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# **The UN Guiding Principles on Business and Human Rights: Implications for Corporate Social Responsibility Research**

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# **The UN Guiding Principles on Business and Human Rights: Implications for Corporate Social Responsibility Research**

Abstract:

*This article presents a review of the literature on the United Nations Guiding Principles (UNGPs) for the purpose of situating the UNGPs in the voluntary corporate social responsibility (CSR) infrastructure. We identify four key themes that underlie the debate: (1) a critical assessment of the Principles, (2) their application to different sectors, (3) a discussion of how to embed key aspects of the UNGPs into the national and regional contexts, and (4) reflections on the role of due diligence. We discuss these themes and outline some practical and theoretical take-aways. Our review highlights some similarities and differences to the discussion of voluntary initiatives in the field of CSR, especially the UN Global Compact. Finally, we show how the theoretical and practical discourse on the UNGPs can be further advanced.*

Keywords: UN Guiding Principles, business and human rights, literature review, UN Global Compact, due diligence

## INTRODUCTION

The United Nations Guiding Principles (UNGPs) on Business and Human Rights were unanimously endorsed by the United Nations Human Rights Council on 16 June 2011. The UNGPs are based on an extensive development process spearheaded by Harvard Professor John Ruggie, who served as the United Nations Special Representative of the Secretary-General (SRSG) from 2005 to 2011 and also was one of two people who wrote the speech by former UN Secretary-General Kofi Annan that eventually framed the UN Global Compact (UNGC). Not surprisingly, the scholarly literature on business and human rights has discussed this development process and its final “product” in much detail. In part that is because, as Ruggie writes, the UNGPs represent the first time that either the Council or its predecessor the Commission on Human Rights “had ‘endorsed’ a normative text on any subject that governments did not negotiate themselves.”<sup>1</sup> Interestingly, the discourse on the UNGPs cuts across a number of different academic disciplines, including legal theory, management and development studies.

This paper aims at providing an overview of the background and context in which the discourse on the UNGPs arose, and reviewing key themes that have appeared in this discourse. We do not claim that our review paints a comprehensive picture of the academic discourse. Rather, the purpose of the review (n=61 publications) is to situate the UNGPs in the voluntary corporate social responsibility (CSR) infrastructure. We identify four key themes: (1) a critical assessment of the Principles, (2) their application to different sectors, (3) a discussion of how to embed key aspects of the UNGPs into national and regional contexts, and (4) reflections on the role of due diligence. We realize that

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<sup>1</sup> John G Ruggie, ‘The social construction of the UN Guiding Principles on Business and Human Rights’ in Surya Deva & David Birchall (Eds), *Research Handbook on Human Rights and Business* (Northampton, MA: Edward Elgar Publishing 2020), 63.

clustering academic contributions into such broad themes comes at the price of simplifying the discourse and omitting some contributions that fall outside of these topics. However, we also believe that identifying and discussing clusters of literature helps us to see commonalities and differences between the discussion of the UNGPs and the scholarly discourse around the emerging institutional infrastructure for CSR (e.g., through initiatives like the UN Global Compact).

## BACKGROUND

The UNGPs were one of a number of important business-related responsibility initiatives that had developed since about the mid-1990s to form an infrastructure intended to pressure companies to be more responsible in their business activities.<sup>2</sup> That infrastructure consisted of a set of voluntary initiatives geared towards holding companies responsible for their activities, including individual companies' codes of conduct initially. As their relative lack of clout became clearer, a number of other, still voluntary, efforts developed in what was viewed as an emerging corporate social responsibility (CSR) infrastructure that set out general or industry-based codes, standards, and principles of responsibility for companies.<sup>3</sup> These principle-based initiatives, some of which, like the UNGPs are also associated with the United Nations, include the UNGC, the Principles for Responsible Investing, and the Equator Principles, among numerous others.

The CSR infrastructure also includes initiatives that set (again mostly voluntary) business or industry standards with associated accreditation and certification processes, for example the LEED

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<sup>2</sup> Frank G A de Bakker, Andreas Rasche & Stefano Ponte, 'Multi-Stakeholder Initiatives on Sustainability: A Cross-Disciplinary Review and Research Agenda for Business Ethics' (2019) *Business Ethics Quarterly*, 29(3), 343–383; Dirk U Gilbert, Andreas Rasche & Sandra Waddock, 'Accountability in a global economy: The emergence of international accountability standards' (2011) *Business Ethics Quarterly*, 21(1), 23-44; Ruggie, 2020; Sandra Waddock, 'Building a new institutional infrastructure for corporate responsibility' (2008) *Academy of Management Perspectives*, 22(3), 87-108.

<sup>3</sup> Waddock, 2008.

(Leadership in Energy and Environmental Design) building standards and the labor standards established by SAI (Social Accountability International). Certification and accreditation were needed to provide credibility to companies adopting various principles or making CSR claims, because such claims evolved in a context of lack of trust. In addition, a number of initiatives emerged in the late 1990s and early 2000s to provide frameworks for what became known as ESG (environmental, social, and governance) reporting, including the Global Reporting Initiative, SASB (the Sustainability Accounting Standards Board), and, more recently <Integrated Reporting>, which asks businesses to provide a single report that integrates financial and ESG reporting, so that companies could report practices and performance in arenas well beyond mere financial results.

In addition, numerous entities that brought together networks of key actors in an industry or sector around responsible practices also evolved during this period. Such networks, called GANs or Global Action Networks, are multi-stakeholder networks.<sup>4</sup> They act cohesively to set industry standards (as with the Forest Stewardship Council or Marine Stewardship Council) or bring about change in an issue arena, sector, or industry. Initiatives like Transparency International fit into the latter category.

Evolving in the context of this voluntary CSR infrastructure over many years, the UNGPs on Business and Human Rights represent a form of what has been called collaborative governance<sup>5</sup> in what is increasingly a polycentric network of (still mostly voluntary) governance initiatives.<sup>6</sup> They build on what went before—and attempted to deal explicitly with a highly problematic and contested issue for companies—how to deal with human rights abuses. For years the UN had tried to create

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<sup>4</sup> Steve Waddell, *Global action networks: Creating our future together*. (New York: Palgrave Macmillan, 2010).

<sup>5</sup> Andreas Rasche, 'Collaborative governance 2.0.' (2010) *Corporate Governance*, 10, 500-511.

<sup>6</sup> Laura Albareda & Sandra Waddock, 'Networked CSR governance: A whole network approach to meta-governance.' (2018) *Business & Society*, 57(4), 636-675.

global human rights standards, starting in 1974 with the (unsuccessful) UN Commission on Transnational Corporations' attempt to establish a corporate code of conduct for transnational corporations. The contest around business and human rights arose because of lack of recognition that businesses even had human rights responsibilities until the 1990s.<sup>7</sup>

Ruggie notes that in the late 1990s, two distinct initiatives arose around the issue of human rights: the Norms on Responsibilities of Transnational Corporations and Other Business Enterprises, and the UNGC.<sup>8</sup> The UNGC provided a set of ten principles based on major UN documents that businesses that voluntarily signed on were expected to adopt.<sup>9</sup> The Norms, in contrast, were based on the belief that mandate, not voluntary action, was needed to achieve responsibility in business, and hence were intended to impose stringent human rights duties on businesses in the context of international law.<sup>10</sup> As Ruggie states, when the Norms were presented the “Commission reacted coolly,” which is a nice way of saying that the Norms were politely turned down.<sup>11</sup> That failure left the issue of business and human rights up in the air, while the voluntary principles of the UNGC took off as the main business responsibility standard with respect to the UN (with about 12,000 business signatories; as of November 2020).

In 2006, John Ruggie was asked by the then new Human Rights Council to undertake an “in-depth examination of business and human rights” with an official mandate from the Council.<sup>12</sup> While Ruggie's mandate was clear, the UNGPs do not themselves constitute law or regulation. Rather the

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<sup>7</sup> Ruggie, 2020; quoting Arvind Ganesan of Human Rights Watch.

<sup>8</sup> Ruggie, 2020.

<sup>9</sup> Andreas Rasche, 'The United Nations Global Compact and the Sustainable Development Goals' in Oliver Laasch, Dima Jamali, R Edward Freeman & Roy Suddaby (eds.). *Research Handbook of Responsible Management*. (Cheltenham: Edward Elgar, 2020), 228-241.

<sup>10</sup> Ruggie, 2020, p. 70.

<sup>11</sup> Ibid, p. 71.

<sup>12</sup> Ibid, p. 74.

Principles, particularly Principle 2, rest on a core set of social norms intended to guide practice. The UNGPs, as adopted in 2011, present a three-part framework: protect, respect, remedy: 1) nation states have a duty to *protect* against human rights abuses by third parties, 2) businesses have the (independent) responsibility to *respect* human rights, and 3) victims need to be able to access *remedy* when human rights abuses have taken place.<sup>13</sup> Ruggie’s own take on the UNGPs at the time of their adoption was that they represented a “common global platform for action, on which cumulative progress can be built, step-by-step, without foreclosing any other promising longer-term developments”.<sup>14</sup> In one sense, they added yet another element to the burgeoning CSR infrastructure, and in another, they provided at least an initial “soft law” solution to a problem that many had viewed as relatively intractable—how to get businesses to pay attention to human rights issues without alienating the entire business community or the UN itself.<sup>15</sup>

Drawing from social norms that influence business practice, Ruggie argues that the UNGPs affirm that businesses must comply with legal mandates.<sup>16</sup> But as social norms, they go further, and “stipulate that enterprises have the responsibility to respect human rights, irrespective of states’ willingness or ability to enforce the law”.<sup>17</sup> For companies, as Ruggie notes, respect for human rights is the baseline or foundation, whether that expectation is a legal one or a social norm. Because the UNGPs provide a process for ensuring that respect is present (assessment of issues, acting on findings, tracking responses, and communicating outcomes), they are grounded in the types of

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<sup>13</sup> UN Human Rights Council, ‘Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework’ (2011) *A/HRC/17/31*. (New York, NY: United Nations, 2011).

<sup>14</sup> Ruggie, 2020, p. 64.

<sup>15</sup> Stéphanie Lagoutte, ‘The UN Guiding Principles on Business and Human Rights- A Confusing “Smart Mix” of Soft and Hard International Human Rights Law’ in Stéphanie Lagoutte, Thomas Gammeltoft-Hansen, and John Cerone (Eds.), *Tracing the Roles of Soft Law in Human Rights* (Oxford et al.: Oxford University Press, 2016) 235–253.

<sup>16</sup> Ruggie, 2020.

<sup>17</sup> *Ibid*, p. 75.



practicality that companies can buy into. To date, the UNGPs remain soft rather than hard law, and a great deal has been written about their effectiveness, which is the focus of this review.

## METHOD

Our discussion of the literature aims at highlighting thematic similarities and differences to the academic discourse on voluntary initiatives in the field of CSR.<sup>18</sup> Hence, we do not aim at a comprehensive review of all literature discussing the UNGPs in some way. While it is clear that the UNGPs are part and parcel of the broader institutional infrastructure for CSR, they also differ in some respect from voluntary initiatives for CSR that firms can participate in. Our intention is to show in what ways both literatures differ from and enrich each other. In particular, we focus on comparing aspects of the discourse on the UNGPs with the literature discussing the UNGC.<sup>19</sup>

Our review is focused on the scholarly literature and therefore excludes publications like practitioner reports or news items. We searched two databases (EBSCOhost and ISI Web of Science) for relevant literature. We used search strings that were closely aligned with the UNGPs: “UNGP\*”, “UN Guiding Principle\*”, “United Nations Guiding Principle\*”, and “Guiding Principle\*”. To ensure a manageable scope of the review, we excluded a number of search results. First, we excluded results that were not directly concerned with the UNGPs (e.g., just mentioning them in passing). Second, we only included academic journal articles and hence excluded trade publications, magazines, and workshop reports. Editorials were also excluded unless they made a specific contribution to knowledge on the UNGPs. Third, we only included articles in English. Overall, this search yielded

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<sup>18</sup> See de Bakker et al., 2019 for a review.

<sup>19</sup> Andreas Rasche, Sandra Waddock and Malcolm McIntosh, 'The United Nations Global Compact: Retrospect and Prospect' (2013) *Business & Society*, 52, 6–30.

43 journal articles. The outlets with the most articles were the *Business and Human Rights Journal* (n=6) and the *Journal of Business Ethics* (n=4).

We further extended the universe of relevant academic work by including 18 book chapters that discussed different aspects of the UNGPs. Overall, our review covers 61 academic contributions discussing the UNGPs. We do not argue that these publications represent a complete list of contributions. Due to the coverage and scope of databases, the used search strings and our exclusion criteria, we only cover parts of the current discourse. Our main aim is to provide one possible, yet by no means the only, overview of the scholarly discourse. All publications were analyzed according to the main themes discussed using an “open” coding technique.<sup>20</sup> This process yielded four key themes in which articles could be organized. While we present a neatly organized overview below, some articles discussed multiple themes and hence could not be easily attributed to one theme only.

### **MAIN THEMES OF RESEARCH ON THE UNGPs**

Four main themes reflected in the literature reviewed are discussed below: (1) a critical assessment of the UNGPs; (2) how they apply to different sectors; (3) discussion of how to embed key elements of the Principles into national and regional contexts; and (4) reflections on due diligence.

#### **Critique of the UNGPs**

A number of articles provide a critical account of the UNGPs.<sup>21</sup> Given the contested historical context of the Principles, with the rejection of the non-voluntary UN Draft Norms in 2003, such a critical

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<sup>20</sup> Anselm Strauss and Juliet Corbin, *Basics of qualitative research: Techniques and procedures for developing grounded theory*, 2nd ed. (Thousand Oaks, CA: SAGE, 1998).

<sup>21</sup> E.g. Yossi Dahan, H Lerner and F Milman-Sivan, 'The Guiding Principles for Business and Human Rights: Labor Violations and Shared Responsibility' (2016) *International Journal of Comparative Labour Law and Industrial Relations*, 32(4), 425–447; Surya Deva 'Treating human rights lightly: A critique of the consensus rhetoric and the language employed by the Guiding Principles' in Surya Deva & David Bilchitz (eds.), *Human Rights Obligations of*

discussion is hardly surprising. Deva, for instance, argues that the UNGPs are based on a “consensus” rhetoric – that is, the Principles do not rely on a strong general agreement, but rather reflect a fragile consensus which was created by “managing objections”.<sup>22</sup> He sees the UNGPs as a weak instrument for the protection of human rights, also because the underlying terminology does not allow for a stronger framing of corporate obligations (e.g., talking about “corporate responsibility” instead of “duty”). A related critique was also raised against the UNGC arguing that its ten principles are too vague and lack clarity. Nolan, for instance, claimed that the UNGC principles “do not constitute a sufficient basis for designing enforceable standards.”<sup>23</sup>

There has also been normative critique of the UNGPs from the perspective of ethics.<sup>24</sup> Wettstein suggests that within the work on the UNGPs there was little emphasis on normative thinking and ethical reflection, despite their relevance for understanding and assessing human rights-related challenges for corporations. One critique presented by Wettstein is that the UNGPs provide a rather limited account of corporate human rights responsibilities.<sup>25</sup> While Ruggie set out to define the *specific* responsibilities that firms face vis-à-vis human rights, the suggested solution (i.e. “not to infringe on the rights of others”<sup>26</sup>) remains generic and could, in principle, apply to all kinds of organizations irrespective of their distinctive roles in society. Wettstein concludes that if social expectations towards companies are used as a reference point for judging their responsibilities, there is need to acknowledge a more proactive framing of such responsibilities focused on the positive

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*Business: Beyond the Corporate Responsibility to Respect?* (Cambridge/New York: Cambridge University Press, 2013), 78–104; Florian Wettstein ‘Normativity, Ethics, and the UN Guiding Principles on Business and Human Rights: A Critical Assessment’ (2015) *Journal of Human Rights*, 14(2), 162–182.

<sup>22</sup> Deva, 2013, p. 89.

<sup>23</sup> Justine Nolan ‘The United Nations’ Global Compact with Business: Hindering or Helping the Protection of Human Rights?’ (2005) *University of Queensland Law Journal*, 24, p. 460.

<sup>24</sup> E.g. Dahan, Lerner, & Milman-Sivan, 2016; Wettstein, 2015.

<sup>25</sup> Wettstein, 2015.

<sup>26</sup> John G Ruggie, ‘Promotion and Protection of all Human Rights, Civil, Political, Economic, Social, and Cultural Rights, Including the Right to Development: Protect, Respect and Remedy - A Framework for Business and Human Rights’ *A/HRC/8/5* (New York: United Nations, 2008), 9.

contributions that firms can make.<sup>27</sup> Such normative discussions have been the exception when discussing voluntary standards for CSR. For instance, despite the contested nature of the origins of the UNGC's ten principles, which reframed state obligations originating from UN declarations and treaties into voluntary business principles, there was little normative analysis of this move.

Some critical contributions explicitly focus on the process of developing the UNGPs based on John Ruggie's six-year mandate as the SRSG. Bijlmakers assesses how far this development process met the democratic ideal of equality, accountability, and participation.<sup>28</sup> The assessment paints a mixed picture. On the one hand, Bijlmakers points to the extensive nature of the underlying consultation process and its inclusive and transparent character. On the other hand, she argues that a "clear participatory strategy was lacking" (p. 296) and that stakeholders from the Global South were excluded from certain consultation meetings (e.g., due to capacity and resource constraints).<sup>29</sup> Similar process-based critiques have been raised against voluntary CSR standards. Several articles outline criteria for assessing the input legitimacy of relevant initiatives.<sup>30</sup> While legitimizing governance structures often existed on paper, many problems need to be overcome to fully enact them in practice. For instance, although the Forest Stewardship Council has been praised for its tripartite governance framework, scholars have criticized the standard's inclusiveness.<sup>31</sup>

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<sup>27</sup> Wettstein, 2015.

<sup>28</sup> Stephanie Bijlmakers, 'Business and human rights governance and democratic legitimacy: the UN "Protect, Respect and Remedy" Framework and the Guiding Principles' (2013) *Innovation: The European Journal of Social Science Research*, 26:3, 288-301.

<sup>29</sup> Ibid, p. 296.

<sup>30</sup> E.g. S Mena and G Palazzo 'Input and Output Legitimacy of Multi-Stakeholder Initiatives' (2012) *Business Ethics Quarterly*, 22(3), 527-556.

<sup>31</sup> S Moog, A Spicer and S Böhm 'The Politics of Multi-Stakeholder Initiatives: The Crisis of the Forest Stewardship Council' (2015) *Journal of Business Ethics*, 128(3), 469-493.

Simons and Handl (2019) provide a feminist analysis of the UNGPs.<sup>32</sup> Their analysis is based on the case of resource extraction and the direct and indirect impact that such activities have on women. Overall, they argue that the UNGPs offer a narrow focus on gender-related issues, for instance by indirectly framing gender-based violence as exceptional moments of crisis.<sup>33</sup> One key claim underlying their analysis is that the Principles divert attention away from deeply embedded and institutionalized structures of discrimination. These arguments show parallels to the discussion of gender quality in the context of the UNGC. Kilgour, for instance, claims that while the UNGC has a strong gender equality mandate, it has not yet systematically fulfilled this mandate.<sup>34</sup>

### **Applications of the UNGPs**

A good deal of the literature discusses applications of the UNGPs to specific contexts, mostly in terms of their relevance for and impact on specific sectors.<sup>35</sup> Such “case studies” are particularly helpful when trying to understand the effects that such a policy framework can have. While we do not view these cases as explicit discussions of the UNGPs’ impact, it is clear that they can help to better understand what outcomes can be produced locally.

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<sup>32</sup> P Simon and M Handl, ‘Relations of Ruling: A Feminist Critique of the United Nations Guiding Principles on Business and Human Rights and Violence against Women in the Context of Resource Extraction’ (2019) *Canadian Journal of Women and the Law*, 31(1), 113–150.

<sup>33</sup> Simons & Handl, 2019, p. 130.

<sup>34</sup> Maureen A Kilgour, ‘The Global Compact and Gender Inequality: A Work in Progress’ (2013) *Business & Society*, 52(1), 105–134.

<sup>35</sup> E.g. J Bonnitcha and R McCorquodale, ‘The Concept of ‘Due Diligence’ in the UN Guiding Principles on Business and Human Rights’ (2017) *European Journal Of International Law*, 28(3), 899–919; Rachel Davis, ‘The UN Guiding Principles on Business and Human Rights and conflict-affected areas: state obligations and business responsibilities’ (2012) *International Review of the Red Cross*, 94(887), 961–979; Sarah Joseph, “‘Is Fox News a Breach of Human Rights?’: The News Media’s Immunity from the Guiding Principles on Business and Human Rights’ (2016) *Business and Human Rights Journal*, 1(2), 229–253; Rae Lindsay et al, ‘Human rights responsibilities in the oil and gas sector: applying the UN Guiding Principles’ (2013) *Journal of World Energy Law and Business*, 6(1), 2–66; Nyakundi M Michieka and Dustin Blankenship, ‘Avoiding the Resource Curse’ in J Martin and K E Bravo (eds.), *The Business and Human Rights* (Landscape: Moving Forward, Looking Back, 2015), 559–573.

Joseph analyzes the application of the UNGPs to the media industry.<sup>36</sup> She finds that the rather vague nature of some parts of the Principles “seems to allow the industry to operate so as to have potentially massive detrimental impacts on human rights.”<sup>37</sup> Her main critique rests on the observation that the Principles follow a “one size fits all” approach which is difficult to contextualize. For instance, she argues that the underlying notion of complicity seems too broad to be applied to the media industry resulting in unclarity about the societal expectations towards this sector. While such assessments show how specific sectors could apply the Principles, we need to keep in mind the underlying intention of the UNGPs. The Principles were set up as a *generic* framework that is supposed to provide orientation for different sectors operating in different geographic regions. The UNGPs cannot define highly contextualized solutions a priori. More contextualized solutions will emerge once legal instruments are defined; these instruments then act as “carefully constructed precision tools”<sup>38</sup> that address specific governance gaps and subject areas.

Bonfanti and Bordinon analyze the role of the UNGPs while discussing slavery in the Thai seafood industry.<sup>39</sup> The analysis highlights that the UNGPs do not sufficiently clarify the role of “unilateral trade sanctions against corporate violations of human rights occurring in the territory of another State.”<sup>40</sup> The study positively acknowledges the role of human rights due diligence in the industry, which however is mostly used in a reactive fashion (i.e. following scandals that damage corporate reputation). The role of due diligence is also highlighted by Lindsay et al. who discuss the application of the UNGPs to the oil and gas sector.<sup>41</sup> Due diligence processes ask companies to look

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<sup>36</sup> Joseph, 2016.

<sup>37</sup> Ibid, p. 252.

<sup>38</sup> John G Ruggie, 'Global governance and "New governance theory": Lessons from business and human rights' (2014) *Global Governance*, 20(1), p. 8

<sup>39</sup> Angelica Bonfanti and Marta Bordinon 'Seafood from Slaves': The Pulitzer Prize in the Light of the UN Guiding Principles on Business and Human Rights' (2017) *Global Policy*, 8(4), 498–504.

<sup>40</sup> Ibid, p. 502.

<sup>41</sup> Lindsay et al., 2013.

beyond mere compliance management and therefore require corporate commitment to a strong human rights policy. Lindsay et al. find that many firms in the oil and gas sector have adopted such policies, although state-owned firms are lagging behind.<sup>42</sup>

The application-based literature shows the difficulty of linking a principled, yet pragmatic, framework for business and human rights to concrete situations. Many scholars want the UNGPs to be more prescriptive and detailed so that applications become “straightforward” and less of an interpretative exercise. This critique has also been raised against the UNGC.<sup>43</sup> From our perspective, such demands misjudge the intention behind the Principles and the historical, legal, and political context in which they are embedded. The UNGPs were set up to organize a difficult and contested discourse around three key pillars; they try to reduce conceptual confusion and promote consensus. Applications to specific sectors need to first of all acknowledge these pillars and then use them as a springboard to discuss and evaluate specific dilemma situations. This in itself is a task that requires legal judgements as well as adequate attention by firms’ senior management.

### **Embedding the UNGPs at the Regional and National Level**

A further theme within the literature is the link between the global nature of the UNGPs and relevant national or regional implementation processes. Several studies highlight the need for national responsiveness, be it through hard law or voluntary CSR practices.<sup>44</sup> For instance, Ruggie and Sherman observe: “The GPs [Guiding Principles] are increasingly reflected in law and regulation, in

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<sup>42</sup> Ibid.

<sup>43</sup> For a discussion, see Andreas Rasche, ‘“A Necessary Supplement” What the United Nations Global Compact Is and Is Not’ (2009) *Business & Society*, 48(4), 511–537.

<sup>44</sup> E.g. Karin Buhmann, ‘(Re-)enter the state: Business and human rights dynamics as shapers of CSR norms and institutions’ in Arnaud Sales (ed.), *Corporate Social Responsibility and Corporate Change* (2019), 119–133; Javed Siddiqui, Shahzad Uddin, ‘Human rights disasters, corporate accountability and the state: Lessons learned from Rana Plaza’ (2016) *Accounting, Auditing and Accountability Journal*, 29(4), 679–704.

public policy, in global, industry-specific or issue-specific standards, in the practice of companies and in the advocacy of civil society.”<sup>45</sup> If the UNGPs are to address specific problem areas, which are always embedded into the institutional infrastructure of a country, national implementation processes need to show a high degree of responsiveness and adaptability.<sup>46</sup> For example, Kristiansson and Götzmann (2020, p. 1) argue with regard to gender-related problems that “national implementation processes must be gender responsive if they are to make a meaningful contribution to addressing gender discrimination and bringing about substantive equality.”<sup>47</sup>

The literature highlights different ways to embed the UNGPs into national and regional contexts.<sup>48</sup> Buhmann discusses the role of National Contact Points (NCPs) that were set up to support the implementation of the OCED Guidelines for Multinational Enterprises.<sup>49</sup> NCPs provide a practical way to contextualize the UNGPs, because they already exist in many countries and hence can be accessed immediately. Buhmann shows that NCPs can be used to provide access to remedy, but that they also offer a platform for deliberation about how to make the concept of due diligence useful within a particular local context.<sup>50</sup> Augenstein, Dawson, and Thielbörger discuss the implementation of the UNGPs within the European Union (EU) via so-called National Action Plans

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<sup>45</sup> John G Ruggie and John F Sherman, 'Adding Human Rights Punch to the New Lex Mercatoria: The Impact of the UN Guiding Principles on Business and Human Rights on commercial legal practice' (2015) *Journal of International Dispute Settlement*, 6(3), p. 457.

<sup>46</sup> Peter A Hall and David W Soskice, 'Varieties of capitalism: The institutional foundations of comparative advantage' (2013) *Oxford: Oxford University Press*.

<sup>47</sup> Linnea Kristiansson and Nora Götzmann, 'National implementation processes for the United Nations Guiding Principles on Business and Human Rights: towards gender-responsive approaches' (2020) *Australian Journal of Human Rights*, p. 1.

<sup>48</sup> E.g. Veronika Haász, 'The Role of National Human Rights Institutions in the Implementation of the UN Guiding Principles' (2013) *Human Rights Review*, 14(3), 165–187; Humberto C Rivera, 'The United Nations Guiding Principles on Business and Human Rights in the European Union: From Regional Action to National Implementation' in J Martin and K E Bravo (Eds.), *The Business and Human Rights Landscape* (Cambridge et al.: Cambridge University Press, 2015), 498–529.

<sup>49</sup> Buhmann, 2019.

<sup>50</sup> Ibid.



(NAPs).<sup>51</sup> EU member states were tasked with developing such Plans to support the enactment of the UNGPs. Augenstein et al. show that many NAPs do not yet provide a sufficient framework for implementing the UNGPs (e.g., because of a lack of indicators and local benchmarks). They argue that some of these shortcomings could be addressed through a novel governance instrument, the Open Method of Coordination, which would put more emphasis on periodic monitoring and peer review processes.<sup>52</sup>

There is one clear difference between the literature on the UNGPs and studies discussing voluntary CSR standards. The latter often have national or local networks as implementation vehicles. Thus, voluntary standards rest on a multi-level governance structure and are usually organized as a global network consisting of multiple local networks.<sup>53</sup> The UNGPs, by contrast, are not formally tied to any predefined local or regional implementation structure and therefore need to be embedded within existing institutions like NCPs<sup>54</sup> or national human rights institutions.<sup>55</sup> Also, we can expect that different actor groups matter when looking at national implementation. For the UNGPs, the role of lawyers is critical when thinking about national embeddedness,<sup>56</sup> while initiatives like the UNGC are not of much interest to lawyers due to the learning-based nature of their operations.

## **Due Diligence**

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<sup>51</sup> Daniel Augenstein, Mark Dawson and Pierre Thielbörger, 'The UNGPs in the European Union: The Open Coordination of Business and Human Rights?' (2018) *Business and Human Rights Journal*, 3(1), 1–22.

<sup>52</sup> Augenstein et al, 2018.

<sup>53</sup> Andreas Rasche, 'Global Policies and Local Practice: Loose and Tight Couplings in Multi-Stakeholder Initiatives' (2012) *Business Ethics Quarterly*, 22(4), 679–708.

<sup>54</sup> Buhmann, 2019.

<sup>55</sup> Haász, 2013.

<sup>56</sup> Stefanie Lemke, 'The UN Guiding Principles and the Legal Profession: Quo Vadis?' (2017) *Business and Human Rights Journal*, 2(2), 351–357; Steven M Richman, 'Ethical Issues for Business Lawyers Under the United Nations Guiding Principles' (2018) *International Lawyer*, 51(3), 423–443.

One novel element of the UNGPs is the discussion of human rights due diligence. It is therefore not surprising that this concept has received much scholarly attention. Bonnitcha and McCorquodale distinguish two different types of due diligence that are included into the UNGPs.<sup>57</sup> On the one hand, due diligence is used to describe a process that allows firms to manage business risks. On the other hand, due diligence also refers to “a standard of conduct required to discharge an obligation.”<sup>58</sup> One reason for the coexistence of both meanings is that the UNGPs introduced the term “due diligence” because businesses, lawyers, and government representatives are familiar with it. However, while business people have a process-oriented understanding of due diligence, lawyers view the concept as describing a standard of conduct. Within the literature, most publications discuss the process-oriented concept of human rights due diligence – that is, they view it as a tool to systematically manage and avoid human rights related risks.

Interestingly, the UNGPs promotion of the due diligence concept has also inspired other standards and frameworks. In 2017, the World Bank aligned its Environmental and Social Framework with the concept, and the International Finance Corporation’s Performance Standards were redesigned in 2012. Mares compares the use of due diligence within these frameworks and finds that current due diligence models fail to capture the idiosyncratic nature of human rights impacts.<sup>59</sup> The avoidance of negative impacts on human rights is reduced to a risk management exercise, which cannot fully account for the full spectrum of possible outcomes. Despite these shortcomings, Kanis shows that findings from due diligence processes can be used when drafting specific contractual terms

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<sup>57</sup> Bonnitcha and McCorquodale, 2017.

<sup>58</sup> *Ibid*, p. 900.

<sup>59</sup> Radu Mares, ‘Securing human rights through risk-management methods: Breakthrough or misalignment?’ (2019) *Leiden Journal of International Law*, 32(3), 517–535.

in order to arrive at a mutual understanding of necessary actions.<sup>60</sup> Due diligence processes can therefore be seen as one input to the formalization of human rights commitments among parties.

### **REFLECTIONS ON ADVANCING THE UNGPs**

This review has identified four themes on which the academic discussion of the UNGPs is based. First, despite the advance that having the UNGPs in place made and the success of their adoption relative to the failure of the Draft Norms, there is no shortage of criticism. A good deal of the criticism rests on the voluntary nature of the Principles and their coverage. Much the same could be said about the UNGC and other voluntary initiatives. In a world where large corporations wield much power, somehow ensuring that their activities with respect to people, structural discrimination, (and nature) are responsible is critically important. This set of critiques suggests that there is still work to be done with finding ways to govern the human rights practices of companies, particularly large multinational companies, with enforceable standards at some point in the future. That said, it is also clear that despite their voluntary nature, the UNGPs set a considerably higher bar for companies than was present before their implementation.

The second theme, application, highlights the ways in which the UNGPs may eventually need to be made more context-specific both in terms of the industries in which they are applied and the geographies, to avoid what Joseph, calls the “one size fits all” approach currently in use.<sup>61</sup> These critiques suggest that in the future building a legal and regulatory framework that permits context sensitivity is critical. Indeed, this building of regulatory frameworks is already beginning to happen (theme three). Since principles, however, are aspirational and have moral suasion potential, and laws

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<sup>60</sup> Blair E Kanis, 'Business, Human Rights, and Due Diligence' in J Martin and K E Bravo (Eds.), *The Business and Human Rights Landscape: Moving Forward, Looking Back* (Cambridge: Cambridge University Press, 2015), 14–431.

<sup>61</sup> Joseph, 2016.

frequently engender a compliance or “box-ticking” mentality, there is possibly some benefit to the initial approach, which seeks its strength at least partially in the norms and values that are deeply embedded in the whole idea of principles—and of the intrinsic dignity and value of every human being.<sup>62</sup>

As the third theme, embedding UNGPs into regional and national contexts, discusses, the implementation into appropriate and context-specific legal frameworks has already begun. One issue with moving away from a principles-based approach is that it is hard to identify all of the specific needs and demands in each possible context or situation. Thus, implementation of the UNGPs needs to, at least in part, be viewed as an ongoing evolutionary process that will continue to be refined over time and with experience. As the discussion suggests, possibly using existing regional networks, e.g., the ones associated with the UNGC, and other powerful industry or sector networks may prove helpful in developing context appropriate implementation strategies over the long term. A similar process orientation is appropriate for taking into account the emerging ideas about due diligence, the fourth theme in the literature to date, because of the novelty of considering business engagement with human rights issues. Clearly, however, there is still much to be learned about implementing the UNGPs and the literature has only begun to address that learning.

While these themes offer important insights into the scholarly literature, a number of relevant topics have been sidelined. One topic deserves particular attention within future research. While some contributions acknowledge that the UNGPs have caused a transformation of the discourse on business and human rights, there is little empirical analysis of how exactly this discourse has shifted. Wettstein, for instance, remarks that “one cannot but acknowledge the tremendous transformation the debate

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<sup>62</sup> Donna Hicks, 'Dignity: The essential role it plays in resolving conflict' (2011) *New Haven: Yale University Press*.

has undergone since John Ruggie took over.”<sup>63</sup> Few would disagree that the discourse has changed, but we know little about how it changed, which actors influenced the shift and in what ways. Shifts in public discourse are important phenomena because they influence how a specific subject area is perceived and framed. Such discourses form the foundational frameworks—or paradigms—that shape mindsets that either foster or inhibit desired changes, such as the ones envisioned by the UNGPs for a more humane way of doing business. Discursive shifts are not limited to language. What is equally important is the social context in which language is used. What is the relationship between the discursive shift and different types of power (e.g., coercive and manipulative)? What types of discourses exist within the business and human rights field (e.g., narrative and argumentative)? Asking these questions will give us a better understanding of how the UNGPs have influenced the practices of various stakeholders over time, and whether or not the aspirations that are deeply embedded in the UNGPs are actually met.

### **THE ROLE OF THE UNGPs IN THE VOLUNTARY CSR INFRASTRUCTURE**

Our discussion up to this point has shown that the scholarly discussion of the UNGPs shares some similarities with research on voluntary standards for CSR. However, so far, there is little discussion about possible interaction effects between the UNGPs and other voluntary CSR standards, particularly UN-based sets of principles and standards like the UNGC and the Principles for Responsible Investing. What should be the role of the UNGPs within the future institutional infrastructure that underlies CSR?

Although the UNGPs are not a standard in the narrow sense of the word, because corporations cannot sign up to them and become a participant, they provide a framework that is relevant for

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<sup>63</sup> Wettstein, 2015, p. 163.

specifying and operationalizing the human rights obligations that are defined by voluntary initiatives. For instance, the UNGC argues that “the UN Guiding Principles provide further conceptual and operational clarity for the two human rights principles championed by the Global Compact.”<sup>64</sup> The current scholarly debate explores linkages between the UNGPs and legal instruments within the human rights sphere, but it falls short of discussing emerging links between the UNGPs and voluntary commitments that firms are making as part of their corporate responsibility work. Future research needs to focus more on the complementary effects between the UNGPs and standards such as ISO 26000, the UNGC, and the OECD Guidelines for Multinational Enterprises. Future practice around the UNGPs needs to consider how these Principles become embedded in industry, sector, and other context-specific sets of standards of practice. Further, to the extent that corporate purposes revolve around the maximization of wealth and continual growth to the exclusion of other important societal values like inclusion, wellbeing and sustainability, attention will be needed to ensure that companies are actually living up to their responsibilities to respect human rights, since there are economic and financial incentives to shortcut them.

We see the UNGPs as one way to specify the managerial implications of human rights responsibilities defined by some voluntary standards. For instance, the Guidelines’ focus on due diligence processes provides managers with a more precise idea about how to live up to general demands set out, for instance, in the UNGC’s human rights principles. Further, the UNGPs provide further clarity regarding the role of state and non-state actors vis-à-vis business and human rights. Given that voluntary CSR standards interact increasingly with state-based regulations such clarification of roles is important and timely. Voluntary standards are important complements to

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<sup>64</sup> UN Global Compact, ‘The Guiding Principles on Business and Human rights: Relationship to UN Global Compact Commitments’, [https://d306pr3pise04h.cloudfront.net/docs/issues\\_doc%2Fhuman\\_rights%2FResources%2FGPs\\_GC+note.pdf](https://d306pr3pise04h.cloudfront.net/docs/issues_doc%2Fhuman_rights%2FResources%2FGPs_GC+note.pdf) (accessed 27 October 2020).

attaining public policy objectives, but we cannot exclusively rely on such standards to protect human rights and work towards a more sustainable global economy. There is need for state-based regulators to publicly recognize the contribution that voluntary standards make (e.g., by endorsing them or by tying them to public procurement) and to use the UNGPs as benchmark for the human rights responsibilities that are defined by such initiatives.

## **CONCLUSION**

The UNGPs represent a vital step towards ensuring that businesses behave responsibly with respect to human rights. But as the literature reviewed above indicates, they are but a first step in what is likely to be a long-term process of change that may well involve a far more fundamental transformation of business purpose and practice so that their aspirations can be realized. Our discussion has revealed that the discussion of the UNGPs and reflections on voluntary CSR standards complement each other in numerous ways, for instance when it comes to the critique that is raised against both. However, we also showed that both discourses differ in some important ways, for instance when it comes to conceptualizing the multi-level nature of governance. We believe that the UNGPs will play an important role in the future development of the institutional infrastructure underlying CSR, because they provide a clear reference point for defining the roles and responsibilities of different groups of actors that are involved in closing some of the omnipresent global governance gaps that surround us.