Emerging International Human Rights Norms for Transnational Corporations

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This article analyzes the emergence of new human rights norms for transnational corporations. It first explores voluntary norm-making approaches, which have been a staple of this issue area since the 1970s. Second, it analyzes the formulation and eventual fall of the UN Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights. A final section reflects on the work of the UN special representative of the secretary-general on business and human rights, John Ruggie, and the future of norm making in this area. It is argued that these three processes constitute differing but fundamental steps toward the construction of international human rights norms for corporations and that, although norm entrepreneurs have clashed in debates over voluntary versus binding standards, norm making in this area remains healthy thanks to a now more solid international awareness regarding the corporate responsibility toward human rights.

KEYWORDS: transnational corporations, international human rights, voluntary codes, business and human rights, binding norms.

For decades, widespread human rights violations have been directly associated with the behavior of states. Weak democracies, authoritarian regimes, military dictatorships, and other forms of nondemocratic rule all around the world are generally regarded as the most prominent scenarios of disrespect to the human rights of local populations. The architecture of the modern international human rights regime, born in the aftermath of World War II partly in response to the atrocities of the Holocaust, is itself a reflection of these eminently state-centered concerns. And although conclusive data on the current state of human rights violations around the globe are elusive, governments are still believed to rank as the worst offenders.

Nevertheless, concerns over the human rights–related conduct of agents other than states have been growing since the 1970s. The end of the Cold War, the consolidation of the global economy, the rise of information technology, and the strengthening of transnational advocacy networks have contributed to effectively turning our attention to the potentially perverse impact of transnational corporations, insurgencies, paramilitaries, and other nonstate actors on human rights.

How is the international human rights system adapting to the conduct of nonstate actors? Are new human rights norms emerging to deal with them? If
so, what types of norms are these, and how and why are they appearing? In this article, I explore this issue in relation to transnational corporations, which some have argued are “the most powerful non-state actors in the world.”

I describe three central processes that have driven the agenda in this issue area, explain why certain types of norms have won out over others, at least provisionally, and argue that although norm entrepreneurs have clashed in debates over voluntary versus binding standards, norm making in this area remains healthy, thanks to a now more solid international awareness regarding the corporate responsibility toward human rights. Transnational advocates participating in these three processes have been particularly effective in transforming the calculations of states and corporations toward respect for human rights.

I begin by laying down the key theoretical tools and concepts that will be used throughout. I then present and analyze the case study and conclude with some ideas for future research.

Some Theoretical Remarks
In this section, I introduce the key theoretical tools that are used throughout the article, drawing from distinct (but compatible) theoretical currents in international relations scholarship. I present first an “international norm dynamics” approach, as posited by Martha Finnemore and Kathryn Sikkink, which can be broadly categorized as ideational; next I introduce interest-based theories that highlight actors’ rational decisionmaking and then complement these with additional concepts related to ideational approaches to decisionmaking. My assumption in this article is that such existing analytical frameworks are also applicable to understanding norm-emergence processes vis-à-vis nonstate actors.

Norm Emergence and Principled Entrepreneurs
A norm is usually defined as “a standard of appropriate behavior for actors with a given identity.” According to Finnemore and Sikkink, a norm follows a “life cycle” consisting of three stages: norm emergence, norm cascade, and norm internalization. In the stage of norm emergence, which is the focus of this article, so-called “norm entrepreneurs . . . attempt to convince a critical mass of states to embrace new norms.” These entrepreneurs are driven by various motives, including altruism, empathy, and ideational commitment to a cause.

Unable to coerce directly those actors whose behavior they seek to alter, whether state or nonstate, norm entrepreneurs must persuade them. Persuasion passes through a process of “meaning managing,” in which norm entrepreneurs call attention to or “create” issues in a way that resonates with broader political understandings. Fundamentally, they seek to construct “frames” that suggest alternative perceptions of both appropriateness and interest. Additionally, norm entrepreneurs usually require a legitimate organizational platform from and through which they promote the new norms.
Historically, norm entrepreneurs have emerged in the form of human rights nongovernmental organizations (NGOs), grassroots organizations, international organizations, legal experts, UN representatives, academics, and even some of the same nonstate actors targeted by such proposed norms. These entrepreneurs may operate in “networks” and establish strategic linkages to exchange information, to clarify issues, to pressure their object-agents, and to bring about behavioral change in them. Indeed, they are what Keck and Sikkink have termed “transnational advocacy networks,” which include “those relevant actors working internationally on an issue, who are bound together by shared values, a common discourse, and dense exchanges of information and services.”

**Interest-based Approaches**

Persuasion by principled entrepreneurs and advocacy networks in the phase of norm emergence involves political, strategic interaction between them and other actors, particularly the target agents of the new norms. Interest-based theories of international relations direct our attention to these strategic interactions between the key actors with a stake in the debate in this case, home and host states, international NGOs, corporations, and others defending their interests.

Generally, interest-based approaches to the emergence of international regimes suggest that the target actors will behave rationally, with a set of ordered preferences, and will calculate the costs and benefits of alternative courses of action in order to maximize their utility in view of those preferences. Actors may also behave as egoists, more concerned about their own absolute gains than the relative gains of others.

Some scholars looking at the reasons why countries commit to international treaties highlight the importance of considering the “anticipated positive and negative effects of international laws on states.” In choosing to adhere to treaties, actors will factor into their decision the “likely effects,” usually equated with the effectiveness of international or domestic legal enforcement, as well as the foreseeable collateral consequences of adhesion. These propositions may help explain why some norms win out over others; that is, why some norms are more readily accepted than others.

**Ideas and Rational Actors**

In the past decade, international relations scholars have come to recognize the importance of ideas in foreign policy making processes by rational, largely self-interested actors. In a seminal volume, Judith Goldstein and Robert Keohane argue that “ideas influence policy when the principled or causal beliefs they embody provide road maps that increase actors’ clarity about goals or ends-means relationships, when they affect outcomes of strategic situations in which there is no unique equilibrium, and when they become embedded in political institutions.” The analysis of human rights norm emergence for transnational corporations presented here will reveal how certain ideas about the
relationship between transnational corporations and human rights have led to
the success of certain norms over others because they have acted as focal points
and “glue” in a situation where there is no single equilibrium. These ideas have
been successful in coordinating the interests of the key actors in the debate and
in creating certain kinds of norms. However, this does not preclude the fact
that the beliefs of other actors will lead them to prefer stronger norms, which
may, however, not yet enjoy the same coordination and glue virtues.9 Finne-
more and Sikkink put it best when they argue that emergent international norms
enter a “highly contested normative space where they compete with other norms
and perceptions of interest.”10

With these theoretical tools in mind, let us now explore in detail the de-
velopment of new human rights norms for transnational corporations.

Transnational Corporations and Human Rights:
Voluntary Approaches to Norm Making
As August Reinisch has noted, attempts to regulate corporate conduct, despite
their seemingly novel nature, are actually not a new phenomenon.11 Initial ef-
forts took place within the UN in 1974 with the establishment of the Com-
mission on Transnational Corporations (UNCTC), which was charged with
drafting a general code of conduct.12 That code focused on issues of interna-
tional trade, nationalization of foreign property, treatment of foreign enter-
prises, jurisdiction, dispute settlement, transfer of technology, and taxation;13
it did not initially include talk of human rights.14 Despite lasting thirteen years
and producing a series of drafts, the UNCTC officially abandoned work on the
code in 1992.15

Other early regulatory attempts, during the 1970s and 1980s, came in the
form of voluntary codes promoted by regional governmental organizations; indus-
try-specific codes; and international codes focusing on specific issues. Nota-
bly, the Organisation for Economic Co-operation and Development (OECD)
issued Guidelines for Multinational Enterprises in 1976, and the ILO produced
its Tripartite Declaration of Principles Concerning Multinational Enterprises
in 1977.16 Several other voluntary codes dealing with corporations emerged in
the late 1970s and early 1980s, focusing particularly on discriminatory hiring
practices, such as the MacBride Principles and Sullivan Principles.17

During the 1990s, reports about the negative impacts of transnational
companies proliferated. Publications by international human rights NGOs
such as Global Witness on Shell’s dealings in Nigeria18 and by Human Rights
Watch and Amnesty International on British Petroleum,19 and on Occidental
Petroleum in Colombia20 and campaigns and boycotts by the International Labor
Rights Fund against ExxonMobil in Indonesia21 and later against Coca-Cola
and Drummond in Colombia; by the International Christian Concern against
Talisman in Sudan; and by EarthRights International against Unocal in Burma progressively brought to the global limelight the potential negative links between corporate activity and human rights. Companies were now being examined not only for alleged unequal hiring practices or negative environmental impact, but also for actions as potentially contributing to conflict and abusing human rights by aligning with authoritarian governments and funding repressive military forces; hiring abusive private security; and paying bribes to illegal armed groups for security. Focusing increased attention on these effects is partly a product of the end of the Cold War, which made way for greater emphasis on pervasive intrastate conflict in the form of civil wars in countries like Angola, Sierra Leone, and Colombia. In addition, as seen before, the growth in number and importance of international human rights NGOs and transnational advocacy networks, as well as the general strengthening of the international human rights regime, undoubtedly played a role. And by the late 1990s, policy and academic circles were keen to explore the economic causes of civil wars, beyond the more traditional political and socioeconomic arguments.

This changing international landscape and the increased recognition that corporate behavior could negatively impact conflict dynamics in civil wars, local governance, and the human rights situation of local communities brought about a new generation of voluntary codes. Human rights, especially the “hardcore” civil and political rights, started to be at the center of the equation, alongside labor and environmental concerns. The UN launched the Global Compact in 2000, as a voluntary platform joining companies and civil society around ten principles on human rights, transparency, labor, and environmental issues. Kofi Annan himself, then UN secretary-general, backed the initiative. Among other things, the Global Compact urged companies to support and respect the protection of internationally proclaimed human rights; to ensure that they are not complicit in human rights abuses; to uphold the freedom of association and the effective recognition of the right to collective bargaining; to eliminate all forms of forced and compulsory labor, including child labor; to take a precautionary approach to environmental challenges; and to work against corruption in all its forms, including extortion and bribery. Thus far, nearly 5,000 companies participate in this initiative, and eighty local networks have been established in countries around the world.

The Voluntary Principles on Security and Human Rights, signed in 2000 by the US and UK governments, international human rights NGOs (including Amnesty International, Human Rights Watch, International Alert, and Pax Christi), and more than fifteen multinational companies from the oil, mining, and gas sectors offered guidelines for political and security risk and impact assessment and recommendations for dealing with private and public security. Particularly emphasized was the observation of international codes regarding the use of force and firearms, heightened care in the transfer of equipment, and
improved provision of human rights training.\textsuperscript{25} In its preamble, the Voluntary Principles explicitly identify the promotion of respect for human rights, particularly those set forth in the Universal Declaration of Human Rights, as a “common goal” between participating states, corporations, and NGOs. Other examples of voluntary initiatives include the Kimberley Process Diamond Certification Scheme, which was created in 2002 between governments, NGOs, and companies to stem the flow of the so-called conflict diamonds that sustain rebel groups in countries such as Angola and Sierra Leone;\textsuperscript{26} and the Extractive Industries Transparency Initiative (EITI), created in 2002 as “a coalition of governments, companies, civil society groups, investors, and international organizations” with the blessing of the UK government and the endorsement of Transparency International to focus on issues such as the publication of revenues that had indirectly financed many internal conflicts around the globe.\textsuperscript{27} All these initiatives were attentive to the fact that, as the quantitative literature on human rights shows, conflict is the best predictor of human rights violations.\textsuperscript{28}

Since the 1970s, voluntary codes have been the preferred response to the potential misconduct of transnational corporations on human rights. Indeed, the fact that, as shown, protoregulation in this area has differed from much other human rights-related regulation usually carried out through treaties poses an interesting puzzle that is worth explaining.

Transnational advocacy networks during the 1990s raised awareness about the negative impact of corporations on human rights so effectively that corporations and states could hardly turn a blind eye. They successfully translated their claims into material and reputation costs for corporations and states. Home states were vulnerable to criticism about the conduct of their flagship companies, as campaigners targeted these (usually democratic) states’ foreign policies by framing inaction or indifference as hypocritical and as indirectly undermining human rights and democracy. This damage to reputation could turn into material loss for states if companies were forced to leave their areas of operation. As such, transnational corporations were deeply affected, with regard to both their public image and finances, particularly when scandals led to drops in sales or in the prices of their shares or, more radically, when they were forced to disinvest. Transnational campaigns successfully changed the interest calculations of states and corporations. This cemented the idea among all actors that something had to be done.

Though it is difficult to explain exactly why codes have been the preferred form of corporate regulation in the first place, the relatively new invocation of legal international responsibilities of transnational corporations under international human rights law and international humanitarian law within the political discourse and strategy of norm entrepreneurs may at least serve to explain why voluntary codes went uncontested for so long. Indeed, as recently as 1996, international legal scholars were still “unclear whether transnational corporations [were] bound to respect these [international human] rights,”\textsuperscript{29} and it was
not until 1998 that the idea that transnational corporations could bear legal responsibility under international law actually started to gain currency. The late entrance of international law into the debate of transnational corporations and human rights would nevertheless eventually be redressed by the dynamism of legal experts, which acting within or outside the UN started to promote the need to go “beyond voluntarism.”

In all, this context facilitated the proliferation of voluntary codes as a way to engage in dialogue and design solutions to concrete problems. It is not hard to see why they have fared so well. Voluntary codes of conduct, by definition, depend on the agreement of a set of actors, including those targeted, to abide by prescribed patterns of action included in them. This means that different actors can usually negotiate the terms of codes, hoping to reach a consensus that satisfies all parties. As a result, if they are negotiated well (and, one could argue, are complied with), voluntary codes can enjoy a respectable level of legitimacy.

Conversely, the implementation of the codes depends largely on the sincerity of the target actors, which is expected to translate into concrete behavioral changes. But sanctions to noncompliance usually tend to be “softer” (i.e., nonlegal), the most common being damages to reputation through public discredit.

All in all, codes that are characterized by being agreed to rather than imposed are easier-to-swallow solutions for corporations. In terms of the interest-based theories introduced earlier, corporations, by resorting to the creation of voluntary codes, are able to anticipate the positive and negative effects of committing to behavioral change with few negative collateral consequences of adhesion. (This, however, does not negate the difficulty of negotiating the breadth of voluntary codes, which is usually a long and arduous process.) But voluntary codes would soon stop being the only available option on the table.

Transnational Corporations and Human Rights: The Struggle Toward Binding Norms
By the late 1990s, voluntary codes ceased to be seen as the only form of possible regulation of corporate activity. In 1997, the UN Sub-Commission on the Promotion and Protection of Human Rights created the Working Group on the Working Methods and Activities of Transnational Corporations (the Working Group, hereafter). It was formed by five independent experts, most of them distinguished international legal scholars representing some of the major world regions (Africa, Asia, Western Europe, Latin America, and Eastern Europe) who were given the mandate to identify issues, to gather and examine information regarding the effects of transnational corporation on human rights, and to make recommendations regarding the work methods and activities of transnational corporations, among others. In 1999, the Working Group decided
to draft a code of conduct for transnational corporations, later christened “Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights” (the Norms.) This was a text consisting of twenty-three articles “setting out human rights standards for companies in areas ranging from international humanitarian law, through civil, political, economic, social, and cultural rights, to consumer protection and environmental practices,” which made it the most comprehensive document on business and human rights.

It was also decided that the Norms would be nonvoluntary in character, radically differentiating this document from the codes and initiatives explored earlier in this article. The Norms placed direct responsibility on corporations as “organs of society” to promote respect for human rights and to secure their universal and effective recognition and observance, as set forth in the Universal Declaration of Human Rights (UDHR.) Further, the Norms bound corporations to respect a long list of rights, including the right to equal opportunity and nondiscriminatory treatment; the right to the security of persons; and the rights of workers. Corporations also had obligations regarding consumer and environmental protection. The comprehensiveness of the Norms, as we will see, would later become a point of criticism.

Although the Norms were not a treaty, once approved by the relevant UN bodies, they would have acquired legal standing. As David Weissbrodt and Muria Kruger explain, “Implemented as soft-law, the Norms could be similar to many other UN declarations, principles, guidelines, standards, and resolutions which interpret existing international law and summarize international practice without reaching the status of a treaty.” Notably, the Norms included implementation mechanisms of independent monitoring, reporting, and verification. They also stipulated obligations to financial redress and were to be “enforced by national courts and/or international tribunals if appropriate.” This made them radically different from voluntary codes and initiatives, which were seen by many as having very little enforcement power and weak governance structures.

The Norms were drafted over a period of seven years within the UN Sub-Commission on the Promotion and Protection of Human Rights. In August 2003, they were approved unanimously by the subcommission and were soon sent to its upper body, the UN Commission on Human Rights, for approval.

In April 2004, the UN Commission on Human Rights met to discuss a variety of issues, including the Norms. In a short resolution, the commission declared that although the issue of the responsibilities of transnational corporations and related business enterprises to human rights was important, the Norms “had not been requested” by the commission and thus had no legal standing. The commission’s decision came despite the fact that the mandate of the Working Group did task it with the duty to “contribute to the drafting of relevant norms concerning human rights and transnational corporations and
other economic units whose activities have an impact on human rights.” In reality, the commission never “officially” considered or voted for or against the Norms but simply set them aside. This move by the commission was puzzling to the supporters of the Norms, within and outside the subcommission. Why did the Norms meet this fate? It may be instructive to assess the interests of different actors to venture an explanation.

**Exploring Actors’ Positions Vis-à-Vis the Norms**

*States.* Most states were not directly involved in the proceedings of the subcommission or in its work on the Norms. (The Swiss government was the exception: it provided financial support during the drafting of the Norms and later supported John Ruggie’s mandate.) States could attend the meetings and make statements, but they rarely, if ever, did so. This initial distance from the process of the Norms had changed by the time the Commission on Human Rights met in early 2004. Unlike the submission, which was formed by more or less independent experts, the commission was formed by fifty-three country representatives elected by the fifty-four-member Economic and Social Council (ECOSOC) and thus was a more overtly political body driven by state interests. By 2004, the Norms faced unofficial opposition of at least the governments of the United States, the United Kingdom, Saudi Arabia, Egypt, and India, which reportedly pushed behind the scenes to keep the Norms off the commission’s agenda.38 (I say “at least” because the data in this respect are rather incomplete and limited to recollections by participants in the debates.) According to some sources, these states’ main quibble with the Norms was that they duplicated the work of other UN bodies.39 Others have hinted at deeper reasons; for example, that “governments often support the preferences of corporations domiciled in their countries and/or compete for foreign investment.”40 States, particularly those that are home to most major corporations, tended to coalesce with business interests.

But this change in states’ position in 2003–2004 was certainly not spontaneous. Instead, it seems to have been the product of strong lobbying by the International Chamber of Commerce and the International Organization of Employers (as well as by the US Council for International Business and the Confederation of British Industry), which produced a report urging the Commission on Human Rights to “make a clear statement disapproving the SubCommission’s draft” and to publicly declare that “the draft Norms are neither ‘UN Norms’ nor ‘authoritative’” but “a draft with no legal significance without adoption by the law-making organs of the United Nations.”41 In addition to the Norms’ alleged harmful effect on home countries (because of the negative fixation on corporations based in their territories), these organizations highlighted the Norms’ negative consequences on host (often developing) nations
because of their introduction of new obligations to respect alleged vaguely defined rights and more stringent reporting criteria that could potentially dissuade corporations from investing in them.

As a result of this strong lobbying, the United States, which although aware of the initiative had remained quiet during the drafting process, started to push against the Norms one day after the subcommission had approved them. This presumably was also the case of other home nations, including the United Kingdom.

Although further research is essential to arrive at a more nuanced explanation of the position of host states vis-à-vis the Norms, it appears that most of them are supportive, viewing them as a tool to prevent potential human rights misconduct by corporations.

**NGOs.** The interests of NGOs vis-à-vis the Norms are relatively less difficult to gauge. The more binding character of the Norms made them particularly attractive to international and local human rights NGOs, in a world where voluntary initiatives were the rule. As such, the Norms had the support of the most important transnational NGOs, among them Amnesty International, Human Rights Watch, Christian Aid, and Oxfam; also supporting the Norms were other nonstate actors such as the International Business Leaders’ Forum, Human Rights Advocates, Forum Menschenrechte, and over eighty-four other NGOs.\(^42\)

However, not all NGOs were completely satisfied with the Norms. Notably, organizations such as the American Association of Jurists and Centre Europe–Tiers Monde criticized the Norms for not going far enough in the obligations assigned to corporations, and for lacking “important elements such as the joint liability of the parent companies for the acts of suppliers, subsidiaries and contractors as well as individual responsibility of the directors in criminal cases such as complicity in the killing of political leaders.”\(^43\) Nevertheless, these organizations considered that the Norms had merit and should continue to be improved rather than dismissed.

**Corporations.** A few major transnational corporations showed initial support for the Norms, including Novartis, British Petroleum, Barclays Bank, and ABB, and some of them even contributed to the drafting process.\(^44\) The majority, however, remained at the margins of the discussions, and there are indications that corporate enthusiasm for the Norms was largely lacking. Notably, the International Chamber of Commerce, which comprises 130 transnational companies from all industry sectors around the world,\(^45\) and the International Organization of Employers, which according to its website consists of 145 national employers’ organizations from 138 countries (allegedly, the largest private sector organization in the world), publicly lobbied states against the Norms.\(^46\) In general, corporations opposed the Norms on the grounds that they went too far in assigning to corporations obligations that in fact belong to states.
Analysis

Although further research is needed to validate this analysis, the data presented here suggest that home states behaved rationally by siding with the interests of their corporations and thus rejecting the Norms. The many factors that may lie behind this decision are most likely a mix of nationalist allegiance and financial interest; after all, one must not forget that the business sector tends to play a key funding role in political campaigns in most countries and exerts other types of political and economic leverage as well. And although most corporations were not directly involved, large business associations promoted their interests by intensely lobbying against the Norms. The majority of NGOs also in line with their “principled” interests supported the Norms.

What is perhaps most interesting in the context of this article is to note that the same states that rejected the Norms are also active supporters of some of the most important voluntary initiatives. Case in point, the United States and the United Kingdom are the original facilitators of the Voluntary Principles on Security and Human Rights, and South Africa is a key player in the Kimberley Process against conflict diamonds. This confirms my earlier argument about the prevalence of voluntary initiatives: because they are voluntary and thus not imposed from above, corporations see them as more benign and with lower risk of negative collateral consequences. States tend to align themselves with their own corporations, so that in a context where norm making depends on their decision (as in the UN), they have the upper hand.

Although progress in implementing the Norms was brought to an abrupt halt, I argue that they should be widely seen as a key stepping-stone in the process of norm making in the area of transnational corporations and human rights. Their importance lies in the fact that, at a minimum, they effectively reactivated the debate within the UN regarding the need to clarify and codify the legal responsibilities of these nonstate actors, opening up the possibility of legal accountability, which, once opened, has proven impossible to evade.

The Role of the UN Secretary-General
Special Representative on Business and Human Rights

The reaction to the Norms of the Commission for Human Rights was followed, two years later, by the commission’s request to the secretary-general to appoint a special representative on the issue of business and human rights. The special representative’s mandate had been previously approved by the commission in April 2005 by a vote of forty-nine to three with one abstention. In July 2005, ECOSOC approved the commission’s request to the secretary-general, and two days later, Kofi Annan appointed John Ruggie to the special representative post. Ruggie’s mandate was to “identify and clarify” international standards and policies in relation to business and human rights and to submit “views and recommendations” for consideration by the commission. Ruggie’s
work was seen by many as decisive for the Norms. His support could have potentially revived them and given them new impetus or further stalled them, casting them to an uncertain future. The major international human rights organizations, including Amnesty International, publicly urged him to “endorse” and “build upon” the text of the Norms.\textsuperscript{48}

But Ruggie’s first report to the UN Human Rights Council, issued in February 2006, completely shocked these expectant audiences. It laid down the conceptual groundings of his approach to the issue, most of which were relatively uncontroversial. However, his implacable assessment of the Norms stirred deep controversy. Ruggie spoke of the “doctrinal excesses” and the “exaggerated legal claims” of the Norms. He argued that although the Norms professed to be a mere “restatement” of previous human rights–related international legal provisions for business, no such previous legal basis really existed.\textsuperscript{49} (Some critics later suggested that Ruggie had a limited understanding of the legal concept of restatement, which to them should not only cover existing law, but also provide a progressive view on what the law should be.) Furthermore, according to Ruggie, the Norms were also flawed due to “their imprecision in allocating human rights responsibilities to states and corporations.”\textsuperscript{50} Importantly, Ruggie objected to the fact that the range of duties that the Norms assigned to corporations encompassed topics that have not been accepted by states such as consumer protection, the “precautionary principle” for environmental management, and the principle of “free, prior and informed consent” of indigenous peoples and communities and was thus, in his view, too broad and also inadequate.\textsuperscript{51} Moreover, according to Ruggie, by assigning corporations the same rights as states, and sometimes more, the Norms failed to recognize that companies play a “specialized role” vis-à-vis human rights. Similarly, Ruggie continues, “Shifting obligations onto corporations to fulfill rights beyond a carefully circumscribed set of limits may further undermine capacity and incentives to make governments more responsible to their own citizenry, which surely is the most effective way to realize rights.”\textsuperscript{52} The supporters of the Norms reacted angrily to Ruggie’s stance and doubted whether his declared strategy of “principled pragmatism” was in reality “mere antagonism.”\textsuperscript{53}

For his second report issued in early 2007, Ruggie, moving beyond his disagreement with the Norms and consistent with his mandate, reviewed existing opportunities for assigning human rights responsibilities to corporations by examining five “clusters” of the current normative environment, including legal responsibilities. This was perhaps Ruggie’s most difficult job, since it was considered to contain the grayest areas thus far. The first cluster assessed the state duty to protect against human rights abuses by a third party, including corporations. Here Ruggie found that “the state duty to protect against non-state abuses is part of the human rights regime’s very foundation” and that it “applies to all substantive rights.”\textsuperscript{54} The second and third clusters explored the legal responsibilities of corporations for grave international crimes, or crimes
against humanity, and the responsibilities for other human rights violations under international human rights law. Ruggie concluded that there are clear indications that corporations will be increasingly liable for both criminal and civil charges in domestic courts, in foreign courts, and potentially even before the International Criminal Court (ICC). Ruggie reminded readers that individual liability for crimes against humanity is possible in international tribunals, including crimes by corporate officers. Second, according to Ruggie, in countries that have a national legal system that already provides for criminal punishment of companies, and that have ratified the ICC statute, international liability may eventually be extended to corporations. Third, some countries’ legal systems allow for extraterritorial jurisdiction and even “universal jurisdiction” of international crimes, and if those countries also allow for corporate liability, those standards may then also extend to companies. Fourth, civil liability is already possible in certain countries, like the United States under the Alien Torts Claims Act (ATCA.)

Fifth, since allegations against companies rarely attribute them direct responsibility for criminal behavior, they are most likely to be held liable through the notion of “complicity” in a human rights violation committed by a third party. Complicity encompasses the ideas of companies indirectly “aiding and abetting” a human rights violation, understood as “knowingly providing practical assistance, encouragement or moral support that has a substantial effect on the commission of a crime.”

Clusters four and five of Ruggie’s report outlined the soft-law mechanisms and self-regulation initiatives, some of which were discussed earlier.

Ruggie’s assessment also concludes that international human rights law does not seem to currently impose direct legal responsibilities on companies. Support for this conclusion comes in three forms. First, the major international human rights sources, including the International Bill of Human Rights, the UDHR, the two covenants, the other UN human rights treaties, and the International Labour Organization (ILO) core conventions, do not clearly articulate corporate responsibility. Second, the treaty bodies’ commentaries (such as the Committee on Economic, Social and Cultural Rights and the Human Rights Council) are ambiguous on the subject. A similar lack of consensus is seen in the treatment given by regional human rights courts to cases of violations linked to nonstate actors: they limit themselves to condemning abuses (Inter-American Commission on Human Rights), opt for imposing on the states greater responsibilities to protect (European Court of Human Rights), or do not state their stance clearly (African Charter).

Evidently, Ruggie’s work diverges deeply from the Norms’ original intentions. Nevertheless, and although Ruggie publicly declared he would not “endorse” or “build upon” the Norms, I argue that his work must be considered as central to the emergence of norms as that advanced by the UN subcommission on human rights before him. Ruggie’s examination of the issues, as summarized earlier, provides a third stepping-stone in the evolution of the
agenda of business and human rights. If the Norms had served to build a momentum within the UN on the issue, Ruggie’s role has served to further it, albeit in a different direction. That is, while the Norms attempted to create direct legal obligations for corporations under international law, Ruggie suggests further clarifying and codifying of states’ duties to protect human rights against corporate violations. In so doing, Ruggie aims to “bring the state back” into the debate, shifting the primary focus of norm making from the international to the domestic realm (or, at least, proposes a more complex interaction of both than suggested by the supporters of the Norms). Furthermore, he has proposed to move beyond corporate culpability to “motivate, activate and benefit from all the moral, social and economic rationales that can affect the behavior of corporations,” and has shown support for the voluntary initiatives presented earlier in this article, such as the Voluntary Principles on Security and Human Rights.

This discussion is reflected in the three key principles that undergird Ruggie’s latest report (the last for his first mandate), published in April 2008: the state duty to protect, the corporate responsibility to respect, and access to remedies. Conceived as a policy framework, it aims to offer a coherent step forward that can serve as a “foundation on which thinking and action can build in a cumulative fashion,” not as a definitive solution. In this report, Ruggie suggests that states should assign human rights a more central place in realms where other interests have tended to trump them, such as commercial policy, investment policy, securities regulation, and corporate governance. States should, for example, highlight the need to consider human rights impact “when they sign trade agreements and investment treaties, and when they provide export credit or investment guarantees for overseas projects in contexts where the risk of human rights challenges is known to be high.”

A stronger push for human rights by states will, Ruggie hopes, shape corporate conduct in positive ways. The second principle, on the “corporate responsibility to protect,” seeks to build on the idea that corporations must act in accordance with the social expectations placed on them to respect human rights, and must do so in a systematic and efficient way, for which Ruggie proposes “a due diligence process for companies to manage the risk of human rights harm with a view to avoiding it.” And the third pillar stresses the importance of strengthening and developing redress mechanisms for victims including, though not limited to, judicial mechanisms.

Ruggie’s final report was endorsed by the forty-seven state members of the Human Rights Council in June 2008, and that same month he was given a new mandate for another three years, with a view to elaborating on his framework and “operationalizing” it along its three main axes.

Ruggie’s work has been and will continue to be contested. Unsurprisingly, his “pragmatic” support of voluntary codes and other types of “soft” regulations on the basis of their effectiveness on the ground, and his call on all actors to go “beyond compliance,” have stirred suspicion of bias in many audiences,
especially those hoping for binding norms. Nevertheless, he has thus far shown a willingness to engage with supporters and critics alike globally—most importantly, international and domestic NGOs—and in so doing has paved the road for the furthering of the debate in a dialogic manner. Indeed, it is telling that Ruggie’s third report has apparently been well received by most of the key audiences, including states, corporations, and major international NGOs. Importantly, a group of twelve major international human rights NGOs issued a public statement declaring that Ruggie’s proposed framework is “valuable and merits further attention” and providing suggestions to the Human Rights Council on how to strengthen it and complement it in key areas, such as legal accountability for corporate abuses. This type of exchange is decidedly less contentious than had been previously anticipated by some. (This does not mean, however, that the push for international binding norms has vanished from the spectrum of possibilities; NGOs and other civil society stakeholders still hold them to be a desirable goal in the future.)

It remains to be seen how successful Ruggie’s proposed policy framework turns out to be (and to which degree states and corporations are willing and able to implement it), but what can be said with certainty is that the debate about human rights norms for transnational corporations, legal or otherwise, is not going away. Norm entrepreneurs may have clashed along the way, but disagreements have not necessarily harmed norm-making efforts. If anything, disagreements have enriched the debate, which hopefully will contribute to further promote the idea that better corporate behavior with regard to human rights is needed.

Conclusion

International relations scholars have argued that with the more systematic recognition of social, economic, and cultural rights within the global human rights discourse, norm-setting efforts will tend to target other actors than states. In this article, I have tried to shed light on how normative accommodation may be occurring to address the conduct of transnational corporations as an example of nonstate actors.

Norm Dynamics

Following the theoretical insights on international norm dynamics, I identified the growing body of voluntary codes and initiatives that has progressively appeared to regulate the actions of corporations. The work of transnational advocacy networks as norm entrepreneurs has been central in that development: by reporting and “naming and shaming” bad corporate practice, international human rights NGOs and other actors connected to them have contributed to “framing” the issues effectively and have placed the urgency for new norms firmly on the international agenda.
Two other key norm-building efforts highlighted here were “the Norms” by the Working Group on the Working Methods and Activities of Transnational Corporations within the UN Sub-Commission on the Promotion and Protection of Human Rights; and the work of John Ruggie as the UN special representative of the secretary-general on business and human rights. All of them have acted on the basis of organizational platforms that have granted them authoritative capacities to develop their arguments and to engage with the variety of stakeholders, including grassroots organizations, trade unions, local NGOs, and other activist groups, to explore grievances, existing responses, challenges, and opportunities for future work.

The Explanatory Relevance of Interests
Interest-based approaches were instrumental in understanding the success of voluntary initiatives over binding efforts. Although the effective work of transnational advocacy networks has changed (home) states’ and corporations’ interest calculations, pushing them to engage more actively in the prevention of human rights abuses, these in turn have preferred to support initiatives they can freely enter and whose terms they can shape or feel more comfortable with, and where sanctions do not necessarily give rise to legal arguments. Voluntary initiatives and codes have fit this bill well.

The lack of support for the Draft Norms provides further evidence of this. Business associations honored the interests of their main constituency corporations and by actively lobbying against the Norms, successfully affected the level of support to them by key states within the UN Commission. Home states reacted rationally to such lobbying and supported the interests of their flagship companies by blocking the Norms. And though host states reportedly supported the Norms, they could not muster enough strength to keep them alive within the commission.

What Does the Future Hold for Norm Making in This Area?
As this article has illustrated, the idea that new norms are needed to regulate the conduct of corporations with regard to human rights was cemented during the 1990s. As a result, since then, the debate about transnational corporations and human rights has largely been about what type of norms to adopt (and not whether new norms are needed at all). For a long time, voluntary codes were the only alternative on the table. By the late 1990s, international legal experts introduced the idea that corporations may hold responsibilities under international law. As a result, the issue of transnational corporations and human rights was transformed into one where “there was no unique equilibrium,” as Goldstein and Keohane would put it.

Nevertheless, as I have demonstrated, the idea that voluntary codes are a viable normative remedy has endured as a focal point precisely because they have provided a sort of equilibrium among the varying interests of these very diverse
actors. This can explain their success over legally binding efforts, on which actors’ positions are more polarized. States have embraced new norms, but they have done so strategically. The same can be said of international human rights NGOs, which have still not withdrawn their support to some of the key voluntary initiatives such as the Voluntary Principles on Security and Human Rights, despite the fact that they would rather see legally binding norms being created. All actors in the debate have behaved, in their own ways, as “principled strategists.”

John Ruggie’s work acknowledges these dynamics in his three reports. In particular, his strategy of “principled pragmatism” apparently intends to reconcile the political intricacies of the issue across a broad range of actors with the need for normative restructuring. Further, Ruggie’s work illustrates the fluctuating character of international law through the International Criminal Court, extraterritoriality, and the development of the doctrine of complicity, all of which open up new possibilities to further the cause for the legal accountability of corporations with regard to human rights.

One might ask: Under what conditions would a set of binding international norms regulating business conduct on human rights be accepted by all major actors, including home states? From the analysis presented here, I can point to at least three factors. First, the legal uncertainties regarding the applicability of existing international human rights law, an issue raised by Ruggie, would need to be resolved. Essentially, it remains to be seen whether “bringing the state back” to prevent human rights violations by corporations is legally possible and effective in practice, or whether instead actors should continue to press directly for the creation of new international norms, thus revitalizing the spirit of the Norms. In both cases, and this is the second point, states and corporations would have to see binding norms as necessary and preferable to voluntary codes, as well as to other mechanisms. Though difficult, this could be brought upon them either by a “norm shock”—that is, a new series of scandals over wrongdoing, which can lead host states to press home states for the extradition of abusers in egregious cases—or by renewed transnational campaigning; for example, on the inefficacy of prevalent alternatives (i.e., voluntary approaches). A new proliferation of abuses, accompanied by more effective campaigning, could also convince corporations that it is better to know their liabilities well and to subject themselves to clear international obligations than to continue to gamble with voluntary initiatives, which, though more palatable, may leave greater room for interpretation and, therefore, for unforeseen consequences. Such a scenario could prove pressing enough to lead these otherwise self-interested actors to modify their calculations and favor binding regulation over voluntary norms. And, third, as previous regulatory experience demonstrates, binding efforts are more likely to succeed if their focus is narrow, at least initially, but retain enough flexibility to expand over time as political consensus on particular issues increases. As a result, it may be wiser for future norm drafters to strategically espouse modesty rather than comprehensiveness,
slowly paving the way for a more encompassing protection of human rights by corporations.

Notes
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16. Ibid.


27. See www.eitransparency.org.


34. See www1.umn.edu/humanrts/links/NormsApril2003.html.
36. Ibid.


39. Ibid.
40. Ruggie, “Business and Human Rights.”

42. Weissbrodt and Kruger, “Human Rights Responsibilities of Businesses as Non-State Actors.”
44. Ibid., p. 3.
45. See www.iccwbo.org/.
50. Ibid.
51. Ruggie, “Business and Human Rights.”
52. Ibid.
55. For information about the ATCA, see www.globalpolicy.org/intljustice/atca/atcaindex.htm.
57. Ibid.
58. Ibid.
60. Ibid.
61. Ibid.
64. See “Joint NGO Statement to the Eighth Session of the Human Rights Council” on Ruggie’s report, signed by twelve organizations; available at www.business-humanrights.org/Gettingstarted/UNSpecialRepresentative.