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## **The Corporate Responsibility to Respect Human Rights: A Status Review**

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# The Corporate Responsibility to Respect Human Rights: A Status Review

Claire Methven O'Brien<sup>1</sup> and Sumithra Dhanarajan<sup>2</sup>

## ABSTRACT

This article provides a critical analysis of developments from 2011 to date relating to the Second Pillar of the United Nations Guiding Principles on Business and Human Rights, the corporate responsibility to respect human rights. The article first briefly contextualises the corporate responsibility to respect human rights as articulated by the UN Guiding Principles on Business and Human Rights with regard to international human rights law as it currently stands. It then describes and analyses new norms and emerging practices in six areas where the UN Guiding Principles on Business and Human Rights call for a response from business and governments: human rights due diligence, corporate policies on human rights, human rights impact assessment, remediation of corporate human rights abuses, supply chain responsibility and transparency, and corporate reporting of human rights impacts. Throughout, the article includes a focus on examples from Asia and Europe. The article concludes by cautioning the need for continuing evaluation of the effectiveness of current approaches to implementing the UN Guiding Principle in securing respect for human rights in practice and the validity of their underlying assumptions.

Key words: Human rights, corporate responsibility to respect human rights, UN Guiding Principles on Business and Human Rights, human rights due diligence, human rights impact assessment, non-financial reporting, supply chains, sustainability

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## The Corporate Responsibility to Respect Human Rights: A Status Review<sup>3</sup>

Claire Methven O'Brien<sup>4</sup> and Sumithra Dhanarajan<sup>5</sup>

The UN Guiding Principles on Business and Human Rights (GPs) are a significant marker in the contemporary evolution of norms and standards on the responsibility and accountability of corporate actors for their social, environmental and human rights impacts.<sup>6</sup> The GPs set down a framework that, consistently with the conventional restrictions imposed by international human rights law, maintains the primary responsibility of States to protect against human rights violations. At the same time, they give explicit recognition to the responsibility of businesses to respect, and not harm, human rights. Arguably, they have thus contributed to preserving the legitimacy of human rights through a re-orientation of human rights norms, if not laws, in line with a changed global environment, and at a time when this was essential to ensure their continuing relevance as a narrative responsive to people's lived experiences of indignity and injustice.

Notwithstanding, doubts persist about the regulatory effectiveness of the GPs' voluntary approach. By 2014, only 272 out of 80,000 or so transnational firms have a human rights policy. While their rhetoric may have captured the policy-making "peaks", this suggests that uptake on the ground is slow, prompting claims that "*firms are still not ready to be safe rather than sorry*".<sup>7</sup> It may be the case that only law can bind,<sup>8</sup> but would a legal intervention yield any better results, in

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<sup>3</sup> This paper draws on parts of S Dhanarajan and C Methven O'Brien, *Human rights and businesses. Background paper for the 14<sup>th</sup> Informal ASEM Seminar on Human Rights*, 18-20 November 2014, available via <http://www.asef.org/projects/themes/governance/3136-14th-informal-asem-seminar-on-human-rights->.

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<sup>6</sup> UN SRSG, "Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy Framework', Annex, UN Doc. A/HRC/17/31 (21 March 2011). Text of the UNGPs translated (officially and unofficially) into a selection of languages is available here <http://business-humanrights.org/en/un-guiding-principles/text-of-the-un-guiding-principles>.

<sup>7</sup> Susan Ariel Aaronson and Ian Higham, "Re-righting Business": John Ruggie and the Struggle to Develop International Human Rights Standards for Transnational Firms," *Human Rights Quarterly* 35:2 (2013): 333.

<sup>8</sup> Bilchitz contrasts the GPs' 'moral normativity' with 'binding normativity' which in his view is needed to achieve corporate accountability for human rights abuses and which he argues only law can provide: David Bilchitz, "A chasm between 'is' and 'ought'? A critique of the normative foundations of the SRSG's Framework and the Guiding Principles," in *Human Rights Obligations of Business Beyond the Corporate Responsibility to Respect*, ed. Surya Deva and David Bilchitz (Cambridge: Cambridge University Press, 2013), 107-137.

terms of increased awareness, implementation and enforcement? A hard law, punitive approach has long had its own sceptics, particularly where corporations are the objects of rules,<sup>9</sup> with numerous empirical studies disclosing the significance of social factors, both internal and external to regulated companies.<sup>10</sup> If these questions are still not settled empirically, neither is their political debate over. In June 2014, the UN Human Rights Council adopted two human rights and business resolutions. One was advanced by the Core Group of states supportive of the GPs.<sup>11</sup> The other, proposed by group of States led by Ecuador and South Africa, proposed the establishment of an intergovernmental working group with a mandate to elaborate an international legally binding instrument on human rights and transnational corporations.<sup>12</sup>

This paper first briefly contextualises the second Pillar with regard to international human rights law as it currently stands. It then reviews developments since 2011 with regard to the interpretation and implementation of each of the GPs included under Pillar II of the UN Framework,<sup>13</sup> with a focus on examples from the regions of Asia and Europe.

## 1. Introducing the second Pillar of the UN Framework

The corporate responsibility to respect human rights under Pillar II of the UN Framework requires businesses to avoid infringing human rights and to address adverse human rights impacts they may be involved in. Businesses should thus seek to prevent or mitigate impacts that they have caused or contributed to, as well as those directly linked to their operations, products or services through their business relationships, both contractual and non-contractual (GP13).

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<sup>9</sup> E.g. Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford: OUP, 1992), Julia Black, “Decentring Regulation: Understanding the Role of Regulation and Self-Regulation in a “Post-regulatory” World”, (2001) *Current Legal Problems*, 54, 103.

<sup>10</sup> E.g. Neil Gunningham et al, *Shades of Green: Business, Regulation and Environment* (Stanford: SUP, 2003).

<sup>11</sup> UNHRC Res.26/... of 23 June 2014, *Human rights and transnational corporations and other business enterprises*, UN Doc.A/HRC/26/L.22/Rev.1. This resolution was supported by 22 countries.

<sup>12</sup> UNHRC Res. 26/... of 24 June 2014, *Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights*, UN Doc. A/HRC/26/L.22/Rev.1. This resolution was supported by 20 countries. Commentaries from a range of actors, including the former SRSG, in response to Resolution and the idea of a treaty, can be found here: <http://business-humanrights.org/en/binding-treaty> .

<sup>13</sup> Report of the Special Representative of the Secretary-General, Protect, Respect and Remedy: A Framework for Business and Human Rights, UN Doc A/HRC/8/5, 7 April 2008, available at <http://www.reports-and-materials.org/sites/default/files/reports-and-materials/Ruggie-report-7-Apr-2008.pdf>

International law still does not establish direct human rights duties on non-state actors.<sup>14</sup> Yet the measures and behaviour required of businesses to fulfil their responsibility to respect human rights can, and should, be provided for by each state's respective national laws and policies, in all the various areas these touch on business activities, from labour, environmental, non-discrimination and product safety standards, to those in the areas of intellectual property, privacy, financial sector and essential services regulation. In many jurisdictions, businesses do, to a large extent, already respect human rights, via this route of compliance with existing legal rules. Yet this mechanism can be an unreliable one: it may assume too much, in terms of the ability, or will, of governments and subordinate public authorities to regulate business conduct in line with human rights requirements - a tendency which, arguably, has been exacerbated by pressure on states to relax regulatory regimes in the context of liberalization and a resulting competition between states for FDI.

Such was the backdrop to the governance "gaps" accompanying globalisation highlighted by the SRSB when launching the UN Framework and, accordingly, the GPs asserted the corporate responsibility to respect human rights as a free-standing, universally-applicable minimum standard of business conduct, driven by global social expectation while at the same time based on international law. Though sometimes criticised for being a legal "fudge", seen in this setting, the hybrid status of the corporate responsibility to respect can perhaps be understood as a necessary compromise. The corporate responsibility to respect recognises the enduring role of states as *de jure* duty bearer for human rights, on one hand, but on the other, the ethically unacceptable limitations imposed by the still state-centric structure of international law.

## 2. Human rights due diligence

The GPs afford a central role to human rights due diligence, a process said to enable any corporation to achieve full respect for all human rights. A business' first step, in undertaking due diligence should be to have a published policy commitment to respect human rights (GP15).

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<sup>14</sup> Though companies are subject to limited direct obligations under e.g. international environmental law, and may also be subject to duties under international humanitarian and international criminal law in certain circumstances.

Thereafter, due diligence is envisaged to comprise four steps, taking the form of a typical continuous improvement cycle (GPs17-20):

- 1) Assessing actual and potential impacts of business activities on human rights – human rights risk and impact assessment;
- 2) Acting on the findings of this assessment, including by integrating appropriate measures to address impacts into company policies and practices;
- 3) Tracking how effective the measures the company has taken are in preventing or mitigating adverse human rights impacts; and
- 4) Communicating publicly about the due diligence process and its results.

Companies should also take steps to remediate any adverse impacts of their activities on rights-holders (GP22). This process is said to be adaptable to the specific character and context of any enterprise: companies are to adjust the scale and complexity of the measures to meet the responsibility to respect human rights depending on factors including size, industry sector, and the seriousness of human rights impacts to which the company's activities can give rise (GP14).

Also, since the corporate responsibility to respect human rights refers to all internationally-recognised human rights, not just those in force in any one particular jurisdiction (GP11), in terms of scope, human rights due diligence should encompass, at minimum, all human rights enumerated in the International Bill of Human Rights, the labour standards contained in the International Labour Organisation's Declaration on Fundamental Principles and Rights at Work and, based on its specific circumstances, additional standards, such as those relating to indigenous peoples<sup>15</sup> or conflict affected areas (GP12).

### 3. Human rights policies

While it is by no means a foregone conclusion that paper promises are turned into reality, without an explicit written commitment, systemic change within a business towards respect for human rights is highly unlikely. At a minimum, a human rights policy should help to raise company

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<sup>15</sup> International Labour Organization (1989) *Convention concerning Indigenous and Tribal Peoples in Independent Countries*, No 169, 27 Jun 1989. United Nations (2007) *Declaration on the Rights of Indigenous Peoples*, 13 September 2007.

awareness of the need to consider human rights impacts, and serve as an entry point for dialogue for stakeholders such as workers or communities. According to the GPs, a high-level company policy statement expressing company commitment to respect human rights is essential: only Board-level buy-in will give a policy the authority needed to permit proper implementation, especially in face of any conflict with any conflicting business imperatives. A company's human rights policy should furthermore be public, so that external stakeholders have a proper platform for engagement with, and scrutiny of, companies affecting them. (GP16).

Establishing the state of play in terms of business practice in this area can however be hard. A paper published by the SRSR in 2006 found that, amongst a (non-representative) sample of Fortune 500 companies, where respondents were mainly based in the US and Europe, ninety per cent reported having an explicit set of principles or management practices in place with regard to human rights.<sup>16</sup> A survey of 153 companies of all sizes and from 39 countries undertaken by the UNWG in 2013 (again based on a non-random sample) found fifty eight per cent with a public statement on human rights.<sup>17</sup> But the Business and Human Rights Resource Centre, which has recently begun to document published company policies on human rights, currently lists just over three-hundred and thirty, worldwide.<sup>18</sup> Matters are further complicated given that companies participating in the UN Global Compact or stating support for the OECD Guidelines for MNEs are also now implicitly committed to respect for human rights. But a 2013 study for the European Commission, assessing 200 randomly-selected large European companies found that only 33% referred to the UN Global Compact, OECD Guidelines or ISO 26000, only 3% to the UNGPs themselves, and 2% to the ILO MNE Declaration.<sup>19</sup>

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<sup>16</sup> John G. Ruggie, "Human Rights Policies and Management Practices of Fortune Global 500 Firms: Results of a Survey," *Corporate Social Responsibility Initiative, Working Paper*, no. 28 (2006), [http://www.humanrights.ch/upload/pdf/070706\\_Ruggie-survey-Fortune-Global-500.pdf](http://www.humanrights.ch/upload/pdf/070706_Ruggie-survey-Fortune-Global-500.pdf).

<sup>17</sup> UNGA (2011) *Addendum: Uptake of the Guiding Principles on Business and Human Rights: practices and results from pilot surveys of Governments and corporations*, A/HRC/23/32/Add.2, 16 April 2013, available at [http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A-HRC-23-32-Add2\\_en.pdf](http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A-HRC-23-32-Add2_en.pdf).

<sup>18</sup> The list does not include company policies referring only to employees or suppliers: "Company Policy Statements on Human Rights," *Business & Human Rights Resource Centre*, accessed October 18, 2014, <http://business-humanrights.org/en/company-policy-statements-on-human-rights>.

<sup>19</sup> European Commission, *An Analysis of Policy References made by large EU Companies to Internationally Recognised CSR Guidelines and Principles* March 2013, available at: [http://ec.europa.eu/enterprise/policies/sustainable-business/files/csr/csr-guide-princ-2013\\_en.pdf](http://ec.europa.eu/enterprise/policies/sustainable-business/files/csr/csr-guide-princ-2013_en.pdf).

Unsurprisingly, the same study found that very large companies (those with over 10,000 employees) were more likely to refer to international standards in CSR policies than smaller companies. It also detected significant variation between surveyed countries in the likelihood that companies have a human rights policy – suggesting that national factors, including government encouragement or support, can influence outcomes in this area. From the viewpoint of “early adopters” of human rights policies, government steps to promote their adoption by the rest would help to level the playing field, so that it should be a business-friendly initiative.<sup>20</sup> On the basis of available data, it seems clear that more needs to be done by both government and business itself to improve performance in this area.

#### 4. Human rights impact assessment

Human rights impact assessment (HRIA) is the first step in a due diligence process. An adverse human rights impact may be said to occur when an action removes or reduces the ability of an individual to enjoy his or her human rights.<sup>21</sup> Companies can be connected to adverse human rights impacts in a number of distinct ways. They are potentially responsible for:

- *Causing* a human rights impact through intended or unintended actions, for example, deliberate discrimination in hiring practices, or accidental pollution of a local waterway, interfering with the right to health
- *Contributing to* a human rights impact, by being one of a number of entities whose conduct together curtails human rights, for instance, where a global brand changes its order specifications at short notice so that its suppliers breach labour standards in meeting them

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<sup>20</sup> DIHR, ICAR and GBI, *Business Dialogue on National Action Plans: Report of Key Themes*, <http://accountabilityroundtable.org/wp-content/uploads/2014/05/Business-Dialogue-ICAR-DIHR-GBI-Key-Themes.pdf>.

<sup>21</sup> For an overview see, *Guide to Human Rights Impact Assessment and Management (HRIAM)* (International Finance Corporation, 2010), <http://www.ifc.org/wps/wcm/connect/8ecd35004c0cb230884bc9ec6f601fe4/hriam-guide-092011.pdf?MOD=AJPERES>. For an example of an HRIA “Toolkit” see also “Human Rights Impact Assessment Tools,” *NomoGaia*, accessed October 18, 2014, <http://nomogaia.org/tools/>.and Human Rights



- Impacts *directly linked* to a business' operations, products or services: a company may be connected to human rights abuses through its business relationships, including those with suppliers, joint-venture partners, direct customers, franchisees and licensees.<sup>22</sup>

The GPs further indicate that companies should, in the course of performing an HRIA, draw on internal or independent human rights expertise; undertake meaningful consultation with potentially affected rights-holders and other relevant stakeholders; consider human rights impacts on individuals from groups that may be at heightened risk of vulnerability or marginalisation, and gender issues; and repeat risk and impact identification at regular intervals, for instance, before entering into a new activity, prior to significant decisions about changes in activities, and periodically throughout the project lifecycle (GP18).

Yet the GPs' guidance on HRIA remains high-level, without detailed descriptions of an HRIA process or orientation on how HRIA should be adapted to particular industries or contexts.

Various initiatives are now attempting to address this, with guidance recently issued, for example, on HRIA for particular sectors,<sup>23</sup> and for thematic HRIAs, for instance, focusing on the rights of children<sup>24</sup> and indigenous people.<sup>25</sup> Some individual companies have devised methodologies for impact assessment in connection with specific issues arising in their own operating environments.<sup>26</sup> So far, only a small handful of HRIAs undertaken by companies have been

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<sup>22</sup> See further, IHRB, *State of Play: The Corporate Responsibility to Respect Human Rights in Business Relationships* (Institute for Human Rights and Business and Global Business Initiative on Human Rights, 2012), <http://www.ihrb.org/pdf/state-of-play/State-of-Play-Full-Report.pdf>.

<sup>23</sup> See e.g. *Human Rights in the Mining and Metals Industry: Integrating Human Rights Due Diligence into Corporate Risk Management Processes* (International Council on Mining & Metals (ICMM), March 2012), <http://www.icmm.com/page/75929/integrating-human-rights-due-diligence-into-corporate-risk-management-processes>, and IPIECA and DIHR, *Integrating human rights into environmental, social and health impact assessments. A Practical Guide for the oil and gas industry*, available at:

[http://www.humanrights.dk/files/media/dokumenter/tools/integrating\\_hr\\_into\\_eshia.pdf](http://www.humanrights.dk/files/media/dokumenter/tools/integrating_hr_into_eshia.pdf)

<sup>24</sup> UNICEF, *Children's Rights in Impact Assessment* (Geneva:UNICEF, 2014), available at [http://www.unicef.org/csr/css/Children\\_s\\_Rights\\_in\\_Impact\\_Assessments\\_Web\\_161213.pdf](http://www.unicef.org/csr/css/Children_s_Rights_in_Impact_Assessments_Web_161213.pdf).

<sup>25</sup> E.g. IWGIA; *Interpreting the UN Guiding Principles for Indigenous Peoples*, available at: [http://www.iwgia.org/iwgia\\_files\\_publications\\_files/0684\\_IGIA\\_report\\_16\\_FINAL\\_eb.pdf](http://www.iwgia.org/iwgia_files_publications_files/0684_IGIA_report_16_FINAL_eb.pdf); and IBIS, *Guidelines for Implementing Indigenous Peoples' Right to Free Prior and Informed Consent*, [http://www.socialimpactassessment.com/documents/Guidelines\\_Implementing\\_rights\\_Indigenous\\_Peoples\\_FPIC.pdf](http://www.socialimpactassessment.com/documents/Guidelines_Implementing_rights_Indigenous_Peoples_FPIC.pdf).

<sup>26</sup> E.g. *Human Rights Due Diligence Checklists Background and Guidance* (Coca-Cola Company, 2011), <http://assets.coca-colacompany.com/7d/59/b2a85d9344bdb7da350b81bcd364/human-rights-self-assessment-checklists.7.14.pdf>.

published,<sup>27</sup> with most meeting criticism from civil society stakeholders *inter alia* for the methodology adopted. Thus, civil society organisations and NHRIs are also undertaking HRIAs,<sup>28</sup> which typically go beyond current corporate practice, for instance, in terms of involvement of rights-holders and transparency.<sup>29</sup>

Thus, the parameters and process of HRIA under the GPs remain emergent and rather contested. One question attracting continuing interest is whether HRIA should be integrated into environmental or social impact assessment processes, particularly where these are provided for by statute or licensing regulations, or undertaken as a separate, “stand-alone” exercise. Another relates to the issues of independence, and equality of arms, in the conduct of impact assessments, and how to achieve this given power asymmetries between companies and communities, which may taint assessments facilitated by company personnel, but also where legislation provides for community consultation to be undertaken by public bodies, who themselves may be, or perceived to be, interested parties in the outcome of an HRIA.<sup>30</sup> Still further questions relate to the potential future role of strategic or sector-wide HRIA, mirroring environmental practice<sup>31</sup>; the role in HRIA of human rights indicators; the value of risk-based approaches,<sup>32</sup> and of the notion of “impact” assessment itself.<sup>33</sup>

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<sup>27</sup> E.g. *Nestlé and DIHR*, Talking the Human Rights Walk: Nestlé’s Experience Assessing Human Rights Impacts in Its Business Activities [http://www.nestle.com/asset-library/documents/library/documents/corporate\\_social\\_responsibility/nestle-hria-white-paper.pdf](http://www.nestle.com/asset-library/documents/library/documents/corporate_social_responsibility/nestle-hria-white-paper.pdf)., and *Human Rights Assessment of Goldcorp’s Marlin Mine*, available at <http://www.hria-guatemala.com/en/MarlinHumanRights.htm>.

<sup>28</sup> See e.g. Misereor et al, *Human rights impact assessment of the Tampakan Copper-Gold Project, Mindanao, Philippines*, available at [http://www.misereor.org/fileadmin/redaktion/HRIA\\_Human\\_Rights\\_Impact\\_Assessment\\_Tampakan\\_Copper-Gold\\_Project\\_August2013.pdf](http://www.misereor.org/fileadmin/redaktion/HRIA_Human_Rights_Impact_Assessment_Tampakan_Copper-Gold_Project_August2013.pdf).

<sup>29</sup> Rights and Democracy, *Getting it Right: Human Rights Impact Assessment Guide*, <http://hria.equalit.ie/en/>; FIDH, “Community-Based Human Rights Impact Assessments,” July 14, 2014, <http://www.fidh.org/en/globalisation-human-rights/business-and-human-rights/7502-community-based-human-rights-impact-assessments>.

<sup>30</sup> A Schilling-Vacaflor, “Democratizing Resource Governance Through Prior Consultations? Lessons from Bolivia’s Hydrocarbon Sector,” GIGA Working Paper No.184 (2012), [http://www.giga-hamburg.de/en/system/files/publications/wp184\\_schilling.pdf](http://www.giga-hamburg.de/en/system/files/publications/wp184_schilling.pdf)

<sup>31</sup> “Sector-Wide Impact Assessments (SWIA),” *Myanmar Centre for Responsible Business*, accessed October 18, 2014, <http://www.myanmar-responsiblebusiness.org/news/sector-wide-impact-assessments.html>.

<sup>32</sup> Mark B. Taylor et al, “Due Diligence for Human Rights: A Risk-Based Approach,” *Corporate Social*, 2009, [http://www.hks.harvard.edu/m-rcbg/CSRI/publications/workingpaper\\_53\\_taylor\\_etal.pdf](http://www.hks.harvard.edu/m-rcbg/CSRI/publications/workingpaper_53_taylor_etal.pdf).

<sup>33</sup> Richard Boele and Christine Crispin, “Should we take the “impact” out of impact assessment?” Paper presented at IAIA12, [http://www.iaia.org/conferences/iaia12/Final\\_Non\\_Review.aspx](http://www.iaia.org/conferences/iaia12/Final_Non_Review.aspx).

## 5. Responding to human rights impact and remediation

Once an assessment is completed, the GPs call for businesses to respond to its findings, to prevent human rights abuses and address any that may have been uncovered. Clearly, such responses will be wide-ranging. Internally, a company might need to amend recruitment processes or contractual terms for employees, change its purchasing, sales or marketing practices, improve worker accommodation, introduce due diligence for land acquisitions, and so on. In addition, ensuring the effectiveness of any such changes will usually require the allocation of new resources, for instance, for training and awareness-raising, monitoring and management of human rights impacts on a continuous basis.<sup>34</sup> Businesses are expected to address all their impacts, though they may prioritise their actions. Here the GPs recommend that companies first seek to prevent and mitigate their severest impacts, or those where a delay in response would make consequences irremediable (GP24).

Where risks or impacts derive from a company's business relationships, rather than from its own activities, the GPs require it to consider what leverage it has over the entity in question; how crucial the relationship is; the severity of the abuse; and whether terminating the relationship would itself have adverse human rights consequences. According to the GPs, 'leverage' is a company's ability to effect change in the wrongful practices of an entity, be that an element within the company itself, another business, or a public actor. Modalities of leverage are thus numerous, ranging from communications emphasizing human rights by top managers to subordinate units to capacity building and amending contract terms for suppliers.<sup>35</sup> If a business has leverage, it is expected to exercise it. This will be so where impacts are *caused by* elements within the business itself, in which case it should cease or prevent the impact, and provide for, or collaborate in, remediation. Where a company has *contributed to* or is *directly linked* to impacts, it should cease and prevent its contribution, exercise leverage, if it has it, and provide, or cooperate in, remediation. If, on the other hand, the company lacks leverage, it is expected to seek ways to

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<sup>34</sup> See e.g. "Monitoring and Remediation," *Gap Inc. Social & Environmental Responsibility Report 2011/2012*, accessed October 18, 2014, <http://www.gapinc.com/content/csr/html/human-rights/monitoring-and-remediation.html>; "Human Rights," *Nestlé Global*, accessed October 18, 2014, <http://www.nestle.com/csv/human-rights-compliance/human-rights>.

<sup>35</sup> *Using Leverage in Business Relationships to Reduce Human Rights Risks* (Shift, 2013), <http://shiftproject.org/sites/default/files/Using%20Leverage%20in%20Business%20Relationships%20to%20Reduce%20Human%20Rights%20Risks.pdf>.

increase it, for example, by offering incentives, or applying sanctions to the relevant entity, or collaborating with others to influence its behaviour.<sup>36</sup>

While the GPs' concept of leverage appears straightforward, views often differ about its application in practice. With regard to the financial sector, banks have tended to emphasise constraints on their leverage over those they lend to,<sup>37</sup> while outsiders argue that, as controllers of access to credit, they wield much greater influence,<sup>38</sup> and point to opportunities to piggy-back human rights screening on anti-corruption due diligence obligations that are already established in many jurisdictions.<sup>39</sup> Another area of concern is that of companies' leverage over the use of their products by customers,<sup>40</sup> especially with regard to policing and military supplies, information technology and surveillance equipment,<sup>41</sup> and dual use technologies. Though the export of such products may be permissible under national standards, the GPs require companies to look beyond technical legality in order to ascertain whether, in reality, their products or services facilitate human rights abuses.<sup>42</sup> More complex still is the question of the responsibility and leverage of internet service providers and social media platforms to prevent their use as a medium for

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<sup>36</sup> GP19. Cf. Stepan Wood, "The Case for Leverage-Based Corporate Human Rights Responsibility," *Business Ethics Quarterly* 22, no. 1 (2011): 63–98.

<sup>37</sup> *UN Guiding Principles on Business and Human Rights: Discussion Paper for Banks on Implications of Principles 16–21* (The Thun Group of Banks, 2013), <http://business-humanrights.org/sites/default/files/media/documents/thun-group-discussion-paper-final-2-oct-2013.pdf>.

<sup>38</sup> "BankTrack on the Thun Group Paper on Banks and Human Rights" (BankTrack and The Berne Declaration, December 2013); Ariel Meyerstein, "Are Big Banks Short-Selling Their Leverage over Human Rights?," *The Guardian*, October 31, 2013, sec. Guardian Sustainable Business, <http://www.theguardian.com/sustainable-business/banks-short-selling-leverage-human-rights>.

<sup>39</sup> See e.g. "Human Rights Guidance Tool for the Financial Sector," *UNEP Finance Initiative*, accessed October 18, 2014, <http://www.unepfi.org/humanrightstoolkit/>; "About," *Finance Against Trafficking*, accessed October 18, 2014, <http://financeagainstrafficking.org/>.

<sup>40</sup> See e.g. *CSR D et al vs Andritz AG, OECD Watch*, accessed October 18, 2014, [http://oecdwatch.org/cases/Case\\_326](http://oecdwatch.org/cases/Case_326).

<sup>41</sup> "German Companies Are Selling Unlicensed Surveillance Technologies to Human Rights Violators – and Making Millions," *Global Voices Advocacy*, accessed October 18, 2014, <http://advocacy.globalvoicesonline.org/2014/09/05/exclusive-german-companies-are-selling-unlicensed-surveillance-technologies-to-human-rights-violators-and-making-millions/>. Ben Wagner, *Exporting Censorship and Surveillance Technology* (Humanist Institute for Co-operation with Developing Countries (Hivos), 2012), [https://www.hivos.org/sites/default/files/exporting\\_censorship\\_and\\_surveillance\\_technology\\_by\\_ben\\_wagner.pdf](https://www.hivos.org/sites/default/files/exporting_censorship_and_surveillance_technology_by_ben_wagner.pdf); Cindy Cohn, Trevor Timm, and Jillian York, *Human Rights and Technology Sales: How Corporations Can Avoid Assisting Repressive Regimes* (Electronic Frontier Foundation (EFF), 2012), <https://www.eff.org/files/filenode/human-rights-technology-sales.pdf>; *Dual Use Items: Big Business Profits Put before Human Rights*, 2014, <https://www.youtube.com/watch?v=s21JCGcdDX8>; Carola Frediani, "A Global Campaign to Monitor the 'Digital Weapons' Trade," *TechPresident*, April 8, 2014, <http://techpresident.com/news/wegov/24901/curtailing-international-surveillance-tech-trade>.

<sup>42</sup> Francesca Marotta, "Request from the Chair of the OECD Working Party on the Responsible Business Conduct" (United Nations Human Rights Office of the High Commissioner, November 27, 2013), <http://www.ohchr.org/Documents/Issues/Business/LetterOECD.pdf>.

propaganda and the organization of criminal acts, especially given the need, on the other hand, to ensure any restrictions on free speech are lawful, rational and proportionate.<sup>43</sup>

## 6. Supply chain responsibility

Since large corporations usually have the resources on paper to prevent or remediate impacts in line with GPs, for many, the widespread persistence of abuses questions whether they have the will to do so.<sup>44</sup> Yet chronic abuses may be indicative of the existence of genuine dilemmas about how to implement and control standards throughout value chains. For some companies, the production process may be relatively static and concentrated<sup>45</sup> but for others their contractual networks are as dynamic as they are vast, while commodities can present their own distinct challenges in terms of traceability.<sup>46</sup>

Supplier codes of conduct ranked amongst the earliest business and human rights initiatives and pre-date the GPs.<sup>47</sup> While uptake of this model by consumer-facing companies was relatively rapid in some sectors, strong critiques of practice also quickly emerged, for instance, with regard to reliance by third-party auditors on a superficial checklist approach, on one hand, and for lack of coordination amongst purchasers leading to ‘audit-fatigue’ amongst inspected businesses, on the

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<sup>43</sup> Loek Essers, “Google, Facebook to Discuss Online Extremism at Dinner with EU Officials,” *PCWorld*, October 8, 2014, <http://www.pcworld.com/article/2813132/google-facebook-to-discuss-online-extremism-at-dinner-with-eu-officials.html>. See also Council of Europe, ICANN’s procedures and policies in light of human rights, fundamental freedoms and democratic values, DG2014/12, and other materials available at <http://www.coe.int/t/information/society/icann-and-human-rights.asp>.

<sup>44</sup> E.g. “Indonesian Wage Trial: Human Rights Violations ‘Systemic,’” *Clean Clothes Campaign*, accessed October 18, 2014, <http://www.cleanclothes.org/news/2014/06/24/indonesian-wage-trial-human-rights-violations-systemic>; Janell Ross, “Major American Brands Silent on Alleged Rights Abuses At Overseas Factories,” *Huffington Post*, July 21, 2011, [http://www.huffingtonpost.com/2011/07/21/american-brands-abuses-factories-jordan-labor-conditions\\_n\\_903995.html](http://www.huffingtonpost.com/2011/07/21/american-brands-abuses-factories-jordan-labor-conditions_n_903995.html).

<sup>45</sup> Many companies rely extensively on single suppliers e.g. Apple /Foxconn: Connie Guglielmo, “Apple’s Supplier Labor Practices In China Scrutinized After Foxconn, Pegatron Reviews,” *Forbes*, December 12, 2013, <http://www.forbes.com/sites/connieguglielmo/2013/12/12/apples-labor-practices-in-china-scrutinized-after-foxconn-pegatron-reviewed/>.

<sup>46</sup> *A Guide to Traceability: A Practical Approach to Advance Sustainability in Global Supply Chains* (United Nations Global Compact and BSR, 2014),

[https://www.unglobalcompact.org/docs/issues\\_doc/supply\\_chain/Traceability/Guide\\_to\\_Traceability.pdf](https://www.unglobalcompact.org/docs/issues_doc/supply_chain/Traceability/Guide_to_Traceability.pdf).

<sup>47</sup> For example, the Ethical Trading Initiative, the Fair Labour Association, Worldwide Responsible Apparel Production Program (WRAP) and Social Accountability International (SAI) were launched before the GPs: see further WG 4.

other.<sup>48</sup> Subsequent innovation has aimed to address these problems with, for example, the launch of virtual data-sharing platforms<sup>49</sup> and an increasing emphasis on capacity strengthening measures for suppliers along with other stakeholders.<sup>50</sup>

Yet egregious abuses continue. In 2013, over 1000 mainly female garment workers were killed and more than 2500 injured in the Savar building collapse. Various factors contributed to the “Rana Plaza” disaster, amongst them breaches of construction, health and safety regulations and labour standards by local suppliers based in the factory, who were suppliers to large numbers of well-known European and American brands, and defective inspection arrangements and social audits, on the part of purchasers, that failed to pick them up.

These problems, as well as a broader context of exploitation and marginalization of female garment workers in Bangladesh, were widely documented<sup>51</sup> and had led to earlier workplace disasters.<sup>52</sup> The Rana Plaza catastrophe, because of its horrendous scale, attracted unprecedented public attention and outrage, and triggered a significant multi-actor mobilization. Brands were convened by the ILO<sup>53</sup> and global unions to coordinate an *Arrangement* for the payment of compensation to workers. In May 2013, within a few weeks of the tragedy, brands and retailers entered into a 5-year binding agreement with Bangladeshi and global trade unions. The *Accord on Fire and Building Safety in Bangladesh* commits more than 150 companies to collaborative efforts to ensure safety in almost half of the country’s garment factories, through measures such as independent inspections by trained fire and building safety experts, public reporting, mandatory repairs and renovations to be financed by brands, a central role for workers

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<sup>48</sup> Jeremy Prepscius, “Building Sustainable Supply Chains,” *The Guardian*, sec. Guardian Sustainable Business, accessed October 18, 2014, <http://www.theguardian.com/sustainable-business/blog/building-sustainable-supply-chains>.

<sup>49</sup> “World Bank Institute Partners with Sedex Global to Develop Open Supply Chain Platform,” *Sedex*, May 12, 2014, <http://www.sedexglobal.com/world-bank-institute-partners-with-sedex-global-to-develop-open-supply-chain-platform/>.

<sup>50</sup> See e.g. cases in *From Audit to Innovation: Advancing Human Rights in Global Supply Chains* (Shift, 2013), [http://shiftproject.org/sites/default/files/From%20Audit%20to%20Innovation-Advancing%20Human%20Rights%20in%20Global%20Supply%20Chains\\_0.pdf](http://shiftproject.org/sites/default/files/From%20Audit%20to%20Innovation-Advancing%20Human%20Rights%20in%20Global%20Supply%20Chains_0.pdf).

<sup>51</sup> Khorshed Alam and Laia Blanch, *Stitched Up: Women Workers in the Bangladeshi Garment Sector* (War on Want, 2011), <http://www.waronwant.org/attachments/Stitched%20Up.pdf>.

<sup>52</sup> Liana Foxvog et al., *Still Waiting - Six Months after History’s Deadliest Apparel Industry Disaster, Workers Continue to Fight for Reparations* (Clean Clothes Campaign and International Labor Rights Forum (ILRF), n.d.); Syeda Sharmin Absar, “Women Garment Workers in Bangladesh,” *Economic and Political Weekly* 37, no. 29 (July 20, 2002): 3012–16.

<sup>53</sup> *The International Labour Organization Response to the Rana Plaza Tragedy* (International Labour Organization, 2013), [http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/article/wcms\\_241219.pdf](http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/article/wcms_241219.pdf).

and unions in both oversight and implementation, supplier contracts with sufficient financing and adequate pricing and worker training.<sup>54</sup> Other international organisations have sought to support these efforts.<sup>55</sup>

Yet various companies have refused to sign the *Accord*, opting for non-binding commitments to improved factory safety. Moreover, the *Rana Plaza Donor's Trust Fund*, set up under the *Accord* has still received only half the US\$40million needed to compensate workers or their families, while only half the companies associated with factories in the collapsed building have contributed to the fund at all.<sup>56</sup>

## 7. Transparency and corporate reporting

With the rise of ethical investment, and increasing recognition of the materiality of social and sustainability issues, in terms of investment risk,<sup>57</sup> corporate sustainability reporting, as a device by which companies can be held accountable to markets, has become increasingly prominent, to the extent that some would suggest there has been a “disclosure revolution”.<sup>58</sup> In line with this trend, the final step called for by the GPs’ due diligence process is for businesses to “communicate” on how they are addressing their human rights impacts.<sup>59</sup> This may be done in a variety of ways, including formal and informal public reporting, in-person meetings, online

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<sup>54</sup> *The Bangladesh Accord on Fire and Building Safety*, accessed October 19, 2014, <http://bangladeshaccord.org/>; Foxvog et al., *Still Waiting - Six Months after History's Deadliest Apparel Industry Disaster, Workers Continue to Fight for Reparations*, 29.

<sup>55</sup> “Statement by the National Contact Points for the OECD Guidelines on Multinational Enterprises - One Year after Rana Plaza” (Organisation for Economic Co-operation and Development (OECD), June 25, 2014), <http://mneguidelines.oecd.org/NCP-statement-one-year-after-Rana-Plaza.pdf>. A further initiative led by US purchasers is the Alliance for Bangladesh Worker Safety, see: <http://www.bangladeshworkersafety.org/about/about-the-alliance>.

<sup>56</sup> “Who Needs to Pay Up?” *Clean Clothes Campaign*, accessed October 19, 2014, <http://www.cleanclothes.org/ranaplaza/who-needs-to-pay-up>.

<sup>57</sup> “Human Rights Guidance Tool for the Financial Sector.”; *Investing the Rights Way - A Guide for Investors on Business and Human Rights* (Institute for Human Rights and Business (IHRB), 2013), <http://www.ihrb.org/pdf/Investing-the-Rights-Way/Investing-the-Rights-Way.pdf>.

<sup>58</sup> Paul Hohnen, “The Future of Sustainability Reporting”, EEDP Programme Paper 2012/02, [http://www.chathamhouse.org/sites/files/chathamhouse/public/Research/Energy,%20Environment%20and%20Development/0112pp\\_hohnen.pdf](http://www.chathamhouse.org/sites/files/chathamhouse/public/Research/Energy,%20Environment%20and%20Development/0112pp_hohnen.pdf).

<sup>59</sup> United Nations General Assembly (2011) *Addendum: Human rights and corporate law: trends and observations from a cross-national study conducted by the Special Representative - Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, A/HRC/17/31/Add.2*, 23 May 2011, available at <http://www.ohchr.org/Documents/Issues/Business/A-HRC-17-31-Add2.pdf>.

dialogues, and consultations with affected rights-holders. Information provided should be: (i) published in a format, and with a frequency, matching the scope and severity of impacts, and should be accessible to intended audiences: for example, company communications should be in relevant languages, address any issues of literacy amongst impacted rights-holders and be accessible even to remote communities affected by their activities; (ii) sufficient to permit evaluation of the adequacy of company responses to any specific impact; (iii) designed not to pose risks to rights-holders or others such as human rights defenders, journalists, local public officials or company personnel, or to breach legitimate commercial confidentiality requirements. Businesses whose operations or operating contexts pose risks of severe human rights impacts are expected to report formally (GP21).

Measures have been taken by some states and, in the European case, regionally, to encourage or require corporate reporting on human rights and supply chain transparency as an evolution in line with the concepts of sustainability and the “triple bottom line”.

Social and environmental reporting is an established practice in an increasing number of countries. In Asia, India issued National Voluntary Guidelines on Social, Environmental and Economic Responsibilities of Business in 2011, which encourage companies to disclose responsible business practices on ‘comply or explain’ basis. In Europe, France was the first to mandate triple bottom line reporting for publicly listed companies in 2001, passing legislation requiring companies to report according to a set of qualitative and quantitative indicators on issues such as employee contracts, working hours, pay, industrial relations, health and safety, disability policies, community relations and environmental reporting.<sup>60</sup> Since 2004, the Netherlands has implemented benchmarking based on companies’ CSR reporting. In Denmark, a non-financial reporting duty for the largest 1100 companies and Danish state-owned enterprises was established in 2009.<sup>61</sup> The

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<sup>60</sup> The law was implemented through regulations adopted in 2012, Grenelle I Act 2009 and Grenelle II Act 2010.

<sup>61</sup> Companies are required to report on social responsibility policies; how these are translated into action; and what has been achieved through them during the financial year, or, to indicate that they are not reporting. Instead of including social content directly in the annual financial statement, companies can refer to separate corporate sustainability reports, information on a company website or a UN Global Compact Communication on Progress. See Danish CSR Action Plan 2008. CSR reports are subject to a consistency check by auditors under the Danish Financial Statements Act §135.



Danish Business Authority periodically evaluates the effectiveness of the reporting requirement,<sup>62</sup> and provides guidance on implementation for companies and auditors, who in turn award prizes for the best CSR reports. In 2012, Denmark set new requirements for the same class of companies to report specifically on business respect for human rights and climate change.<sup>63</sup> In 2013, Norway enacted legislation requiring companies to report on steps to integrate considerations for human rights into their strategies.<sup>64</sup>

In 2014, after prolonged debate,<sup>65</sup> the EU resolved to adopt a new Directive requiring all Member States to implement non-financial reporting based on a “comply or explain” model.<sup>66</sup> Under the Directive, “public interest enterprises” with more than 500 employees must be required by national law to report annually on principal risks in relation to human rights, the environment and social impacts linked to their operations, relationships, products and services, as well as aspects related to bribery and diversity. They must also provide information on relevant policies, any due diligence procedures for identifying, preventing and mitigating risks identified, and significant incidents occurring during the reporting period.<sup>67</sup> Whilst the Directive has been welcomed as a step towards greater corporate accountability,<sup>68</sup> it has also been criticised for its narrow scope, given that only approximately 6,000 of 42,000 large companies incorporated in the EU are

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<sup>62</sup> The most recent analysis, undertaken by Copenhagen Business School, showed that almost all companies report on CSR (97%), while 41% report on human rights and labour rights – a significant increase from 19% doing so in 2009.

<sup>63</sup> *Law on Establishing a Mediation and Complaints Mechanism for Responsible Business Conduct 2012; Guidance material to draft law on Establishing the Mediation and Complaints Institution for Responsible Business Conduct*. In scope, the requirement extends to business relationships.

<sup>64</sup> *Carrots and Sticks: Sustainability Reporting Policies Worldwide-Today's Best Practice, Tomorrow's Trends* (KPMG, 2013), 33–34.

<sup>65</sup> "Non-financial reporting reform on thin ice," European Coalition for Corporate Justice, accessed October 15 2014, <http://www.corporatejustice.org/Non-financial-reporting-reform-on.html?lang=en>

<sup>66</sup> *Directive 2014 of the European Parliament and of the Council amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups*, A7-0006/52, 4 August 2014. The Directive will enter into force in 2014 and Member States have 2 years to transpose it into national legislation. The European Commission is required to produce guidelines within one year to assist companies in reporting.

<sup>67</sup> Public interest entities (PIE) are defined as listed companies, credit institutions, insurance undertakings and any other entity designated by an EU Member State as a PIE. In providing information, companies are to be guided by the GPs, the UN Global Compact, the OECD Guidelines for MNEs and the ILO Tripartite Declaration on principles concerning multinational enterprises and social policy, and risks must be disclosed regardless of what a company considers relevant or “material” to the interests of its shareholders.

<sup>68</sup> "EU Directive on the disclosure of non-financial information by certain large companies: an analysis," European Coalition for Corporate Justice, accessed October 15 2014, <http://www.corporatejustice.org/On-15-April-2014-the-European.html?lang=en>

covered; potentially wide-ranging exemptions for information<sup>69</sup>; a weak clause on supply chains - a high risk area for many companies – that requires reporting only “when relevant and appropriate”; and the lack of a common reporting framework or indicators.<sup>70</sup> Moreover, the Directive does not provide for monitoring or mechanisms to sanction defaults by companies: auditors need only indicate whether non-financial information has been provided, or not.<sup>71</sup>

Turning to developments with regard to corporate reporting specifically on supply chains, the US government, for example, has introduced requirements for disclosure of companies’ policies and processes in connection with new investments in Myanmar.<sup>72</sup> The UN Security Council endorsed due diligence for all companies sourcing minerals from the Democratic Republic of the Congo (DRC) in 2010,<sup>73</sup> and the OECD published Due Diligence Guidance for Responsible Supply Chain of Minerals concerning the sourcing of natural resources from conflict-affected and high-risk areas.<sup>74</sup> Following in suit, Section 1502 of the 2010 U.S. Dodd Frank Wall Street Reform and Consumer Protection Act requires all companies listed with the US Securities and Exchange Commission (SEC) to carry out due diligence to a nationally or internationally recognised due diligence framework in order to determine whether their products contain minerals that have funded armed groups in the DRC or bordering countries.

In parallel, twelve African states of the International Conference of the Great Lakes Region (ICGLR) have made meeting the OECD due diligence requirements a condition of their regional mineral certification scheme. In 2012, Congo’s government introduced legislation requiring companies operating in its tin, tantalum, tungsten or gold mining sectors to undertake supply chain due

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<sup>69</sup> For instance, information “impending developments” or where disclosure would be “seriously prejudicial” to a company’s commercial position: see proposal, Article 1(3) at page 28 of “Non-financial reporting reform on thin ice,” European Coalition for Corporate Justice, <http://www.corporatejustice.org/Non-financial-reporting-reform-on.html?lang=en>

<sup>70</sup> The European Commission is however mandated under the Directive to publish within 2 years non-binding guidelines on a methodology for reporting, including general and sector non-financial Key Performance Indicators.

<sup>71</sup> *Why Is the Corporate Reporting Reform Important?*, Media briefing (European Coalition for Corporate Justice, February 26, 2014), [http://www.corporatejustice.org/IMG/pdf/media\\_briefing\\_26-02-2014.pdf](http://www.corporatejustice.org/IMG/pdf/media_briefing_26-02-2014.pdf)

<sup>72</sup> “Burma Responsible Investment Reporting Requirements,” U.S. Department of State, accessed October 15 2014, <http://www.state.gov/r/pa/prs/ps/2013/05/209869.htm>

<sup>73</sup> United Nations Security Council (2010), *Resolution 1952 (2010)*, S/RES/1952, 29 November 2010, [http://www.un.org/ga/search/view\\_doc.asp?symbol=S/RES/1952\(2010\)](http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1952(2010)).

<sup>74</sup> The Organisation for Economic Development and Co-operation (OECD), *Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas* (Paris: Organisation for Economic Co-operation and Development, 2013), <http://www.oecd-ilibrary.org/content/book/9789264185050-en>.

diligence according to the OECD standard, and Rwanda's government adopted similar legislation. The Chinese government, through the China Chamber of Commerce of Metals, Minerals & Chemicals Importers & Exporters has committed to launching a 'Guideline for Social Responsibility in Outbound Mining Investments' during 2014.<sup>75</sup> The European Commission has proposed a regulation to establish a voluntary self-certification scheme, based on the OECD Guidance, for the 300-400 companies that import tin, tantalum, tungsten and gold ores and metals into Europe.<sup>76</sup>

Together, these measures have prompted some significant changes in companies' sourcing practices.<sup>77</sup> Yet many such measures are too new to permit a review of their influence upon business practice, and a cost-benefit analysis undertaken for the European Commission in 2013 revealed that only 4 per cent of 330 companies surveyed were voluntarily preparing a public report on how they identify and address the risk of funding conflict or abuses in their supply chains, raising questions about the efficacy of a voluntary approach at least in the European context.<sup>78</sup>

"Private" frameworks and guidance on corporate sustainability reporting, discussed next, have existed for much longer, and companies are in any case likely to use these to produce sustainability reports, whether voluntarily or as a result of new legal requirements.

The Global Reporting Initiative (GRI) is an international not-for-profit organization. It has developed, within a multi-stakeholder process, a comprehensive Sustainability Reporting Framework, comprising Reporting Guidelines, Sector Guidance and other resources that provides "*metrics and methods for measuring and reporting sustainability-related impacts and*

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<sup>75</sup> The draft Guideline includes supply chain due diligence in accordance with international standards.

<sup>76</sup> Proposal for a Regulation for "setting up a Union system for a supply chain due diligence self-certification of responsible importers of tin, tantalum and tungsten, their ores, and gold originating in conflict affected and high-risk areas".

<sup>77</sup> *Seeing the Light: Responsible Mineral Sourcing from the DRC* (Global Witness, April 2014), <http://www.globalwitness.org/sites/default/files/Seeing%20the%20Light%20April%202014.pdf>.

<sup>78</sup> European Commission, "Assessment of due diligence compliance cost, benefit and related effects on selected operators in relation to the responsible sourcing of selected minerals", p.61. A recent NGO study found that over 80 per cent of 186 European companies surveyed did not provide any public information about the checks they had undertaken to ensure their supply chains had not funded conflict or human rights abuses: *Conflict Due Diligence by European Companies* (SOMO, November 2013), <http://somo.nl/news-en/sourcing-of-minerals-could-link-eu-companies-to-violent-conflict> (note that 19 of the companies surveyed by SOMO (11%) are dual listed in the US and Europe, and so are directly impacted by Dodd Frank Act Section 1502).

performance”.<sup>79</sup> The GRI ranks as the “first-mover” of sustainability reporting and is widely used: European enterprises using the GRI Framework to produce sustainability reports rose from 270 in 2006 to over 850 in 2011.

The GRI has provided basic guidance on reporting on human rights from 2006.<sup>80</sup> A 2009 survey of corporate reports undertaken for the GRI and the UNGC (which requires participants to include human rights within the scope of the annual *Communication on Progress*<sup>81</sup>) identified some creative approaches by companies to human rights reporting but concluded that, overall, corporate human rights reporting was weak with regard to the criteria of balanced reporting (that is, presentation of both positive and negative aspects of an issue), completeness, and inclusion of the most relevant issues.<sup>82</sup>

Subsequently, GRI’s standard for human rights reporting has been expanded, in line with the GPs. Under this, a company is now expected to report on: (i) material issues, namely, those relevant to the human rights impacts of the company or operation, considering its sector and location; (ii) human rights due diligence, that is, the company’s human rights policy, assessment process; allocation of responsibilities for human rights within the organisation; (iii) measures to promote human rights awareness, such as training; (iv) monitoring of impacts of company activities; (v) and company measures to follow-up and remediate any human rights impacts detected.

In addition, the framework includes a wide set of performance indicators that allow the effectiveness of a company’s human rights due diligence processes and remediation to be measured.<sup>83</sup> Human rights risks are further integrated into GRI’s ten ‘Sector Supplements’ –

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<sup>79</sup> “An Overview of GRI,” *Global Reporting Initiative*, accessed October 19, 2014, <https://www.globalreporting.org/information/about-gri/what-is-GRI/Pages/default.aspx>.

<sup>80</sup> *Sustainability Reporting Guidelines* (Global Reporting Initiative, 2011), 32, <https://www.globalreporting.org/resourcelibrary/G3-Guidelines-Incl-Technical-Protocol.pdf>.

<sup>81</sup> “What Is a COP?,” *United Nations Global Compact*, accessed October 19, 2014, <https://www.unglobalcompact.org/COP/index.html>.

<sup>82</sup> Elizabeth Umlas, *Corporate Human Rights Reporting: An Analysis of Current Trends* (Global Reporting Initiative, The UN Global Compact, and Realizing Rights: The Ethical Globalization Initiative, 2009), [https://www.globalreporting.org/resourcelibrary/Human\\_Rights\\_analysis\\_trends.pdf](https://www.globalreporting.org/resourcelibrary/Human_Rights_analysis_trends.pdf).

<sup>83</sup> *Sustainability Reporting Guidelines*, 32; and *G4 Sustainability Reporting Guidelines* (Global Reporting Initiative, 2013), 70, <https://www.globalreporting.org/resourcelibrary/GRIG4-Part1-Reporting-Principles-and-Standard-Disclosures.pdf>.

versions of the general reporting framework tailored to specific industry sectors, such as Airport Operators, Mining and Metals, Media, Event Organisers, Electrical Utilities and also NGOs.<sup>84</sup> UNICEF has issued guidance on how to integrate child rights into reporting under the GRI Framework.<sup>85</sup> Along with the International Federation of Accountants, the GRI participates in the International Integrated Reporting Council, which aims to establish an internationally accepted, unitary framework for integrated financial and sustainability reporting.<sup>86</sup>

Doubts are voiced about the value of current reporting practice as an accountability mechanism in relation to human rights. It is often thought that the businesses that most need to report on human rights, those with negative impacts, may be reluctant to do so, given commercial sensitivities, potential legal liability, and the likelihood of reputational damage.<sup>87</sup> If the development of universal human rights indicators is seen by some as crucial for comparability across company reports, the potential for irrelevance, perverse outcomes and selectivity is emphasized by others.<sup>88</sup> Equally, while civil society actors are at the forefront of calls for mandatory sustainability reporting requirements, they frequently criticise published reports as instruments for “green-“ or “blue-washing”, the presentation of an unduly favourable image of company impacts on people and the environment, following from a selective approach to what information is communicated.<sup>89</sup>

One solution to this dilemma may be independent assurance of corporate sustainability reports. The GPs maintain that “*independent verification of human rights reporting can strengthen its*

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<sup>84</sup> “G3 / G3.1 Sector Supplements,” *Global Reporting Initiative*, accessed October 19, 2014, <https://www.globalreporting.org/reporting/sector-guidance/sector-guidance/Pages/default.aspx>.

<sup>85</sup> *Children’s Rights in Sustainability Reporting: A Guide for Incorporating Children’s Rights into GRI-Based Reporting* (United Nations Children’s Fund (UNICEF), 2014), [http://www.unicef.org/csr/css/Childrens\\_Rights\\_in\\_Reporting\\_Second\\_Edition\\_HR.pdf](http://www.unicef.org/csr/css/Childrens_Rights_in_Reporting_Second_Edition_HR.pdf).

<sup>86</sup> “Integrated Reporting,” *The IIRC*, accessed October 19, 2014, <http://www.theirc.org/>.

<sup>87</sup> Cf. Christopher Marquis and Michael W. Toffel, “Scrutiny, Norms, and Selective Disclosure: A Global Study of Greenwashing,” *Harvard Business School Organizational Behavior Unit Working Paper*, no. 11–115 (2014), [http://www.hbs.edu/faculty/Publication%20Files/11-115\\_eb3f204e-3a5f-4a8d-a471-35ce66adc1a7.pdf](http://www.hbs.edu/faculty/Publication%20Files/11-115_eb3f204e-3a5f-4a8d-a471-35ce66adc1a7.pdf).

<sup>88</sup> E.g. Damiano de Felice, “Challenges and Opportunities in the Production of Business and Human Rights Indicators to Measure the Corporate Responsibility to Respect,” *Human Rights Quarterly* 37, no. 2 (May 2015), <http://papers.ssrn.com/abstract=2423305>.

<sup>89</sup> Rina Horiuchi and Ryan Schuchard, *Understanding and Preventing Greenwash: A Business Guide* (BSR and Futerra, 2009), [http://www.bsr.org/reports/Understanding\\_Preventing\\_Greenwash.pdf](http://www.bsr.org/reports/Understanding_Preventing_Greenwash.pdf).

*content and credibility*".<sup>90</sup> But the quality and reliability of assurance has also been impugned.<sup>91</sup> Ultimately, then, in this complex area, it seems likely that a more potent mixture of mandatory disclosure rules, credible independent assurance, and continuing, enhanced investor and civil society scrutiny of company information will be needed if reporting's potential as a lever to improve corporate sustainability and business respect for human rights is to be delivered.

## 8. Conclusion

Transnational corporations are powerful, dynamic, networked entities which control and dispose of vast natural and social wealth, formally still driven by the distinctly 'private' principles of profit and shareholder value, but lacking mechanisms of democratically unaccountability. Over the last century, this state of affairs has substantially challenged the pursuit of socially and environmentally sustainable economies. The profile of human rights in the quest to redress the balance has arguably not been as high as is required, and the GPs amongst other international, regional and national developments are beginning to correct this deficit.

The GPs embody important progress as providing a global framework with regard to the human rights duties and obligations of States and business. Fresh steps, as seen in this paper, are being innovated by a plethora of actors in government and the corporate sector, amongst CSOs, labour unions and others, to take the operationalisation of the GPs around the world. Yet change on the ground is slow and partial, and severe business-related human rights abuses remain endemic across industry sectors in many countries, with unacceptable costs to humans and our common environment. It is too early to draw conclusions regarding the impact of Pillar 2 of the GPs, and its strengths and weakness by comparison with other current or alternative approaches. Prudence would however demand that we remain alert as to whether concepts and standards are 'fit for purpose'.

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<sup>90</sup> *The External Assurance of Sustainability Reporting* (Global Reporting Initiative, 2013), <https://www.globalreporting.org/resource/library/GRI-Assurance.pdf>. See also "Human Rights Reporting and Assurance Frameworks Initiative - RAFI," *Shift Project*, accessed October 19, 2014, <http://www.shiftproject.org/project/human-rights-reporting-and-assurance-frameworks-initiative-rafi>.

<sup>91</sup> Alberto Fonseca, "How Credible Are Mining Corporations' Sustainability Reports? A Critical Analysis of External Assurance under the Requirements of the International Council on Mining and Metals," *Corporate Social Responsibility and Environmental Management* 17, no. 6 (November 1, 2010): 355–70, doi:10.1002/csr.230.

