Defining the Relationships: "Cause, Contribute, and Directly Linked to" in the UN Guiding Principles on Business and Human Rights

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ABSTRACT

According to the United Nations Guiding Principles on Business and Human Rights, businesses owe remediation when they "cause" or "contribute to" a human rights impact, but not when they are only "directly linked to" it. These terms determine when a victim is entitled to seek remediation from a business, but they have largely been ignored in existing scholarship. This article investigates the meaning of "cause, contribute, and directly linked to", revealing confusion and uncertainty before proposing a new system, built on existing authoritative guidance, for interpreting the terms and determining when businesses owe remediation for their human rights impacts.

I. INTRODUCTION

The Chinese government has reportedly forced more than 80,000 Uyghur workers to labor in factories that produce goods for transnational corporations including Apple, BMW, Nike, Samsung, and Volkswagen.[1] China claims that participation in its labor transfer programs is voluntary.[2] Independent research, however, suggests that members of the ethnic and religious minority Uyghur community risk arbitrary detention if they do not participate, while at work they are isolated, monitored, prevented from practicing their religion, and subjected to "patriotic education" classes.[3] Assuming, for the sake of argument, that the allegations are true, do the retail companies have a responsibility to provide remedies and reparations to the workers forced to labor in their supply chains? For decades, scholars, civil society, businesses, and governments have debated the appropriate answer to this question.[4] In this article, I offer a new approach for answering this question, one that builds upon and aligns with the 2011 United Nations Guiding

Principles on Business and Human Rights (UNGPs or Guiding Principles),[5] but challenges existing applications of the UNGPs. This proposed system has the potential to clarify and provide nuance to complex cases while encouraging businesses to proactively address their human rights "impacts."[6]

Currently the most authoritative statement on the responsibility of businesses for human rights in international law, the value-added of the UNGPs stems from the recognition of an independent responsibility on all businesses to respect all human rights in all contexts.[7] The other two "pillars" of the Guiding Principles—the state's responsibility to protect human rights from interference by business and the rights of victims to adequate remedial processes—reflect existing international human rights law (IHRL).[8] The business responsibility to respect, however, was designed to change "what we should now consider 'reasonable'" conduct by businesses[9] so as to provide "tangible results for affected individuals and communities."[10] As part of the independent responsibility to respect, businesses have a responsibility to remedy harms they "cause" or "contribute to."[11] If a business is only "directly linked to" the harm, it does not need to provide remedies but can instead use its "leverage" to affect change in its business partners.[12] Intended as *sui generis* terms,[13] "cause," "contribute," and "directly linked to" (collectively referred to here as the "participation terms")[14] are central to defining businesses' responsibility under the UNGPs.[15] Yet, their meaning has rarely been examined.[16] The literature on the business responsibility to respect has primarily focused on enforcement mechanisms,[17] while the literature on remedies principally addresses the procedural demands of judicial and non-judicial processes.[18]

The limited guidance on the participation terms to date rests on definitions provided by the United Nations (UN) Office of the High Commissioner for Human Rights (OHCHR), which

found a business "causes" an impact when its acts or omissions, without the involvement of other parties, reduces the realization of a right.[19] A business "contributes" where its conduct together with those of others negatively impacts a right.[20] Where it neither causes nor contributes to a harm, a business may be "directly linked to" it via operations, products, services, and business relationships.[21] The OHCHR's definitions, offered in the abstract, do little to clarify businesses' remedial responsibilities. Since they are not acting on their own, Apple and Volkswagen are clearly not "causing" the harm, but are they "contributing to" or merely "directly linked to" the harms inflicted on the Uyghurs? The answer is unclear under the current definitions.

Subsequent literature has applied the OHCHR's definitions to real and hypothetical examples but without significant analysis.[22] As I reveal in Part 3, this has led to contradictory guidance with unclear reasoning. States have begun drafting and adopting legislation to implement the UNGPs,[23] and businesses have developed non-judicial processes to address their responsibilities,[24] without knowing when the UNGPs expect businesses to provide remediation. This has practical implications for victims. If it is unclear when businesses owe remedies, it is uncertain when victims have a right to pursue them. Even where appropriate processes are put in place, victims may not be able to secure the remediation they are entitled to.

Unlike earlier scholarship that debated the theoretical basis for assigning human rights obligations to businesses,[25] this article builds on the UNGPs' recognition of a responsibility to remediate and questions the conditions needed to trigger that responsibility. I first consider the need for *sui generis* terms and then examine the existing guidance on the terms' meaning. I explain that the OHCHR definitions unduly emphasize the number of actors involved, creating incentives for businesses to restructure operations so as to avoid liability rather than to avoid human rights impacts. This approach is unhelpful and could undermine the transformative

promise of the UNGPs. By critically analyzing the existing guidance I identify implicit factors that can be brought together to form a system of responsibility,[26] giving definition to the participation terms. I reconceptualize the participation terms in light of these factors, asserting that the difference between the participation terms rests in the strength and confluence of the factors identified: the power, independence, and mitigation efforts of the business; and the predictability and severity of the harm. In Part 5, I apply my proposed system to the case of the Uyghur laborers and conclude, in Part 6, that my approach charts a path for the practical implementation of the UNGPs.

II. THE CREATION OF *SUI GENERIS* STANDARDS OF RESPONSIBILITY

Understanding why the UNGPs use *sui generis* terms rather than existing legal frameworks can help explain their purpose and importance. Built on the premise of "principled pragmatism," the UNGPs expect businesses to respect human rights by refraining from interfering in their realization.[27] Non-binding on their own, the UNGPs have been embraced by states and businesses, who have accepted the UNGPs as an articulation of what should be, even if it does not reflect the law as it is now.[28] As such, they serve as a means of assessing the adequacy of law, public policy, and business practice.

The UNGPs encourage businesses to engage with "human rights due diligence" (HRDD) in order to proactively identify risks posed by the business, and mitigate and remediate impacts the business causes or contributes to.[29] According to the official Commentary to the UNGPs, while HRDD is important for ensuring the business respects human rights, it may not "automatically and fully absolve" a business of liability where it has caused or contributed to a

harm.[30] This left a question as to when HRDD might affect a business's responsibility to remediate. Jonathan Bonnitcha and Robert McCorquodale argued that a strict responsibility to remediate was appropriate for a business's direct harms, but suggested the responsibility for indirect responsibilities could be absolved through HRDD.[31] This was rebuffed by the UNGPs' author, former UN Special Representative to the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, John Ruggie, writing together with John Sherman.[32] The latter duo claimed that businesses owe remediation whenever they directly or indirectly "cause" or "contribute to" a harm, even if the business has acted diligently.[33] This was echoed by the UN Working Group on Business and Human Rights, who concluded that the business responsibility for human rights "is a function of impact," rather than a result of negligence or diligence.[34] This is appropriate. The foundational responsibility of businesses is to "avoid infringing on the human rights of others."[35] HRDD is only a means of realizing that responsibility, rather than the responsibility itself.

The introduction of the participation terms in the UNGPs was controversial. Without clear content, scholars often use the terms only in passing, if at all, before focusing their research on well-trod areas of international and domestic criminal law and domestic tort law.[36] In early critiques, Robert Blitt, Björn Fasterling, and Geert Demuijnck complained that the undefined participation terms effectively gave businesses the authority to determine their own responsibility.[37] Earlier scholarship, Ruggie's preparatory work for the UNGPs, and the UNGPs' Commentary engaged the language of "complicity."[38] Fasterling and Demuijnck argued that Ruggie should have employed "well elaborated" categories of complicity.[39] Yet, Ruggie chose the *sui generis* participation terms to trigger businesses' remedial responsibilities. Blitt,

Fasterling, and Demuijnck never considered why Ruggie might have done this, and he himself has not directly addressed this choice.[40]

Ruggie has, however, insisted that the business responsibility to respect human rights, which includes the responsibility to remediate harms a business causes or contributes to, is not derived from existing law and should not be confused with it.[41] His objection might reflect a general dislike of legal formalism,[42] but it seems more likely that he recognized the dangers of transposing norms from existing legal frameworks.[43] Legal systems use concepts like complicity or aiding and abetting in similar but not synonymous ways.[44] Terms with numerous, complex, and debated meanings can give rise to anthropological equivocations, errors in understanding that arise when two people (or cultures) use the same word to express different meanings without realizing it.[45] When states adopt a legal standard from another system, the norm's original meaning may be "nullified, modified, distorted, or remodeled, often giving rise to something new and different from the original model that may in turn circulate back to the context of original production."[46] For the UNGPs, a term like complicity carries the risk of numerous layers of modifications, moving from original systems with competing ideas of complicity into business and human rights (BHR), "contaminating" the UNGPs,[47] and then back into domestic systems or into new systems through the implementation of the Guiding Principles.

BHR has experienced the confusion that arises from ambiguous terms, particularly that of complicity. First, as the UNGPs' Commentary notes, commentary has "both non-legal and legal meanings."[48] One might consider a business morally complicit even where it does not meet the unique, technical requirements for legal complicity in domestic and international law.[49] Second, US courts became mired in a debate over the necessary *mens rea* for complicity under international criminal law (ICL) when claimants brought cases against businesses under the

anomalous Alien Tort Statute (ATS), which allows foreigners to sue in US courts for violations of customary international law.[50] US courts invoked complicity in ICL, but ICL did not offer a single standard for complicity.[51] US courts varyingly applied a "knowledge" test intended to reflect customary international law,[52] or a "purpose" test intended to reflect what US courts believed the International Criminal Court's (ICC) statute required.[53] The ICC had not yet decided its own standards, so US courts interpreted "purpose" in a manner that reflected US domestic law.[54] The appropriate *mens rea* for the ATS remains uncertain,[55] but the debate over when and how businesses might be "complicit" under international law dominated BHR scholarship for years.[56]

Had the UNGPs invoked a term like complicity, it might have led states to assume compliance on the basis of their existing complicity standards. Rather than motivate necessary changes, this could have reinforced deficient approaches. Clearly defined *sui generis* participation terms, on the other hand, can draw attention to differences between the UNGPs and existing legal frameworks and should encourage states to question their compliance. For this to work, however, the participation terms need to be better articulated and understood.

III. CURRENT GUIDANCE

As noted above, OHCHR has found that a business "causes" an impact when it reduces the realization of a right on its own, without the contribution "of clients or other stakeholders."[57] It "contributes" where the harm occurs as a result of the business's conduct together with that of others.[58] "Contributing to," according to OHCHR, requires some "element of causality" that extends beyond "trivial or minor" effect but the conduct need not rise to *conditio sine qua non*.[59]

While the Organization for Economic Co-Operation and Development (OECD) used stronger language, suggesting the "[c]ontribution must be substantial," it also found that this simply excludes "minor or trivial contributions."[60] Rachel Davis, a member of Ruggie's team during the UNGPs' development, pointed to three distinct ways a business may "contribute to" a harm: it may "facilitate or enable" abuse; create "strong incentives" for a third party to breach IHRL; or undertake activities "in parallel with a third party, leading to cumulative impacts" that harm a right.[61] Finally, a business can be "directly linked" to a harm via its products, services, operations, or business relationships when it neither causes nor contributes to the impact.[62] This requires a relationship between the business and the harm, not merely the business and the other party.[63] A business that is "directly linked to" an impact "has the least direct control or influence over whether that impact occurs."[64]

Normally, a business that is "directly linked to" an impact need only use leverage to affect change.[65] Sometimes, however, the Guiding Principles recognize that the severity of an impact requires a business to terminate a relationship where it is "directly linked to" a harm.[66] According to the Commentary, "the more severe the abuse, the more quickly the enterprise will need to see change."[67] Businesses that maintain a relevant relationship "should be able to demonstrate [. . .] ongoing efforts to mitigate the impact and be prepared to accept any consequences—reputational, financial or legal—of the continuing connection."[68] The OHCHR's definitions seem to suggest that the number of actors involved, and the directness of the relationship between the business and the harm, are the primary considerations for determining a business's responsibility. Both criteria are questionable.

According to OHCHR and Ruggie, the participation terms sit on a "continuum."[69] Where a business is "directly linked to" a harm and "fails to take reasonable steps to seek to prevent or

mitigate the impact," the business's responsibility may increase.[70] This can mean it is "contributing to" the harm and owes remedies for the impacts.[71] OHCHR did not explicitly address whether the continuum of responsibility also extends from "contribute" to "cause." The OHCHR definitions, however, only ascribe "cause" to instances in which a business acts alone,[72] indicating it would be impossible for a business to move along the continuum from "directly linked to" or "contributing" to "causing" it. This may explain why Bonnitcha and McCorquodale concluded that a business's responsibility could be divided between cause and contribute, on the one hand, and directly linked to on the other.[73] If the difference between cause and contribute is only the number of actors involved, the terms appear qualitatively the same. Yet, Ruggie and Sherman responded by asserting that there are three unique categories, with "cause" and "contribute" representing distinct forms of responsibility.[74] This would suggest "cause" is supposed to be qualitatively different than "contributes to," is the most severe form of responsibility, and the endpoint for the responsibility continuum.

Centering the participation terms' definitions on the number of actors is also potentially dangerous for the UNGPs. Dan Danielsen's research explains that when faced with regulatory liability, businesses often structure operations in a manner that amplifies anomalies and exploits any regulatory uncertainty.[75] If the number of businesses involved in a project influences whether they owe reparations, one could imagine businesses revising their operations to avoid liability, rather than to avoid human rights impacts. This would undermine the purpose of the UNGPs.

The relevance of directness is also contentious. The Thun Group, a network of banks collaborating on BHR issues, suggested that a bank's responsibility could be determined by "the degree of directness," or its "proximity" to the harm.[76] They concluded that where a bank

provides financial support to a party who uses the financing to harm human rights, the bank is too far removed from the impact to be "contributing"; the bank could only be "directly linked."[77] The Thun Group was resoundingly rebuked by both Ruggie and the UN Working Group on Business and Human Rights.[78] The Working Group said the term "proximity" was unhelpful and could be confusing,[79] while Ruggie said the banks' approach "defies common logic."[80] Neither addressed how or when directness might be relevant, but their opposition to the Thun Group's approach raises questions about the seeming emphasis on directness in the OHCHR's definitions.

Ruggie recognized the need for a "greater understanding of the factors that can drive a situation" to be classified in one category of responsibility or another.[81] He identified a few factors, although it appears his list was not intended to be exhaustive: "the extent to which a business enabled, encouraged, or motivated human rights harm by another; the extent to which it could or should have known about such harm; and the quality of any mitigating steps it has taken to address" the impact.[82] Ruggie's factors suggest that the question of a business's responsibility cannot be reduced to the number of actors or the directness of the relationship.[83] What factors are relevant, however, is uncertain. In this section, I examine the only significant engagements with the participation terms: guidance by OHCHR, the UN Working Group on Business and Human Rights, Ruggie, and OECD;[84] an article by Davis;[85] and a report by the Essex Business and Human Rights Project (EBHR), which I co-authored.[86] These pieces engage in limited analysis, relying instead on real or hypothetical examples (often the same ones) to demonstrate the terms' application.[87] I cluster the examples around the types of activities addressed: causing harms through direct action; providing support for military or police conduct; economic support for harmful conduct; making unreasonable demands or controlling social or economic conditions; and other relationship-based responsibilities. A critical reading reveals conflict and confusion

over the application of the participation terms, as well as some implicit factors I identify in Section 4 in order to design a stronger framework of responsibility.

A. Causing Harms Through Direct Action

Most of the guidance treats "cause" as self-explanatory, offering only a few examples. OHCHR, the Working Group, OECD, and Davis recognize that a business "causes" a harm where it engages in discriminatory financing or hiring practices, breaks up unions, pollutes a community's water supply, and exposes workers to hazardous conditions without adequate and appropriate safety equipment.[88] EBHR found that a company engaged in the war crime of "pillage", caused the attendant human rights impacts.[89] These examples align with the OHCHR approach in which businesses "cause" impacts by acting on their own without the support of other actors.[90]

B. Examples on Forced Displacements

The Working Group and Davis also indicated a business "causes" an impact where it threatens landowners or otherwise takes direct action to displace people without ensuring adequate human rights safeguards.[91] The guidance on the responsibility of businesses for forced displacements is particularly instructive because it includes examples of all three types of involvement. A bank can "contribute" by financing an infrastructure project without adequate human rights safeguards, even if financial support could have otherwise been procured.[92] Finally, according to OHCHR, a business might be "directly linked to" a harm if it is "one of several financiers to a

project,"[93] or where, despite assurances to the contrary, a government displaces people without adequate human rights safeguards.[94]

These examples highlight the problem with the OHCHR's numeracy-based approach. To "cause" the harm, the business must do the displacing. To "contribute," another actor undertakes the displacement while the bank provides material support without insisting on adequate safeguards; to be "directly linked," the bank is one of several companies carrying out the same, indirect conduct. Yet, a bank that finances a project undertakes the same conduct, via the same relationship, with the same impact on the victims regardless of the number of other banks involved. If the participation terms are intended to explain a business's relationship to a harm, the number of actors is less important than the type of activity undertaken as the number of participants is unlikely to change the significance of any single actor.

In the final OHCHR example, the government's assurances seem to move the bank from "contributing" to "directly linked to." This suggests that where a business seeks to ensure adequate safeguards, it may incur less responsibility for subsequent harms. Given that the responsibility to respect and remedy is strict and not impacted by the exercise of due diligence,[95] this poses a logical challenge: due diligence cannot reduce responsibility but efforts to secure safeguards as part of a business's due diligence may. I attempt to resolve this tension in Section IV.

C. Material Support for the Military or Police Activity

Material support for security forces has also featured heavily in the existing guidance. OHCHR and the Working Group found a business "contributes to" a harm "if it lends vehicles to security

forces" that are used to abuse human rights, or builds or maintains prisons engaged in inhuman treatment.[96] One of the more interesting conclusions by the Working Group, OHCHR, and Davis is that a tech company can contribute to impacts by providing a government with information or data that is subsequently used to target dissidents for harassment.[97] OHCHR added a condition: "If an Internet company's staff automatically defer to every Government request for information about users, regardless of the human rights implications, it runs the risk" of contributing to the abuse.[98] This could indicate that the predictability of an impact is a relevant factor. It also highlights the importance of independent assessment and safeguards when determining a business's impact. The UNGPs do not require a business to breach domestic law,[99] but this example suggests that businesses cannot merely rely on states' claims of legality, but at times may need to challenge the state. This raises questions about when or how duress might act as a legitimate defense that sit beyond the scope of this article but deserves greater attention in scholarship.

Finally, EBHR considered the responsibility of businesses that supported the construction, financing, or maintenance of Israeli settlements.[100] The settlements are associated with a wide range of long-standing and severe IHRL and international humanitarian law violations impacting, *inter alia*, Palestinians' rights to life, freedom from torture, housing, water, and education.[101] Israeli law and public policy, EBHR determined, makes it clear that any effort to use leverage to mitigate the violations will be unsuccessful.[102] EBHR concluded that the severity and duration of the impacts means that any business that might normally be considered "directly linked to" will move along the continuum to "contributing to" the harm quickly.[103] Even short-term engagements are likely to lead a business to "contribute to" the resulting harms, owing remediation.[104]

D. Economic Support for Harmful Conduct

The current guidance includes several examples addressing the responsibility of financial actors. As noted above, OHCHR and the Working Group concluded that a bank contributes to a harm where it finances a project without proper safeguards for human rights.[105] For a bank to be "directly linked," OHCHR stated that "the link needs to be between the financial product or service provided by the bank and the adverse impact."[106] As such, not all financial support creates a "direct link,"[107] although OHCHR did not explain which types of financing would fall outside the participation terms' continuum.

In addition to being one of several financiers, OHCHR concluded a bank may be "directly linked" where a client uses the bank's financing to support another actor who uses the funds to cause or contribute to a harm.[108] The Working Group determined a bank may be "directly linked" if it (1) manages the assets of a client that causes or contributes to a harm, or (2) invests in a company that either "systematically buys produce from farms with child labour" or that buys or uses conflict minerals.[109] OECD similarly concluded institutional investors can contribute to a harm if they actively encourage a company's management to take specific actions that increase the likelihood of foreseeable risks.[110] These findings suggest that investing in a company is similar to managing assets, and that these activities are distinguishable from loans or project financing. The lack of clear analysis makes it impossible to discern the reason for this division. There are at least two potential explanations, although both rest on shaky foundations.

One potential interpretation is that the Thun Group's focus on proximity and directness was right, but their application—in which banks are always too far removed to "contribute to" a harm[111]—was wrong. One might assume that a project financier operating on its own has a more direct engagement than a bank that joins several other financiers. Similarly, financing may be

considered a more direct engagement than managing general assets, which involves the movement of money that may or may not be directly tied to a project. It is appropriate to conclude that, in general, asset management only creates a "direct link to" the harm. A bank may monitor the internal nature of a financial transaction to deter the (il)legality of a client's conduct, such as money laundering or terrorist financing, but it cannot determine or monitor external characteristics, such as the projects on which a business spends its income.[112] This does not explain the differences between institutional investors and project financiers.

The conclusions on institutional investors are troubling. As Mohammed Alshaleel and I explained, institutional investors play an active role in supporting investees, providing an infusion of capital through their investment choices.[113] We determined that institutional investors can "contribute to" a harm in the same way as a project lender. This can trigger a responsibility to remediate even if an investor is otherwise passive where it fails to take steps to mitigate the risks of human rights impacts.[114]

Another explanation for the Working Group's division between institutional investors and project financiers might be that investing is a generalized form of support for a business, rather than project specific. Ascribing responsibility for generalized economic support has proven difficult. The South African Truth & Reconciliation Commission found that Swiss Banks "save[d] apartheid" when other actors stopped financing the regime.[115] The Commission determined that the banks owed reparations as "accomplices to a criminal government that consistently violated international law."[116] It was, however, incapable of ordering the banks to comply with its finding.[117] In response, a group of South Africans pursued the banks under the ATS.[118] The US trial court determined that "simply doing business with a state or individual" who violates IHRL cannot give rise to liability.[119] For complicity, according to the court, support

is evaluated by the "quality of the assistance," which is generally tied to the nature of the good.[120] Since "[m]oney is a fungible resource," the court concluded it could not be the basis of liability.[121] This decision suggests that some business activity is too passive to create liability, a conclusion with echoes in the Thun Group's rejected approach.[122] Ruggie repudiated the US court when he concluded that businesses have the same responsibility and potential to be involved in human rights impacts regardless of industry.[123]

Sabine Michalowski provided an important critique of the US court's approach, arguing that the importance of financial support for violations of international law is reflected in anti-terrorist financing laws.[124] More broadly, it is illogical to exclude responsibility for certain industries, like financing, that can be crucial to the commission of a violation.[125] Instead, Michalowski concludes, the court should have directed its attention to the purpose and conduct of the business and its relationship to the harm.[126] Michalowski is right. There is no reason to excuse material support merely because it is general in nature. A company with an ongoing contract or license might lend an actor vehicles or construction equipment[127] that are used for diverse activities only some of which are prohibited. EBHR criticized several companies for exactly this type of support.[128] Businesses provide Israel with security equipment that have legitimate purposes, but which are routinely employed to commit IHRL violations.[129] That the equipment can be used legitimately does not excuse a business's responsibility for "contributing to" a harm where it had reason to believe or know that some of its equipment would be used to violate IHRL.[130] Rather than distinguishing responsibility on the basis of whether support is specific or general, a different lens may provide a stronger foundation. I return to this issue in Section 4, below.

E. Unreasonable Demands and Establishing Social or Environmental Conditions

Two of Davis's three ways in which a business might "contribute to" a harm—creating "strong incentives" for an impact, or acting "in parallel with a third party, leading to cumulative impacts"[131]—feature in several significant examples. First, businesses may establish unreasonable demands that require or encourage another party to negatively impact human rights. The Working Group found a bank "contributes to" a harm where it sets conditions that lead a contracted builder to breach labor rights.[132] OHCHR pointed to a toy company that "makes decisions without regard to how they may impact the ability of suppliers to comply with labour rights."[133] Davis employed a similar example, but with a security company setting deadlines that are too short for its recruitment company to adequately perform background checks.[134] OECD echoed this but conditioned responsibility on the foreseeability of the harm, using an example of a "retailer that sets a very short lead time for delivery of product" despite knowing from past production that "the time is not feasible" and will require excessive overtime.[135] In these examples, the "contributing" businesses are not in direct control of the harm but possess the relational power necessary to influence whether a violation occurs. Davis and OHCHR suggested that these are examples of "incentives," but that is inaccurate. The common factor here is not the structure of the conditions—incentives, contractual standards, or purchasing requests—but rather the business's relative power, which allows it to make unsustainable demands leading to predictable harms.

A final example of "incentives" seems misplaced. OHCHR claimed that a construction company "contributes to" impacts where it "rewards operational staff purely on their speed . . . and without regard to whether they harm communities."[136] This seems to reflect a belief that incentive structures constitute a contribution to, rather than a causation of, a harm. In this case,

however, the business's policies are influencing the conduct of its own employees. Such incentive structures are not "contributions" but a direct means by which the business's policies and conduct have reduced the enjoyment of relevant rights.

A different set of examples suggest a business can contribute to an impact by controlling social or environmental conditions. OHCHR found a business that targets children with unhealthy foods or drinks "contributes to" resulting obesity and its attendant health problems.[137] Davis and OHCHR concluded a business that requires women employees to stay late or "leave or arrive outside daylight hours" despite operating "in an area that is dangerous for women at night" contributes to the violence its employees experience.[138] Unlike the examples of the toy company, the bank, or the construction company, these businesses are incurring a responsibility for harms directly caused by a third party actor unconnected to the business. Ascribing responsibility to these companies only makes sense if one recognizes that the business has control over relevant environmental or social factors so that its conduct indirectly but clearly and predictably leads to a harm. While the system I propose in the next section takes account of these examples, further scholarship should examine the limits and appropriateness of assigning a responsibility for harms directly caused by third party actors unconnected to the business.

F. Other Relationship-Based Responsibilities

Finally, the current guidance suggests several other ways in which a business may be "directly linked to" a harm based on its relationships. OHCHR pointed to a business whose supplier engaged in child labor in breach of contractual obligations,[139] and Davis concluded that it was "clear" that an extractive company would only be "directly linked to" an impact caused by its

security provider if the extractive company tried to prevent or mitigate the harm by enforcing a code of conduct, and screening and monitoring its providers.[140] Similar to earlier examples, these suggest that introducing safeguards and other efforts at mitigation can influence a business's responsibility.

OECD introduced an indelicate example, however, when it concluded that a business is only "directly linked" where it "sources cobalt mined using child labour" for use in its products.[141] OECD skims past questions of how the depth of a supply chain or the presence or absence of mitigation efforts might affect this determination. OECD's surrounding guidance emphasizes that mitigation efforts can affect a business's responsibility and notes that various business partners—"the smelter, minerals trader, and mining enterprise"—would separate the business from the child labor.[142] One way to interpret this, which requires reading into OECD's silence, might be that OECD considers natural resource suppliers to enjoy greater power than their purchasers.[143] Another explanation may be that unlike a purchaser who sets specific conditions, a business that passively purchases materials without conditionality cannot "contribute" to the harm. This latter interpretation would, of course, cause tension with the UNGP's expectation that businesses proactively engage in HRDD. I pick up on these potential interpretations—power as a factor and active versus passive relationships—in the next section.

IV. TOWARDS A CLEARER SYSTEM

Some of the confusion, inconsistency, and tension in the existing guidance may result from a reluctance to identify factors that are not explicit within the Guiding Principles. The UN Working Group objected when the Thun Group claimed "proximity" is a relevant factor, in part

because "the concept of 'proximity' to the impact is not one that is found in the UNGPs, and it risks creating confusion rather than clarification."[144] Such reluctance might reflect fears, represented by Danielsen's work,[145] that any enumerated list of criteria will simply lead businesses to restructure operations without increased respect for human rights. Such concern is borne out in the Thun Group's efforts to define "proximity" in a manner that would limit a bank's liability for its direct impacts.[146] These concerns should not, however, lead BHR to abandon clear criteria. Instead, the field should develop a system of accountability that embodies the purposes of the UNGPs with the flexibility needed to respond to new business models and activities. Such a system could also correct some of the weaknesses in the existing definitions, including OHCHR's focus on the number of actors involved, which, as I explained above, is illogical and potentially dangerous.[147] A different approach is needed.

One potential direction, alluded to above,[148] would stress responsibility for active engagement or direct control over passive engagement. This is suggested by the Working Group's differentiated responsibility for asset managers, institutional investors, and project financiers.[149] In this section, I first consider the problems with an "active engagement" framework before articulating a new approach for responsibility under the UNGPs, built on five factors that can determine where a business sits on the continuum of responsibility.

A. Problems with an "Active Engagement" Framework

A framework focused on active engagement could result in arbitrary distinctions, and, as with the OHCHR numeracy approach, lead businesses to restructure their operations without protecting for human rights. Already, Jena Martin asserts, businesses intentionally portray themselves as

"bystanders" so as to avoid accountability.[150] She demonstrates this with, among other cases, Shell's response to the Nigerian government's infamous 1995 killing of Ken Saro-Wiwa and eight other Ogoni leaders.[151] Nigeria targeted the Ogoni because they protested Shell's environmental impacts on their traditional lands.[152] Shell was allowed to observe the criminal trial of the Ogoni, which breached IHRL standards, while international press were excluded.[153] While the African commonwealth suspended Nigeria's membership for three years,[154] Shell's actions added credibility to Nigeria's activity.[155] Shell claimed it bore no responsibility because it was merely a witness, and not an active participant, in the violations.[156] Martin rightfully argues that such "passive" instances of "bystander" activity can lend legitimacy or moral support to harmful conduct.[157] She called for an international framework capable of addressing such relationships.[158]

Martin considered Shell's conduct leading up to the execution,[159] but equally important is what followed. Two days after Saro-Wiwa was hanged, Shell finalized a deal with the Nigerian government worth $2.5 billion USD.[160] At a time when the international community was censuring the state, Shell's conduct (albeit not its public words)[161] represented an embrace of the regime. The company might not have directly carried out the breach, but, at best, it provided an economic lifeline for the military regime and, at worst, an economic reward for the violation.

The International Criminal Tribunal for the Former Yugoslavia (ICTY) has concluded the passive observers can incur international responsibility. It found that "presence, when combined with authority, can constitute assistance in the form of moral support," fulfilling the *actus reus* for complicity.[162] The tribunal determined that the leader of a special unit in a non-state armed group aided and abetted crimes committed by the commander of a different unit in the same armed group.[163] The accused was well-regarded by the principal perpetrator and the tribunal

concluded that the defendant's mere presence "had a significant legitimizing or encouraging effect."[164] The ICTY recognized that assessing responsibility through a lens of "active" versus "passive" does not adequately capture the necessary nuance of moral support.

Both Martin and the ICTY were right to recognize that passive conduct can constitute a necessary contribution that furthers the likelihood of a harm occurring. This is particularly important for BHR. As with OHCHR's numeracy-based approach and the US court's conclusions with regard to banks financing apartheid, a framework centered on dividing "active" from "passive" responsibility is likely to draw arbitrary distinctions incapable of appropriately addressing the relationship between a business and a harm. Moreover, it would sit in tension with the UNGPs, which recognize that businesses can, or should, incur a responsibility for certain passive involvements. This is most evident in the expectation that businesses "directly linked to" an impact should actively use leverage to affect change in the conduct of others, and the failure to do so can incur a responsibility to provide remediation. The Guiding Principles cannot reasonably attribute to businesses a responsibility to respond actively to a situation where they would normally be passive while shielding them from liability only if they remain bystanders.

B. Focusing on Power and Independence

I propose a system built on a businesses' power and independence to facilitate or prevent abuse. BHR developed in response to concerns that the power of businesses eclipses that of many states, creating an accountability gap for businesses that harm human rights.[165] Redressing these power differentials and their impact on human rights is the *raison d'etre* of BHR. Yet, power is not an absolute concept.[166] There are numerous ways in which a business can exercise, limit, or

surrender its power. The significance of power, and its changing nature, crystallizes in the expectation that a business that is "directly linked to" a harm but does not naturally have power, or in the UNGPs' terminology "leverage," should increase its power to affect change.[167] It is, therefore, appropriate to situate the lens of responsibility on power. When considered more closely, the current guidance bears this out.

1. Three Forms of Power

The existing guidance points to three forms of power: direct control; relational power; and power over relevant social and environmental conditions. Direct control, meaning the direct creation or mitigation of a harm, is evident in the examples where a business "causes" a harm: discrimination in hiring or financing; breaking up unions; polluting water supplies; or committing war crimes.[168] Relational power refers to the ability of a business to influence the conduct of another actor because of its economic, moral, or practical influence. Where a business exercises strong relational power, it can issue unreasonable demands and expectations that lead other actors to cause an impact. This is evident with the toy company and its supplier.[169] Relational power also explains the expectations on businesses to employ leverage when they are "directly linked to" a harm; a business's relational power to affect change incurs a responsibility to use it. Finally, businesses may have power over relevant environmental and social conditions that give rise to the harm. Where an employer sets working hours in an environment that subjects women employees to a heightened risk of violence,[170] it controls the conditions that lead to the harm. The same is true where a business targets children with sugary drinks, leading to obesity.[171] The direct cause of the harms stem from a third party's conduct, but the harms occur,

in part, because the businesses create the conditions by which the likelihood of a predictable harm substantially increases.

Each form of power operates on its own continuum from strong to weak. For example, a business that supplies another actor with weapons or construction equipment[172] may have no direct power but may have intermediate relational power that it can exercise by including human rights clauses in their contracts,[173] providing appropriate training,[174] or limiting the sale or provision of goods and services that can harm human rights. If, for example, a business is the largest manufacturer of a particular weapon, it enjoys strong relational power. Conversely, a highly dependent supplier—for example, a manufacturer whose principal purchaser is a powerful brand name—will have weak relational power. Where a business has strong power, it is more likely to be causing or contributing to the harm; where it has weak power—where a bank manages assets,[175] it has no direct control, limited relational control, and no relationship to the conditions—it appears "directly linked to" the harm. Power, however, is not the only relevant consideration and it will intersect with other factors that can influence a business's responsibility.

2. Independence

Independence as a factor focuses on whether a business's ability to respect human rights in a particular situation can be evaluated in isolation from the conduct of others. Where a business is dependent on others, the question becomes whether it could and did take steps to ensure those actors meet their responsibilities. The significance of independence appears in several examples but is most palpable in the OHCHR's determination that a tech company contributes to a harm where it acquiesces without questioning a government's requests.[176] OHCHR expected the tech

company to exercise its independence to question the government's conduct. As with power, independence operates on its own continuum and businesses may exercise strong, weak, or intermediate independence. A business directly engaged in discriminatory practices or one that displaces individuals without adequate protections[177] has a strong level of independence whereas a purchaser highly dependent on a supplier to respect human rights has a weak level of independence.

Independence, like power, is not absolute and can take many forms. A business that is "directly linked to a harm" is merely expected to use its leverage to affect change, which (except in severe cases) need not be immediately successful. In this context, the business's ability to meet its responsibility is not dependent on the other actor, but this can change if the harm is severe, and its use of leverage is unsuccessful. At that point, the business may need to terminate its relationship and the focus shifts to whether the business could and did terminate the relationship.

3. Intersecting Power and Independence

Power will often intersect with independence. A company that undertakes a project requiring the forced displacement of a population, or one that carries out that displacement, will generally exercise significant direct power and independence. Power and independence may not always intersect, however. A bank that finances a project can have strong relational power via its loan conditions,[178] but only intermediate independence. It can adopt practices that deter harmful conduct or sanction a business after a harm occurs but cannot directly prevent a harm. Similarly, a toy company[179] may have such strong relational control over its supplier that it becomes

equivalent to the supplier's direct control. In this case, the independence of each business is intermediate, as their involvement depends at least partly on the conduct of the other. This highlights an important difference between my proposed system of accountability and the OHCHR's numbers-based approach; once one rejects the number of actors involved as a relevant factor, "cause" becomes a qualitatively different relationship than "contributes to." More than one actor can "cause" a harm if the qualitative contribution is essential or significant to the harm's occurrence. It is therefore conceivable that a business might move along the full continuum from "directly linked to" to "cause," depending on its actions and response to the situation. The number of actors and their individual involvement might affect the quantum of reparations owed—further scholarship should investigate when and how this might occur—but not the nature of their responsibility.

Reformulating questions of HRDD and mitigation into ones of power and independence may also help answer one of the more difficult questions raised by the guidance: why do some efforts at mitigation or HRDD affect a business's responsibility if the responsibility to remediate is strict and independent of due diligence efforts? A business that seeks assurances from a state that human rights will be respected[180] has used its relational power and its independence to prevent the harm. It provided no material or moral support, has no direct power over the harm, and has no further independence to stop the harm. The same would hold true for a company whose security forces or subcontractors breach a business's routinely maintained code of conduct.[181] Where a business has utilized its power and independence to prevent a harm by adopting and maintaining a code, it has only weak or non-existent power and independence at the time of the harm. In these cases, the business's responsibility is lower than it would have been had the business not undertaken mitigation efforts. This interpretation demands caution as

businesses may try to invoke a subjective feeling of powerlessness to suggest they could not have done more to prevent a harm.[182] It may be more appropriate to treat mitigation as an independent factor, which I do below.

Power and independence appear to be the most important and consistent factors. Their intersection would help initially situate a business on the responsibility continuum. Yet, it is clear from the existing guidance that other factors may play a secondary role, moving the business along the continuum, either towards "causing" a harm where it might have otherwise been "directly linked to," or towards "directly linked to" where it might have otherwise "contributed to" the harm. In the existing guidance, I find three such factors: the severity and predictability of a harm, and the mitigation efforts employed by a business.

C. Severity, Predictability, and Mitigation as Secondary Factors

1. Severity

Since a foundational premise of the UNGPs is that all businesses owe a responsibility to respect all human rights at all times,[183] treating the severity of a harm as a relevant factor may seem counterintuitive. Yet, the existing guidance makes it clear that the severity of a harm matters where a business is "directly linked to" a harm but fails to exercise leverage or its leverage is ineffective.[184] The more severe a harm, the more quickly a business needs to see change or else it will move along the responsibility continuum.[185] EBHR's conclusions emphasize this relationship between severity and time, concluding as they do that even short-term engagements can constitute a "contribution" where the harms are particularly severe and leverage will clearly be ineffective.[186]

2. Predictability[187]

The predictability of a harm also seems to matter when determining a business's responsibility, even if due diligence efforts do not. Predictability is a dangerous factor as it has been used by businesses to excuse their responsibility in situations where the risks were clearly present and known but the business did not predict the harm or take the risk seriously.[188] Given that the responsibility to respect and remediate is a strict one, the predictability of an impact seems irrelevant where an initial assessment indicates a business has "caused" the harm. Where predictability does seem helpful, however, is in determining whether a business is "directly linked to" or "contributing to" a harm. Predictability appears particularly relevant where a business's conduct can have legitimate or illegitimate purposes, such as asking a contractor to meet a short deadline or providing equipment or information to a state's military or police. Here, a business's responsibility may increase where a risk is predictable and salient in light of the industry or a political and/or social environment.[189] Normally, a business would not be responsible for "causing" or "contributing to" an assault that takes place after hours and off company property; nor would we expect a business to provide remedies to a consumer whose personal habits are the direct cause of a harm. Yet, a business that requires women to work late in a dangerous environment or a beverage company that intentionally targets children[190] can and should have predicted these risks. By failing to take action to address these predictable harms, the businesses' responsibilities increase.

3. Mitigation

Similar to severity and predictability, mitigation as a factor creates tension with the claim[191] that the responsibility to respect is a strict one. Yet, the guidance repeatedly suggests that in a narrow set of cases such efforts can reduce a business's responsibility from "contributing to" to "directly linked to." This is the inverse of a business's increasing responsibility when it is directly linked to a harm but fails to use its leverage to affect change.[192] Where a business exercises controls through contractual clauses, codes of conduct, or assurances aimed at preventing a harm directly caused by another, a business appears "directly linked" to the harm even if its conduct would normally be considered a "contribution."[193]

D. The Confluence of Factors in the System

The system I propose, and the factors I identify, focus on the substantive relationships between the business and the harm. This represents a marked departure from the OHCHR's emphasis on the number of actors but aligns well with the purpose of the UNGPs.[194] Focusing on the number of actors is likely to encourage businesses to restructure operations to avoid liability but may not provide benefits to affected individuals and communities. A system built around the business's power, independence, and mitigation efforts, and the severity and predictability of the harm has the potential to encourage businesses to change their operations to avoid human rights impacts, not simply liability.

Throughout this article, I have referred to this new proposal as a "system of accountability." Systems theory recognizes that both naturally occurring, and human-made systems have interrelated and interdependent parts that are best understood through their relationship with one another.[195] While I have identified five factors, the determination of a

business's responsibility is dependent on how these five factors interact, influence, and change one another. As an open system,[196] these factors can interact not only with one another but also with external elements so that as the context of a harm shifts, the importance of any one factor and the dynamics between them might change. As such, a business might "move along the continuum" in two ways. First, this might occur during an initial assessment of responsibility when the confluence of factors changes. In this approach, issues of power and independence might initially determine a business's responsibility but the assessment changes when predictability, severity, or mitigation are considered. Alternatively, by failing to respond appropriately to lower forms of responsibility, a business may move along the continuum to incur greater responsibility. This has a temporal feature: elapses in time change the responsibility, either quickly or slowly depending on the confluence of factors.

The simultaneous and seemingly contradictory claims that the responsibility to remediate is strict but sometimes mitigation efforts should be used can also be explained, or at least rationalized, by the proposed system. While the factors interact in this system, they do not carry the same weight. Power and independence are more important than predictability, mitigation, and severity. Where the former two factors determine a business has "caused" a harm, the latter three factors lose resonance. This is an appropriate application of the UNGPs' strict responsibility to remediate.[197] The qualitative difference of "causation" carries with it a recognition that best efforts are irrelevant when the business's control and independence indicate it should have prevented the harm. The movement between "directly linked" and "contributing to" appears more fluid and reliant on the confluence of all factors. As a result, while a business's responsibility might increase in this system, it cannot always decrease. The severity,

predictability, and mitigation factors cannot alleviate the responsibility of a business whose conduct was essential to the harm's occurrence.

V. UNDERSTANDING THE SYSTEM OF RESPONSIBILITY

The system I propose above is founded upon the UNGPs and based on factors that can be identified from the existing guidance, but represents a new approach to the participation terms that provides for more rigorous and nuanced analysis of a specific cases, and which encourages businesses to proactively manage their impacts. Once one abandons an approach centered on the number of actors involved, then the system not only gives content to the participation terms but can operate as a stand-alone approach to businesses' responsibility. Within this system, the continuum extends between the three participation terms, giving rise to qualitatively different levels of responsibility for each term. To explain the application of this system, I return to the treatment of the Uyghur workers in the supply chains of companies like Volkswagen and Apple. I use these two companies as proxies for the others to consider how the confluence of factors can affect responsibility. Following the submission of this article, several facts about the companies' relationships and mitigation efforts have come to light. Apple and Volkswagen have publicly staked out different positions on the situation in Xinjiang, allowing for an interesting and important comparison. The facts recounted here are those in the public domain as of July 2021.

Volkswagen operates a factory in Xinjiang via a subsidiary, Volkswagen Group China (VGC).[198] VGC's Chief Executive Officer (CEO) has stated that the company directly employs its 600 workers, of which approximately 25 percent are from ethnic minority communities, including Uyghur workers.[199] Despite this, the CEO has reportedly claimed that "We can't have

an issue like forced labor because we employ employees directly."[200] When pushed, however, he modified his language and said, "[w]e try to control our company-related processes, including the HR process . . . [a]nd this reduces for us the risk that something happens. . . . But I guess we could never reach 100% certainty."[201] He stated VGC will maintain its Xinjiang operations as long as it is economically feasible,[202] suggesting any involvement in forced labor will not outweigh the company's financial interests.

The assessment of Volkswagen and VGC is straight-forward. Other companies have reportedly stopped their involvement in the government's forced labor program,[203] and as a direct employer, VGC has significant direct control and independence in its practices. Additionally, it has strong power and independence concerning where it sources from.[204] While Volkswagen may benefit from aspects of manufacturing in China, it could change suppliers or relocate its manufacturing operations. Forced labor is a severe impact and is predictable in any retail supply chain.[205] As such, if VGC utilizes forced labor, it has caused the harm and owes reparations. If VGC is unable to prevent the use of forced labor, the severity of the harm suggests the company needs to take steps to terminate its operations in a manner that complies with human rights. Volkswagen's seeming intransigence on this case further raises questions that sit beyond the scope of this article about when businesses should be required to pay punitive damages.

Unlike Volkswagen, Apple appears to rely on external suppliers, seven of which were linked to forced labor in Xinjiang.[206] Although Apple has reportedly stated that it does not have forced labor in its supply chain,[207] it actively lobbied against U.S. legislation to prohibit the import of goods produced by forced labor in Xinjiang.[208] It appears, however, that Apple may have quietly taken action against some of its suppliers. In July 2021, Apple indicated it had

conducted more than 1,100 audits in the past year-and-a-half.[209] One of its suppliers, OFilm, announced in March 2021 that a major overseas client—widely believed to be Apple—was terminating their relationship.[210] Another supplier, Lens Technology, has reportedly "phased out" its involvement in the government labor transfer program.[211]

Initially, one might assume Apple is only "directly linked to" the impact because the harm is caused by its contractors. However, as with Volkswagen, forced labor is a severe harm and is highly predictable in retail-based supply chains.[212] Chinese manufacturing firms, in particular, have a history of abusive working conditions,[213] and United Nations treaty bodies have raised concerns about the Chinese government's abusive treatment of Uyghurs since at least 2018, suggesting that Apple had relevant information for two years before the latest round of audits.[214] With the increased predictability and severity of the harm, Apple's responsibility needs to be reconsidered. The company clearly exercises significant relational power over their direct suppliers and could use that power to insist on stronger protections against forced labor. Under the proposed system, Apple's responsibility hinges on what steps they have taken in response to the severe and predictable risks.

It appears Apple has taken some steps—auditing and threatening or terminating relationships—but the steps only seem to have come after public pressure. Assuming this is all that has been done, the response seems insufficient in light of their relational power and independence, as well as the severity and predictability of the harm. As such, they would have moved along the continuum from "directly linked to" to "contributing to" the harm. This suggests that Apple owes reparations for past involvement in forced labor in Xinjiang, although its mitigation efforts might move the company back along the continuum towards "directly linked to." This would limit its responsibility for reparations in the future. Given their seeming

effectiveness, these mitigation efforts might allow Apple to retain the relationships and remain only "directly linked to" the harm. If, however, Apple's role has been mistaken and it never took steps to mitigate the use of forced labor, their responsibility would have increased quickly; in light of the duration of the harm, the lack of mitigation efforts might lead to the conclusion that Apple is "causing" the violation alongside the suppliers and the Chinese government.

VI. CONCLUSION

The UNGPs were intended to help answer a long-standing debate over the responsibility of businesses for human rights impacts caused by their operations and activities. The participation terms play a central role in the UNGPs, delineating when a business independently owes a responsibility to provide remedies. The current approach to the participation terms stems from limited guidance heavy with hypothetical examples but weak in critical analysis. It uses the number of actors involved in a harm as a dominant factor in categorizing businesses' responsibility. As I argued, this can act as an incentive for businesses to reform their structures to avoid responsibility rather than reforming their practices to avoid human rights impacts. For the UNGPs to work effectively, the participation terms need clearer content.

In this article, I critically engage for the first time in scholarship with the existing guidance on the participation terms. In addition to revealing inconsistency and confusion in the guidance, I propose a new system of responsibility that moves away from the number of actors to the nature of a business's relationship to the resulting harm. This system is built around five factors: the power (direct, relational, and over social or environmental conditions), independence, and mitigation efforts of the business; and the predictability and severity of the

harms. As I explain, these factors are implicit in the existing guidance, so that the new system will often result in similar findings to the current guidance but with a clearer reasoning, greater nuance, and a more context-specific analysis. By recognizing that a business's responsibility to provide remediation will change depending on the context and its own conduct, I introduce a system that should encourage businesses to take a proactive role in managing their relationships. As such, this system better aligns with the intent and purpose of the UNGPs than the current guidance.

While there are five factors, they do not carry equal weight in this new system. If a business exercises strong power and independence so that it is "causing" a harm, the strict nature of the responsibility to respect means the other factors will not reduce its responsibility. The business's mitigation efforts, and the severity and predictability of the harm can otherwise move a business along the continuum in both directions, either towards "directly linked to" or towards "causation." Stemming from and aligned with the UNGPs, this system can stand on its own. By emphasizing power and independence, with the recognition that additional factors might change the dynamics between actors, I introduce a system that is comfortable with, and capable of addressing, nuanced distinctions between cases. I demonstrate how this system might affect the responsibility of transnational brands for the use of forced labor in their supply chains. Further scholarship should test the system to determine whether additional factors are needed, and to analyze its adequacy in specific industries, such as arms manufacturing.

Because a business's responsibility is based on the confluence of five factors, I set forth a claim that "cause" is qualitatively, not quantitatively, different from "contributes to" and is the end of the responsibility continuum. As a result, multiple businesses can jointly "cause" a harm. This carries an implicit suggestion that businesses that "cause" a harm owe more in terms of

substantive remediation than businesses that "contribute to" the harm. Further scholarship should examine this issue. By challenging the existing guidance, I was able to construct a stronger system of responsibility that aligns with the UNGPs, can answer some of the more difficult questions within BHR, while opening up new possibilities for scholarship.

Endnotes

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[1] Vicky Xiuzhong Xu, et al., *Uyghurs for Sale: "Re-education," Forced Labour and Surveillance Beyond Xinjiang*, AUSTRALIAN STRATEGIC POLICY INSTITUTE, Policy Brief Report No. 26/2020, at 3-4 (2020).

[2] *Id*. at 6.

[3] *See id*. at 4; Amy K. Lehr and Mariefaye Bechrakis, *Connecting the Dots in Xinjiang: Forced Labor, Forced Assimilation, and Western Supply Chains*, CSIS HUMAN RIGHTS INITIATIVE 6 (16 October 2019), https://www.csis.org/analysis/connecting-dots-xinjiang-forced-labor-forced-assimilation-and-western-supply-chains.

[4] For representative literature addressing these debates from different eras, see, e.g., Stéphan Coonrod, The United Nations Code of Conduct for Transnational Corporations, 18 HARV. INT'L L. J. 273 (1977); David Kowalewski, *Transnational Corporations and the Third World's Right to Eat: The Caribbean,* 3 HUM. RTS. Q. 45 (1981); Yemi Osinbajo & Olukonyisola Ajayi, Human Rights and Economic Development in Developing Countries, Int'l Lawyer 727 (1994); Beth Stephens, *The Amorality of Profit: Transnational Corporations and Human Rights*, 20 BERKELEY J. INT'L L. 45 (2002); Robert McCorquodale, *Corporate Social Responsibility and International Human Rights Law*, 87 J. BUSINESS ETHICS 385 (2009); Gwynne Skinner, *Beyond Kiobel: Providing Access to Judicial Remedies for Violations of International Human Rights Norms by Transnational Business in a New (Post-Kiobel) World*, 46 COLUMBIA HUM. RTS. L. REV. 158 (2014); Anita Ramasastry, *Corporate Social Responsibility Versus Business and Human Rights: Bridging the Gap between Responsibility and Accountability*, 14 J. HUM. RTS. 237 (2015).

[5] United Nations Guiding Principles on Business and Human Rights, U.N. Doc. A/HRC/17/31 (2011) [hereinafter UNGPs].

[6] The terms "impact" or "harm" are used interchangeably here. The UNGPs use the term "impacts," which David Birchall rightly argues encompasses a broader range of harms than "violation." *See* David Birchall, *Any Act, Any Harm, To Anyone: The Transformative Potential of "Human Rights Impacts" under the UN Guiding Principles on Business and Human Rights*,

UNIV. OXFORD HUM. RTS HUB J. 120 (2019), https://ohrh.law.ox.ac.uk/publications/any-act-any-harm-to-anyone-the-transformative-potential-of-human-rights-impacts-under-the-un-guiding-principles-on-business-and-human-rights-2019-u-of-oxhrh-j-120/.

[7] UNGPs, *supra* note 5, Principle 12, Commentary.

[8] *Id*. General Principles. For more on the states' existing obligations, see, e.g., Committee on Economic, Social and Cultural Rights, General Comment No. 24 on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities, U.N. Doc. E/C.12/GC/24 (2017).

[9] John Gerard Ruggie & John F. Sherman, III, *The Concept of 'Due Diligence' in the UN Guiding Principles on Business and Human Rights: A Reply to Jonathan Bonnitcha and Robert McCorquodale*, 28 EUR. J. INT'L L. 921, 924 (2017).

[10] UNGPs, *supra* note 5, General Principles.

[11] *Id*. Principle 22.

[12] *Id*. Principle 19 (b), Commentary.

[13] See the introduction to Section 2, below.

[14] I chose "participation terms" because the UNGPs specifically reject the use of legal modes of responsibility and differentiate a business's responsibility based on how it participates in a harm. Some have referred to these terms as "involvement terms," but this phrase diminishes the active nature of business's participation. *See* Debevoise & Plimpton & Enodo Rights, *Practical Definitions of Cause, Contribute, and Directly Linked to Inform Business Respect for Human Rights: Discussion Draft* (9 Feb. 2017), https://www.business-humanrights.org/sites/default/files/documents/Debevoise-Enodo-Practical-Meaning-of-Involvement-Draft-2017-02-09.pdf.

[15] UNGPs, *supra* note 5, Principles 7, 13, 15(c), 17(a), 19, 22, 23, accompanying Commentary.

[16] To date, the only significant engagement is found in: OHCHR, *Response to Request from BankTrack for Advice Regarding the Application of the UN Guiding Principles on Business and Human Rights in the Context of the Banking Sector* 5 (12 June 2017), https://www.ohchr.org/Documents/Issues/Business/InterpretationGuidingPrinciples.pdf; OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, (OHCHR), THE CORPORATE RESPONSIBILITY TO RESPECT HUMAN RIGHTS: AN INTERPRETIVE GUIDE (2012), http://www.ohchr.org/Documents/Issues/Business/RtRInterpretativeGuide.pdf; OECD, OECD DUE DILIGENCE GUIDANCE FOR RESPONSIBLE BUSINESS CONDUCT (2018), https://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf; Michael K. Addo, Chair of the UN Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, Letter to Members of the Thun Group of Banks 3 (23 Feb. 2017), https://www.business-humanrights.org/sites/default/files/documents/20170223%20WG%20BHR%20letter%20to%20Thun%20Group.pdf; UN Working Group on Business and Human Rights, Letter to Roel

Nieuwenkamp re: Request for Guidance on Specific Aspects the Guiding Principles and their Meaning in the Context of Financial Transactions and Institutions (3 Dec. 2013), https://www.ohchr.org/Documents/Issues/Business/LetterResponseToOECD.pdf; John Ruggie, Letter to Prof. Dr. Roel Nieuwenkamp (6 Mar. 2017), https://www.business-humanrights.org/sites/default/files/documents/OECD%20Workshop%20Ruggie%20letter%20-%20Mar%202017%20v2.pdf ; Rachel Davis, *The UN Guiding Principles on Business and Human Rights and Conflict-Affected Areas: State Obligations and Business Responsibilities*, 94 INT'L REV. RED CROSS 961 (2012); CHIARA MACCHI, TARA VAN HO & LUIS FELIPE YANES, ESSEX BUSINESS AND HUMAN RIGHTS PROJECT, INVESTOR OBLIGATIONS IN OCCUPIED TERRITORIES: A REPORT ON THE NORWEGIAN GOVERNMENT PENSION FUND— GLOBAL, (2019), https://www1.essex.ac.uk/ebhr/documents/Investor%20Obligations%20in%20Occupied%20Territories%20-%20Report%20on%20the%20Norwegian%20Government%20Pension%20Fund%20-%20Global%20-%20EBHR%20report.pdf. The discussion paper Debevoise & Plimpton & Enodo Rights, *supra* note 14, and an argument by the Thun Group of Banks were authoritatively rejected by Ruggie, while the UN Working Group also authoritatively rejected the Thun Group's approach. *See*, Ruggie, Letter to Roel Nieuwenkamp, *supra*; Addo Letter, *supra*. These engagements with the participation terms are addressed in detail in Part 3, below.

[17] *See, e.g.*, Chiara Macchi & Claire Bright, *Hardening Soft Law: The Implementation of Human Rights Due Diligence Requirements in Domestic Legislation, in* LEGAL SOURCES IN BUSINESS AND HUMAN RIGHTS: EVOLVING DYNAMICS IN INTERNATIONAL AND EUROPEAN LAW 218 (Martina Buscemi, et al., eds., 2020); James Gathii & Ibironke T. Odumosu-Ayanu, *The Turn to Contractual Responsibility in the Global Extractive Industry*, 1 BUS. & HUM. RTS. J. 69 (2015); Emmanuel Umpula Nkumba, *How to Reduce Conflicts Between Mining Companies and Artisanal Miners in the Province of Lualaba: Overcoming the Policy and Systemic Barriers to a Model that Respect Human Rights*, BUS. & HUM. RTS. J. (2020), https://www.cambridge.org/core/journals/business-and-human-rights-journal.

[18] *See, e.g.,* Jonathan C. Drimmer & Lisa J. Laplante, *The Third Pillar: Remedies, Reparations and the Ruggie Principles, in* THE BUSINESS AND HUMAN RIGHTS LANDSCAPE: MOVING FORWARD, LOOKING BACK 316 (Jena Martin & Karen E. Bravo eds., 2016); Gabrielle Holly, *Transnational Tort and Access to Remedy Under the UN Guiding Principles on Business and Human Rights: Kamasaee v Commonwealth*,19 MELBOURNE J. INT'L L. 52 (2018); Fiona Haines & Kate Macdonald, *Nonjudicial Business Regulation and Community Access to Remedy*, 14 REGULATION & GOVERNANCE 840 (2019), https://doi.org/10.1111/rego.12279; Keon-Hyung Ahn & Hee-Cheol Moon, *An Introductory Study on the Draft Hague Rules on Business and Human Rights Arbitration*, 29 J. ARBITRATION STUD. 3 (2019). As I have noted elsewhere, the issue of substantive reparations has largely been ignored in the BHR scholarship. *See* Tara L. Van Ho, *Introductory Note to the General Comment No. 24 (2017): State Obligations Under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities (CESCR)*, INT'L LEGAL MATERIALS 872, 873 (2019).

[19] *See* OHCHR, *BankTrack Response*, *supra* note 16, at 4, 5.

[20] OHCHR, INTERPRETIVE GUIDE, *supra* note 16.

[21] OHCHR, BankTrack Response, *supra* note 16, at 4.

[22] *See supra* note 16.

[23] *See, e.g.*, Loi No. 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des enterprises donneuses d'ordre, [French Corporate Duty of Vigilance Law], https://respect.international/wp-content/uploads/2017/10/ngo-translation-french-corporate-duty-of-vigilance-law.pdf, https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000034290626&categorieLien=id; Anneloes Hoff, *Dutch Child Labour Due Diligence Law: A Step Towards Mandatory Human Rights Due Diligence*, UNIV. OXFORD HUM. RTS HUB J. (10 June 2019), http://ohrh.law.ox.ac.uk/dutch-child-labour-due-diligence-law-a-step-towards-mandatory-human-rights-due-diligence/#. For ongoing developments internationally, see Business and Human Rights Resource Centre, Mandatory Due Diligence, https://www.business-humanrights.org/en/mandatory-due-diligence.

[24] *See, e.g.*, *generally*, Mariana Aparecida Vilmondes Türke, *Business and Human Rights in Brazil: Exploring Human Rights Due Diligence and Operational-Level Grievance Mechanisms in the Case of Kinross Paracatu Gold Mine*, 15 REVISTA DE DIREITO INTERNACIONAL 222 (2018); Deanna Kemp & John R. Owen, *Grievance Handling at a Foreign-Owned Mine in Southeast Asia*, 4 THE EXTRACTIVE INDUSTRIES & SOC'Y 131 (2016).

[25] *See, e.g.*, Steven Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L. J. 443 (2001); ANDREW CLAPHAM, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS (2006).

[26] As I explain in Section IV, below, the factors create an "open system" as that term is used in general systems theory. *See, e.g.*, Anthony D'Amato, *Groundwork for International Law*, 108 AM. J. INT'L L. 650 (2014); Stefan Oeter, *International Law and General Systems Theory*, 44 GERMAN Y.B. INT'L L. 72 (2001).

[27] UNGPs, *supra* note 5, Principles 15-16, and Commentary.

[28] The UNGPs were unanimously endorsed by the Human Rights Council, are the basis for National Action Plans aimed at implementing the Guiding Principles and have been referenced by business in policy statements. *See, e.g.*, Human Rights Council, Resolution 17/4, U.N. Doc. A/HRC/RES/17/4 (6 July 2011); Business and Human Rights Resource Centre, Company Policy Statements on Human Rights, https://www.business-humanrights.org/en/company-policy-statements-on-human-rights; OHHR, State National Action Plans on Business and Human Rights, https://www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx.

[29] UNGPs, *supra* note 5, Principles 17, 22, and Commentaries.

[30] *Id.*

[31] Jonathan Bonnitcha & Robert McCorquodale, *The Concept of "Due Diligence" in the UN Guiding Principles on Business and Human Rights,* 28 EUR. J. INT'L L. 899, 917 (2017).

[32] Ruggie & Sherman, *supra* note 9, at 928.

[33] *Id.*

[34] UN Working Group, Letter to Roel Nieuwenkamp, *supra* note 16.

[35] UNGPs, *supra* note 5, Principle 11.

[36] For a representative sample of the literature in these areas, *see*, Holly, *supra* note 18; Robert McCorquodale, *Waving Not Drowning:* Kiobel *Outside the United States*, 107 AM. J. INT'L L. 846 (2013); Caroline Kaeb, *The Shifting Sands of Corporate Liability Under International Criminal Law*, 49 GEO. WASH. INT'L L. REV. 351 (2016); Nadia Bernaz, *Corporate Criminal Liability Under International Law: The* New TV S.A.L. *and* Akhbar Beirut S.A.L. *Cases at the Special Tribunal for Lebanon*, 13 J. INT'L CRIM. JUST. 313 (2015); LUCAS ROORDA, JURISDICTION OVER FOREIGN DIRECT LIABILITY CLAIMS AGAINST TRANSNATIONAL CORPORATIONS IN E.U. MEMBER STATES: INCREASING ACCESS TO REMEDY FOR VICTIMS OF HUMAN RIGHTS VIOLATIONS (2019); Tara L. Van Ho, *Transnational Civil and Criminal Litigation*, *in* CORPORATE ACCOUNTABILITY IN THE CONTEXT OF TRANSITIONAL JUSTICE 52 (Sabine Michalowski ed., 2013); Andrew Sanger, *Corporations and Transnational Litigation: Comparing* Kiobel *with the Jurisprudence of English Courts*, 107 AM. J. INT'L L. UNBOUND 23 (2013).

[37] Robert C. Blitt, *Beyond Ruggie's Guiding Principles on Business and Human Rights: Charting an Embracive Approach to Corporate Human Rights Compliance*, 48 TEX. INT'L L. J. 33, 49 (2012); Björn Fasterling & Geert Demuijnck, *Human Rights in the Void? Due Diligence in the UN Guiding Principles on Business and Human Rights*, 116 J. BUS. ETHICS 799, 809 (2013).

[38] *See, e.g.*, CLAPHAM, *supra* note 25; *Clarifying the Concepts of "Sphere of Influence" and "Complicity" Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie*, U.N. Doc. A/HRC/8/16 (15 May 2008); UNGPs, *supra* note 5, Principle 17 and Commentary.

[39] *Id.*

[40] This sits in contrast to explanations as to why Ruggie adopted "human rights due diligence." *See e.g.*, JOHN GERARD RUGGIE, JUST BUSINESS: MULTINATIONAL CORPORATIONS AND HUMAN RIGHTS 99-102, 113-14 (2013); Ruggie & Sherman, *supra* note 9.

[41] *Id.* at 924.

[42] Ruggie has criticized those he perceives as "legal formalists" as being out of touch with reality. John Ruggie, Statement to the Business and Human Rights Resource Center on the Book Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect? (17 Dec. 2013), https://www.business-humanrights.org/sites/default/files/media/ruggie-comment-surya-deva-david-bilchitz.pdf.

[43] I use the term "transpose" instead of the commonly employed "transplant" in recognition that the imported rule "takes the same relative place" of the original but with some changes intended

to "suit the particular socio-legal culture and needs of the recipient." *See* Esin Örücü, *Law as Transposition*, 51 INT'L & COMP. L. Q. 205, 207 (2002). Other scholars have introduced other terms including reception, migration or mobility, circulation, and diffusion. *See* Olivier Moréteau, *An Introduction to Contamination*, (2010) 3 J. CIV. L. STUD. 9, 9 (2010).

[44] *See, e.g.*, Markus D. Dubber, *Criminalizing Complicity: A Comparative Analysis*, 5 J. INT' CRIM. JUST. 977 (2007); Mohamed A. 'Arafa, *Criminal Complicity: Accomplices Criminal Liability to the Criminal Offences: A Comparative Analysis Between the Egyptian Criminal Law System and the Criminal Law System of the United States of America*, *Revista de Estudos Criminais* 9 (2017); MARINA AKSENOVA, COMPLICITY IN INTERNATIONAL CRIMINAL LAW (2016).

[45] *See* Eduardo Viveiros de Castro, *Perspectival Anthropology and the Method of Controlled Equivocation*, 2 TIPITÍ: J. SOC'Y FOR THE ANTHROPOLOGY OF LOWLAND S. AM. 3 (2004).

[46] Elisabetta Grande, *Legal Transplants and the Inoculation Effect: How American Criminal Procedure Has Affected Continental Europe,* 64 AM. J. COMP. L. 583, 585-86 (2016).

[47] *See* Moréteau, *supra* note 43.

[48] UNGPs, *supra* note 5, Principle 17, Commentary.

[49] *Id.*

[50] Alien Tort Statute, 28 U.S.C § 1350 (25 June 1948).

[51] *See, e.g.*, Presbyterian Church of Sudan v. Talisman Energy, 582 F.3d 244, 257 n 7 (US 2d Cir. 2009). For an overview of the use of the ATS, see Katherine Gallagher, *Civil Litigation and Transnational Business: An Alien Tort Statute Primer*, 8 J. INT'L CRIM. JUST. 745 (2010).

[52] Complicity under customary international law involves knowingly providing "practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime." ICTY, Prosecutor v. Anto Furundzija, Judgement (Trial Chamber), Case No. IT-95-17/1-T (10 Dec. 1998), ¶ 249. The Commentary to the UNGPs recognizes this standard under customary international criminal law. *See* UNGPs, *supra* note 5, Principle 17, Commentary.

[53] Rome Statute of the International Criminal Court, adopted 17 July 1998, art. 25(3)(c), U.N. Doc. A/CONF.183/9 (1998), 2187 U.N.T.S. 90 (*entered into force* 1 July 2002). *Compare* Kiobel v. Royal Dutch Petroleum, Co., 621 F.3d 111 (US 2d Cir. 2010), *affirmed on other grounds by the US Supreme Court*, 133 US 1659 (2013); Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244, 258 (US 2d Cir. 2009). For further analysis, *see, e.g.,* Sabine Michalowski, *The "Mens* Rea" *Standard For Corporate Aiding and Abetting Liability—Conclusions From International Criminal Law,* 18 UCLA J. INT'L L. FOREIGN AFF. 237 (2014).

[54] Manuel Ventura claims that the ICC approach remains uncertain even now. *See* Manuel J. Ventura, *The International Criminal Court's* Bemba et al. *Case*: *The ICC Trial and Appeals Chamber Consider Aiding and Abetting under Article 25(3)(c) of the Rome Statute (1998),* 20 INT'L CRIM. L. REV. 1138 (2020).

[55] Without addressing the *mens rea* debate, the US Supreme Court has held that the US cannot hear cases under the ATS against foreign corporations. *See* Jesner et al., v. Arab Bank, PLC, 138 S. Ct. 1386 (2018); *see also* Rebecca J. Hamilton*, Jesner v. Arab Bank,* 112 AM J. INT'L L. 720 (2018).

[56] For more on the confusion, and a representative sample of literature, *see* James G. Stewart, *The Turn to Corporate Criminal Liability for International Crimes: Transcending the Alien Tort Statute*, 47 NYU J. INT'L L. & POL. 121, 143-46 (2014); Chimène I. Keitner, *Conceptualizing Complicity in Alien Tort Cases*, 60 HASTINGS L. J. 61, 62 (2008); Sabine Michalowski, *No Complicity Liability for Funding Gross Human Rights Violations?*, 30 BERKELEY J. INT'L L. 451 (2012).

[57] OHCHR, BankTrack Response, *supra* note 16, at 5; OHCHR, INTERPRETIVE GUIDE, *supra* note 16.

[58] OHCHR, BankTrack Response, *supra* note 16, at 5; OHCHR, INTERPRETIVE GUIDE, *supra* note 16.

[59] OHCHR, BankTrack Response, *supra* note 16, at 5.

[60] OECD, *supra* note 16, at 70.

[61] Davis, *supra* note 16, at 973.

[62] OHCHR, BankTrack Response, *supra* note 16, at 6.

[63] *Id.*

[64] *See, e.g.*, OHCHR, INTERPRETIVE GUIDE, *supra* note 16, at Q46, Answer.

[65] UNGPs, *supra* note 5, Principle 19 and Commentary.

[66] *Id.*

[67] *Id.*

[68] *Id.*

[69] OHCHR, BankTrack Response, *supra* note 16, at 7; Ruggie, Letter to Nieuwenkamp, *supra* note 16.

[70] OHCHR, BankTrack Response, *supra* note 16, at 7.

[71] *Id.*

[72] *Id.* at 5-7 (June 2017); OHCHR, INTERPRETIVE GUIDE, *supra* note 16.

[73] Bonnitcha & McCorquodale, *supra* note 31, at 912.

[74] Ruggie & Sherman, *supra* note 9, at 927.

[75] Dan Danielsen, *How Corporations Govern: Taking Corporate Power Seriously in Transnational Regulation and Governance*, 46 Harv. Int'l L. J. 411, 421-22 (2005). Sometimes, this is a temporary arrangement while they build up "the resources and customer clout" to affect the regulation they are subjected to. *Id.*

[76] Thun Group of Banks, *Discussion Paper on the Implications of Guiding Principles 13 & 17 in a Corporate and Investment Banking Context* 3 (2017), https://www.business-humanrights.org/sites/default/files/documents/2017_01_Thun%20Group%20discussion%20paper.pdf (internal quotations omitted).

[77] *Id*. at 6-7.

[78] Addo Letter, *supra* note 16, at 3; Ruggie, Letter to Nieuwenkamp, *supra* note 16, at 2.

[79] Addo Letter, *supra* note 16, at 2-3.

[80] Ruggie, Letter to Nieuwenkamp, *supra* note 16, at 2.

[81] *Id*.

[82] *Id*. Following Ruggie's letter, OECD included these factors in its official guidance. *See* OECD, *supra* note 16, at 70.

[83] Ruggie, Letter to Nieuwenkamp, *supra* note 16, at 2.

[84] Another source might have been the OECD National Contact Points (NCPs), which are tasked with mediating disputes under the OECD Guidelines on Multinational Enterprises. Unfortunately, NCPs are often unable or unwilling to review the actions of governments, even to determine a business's responsibility, meaning their decisions are at best incomplete, and at worst opaque and inconsistent. *See, e.g*., Lok Shakti Abhiyan et. al v. Government Pension Fund – Global, South Korean National Contact Point (27 May 2013), https://www.oecdwatch.org/complaint/lok-shakti-abhiyan-et-al-vs-government-pension-fund-global/; Jijnjevaerie Saami Village v. Statkraft, Sweden National Contact Point (29 Oct. 2012), https://complaints.oecdwatch.org/cases/Case_280.

[85] Davis, *supra* note 16, at 973.

[86] MACCHI, VAN HO, & YANES, *supra* note 16.

[87] *See* OHCHR, BankTrack Response, *supra* note 16, at 7; Addo Letter, *supra* note 16; Ruggie, Letter to Nieuwenkamp, *supra* note 16, at 2. For their additional guidance, *see* OHCHR, INTERPRETIVE GUIDE, *supra* note 16; UN Working Group, Letter to Roel Nieuwenkamp, *supra* note 16, at 2.

[88] *See* OHCHR, BankTrack Response, *supra* note 16, at 4-5; OHCHR, INTERPRETIVE GUIDE, *supra* note 16, at 17; UN Working Group, Letter to Roel Nieuwenkamp, *supra* note 16, at 2-3;

OECD, *supra* note 16, at 70; Davis, *supra* note 16, at 973.

[89] MACCHI, VAN HO & YANES, *supra* note 16, at 21.

[90] OHCHR, BankTrack Response, *supra* note 16, at 5.

[91] *See* Davis, *supra* note 16, at 973; UN Working Group, Letter to Roel Nieuwenkamp, *supra* note 16, at 2.

[92] OHCHR, BankTrack Response, *supra* note 16, at 5-6; UN Working Group, Letter to Roel Nieuwenkamp, *supra* note 16, at 2.

[93] OHCHR, BankTrack Response, *supra* note 16, at 6.

[94] OHCHR, INTERPRETIVE GUIDE, *supra* note 16, at Q46, Answer.

[95] *See* notes 31-35.

[96] OHCHR, INTERPRETIVE GUIDE, *supra* note 16, at Q39, Answer.

[97] UN Working Group, Letter to Roel Nieuwenkamp, *supra* note 16, at 2; OHCHR, INTERPRETIVE GUIDE, *supra* note 16, at Q25, Answer; Davis, *supra* note 16, at 973.

[98] OHCHR, INTERPRETIVE GUIDE, *supra* note 16, at Q25, Answer.

[99] UNGPs, *supra* note 5, Principle 23(b) and Commentary.

[100] MACCHI, VAN HO & YANES, *supra* note 16.

[101] *Id*. at 11, 21, 25.

[102] *Id.* at 21.

[103] *Id*. at 11, 21, 25.

[104] *Id*. at 25-26.

[105] OHCHR, BankTrack Response, *supra* note 16, at 5.

[106] *Id.*

[107] *Id.*

[108] *Id.*

[109] UN Working Group, Letter to Roel Nieuwenkamp, *supra* note 16, at 3.

[110] OECD, *supra* note 16, at 71.

[111] *See supra* notes 80-81.

[112] *See, e.g.*, ROSS CRANSTON, ET AL., PRINCIPLES OF BANKING LAW 199-201 (3d ed. 2018); EMMANUEL IOANNIDES, FUNDAMENTAL PRINCIPLES OF EU LAW AGAINST MONEY LAUNDERING 49-53 (2014).

[113] Tara L. Van Ho & Mohammed K. Alshaleel, *The Mutual Fund Industry and the Protection of Human Rights*, 18 HUM. RTS REV. 1, 5-8 (2018).

[114] *Id.* at 15-16.

[115] SOUTH AFRICAN TRUTH AND RECONCILIATION COMMISSION (SATRC), REPORT OF THE REPARATION & REHABILITATION COMMITTEE: REPARATIONS AND THE BUSINESS SECTOR VOL. 6, § 2, ch. 5, ¶ 21 (n.d.), https://www.justice.gov.za/trc/report/finalreport/vol6_s2.pdf [hereinafter SATRC REPORT]. This is not the only time Swiss banks have been accused of supporting oppressive regimes. *See Anita Ramasastry, Secrets and Lies? Swiss Banks and International Human Rights*, 31 VANDERBILT J. TRANSN'L L. 325 (1998).

[116] SATRC REPORT, *supra* note 115, ¶¶ 26, 23.

[117] *Id.* ¶¶ 23-28.

[118] In re South African Apartheid Litigation, 617 F.Supp. 2d 228 (S.D.N.Y. 2009).

[119] *Id.* at 257.

[120] *Id.* at 265.

[121] *Id.*

[122] *See supra* notes 80-81.

[123] *See* U.N. Doc. E/C.12/GC/24, *supra* note 8.

[124] Michalowski, No Complicity, *supra* note 56, at 484.

[125] *Id.* at 484, 509-10.

[126] *Id.*

[127] MACCHI, VAN HO & YANES *supra* note 16.

[128] *Id.* at 18-21.

[129] *Id.* at 19-20.

[130] *Id.*

[131] *See* Davis, *supra* note 16.

[132] UN Working Group, Letter to Roel Nieuwenkamp, *supra* note 16, at 3.

[133] OHCHR, INTERPRETIVE GUIDE, *supra* note 16, at Q 25, Answer.

[134] Davis, *supra* note 16, at 973.

[135] OECD, *supra* note 16, at 70.

[136] OHCHR, INTERPRETIVE GUIDE, at Q 25, Answer.

[137] *Id*. at 17.

[138] Davis, *supra* note 16, at 973; OHCHR, INTERPRETIVE GUIDE, *supra* note 16, at Q39, Answer.

[139] *Id*. at Q46, Answer.

[140] Davis, *supra* note 16, at 974.

[141] OECD, *supra* note 16, at 71.

[142] *Id*.

[143] For a discussion on how power can vary depending on the nature of the supply chain, *see e.g*., ANDREW COX, ET AL., SUPPLY CHAINS, MARKETS AND POWER: MANAGING BUYER AND SUPPLIER POWER REGIMES 20-22 (2001). For an examination of how businesses respond to scarcity issues within natural resource supply chains, *see* Dimitra Kalaitzi, et al., *Supply Chain Strategies in an Era of Natural Resource Scarcity*, 38 INT'L J. OPS & PROD. MGMT 784 (2018).

[144] Addo letter, *supra* note 16, at 4.

[145] *See supra* note 75.

[146] Ruggie, Letter to Nieuwenkamp, *supra* note 16, at 2.

[147] *See supra* notes 73-80.

[148] See above Section III.

[149] *See supra* note 113.

[150] Jena Martin Amerson, *What's in a Name: Transnational Corporations as Bystanders Under International Law*, 85 ST. JOHN'S L. REV. 1, 2 (2011).

[151] *Id*. at 25-26.

[152] *See* A. R. M. Babu, *Why Ken Saro-Wiwa Had to Hang,* 11 EARTH ISLAND J. 24, 24 (1995-1996). Claims against Shell are still being litigated in the Netherlands after the US Supreme Court denied jurisdiction under the ATS. Rechtbank Den Haag, 1 July 2019, ECLI:NL:RBDHA:2019:6670 (English translation published 19 July 2019),

https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2019:6670. For the US case, see, *Kiobel, supra* note 53.

[153] Amerson, *supra* note 150, at 25-26. For his first-hand account of the trial, see, Ken Saro-Wiwa, *Ken Saro-Wiwa's Final Address to the Military-Appointed Tribunal,* 11 EARTH ISLAND J. 25 (1995-1996) (on file with author).

[154] Babu, *supra* note 152.

[155] Amerson, *supra* note 150, at 25-26.

[156] *Id*. at 25.

[157] *See generally*, *id*.

[158] *Id*.

[159] *Id*.

[160] Babu, *supra* note 152. Ken Saro-Wiwa wrote a speech for the trial in which he stated a belief that the trial itself was an indictment of Shell's conduct, even if Shell was not facing legal sanction at the time. *See* Saro-Wiwa, *supra* note 153.

[161] Shell claimed it was "concerned about, and sympathise[d] with, many of the grievances felt" by the Ogoni and other Niger Delta communities. *See* Amerson, *supra* 150, at 4.

[162] International Criminal Tribunal for the former Yugoslavia, Prosecutor v. Furundzija, Judgement, Case No. IT-95-17/1-T (Trial Chamber), ¶¶ 209, 232-35.

[163] *Id*. ¶ 262.

[164] *Id*. ¶ 232.

[165] *See, e.g.,* INTERNATIONAL COUNCIL ON HUMAN RIGHTS POLICY, BEYOND VOLUNTARISM: HUMAN RIGHTS AND THE DEVELOPING INTERNATIONAL LEGAL OBLIGATIONS OF COMPANIES 9-10 (2002); Ratner, *supra* note 25, at 496-98.

[166] *See, e.g., id*. 519-20.

[167] *See supra* note 13.

[168] *See* Section III.

[169] *See supra* notes 143-145.

[170] *See supra* note 150.

[171] Tara L. Van Ho & Alshaleel, *supra* note 113.

[172] MACCHI, VAN HO & YANES, *supra* note 16.

[173] *See, e.g.*, Gathii & Odumosu-Ayanu, *supra* note 16. The American Bar Association has developed model contract clauses to facilitate this, and a group of experts have proposed rules for arbitrating such disputes. *See* Sarah Dadush, *Contracting for Human Rights: Looking to Version 2.0 of the ABA Model Contract Clauses*, 68 AM. UNIV. L. REV. 1519 (2019); Center for International Legal Cooperation, The Hague Rules on Business and Human Rights Arbitration, https://www.cilc.nl/project/the-hague-rules-on-business-and-human-rights-arbitration/. *But, see* Jonathan C. Lipson, *Something Else: Specific Relief for Breach of Human Rights Terms in Supply Chain Agreements,* 68 AM. UNIV. L. REV. 1751 (2019).

[174] *See* Sadaat Ali Yawar & Stefan Seuring, *Management of Social Issues in Supply Chains: A Literature Review Exploring Social Issues, Actions and Performance Outcomes,* 141 J. BUS. ETHICS 621, 626 (2017).

[175] *See supra* note 113.

[176] MACCHI, VAN HO & YANES, *supra* note 16.

[177] OHCHR, BankTrack Response, *supra* note 16, at 5-6.

[178] In 2016, Dutch banks signed an agreement to ensure respect for human rights in their corporate loans, including through contractual terms. *See* DUTCH BANKING SECTOR AGREEMENT ON INTERNATIONAL RESPONSIBLE BUSINESS CONDUCT REGARDING HUMAN RIGHTS, § 4 (2016), https://www.imvoconvenanten.nl/en/banking/about-this-agreement.

[179] *Supra* note 75.

[180] OHCHR, INTERPRETIVE GUIDE, *supra* note 16, at Q25, Answer.

[181] *Id.*

[182] The Japanese company behind the Fukushima nuclear disaster has tried to claim the tsunami triggering the disaster was unpredictable. The company, however, had been warned to prepare for a tsunami of that size. For more on this, see Tara L Van Ho & Theodora N. Valkanou, *The Fukushima Diaspora: Assessing the State-Based Non-Judicial Remedies, in* CIVIL AND POLITICAL RIGHTS IN JAPAN: A TRIBUTE TO NIGEL RODLEY (Saul J. Takahashi ed., 2019).

[183] UNGPs, *supra* note 5, Principle 12, Commentary.

[184] OHCHR, BankTrack Response, *supra* note 16, at 7,

[185] *Id.*

[186] MACCHI, VAN HO & YANES, *supra* note 16.

[187] I chose the term predictability to distinguish it from existing English tort law standards of foreseeability, which requires both the harm and affected individuals as foreseeable. *See, e.g.*,

Caparo Industries v. Dickman [1990] 2 A.C. 605, 618 (UK House of Lords).

[188] See Martin Amerson, *supra* note 150, at 25-26.

[189] *See* OHCHR, INTERPRETIVE GUIDE, *supra* note 16, at 8.

[190] *See supra* note 113.

[191] See, Ruggie & Sherman, *supra* note 9, at 928.

[192] OHCHR, BankTrack Response, *supra* note 16, at 7; Ruggie, Letter to Nieuwenkamp, *supra* note 16.

[193] OHCHR, INTERPRETIVE GUIDE, *supra* note 16, at 17.

[194] *See* Section III.

[195] *See* D'Amato, *supra* note 26.

[196] *Id.* at 650. Open systems interact with the environment around them while a closed system interacts only with itself.

[197] UN Working Group, Letter to Roel Nieuwenkamp, *supra* note 16; UNGPs, *supra* note 5, Principle 11.

[198] John Sudworth, *China Muslims: Volkswagen says 'No Forced Labour' at Xinjiang Plant*, BBC NEWS (12 Nov. 2020), https://www.bbc.co.uk/news/world-asia-china-54918309.

[199] *Id.*

[200] Sinéad Baker, *Volkswagen is not Closing its Factory in Xinjiang as Long as it's 'Economically Feasible,' Exec Says*, BUS. INSIDER (19 Apr. 2021), https://www.businessinsider.com/volkswagen-xinjiang-factory-economically-feasible-stephan-woellenstein-2021-4.

[201] Sudworth, *supra* note 198.

[202] Baker, *supra* note 200.

[203] *See* Liza Lin, Eva Xiao, & Yoko Kubota, *Chinese Suppliers to Apple, Nike Shun Xinjiang Workers as U.S. Forced Labor Ban Looms*, WALL ST. J. (20 July 2021), https://www.wsj.com/articles/chinese-suppliers-to-apple-nike-shun-xinjiang-workers-as-u-s-forced-labor-ban-looms-11626795627.

[204] Meihui Zhao, *The Supplier System in Chinese Automobile Industry: The Case of FAW Volkswagen,* INTERNATIONAL CONFERENCE ON ECONOMIC MANAGEMENT SCIENCE AND FINANCIAL INNOVATION 141, 144 (2018) (indicating the power Volkswagen exercises over suppliers despite trying to ensure a collaborative relationship).

[205] Genevieve LeBaron, *Subcontracting Is Not Illegal, But Is It Unethical? Business Ethics, Forced Labor, and Economic Success*, 2 BROWN J. WORLD AFF. 237, 237-38 (2014).

[206] Katie Canales, *7 Apple Suppliers in China Have Links to Forced labor Programs, including the Use of Uyghur Muslims in Xinjiang, According to a New Report*, BUS. INSIDER (10 May 2021), https://www.businessinsider.com/apple-china-suppliers-uyghur-muslims-forced-labor-report-2021-5?r=US&IR=T.

[207] U.S. Congressional-Executive Commission on China, *Xinjiang: Chairs Issue Statement about Forced Labor in Apple's Supply Chain*, (8 June 2021), https://www.cecc.gov/media-center/press-releases/chairs-issue-statement-about-forced-labor-in-apple%E2%80%99s-supply-chain-in.

[208] *Id.*; Ana Swanson, *Nike and Coca-Cola Lobby against Xinjiang Forced Labor Bill*, N. Y. TIMES (29 Nov. 2020), https://www.nytimes.com/2020/11/29/business/economy/nike-coca-cola-xinjiang-forced-labor-bill.html.

[209] Lin, Xiao, & Kubota, *supra* note 203.

[210] *Supplier Shares Hit by Apple 'Cut-Off Woes' over Xinjiang Labour*, ASIA FINANCIAL (8 April, 2021), available at https://www.asiafinancial.com/supplier-shares-hit-by-apple-cut-off-woes-over-xinjiang-labour.

[211] Lin, Xiao, and Kubota, *supra* note 203203.

[212] LeBaron, *supra* note 205.

[213] *See, e.g.*, Jenny Chan, Pun Ngai, & Mark Selden, *The Politics of Global Production: Apple, Foxconn and China's New Working Class*, 28 NEW TECH., WORK & EMPLOY. 100, 108-11 (2013).

[214] *See Committee on the Elimination of Racial Discrimination, Concluding Observations on the Combined Fourteenth to Seventeenth Periodic Reports of China (including Hong Kong, China, and Macao, China)*, U.N. Doc. CERD/C/CHN/CO/14-17 ¶¶ 39-42 (2018).