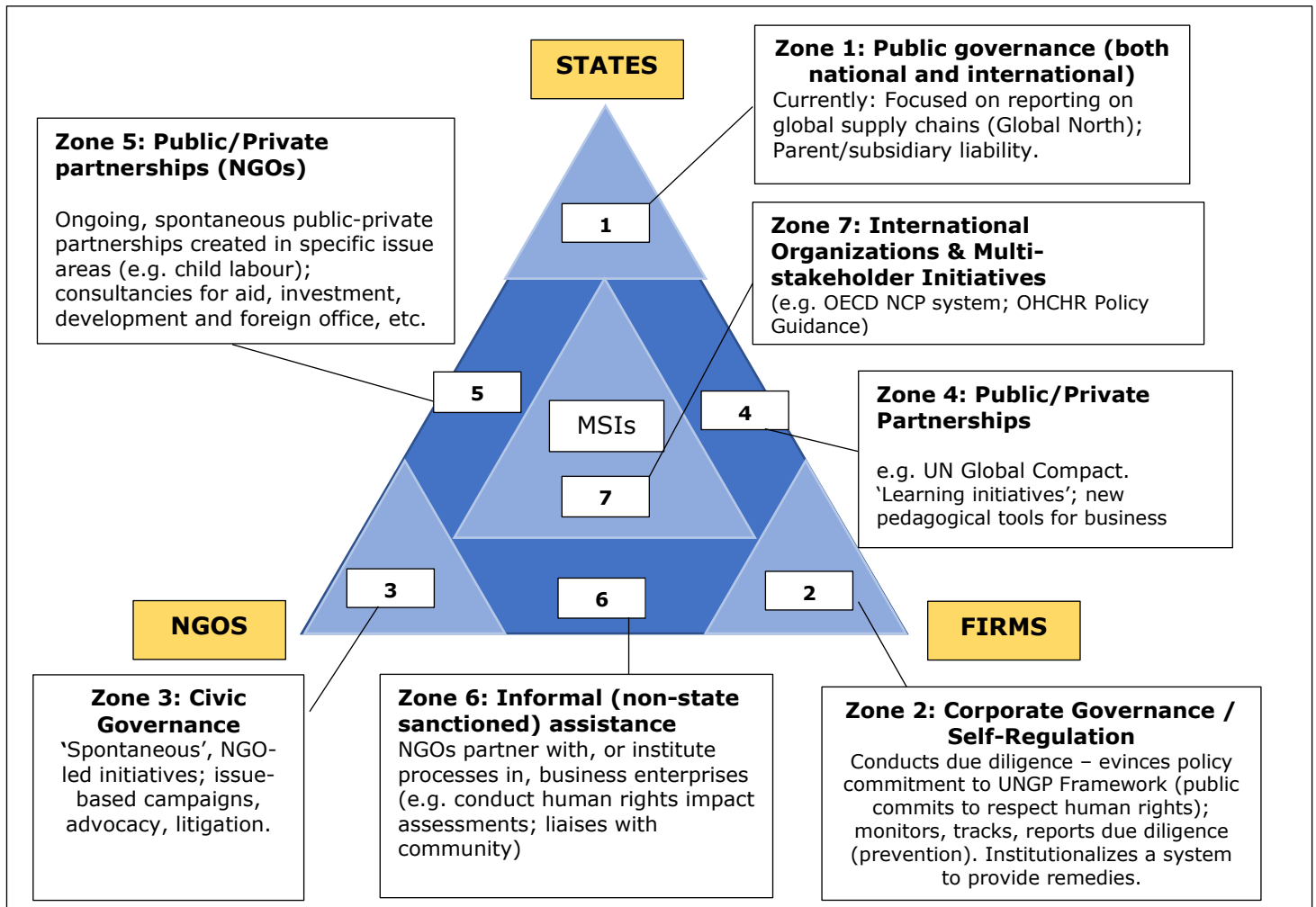
⁷³See www.treatyalliance.org.

⁷⁴See Art. 8,9 and 10, when read in conjunction. Note in particular states' guarantee the right of victims, individually or as a group, to present claims in their courts' and to assist in investigations. (Article 8(2)).

⁷⁵Most recently, see Barnali Choudhury 'Balancing Soft and Hard Law for Business and Human Rights' (2018) 67(4) International & Comparative Law Quarterly 961.

5.3 Polycentric Governance, Pragmatism & Emancipation

Figure 1.1 The Polycentric Governance System under the UNGP Framework



As has already been noted, the UNGP Framework attempts to constitute a polycentric governance system.⁷⁶ Polycentric governance systems are 'those in which the state is not the sole locus of authority or indeed, which plays no role at all.'⁷⁷ The system envisaged by the UNGP Framework relies on the presence of multiple, overlapping regimes whereby 'many officials and decision-making structures are assigned limited

⁷⁶Ruggie (2014); Ruggie (2017). See also Jamie Prekert and Scott Shackleford, (2014) 'Human Rights, Business and the Promise of Polycentricity', *Vanderbilt Journal of Transnational Law* 47, 451 – 498. [Prekert/Shackleford (2014)].

⁷⁷Julia Black 'Constructing and Contesting Legitimacy and Accountability in Polycentric Governance Regimes' (2008) 2(2) *Regulation & Governance* 137, 137-8. [Black (2008)].

and relatively autonomous prerogatives to determine, enforce and alter legal relationships.⁷⁸

Figure 1.1 provides a brief sketch as to how it can be envisaged that this system would operate in the emerging GPD. The interlocking elements envisaged in the UNGPs' tripartite governance system have been adapted from Kenneth Abbott & Duncan Snidal's governance triangle. (Abbott & Snidal's triangle is chosen because Ruggie has utilized it to frame the polycentric system he assumes the UNGP Framework can create). States, non-governmental organizations and business enterprises can be seen to create forms of regulation, both separately and in partnership with one another, through seven distinct 'zones' in the triangle.⁷⁹ Each zone depicts a distinct level of partnership between the three different actors. According to Abbott and Snidal, polycentric governance then evolves as standards interlock and complement one another across these various zones. Zone 1 is the zone of 'traditional' state law and regulation (both national and international (through multilateral agreement and custom)) and Zone 2 represents self-regulatory schemes (of business and industry). The remaining Zones 3 – 7 include partnerships between states, private firms and civil society in various constellations, be it informally (e.g. through civil society organizations issuing reports, which are then utilized by firms) or more formally (through private-private partnerships (as in Zone 4) or multi-stakeholder initiatives (as in the case of Zone 7)).⁸⁰ Taken together, zones in the governance triangle attempt to map how different actors engage, both separately and in concert with each other, in regulatory standard-setting and implementation. This provides a basis from which to map how states, non-governmental organizations and corporations are each engaging in tailoring the implementation of the UNGP Framework to specific industry, national, regional and cross-border (transnational) contexts.

Since its constitution as a Field, Ruggie has consistently argued that:

The UNGPs are based on the observation that corporate conduct at the *global level* is shaped by three distinct governance systems. The first is the system of public law and governance, domestic and international. The second is a civil governance system involving stakeholders affected by business enterprises and employing

⁷⁸See Paul D. Aligicia and Vlad Tarko, (2012) 'Polycentricity: From Polanyi to Ostrom and Beyond' *Governance: An International Journal of Policy, Administration, and Institutions* 25(2), 237-262.

⁷⁹Kenneth W. Abbott and Duncan Snidal 'Strengthening International Regulation through New Transnational Governance: The Orchestration Deficit' (2009) *Vanderbilt Journal of Transnational Law* 42, 501, 513.[Hereafter, Abbott & Snidal, 2009]. See also Ruggie (2014), 9-10.

⁸⁰Abbott & Snidal 2009, 512-516.

various social compliance mechanisms such as advocacy campaigns and other forms of pressure, but also collaborating with them. The third is corporate governance, which internalizes elements of the other two (unevenly, to be sure) as constraints and opportunities.⁸¹

As stand-alone systems, state, civic and corporate governance can just as easily be conceived as tripartite, monocentric systems rather than interlocking and engaging in any polycentricity. This is because a polycentric system relies, for its emergence, on orchestration *amongst* these systems to occur. Additionally, polycentricity, as originally conceived, was a 'bottom up' (not a 'top down') process. (Ironically, bottom up approaches appear to be more aligned to Ruggie's critics' approach than his own). It is worth, therefore, considering underlying basis for polycentricity prior to continuing to analyse the GPD.

Previous Views of Polycentricity: Liberty, Community, Justice

Michael Polanyi (Karl's brother) first advanced the concept of polycentricism in his book *The Logic of Liberty*.⁸² It has since spread to law studies, urban network studies and governance studies, largely thanks to Vincent and Elinor Ostrom and the Bloomington school of institutional analysis.⁸³

Polanyi's philosophical treatise on polycentricity is complex and multifaceted. Due to the confines of this thesis, the concern here is only to assess briefly his understanding of polycentricity for the purposes of its significance for later conceptions of the same in law and regulatory theory. Additionally, however, it is worth noting that Polanyi considered philosophical pragmatism when determining how considered polycentricity should operate.⁸⁴ It will be recalled that in Chapter 1, I identified the following characteristics as underpinning philosophical pragmatism: (1) 'truth' is understood as contingent, specific, and attributable to a concept because a group of people agree that it makes sense (and it can be evidenced empirically to make sense); (2) means are favoured over (or at the expense of) ends; (3) observation, study and scientific rationality can be usefully applied to moral and ethical questions; (4) human

⁸¹Ruggie (2017), 48-49.

⁸²Michael Polanyi *The Logic of Liberty: Reflections and Rejoinders* (Routledge & Kegan Paul Ltd, 1951) ['M. Polanyi (1951)'].

⁸³Paul D Aligicia and Vlad Tarko, 'Polycentricity: From Polanyi to Ostrom, and Beyond' (2012) 24(2) *Governance: An International Journal of Policy, Administration and Institutions* 237 ['Aligicia & Tarko (2012)'].

⁸⁴See in particular, Stefania Ruzsits Jha, *Reconsidering Michael Polanyi's Philosophy* (University of Pittsburgh Press, 2002), at Chapter 6 ('Polanyi's view on the Pragmatism of Dewey').

beings are inevitably committed to provisional and not conclusive epistemological projects, due to their own fallibility.⁸⁵

For Polanyi, pragmatism lead to a moral relativity and a kind of instrumentalism in reasoning that he considered problematic. This was because pragmatism stripped the knower of her personal responsibility for that which she claimed to know or have discovered, which always remained contingent (provisional). Instead, Polanyi emphasized personal responsibility in creative freedom as an ideal to strive for, manifested by heeding to standards. He further acknowledged that 'creative freedom and standards are grounded in tradition tempered by the judgment of the community of knowers'.⁸⁶ In this respect, Polanyi did not believe that neither standards nor freedom could be encompassed in formal law: 'both grow and are sustained tacitly by all members participating in upholding them'.⁸⁷

A polycentric system, as understood by Michael Polanyi, is one in which individuals maintain as much liberty as possible in order to pursue an agreed abstract end goal (e.g. truth or justice) based on a shared common ideal (e.g. freedom of information).⁸⁸ For Polanyi, individuals should be given as much latitude as possible to hold opinions, not just as abstract hypotheticals but also to be able to implement them into practice.⁸⁹ Polanyi's key assertion is that abstract end goals cannot be imposed upon the participants in a system by an overarching authority: any attempt to impose progress toward an abstract ideal is doomed to failure, because 'progress' is the result of trial and error processes of many agents interacting freely.⁹⁰ He first applied this analysis to science, but also argued it could be applied to religion, art and law, because all these activities are driven by certain ideals (in the case of law, that of justice).⁹¹ For Polanyi, cultivating systems of thought must be kept free from the market, because it is impossible to parcel up and hand out to consumers the results of such labours without reducing their overall worth. Even if it were possible, the public would then rely on 'the guardians of professional standards' to guide them on that which was being

⁸⁵See *infra*, Chapter 1, at 1.5.2.

⁸⁶Jha (2002), 166-7.

⁸⁷Jha (2002), 167.

⁸⁸M.Polanyi (1951), 111-138. See also, Paul D Aligicia and Vlad Tarko, 'Polycentricity: From Polanyi to Ostrom, and Beyond' (2012) 24(2) Governance: An International Journal of Policy, Administration and Institutions 237 ['Aligicia & Tarko (2012)'].

⁸⁹M.Polanyi (1951), 184-200.

⁹⁰M.Polanyi (1951). This most forcefully argued at 198-200 ('The Defence of Liberty') but is the subject of the entire book. See also Chapter 4 (Self-government of Science), 49-67.

⁹¹M.Polanyi (1951), 162-167.

consumed, reducing the systems of intellectual order to the mere satisfaction of public demands.⁹²

When applying this analysis to economic planning in capitalist and socialist systems, Michael Polanyi argued that the centralized planning of a socialist system would fail, because the amount of information required to manage all the production processes of an industrialized economy was too overwhelming to be able to be gathered and analysed.⁹³ For Polanyi, a centrally directed industrial system was impossible 'in the same sense in which it is for a cat to swim the Atlantic'.⁹⁴ In this respect, he agreed with Friedrich Hayek regarding the impossibility of calculation in a socialist system, yet, like his brother, Karl, he departed with Hayek regarding the importance of social justice.⁹⁵ While Hayek considered the ideal of social justice as irrelevant to the market, Polanyi was concerned that the market system comes into conflict with certain religious or moral values and that it may actually generate incentives undermining moral behaviour. Yet he rejected the idea that morality in the market could be achieved through a centralized agency imposing its enforcement.⁹⁶

For Polanyi, the ideal of social justice could only ever be achieved through experimentation and trial and error: polycentricism allowed for this experimentation to be empirically evidenced and for social justice to be realized in concrete terms as a result. In this respect, his ideas can be seen to overlap with that of his brother, Karl, whose concept of embeddedness attempted to evidence the pendulum movement and social reformist task of law (in practice) re-embedding the market into fully social institutions, reflecting a complex alchemy of politics, culture and ideology (what I have called 'shared social values' throughout this thesis).

The idea of polycentric governance was brought into legal studies by Lon Fuller.⁹⁷ Fuller argued that judges are often called upon to settle disputes which involve many decision-making centres and networks of cause and effect. For Fuller, there should be a threshold defined by the level of polycentricity in a system, beyond which courts should not rule but instead leave the matters either to markets or to the political process to determine. Adjudication was one form of social ordering, the two others

⁹²Ibid., 167.

⁹³Ibid., 111-138.

⁹⁴Ibid., 127.

⁹⁵Aligicia & Tarko (2002), 96 (citing Friedrich Hayek, *Law, Legislation and Liberty* (Chicago University Press, 1973). Polanyi himself refers to Hayek's *The Road to Serfdom*, as well as the work of Ludwig von Mises. See M. Polanyi (1951) 125-6.

⁹⁶M. Polanyi (1951), 184-200.

⁹⁷Lon Fuller and Kenneth Winston 'The Forms and Limits of Adjudication' (1978) 92(2) Harvard Law Review 353. (published posthumously after Fuller's death).

being negotiating contracts and voting in elections. Fuller's analysis of a polycentric system and forms of social ordering have been criticized as failing to recognise 'the limitless possibilities arising from the interactions between societies'.⁹⁸ In particular, both the capacity to 'rediscover institutional forms half-forgotten or hidden from view and the endless inventiveness and adaptability of people' were seen as side-lined through his understanding of social ordering.⁹⁹

Yet perhaps the most renown proponent of polycentric governance is nobel prize-winning economist, Elinor Ostrom, whose ground-breaking work in economics evidenced how polycentric systems, comprising multiple governing authorities at different scales, forming networks and interacting amongst themselves, can more effectively address collective action problems than those provided by top-down, state-imposed regulation.¹⁰⁰ Ostrom's thesis negated rational choice theory of the provision of public goods that emerged in the 1970s and '80s, which suggested that rational actors would not cooperate to achieve a socially optimal outcome in a prisoner's dilemma situation like that associated with the distribution of common pools of resources.¹⁰¹ Ostrom showed empirically, through a number of case studies that, contrary to this theory, many local and regional groups of a small to medium scale were found to self-organize to combat common pool resource problems, despite having no individual incentives to do so.¹⁰²

Ostrom's ideas have been adapted by several international environmental lawyers toward understanding how to consider climate change as a collective action problem which can be determined through polycentric systems. Similarly, Ostrom's theory has influenced a number of regulatory theorists also assess regimes including transnational non-state regulators, through which the multiple sites at which regulation occurs, at national, sub-national and transnational level can be identified and understood.¹⁰³ Polycentric governance has also been described as transnational

⁹⁸John W.F. Allison 'Legal Culture in Fuller's Analysis of Adjudication' in *Rediscovering Fuller: Essays on Implicit Law and Institutional Design* (Amsterdam University Press: 1999) 346, 355.

⁹⁹Ibid.

¹⁰⁰Prenkert and Shackleford, 2014, at 459-466. See also Elinor Ostrom (2015) *Governing the Commons: The Evolution of Institutions for Collective Action* (Cambridge University Press).

¹⁰¹Mancur Olsen *The Logic of Collective Action: Public Goods and the Theory of Groups* (Harvard University Press, 1965).

¹⁰²Elinor Ostrom, 'Polycentric systems for coping with collective action and global environmental change' (2010) 20 *Global Environmental Change* 550.

¹⁰³Ibid., 551-2.

'new' governance, regulatory pluralism,¹⁰⁴ responsive regulation¹⁰⁵ and regulatory capitalism.¹⁰⁶ Although these latter terms emphasize distinct components of governance systems, all assume a multiplicity of actors engaging in both creating and adhering to legal and non-legal, regulatory and self-regulatory, regimes at a multiplicity of levels.

A key distinction between the manner in which Polanyi and Ostrom have defined polycentricity and Ruggie defines it, however, is that for the former, there is no overarching method imposed upon how these systems interact. The 'consistent and predictable patterns of behaviour' are determined by those operating *within* the system themselves.¹⁰⁷ Furthermore, the creation of the system should be between actors from the bottom up. This means that there is no top down authority administering the system, as in the case of the HRC, the OECD or any other international organization. Instead, polycentric systems emerge from the grass-roots level and are deeply associated with localised understandings of how to administer responses to collective action problems. This is important to continue taking into consideration, as this thesis analyses how polycentric governance may be envisaged as operating in the BHR Field. It is this to which I turn next.

Polycentric Governance in the BHR Field

I have argued that attempts made by different parties to determine what kind of economic order international law should support can be understood using the concept of embeddedness. Embeddedness refers to the process by which parties conceptualize the economic order with differing understandings of that order's shared social values. This then determines the role they assert that international law should play in regulating the conduct of the TNC (and later: TNCs and other business enterprises).

In the BHR Field, the inauguration of a system of polycentric governance maintains the public/private distinction (between states, on the one hand, and corporations and civil society, on the other), but assumes that this distinction can be collapsed, on a case-by-case basis, through the constitution of a GPD.¹⁰⁸ As already

¹⁰⁴See for example, Elinor Ostrom, James Walker, and Roy Gardner (1992) 'Covenants with and without a Sword: Self-Governance Is Possible.' (1992) 86 *American Political Science Review* 404.

¹⁰⁵Abbott & Snidal (2009). See also Ruggie (2014), 8.

¹⁰⁶John Braithwaite (ed) *Regulatory Capitalism: How It Works, Ideas for Making It Better* (Edward Elgar 2008).

¹⁰⁷Ostrom (2010), 552.

¹⁰⁸*Ibid.*

noted, the GPD comprises discourse, contestation and action organised around global rule-making – a transnational space that permits the direct expression and pursuit of human interests, not merely those mediated by the state. Nevertheless, the state is still given a certain primacy within this domain. The GPD ‘cannot substitute for effective action by the state but may help to produce it’.¹⁰⁹

In the GPD, however, it remains unclear whether transnational actors are opposing the commodification of land and labour, or even whether the belief that land and labour *should* be de-commodified is central to the manner in which this new domain operates.¹¹⁰ Instead, what seems to be advocated for, is the ongoing commodification of social life itself. As I have already noted in Chapter 1, Karl Polanyi’s thesis had an explicit socio-political reformist connotation that endeavoured to socially embed markets in societies. Ruggie, on the other hand, has seemed at once idealist and functionalist in his conceptualization of the GPD. By relying on transnational actor networks to engage with the market’s inclusiveness and fluidity in order to effect change, Ruggie assumes that transnational civil society organizations (and TNCs and other business enterprises) can act as an institutional counterweight to the State. As Claire Methven-O’Brien has pointed out, this has the effect that embeddedness, in its new ‘global’ form, identifies ‘with the rules and regulation of market *exchange*’ quite distinct from Polanyi’s concern with commodification and de-commodification as key components of embeddedness.¹¹¹

In this respect, Ruggie appears to rely on the idea of embeddedness as put forward by economic sociologist, Mark Granovetter. According to Granovetter, economic action is embedded in ‘concrete, ongoing systems of social relations’.¹¹² For Granovetter, economic outcomes are explained by the structural properties of social networks. As a result, Granovetter’s argument does not give rise to an ontological interpretation of commodification: it does not presuppose an original condition of land, labour and money that resists being commodified. Instead, it directs attention to the tendency of *laissez faire* markets to destroy their own conditions of possibility.¹¹³

¹⁰⁹Ibid.

¹¹⁰Ibid.

¹¹¹Methven-O’Brien (2011) 346-7 [My emphasis].

¹¹²Beckert (2007), 8-9. See also Mark Granovetter ‘Economic Action and Social Structure: The Problem of Embeddedness’ (1985) 91 *American Journal of Sociology* 481; Mark Granovetter et al, ‘Polanyi Symposium: A Conversation on Embeddedness’ (2004) 2 *Socioeconomic Review* 109.

¹¹³Beckert (2007), 8-9; Fraser (2014), 547.

In this respect, Nancy Fraser has argued that Polanyi's understanding of false commodities was ahistorical, essentialist and insensitive to domination. According to Fraser, Polanyi's reading of land, labour and money as having the 'original condition' of not having been produced for sale had the effect of obscuring their historicity. Furthermore, it obscured the fact that relations of power are constituted in the pre-market private sphere as much as they are when goods are exchanged. For Fraser, this failed to consider that social constructions of land, labour and money are 'typically encoded in relations of domination – witness feudalism, slavery and patriarchy' all of which cast land, labour and money as 'non-commodities'.¹¹⁴

The effect of maintaining an ontological view of commodification is to reify the market: associating commodification exclusively with decay and decline is to overlook the possibility that 'marketization can generate emancipatory effects, by dissolving modes of domination external to the market and creating the basis for new, more inclusive and egalitarian solidarities.'¹¹⁵ Fraser suggests that Polanyi's notion of a double movement needs to be complicated by the story of emancipation (of labour), real subsumption (of land), and alter-globalisation (against private investment) which leads to a triple movement. This triple movement takes place when considering not only a relationship between de-commodification and re-commodification of land, labour and money as it is bought and sold in global markets, but also, by paying attention to the extent to which unwaged activity, the destabilization of the environment and the proliferation of markets themselves, sustain and maintain the commodification process without ever being fully recognized.¹¹⁶

For Fraser, by introducing the *problematique* of domination and emancipation, we can further grasp the neoliberal proletarianizing of those who still do the lion's share of unwaged work at home. This story can also be further complicated by a global supply chain of care, through which racialized and/or rural caregivers take on the reproductive and caring labour previously performed by wealthier women.¹¹⁷

Similarly, far from simply trading in natural objects, the current neoliberal economy generates new ones. The privatization of water, the bioengineering of sterile seeds and the patenting of DNA – to name a few examples – mean that nature is now truly produced *solely* for sale and completely subsumed into capitalism.¹¹⁸ Finally, with

¹¹⁴Fraser (2014), 547.

¹¹⁵Ibid., 548.

¹¹⁶Ibid. 549 – 550.

¹¹⁷Ibid.

¹¹⁸Ibid.

the invention of derivative instruments and the ongoing securitization of global financial markets, the commodification of money is now able to float entirely free of the materiality of social life.

For Fraser, a *structural* understanding of market dynamics far better equips those engaging with such theories to think about land, labour and money than the original ontological reading offered by a Polanyian critique of the emergence of *laissez faire* in Britain could do. A structuralist account is sensitive of, and critical to, domination in all its forms. It directs attention to the fact that commodification is socially constructed and historically dependent and asks the question whether the 'traditional' structures that are being eroded by the market are in fact, worth preserving.

Understanding the BHR Field as a polycentric system, therefore, would seem to enable a structural analysis to be engaged when thinking about the neoliberal economic order. If the system can comprise multiple sites of regulatory authority, this has the potential to allow for mutual monitoring, learning and adaptation over time, that could be informed by analyses of the problems associated with global capitalism for specific rightsholders. This would require close attention being paid, however, to those *experiencing* the rights violations in question and would require significant effort being made to listen to their needs, wants and desires to be heard. It may also require recalibrating the approach to rights, to incorporate not only human rights abuse, but also human abuse and exploitation. In other words, this would require placing social movements in the global South, as well as those disenfranchised from capitalism in the global North, at the centre of any approach. As I showed in Chapter 4, this may require re-thinking the pragmatism that remains central to the UNGP Framework, toward a more critical pragmatism or perhaps, beginning to rethink the need for pragmatism altogether.

The problem, however, with the polycentric system as currently envisaged by the chief architects of the UNGP Framework is that it is still largely top-down in its approach to problem-solving. It also focuses on maintaining an idealized notion of 'the state' and 'the TNC' that best accords with how those entities have historically functioned in the US and the UK. As will be discussed in the section which follows, this leads to significant contestation in the conceptualization of the BHR Field that centres on perceiving human rights as regulatory in its function and supportive of the existing economic order, on the one hand, and reconceptualizing the place and purpose of business, to secure human rights, on the other.

5.3.3 Three Pillars, One End?

As already noted above, polycentricity is created through three interlocking systems of governance. Most recently, John Ruggie and John Sherman ('Ruggie/Sherman') have described this as comprising:

The traditional world of public governance (legislation and regulation; judicial and non-judicial redress; international law and institutions); corporate governance (separate legal personality and limited liability but integrated business strategy, operations and risk management systems) and civil governance (through social compliance mechanisms and campaigns, lawsuits, other forms of pressure and also partnering).¹¹⁹

The reference to 'separate legal personality and limited liability' when considering corporate governance again, takes a highly conservative view as to what a corporation actually is and where it functions. This does not resemble a *keiretsu* (in Japan), a kinship corporation (in China) or a *Mittelstand* (in Germany).¹²⁰ It pays no attention to ideas of the market founded in German Ordo-liberalism or the 'bamboo network' of family businesses created by Chinese living overseas, to give just two examples of the multitude of ways in which capitalism operates.¹²¹ Ruggie/Sherman's characterization of the 'business enterprise' therefore, seems in keeping with the characterizations advanced by the U.S. and the U.K. during the Code negotiations and the ICC during the Norms process.

For Ruggie, the epistemological work being done by the UNGP Framework is to provide the experiential basis or blueprint upon which the interlocking of these three governance systems can be both evidenced and recalibrated. In concrete terms, as states evidence their duty to protect human rights under the guidance of Principles 1 – 10 of the UNGP Framework, they will bring into being domestic and international law that conforms to this duty. At the same time and concurrently, civil society actors ('CSO's) will either support or provide a countermovement against those legislative moves whereby the state has to recalibrate its response to the duty to protect. Similarly, by institutionalizing HRDD processes, TNCs and other business enterprises will internalise the laws and regulations to which they need to comply in order to ensure they conform with the state's understanding of the protection of human rights,

¹¹⁹Ruggie & Sherman (2018), 926.

¹²⁰Muchlinski (2007) 17 (Germany), 63-5 (Japan); and Gray (2009), 92-100 (Germany) and 182-6 (China).

¹²¹Gray (2009), 182-6.

as well as respond to CSO campaigns in the GPD advocating against them when they fail to respect human rights.

Yet there are several problems with the ongoing institutionalization of embedded pragmatism as envisaged by the polycentric system of governance which Ruggie claims the UNGP Framework represents. It will be recalled that this thesis has identified embedded pragmatism as the primary mode of legal reasoning animating the UNGP Framework, when viewed from the perspective of its drafters. Although pragmatism can take on a variety of forms, embedded pragmatism seeks to institutionalise human rights as a form of regulation and mode of governance that will ensure a kinder, gentler globalisation from within the existing neoliberal economic order. Although Ruggie himself does not share the economic pragmatist's view that the ICC has evinced, he has clearly aligned his view with the ICC and with business' interests, over that of those who seek emancipation from the existing economic order. I will discuss this further below.

As currently envisaged, polycentric governance, therefore, does not consider the structural problems associated with the system it intends to create. First, the power disparities between the tripartite actors engaged in this system – namely, states, TNCs and other business enterprises, and civil society – as well as the disparities between actors from the same group within this system (i.e. states from the global North vs states from the global South; small and medium-sized enterprises vs TNCs; international NGOs vs grassroots social movements) have not been taken into account. I identify this as the problem of 'functional coordination'.

Second, the GPD as currently understood in Ruggie's tripartite system does not adequately consider the problems associated with fragmentation in polycentric regimes. In this respect, the problem of determining what sources of law should be prioritised, at what stage, and by whom, remains problematic when there is more than one source of law (and more than one authority to determine which source is prioritised). Yet it is also extremely jurisgenerative. I identify this as the problem of the system's 'jurispathic/jurisgenerative possibilities'.

Third, it assumes that the current global economic order is animated by 'shared social values' as determined by human rights. Yet it fails to consider adequately how, absent a political community, the problems associated with normative indeterminacy to which rights gives rise might exacerbate human rights situations, rather than enable TNCs and other business enterprises to address adverse human rights impacts in a

manner that is most likely to do no harm to the rightsholders they seek to respect. I identify this as the problem of 'normative indeterminacy'.

Finally, in light of these three concerns, remaining focused on embedding pragmatism allows for the ongoing neglect of the relationality and systematicity of rights abuses taking place in the existing global economic order. As a result, in the absence of a political community to determine which rights to prioritise, determinations are left to the market itself. Hence, the 'value' of any given human right is determined through market exchange, rather than remaining distinct from it. But further – far from prioritizing emancipation (as Fraser suggests we do) business interests are prioritised. Early indications in the BHR Field suggest that this results in the creation of ongoing 'markets for virtue' to resolve this deficit.

I will now consider each of these problems in turn.

Functional Coordination: The Problem of Ensuring Agency

A central problem associated with the polycentric governance system the BHR Field inaugurates is that it lacks a clear basis upon which parties can determine how to coordinate their activities together with, or in the absence of, hierarchical state-based authority. In this respect, Jamie Prenekert and Scott Shackelford's recent study of conflict minerals legislation in the U.S. provides a telling instance of the problems associated with functional coordination in the BHR Field as it relates to labour.¹²²

Conflict minerals legislation was precipitated by growing concern, from international NGOs, national level state actors, and the Securities and Exchange Commission ('SEC') in the United States, regarding the problems associated with TNCs and other business enterprises sourcing minerals from conflict-ridden states in the Great Lakes region of Africa. In particular, in the eastern part of the Democratic Republic of Congo ('DRC'), armed rebel groups, as well as some groups loosely affiliated with the DRC's military were known to be profiting from, and funding, their armed attacks through the control of mines in which precious metals (gold, cassiterite, wolframite and coltan) were being sourced, refined and sold globally. Many of these metals are utilized in the production of electronic devices (I-Phones, laptops and digital video cameras, amongst others). Other than gold, these minerals are commonly

¹²²Prenekert/Shackelford (2014).

referred to as '3T' minerals, due to their use in making tin (cassiterite), tungsten (wolframite) and tantalum (coltan).¹²³

In response to this, in 2010, the U.S. Congress §1502 of the Dodd Frank Wall Street Reform and Consumer Protection Act (the 'Dodd Frank Act').¹²⁴ The goal of §1502 was 'to starve the armed rebel groups of the essential funding sources that comes from trading conflict minerals'.¹²⁵ This end-goal was pursued on the basis that this would reduce the violence committed by these groups, hence preventing violations of international humanitarian law and IHRL being committed in the DRC.

The Dodd Frank Act did not call for the banning of the purchase or use of conflict minerals from the DRC or its neighbours. Rather, in keeping with the UNGP Framework, it required publicly listed companies of a certain size to disclose to the SEC and to make available through their web-sites information regarding their supply chain monitoring and use of conflict minerals. The SEC released a rule pertaining to the Dodd Frank Act in 2012. To be DRC 'conflict free' a product could not contain minerals that directly or indirectly financed or benefited armed groups in the DRC.¹²⁶ According to Mary Footer, §1502 was the first time that a piece of U.S. legislation was specifically directed at human rights violations.¹²⁷

Prekert and Shackelford argue that this is early evidence of a polycentric governance system taking shape in the BHR Field. They then detail the extent to which Congress' decision and the SEC's subsequent ruling led to ongoing legislative and regulatory amendments over the two-year period that followed, further complementing the due diligence processes which had been mandated by §1502.

According to Prekert and Shackelford, this included: (1) Regulatory enforcement and mapping, by the State Department, 'to develop a strategy to address the linkages between human rights abuses, mining of conflict minerals and commercial products' pertaining to the DRC;¹²⁸ (2) the enactment, by several cities in the United States, and some states, of complementary legislation aimed at reducing their exposure to the human rights risks associated with conflict minerals;¹²⁹ (3) the

¹²³Ibid. 471. See also Mary E. Footer 'Human Rights Due Diligence and the Responsible Supply of Minerals from Conflict-Affected Areas: Towards a Normative Framework?' in Jernej Letnar Cernic and Tara van Ho (eds) *Human Rights and Business: Direct Human Rights Obligations of Corporations* (Wolf Legal Publishers 2015) 179, at 197-99. [Footer (2015)].

¹²⁴See Dodd Frank Act, footnote 67 of this Chapter.

¹²⁵Prekert/Shackelford (2014), 473.

¹²⁶Conflict Minerals, 77 Fed. Reg. 56274 (12 September 2012) (codified at C.F.R. §§240, 249b).

¹²⁷Footer 2015, 198.

¹²⁸Prekert/Shackelford (2014), 482.

¹²⁹Ibid.

introduction of a bill, in the Canadian parliament, by Canadian member of Parliament, MP Paul Dewar, requiring Canadian corporations that have 'processed, purchased, traded in, or used or extracted conflict minerals or contracted to do so' to undertake due diligence processes modelled on the Dodd Frank Act provision;¹³⁰ (4) A questionnaire being issued, by the European Commission Directorate-General for Trade to determine the possibility of an EU initiative similar to s.1502; (5) Issuance by the OECD, concurrent to that of the SEC, of due diligence guidelines for TNCs regarding conflict minerals, including a detailed discussion on responsible supply chain management based on the UNGP Framework; and (6) Industry-specific due diligence guidance issued by the Electronic Industry Citizenship Coalition ('EICC'), the Global e-Sustainability Initiative ('GeSI' and together, the 'Conflict-Free Sourcing Initiative'), the Automotive Industry Action Group and the Japanese Electronics Association, to name a few, who together launched the Conflict-Free Smelter Program ('CFS-Program'). The CFS program including producing a conflict-free reporting template, conducted conflict-free supply chain workshops, conducted conflict minerals training and best practices dissemination and ongoing research on conflict minerals and metals used in the electronics sector.¹³¹

Prenkert and Shackelford then note, however, that 'any truly polycentric system will have local decision-making centres involved in the process' – an area in which they admitted the UNGP Framework was 'ill-fitted to the polycentric governance model'. Prenkert and Shackelford go on to note that global civil society actors – most notably, George Clooney's 'Enough' Project and Global Witness – had active involvement in the process. Stakeholders 'on the ground' in the DRC were largely left out of the decision-making process, leading local artisanal mining cooperatives to express their ongoing concerns about the effects §1502 in the DRC.¹³²

Nik Stoop, Marijke Verpoorten & Peter van der Windt, have undertaken the longest-term study to date of the impact of §1502 of the Dodd-Frank Act in the DRC, covering the period of 2004 – 2015.¹³³ They build on a shorter-term study produced by Dominic Parker and Bryan Vadheim, who assessed the impact of §1502 on artisanal

¹³⁰Ibid., 483.

¹³¹Ibid. 484-91.

¹³²Ibid., 491.

¹³³Nik Stoop, Marijke Verpoorten, Peter Van Der Windt, 'More Legislation, More Violence? The Impact of the Dodd Frank Act in the DRC' (2018) 13(8) PloS One 1 [e0201783] ['Stoop et al (2018)'].

mining in the DRC, based on the period 2004 – 2012.¹³⁴ Their study, which is based on empirical data collated from 70 administrative territories in Eastern Congo, assesses the correlation between the Dodd Frank Act and increases in violence and civilian looting in areas where armed groups compensated their losses from taxing 3T mines by roving the countryside and increasing battles over gold mines.

According to Stoop et al, §1502 has had the effect of increasing the violence in the DRC, rather than reducing it. In addition to doing little to improve the security situation in the DRC, s.1502 has had the effect of increasing the possibility of looting in some areas of the DRC by 143%. They note that the response to this might be that these remain short-term effects which are necessary in order to achieve the long-term goal of peace and stability in the DRC. The argument for this kind of long-term effect would be as follows: crime displacement cannot entirely substitute for the foregone revenue from 3T mining. As a result, over time, armed groups will face problems financing labour and capital, losing weaponry and manpower. This would give room for a power vacuum to form, which the state can then fill by establishing law and order, which allows for the local economy to recover from this initial shock. Although possible in theory, this seems unlikely to happen in practice. As Stoop et al conclude, however, this kind of assessment completely misunderstands the power dynamics at play between the Kabila government and local armed groups: the ban merely shifted the illicit control of mining sites from disloyal army units toward politico-military authorities who are loyal to Kabila.¹³⁵

On 8 June 2017, the US House of Representatives introduced the Financial CHOICE Act.¹³⁶ It aims to reverse many of Dodd-Frank's provisions including §1502. As at the date of writing, however the Act is yet to receive Senate approval.

The challenge identified here centres on HRDD being at once too broad and too narrow in its focus. It remains too broad, in the sense that it responds to a general concern (prevent conflict minerals in the supply chain) by focusing on the activities and effects of the TNC in that supply chain. This essentially asks the TNC (or business enterprise) to conduct a risk assessment exercise that is, in reality, vast. As Ruggie himself has stated on a number of occasions, including when addressing the G-20

¹³⁴Dominic Parker and Bryan Vadheim, 'Resource Cursed or Policy Cursed? U.S. Regulation of Conflict Minerals and Violence in the Congo' (2017) 4 Journal of the Association of Environmental and Resource Economists 1.

¹³⁵Stoop et al (2018), 6-7.

¹³⁶Financial CHOICE Act of 2017, H.R.10 (115th).

Trade Ministers in 2017, an iPhone 4 alone has 785 suppliers in 35 countries.¹³⁷ As has already been noted, given the complexities of global supply chains, conducting due diligence becomes uncertain and costly.

Yet HRDD is simultaneously too narrow, in that it often fails to question the underlying root causes of the human rights abuse identified or the historical and situational context of the community or stakeholders it seeks to assist. Nor does it address the long-term effects of the market itself (e.g. the sale of electronic products at the scale and intensity required) and the extent to which averting this specific risk will or will not lead to a plethora of other risks arising for the people it seeks to protect.

This is a problem associated with embedded pragmatism itself. The UNGP Framework attempts to institutionalize a due diligence process that asks only that companies avoid causing or contributing to adverse human rights impacts or prevent or mitigate them where they are directly linked to the company's business operations. This is in keeping with an approach that focuses on the business 'activities' and 'business relationships' but does not ask that the business in question consider the underlying structural causes of the relevant adverse human rights impact. Furthermore, if due diligence remains focused on risk assessment from the TNC's (or the market's) perspective, the problem becomes that there is limited likelihood that the process can allow for the level of coordination required amongst actors to ensure the TNC is, in fact, preventing harm, rather than preventing a harm that may very well be causing, or correlated to, another.

What is perhaps most evident from this case study, and which remains a key problem that the system of polycentric governance envisaged risks perpetuating, is the lack of local engagement in both identifying the problem and engaging the relevant transnational governance actors to respond to it. This remains a key concern for the functionality of the UNGP Framework.

Conceptual Fragmentation: The Jurispathic and Jurisgenerative Potential of Polycentricity

¹³⁷John G. Ruggie, 'Making Economic Globalization Work for All: Achieving Socially Sustainable Supply Chains', Address to the G-20 Labour and Employment Meeting, Hamburg, 15 February 2017. Available online at: <https://www.shiftproject.org/resources/viewpoints/ruggie-address-responsible-supply-chains-g20/>

A second issue of concern with the polycentric governance system proposed by the UNGP Framework relates to the problem of fragmentation. As Julia Black has noted, the proliferation of normative orders associated within polycentric governance regimes gives rise to opportunities for both norm collision and norm entrepreneurship. This can potentially be problematic, where orchestration coherence between regimes is preferred in order to maintain the authority and legitimacy of the regime itself.¹³⁸

In the BHR Field, a vast array of toolkits, guidance notes, frameworks and other forms of what has traditionally been known as 'soft law' is now available (and proliferating) through the OHCHR. At the same time, law firms are increasingly establishing 'business and human rights' practices that focus primarily on advising clients on emerging regulatory regimes now considered to undergird human rights protection. In this regard, the International Bar Association ('IBA') has issued advice on how lawyers can incorporate the UNGP Framework into their advice to corporate clients.¹³⁹ Additionally, NGOs, public-private institutions and coalitions between NGOs and investors have devised benchmarking and reporting schemes to both: (i) ensure TNCs and other business enterprises integrate human rights due diligence in accordance with the UNGP Framework and (ii) enable the assessment of companies' human rights performance based on indicators devised from publicly available information regarding what the company is doing to respect human rights.¹⁴⁰

Fragmentation is, of course, not a new concern for international jurists. What is perhaps significant here is that modes of legal reasoning traditionally applied in IHRL are now competing with legal reasoning as understood in ordinary business practice for primacy of place in terms of the BHR Field's ongoing constitution. This is of particular concern because, as was evidenced in the section pertaining institutionalization above, HRDD and reporting has become central to the BHR Field's development as a whole. To date, both *state practice* and *opinio juris* suggest that several states in the Global North require companies to conduct HRDD and report on adverse human rights impacts in their global supply chain. As of yet (and based on the

¹³⁸Black (2008), 139-40.

¹³⁹IBA, 'Business and Human Rights for the Legal Profession' (Adopted by the IBA Bar Council 8 October 2015), available online at: <https://www.ibanet.org/LPRU/Business-and-Human-Rights-for-the-Legal-Profession.aspx>

¹⁴⁰See Damiano de Felice, 'Business & Human Rights Indicators to Measure the Responsibility to Respect: Challenges and Opportunities' (2015) 37(2) Human Rights Quarterly 511; Claire Methven-O'Brien & Sumithra Dhanarajan 'The Corporate Responsibility to Respect Human Rights: A Status Overview' (2016) 29(4) Auditing, Accounting & Accountability Journal 542.

NAPs submitted by states to the OHCHR), similar state practice does not appear to be as apparent in states from the global South.

As Jonathan Bonnitcha and Robert McCorquodale ('Bonnitcha/McCorquodale') have recently identified, at least two competing understandings of due diligence can emerge from the UNGP Framework: one which is associated with a standard of conduct required to discharge an obligation, and the other associated with a process to manage business risks.¹⁴¹ According to Bonnitcha/McCorquodale, a conceptual slippage can be evidenced between the concept of due diligence as specified in Ruggie's reports to the HRC in 2009 and 2011, and the concept of due diligence as defined in Principles 15(a) and 17 of the UNGPs.¹⁴² For Bonnitcha/McCorquodale, when read together, a key distinction can be discerned between human rights due diligence as a standard of conduct (as in the reports to the HRC), and due diligence in the ordinary, business sense of the term as 'a procedural practice to assess risk in a company's own interest'.¹⁴³ This conceptual confusion could give rise to an understanding from business enterprises that merely implementing a due diligence process is sufficient to discharge the obligation to respect human rights as contained in the UNGP Framework. Yet this would lead to the incorrect analysis that the TNC or business enterprise did not have a correlative responsibility to remedy adverse human rights impacts which it had caused, contributed toward or was linked.¹⁴⁴

Bonnitcha/McCorquodale argued that these two distinct forms of understanding HRDD could pertain to the differing responsibilities of business contained in the UNGP Framework. Under Guiding Principle 13, businesses have a responsibility to:

- (a) Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur;
- (b) Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.¹⁴⁵

As a result, Bonnitcha/McCorquodale assert that the first responsibility – through which business must avoid causing or contributing to adverse human rights impacts as a result of their own activities – could give rise to a strict, no fault, do no harm obligation on business to which they would be required to provide a remedy. This interpretation is consistent with UNGP 22 (regarding access to remedies) in that business 'should

¹⁴¹Bonnitcha/McCorquodale (2017).

¹⁴²Bonnitcha/McCorquodale (2017), 909.

¹⁴³Ibid., 902.

¹⁴⁴Ibid., 903-4.

¹⁴⁵UNGP 13.

provide for or cooperate in remediation' where it could be shown that they have caused or contributed to adverse human rights impacts.¹⁴⁶ Next, they argued that the conduct of due diligence – applied as a standard of conduct – should only be relevant with regard to Guiding Principle 13(b) – where the business was seeking to prevent or mitigate adverse human rights impacts which were linked to its operations. Furthermore, they argue that this form of strict – or no fault – responsibility in the case of the business' activities itself, is wholly consistent with IHRL, in that a states' due diligence obligations are only relevant where it can be shown that the conduct in question is not attributable to the state.¹⁴⁷

By combining formalist aspects of extant international law with a novel reading of the UNGP Framework, Bonnitcha/McCorquodale's approach includes an analysis of how different states are held to different standards of conducting due diligence. This appeared to gesture toward a structural analysis in the use of the UNGP Framework, in that the standard of due diligence implemented would need to be sensitive to the degree of risk or harm and the resources (both economic and technical) of the entity in question, the nature of the adverse human rights impact and the need to be cognizant of victims' needs and desires in this regard.¹⁴⁸ Here, Bonnitcha/McCorquodale are arguing for the primacy of customary international law and IHRL to remain the focus of the BHR Field, yet in a manner that remains sensitive to CIL's potential to perpetuate (rather than curtail) economic disparities.¹⁴⁹ This is because they are primarily concerned to keep the *victims of human rights abuse* – i.e. those in need of a remedy – at the centre of the Field.

In direct response to this conceptualisation, Ruggie/Sherman have argued that there is no conceptual slippage in the UNGP Framework, and that the human rights due diligence process formulated therein is wholly separate due diligence in state-based IHRL. Reiterating the importance of polycentric governance once again, according to Ruggie/Sherman, the UNGP Framework:

seeks to achieve greater alignment among three governance systems in the business and human rights domain under the 'Protect, Respect, Remedy' framework. Thus, human rights due diligence is but one component of a more complex system...The recitation of the history of due diligence as a standard of conduct is irrelevant to the corporate responsibility to respect human rights under the Guiding Principles. This responsibility is neither based on nor analogizes from

¹⁴⁶Bonnitcha/McCorquodale (2017), 913.

¹⁴⁷Ibid., 914-6.

¹⁴⁸See in particular the reasoning at 905-6.

¹⁴⁹This is clear throughout the piece. See also Deva (2013) and Bilchitz (2013). See also Deva/Bilchitz (2017) 1.

state-based law. It is rooted in a transnational social norm, not an international legal norm.¹⁵⁰

In constitutionalizing this new 'transnational social norm', Ruggie and Sherman rely on the work of Amartya Sen, arguing that human rights should be construed as drawing on the interests of not only states but also 'market actors, civil society actors and workers'.¹⁵¹ International law is seen as 'incarcerating' the regulation of human rights, which can better be achieved from a flexible definition of due diligence that enables a polycentric understanding of rights, grounded in the experiences of people, to take shape.¹⁵²

As noted in Chapter 4, Sen's theory of human rights, however, again 'universalizes' the experience of the rightsholder, assuming that her capacity to have rights can be quantified in metrics and assessed on a global scale. Sen's capabilities approach assumes that for opportunities to be realized, one can usefully distinguish between having the *means* to achieve what one values (such as income or primary goods) and having the *opportunity* to achieve what one values (which can be differentiated, for example, by race, gender, class or disability – depending on the context).¹⁵³

For Sen, a capabilities' approach to human rights prioritises a focus on conceptualizing rights in the context of how they are being administered and who they may privilege. Yet at the same time, Sen openly admits that in order for rights to maintain their political potential, they need to be determined through a process which is transparent, open to valuational scrutiny and public reasoning, and linked to an understanding of justice determined by a specific community.¹⁵⁴ This is not something inherent in rights themselves, but something which has to be determined through a political community that remains distinct from the market. Ruggie/Sherman wrongly assume that merely regulating rights will enable rights to be realized. Yet it is precisely the spontaneity of asserting rights that enables them to retain their political power.¹⁵⁵

¹⁵⁰Ruggie/Sherman (2017), 923.

¹⁵¹Ruggie/Sherman (2017), 926. Ruggie and Sherman rely specifically on Sen, A. 'Elements of a Theory of Human Rights' (2002) 32 *Philosophy and Public Affairs* 319.[Sen (2002)'].

¹⁵²Ruggie/Sherman (2017), 926.

¹⁵³Sen (2002) 330. See also Chapter 4 of this thesis, at 4.2.1.

¹⁵⁴*Ibid.* 333-334.

¹⁵⁵Note Nussbaum's clarification of Sen: Martha Nussbaum, 'Capabilities as Fundamental Entitlements: Sen and Social Justice' (2003) 9(2) *Feminist Economics* 33. See also Amartya Sen *The Idea of Justice* (Harvard University Press 2009). Yet see Pahuja (2006); and Rajagopal (2003).

What is perhaps even more surprising, is that they are arguing that the history of an entire body of law upon which the initial impetus for the UNGP Framework came, and to which the UNGP Framework still forms a part, should be rendered irrelevant, due to its incarcerating logic.¹⁵⁶ This is an extraordinary claim: it assumes that because prior attempts to regulate the TNC utilizing extant IHRL have not been successful, law should be relegated to the dustbin of history. Yet paradoxically, the very system Ruggie attempts to create relies on the interaction between state-based human rights protections and corporate HRDD: even if the authors were of the view that the analogy did not accord with their view of the UNGP Framework, rendering it 'irrelevant' seemingly attempts to usurp the possibility that that the UNGP Framework could be imagined in other ways. This is anathema to a polycentric system, where normative authority does not rest with any one actor.¹⁵⁷

Rather than further enhancing normative entrepreneurship in this instance, and advocating for a plurality of approaches, Ruggie/Sherman maintain a conservative approach to the UNGP Framework.¹⁵⁸ This is wholly consistent with embedded pragmatism. Yet in so doing, they risk institutionalizing a monocentric approach to the development and evolution of the UNGP Framework and the BHR Field. Opportunities to consider more pluralistic understandings of the UNGP Framework and facilitating norm collision and norm entrepreneurship, rather than attempting to maintain 'control' over how the UNGP Framework is defined, may yet prove beneficial to the BHR Field. The expansion of customary international law, for instance, to incorporate transnational social norms that emerge of benefit to those most vulnerable to human rights abuse, may be one area yet worth pursuing.

Normative Indeterminacy

A final issue that needs to be confronted when thinking about the BHR Field as a system of polycentric governance is that it presupposes that 'human rights' constitute a distinct normative field from which 'shared social values' can emerge. Whose values emerge, and at what cost? Whether or not an issue is framed as human rights or for example, 'environmental crime' or 'economic development' reflects a prior political decision. As a

¹⁵⁶Ruggie/Sherman (2017), 926.

¹⁵⁷On this point, see as examples: Abbott & Snidal (2009); Krisch (2014), 12; and Benvenisti (2014) 286.

¹⁵⁸On norm entrepreneurship/collision, see in particular Andreas Fischer-Lescano, and Gunther Teubner, "Regime-collisions: the vain search for legal unity in the fragmentation of global law" (2003) 25 Michigan Journal of International Law 999.

result, transnational governance actors can recast any prospective concern where business is implicated as a rights concern. Business and human rights can therefore consider issues as diverse as the 'war on terror', climate justice, anti-corruption and human trafficking and reconstitute them as problems pertaining to individual human rights – and indeed, it often does.¹⁵⁹

The problem becomes that if every interest is re-cast as a 'human rights' concern the normative power of human rights language is diminished. The 'business' of business and human rights is then deluged by the number of issues in which rights plays a part. How then, does business choose which rights to prioritise?

The OHCHR has issued policy guidance to enable companies to prioritise 'adverse human rights impacts' in the conduct of HRDD.¹⁶⁰ According to the UNOHCHR:

A business enterprises' human rights risks are any risks that its operations may lead to one or more adverse human rights impacts. They therefore relate to its potential human rights impact. In traditional risk assessment, risk factors in both the consequences of an event (its severity) and its probability. In the context of human rights risk, severity is the predominant factor. Probability may be more relevant in helping prioritize the order in which potential impacts are addressed...Importantly, an enterprise's human rights risks are the risks that its operations pose to human rights. *This is separate from any risks that involvement in human rights impact may pose to the enterprise, although the two are increasingly related.*¹⁶¹

This definition has become the authoritative definition for prioritising risk in the BHR Field.¹⁶² Yet there are several concerns to which this definition gives rise. They can be illustrated if the thesis takes, as an example, a recent human rights report issued by a major TNC, Coca-Cola Plc ('CC'). I will discuss the issues first and then consider the example of CC to further illustrate this thesis' concerns. CC is selected here for illustrative purposes only

First, time, or the temporal nature of 'adverse human rights impacts', is not factored into this definition. There is no sense whether, for example, the human rights risk of depleting a community's water supply i.e. the right to water over a 10-year period should be considered more or less 'severe' an adverse human rights risk than potential loss of jobs for employees i.e. the right to work over the next two years. Severity, however, requires business enterprise to considers the scope, scale and remediability of an 'adverse human rights impact', hence suggesting that time is

¹⁵⁹Koskeniemi (2011) at 142.

¹⁶⁰OHCHR, HR/PUB/12/02 'The Corporate Responsibility to Respect Human Rights: An Interpretive Guide' (Geneva/New York 2012).

¹⁶¹Ibid., at 7.

¹⁶²See the section marked 'Institutionalization' in this chapter.

irrelevant if the impact is severe. Similarly, companies are only asked to look *prospectively* at risk: history, too, is irrelevant in this definition.

Next, the conceptualization of human rights risk seeks to delineate between the human rights harms that the business itself may potentially cause or contribute toward and those human rights harms which may pose a threat to the business itself. This appears to be an attempt to prevent the business from adopting an economic pragmatist approach to the reduction of human rights harm that I argued, in Chapter 4, was prevalent in the ICC's understanding of human rights.

Yet at the same time, the definition of 'adverse human rights impact' has now been recast human rights abuse as an 'adverse human rights *risk*', hence associating the determination of impact ('harm') with risk assessment. This guides the business enterprise toward conceptualizing human rights harm utilizing risk assessment metrics, which prioritise accounting for human rights harm utilizing auditing and accounting methods and mechanisms. This prioritises a technocratic, managerial understanding of human rights harm that can lead to companies considering harm prevention as yet another form of non-financial reporting.¹⁶³ Indeed, this is now the manner in which corporate law firms and several accounting firms advertise their expertise in the conduct of HRDD.

Taking CC as an example, it produced its first stand-alone human rights report ('HRR') on its due diligence processes in 2017.¹⁶⁴ In it, CC identifies 13 priority salient human rights risks which include: safety and health of all workers; equality/non-discrimination and related risks; child labour; forced labour; freedom of association; access to water; working hours; healthy lifestyles; land rights; product safety/quality; rights linked to sponsorship; rights to privacy; and linkage to corruption.¹⁶⁵ All 13 salient human rights risks are given equal priority – or at least, once determined, CC does not engage in any further prioritization between risks.¹⁶⁶

What becomes clear from CC's report is that, in responding to the normative indeterminacy of human rights, CC responds to its assessment of salient human rights risks utilizing similar technologies to the ones that Prenkert and Shackelford noted for

¹⁶³This is the basis of the EU Non-Financial Reporting Directive (2014). See the sections entitled 'Institutionalisation' and 'Juridification' above in this chapter.

¹⁶⁴Coca-Cola, 'The Coca-Cola Company's Human Rights Report 2016-17' ['CC Report'] available online at: <https://www.coca-colacompany.com/content/dam/journey/us/en/private/fileassets/pdf/human-and-workplace-rights/Human-Rights-Report-2016-2017-TCCC.pdf>

¹⁶⁵CC Report, 19.

¹⁶⁶CC Report, 20.

companies and industries bodies that have reacted to §1502 of the Dodd Frank Act. Responding to adverse human rights impacts becomes about generating tools to assess risks, to mitigate them and to respond, to use Jochnick's terminology, to Human Rights concerns. This is undertaken without requiring any reflection or assessment of the risk that the core business itself – i.e. the rate and amount of Coca-Cola it is producing – may have on generating adverse human rights impacts. Once again, the concerns addressed become at once too large e.g. ensuring access to water across 20 'markets' and responsible sourcing of water and too narrow e.g. accounting for access to water vs protecting the environment.¹⁶⁷

CC attempts to respond to this as follows. First, it embeds a policy commitment within its corporate structure, to put all its employees, as well as businesses with which it has links, on notice that it is committing to respect human rights.¹⁶⁸ This is consistent with Guiding Principle 16 and can be seen to act as a kind of deed of intent issued by the company, seeing as the UNGP Framework determines that it must be approved by the highest senior management (which CC's reflects).

Next, CC produces risk assessment metrics (auditing materials) to determine how to identify, monitor and track the human rights risk. It also engages in partnerships with other companies to promote initiatives in support of preventing the risk. Furthermore, it identifies employee-related programmes to maintain prevention of the human rights risk in question. As an example, in order to ensure equality and non-discrimination in the workplace, it has empowered 'cultural champions' to promote an inclusive culture.¹⁶⁹

Finally, it engages with civil society (NGOs and academia) to assist it in implementing programmes to prevent or mitigate the risk in question. This creates a symbiotic relationship between CC and the NGOs in question. To give as an example, CC launched the Leadership Group for Responsible Recruitment as part of its mitigating actions to prohibit child labour in its global supply chain. This is an initiative that involves several NGOs, including the Interfaith Center on Corporate Responsibility ('ICCR'). ICCR then issued a report highlighting CC's good practices in its sugar supply chain, which CC then proceed to highlight in its HRR as being evidence of it meeting its commitment to prevent forced labour.¹⁷⁰ CC does not appear to see it as a concern that ICCR may not be able to assess objectively whether CC is in fact, engaging in

¹⁶⁷Ibid., 21.

¹⁶⁸Ibid. 9, corresponding to UNGP 16.

¹⁶⁹Ibid. 21-22.

¹⁷⁰Ibid. 47.

'good' practices. Later, the report notes that ICCR is an 'important coalition of shareowners' representing 300 faith and values-driven organizations, representing more than US\$400 billion in invested capital. It remains unclear whether ICCR is in fact a shareholder in CC, again making their capacity to assess CC's actions independently at least questionable.¹⁷¹ CC, however, sees its actions in this respect as an important example of coalition-building between 'like-minded' organizations, suggesting it shares the top-down approach advocated by Ruggie et al.¹⁷²

In this respect, CC's response to the right to water is particularly interesting. In its report, CC no longer characterises this as a right, but simply refers to it as 'access to water'.¹⁷³ It then identifies 'access to water' as a global crisis, affecting one third of the world's population significantly:

Hundreds of millions of people do not have access to drinking water, and 2.4 billion people lack access to basic sanitation services. At CC, we respect the human and ecological needs for water. As a beverage company, we recognise the indispensable nature of water in advancing healthy ecosystem, communities, business, agriculture and commerce.¹⁷⁴

Next, CC explains what it has done to ensure this risk is mitigated. For CC, this has involved establishing a highly sophisticated water stewardship program across its 800 facilities. This begins by 'requiring each of them to employ a 'rights-based' approach to local community water needs by determining the possible impact of the facility's water use on the community'.¹⁷⁵ Once again, however, a 'rights-based approach' is managerial: a detailed risk assessment is conducted, which is then complemented by a comprehensive 'source water protection plan program' ('SWPPP'). Each facility must conduct due diligence to determine where their water comes from, the amount of available water, its quality, water infrastructure conditions and needs, policies governing water, and more. This process is called a 'Source Vulnerability Assessment' ('SVA'). Once the SVA is complete, CC plants then develop a Source Water Protection Plan ('SWPP').¹⁷⁶ SWPPs concentrate on 'shared challenges at the watershed level' and are often the basis for CC's community water projects aimed at protecting and improving water sources.¹⁷⁷ This is complemented by training programs for the water resource management teams. As at the date of the HRR, CC has identified 3,700

¹⁷¹Ibid.

¹⁷²Ibid.

¹⁷³Ibid., 29.

¹⁷⁴Ibid., 30.

¹⁷⁵Ibid.

¹⁷⁶Ibid.

¹⁷⁷Ibid.

mitigation actions.¹⁷⁸ CC then states that, since 2005, it has worked with communities, governments and 'respected-third parties' to support projects that address local water needs, from safe water access to watershed protection.¹⁷⁹

Since 2016, CC states it has replenished 100 per cent of the water used in finished beverages 'back to communities and nature'.¹⁸⁰ CC then notes, however, that 'total replenish work' is determined based on its replenish work globally, and in some markets it produces more than 100 per cent of the water used, whereas in others it is yet to meet its target.¹⁸¹ To date, it is replenishing 100 per cent of the water supply for finished beverage in 12 out of 18 markets, including Brazil, China, Mexico and India. It should be noted that CC refers to all geographic locations as 'markets' and all of its operations as 'business units'.¹⁸² CC further notes that two of its business units, Middle East & North Africa and Southern & Eastern Africa 'while committed to water replenishment, face many challenges due to conflict, geopolitical and social issues'.¹⁸³ Note again, that the *context* in which the business unit is working is considered an 'external challenge' and not indicated as itself, a human rights concern that CC may need to consider.¹⁸⁴

Here, we see that the human rights harm identified ('access to water') is no longer about that right as it pertains to a specific community: instead, it is applied as part of a global metric, in which, if an overall benefit is maintained (i.e. replenishing water *globally*), then CC considers this a positive result. This is the case, even if it is operating in some contexts where that is decidedly *not* the case. Yet at the same time, the fact that it is not the case is considered to be as a result of 'geopolitical and social issues' which are irrelevant to the characterization of 'adverse human rights impact' as it pertains to access to water.¹⁸⁵ This fails to take into account that the primary impetus for the UNGP Framework is that it is intended to ensure that 'individuals from human groups or populations that may be at *heightened risk of becoming vulnerable or marginalised*' are given priority.¹⁸⁶

This might be considered less a problem of indeterminacy and more a problem of misplaced risk management metrics. I would argue, however, that it is because *any*

¹⁷⁸Ibid.

¹⁷⁹Ibid.

¹⁸⁰Ibid., 32.

¹⁸¹Ibid.

¹⁸²Ibid.

¹⁸³Ibid.

¹⁸⁴Ibid.

¹⁸⁵Ibid.

¹⁸⁶UNGP 1 (General Principles).

course of action can be justified utilizing human rights that CC is able to make claims in this way.

To conclude, human rights have come to form part of a cost-benefit matrix in which the supply of *global* public goods (in this, case water) can be determined on a case-by-case basis and in isolation from other global public goods. Ultimately, whether or not this is a public good which a particular community itself wants CC to supply, while maintaining its operations, is not evidenced in the HRR. CC maintains that it 'consults' with communities and trains its business operations managers, yet there is no discussion of context, no discussion of history, no assessment of whether those who are in gainful employment with CC can accurately and adequately reflect community water needs. Yet as Tara Melish has noted advocates of the agency of the community are more often than not cast as misguided in their pursuit of lost utopias – the last utopia here, being human rights as regulation. As Melish has noted (speaking of the UNGPs generally):

Though grossly misrepresentative of the actual positions of the parties, the heuristic serves the GP project well...It casts defenders of the GPs, including powerful business and Global North states, as the 'true' defenders of human rights progress in the B&HR field. It also casts human rights NGOs (the GPs strongest and most effective critics) and the growing number of Global South states supportive of a treaty instrument in the field as obstacles to real progress, stubborn and myopic in their ideological extremism and ideological excess...¹⁸⁷

I would only argue further, that the problem is more about failing to consider that the UNGP Framework itself is in very grave risk of *perpetuating* and *exacerbating* the harm it seeks to prevent – namely *human* abuse as well as human rights abuse – if it remains wedded to a vision of the UNGP Framework that is itself, myopic, single-focused and grounded in embedded pragmatism, without shifting the focus of its embeddedness to the structural causes of the harms it seeks to prevent.¹⁸⁸

5.4 Conclusion to Chapter 5

The resolution of the legal/non-legal divide through the UNGP Framework has brought into sharp relief the underlying dynamics of power, distribution and wealth generation that law, in all its forms, can be utilised to support. This has been evidenced in the BHR Field through a consolidation in the relationship between powerful business interests, development, and human rights – now reframed as global public goods. This

¹⁸⁷Melish (2017), 79.

¹⁸⁸Baxi (2008), 448.

replaces any notion of human rights as politically pregnant and tied to social transformation with a technocratic, managerial focus that allows human rights, in all their normative indeterminacy, to dissolve into risk assessment metrics in a manner palatable for corporate consumption.

Furthermore, despite maintaining a commitment to polycentricity, the original drafters of the UNGP Framework ultimately maintain a tripartite system of monocentricity, which assumes equal distribution of power between its constitutive parts. This does nothing to ensure that the processes to which the UNGP Framework gives rise maintain any abstract commitment to justice, in any form. The ongoing creation of opportunities for BHR jurists; the pursuit of reducing adverse human rights impacts through risk calculation and quantification; and the maintenance of a 'human face in the global markets' within the existing capitalist order continue to take priority over any discussion of the structural causes of human rights harms or the relationality and systematicity of human rights abuse produced in our current age of neoliberalism.

The animating feature of this relationship remains the dominant reading of the UNGP Framework as one of embedded pragmatism – now embodied in practices and modes of legal reasoning in a polycentric governance system. Once inaugurated as a 'global' practice through the UNGP Framework and in the BHR Field, embedded pragmatism shifts the burden of determining 'shared social value' from institutions to persons (both natural and legal) in transactions within the global economic order (now no longer conceived as regulated by an international system of states but instead, through a transactional global supply chain). Yet because embedded pragmatism, as construed by the chief architects of the UNGP Framework, maintains a commitment to risk management, any structural account of why the current economic order is problematic, and who it is problematic for, continues to be sidelined for market-friendly CSR processes that are most palatable to business interests and remain myopic in their view of the world.

To date, this deficit allows for the ongoing construction of the GPD largely favoring the short-term interests of TNCs and other business enterprises and the long-term interests of the existing economic order as it is experienced by business people in Western Europe and the U.S. It may yet be successfully transferred to capitalist interests in the global South, as the growing interest in the BHR Field may yet indicate. In its current constellation, the polycentric governance system envisaged may lead to further possibilities to eviscerate the political potential of human rights, rather than to restore them. Yet as I have argued in this Chapter, the concept of embeddedness

remains pregnant with the promise of conceiving the world in different ways. What then, remains the new challenge for BHR jurists? It is to this final question that this thesis now turns.

Chapter 6: Conclusion – Beyond Ends and Beginnings: Into Life

'For all its charm, the island is uninhabited,
and the faint footprints seen along the shore
point without exception in the direction of the sea.

As if this were a place just for the leaving
and for immersion in a depth with no return.

In a life that's not for comprehending.'

- *Utopia*, Wislawa Szymborska (1976)¹

6.1 The central intellectual puzzle of this thesis – revisited

The central intellectual puzzle of this thesis has been to try to understand the emergence of the BHR Field and how that field might yet affect the way international lawyers theorize and practice IHRL in our current age of neoliberalism. It was an ambitious project from the start but one which I have attempted to approach with humility and care. I am fully cognizant of this thesis' positionality as a contribution to critical legal scholarship yet embrace the possibilities that contribution might yet bring to the world. As Konstantina Tzouvala has aptly put it, 'since a complete, accurate and impartial construction of the past is both elusive and pointless, historical narratives can only be partial, therefore political'.² This is the case, even when analyzing the most recent past: one woman's 'event' is another woman's 'myth', and both may yet combine or collide to be reconstructed as experience.³

I began this thesis with a diagnosis, in attempting to understand whether there might be a central animating concept and method underlying the UNGP Framework. This led me to analyse the process preceding the UNGP Framework and provided a plausible explanation as to why its drafters chose to do it this way. This was the foundation for my conceptualization of embedded pragmatism in the thesis. I used embedded pragmatism to explain the modes of legal reasoning through which the UNGP Framework's drafters sought to create an instrument that would embed the existing international economic order, as they conceived of it, in shared social values

¹Wislawa Szymborska *Sounds, Feelings, Thoughts: 70 Poems* (Princeton University Press, 1981) (Trans. by Magnus J. Krynski and Robert A. Maguire), 194.

²Konstantina Tzouvala, *Letters of Blood and Fire: A Socio-Economic History of International Law* (Doctoral Thesis submitted 2016, University of Durham) 220 (on file with the author).

³Paul Cohen, *History in Three Keys: The Boxers as Event, Experience and Myth* (Columbia University Press, 1997).

embodied in human rights. The limits of this reasoning were constructed with reference to pragmatism – an argumentative practice and way of thinking about international law that has arguably animated debates and practices at the UN for much of the post-World War II period.

The malleability of the concept of pragmatism called for me to put down some markers as to how I conceived of pragmatic reasoning in the context of regulating the conduct of TNCs and other business enterprises. Drawing from the statements and reports of the SRSG, John Ruggie, as well as my own analysis of the modes and manner in which determinations were being made in the archival record, I then determined that embedded pragmatism has the following six characteristics: (1) determining how to regulate the TNC and other business enterprises remains contingent on an empirical analysis of its effects and activities; (2) a focus on fact-based particularism and the ‘art of the possible’ means any idea of what *is* possible is inherently conservative (in the literal, as opposed to the political, sense of this word); (3) process is favoured over outcomes; (4) any contestability of the description of what exists remains narrow; (5) any radically alternative structural account of the economic order is almost always opposed as being impractical; and (6) because it remains impossible to predict how the world is going to change, assessments on how international law can and should be incorporated into the conduct being regulated are made with a view that is short-term in orientation, or in the long-term systemic interests of the existing economic order.

I then investigated recent attempts to regulate the conduct of the TNC at the United Nations, culminating in the adoption of the UNGP Framework, paying close attention to process and struggle. Utilizing the concept of embedded pragmatism, I sought to uncover, recover and discover what role IHRL played for different actors in these processes. This included examining how those actors characterized the TNC and its role in the societies in which it operates, and what role pragmatism played in their reasoning about the use of IHRL to regulate the conduct of the corporation. I also examined what were the continuities and discontinuities, both within and amongst the reasoning in these previous processes, and the processes that were utilized to construct the architecture of the UNGP Framework.

In so doing I engaged primarily in a close reading of these processes to animate what was at stake for what David Kennedy calls the ‘background players’ inhabiting the worlds of UN bureaucracy.⁴ I have considered the archival record, looking at the positions put forward by states’ representatives (sometimes known simply by their

⁴Kennedy (2016), 64.

country of origin in the archival record), civil servants, special rapporteurs, working groups, representatives of civil society organizations, business organizations and academics – all of whom have played a part in the narrative constructed here.

I have sought in the thesis to analyse and critique the professional vernacular of technical expertise contained in the archival records, to find ruptures and combinations in how parties understood embeddedness and pragmatism, and to provide a plausible narrative explaining how the BHR Field emerged. 'Background players' typically refrain from the language of interests and ideologies – speaking instead in the vernacular of 'best practice, analytical rigour, empirical necessity, good sense and consensus values'.⁵ Yet these interests and ideologies can be detected and better understood when close attention is paid to how these vernaculars are being employed, by whom and for what purpose.

The three processes analysed in this manner were: the United Nations Code of Conduct on (later: for) Transnational Corporations (Chapter 3); the Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Respect to Human Rights (Chapter 4); and the process leading to the UNGP Framework itself (Chapter 2). In the final analysis (Chapter 5), I considered how the conceptualization of the BHR Field, as a polycentric governance system, might affect the way international lawyers are being asked to think about IHRL. This included considering whether embedded pragmatism continues to animate modes of reasoning underlying the way the OHCHR is institutionalizing the UNGP Framework and what this might yet tell us about the role and function being afforded to human rights – and by extension – international human rights *law* – as a result.

6.2 Why Embedded Pragmatism?

In constructing this narrative, I have sought to provide a novel explanation for the emergence of the BHR Field that has woven three disparate yet related strands of scholarship together. As noted in Chapter 1, the first strand was the work to trace the rise of the TNC in our contemporary legal moment and to analyse why this has been accompanied by international law's ongoing failure to regulate its conduct directly. The second was to consider the claim to human rights' ascendance in the current age of neoliberalism, in light of ongoing critiques of how this ascendancy has diminished attempts to decolonize international law and to respond to growing inequality. Finally,

⁵Ibid., 114.

I provided an assessment of how the BHR Field attempts to deliver on its central claim to bring justice to victims, in light of ongoing struggles about the methods utilized to regulate the conduct of TNCs and other business enterprises, and the place and purpose of human rights in doing so.

Why did I choose the concept of embedded pragmatism? Why was it necessary to view the processes in this way? And what has the approach illuminated that other approaches have not? There are several answers to these questions.

First, as has recently been shown by several international law scholars, including Hilary Charlesworth, 'international law generally steers clear of analysis of longer-term trends and structural problems.'⁶ In particular, analyses conducted by international human rights lawyers and advocates, both within and outside of the UN, have framed 'root causes' of human rights violations narrowly. As Susan Marks has ably shown, the 'root' of root causes is often portrayed by privileging the state without reference to grassroots social movements, portraying the international community as anodyne or leaving out the international/global economic order that perpetuates the causes identified.

Within the emerging BHR Field, this has often incorrectly polarised debates between international human rights lawyers and advocates, on the one hand, and regulatory theorists, on the other. The former are often viewed as formalist and doctrinal, focused on creating law that binds, and narrow in their approach to BHR problems. The latter are viewed as politically astute, historically grounded, infinitely flexible, results-oriented and collaborative in their approach. I have sought to provide a much-needed corrective to this polarisation, by beginning to do the more difficult work of mapping competing ideas about the economic order and competing theories of social change that both led to the UNGP Framework and continue to animate the BHR Field.

Secondly, embedded pragmatism has sought to shed light on how human rights have been utilized to both justify and substantiate contrasting views of the international economic order in these processes, to show how IHRL has become complicit in regulating certain kinds of economic order as well as how it can be utilized differently. In this respect, embedded pragmatism provides a novel way of conceptualizing the role played by human rights in regulating the TNC and other business enterprises, which is mindful both of the international economic order that

⁶Hilary Charlesworth, 'International Law: A Discipline of Crisis' (2002) *Modern Law Review* 377, 389.

regulation is being utilized to support, and cognizant of the methods and reasoning being adopted to evince that support. Unlike existing theories utilized to explain the BHR Field, the focus of embeddedness is one of contestation, struggle and plurality, *not* collaboration and consensus. This is because embeddedness/dis-embeddedness is a *dynamic* rather than a static process. This makes the concept politically productive and generative of new ways of conceptualizing both the UNGP Framework and the BHR Field.

Third, unlike Marxian critiques of our current age of neoliberalism, in this thesis I have sought to understand and engage in a close reading of liberal governance in action and on the terms set by those engaged in the legal processes I have analysed. As such, and because it began with a diagnostic exercise, the initial conceptualization of embeddedness came from the chief architect of the UNGP Framework's own usage of the term. However, in conceptualizing embedded pragmatism, rather than simply maintaining the SRS's focus on embedded liberalism, I have striven for as a corrective to the SRS's own characterisation of how the international, and subsequently global, economic order functions in two important ways. First, I have exposed the fact that liberalism, as embedded by some states – most notably, the US and the UK – in the aftermath of World War II, relied upon racist assumptions as to how the benefits of social welfare could be maintained in the global North at the expense of the global South. Second, I have provided evidence of the role law plays in the embedded/dis-embeddedness dynamic, a role which has remained largely absent from previous understandings and usages of the term, despite law's underwriting of the political and economic spheres, at the national, international and transnational level.

In these important respects, embedded pragmatism is able to focus attention on how international law, and IHRL, specifically, are being utilized by background actors in these processes to substantiate their claims about the international/global economic order and the role of the TNC and other business enterprises within it. It sharpens the focus of the critique of these debates and shows both what united parties and what kept them apart. It then allows for the thesis to provide an interpretive analysis as to why certain processes failed, and the UNGP Framework succeeded. To be clear, this is not a causal explanation: embedded pragmatism only allows for an interpretive analysis to emerge at each stage of the critique provided. It does not seek to provide an analysis proving that the UNGP Framework succeeded *because* these other processes failed in the way that they did.

Once the BHR Field is inaugurated, embedded pragmatism helps explain the understanding proposed by the drafters of the UNGP Framework, with respect to how the system of polycentric governance, underpinning the Field, *should* operate. Yet in light of the analysis that I have provided throughout the thesis, this new-found normative commitment needs to be further challenged and contested. I will, therefore, first briefly reiterate the findings of each chapter, and subsequently provide some ideas for how it can be challenged, and what future areas of research might be, in light of the findings provided herein.

6.3 Central Findings of the Thesis

In Chapter 2, I provided a close reading of the six-year process that led to the UNGP Framework, which began with the introduction of the concept of embedded pragmatism. I then evidenced how the iterative process that culminated in the unanimous consensus of the UNGP Framework by the HRC, required that certain, previously unresolved questions, regarding the regulation of the TNC, were resolved. In particular, questions of legality and form were resolved through the process of achieving consensus on the UNGP Framework.

The descriptive move of embedded pragmatism was shown as collapsing the distinction between the (legal) state duty to protect human rights, on the one hand and the (non-legal) corporate responsibility to respect human rights, on the other. The normative move of embedded pragmatism was evidenced in Chapter 2 through ongoing claims that the resulting UNGP Framework would enable the creation of positive 'change where it matters most – in the daily lives of people'. It further noted that the UNGP Framework attempts to prioritize the 'rights and needs of, as well as the challenges faced by, individuals from groups or populations that may be at heightened risk of becoming vulnerable or marginalized'.⁷ These moves had the potential to open up rather than to shut down questions about law's role in distribution, inequality and conflict. I then moved on to investigate upon what grounds this collapse in distinction had come to be agreed, and what kind of world views it might be seeking to support.

In Chapter 3, I began the excavation process. In analysing the Code of Conduct proceedings at the UNCTNC, I considered what had remained at the heart of the disagreement between states during this process that the UNGP Framework later

⁷UNGP (General Principles), 1.

claimed to resolve. Namely: how did member states and civil servants conceptualize the legality of this instrument during the Code of Conduct proceedings? And how did they consider the issue of corporate form?

I argued that the question of legality turned on the contestation between two very different ideas as to how international law should embed values into the international economic order and what role human rights should play in that ordering. On the one hand, there was the NIEO's vision of a world in which states determined endogenously what constituted social value, TNCs were productively used in the service of development, and human rights remained grounded in self-determination and the abolition of racist apartheid regimes. This was pitted against a vision of a world in which protecting the private world of foreign investment from public international interference remained a priority, and human rights should be utilized to ensure civil and political freedoms within the state.

The question of corporate form was debated and consistently deferred, with no agreement reached on the regulation of the TNC, as a real entity, distinct from the state, and posing a threat to states as a whole. Instead, the TNC came to be conceived as not a TNC at all. Rather, it was an aggregate of contracts that could ultimately include all businesses, provided all other issues in the Code were agreed. Dogged persistence by civil servants, however, failed to get states to jettison their positions of principle. The failure of the Code was a failure for pragmatism and for international law, which became unable to paper over what had become fundamental cracks in the artifice of the international system. Once in the throes of structural adjustment programs ('SAPs') by the mid-1980s, Third World countries largely 'trapped in underdevelopment and sluggish economic performance' began to change their earlier, radical views. The need for the Code became side-lined altogether as they sought to obtain TNCs support, often compelled to do so by SAP policies.

In Chapter 4, I considered the Norms process, looking at how the forum shift from the UNCTNC to the SCHR grounded the discussion in civil society. Human rights, now perceived as the 'universal' language of shared social values, shifted from being contested at the site of states to the TNC itself. Legality was contested again, as was corporate form. Whether or not TNCs, and eventually, other business enterprises, could have direct human rights obligations became the primary preoccupation of social movements, NGOs and business associations – most notably, the ICC. The story of embedded pragmatism was momentarily complicated during the Norms process, while civil society actors attempted a revolutionary move through their formulation of the

Norms. The battle of the pragmatisms then ensued: with critical, CSR and economic approaches to pragmatism vying for primacy in the Norms process.

The first camp attempted to inscribe onto TNCs responsibilities for human rights that would require them to take seriously the need to remedy human rights abuses, wherever and whenever they occurred. This camp used modes of reasoning that would allow for contestation, conflict and counter-movements to *persist* in their advocacy against the deleterious effects of the TNC in the neoliberal economic order. Critical pragmatists, as I called them, attempted to re-historicize the debate about TNCs and radicalize the manner in which TNCs were viewed. They did so by reasoning that the TNC was a *real* entity, whose powers needed to be curtailed and whose ability to cause human suffering should be seriously confronted.

The second camp instead, adopted what I have argued is a CSR approach that attempted to ensure that corporate *social* responsibilities existed alongside the corporation's legal responsibilities, as determined by each state and as part of the international order. This view largely maintained the idea of embedded pragmatism, as evidenced by representatives of several states during the UNCTNC process. According to this view, agreement on the conduct of TNCs throughout the Code of Conduct process allowed for the rights, exercised by those engaged in the ownership and control of foreign direct investment to remain subordinate to the 'legitimate social purpose' of that investment as determined by states.

Yet ultimately, both of these views of the Norms were usurped by those in support of economic pragmatism. The ICC argued not for what business could do for human rights but instead, for how human rights could best serve the interests of business. Facilitating new markets and ensuring foreign investment should be why states embraced human rights: ensuring enough environmental protection and safeguarding at a minimum civil and political rights would allow for the economy, like life itself, to maintain its dynamism and prosper. The failure of the Norms process provides as much an explanation as to the *limitations* of the UNGP Framework as it does its success. The Norms questioned the relationality and systemization of privilege and deprivation that global corporate and financial transactions maintain and perpetuate: the UNGP Framework does not.

Finally, in Chapter 5, I critiqued the newly emerging system of polycentric governance, explaining why I consider that system, as currently envisaged operating by the UNGP Framework's original drafters, to be perpetuating human rights managerialism and a technocratic understanding of rights that fail to consider

adequately the structural causes of human abuse and human rights abuse. I provided evidence of how these twin approaches are emerging in corporate practice through the conduct of HRDD. I did so, by providing examples of how the BHR Field is currently addressing questions of functional coordination, conceptual fragmentation and normative indeterminacy, and gesturing toward how this might still be imagined differently.

6.4 Where to from here? The new New International Lawyer

The narrative constructed by this thesis, which explains the emergence of the BHR Field, is in one register, a meditation on liberal governance. It seeks to uncover, recover and discover the way in which international law has twisted and contorted, in its attempts to regulate the conduct of the TNC. It has also moved from state-centred authority for the institutionalization of IHRL to market-centred legitimacy in which technical, regulatory human rights managerialism threatens to replace the hope of politically-contested social change that remains at the heart of human rights for many human rights lawyers.

The story told in this thesis may seem, on its face, to belong to a now well-established genre in which critically-minded international lawyers explain both the limits and potential of international law as a project that has emancipatory potential. The story now is often told: if only those practicing international law can simultaneously transcend the situation in which law is being applied, and historically situate that situation by working within it and opening it up to newer, better, concrete possibilities, the world will be a better place.

In what has become perhaps the canonical text for a generation of international lawyers who perceive of themselves in this ilk, Martti Koskenniemi's *From Apology to Utopia* implicitly tells the story of this Subject – at once both cognizant of the pitfalls of international law, as an argumentative practice, and remaining open, capable of navigating adeptly to determine when to align her preferences with natural law (utopia) or state-centred politics (apology).⁸ As Sahib Singh has recently shown, if *From Apology to Utopia* speaks from the pulpit, *The Gentle Civilizer of Nations* speaks from the confessional.⁹ Here, the international lawyer is re-cast as eminently pragmatic, refusing to maintain a critical disenchantment, instead becoming an

⁸Koskenniemi (2005).

⁹Sahib Singh, 'Images of the International Lawyer' (2016) *Leiden Journal of International Law* 699, 716.

instrumentalized cog, whose fantasy is 'that of holding the prince's ear' that of becoming 'counsel for the functional power holder'.¹⁰

Where my narrative differs, however, is both in where it ends up situating the international lawyer and the place it suggests that she moves to next. In situating myself in the BHR Field, I suggest that this new 'new' international lawyer can be imagined as not solely the critical international lawyer, maintaining a distance from managerial practice, or the managerial lawyer, pragmatically determining the outcomes within a system she can only hope marginally to influence. Instead, she is both at the same time.

As Sundhya Pahuja has ably pointed out, this is to conceive of international law not as an either/or, but as a both/and: to think of international law as the site of contestation and struggle.¹¹ It is to know what (or whose) struggle one is fighting for, without assuming that the object is to dominate. Rather, it is to open up the space for ongoing contestation, and for the capacity for more people to have the privilege to do so – to contest, to have their struggles acknowledged. At points, this might mean less law or no law – or at the very least, refusing to lawyer.

Structural emancipation in the story of this thesis, therefore, does not come from liberating oneself from the strictures of liberal governance but instead, accepting responsibility for them. This was the Polanyi brothers' hope for a better world, and it is this thesis' hope as well. It involves no longer being able to seclude oneself in the confines of international law but instead, operating at the ideational and operational links between international law, corporate law, investment law, and human rights – to name a few – and doing so with a sense of moral conviction that at its best, remains open, compassionate, kind.

Yet this moral conviction cannot be that human rights, *per se* are emblematic of social values or that 'the market' can resolve ideological conflict or determine which public goods to prioritise. It can only ever come from trying, as much as possible, as hard as possible, to *listen* to the needs, wants and desires of those that remain most disenfranchised from the global economy in our current age of neoliberalism. Gina Heathcote calls this a method informed by 'embedded intersectionality' – one in which plural subjectivities become the normative grounding for the way in which we critique what international law is doing in the world, and how it is doing it.¹² For Heathcote,

¹⁰Ibid.

¹¹Pahuja (2011), 7.

¹²Heathcote (2018), 78.

top-down approaches are replaced by dialogues and dialogic reasoning, through which one 'listens to the conditions at which one arrives at international law' before considering its futures.¹³

In terms of where this may lead, for future research and inquiry in the BHR Field: I would propose alternative readings of polycentric governance and the UNGP Framework that might revive what Upendra Baxi has convincingly argued could be an interconnected, transnational governance domain that seeks to prevent *human* abuse as well as human rights abuse.¹⁴ Further research projects, assessing empirically whether the theory posited in this thesis accurately reflects the dominant approach in the BHR Field, and documenting how this might still be imagined as a pluralistic, polycentric governance system, could further enable the BHR Field to move in new directions. In response to the question then, are human rights being incorporated into the managerial practice of corporations? At least insofar as there is now an emerging BHR Field for which this thesis has provided some evidence, the answer is a resounding yes. And in our current age of neoliberalism, what might this incorporation be achieving and whose values are being upheld? To this question there are, as yet, many answers. And I would argue we need to work hard to keep it that way.

¹³Ibid., 204.

¹⁴Baxi (2008) 450.

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