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Interview with John G. Ruggie*

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The conduct of multinational corporations, particularly those operating in conflict areas, is increasingly becoming subject to public scrutiny. More and more companies profess a commitment to live up to their human rights responsibilities in fragile contexts. In situations of armed conflict, international humanitarian law also applies. The business sector is, however, relatively less aware of this body of law.

In June 2011, the United Nations Human Rights Council adopted unanimously the Guiding Principles on Business and Human Rights, which spell out what measures companies and states could take to strengthen the human rights performance of the business sector around the world.¹ The Review wanted to hear from the person who spearheaded this initiative, Professor John G. Ruggie, and have his views on any emerging good practices amongst governments and companies in implementing the Guiding Principles, on the importance of due diligence criteria and grievance mechanisms, and on the role of regional organisations and civil society in promoting the Principles.

Trained as a political scientist, Professor Ruggie has made significant contributions to the study of international relations, focusing on the impact of economic and other forms of globalisation on global rule-making and the emergence of new rule-makers. In addition to his academic pursuits, Professor Ruggie has long been involved in practical policy work. From 1997–2001, he served as UN Assistant Secretary-General for Strategic Planning, assisting the Secretary-General in establishing and overseeing the UN Global Compact, and proposing and gaining General Assembly approval for the Millennium Development Goals. In 2005, Professor Ruggie was appointed as the UN Secretary-General's Special Representative for Business and Human Rights. Over the course of six years and after extensive research, consultations, and work on pilot projects, Professor Ruggie developed the UN Guiding Principles on Business and

* This interview was conducted at Harvard University in Boston on 29 March 2012 by Vincent Bernard, Editor-in-Chief of the *International Review of the Red Cross*, and Mariya Nikolova, Editorial Assistant.

Human Rights. Today, he chairs the boards of two non-profits, the Institute for Human Rights and Business and Shift: Putting Principles into Practice, and serves as Senior Advisor to the corporate social responsibility practice of the law firm Foley Hoag LLP.

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Professor Ruggie, could you summarize what your mandate as Special Representative on Business and Human Rights tried to tackle? What are the problems that we face today when we talk about business and human rights, especially in conflict areas?

The main problem was the lack of authoritative standards and guidance for states and businesses with regard to their respective obligations in the area of business and human rights. Different countries have different legal requirements at the domestic level. There are no universally recognized and enforced legal rules with regard to the overseas conduct of corporations in relation to human rights. In some jurisdictions it is possible to bring cases against companies for overseas behaviour; in others it is more difficult or impossible. There has been a proliferation of voluntary initiatives but none has reached any scale. So, there was a general lack of clarity and lack of understanding about both what states are supposed to do with regard to regulating businesses and what businesses are supposed to do with regard to their own responsibilities, whatever the local legal requirements may be. This was the overarching problem that my United Nations mandate tried to address.

In different industry sectors, and in different regions of the world, you have different manifestations of the problem. In the case of light manufacturing, for example, the issue typically has to do with inadequate or unenforced workplace standards. In the extractive industry, it has to do with community relations and inadequate consultations and compensation for land, and with physical security of persons. There have been numerous instances of security agents – whether state or private – wounding or even killing people who demonstrate outside a mining operation or outside an oil facility or a plantation. In the information and communication technology sector, the main issues are the right to privacy and freedom of expression, with companies either infringing on those rights directly through their own commercial practices, or by being complicit with governments in invading privacy or curtailing freedom of expression through censorship.

Conflict zones are particularly problematic because nobody can claim that the human rights regime, as it is designed, can possibly function in a situation of extreme duress for the host state. Though it technically has the primary obligation to protect human rights, in times of armed conflict the host state is typically either not functioning, does not control a particular part of a country, or is itself engaged in human rights violations.

1 See UN Doc. A/HRC/17/31, Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework, 21 March 2011, unanimously endorsed by the United Nations Human Rights Council on 16 June 2011.

In short, the specific manifestations vary but the overarching problem is that there was no universally recognized authoritative set of rules that would govern or guide these issues globally. The UN Guiding Principles on Business and Human Rights begin to fill that gap.

You conducted extensive research and consultations before submitting the Guiding Principles to the UN Human Rights Council. What challenges do you identify ahead in terms of their implementation?

Yes, we convened nearly fifty international consultations during the course of the mandate, and at one point we had more than two-dozen law firms and numerous other volunteers from around the world conducting *pro bono* research. The UN Working Group² – and everyone else in this space – can draw on these foundations. All of the materials are posted on the Business and Human Rights Resource Centre website.³

The mandate of the UN Working Group is to promote implementation and disseminate the Guiding Principles; to help build capacity, both among small and medium-sized enterprises as well as in smaller countries; to make country visits in order to get a better sense of how things are working out on the ground; and to convene an annual forum in Geneva where stakeholders come together and reflect on the progress that has been made. On the basis of that mandate the Working Group can also offer further recommendations to the Human Rights Council.

Do you consider that your mission has been accomplished?

Absolutely! I'm done. I signed up for two years and ended up serving for six because governments kept extending and expanding the mandate. When I began, it was intended essentially to identify and clarify existing standards and best practices. There was no normative dimension to it. After the second year I was asked to develop recommendations. So I returned in the third year with the 'Protect, Respect and Remedy' framework. The Human Rights Council welcomed it unanimously.⁴ They also asked me to spend another three years to develop more operational guidance on how to implement the Framework. This is how the Guiding Principles came to be.

Nevertheless, when I presented the Guiding Principles to the Council in June 2011, I stated in my remarks that I was under no illusion that this now solved

2 Editor's Note: The UN Human Rights Council resolution endorsing the Guiding Principles (UN Doc. A/HRC/RES/17/4, 6 July 2011) also established a UN Working Group on Business and Human Rights, whose key mandate is to promote the effective and comprehensive dissemination and implementation of the Guiding Principles.

3 See Business & Human Rights Resource Centre, available at: <http://www.business-humanrights.org/SpecialRepPortal/Home>.

4 Editor's Note: The 'Protect, Respect and Remedy' framework was elaborated in UN Doc. A/HRC/8/5, 7 April 2008, and is discussed in detail in Rachel Davis' contribution in this edition.

all business and human rights problems once and for all time. This is not the end, I said, but it is the end of the beginning. What I meant is that we now have for the first time a common framework and set of normative standards with regard to business and human rights that have been unanimously endorsed by the UN Human Rights Council. This includes not only Western countries, but also Brazil, China, India, Nigeria, Russia, and every other of the forty-seven countries represented on the Council.

The endorsement of the Guiding Principles was quite exceptional. It was the first time that the UN Human Rights Council or its predecessor had ever used the verb 'endorse' in relation to a normative text that governments did not negotiate themselves. Furthermore, the Corporate Responsibility to Respect Human Rights component has been incorporated into the new Organisation for Economic Co-operation and Development's (OECD) Guidelines for Multinational Enterprises,⁵ which have a complaints mechanism. It has been referenced by the International Finance Corporation, which affects access to capital. The International Organisation of Standardization (ISO) recapitulates its core features in ISO 26000, and it has a whole industry of consultants behind it who are eager to help companies become certified as operating in a socially responsible manner. The Guiding Principles are also included in the new European Union (EU) corporate responsibility strategy. All of this makes the Guiding Principles the most authoritative global standard in business and human rights.

I should also note that when the EU and the United States (US) suspended economic sanctions on Burma, both referenced the UN Guiding Principles as benchmarks for investors – indeed, the US did so in the reporting requirements it established for US individuals and entities investing more than US\$500,000 in Burma. So the Guiding Principles have provided short-term guidance, as well as driving a longer-term process.

Could you give some examples of the follow-up work that has been done directly with companies since the adoption of the Guiding Principles?

I have already mentioned several important instances. There are many others. For example, the association of major oil companies called IPIECA has launched a two-year pilot project to pilot the due diligence requirements as well as the grievance mechanisms specified in the Guiding Principles. The mining industry is equally active. The European Commission has undertaken a project to develop sector-specific guidance for businesses in employment and recruitment, information and communication technologies, and the oil and gas industries, as well as for small and medium-sized enterprises.

5 The OECD Guidelines are available to consult online at: <http://www.oecd.org/daf/internationalinvestment/guidelinesformultinationalenterprises/oecdguidelinesformultinationalenterprises.htm> (last visited June 2012).

Also, when the UN Human Rights Council considered the Guiding Principles, a number of companies posted endorsements on the Internet, ranging from a palm oil company in Malaysia to Coca-Cola, General Electric, and Sakhalin Energy in Russia. A wide variety of companies have endorsed the Guiding Principles and are moving forward with implementation. At the same time, several governments have held public hearings or inter-agency meetings on developing national implementation strategies. So we're off and running. But this type of work does take time: the Guiding Principles were only endorsed in June 2011.

How has civil society responded to, or used, the Guiding Principles so far?

Initially, a number of civil society groups viewed my mandate through traditional lenses, arguing that I should advocate for a single, overarching international business and human rights treaty; that I should receive complaints from victims; and so on. I took great pains to explain why these approaches were not the most effective way to rapidly reduce the incidence of corporate-related human rights harm and that judicial remedy, while necessary for providing remedy in the case of some abuses, needed to be supplemented with non-judicial forms that can deal quickly and fairly with many grievances before they escalate. But those differences are ancient history. Civil society is now using the Guiding Principles as an advocacy tool and as the basis for developing additional, more focused initiatives.⁶ Workers organisations were strongly supportive throughout the mandate. And they, too, are using the Guiding Principles as benchmarks against which to measure both companies and governments and to advocate for improved policies and practices.⁷

How do you see the role of an organisation such as the ICRC in the global impulse to provide a common framework for companies regarding their involvement in conflict situations or situations of violence?

Along with the Guiding Principles I submitted a companion report dealing specifically with conflict situations.⁸ It is my belief that conflict situations warrant special measures on the part of governments, both host and home governments – the latter especially where the host governments may not be in control of a particular part of a country in which a conflict is taking place. These situations also require enhanced due diligence by business enterprises.

6 For examples, see <http://accountabilityroundtable.org/campaigns/human-rights-due-diligence> (last visited June 2012); and SOMO, CEDHA, Cividep, 'How to use the UN Guiding Principles for Business and Human Rights in company research and advocacy', due to be published in 2012.

7 For example, see International Trade Union Confederation, 'The UN "Protect, Respect and Remedy" framework for business and human rights and the UN Guiding Principles on Business and Human Rights: a guide for trade unionists', May 2012, available at: <http://www.ituc-csi.org/the-united-nations-protect-respect,11734.html> (last visited July 2012).

8 Business and Human Rights in Conflict-Affected Regions: Challenges and Options for State Responses, UN Doc. A/HRC/17/32, 27 May 2012.

A greater role is imposed on home and on neighbouring countries to ensure that conflict zones do not end up being law-free zones. My report on conflict zones lays out some of the steps that I believe home and neighbouring states ought to take in that regard.

Also, I think this is an area in which further international legal measures are warranted, because, as I noted earlier, the human rights regime cannot possibly function as intended in a situation of extreme duress or outright conflict. The ICRC has long been active in this domain, and is well positioned to contribute to the further development of legal and other initiatives to deal with these exceptional circumstances.

During the elaboration of the Guiding Principles was there much discussion on the relationship between international human rights and humanitarian law obligations?

Throughout the mandate I stressed that in situations of conflict, companies themselves ought to be looking to international humanitarian law (IHL) to make sure that they do not find themselves either directly or indirectly contributing to violating IHL provisions or end up being complicit in IHL violations. Of course, states have their own obligations under IHL.

The framework Protect, Respect, Remedy has important implications for states. Tell us a bit more about the state duty to protect. How have states seen their obligations with respect to business involvement, and has their understanding evolved since the beginning of your mandate?

The state duty to protect against human rights abuses is foundational. It includes protection against third-party abuse. Business is such a third party. What I found in the course of the mandate is that in many, if not most, instances states had not developed a well-articulated understanding of their specific obligations with regard to business as a third party. Nor had this been spelled out elaborately or authoritatively at the international level. The UN human rights treaty bodies have only episodically referred to it.

One of my tasks in the mandate was to engage states in serious discussions about the fact that ‘business and human rights’ is not a little self-contained box. You do business and human rights when you do corporate law, or when you do securities regulations, when you negotiate investment treaties, or negotiate trade agreements. There are business and human rights implications in all of those areas, and most states had not paid much attention to them. They seemed to think that business and human rights is some isolated thing that you can treat separately with three junior people in the foreign ministry. But it is not. It is a cross-cutting issue that ought to be considered in all areas of law and policy that affect business conduct. Pointing that out to governments and getting them to agree that, indeed, the duty to protect is more expansive

than they had previously thought was one of the major contributions of my mandate.

The most controversial element in the state duty to protect against corporate-related human rights abuse is, of course, extraterritorial jurisdiction. The human rights treaties are silent on the subject. Customary international law suggests that states are not generally required to exercise extraterritorial jurisdiction, but nor are they generally prohibited from doing so where it concerns the most egregious violations and where a recognized jurisdictional basis exists.

Do you find that in the last couple of years there has been more information regarding business and human rights available to corporate lawyers? How, in your assessment, do they perceive their own responsibilities in this domain?

One of the unique features of the mandate was to get the corporate law community involved. At one point we had law firms from sixteen or seventeen countries, including in Africa, Asia, and Latin America working with us to analyse the relationship between human rights law and corporate and securities law in thirty-nine different jurisdictions. All of this research was shared with the UN Human Rights Council and posted on my website.

Getting corporate lawyers involved made an enormous difference to the mandate because this was the first time most of them had paid attention to human rights law. They became engaged, they conducted extensive research, and the word began to spread. As a result of that type of engagement the American Bar Association ended up endorsing the Guiding Principles, as did the International Bar Association. Also, Clifford Chance LLP, which I believe is the largest law firm in the world, put out a public statement saying that they, as a business, will adhere to the Guiding Principles. Finally, the involvement of corporate lawyers raised the visibility of the mandate within companies well beyond corporate social responsibility (CSR) units to include C-suites and boards.⁹

Traditionally, human rights activists have tended to see business enterprises mainly through the prism of litigation. Do you see a sort of warming of relations between the human rights community and the corporate world? Is there a change of focus now?

There will always be a role for litigation. But consider that domestically only a small fraction of disputes are resolved through the courts – the number is in the single digits. This means that the vast majority are not. There are other ways of dealing with them. I would imagine this is equally valid on a global scale. While litigation has an important role to play, one cannot rely on litigation seeking after-the-fact punishment to solve the problem alone. The first priority is to prevent bad things from happening. Moreover, for certain kinds of disputes non-judicial means may be

9 Editor's note: The term is used to designate a corporation's most important senior executives.

more effective or desirable than lawsuits. Judicial remedy, of course, is necessary in some instances. But the idea that you can drive the business and human rights agenda entirely or largely through punishing people who have already harmed someone never made much sense to me – quite apart from the fact that judicial reform takes a lot of time. That is why I put such a strong emphasis on preventative measures and non-judicial grievance mechanisms.

Some would argue that business can also play a positive role in conflict. What do you make of this proposition?

Of course – there is no question about that. I am strongly in favour of business contributing to the solution of societal challenges of all sorts. But the first step is to not infringe on the rights of others; not to contribute to harm or make a situation worse; not to exploit the absence of or weakness in the rule of law in a particular country or situation. Moreover, there is no equivalent to carbon offsets in human rights: ‘doing good’ by building a clinic does not absolve a company from otherwise harming individuals or damaging communities.

Let us now focus on grievance mechanisms. How do companies approach such mechanisms?

I believe all the major mining companies that belong to the International Council on Metals and Mining either have or are developing grievance mechanisms. Some of the oil companies are as well. It is no accident that the extractive industries are moving rapidly in this direction because they operate in communities – typically for a long time. It is likewise no accident that the mining companies are ahead of the oil companies because the mining companies have a bigger footprint in communities. So this is rational behaviour once the option of grievance mechanisms was put on the table and criteria for their effectiveness and legitimacy were laid out. We conducted nearly eighteen-month-long pilot projects with companies and their stakeholders in six countries to test those criteria, which are included in the Guiding Principles.

Grievance mechanisms may be flexible and convenient for companies, but they may not necessarily remedy victims. Do you see any emerging best practices on compensation or other forms of reparation for victims?

As you well know, the world currently does not have an effective system of remedy. It would be an exaggeration even to call it a system. It is a group of fragments that are inadequate in terms of the needs out there. Yet there is no one single solution that is going to solve it all, or all at once. So, in my mandate I talked about how we need to strengthen national human rights institutions, for example. I talked about reducing impediments to access to justice, access to the courts, including in some cases

extraterritorial jurisdiction. I talked about the way corporate law is structured. And so on. There is a menu of things, but there is not any single measure that is going to fix it all. What the Guiding Principles seek to do is to connect these various strands within a single framework so that cumulative progress can be achieved.

In terms of hard law, we are not even sure anymore whether it is possible to hold companies to account for contributing to acts that amount to crimes against humanity under the US Alien Tort Statute (ATS). It is now under review by the Supreme Court and its applicability to companies may not survive. But even if it were to survive, it is still an oddity that a statute adopted in 1789 for different purposes should be the primary global vehicle to hold companies to account for alleged involvement in the most egregious human rights abuses.

One of the most obvious gaps that I found – and one that can be most readily filled – was in non-judicial grievance mechanisms, which a company itself can set up or in which it can participate. That is why I devoted as much time and energy to develop the concept.

What could be the implications of the *Kiobel*¹⁰ case, currently before the US Supreme Court, for holding companies to account in the future?

Obviously I do not follow all court cases in the world, but I do not need both hands to count the number of successful suits against multinational corporations in other countries for human rights abuses abroad. But some 100 such cases have been brought in the United States since the early 1990s under the ATS, the vast majority of which have been dismissed.

If the applicability of the ATS to companies is disallowed, plaintiffs' lawyers would have to find new ways. My sense is that they would go in two directions. First, they would try to bring cases against company executives, which might be even more embarrassing for the individuals concerned than bringing cases against their companies. Second, they would try to bring cases under state law rather than federal law. Recently, a few cases have been brought in Nigeria, so developing host countries are beginning to be more involved. And there are cases in Dutch, Canadian, and UK courts against companies domiciled in those countries. If access to the ATS were to be constricted on nationality grounds, plaintiffs and the activist community also would focus more on other jurisdictions.

I ended up submitting an *amicus* brief to the US Supreme Court in the *Kiobel* case. It was in support of neither party but did point out that the Shell lawyers had misconstrued a key finding of my mandate and used it in support of their argument. They claimed I had found that international law does not impose any direct obligations on companies. What I actually said was that while the

10 Editor's note: The *Kiobel* case (*Kiobel v. Royal Dutch Petroleum Co.*, US Supreme Court, No. 10-1491) was brought under the ATS by members of the Ogoni community in Nigeria against Shell. The plaintiffs alleged that Shell had aided and abetted the Nigerian military dictatorship in the 1990s in the commission of gross human rights violations, including torture, extra-judicial execution, and crimes against humanity. A decision is expected in the first half of 2013.

international human rights treaties are largely silent on this subject, one of the most consequential legal developments in recent years has been ‘the gradual extension of liability to companies for international crimes, under domestic jurisdiction but reflecting international standards’.¹¹

Can you give us some examples of how companies apply the ‘corporate responsibility to respect’ concept?

The sequence is more or less as outlined in the Guiding Principles. Typically, a policy commitment is undertaken. A policy statement is drafted by senior management and shared throughout the company. It may be shared with some outside stakeholders including non-governmental organisations (NGOs) on a confidential basis. Then, it goes to the chief executive officer (CEO) and sometimes the Board of the company for formal adoption. Ownership of the policy is assigned and it gets incorporated into operational policies and practices.

It takes a lot to translate a policy statement into operational guidance for every business function. What does it mean for the human resources department? What does it mean for the procurement department? What does it mean for the marketing department? For operations? And so on.

For every business function you have to have a specially tailored set of guidelines. Then, you have to train people in how to do it. Then you have to have some accountability mechanism in terms of internal reporting and working it into the compensation scheme so that, when the assessments of annual performance are done and bonuses allocated, human rights performance gets reflected in the process. All of this can take anywhere from eighteen months to two years to implement. Some companies began even before the Guiding Principles were approved, but we are not going to see the actual results for a while because it is still work in progress.

What could be the international fora that keep track of all of these developments for companies? Do you see the UN Human Rights Council adopting reports on, say, best practices by companies in the future?

There is a real challenge just to keep up with all these developments. The world is a big place, and governments as well as large companies are complex institutions. I hope the UN Working Group will play a central role in keeping track. NGOs and workers’ organisations are also well equipped to do so.

¹¹ Editor’s Note: The quotations are from ‘Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts’, Report of the Special Representative of the Secretary-General (SRSG) on the issue of human rights and transnational corporations and other business enterprises, UN Doc. A/HRC/4/035, 9 February 2007, paras. 41, 44, 22 and 84, respectively.

Could you tell us a little bit more about the research project in which you are involved, on the ‘cost of conflict’ for companies?

This is not necessarily ‘conflict’ in the sense of people shooting at each other. It includes lower levels of conflict. The project arose from the following question: we know what the harm is to individuals when companies do not have a sustainable working relationship with the communities, but it cannot be cost free to the companies either, right? What does it actually cost companies in terms of pipelines being blown up, access roads to mines being shut down, facilities attacked, company personnel kidnapped, or simply consuming the time and energy or staff, and so on? I started asking companies what information they had on this. And the answer was that they did not have much.

Then Goldman Sachs came out with a study of 190 projects in the oil industry, which had some interesting findings.¹² One was that the length of time it takes from the beginning of a project to the time the first drop of oil comes out of the ground had doubled over the course of a decade, and that the largest proportion of the added time was not due to technical or financial risk factors. It was something they did not have a name for, which is now called ‘stakeholder-related risk’. So then I started asking, don’t you guys measure this? One oil company actually brought in a consulting firm and gave them access to their data. They discovered that they had lost US\$6.5 billion over a two-year period as a result of stakeholder-related risk. I said: ‘Gee, that’s a big number! Didn’t anybody notice?’ And the answer was: ‘Well, you see, those numbers never got aggregated. They were rolled into local operating costs. We saw a general cost inflation, but we never broke it down.’ My team and I started looking at other companies and other industry sectors.

To cite one example that is in the public domain, Newmont Mining has an operation in Peru they had to shut down because a national state of emergency was declared for safety reasons after massive community demonstrations against the operation – the Conga mine. *The Financial Times* reported that Newmont was losing somewhere between US\$2million and US\$2.5 million a day as a result. This is what I mean by the cost of conflict with communities. One of the reasons these companies are now jumping toward adopting grievance mechanisms is to avoid paying \$2.5 million a day in lost revenue as a result of not managing their relationships with communities properly. The message for businesses is that the cost of conflict is not only imposed on the victim; you are also imposing costs on yourselves. This is a lose-lose proposition that you can and should fix.

What are your views on multi-stakeholder initiatives? They seem to be the newly preferred model for managing relations between state, private actors, and civil society.

They are harder to manage than we thought. In principle, they are a great idea and I have been a supporter. In fact, I helped create what may be the largest in the

12 Goldman Sachs Global Investment Research, ‘Top 190 projects to change the world’, April 2008.

world – the UN Global Compact. But one has to be very careful about how they are structured because often they fail to make it absolutely clear who is supposed to be contributing what. One result is that shirking takes place. Even when specific roles are assigned, multi-stakeholder initiatives can make it easier to pass the buck. A second challenge is that they require far greater resources and commitments than anybody thought. And the individual participants, whatever pillar they work in – whether they're in government or business or civil society – typically do not get a lot of credit in their home institutions for their contribution to the collective effort. One's performance in a government agency generally is not evaluated based on one's contribution to collective initiatives. The same is true with businesses and NGOs. It is often an added burden for all of the participants, who may care deeply about the initiative but without being properly rewarded or incentivized.

So, in principle I think multi-stakeholder initiatives are a good idea and they are making a significant contribution to helping close global governance gaps. But we have to go into them with eyes wide open about what the challenges are and make sure that we are actually dealing with them, not simply hope that they will resolve themselves.

A last word of encouragement for all those who work in the field of business, violence, and conflict?

That's easy: five years ago, we would not have had this interview – certainly not at this length! There would have been too little to talk about. Ten years ago, this subject barely existed. So if you take even a medium-term perspective, we have come a long way in a relatively short period of time. That should be enormously encouraging for all those who are dedicated to making a difference. But as I said earlier, in business and human rights we are only at the end of the beginning. There is much more to be done.