

**Complementing Mandatory Human Rights Due Diligence:
Using Multi-Stakeholder Initiatives to Define Human Rights Standards**
Dorothee Baumann-Pauly and Lilach Trabelsi

Abstract:

This commentary focuses on Article 30 of the UNGPs, which refers to the role of industry, multi-stakeholder, and other collaborative initiatives that are based on respect for human rights-related standards in addressing human rights matters. We consider the role of collaborative initiatives in business practice, and argue that these initiatives play a broader role than the one assigned to them by the UNGPs. We draw attention to and discuss the role of one type of MSIs in particular, namely, Human Rights Governance MSIs (HRG MSIs). We submit that the role of these MSIs should be strengthened, and that these types of voluntary initiatives can complement mandatory regulatory approaches to advancing human rights.

Key words: Human rights; business and human rights; multi-stakeholder initiatives; collaborative initiatives; corporate responsibility; corporate accountability

1. Introduction

The United Nations Guiding Principles on Business and Human Rights (UNGPs) refer to industry, multi-stakeholder, and other collaborative initiatives that are based on respect for human rights-related standards in UNGP Article 30. The explicit reference to these initiatives highlights the key role that they play in supporting corporations in advancing respect for human rights. Professor John Ruggie, the architect of the UNGPs, specifically referred to multi-stakeholder initiatives (MSIs) as the gold standard for the implementation of the UNGPs.¹

However, the UNGPs explicitly mention collaborative initiatives only in a very narrow context. Namely, they state that collaborative initiatives “should ensure that effective grievance mechanisms are available”. Yet, these initiatives have been actively growing in the field of business and human rights for over 20 years, and they come in many forms serving various functions. For instance, MSIs can provide a legitimate framework for defining industry-specific human rights standards.² Some MSIs, such as the Fair Labor Association or the Fair Wear Foundation in the apparel industry, establish industry-specific human rights standards based on international human rights norms, define metrics that enable measuring compliance with the industry-specific standards, and develop mechanisms to monitor and track corporate human rights performance. While they offer courses to file grievances as the UNGPs prescribe, this is just one element in a comprehensive, standards-based approach to ensuring respect for human rights in corporate practice.

In this commentary, we highlight that the role of collaborative initiatives in business practice goes beyond providing access to effective grievance mechanisms. We argue that the broader

¹ Available at <https://media.business-humanrights.org/media/documents/files/media/bhr/files/Text-of-Ruggie-video-message-to-VPs-plenary-16-Mar-2009.pdf>

² Baumann-Pauly, D., Nolan, J., van Heerden, A., & Samway, M. (2017). Industry-specific multi-stakeholder initiatives that govern corporate human rights standards: Legitimacy assessments of the Fair Labor Association and the Global Network Initiative. *Journal of Business Ethics*, 143(4), 771-787.

role that collaborative initiatives play should be acknowledged. We especially wish to underscore and discuss the role of one type of MSIs termed Human Rights Governance MSIs (HRG MSIs). We posit that the role of these MSIs should be strengthened during the second “decade of action” of the UNGPs, which started in 2021.

In the following sections, we start by differentiating between different collaborative initiatives and draw attention to HRG MSIs. We then introduce the increasingly popular dichotomy between voluntary and mandatory initiatives, and argue that these regulatory approaches should be treated as complementary approaches for advancing human rights. We conclude that, going forward, collaborative initiatives should be strengthened to enable them to effectively address human rights implementation challenges and enhance corporate accountability.

2. Types of collaborative initiatives in the human rights context

Collaborative initiatives can take different forms, resulting in the existence of a number of typologies. For instance, one typology underscores the variation in the issues addressed, the processes that are standardized (e.g. accounting, auditing, and reporting processes), and the specificity of the norms.³ A second typology focuses on the differences in form (participatory make-up and governance structure), scope (reach in terms of product, industry, and geography), and the functions performed (fostering dialogue, creating and enforcing standards, and issuing certifications).⁴ Understanding the variety of collaborative initiatives is critical for assessing the roles that they can play in advancing human rights. Failing to differentiate between different types of collaborative initiatives may result in a premature dismissal of all collaborative initiatives.⁵

Over the years, many human rights-focused MSIs have been established. These MSIs aspire to address human rights issues ranging from child labor, forced labor, and worker rights, to the provision of living wages and food security. Another important issue that initiatives seek to tackle is the enhancement of supply chain transparency. To this end, various initiatives that aim to ensure respect for human rights have been established in different sectors. Examples include the Voluntary Principles on Security and Human Rights (VPSHR), the International Council on Mining and Metals (ICMM), the Responsible Minerals Initiative (RMI), and the Extractives Industry Transparency Initiative (EITI) in the extractives sector. Similarly, the Fair Wear Foundation and the Fair Labor Association have been founded to address human rights issues in the garment sector. In the finance sector, the Thun Group of Banks has started the discussions on how to further the integration of human rights, and the Equator Principles have recently been updated to include a stronger focus on human rights when managing sustainability risks in projects financed by financial institutions.⁶ It should be noted that different human rights-focused MSIs have different purposes and regulatory capacities⁷, and

³ Gilbert, D. U., & Rasche, A. (2008). Opportunities and problems of standardized ethics initiatives—a stakeholder theory perspective. *Journal of Business Ethics*, 82(3), 755-773.

⁴ Baumann-Pauly, D., Nolan, J., van Heerden, A., & Samway, M. (2017). Industry-specific multi-stakeholder initiatives that govern corporate human rights standards: Legitimacy assessments of the Fair Labor Association and the Global Network Initiative. *Journal of Business Ethics*, 143(4), 771-787.

⁵ Freeman, B. (October 1, 2020). Available at: <https://www.msi-integrity.org/rethinking-msis-time-to-bury-msis-not-so-fast/>

⁶ Available at: <https://www.whitecase.com/publications/alert/project-finance-human-rights-and-climate-change-updated-equator-principles-4#:~:text=The%20Equator%20Principles%20have%20been,effect%20from%20October%201%2C%202020.>

⁷ See <https://msi-database.org/>

that only few entities can be considered HRG MSIs.⁸ We also observe that while many more examples exist, there is no comprehensive registry of all human rights-focused MSIs.

In contrast to other collaborative initiatives focused on human rights, HRG MSIs “have the potential to effectively address governance gaps and regulate corporate conduct in markets where governments cannot or will not protect human rights”.⁹ These initiatives are characterized by their common objective to address governance gaps through the creation of binding and enforceable rules to be followed by companies competing within an industry.¹⁰ As such, HRG MSIs are initiatives that best meet the spirit of the UNGPs, which ask companies to prevent, address, and remedy human rights abuses committed in business operations.¹¹

3. The false dichotomy of voluntary and mandatory human rights due diligence

In an opinion piece published in October 2020, Bennett Freeman, an experienced board member of several MSIs, argued that the aim of MSIs has always been to “supplement, but not supplant, the role of governments”¹² where there are regulatory governance gaps in relation to corporate misconduct associated with human rights. MSIs serve as a starting point and can help enhance corporate accountability, but because they have “limited purposes” and their response is “imperfect”, MSIs should not be expected to facilitate the resolution of all matters left unattended by governments due to regulatory governance gaps.¹³

Companies may prefer voluntary over mandatory human rights requirements for different reasons. Some companies see invaluable benefits that can be obtained through MSI engagements, while others may use their engagements in these initiatives more opportunistically as a façade for avoiding substantive changes in their organizations. This discrepancy is reflected in academic literature, which is divided on the value of such initiatives. Some studies attest that collaborative initiatives facilitate the adoption of common views, frameworks, certification schemes, standards, policies, and the development and sharing of knowledge and best practices. They demonstrate that MSIs can generate tangible benefits, such as economic ones, or intangible benefits in the form of enhanced reputation or legitimacy, better risk management, regulatory benefits, and opportunities for learning and networking.¹⁴

⁸ Baumann-Pauly, D., Nolan J., Labowitz S., & van Heerden A. (2016). Setting and enforcing industry standards for human rights: the role of multi-stakeholder initiatives in regulating corporate conduct. *Business and Human Rights: From Principles to Practice*. New York: Routledge, 170-191.

⁹ *Ibid*

¹⁰ *Ibid*

¹¹ See <https://www.business-humanrights.org/en/un-guiding-principles>

¹² Freeman, B. (October 1, 2020). Available at: <https://www.msi-integrity.org/rethinking-msis-time-to-bury-msis-not-so-fast/>

¹³ *Ibid*

¹⁴ Arevalo, J. A., & Aravind, D. (2017). Strategic Outcomes in Voluntary CSR: Reporting Economic and Reputational Benefits in Principles-Based Initiatives. *Journal of Business Ethics*, 144(1), 201–217; Austin, J., & Reficco, E. (2005, January 10). Motivation and the Cross-Sector Alliance. Retrieved December 2, 2018, from <https://hbswk.hbs.edu/item/motivation-and-the-cross-sector-alliance>; Berliner, D., & Prakash, A. (2015). “Bluewashing” the firm? Voluntary regulations, program design, and member compliance with the United Nations Global Compact. *Policy Studies Journal*, 43(1), 115-138; Cetindamar, D. (2007). Corporate social responsibility practices and environmentally responsible behavior: The case of the United Nations Global Compact. *Journal of Business Ethics*, 76(2), 163-176; King, A., Prado, A. M., & Rivera, J. (2012). Industry self-regulation and environmental protection. In *The Oxford Handbook of Business and the Natural Environment*. Oxford, UK: Oxford University Press, 103–121; Mele, V., & Schepers, D. H. (2013). E Pluribus Unum? Legitimacy issues and multi-stakeholder codes of conduct. *Journal of Business Ethics*, 118(3), 561–576; Runhaar, H., & Lafferty, H. (2009). Governing corporate social responsibility: An assessment of the contribution of the UN Global Compact to CSR strategies in the telecommunications industry. *Journal of*

In contrast, studies that are critical of MSIs point out that collaborative initiatives effectively allow companies to regulate themselves. Particularly, they may enable companies to subject themselves to soft law or voluntary actions that are too lenient in comparison with other regulatory approaches.¹⁵ Furthermore, companies that participate in MSIs may enjoy some of the intangible benefits of being part of an initiative without making substantial changes to their operations.¹⁶ The lenient approach some initiatives take towards company reporting on adherence to and implementation of MSI guidelines results in some initiatives leaving it up to companies to decide on their responses, how to measure their progress, and which indicators to report on.¹⁷

Nevertheless, some studies argue that forgoing high barriers to entry into initiatives and refraining from strict monitoring, enforcement, and reporting requirements is sensible if MSIs are to ensure a wide participation of stakeholders. A multitude of participants can empower initiatives to act as a learning platform, help foster dialogue, collaboration, collective action, and transparency and to play a key role in bringing about systemic change.¹⁸ This participatory quality of MSIs is recognized by the “nurturant parent” approach, in opposition to the “strict father” approach,¹⁹ the proponents of which argue for the need for stricter compliance and monitoring of participating stakeholders to ensure conformity to the principles that the participants have agreed to abide by.

Many of these studies fail to distinguish between the different types of collaborative initiatives, particularly in relation to their purpose, e.g., whether the collaborative initiatives were set up to regulate company behavior or not. As such, the previously-introduced HRG MSIs are often simplistically categorized as voluntary collaborative initiatives. While companies participate on a voluntary basis in most collaborative initiatives, once they join a HRG MSI, participants are expected to respect a jointly-agreed standard. As a result, the so-called soft law standards of HRG MSIs are in fact hard requirements for companies that want to participate in these initiatives. Hence, HRG MSIs represent a middle ground between collaborative initiatives without performance requirements on the one end of spectrum, and mandatory human rights due diligence legislations on the other end. Exploring these initiatives’ model, which includes the delivery of standards, metrics, and means of evaluation for corporate human rights

Business Ethics, 84(4), 479-495; Trabelsi, L. (forthcoming). Corporate sustainability, stakeholder orientation, and collaboration between competitors: What lies beneath. In *World Scientific Encyclopedia of Business Sustainability, Ethics & Entrepreneurship*. World Scientific Publishing.

¹⁵ Argandoña, A. (2004). On ethical, social and environmental management systems. *Journal of Business Ethics*, 51(1), 41-52; Baumann-Pauly, D., Nolan, J., Labowitz, S., van Heerden, A. (2016). Setting and enforcing industry standards for human rights: the role of multi-stakeholder initiatives in regulating corporate conduct. In *Business and Human Rights: From Principles to Practice*. New York: Routledge, 170-19.

¹⁶ Perez-Batres, L. A., Doh, J. P., Miller, V. V., & Pisani, M. J. (2012). Stakeholder pressures as determinants of CSR strategic choice: Why do firms choose symbolic versus substantive self-regulatory codes of conduct?. *Journal of Business Ethics*, 110(2), 157–172.

¹⁷ Baumann-Pauly, D., Nolan, J., Labowitz, S., van Heerden, A. (2016). Setting and enforcing industry standards for human rights: the role of multi-stakeholder initiatives in regulating corporate conduct. In *Business and Human Rights: From Principles to Practice*. New York: Routledge, 170-19.

¹⁸ Baumann-Pauly, D., Nolan, J., van Heerden, A., & Samway, M. (2017). Industry-specific multi-stakeholder initiatives that govern corporate human rights standards: Legitimacy assessments of the Fair Labor Association and the Global Network Initiative. *Journal of Business Ethics*, 143(4), 771–787; Kell, G. (2005). The global compact selected experiences and reflections. *Journal of Business Ethics*, 59(1-2), 69–79; Rasche, A., & Waddock, S. (2014). Global sustainability governance and the UN Global Compact: A rejoinder to critics. *Journal of Business Ethics*, 122(2), 209–216; Williams, O. F. (2014). The United Nations Global Compact: What Did It Promise?. *Journal of Business Ethics*, 122(2), 241–251.

¹⁹ Haack, P., & Scherer, A. G. (2014). Why sparing the rod does not spoil the child: A critique of the “strict father” model in transnational governance. *Journal of Business Ethics*, 122(2), 225–240.

performance could offer a way out of the polarized debate in the business and human rights field that increasingly views voluntary and mandatory measures as either-or options.

It is important to stress that HRG MSIs are not set up to replace government action. Instead, they are created for situations in which governments are either unable or unwilling to protect human rights, and in which no actor alone is able to effectively establish human rights standards. While these MSIs started as “stopgap” measures, after several decades in operation, the question is whether they are here to stay. According to the UNGPs, in the context of a global economy, it is unlikely that governments around the globe will be effective in protecting human rights in the short or medium term. It is therefore all the more relevant that the role of private companies to respect human rights develops within effective frameworks that can complement government action. This argument is strengthened by a recent study of voluntary and mandatory regulations conducted in the environmental context. The study posits that as voluntary regulation has the advantage of being flexible but may not prove to be very effective, while mandatory regulation is less flexible yet more effective, a balanced combination of both voluntary and mandatory regulations could provide companies with the structure and flexibility needed for addressing sustainability challenges and improving performance.²⁰

HRG MSIs are ideally positioned to complement mandatory regulation, for example, by complementing regulations on human rights that require companies to conduct human rights due diligence. The legislative trend of introducing mandatory human rights due diligence is ongoing in Europe and is expected to grow in the coming years. Existing examples of mandatory human rights-related regulations include the UK’s Modern Slavery Act 2015; France’s Corporate Duty of Vigilance Law enacted in 2017; Australia’s Modern Slavery Act 2018; and the Netherlands’ Child Labor Due Diligence Act enacted in 2019.²¹ Discussions of additional regulatory requirements in other countries and at the EU level are underway.²² Amid these developments, HRG MSIs can help operationalize what legal human rights due diligence requirements should entail in practice for companies that operate in different industry contexts. Such a concrete operationalization of the UNGPs for specific industry contexts is currently missing. Industry-specific standards developed in MSI settings could define what “appropriate” due diligence on companies that operate within the same industry should entail.

4. The need to strengthen Human Rights Governance MSIs to advance business and human rights and enable corporate accountability

Dismissing collaborative initiatives altogether as too weak to drive respect for human rights ignores the favorable qualities that MSIs have to offer. Therefore, we argue that MSIs such as HRG MSIs are an essential complement to mandatory human rights requirements. While the implementation of these initiatives may not be perfect and their governance model may require further strengthening, such initiatives stand out as relevant and legitimate venues for advancing the work on and implementation of concrete human rights standards for corporations to follow.

Without the concrete operationalization of what human rights due diligence is intended to convey in specific industry contexts, mandatory regulatory requirements risk being void of substance as they only refer to a process that by itself is unable to ensure respect for human

²⁰ Aragon-Correa, J. A., Marcus, A. A., & Vogel, D. (2020). The effects of mandatory and voluntary regulatory pressures on firms’ environmental strategies: A review and recommendations for future research. *Academy of Management Annals*, 14(1), 339-365.

²¹ See Finance & Human Rights (FaHR) (2020) Finance and Human Rights: Regulatory overview

²² See EU Regulation 2019/2088 on sustainability-related disclosures in the financial services sector

rights in corporate practice. Human rights due diligence alone, without the clear definition of standards, metrics, and means of evaluations, allows companies to claim that they are on a journey towards respecting human rights, and it absolves them from proving actual progress, as long as they go through the procedural motions of due diligence.

Stakeholders genuinely committed to advancing human rights must reject settings that enable companies to be on an “eternal journey” towards respect for human rights, and instead insist on industry-specific human rights standards and accountability mechanisms. HRG MSIs have the potential to assist in the implementation of concrete human rights standards in the spirit of the UNGPs and advance corporate accountability. John Ruggie saw this opportunity and used the example of organizations such as the Fair Labor Association as a model for implementation. As we are starting a new decade of action, it is all the more timely to strengthen these collaborative initiatives and thereby facilitate substantive progress on establishing respect for human rights in corporate practice.