Preface

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HUMAN RIGHTS AND BUSINESS AT THE INDETERMINATE CROSSROADS

Multinational corporations have the potential to deeply impact human rights. Commerce can bring robust economic and social benefits to growing economies. As economic growth accelerates, an improving quality of life can follow, as well as in some circumstances, political freedom and democracy. Commerce also has the potential to degrade the human condition. With commerce can come environmental pollution, social upheaval, and political corruption that can suppress many fundamental human rights. The intersection of business and human rights is one with substantial economic, social, and political implications.

For decades, international organizations have tried to build a framework through which the responsibilities of business to human rights are more clearly understood. In 1976, the United Nations Commission on Transnational Corporations was tasked with drafting a Code of Conduct for Transnational Corporations. This code, which would have regulated various business practices on a global level, was beset with opposition from developed countries and other sources. Later efforts during the 1990s and early 2000s produced the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Respect to Human Rights (Norms). Endorsed by numerous NGOs, multinational corporations strongly resisted their adoption as they potentially bound corporations to a set of mandatory and ambiguous obligations. The U.N. ultimately decided that the Norms lacked legal standing and that no monitoring for compliance should be conducted.

In 2005, the U.N. tried again with the appointment of John Ruggie as a Special Representative of the U.N. Secretary General Ruggie’s focus was different from his predecessors. He dismissed the norms and actively sought to engage numerous stakeholders impacted by the intersection of
business and human rights. Notably, these stakeholders included multi-
national corporations and law firms to which any framework would be 
applied. Fourteen multistakeholder consultations, two dozen research 
projects, and 1,000 pages of documents later, Ruggie produced a final 
report in 2011 titled “Guiding Principles on Business and Human Rights: 
Implementing the United Nations ‘Protect, Respect and Remedy’ frame-
work.” The framework became a global and voluntary platform based 
on “principled pragmatism” that articulates specific calls to action 
strengthening the protection of human rights while taking into account 
realistic competitive issues and interests important to most multinational 
corporations.

The “Protect, Respect and Remedy” framework has received both 
criticism and praise. Some contend that it represents an innovative 
platform for embedding stronger norms, while others perceive its volun-
tary nature as insufficient for protecting human rights in a global 
economy. An underexplored issue in this area is the need for convergence 
between global business enterprises and civil society groups that protect 
human rights. Much can be done, and much needs to be understood, to 
facilitate participation of business in the human rights dialogue through 
constructive and meaningful interaction. One can advance respect for 
human rights by illuminating the perspective and goals of multinational 
corporations who conduct business where human dignity is in peril.

It is from this perspective that this text takes a call to action. The 
business law group in the University of Connecticut School of Business 
hosted a colloquium titled “Bridging the Gap between Business and 
Human Rights.” The event took place on May 14–15, 2013, at the 
University of Connecticut and was organized by Robert Bird, Associate 
Professor of Business Law in the School of Business and Northeast 
Utilities Chair in Business Ethics and co-sponsored by the Kelley School 
of Business at Indiana University. The purpose of this colloquium was to 
exchange the potential for common ground between business and civil 
society groups in the area of human rights. Attendees at the conference 
exploded how firms perceive and interact with human rights, examined 
how voluntary regulatory regimes can positively influence business 
behavior, and analyzed how multinational corporations can align their 
interests with human rights in their chosen markets. The result of this 
collaborative endeavor is found in the pages of this book.

This book, like the colloquium that inspired it, is not intended to serve 
as a comprehensive guide, but rather to explore business and human 
rights from a particular perspective. Participant authors who publish here 
are mainly business lawyers teaching at American business schools who
have an abiding interest in the value-driven necessity of global commerce. These faculty are immersed in the language, practices, and goals of business academia. They speak the language of business schools, understand business school norms, and teach students whose goals are more often to maximize shareholder value than to serve a loftier goal of ethical leadership.

However, they are not merely servants of a profit-seeking philosophy. Law is the embodiment of social policy, and it is the impact of laws on our society to both facilitate commerce and remedy injustice that are an important focus. These authors mainly come from a legal background, with a firm grounding in fairness, justice, and advocacy of normative social policy. Their points of view shed light on the intersection of business and human rights in a unique and informative fashion. It is intended neither to be final nor definitive, but simply a perspective – one that would be modest in its goals but yet still contributing to an important idea. One hopes that this book will be only the beginning of a robust and engaging dialogue that bridges the gap and, in the process of doing so, helps change the world.

This book is divided into two parts. The first part focuses on the role of the multinational corporation in respecting human rights and its chapters examine the impact of human rights from the perspective of the corporations who have a significant ability to buttress or erode these rights in markets where they do business.

The book begins with a chapter by Radu Mares, of Raoul Wallenberg Institute of Human Rights and an Associate Professor Faculty of Law, Lund University. Professor Mares’s work focuses squarely on one of the most important innovations in business and human rights – the protect, respect, and remedy framework developed by John Ruggie and his team. This chapter concentrates on the most relevant prong to business – the corporate responsibility to respect human rights. Professor Mares carefully examines what the “respect” label really implies, and explores the potential for a convergence of expectations around this relatively new, and potentially ambiguous, concept. He rightly notes the importance of the concept of due diligence as the defining idea, even over the responsibility to respect that headlines much of Ruggie’s work. This is likely just the beginning of future research understanding the full implications of the framework and Ruggie’s apparently deliberate choice of language familiar to corporate enterprises.

Chapter 2 is by Stephen Kim Park, Assistant Professor of Business Law at the University of Connecticut. This chapter shows how mandatory disclosure in human rights can be a catalyst for internally driven changes
in tactical operations and strategic objectives. Mandatory disclosure can drive self-regulation, which can in turn improve performance. Viewing mandatory disclosure through the lens of Section 1502 of the Dodd–Frank Act, which requires firms to disclose if their products use minerals from certain conflict-plagued nations, Professor Park examines the benefits and costs of such disclosures, and identifies areas for future improvement.

The book continues with a chapter by Norman Bishara and David Hess, Assistant Professor of Business Law and Business Ethics and Associate Professor of Business Law, respectively, at the Stephen M. Ross School of Business at the University of Michigan. The authors explore one of the most pressing issues in international development – that of corruption of developing states. The chapter proposes that corporate impact on human rights will improve if business, human rights, and corruption are considered in tandem. Suppressing business-related corruption has many benefits but can also end the proliferation of human rights abuses that plague so many governments.

Lucien J. Dhooge, Sue and John Staton Professor of Law and Area Coordinator for Law and Ethics at the Scheller College of Business at Georgia Institute of Technology, contributes Chapter 4, focusing on the intersection between mandated disclosure regulations and the compelled speech doctrine embedded in the First Amendment to U.S. Constitution. Professor Dhooge reflects upon how disclosure regulations that can provide helpful transparency to government and civil society can potentially conflict with basic protections of expression guaranteed by national governments. The chapter reveals how the range of top-down regulatory solutions to human rights issues involving corporations are not limitless, and that uncertain boundaries in U.S. law between permissible disclosure requirements and unconstitutional compelled speech will make challenges to such regulation a continuing inevitability.

Chapter 5 is authored by Janine S. Hiller, Professor of Business Law at Virginia Tech, and Shannon S. Hiller, MPA Candidate at Princeton University. The authors squarely focus on the challenge of collaboration between two distinct groups – multinational corporations and the civil society groups who monitor them for human rights abuses. Using the protect, respect, remedy framework of John Ruggie as a springboard, the authors explore the risks of co-opetition between two disparate and often conflicting interests. While co-opetition has its risks, particularly for the civil society group that may find itself coopted by the corporate entity with which it too-closely affiliates, co-opetition can be a mechanism by which multinational corporations and the civil society groups genuinely partner to solve some of the most pressing global human rights problems.
Part II of this book takes a different tack, namely, the rights of vulnerable stakeholders and their erosion via direct or indirect corporate activity. Obligations for corporations to respect human rights are not merely motivated by noblesse oblige but based on empowerment held in the inherent dignity of each human person. The remaining chapters focus on human rights of individuals and groups impacted by corporate conduct and how meaningful communication and respect between business and civil society can produce mutually beneficial and rights-respecting outcomes.

This Part begins with a contribution by Marisa Anne Pagnattaro, Josiah Meigs Distinguished Teaching Professor at the University of Georgia. Professor Pagnattaro highlights the availability of legal tools that can be applied to improve the labor standards of the communities in which firms employ workers. This chapter is not simply about compulsion, however, and takes the intriguing perspective that implementation of voluntary labor standards can be a successful long-term sustainability strategy, citing research showing that high-sustainability firms have outperformed lower ones over time. While regulation may be necessary through a variety of means to protect worker rights, such regulation may not be an entirely zero-sum loss for firms subject to its requirements.

Chapter 7 focuses on the rights of indigenous peoples related to traditional knowledge that may be misappropriated by multinational corporations. David Orozco, Assistant Professor of Legal Studies and Florida State University, Kevin McGarry, Assistant Professor of Business Law at Texas Wesleyan University, and Lydie Pierre-Louis, Associate Professor of Business Law at University of San Francisco, examine how traditional U.S. legal doctrines have applicability to modern human rights problems. Such doctrines would speak to the access to remedy principle embedded in the protect, respect, and remedy framework.

In Chapter 8, Jamie Darin Prenkert, Weimer Faculty Fellow and Associate Professor of Business Law at Indiana University (Bloomington), explores some of the fundamental assumptions of the protect, respect, and remedy framework and the Guiding Principles. These are fundamentally conceived as a polycentric governance system, whereby a regulatory regime eschews top-down mandated rules in favor of a nonhierarchical and partially overlapping regime system. Using the work of Elinor and Vincent Ostrom, Professor Prenkert applies an institutional analysis and development framework to illuminate how polycentric governance can impact a voluntary regime like the Ruggie framework. Using the example of conflict minerals, Professor Prenkert reveals how polycentric governance can be a promising regime for successful
implementation of the protect, respect, and remedy framework and the Guiding Principles.

In the final chapter, Daniel R. Cahoy, Professor and Dean’s Faculty Fellow in Business Law at Pennsylvania State University, examines the intersection of the human right to food with the need for incentives to encourage innovation in agriculture through the use of intellectual property rights. Advances in technology protected by intellectual property can be a catalyst for substantial change, but also lock out food producers denied access in an environment of genetic diversity. This chapter balances compensation needs for innovators with the human right to access to food and also discusses the role of established legal doctrines in facilitating or impeding the human right to food.

When U.N. Special Representative John Ruggie completed his mandate to identify human rights standards for business, clarify their implications for business, and develop materials for impact assessments, he said that this was not the end of the process. Rather, it was the end of the beginning. A foundation of understanding regarding the intersection of business and human rights now exists, and it is the role of numerous participants, including academic commentators, to propel this understanding forward into practical and successful application. It is hoped that this book will be one of many helpful contributions toward making the aspirations of this mandate, and other mandates to come, a reality.