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Business and Human Rights (BHR) before the United Nations Guiding Principles:

How we got to where we are now.

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[This outline is based on Peter T Muchlinski *Advanced Introduction to Business and Human Rights* (Cheltenham, Edward Elgar, 2022) chapter 1.]

Introduction

In 2011 the United Nations Guiding Principles on Business and Human Rights (UNGPs) were adopted. They introduced the three pillars for the UN business and human rights framework:

- the state duty to protect against business abuses of human rights;
- the business responsibility to respect human rights through the exercise of human rights due diligence (HRDD);
- and access to remedy for victims of alleged business human rights abuses.¹

¹ UN Human Rights Council Seventeenth Session 21 March 2011: “Guiding Principles on Business and Human Rights Implementing the United Nations “Protect, Respect and Remedy” Framework” (UNGPs) at https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf.

This session examines the conceptual and historical context in which business responsibility for human rights has emerged:

- Section 1 describes the origins of the liberal conception of human rights and significant historical antecedents of business responsibility for human rights including the abolition of slavery, introduction of fundamental international labour rights and ideas of corporate responsibility for human rights before war crimes tribunals;
- Section 2 considers the relationship between human rights and the protection of private and commercial property which allow the development of corporate constitutional rights and “corporate human rights”;
- Section 3 discusses the interaction between human rights and international economic law given the significant effect that business responsibilities for human rights have upon its development; and, finally,
- Section 4 highlights the most significant developments since the 1980s which helped build contemporary business responsibilities for human rights

1. The Historical Development of Human Rights

1.1. The Dominant Western Narrative

According to the dominant Western narrative, the first modern ideas of human rights, prompted by Enlightenment values, emerged in the eighteenth century, leading to opposition

against absolute monarchic government.² This movement was conducted mostly by white men of property.

- Wealthy American colonists sought liberation from the oppression by the British crown, including through the imposition of taxes without political representation and the granting of monopoly rights over trade to the Americas for the British East India Company, undermining fledgling American traders.³
- Similarly, the emergent French bourgeoisie, and landowners outside the nobility, sought to control the autocratic rule of the Bourbon dynasty and led their country towards the French Revolution.⁴

The instruments that these movements developed, the American Declaration of Independence and Bill of Rights and the French Declaration of the Rights of Man and Citizen, are commonly identified as the first sources of modern human rights.⁵ Both Declarations emphasise the protection of the person, political freedoms, rights to procedural fairness and the right to private property.

The American Declaration puts it thus:

² See e.g. Lynn Hunt *Inventing Human Rights: A History* (New York, W.W. Norton & Company Inc, 2007) and Vincenzo Ferrone “The Rights of History: Enlightenment and Human Rights” 39 *Human Rights Quarterly* 130 (2017); for a critique of the dominant Western narrative see: Joseph R. Slaughter “Hijacking Human Rights: Neoliberalism, the New Historiography and the End of the Third World” 40 *Hum. Rts. Q.* 735 (2018); on the problematic history of human rights see Philip Alston “Book Review: Does the Past Matter? On the Origins of Human Rights: Review of Jenny Martinez *The Slave Trade and the Origins of International Human Rights Law*” 126 *Harv.L.R.* 2043 (2013).

³ See Thom Hartmann *Unequal Protection: How Corporations became “People” – and How You Can Fight Back* (San Francisco, Berrett-Koehler Publishers Inc, 2010) ch 4.

⁴ See William Doyle *The Oxford History of the French Revolution* (Oxford, Oxford University Press, 3rd ed, 2018) especially ch 17.

⁵ On the American Declaration of Independence 1776 and the American Bill of Rights 1789 see “America’s Founding Documents” at <https://www.archives.gov/founding-docs>; for the French Declaration of the Rights of Man and Citizen 1789 in English see https://www.conseil-constitutionnel.fr/sites/default/files/as/root/bank_mm/anglais/cst2.pdf. See too Ilias Bantekas and Lutz Oette *International Human Rights Law and Practice* (Cambridge, Cambridge University Press, 3rd ed, 2020) at 8-10.

“We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are Life, Liberty and the Pursuit of happiness.”

These “unalienable rights” are elaborated in the Bill of Rights of 1789 with the Fifth Amendment stating:

“No person shall be ... deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”

The French Declaration Article 2 asserts,

“The aim of every political association is the preservation of the natural and imprescriptible rights of Man. These rights are Liberty, Property, Safety and Resistance to Oppression.”

Article 17 adds,

“Since the right to Property is inviolable and sacred, no one may be deprived thereof, unless public necessity, legally ascertained, obviously requires it, and just and prior indemnity has been paid.”

- These statements ensure that private property, and the gains associated with it, are not arbitrarily interfered with by the state. The right is not absolute, as the state can

deprive the owner of their property, but this must be done with procedural fairness and on payment of “just compensation”.

- The right to property is significant not only as it can help merchants and landowners secure their economic interests but also because in both independent America and revolutionary France, a property-based franchise was adopted.⁶
- Despite claims that human rights were universal, the original notion of “the rights of man” pertained to white, male owners of property and so excluded propertyless men, women, indigenous peoples, people of colour, and slaves.⁷

1.2. Human Rights and the Abolition of Slavery

- The development of modern “universal” human rights occurred at a time when Europeans and Euro-Americans practiced mass slavery and expanded their dominance over the indigenous peoples of the lands they colonised. Thus, it is not easy to fit the past into a continuous narrative of progressive evolution of human rights.⁸
- That said slavery, as a lawful practice, was gradually abolished worldwide during the nineteenth century with the UK playing a major role.
- It is arguably the first historical instance of holding commercial actors to account for violations of fundamental rights, though the precise reasons for, and causes of, abolition remain historically contentious and may not be easily explained by reference to ideas of universal rights.⁹

⁶ See Micheline R. Ishay *The History of Human Rights: From Ancient Times to the Globalization Era* (Berkeley, University of California Press, 2008) at 91-9.

⁷ See Ishay *ibid* at 107-16. See too Colin Samson *The Colonialism of Human Rights* (Cambridge, Polity Press, 2020).

⁸ See Alston above n 4 and Slaughter above n 4.

⁹ See further Seymour Drescher *Abolition: A History of Slavery and Antislavery* (Cambridge, Cambridge University Press, 2009) and *ibid Econocide: British Slavery in the Era of Abolition* (University of North

- Abolition first targeted commercial slave traders and, later, slave owners. In the UK it was led by various bodies which evolved into the Anti-Slavery Society, established in 1839, now Anti-Slavery International.¹⁰ The UK Act for the Abolition of the Slave Trade 1807 outlawed the slave trade across the British Empire, but slavery itself was abolished later in the Act for the Abolition of Slavery of 1833.¹¹
- Abolition was accompanied by significant sums of compensation from the British government to former slave owners and businesses dependent on slavery.¹² None was forthcoming to former slaves, who remained excluded from civil society by reason of race and status.
- The repercussions are still felt to this day in the treatment of their descendants in former slave-owning states and former imperial home countries.¹³ Nor is it clear that appeals to “human rights” lay at the heart of the movement, though moral concerns about the welfare of slaves were undoubtedly a key motivation.¹⁴
- Abolition not only gave rise to national laws but also to the adoption of international anti-slavery treaties, concluded principally by Britain and its trading partners.¹⁵ Anti-slavery treaties outlawed trade in slaves and permitted the seizure and confiscation of slave ships subject to review by Mixed Commissions established under the treaties.

Carolina Press, 2nd ed, 2010); Robin Blackburn *The American Crucible: Slavery Emancipation and Human Rights* (London, Verso, paperback ed, 2013).

¹⁰ See Anti-Slavery International “Over 180 years fighting slavery” at <https://www.antislavery.org/about-us/history/>; Nadia Bernaz *Business and Human Rights: History, law and policy – Bridging the accountability gap* (Abingdon, Routledge, 2017) ch 2 and Marcel van der Linden “Introduction” in Marcel van der Linden (ed) *Humanitarian Intervention and Changing Labor Relations: The Long-Term Consequences of the Abolition of the Slave Trade* (Leiden, Brill Publishers, 2010) tracing the course of abolition in a global context. These paragraphs are based on Peter T. Muchlinski *Multinational Enterprises and the Law* (Oxford, Oxford University Press, 3rd ed, 2021) at 511-12.

¹¹ Van der Linden *ibid* at 22-7.

¹² See Nicholas Draper *The Price of Emancipation: Slave Ownership, Compensation and British Society at the End of Slavery* (Cambridge, Cambridge University press, 2010).

¹³ See Samson above n 7 especially chapter 3.

¹⁴ See Alston above n 2 at 2048-52.

¹⁵ See van der Linden above n 10 Table 1 at 7 for the main treaties and international conventions between 1817 and 1882.

Jenny Martinez maintains that these constituted the first ever international legal mechanism dealing with human rights.¹⁶

- By the middle of the nineteenth century, abolition was generally accepted, and the first multilateral treaty was signed in 1841 by Austria, Great Britain, Prussia and Russia.¹⁷ Slavery in the Western Hemisphere did not end until the outlawing of slavery in the US in 1865 and in Brazil in 1888.¹⁸ Sadly, slavery remains an active issue worldwide and has prompted modern slavery laws.¹⁹

1.3. Other Human Rights Developments in the Nineteenth Century:

- During the nineteenth century universal male suffrage was achieved in some Western states as was the abolition of child labour.²⁰
- However this was also the time when ideas and values inimical to universal human rights emerged.²¹ These included
 - the rise of nationalism, which denied the universality of humanity, and,
 - allied with the rise of biological theories of racial difference, led to new forms of racism and to modern anti-Semitism.
 - Explanations of biological difference also helped fuel sexism and the continued marginalization of women's rights.

¹⁶ See Bernaz above n 10 at 105-6 and see further Jenny S. Martinez *The Slave Trade and the Origins of International Human Rights Law* (Oxford, Oxford University Press, paperback ed, 2014). For a critical appraisal of Martinez's thesis see Alston above n 4. For Martinez's reply to Alston see Jenny S. Martinez "Human Rights and History" 126 Harv.L.R. 221 (2012).

¹⁷ Treaty for the Suppression of the African Slave Trade 20 December 1841 cited by Bernaz ibid at 38.

¹⁸ Van der Linden "Introduction" above n 10 at 23-4.

¹⁹ See Anti-Slavery International "What is modern slavery" at <https://www.antislavery.org/slavery-today/> and see Muchlinski above n 10 at 539-43.

²⁰ Ishay above n 6 at 155.

²¹ See further Hunt above n 2 ch 5 and Ishay ibid at 155-72.

- Of further significance was the development of Marxist critiques of “bourgeois” rights, in particular the right to private property, which inspired revolutions in Russia and Mexico in the early twentieth century.
 - Both countries introduced mass nationalisations of land and industry. These were seen by the Western powers as major threats to the international free market order based on legally protected rights to private property that they had constructed.
 - In response, new international legal norms were asserted requiring prompt, adequate and effective compensation for the expropriation of property belonging to aliens.²²

1.4. Developments after World War I

The twentieth century both retarded and subsequently furthered the development of modern human rights.²³

- The end of World War I hastened the destruction of the great European monarchic empires of Germany, Austria-Hungary and Russia, as well as the Ottoman Empire, leading to new independent republics espousing the right to self-determination.
- While creating new centres of popular self-government, this also created a cauldron in which virulent nationalism could thrive amid fears of renewed war and the threat of Soviet Bolshevism.

²² See further Kate Miles *The Origins of International Investment Law* (Cambridge, Cambridge University Press, 2013) chs 1 and 2 especially at 74-6.

²³ See generally Isahy above n 6 ch 4.

- A further outcome of the Peace Conference, one of direct relevance to the development of business human rights responsibilities, was the establishment of the International Labour Organisation (ILO) under the Treaty of Versailles.

1.5. International Labour Standards

Labour rights represent the oldest category of social rights under national and international law and are significant in the rise of international corporate social responsibility.²⁴ The signatory nations created the ILO recognising that

“conditions of labour exist involving such injustice, hardship and privation to large numbers of people as to produce unrest so great that the peace and harmony of the world are imperilled, and an improvement of those conditions is urgently required...”²⁵

The preamble to the ILO Convention adds,

“the failure of any nation to adopt humane conditions of labour is an obstacle in the way of other nations which desire to improve the conditions in their own countries...”²⁶

²⁴ See Bernaz above n 10 at 44-5; Arturo Bronstein *International and Comparative Labour Law: Current Challenges* (Basingstoke, Palgrave MacMillan/ILO, 2008) at 1-3 and see further Muchlinski above n 12 at 103-6 on which this account draws.

²⁵ ILO *Rules of the Game: A brief introduction to International Labour Standards* (Geneva, revised ed, ILO, 2019) 12 at https://www.ilo.org/global/standards/information-resources-and-publications/publications/WCMS_672549/lang-en/index.htm citing the Preamble to the ILO Constitution 1919 available at http://www.ilo.org/dyn/normlex/en/f?p=1000:62:0::No:62:P62_LIST_eNtrle_ID:2453907:No

²⁶ *ibid.*

- Although the language is that of an international treaty aimed at states, the focus on protecting worker's rights in the interests of humane labour conditions offers an unmistakable message that corporate abuses of workers should not be tolerated.
- However, these developments must be seen in the context of continuing workers struggles for freedom of association and decent working conditions, the significant opposition that these encountered throughout the nineteenth and twentieth centuries and which continue to this day.²⁷

1.6. Developments after World War II

The development of modern human rights was fuelled by the horror of Nazi Germany's slaughter of millions of white fellow Europeans during World War II, though, as Colin Samson notes, not by the centuries of exploitation and violence meted out to those that Europe had colonised.²⁸

- Nazi Germany deliberately set out to exterminate the Jews of Europe through the Holocaust, in the name of European racial purity. Nazi atrocities extended to the extermination of other "sub-humans" including Gypsies, Slavic peoples, and the mentally and physically handicapped, the persecution of gay men and the use of slave labour.
- Mass expropriations of property in the occupied countries, and their reassignment to German nationals and corporations, also occurred.²⁹

²⁷ See further Ronaldo Munck *Rethinking Global Labour* (Newcastle, Agenda Publishing, 2018).

²⁸ See Samson above n 7 at 36. See too Samuel Moyn *The Last Utopia: Human Rights in History* (Cambridge Mass, Harvard University Press, Reprint Edition, 2012) who argues that only in the 1970s did the modern conception of human rights have real impact through its use at that time by popular movements across the world.

²⁹ See further Mark Mazower *Dark Continent: Europe's Twentieth Century* (London, Penguin, 1998) ch 5.

These events prompted a renewed international emphasis on human rights. A key result was the inclusion of a commitment to human rights in the UN Charter and the adoption of the UN Universal Declaration of Human Rights 1948 (UDHR). The UDHR lists the key civil, political and economic and social rights and stresses in Article 2 that

“Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.”³⁰

The Preamble to the UDHR requires that

“every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.”

³⁰ Universal Declaration of Human Rights 10 December 1948 at <https://www.un.org/en/universal-declaration-human-rights/>.

- The reference to “every organ of society” has been interpreted as including business organisations.³¹
- However, the UNGPs do not use this phrase and take a more functional approach seeing business actors as primarily economic organisations that can abuse human rights but which, as a result, require a different approach to their human rights accountability than states.

1.7. The Impact of War Crimes Tribunals

A further consequence of World War II was the institution of war crimes tribunals.

- Some of the cases heard involved the question of responsibility for the exploitation of slave labour by German and Japanese corporations.
- Although no corporations were indicted, senior executives of these firms were brought before the US Military Tribunal in Germany (USMT) and the British War Crimes Court in Hong Kong.³²
- These tribunals established that active and willing participation in the use of forced labour could constitute a violation of international humanitarian law.

³¹ See Bernaz above n 10 at 82-3; Rebecca Bratspies “Organs of Society: A Plea for Human Rights Accountability for Transnational Enterprises and Other Business Entities” 13(9) Michigan State Journal of International Law 9 (2005); Louis Henkin “The Universal Declaration at 50 and the Challenge of Global Markets” 25(1) Brook. J. Int’l L. 17 at 24-5 (1999).

³² See further Doreen Lustig *Veiled Power: International Law and the Private Corporation, 1886-1981*. (Oxford, Oxford University Press, 2020) chs 4-5, who criticises the legal and political reasoning that led to the exclusion of indictments against corporations.

- Exceptionally, the defendant could plead the defence of necessity where they would certainly be killed if they refused to use forced labour though the risk of economic ruin was excluded.³³
- In addition, although corporations were not indictable, the interaction between the corporation and its executives was seen as a system through which mass violations of human rights were enabled.
- For example, in the case against twenty-three employees of I.G. Farben the USMT held

“While the Farben organization, as a corporation, is not charged under the indictment with committing a crime and is not the subject of prosecution in this case, it is the theory of the prosecution that the defendants individually and collectively used the Farben organization as an instrument and through which they committed the crimes enumerated in the indictment.”³⁴

- In addition, the USMT found that I.G. Farben and Krupp, through their executives, had violated the prohibition against seizure of private property in occupied lands under the Hague Rules when these corporations acquired confiscated factories in a number of Nazi-occupied countries.³⁵

³³ See further Antia Ramasastry “Corporate complicity: From Nuremberg to Rangoon - an examination of forced labor cases and their impact on the liability of multinational corporations” 20(1) Berkeley J. Int'l L. 91 (2002).

³⁴ See *U.S. v. Krauch, et. al, The I.G. Farben Case*, VIII Trials of War Criminals Before the Nuremberg Military Tribunals, iii-iv at 1108 (1952).

³⁵ See Ramasastry above n 33 at 107-11.

1.8. The International Bill of Rights

The UDHR was a starting point for what has become known as the “International Bill of Human Rights”. This comprises

- the UDHR and
- the two UN human rights covenants:
 - the International Covenant on Economic, Social and Cultural Rights (ICESCR) and
 - the International Covenant on Civil and Political Rights (ICCPR) both of which entered force in 1976.³⁶
- The two UN Covenants reflect post-war ideological divisions between the capitalist, free market oriented, West centred on the US and Western Europe and the communist, command economy oriented, Eastern Bloc centred on the Soviet Union and its Central and East European satellite states alongside China as an independent communist power. The Soviet opposition to private property rights ensured that the right to property was not included in the ICCPR while the ICESCR elaborated on the few social rights listed in the UDHR.³⁷

1.9. The Cold War and its Impact

The ideological battle between the West and the East relegated other states to client status and deeply affected their human rights situation.³⁸

³⁶ See UN Office of the High Commissioner for Human Rights “International Human Rights Law” at <https://www.ohchr.org/EN/ProfessionalInterest/Pages/InternationalLaw.aspx>

³⁷ See Ishay above n 6 at 224.

³⁸ See Ishay ibid at 191-9 and 225-9

- Proxy wars in the Middle East and South East Asia, particularly the decades long struggle for independence in Vietnam, created fertile ground for atrocities.
- Equally the need for investment made many of the poorer, newly independent, post-colonial states of Asia and Africa beholden to corporate interests from the West and to state sponsored investment from the East.
- Their elites could afford to ignore the human rights of their populations in exchange for economic and political support, provided they supported one side or the other in the “Cold War”.
- After the end of the “Cold War” in the late 1980s, the apparent triumph of the West was echoed in the extension of free-market oriented investment policies in increasing numbers of states. This did not necessarily improve local human rights conditions or bring about an end to economic exploitation.
- Private foreign investors enjoyed the economic opportunities that these countries offered. Some found themselves sucked into local political realities and either deliberately collaborated with regimes that abused human rights or turned a blind eye to those abuses.
- As will be shown below it was out of such situations that the first highly publicised corporate human rights abuse cases emerged in apartheid-era South Africa and, later, in the Niger Delta the 1990s marking the beginning of the contemporary movement towards human rights obligations for business.
- Equally, the desire to protect their investments in post-colonial developing states led foreign investors to demand greater legal protections against arbitrary local government actions. This resulted in the development of international investment agreements (IIAs) whose value as sources of legal rights became highly apparent in

the 1990s when large numbers of claims began to be made by investors under their investor-state dispute settlement (ISDS) provisions.³⁹

2. Human Rights and the Protection of Private Commercial Property

2.1. The Liberal Conception of Commercial Property Rights

The interaction between international investor protection norms and the rise of claims that businesses have human rights responsibilities is where the tension between the protection of corporate private property rights and protection against corporate abuses emerges. This tension has its roots in liberal legal reasoning and its prioritisation of private property rights to the status of fundamental corporate rights.

- The liberal conception of rights attributes fundamental rights to the corporate entity and its shareholders.
- In some Western legal systems corporate actors enjoy certain constitutional rights to facilitate their effective operation. Following the logic of fundamental rights, the US Supreme Court has accepted that, while a corporation is not a “citizen” within the meaning of the US Constitution, corporations can hold certain civil and political rights as there is no reason to distinguish between different classes of legal person for the purposes of protecting rights that belong to “persons”.⁴⁰
- The European Court of Human Rights (ECtHR) has also extended the protection of certain rights under the European Convention on Human Rights (ECHR) to

³⁹ On which see further M. Sornarajah *The International Law on Foreign Investment* (Cambridge, Cambridge University Press, 4th ed, 2017).

⁴⁰ See Philip I. Blumberg *The Multinational Challenge to Corporation Law* (Oxford, Oxford University Press, 1993) ch 2. For a critical appraisal see Hartmann above n 3 especially chs 1 and 6.

corporations and shareholders whose human rights have been infringed through actions taken against the corporation in which they hold shares. This bypasses the legal separation between a corporation and its shareholders, even though the actions leading to this situation are effected upon the company, making violations of the latter's human rights a reason to "lift the corporate veil" between the company and its shareholders.⁴¹

- Contrary to the jurisprudence of the ECHR, the Inter-American Court of Human Rights held, in 2016, that corporations do not enjoy human rights protection except when necessary for the realisation of the human rights of the natural persons who are its members.⁴² Thus even though the Inter-American Court of Human Rights restricts the enjoyment of human rights to natural persons it too allows for a lifting of the "corporate veil" to protect the human rights of the shareholders in the company.
- In addition, the liberal conception of human rights prioritises civil and political rights over economic, social and cultural rights. The former are said to be real rights, or "positive rights" that can be upheld by legal sanction, while the latter are merely "rights to be given things, things such as a decent income, schools and social services" which cannot be guaranteed in law but by elaborate social and economic programmes.⁴³

⁴¹ See further Marius Emberland *The Human Rights of Companies: Exploring the Structure of ECHR Protection* (Oxford, Oxford University Press, 2006).

⁴² *Opinión Consultiva OC-22/16 de 26 de Febrero de 2016 Solicitada por la República de Panamá* at http://www.corteidh.or.cr/docs/opiniones/seriea_22_esp.pdf

⁴³ See Maurice Cranston *What are Human Rights* (London, The Bodley Head, 1973) at 69.

2.2. The Socialist Conception of Rights

By contrast, a socialist conception of rights sees the true source of economic welfare in the value added by the exercise of work and not in the financial profit generated by the sale of the resulting product, whose ownership rests with the producer. Accordingly,

- in the socialist conception, the right of the worker to employment becomes a fundamental right and this subordinates the right of the producer to their profit.
- It also underlies the logic of abolishing all private property and vesting productive assets in the state as the political representative of the people.
- Thus, a socialist approach to human rights emphasises the need for economic and social rights and places these above traditional civil and political rights.
- This resulted in a lack of effective protection for those rights in the Soviet Bloc and, as history shows, offered a ready avenue for undermining the legitimacy of the Soviet system both from outside and from within.⁴⁴

3. Business Responsibilities for Human Rights and International Economic Law

3.1. The Interaction of These Two Spheres

The evolution of business responsibilities for human rights should be examined in the wider context of its relationship with international economic law.⁴⁵

⁴⁴ See Ishay above n 6 at 225-9 and 248-53.

⁴⁵ See Ilias Bantekas and Michael Ashley Stein (eds) *The Cambridge Companion to Business and Human Rights* (Cambridge, Cambridge University Press, 2021) especially chs 1-5; Janet Dine *Companies, International Trade and Human Rights* (Cambridge, Cambridge University Press, 2005); Andrew Lang *World Trade Law After Neoliberalism: Re-Imagining the Global Economic Order* (Oxford, Oxford University Press, 2011) especially ch 2.

- This is important as any extension of human rights obligations to businesses operating transnationally will affect the nature and scope of international economic law norms as well.
- International economic law controls the sovereign right of states to impose restrictions on trade and investment at their border, and within their economy, so as to facilitate the global liberalisation of trade and investment. It is found in numerous international treaties, including IIAs and, most notably, in the agreements founding the legal order of the World Trade Organisation (WTO).
- The liberal conception of the international economic order stems from similar intellectual origins to the liberal conception of human rights. Both aim to restrict the power of the state to control the application of private commercial property for personal and commercial gain.
 - Human rights do this, as seen above, by protecting those rights which ensure personal freedom and security, including the right to peaceful enjoyment of possessions, alongside voice and participation in political life.
 - International economic law does this by constraining a state's economic regulatory discretion and channeling it into certain procedural pathways that ensure the observance of substantive economic rights. In particular, states must adhere to certain standards of economic governance that ensure: non-discrimination between national and foreign traders and investors (national treatment), or between different classes of foreign traders and investors (most-favoured-nation treatment); the fair and equitable treatment of foreign investors; the protection of their property, including intellectual property; free movement of capital; market access rights for goods, which include protection

against both tariffs at the border and non-tariff barriers; and the right of entry and establishment for investors and their investments.

3.2. “Embedded Liberalism”

This model emerged from the reconstruction of the post-World War II economy. It involved

- the partial abandonment of free trade through a managed multilateral international economic system where market forces would be subjected to state intervention aimed at achieving social goals such as full employment, resulting in tolerance for national policies favouring such objectives.
- This was a form of “embedded liberalism”.⁴⁶
- It relied heavily on US leadership, which encouraged continued trade liberalisation negotiations under the General Agreement on Trade and Tariffs (GATT) and coordination of financial policies through the World Bank and IMF to protect national balance-of-payments and stability.

3.3. The New International Economic Order of the 1970s

During the 1970s this model was challenged by the emerging post-colonial states of Asia and Africa who had gained political self-determination but still lacked economic self-determination.

- These states of the Global South coalesced into the “Group of 77” within the UN.

⁴⁶ See John G. Ruggie “International Regimes, Transactions, and Change: Embedded Liberalism in the Post-war Economic Order” 36(2) International Organization 379 (1982).

- They demanded a New International Economic Order (NIEO) to ensure economic sovereignty and political independence.⁴⁷
- Key was the right to nationalise foreign owned property.⁴⁸
- This echoed the earlier UN General Assembly Resolution 3171 of 1973 on Permanent Sovereignty over Natural Resources which affirmed each state's inalienable right to exercise sovereignty over their natural resources and the right to nationalise as an expression of sovereignty to safeguard their natural resources.⁴⁹

3.4. The Draft UN Code of Conduct for Transnational Corporations

In addition, the role of multinational enterprises (MNEs), or transnational corporations (TNCs) in UN language, in the development of these states was debated. The UN established a Centre and a Commission on Transnational Corporations through which negotiations began over a Code of Conduct for TNCs. This included a provision on human rights. By Article 13 of the Draft Code of Conduct

“Transnational corporations should/shall respect human rights and fundamental freedoms in the countries in which they operate. In their social and industrial relations, transnational corporations should/shall not discriminate on the basis of race, colour, sex, religion, language, social, national and ethnic origin or political or other

⁴⁷ The principal UN General Assembly Resolutions on the New International Economic Order are: Res.3201 (S-VI) of 9 May 1974 The Declaration on the Establishment of a New International Economic Order; Res.3202 (S-VI) of 16 May 1974 The Programme of Action on the Establishment of a New International Economic Order both reproduced in 13 ILM 715-766 (1974) and <https://digitallibrary.un.org/record/218450>; <https://digitallibrary.un.org/record/218451?ln=en>. These were followed by Res.3281 (XXIX) of 15 January 1975 The Charter of Economic Rights and Duties of States reproduced in 14 ILM 251-265 (1975) and <https://digitallibrary.un.org/record/190150?ln=en>

⁴⁸ See art 2 of the Charter of Economic Rights and Duties of States *ibid*.

⁴⁹ UN General Assembly Resolution 3171 (XXVIII) GAOR 28th Sess. Supp.30 p.52 (1973), 68 AJIL 381 (1974).

opinion. Transnational corporations should/shall conform to government policies designed to extend equality of opportunity and treatment.”⁵⁰

- The Draft Code of Conduct was never adopted.
- However, Article 13 was embedded in an instrument that covered both the obligations of TNCs and their rights, and the rights of states to regulate TNCs.
- The Draft Code of Conduct thus intertwines human rights responsibilities with wider questions covered by international economic law and public international law, foreseeing contemporary developments discussed in later chapters.

4. Origins of Contemporary Moves Towards Business Responsibilities for Human Rights

The origins of contemporary moves towards business responsibilities for human rights can be explained as a result of shifts in economic policy that have enhanced corporate power, countervailing instances of activism leading to greater public awareness of the potential that business has to violate human rights and by the acceptance, through human rights non-governmental organisations (NGOs), that this issue should rank alongside traditional concerns involving human rights violations by states.

⁵⁰ See Draft UN Code of Conduct on Transnational Corporations (1983) at <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2891/download>

4.1. The Shift Towards “Neoliberalism” in the 1980s

In the 1980s liberal market policies revived, both at the domestic and international levels, leading to a major shift in thinking, especially in the US and UK, towards what has come to be called “neoliberalism” an ideology that has roots which significantly predate this period.⁵¹

- “Neoliberalism” promotes an increasingly integrated global economy, where barriers to trade and investment fall, and where the state is reinvented as the “market-state” a source of facilitative rules creating an economic space in which integrated global production chains emerge.⁵²
- It assumes that the market allocates resources most efficiently, requiring a facilitative regulatory order leading to an “open” international economy overseen by global rules, promulgated by intergovernmental organisations (IGOs), which constrain state rights to regulate in ways that undermine global market freedom.⁵³
- MNEs play a key role by integrating different national economies, with different comparative advantages in skills, labour, raw materials and know-how, through the international division of labour within the enterprise and through the global production and supply chains that MNEs establish.

⁵¹ See further Langabein 45; Quinn Slobodian *Globalists: The End of Empire and the Birth of Neoliberalism* (Cambridge Mass, Harvard University Press, 2018); David Harvey *A Brief History of Neoliberalism* (Oxford, Oxford University Press, paperback ed, 2007); Stephen Metcalfe “Neoliberalism: the idea that swallowed the world” *The Guardian* 17 August 2017 at <https://www.theguardian.com/news/2017/aug/18/neoliberalism-the-idea-that-changed-the-world>. This paragraph is adapted from Muchlinski above n 10 at 91-2.

⁵² “Market-state” denotes a state that outsources public functions to private providers, uses public-private partnerships to deliver public services and infrastructure, privatises public enterprises, and liberalises and deregulates markets and firms.

⁵³ See further Slobodian above n 51.

- Crucial to this is a world economy in which MNEs are free to set up affiliates whenever and wherever they wish, to engage in uninhibited intra-firm trade, and trade with third parties.
- The establishment of the WTO in 1995 is a direct result of these trends.
- The linkage between international trade regulation and liberal conceptions of human rights has also been re-emphasised by the debate over whether there should be a “human right to free trade” to protect business interests in internationally liberalised markets.⁵⁴

4.2. The Resulting Enhancement of Private Corporate Power

The rise of the liberal “market-state” and the shift towards economic globalisation since the 1980s has enhanced corporate power.⁵⁵

- As the state cedes functions hitherto reserved for the public sphere to private undertakings, such as the provision of public services and utilities, the power of private firms to shape the regulatory environment increases.
- Participating firms will negotiate the contractual forms and institutional structures of the resulting public-private partnerships and privatised firms.⁵⁶

⁵⁴ See, in favour, E-U Petersmann “Human Rights and International Economic Law in the 21st Century: The Need to Clarify their Inter-relationships” 4 JIEL 3 (2001) and against, P. Alston “Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann” 13 EJIL 815 (2002) eliciting a rejoinder from Petersmann at 13 EJIL 845 (2002). See further Dine above n 45 at 199-207 and Lang above n 45 at 52-7.

⁵⁵ This paragraph is adapted from Peter Muchlinski “The Changing Nature of Corporate Influence in the Making of International Economic Law: Towards “Multistakeholderism”” in Markus Krajewski (ed) *European Yearbook of International Economic Law 2020* https://doi.org/10.1007/8165_2020_52

⁵⁶ See further Michael Likosky (ed) (2005) *Privatising Development: Transnational Law, Infrastructure and Human Rights* (Leiden, Martinus Nijhoff Publishers, 2005) and Michael Likosky *Law Infrastructure and Human Rights* (Cambridge, Cambridge University Press, 2006).

- Corporate power is further enhanced by the possession of technical knowledge and innovative capacity, empowering firms to address specific economic and technological challenges.
- MNEs, in particular, have a significant degree of political power. According to Stephen Wilks, the political power of a corporation is measured according
 - to the possession of sufficient resources,
 - motivation and opportunity to pursue political goals and
 - capacity to participate in the political process.
 - These factors will favour firms with large size and resources, market share and international reach.⁵⁷ Small and medium sized enterprises and purely domestic corporations are unlikely to share such advantages.

The power of large corporations affects the enjoyment of human rights on a number of levels.⁵⁸

- First, firms have direct power over individuals, especially their employees, and how they can enjoy their rights.
- Secondly, large corporations may control access to certain resources essential to the enjoyment of human rights such as access to housing, finance, land and the environment.
- Thirdly, given their political power, corporations can influence institutions through lobbying, by the ability to cross borders and threaten disinvestment if their will is not

⁵⁷ See Stephen Wilks, *The Political Power of the Business Corporation* (Cheltenham, Edward Elgar, 2013) at 37-40.

⁵⁸ See David Birchall “Corporate Power over Human Rights: An Analytical Framework” 6(1) BHRJ 42 (2021), doi:10.1017/bhj.2020.23 on which this paragraph draws.

met by local authorities and, as already noted, through the privatisation of public functions.

- Finally, corporations have the power to form opinions and steer knowledge towards business-friendly outcomes.

4.3. The Countervailing Power of Social Issue Orientated NGOs

Large corporations do not always get their way. The vacating of regulatory space to non-state actors through the rise of the “market-state”, while favouring the most powerful multinational firms, has also empowered social issue oriented NGOs as alternative voices to MNEs in the construction of transnational political and regulatory discourse.⁵⁹

- Doris Fuchs notes that corporate resources give an advantage in developing, “the density of messages, establishing scientific evidence and identifying and communicating persuasive arguments” but cannot guarantee the maintenance of business’s discursive power in the face of possibly changing societal norms and perceptions of business legitimacy.⁶⁰
- It is against this background that calls for increased business responsibility for human rights violations have emerged. The threat of unchecked corporate power has been countered by NGO claims for greater corporate accountability.

⁵⁹ See further M. Yaziji and J. Doh *NGOs and Corporations: Conflict and Collaboration* (Cambridge, Cambridge University Press, 2009). Social issue NGOs should be distinguished from business promoting NGOs established by firms and industry groups to represent business interests.

⁶⁰ Doris Fuchs, *Business Power in Global Governance* (Boulder and London, Lynne Rienner Publishers, 2007) at 154.

- These claims go beyond the voluntarism of traditional corporate social responsibility initiatives, that centre on corporate philanthropy, and require a degree of moral and legal accountability for adverse human rights impacts from business operations.⁶¹

4.4. The Contribution of the Anti-Apartheid Struggle to Business responsibilities for Human Rights

A significant milestone towards business responsibilities for human rights was the struggle against apartheid in South Africa during the 1970s and 80s.⁶²

- The anti-apartheid movement highlighted the extent to which foreign firms profited from the exploitation of cheap black labour and encouraged them to take an active stance against apartheid.
- This stance was complicated by the “Cold War” which led to the perception that South Africa, while racist, was a Western ally. By contrast the leading opponent of apartheid, the African National Congress, was in receipt of Soviet funding, had an overtly socialist economic policy agenda and was considered a terrorist organisation by Western security agencies.⁶³

⁶¹ See, on the relationship between corporate social responsibility and human rights, Karin Buhmann *Changing Sustainability Norms Through Communication Processes: The Emergence of the Business and Human Rights Regime as Transnational Law* (Cheltenham, Edward Elgar, 2017) ch 2; Anita Ramasastry “Corporate Social Responsibility Versus Business and Human Rights: Bridging the Gap Between Responsibility and Accountability” 14 J. Hum. Rts. 237 (2015).

⁶² This account expands Peter Muchlinski “The Impact of the UN Guiding Principles on Business Attitudes to Observing Human Rights” 6(2) BHRJ 212 at 216-7 (2021) doi:10.1017/bhj.2021.14.

⁶³ See Olivia B. Waxman “The U.S. Government Had Nelson Mandela on Terrorist Watch Lists Until 2008. Here's Why” *Time* 18 July 2018 at <https://time.com/5338569/nelson-mandela-terror-list/>; Andy McSmith “Margaret Thatcher branded ANC ‘terrorist’ while urging Nelson Mandela’s release” *The Independent* 9 December 2013 at <https://www.independent.co.uk/news/uk/politics/margaret-thatcher-branded-anc-terrorist-while-urging-nelson-mandela-s-release-8994191.html>.

- Despite this political context the anti-apartheid movement managed to pressure Western MNEs into engaging against segregation and even to divest from South Africa, as numerous US-based universities, municipalities, pension funds and state legislatures did during the 1970s and 80s.⁶⁴
- A significant development was the 1977 Sullivan Principles, named after their originator, Reverend Leon Sullivan, a highly experienced African American community leader who became the first ever African American non-executive board member when, in 1971, he was invited to join the board of General Motors.⁶⁵
- The Sullivan Principles represent the first voluntary corporate human rights monitoring instrument. Signatory firms reported on furthering the desegregation of their workplaces, and improving the lives of black and other non-white South Africans, in accordance with the requirements of the Principles. These were:
 1. Non-segregation of the races in all eating, comfort, and work facilities.
 2. Equal and fair employment practices for all employees.
 3. Equal pay for all employees doing equal or comparable work for the same period of time.
 4. Initiation of and development of training programs that will prepare, in substantial numbers, blacks and other non-whites for supervisory, administrative, clerical, and technical jobs.
 5. Increasing the number of blacks and other non-whites in management and supervisory positions.

⁶⁴ See Gay W. Seidman “Monitoring Multinationals: Lessons from the Anti-Apartheid Era” 31(1) Politics & Society 1 at 11 (2003) DOI: 10.1177/0032329203254861

⁶⁵ See Paul Lewis “Leon Sullivan, 78, Dies; Fought Apartheid” *The New York Times* 26 April 2001 at <https://www.nytimes.com/2001/04/26/world/leon-sullivan-78-dies-fought-apartheid.html>.

6. Improving the quality of life for blacks and other non-whites outside the work environment in such areas as housing, transportation, school, recreation, and health facilities.⁶⁶
 7. Working to eliminate laws and customs that impede social, economic, and political justice. (Added in 1984.)
- The implementation of the Sullivan principles left a lot to be desired. They were administered by a US accountancy firm unfamiliar with social reporting issues, and encouraged corporations to prioritise cash donations to good local causes, over workplace improvements and equal pay and conditions, to increase their score in the corporate compliance list drawn up under the Principles.⁶⁷
 - The Sullivan Principles were questioned by anti-apartheid activists as they assumed that it was acceptable for firms to continue to invest in South Africa and so uphold the regime. Activists favoured outright divestment and Reverend Sullivan eventually agreed, resigning from the board that oversaw the Principles.⁶⁸
 - Events overtook the Sullivan Principles. Corporations increasingly pulled out of South Africa in the late 1980s, when the political and security situation deteriorated, and the eventual introduction of democratic government after the election of 1994 brought an end to apartheid.⁶⁹

⁶⁶ See Sullivan Principles 1977 available at <https://www.bu.edu/trustees/boardoftrustees/committees/acsri/principles/>

⁶⁷ See Seidman above n 64 at 14-17.

⁶⁸ *ibid* at 19.

⁶⁹ *ibid* at 19-21.

4.5. Shell and the Niger Delta

It was also during the 1990s that NGOs began to highlight cases of corporate human rights abuses and raise public awareness of the problem through the media. A key case concerned the human rights impacts of oil company operations in the Niger Delta in the 1990s.⁷⁰

- Subsequently a number of claims arising out of this situation, and other notable cases of business involvement in human rights violations, came before the US courts under the Alien Tort Claims Act (ATCA).⁷¹ Other cases included Texaco's environmental practices in Ecuador between 1964 and 1992, whose operations were taken over by Chevron, which was later implicated in allegations of violent suppression of protests against oil developments in the Niger Delta.⁷²
- Shell in particular came under scrutiny following the execution of Ogoni author and environmental activist, Ken Saro-Wiwa, and eight others, wrongly accused of murder by the Nigerian authorities.⁷³ A coalition of environmentalists, human rights activists and churches criticised Shell's failure to intervene in the case. Institutional shareholders in the UK, including public employee pension funds and religious organisations, also called for reforms of the company's corporate governance. Shell responded with a radical overhaul of its corporate governance systems to ensure that it was more responsive to CSR concerns. The Chief Executive of Shell at the time,

⁷⁰ A key document is Human Rights Watch *The Price of Oil: Corporate Responsibility and Human Rights Violations in Nigeria's Oil Producing Communities* (HRW Index No. 1-56432-225-4 January 1999) at <https://www.hrw.org/legacy/reports/1999/nigeria/nigeria0199.pdf>.

⁷¹ See further Sarah Joseph *Corporations and Transnational Human Rights Litigation* (Oxford, Hart Publishing, 2004). On access to legal remedies see further ch 6.

⁷² See Business and Human Rights Resource Centre "Texaco/Chevron lawsuits (re Ecuador)" at <https://www.business-humanrights.org/en/latest-news/texacochvron-lawsuits-re-ecuador-1/>

⁷³ This account is taken from Muchlinski above n 62 at 217-8.

Mark Moody-Stuart, opined that the commercial and social obligations of the company could not be separated:

“You can’t divorce the two. People sometimes try to do that. They say, all this societal stuff is woolly, we should stick to commerce. The two are absolutely linked ... These soft issues are really business issues, because we are part of society, and members of society are our customers. So, our impact on society really matters commercially.”⁷⁴

4.6. Amnesty International and Business Responsibilities for Human Rights

A highly significant moment for the development of business responsibilities for human rights occurred when in the 1990s Amnesty International (AI) entered the field of business responsibilities for human rights. Until then AI had focuses exclusively on violations by states of civil and political rights.

- A key moment was the establishment of the Amnesty International UK Business Group (AI Business Group) under the leadership of the late Sir Geoffrey Chandler, a former Shell executive who was a pioneering voice in the business and human rights movement of the 1990s.⁷⁵ In the light of the Ogoni case, Shell entered a dialogue on how to reform its social responsibility strategy with Sir Geoffrey and the AI Business Group. The result was, in 1997, the first Shell public statement that it accepted

⁷⁴ Quoted in Anne T. Lawrence “The drivers of stakeholder engagement: Reflections on the case of Royal Dutch/Shell” in J. Andriof, S. Waddock, B. Husted, and S.S.Rahman *Unfolding Stakeholder Thinking : Theory, Responsibility and Engagement* (Abingdon, Greenleaf Publishers 2002 republished by Routledge, 2017) 185 at 190.

⁷⁵ See Sir Geoffrey Chandler “The Amnesty International UK Business Group: Putting Human Rights on the Corporate Agenda” 33 *The Journal of Corporate Citizenship* 29 (2009) at <http://www.jstor.org/stable/jcorpciti.33.29>

corporate responsibilities for human rights. Shell's Statement of General Business Principles now included a responsibility to respect the human rights of employees and "to express support for fundamental human rights in line with the legitimate role of business".⁷⁶ Shell's current position is to support the UNGPs and the human rights due diligence principle they embody.⁷⁷

- Also significant was the adoption, by Amnesty International, of its International Human Rights Principles for Companies in January 1998.⁷⁸ Until then Amnesty was dedicated to the protection of civil and political rights against state interference.⁷⁹ The decision to add corporations to Amnesty's agenda stressed that human rights should no longer be compartmentalised but defend as an integrated whole that includes economic, social and cultural rights over which corporate actors have significant impacts. Amnesty's Principles also mark the inclusion, in addition to the state, of privately-owned corporations as bearers of human rights responsibilities.

⁷⁶ Quoted in Chandler *ibid* at 32. See too Shell *Shell General Business Principles* (2014 revision) at <https://www.shell.com/about-us/our-values>

⁷⁷ See Shell Global "Human Rights" at <https://www.shell.com/sustainability/transparency/human-rights.html#iframe=L3dIYmFwcHMvU3VzdGFpbmFiaWxpdlHlcmVwb3J0XzIwMTky>

⁷⁸ Amnesty International (AI) Human Rights Principles for Companies (ACT 70/001/1998 1 January 1998) at <https://www.amnesty.org/en/documents/act70/001/1998/en/> and see further AI "Corporations" at <https://www.amnesty.org/en/what-we-do/corporate-accountability/>

⁷⁹ *ibid* at 5-6.