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## Conference Paper:

# The United Nations' "Protect-Respect-Remedy" Project : Operationalizing a Global Human Rights Based Framework for the Regulation of Transnational Corporations

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**Abstract:** The advent of contemporary economic globalization has substantially altered the regulatory environment in which economic enterprises operate. Once assumed to be creatures of the states that recognized and regulated their existence, economic enterprises today are increasingly capable of arranging their activities beyond the regulatory scope of any state or groups of states. That gap between operational and regulatory capacity has produced a sustained reaction at the national and international levels. States have sought to extend their power over corporations beyond their borders. International organizations have sought to develop supra national legal governance frameworks. This paper examines one of the more important efforts to elaborate a transnational regulatory framework for transnational corporations and other business enterprises—the United Nations “protect, respect, and remedy” framework. The three parts of the framework—the state duty to protect, the corporate responsibility to respect and the access to remedies—posits a system in which national legal orders incorporate and apply national and international human rights norms as enterprises implement global systems of institutionalized social norms, and both provide mechanisms for remedy of breaches of these overlapping but not identical legal and governance systems within their respective jurisdictions. The conceptual grounding of the framework is first explored on its own terms. The framework’s viability as a transnational autonomous regulatory soft law system is then explored. The resulting issues of implementation under the framework are then examined, as national systems transpose international legal obligations in the governance of enterprises that are themselves independently subject to global systems of social norms, both of which are bound up in a remedial matrix. The paper ends by examining the implications for the regulation of corporations raised by the proposed construction of this polycentric multilevel law-governance system.

## I. INTRODUCTION.

It was once a comfortable tenet of law that economic enterprises organized incorporate form were the creatures of the states that recognized and regulated their existence.<sup>2</sup> The advent of contemporary economic globalization has substantially altered

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<sup>2</sup> See, e.g. Rehnquist Dissent, *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 822-823 (1978). The Supreme Court decided at an early date that a business corporation is a “person” entitled to the protection of the Equal Protection Clause of the Fourteenth Amendment. Similarly, the property of a corporation is protected by the Due Process Clause of the same Amendment. Additionally, Mr. Chief Justice Marshall has described the status of corporations as “an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of creation confers

the regulatory environment in which economic enterprises operate.<sup>3</sup> Economic enterprises today are increasingly capable of arranging their activities beyond the regulatory scope of any state or groups of states.<sup>4</sup> That gap between operational and regulatory capacity has produced a sustained reaction at both the national and international level. At the national level, efforts have been made to extend the reach of national law beyond the territorial borders of states,<sup>5</sup> to revamp corporate law principles to reach overseas operations of domestic corporations,<sup>6</sup> to make jurisdiction over foreign related entities easier to attain,<sup>7</sup> to expand the scope of disclosure with respect to overseas impacts,<sup>8</sup> and to impose some form of enterprise liability.

At the same time substantive standards have been emerging at the national and international level. In the form of corporate social responsibility,<sup>9</sup> disclosure and reporting,<sup>10</sup> sustainability,<sup>11</sup> corporate citizenship<sup>12</sup> and similar approaches, state and non-state actors have sought to create substantive rules for the regulation of global operations of transnational corporations and related entities. At the international level, the United Nations famously sought to draft a set of Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights. The abandonment of that attempt at supra-national governance served to

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upon it, either expressly, or as incidental to its very existence." See, *Dartmouth College v. Woodward*, 4 Wheat. 518, 636, 4 L.Ed. 629 (1819).

<sup>3</sup> For a discussion of globalization and regulation see, Joseph E. Stiglitz, *Making Globalization Work* (2007). See also, Thomas L. Friedman *The Lexus and the Olive Tree* (1999).

<sup>4</sup> See, Larry Catá Backer, *The Autonomous Global Corporation: On the Role of Organizational Law Beyond Asset Partitioning and Legal Personality*, 41(4) TULSA LAW JOURNAL 541 (2006).

<sup>5</sup> For discussion see, e.g. Larry Catá Backer, *Extraterritoriality and Corporate Social Responsibility: Governing Corporations, Governing Developing States. Law at the End of the Day*. Thursday, March 27, 2008. Available at <http://lcbackerblog.blogspot.com/2008/03/extraterritoriality-and-corporate.html>

<sup>6</sup> See, e.g., Foreign Corrupt Practices Act of 1977 (FCPA) (15 U.S.C. §§ 78dd-1, et seq.).

<sup>7</sup> For a discussion, see, e.g., PHILLIP I. BLUMBERG, *THE MULTINATIONAL CHALLENGE TO CORPORATE LAW: THE SEARCH FOR A NEW CORPORATE PERSONALITY* (New York: Oxford University Press, 1993).

<sup>8</sup> See, e.g., Securities and Exchange Commission, Press Release, SEC Issues Interpretive Guidance on Disclosure Related to Business or Legal Developments Regarding Climate Change, Press Release No. 2010-15, Jan. 27, 2010, available <http://sec.gov/news/press/2010/2010-15.htm> (accessed Feb. 14, 2010). The SEC voted to provide companies with interpretive guidance on disclosure requirements as they apply to business or legal developments relating to climate change. With respect to climate change issues triggering reporting, companies are to take into account the impact of international accords. "A company should consider, and disclose when material, the risks or effects on its business of international accords and treaties relating to climate change" *Id.*

<sup>9</sup> The interest in corporate social responsibility has grown exponentially in the years since end of the Soviet Union system in 1989-1991. For a sampling, see, e.g., CITE.

<sup>10</sup> See the work of the Global Reporting Initiative. "The Global Reporting Initiative (GRI) is a network-based organization that has pioneered the development of the world's most widely used sustainability reporting framework and is committed to its continuous improvement and application worldwide." Global Reporting Initiative, What is GRI, available, <http://www.globalreporting.org/AboutGRI/WhatIsGRI/>.

<sup>11</sup> See, e.g., Thomas Dyllick and Kai Hockerts, *Beyond the Business Case for Corporate Sustainability*, 11 BUS. STRAT. ENV. 130-141 (2002); Oliver Salzmann, Aileen Ionescu-Somers, and Ulrich Steger, *The Business Case for Corporate Sustainability: Literature Review and Research Options*, 23(1) EUROPEAN MANAGEMENT JOURNAL 27-36 (2004)..

<sup>12</sup> See, e.g., Dirk Matten and Andrew Crane, *Corporate Citizenship: Towards an Extended Theoretical Conceptualization*, International Centre for Corporate Social Responsibility, No. 04-2003 ICCSR Research Paper Series - ISSN 1479-5124; World Economic Forum. 2002. *Global corporate citizenship: the leadership challenge for CEOs and Boards*. Geneva: World Economic Forum and The Prince of Wales Business Leaders Forum.

reframe international efforts, focusing principally on encouraging states to strengthen their legal regimes in this respect and framing increasingly comprehensive systems of soft law governance at the transnational level. Among transnational actors that have stepped into the void has been the Organization of Economic Cooperation and Development (OECD)<sup>13</sup> with its soft law Guidelines for Multinational corporations.<sup>14</sup> The OECD framework has become more influential as it is elaborated from a system of principles-based norms to a system that is beginning to take on the characteristics of a substantially complete principles based rule code.<sup>15</sup> The United Nations system itself has not abandoned the field, moving from the Norms first to a stakeholder based general principles based “Global Compact.”<sup>16</sup>

This paper examines one of the more important efforts to elaborate a transnational regulatory framework for transnational corporations and other business enterprises through the United Nations system under the guidance of John Ruggie, the Special Representative of The Secretary-General on The Issue of Human Rights and Transnational Corporations and Other Business Enterprises.<sup>17</sup> That effort, the “protect, respect, and remedy” framework is meant to create a self referencing and internally complete functionally differentiated governance system<sup>18</sup> grounded in human rights and incorporating within its framework both public and private governance entities. The three parts of the framework are made up of a state duty to protect human rights, a corporate responsibility to respect human rights, and the provision of access to remedies for interference with human rights.

Together this human rights framework posits a system in which national legal orders incorporate and apply national and international human rights norms as enterprises simultaneously implement autonomous global systems of institutionalized social norms, and both provide mechanisms for remedy of breaches of these overlapping but not identical legal and governance systems within their respective jurisdictions. The elaboration of an autonomous internationally based framework for corporate governance that is meant to apply simultaneously with a corporation’s obligations under the laws of domestic legal orders in which they operate, is among the greatest

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<sup>13</sup> See, Organization of Economic Cooperation and Development (OECD), [http://www.oecd.org/home/0,3355,en\\_2649\\_34889\\_1\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/home/0,3355,en_2649_34889_1_1_1_1_1,00.html).

<sup>14</sup> See, Guidelines for Multinational Enterprises (2000), [http://www.oecd.org/home/0,3355,en\\_2649\\_34889\\_1\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/home/0,3355,en_2649_34889_1_1_1_1_1,00.html). For a discussion, see, CITE .

<sup>15</sup> See, e.g., Larry Catá Backer, Case Note: *Rights And Accountability In Development (Raid) V Das Air* (21 July 2008) And *Global Witness V Afrimex* (28 August 2008); *Small Steps Toward an Autonomous Transnational Legal System for the Regulation of Multinational Corporations*, 10(1) MELBOURNE JOURNAL OF INTERNATIONAL LAW 258 (2009).

<sup>16</sup> The Norms have been disregarded by SRSG Ruggie as unable to advance the interests of business and human rights, and the introduction of the UN Global Compact, the voluntary initiative, being followed more than other initiatives as it has gained a larger share of adherence by international organizations. See, UN Global Compact available at, <http://www.unglobalcompact.org/>.

<sup>17</sup> For a biography of John Ruggie, see Harvard Kennedy School biography, available at <http://www.hks.harvard.edu/about/faculty-staff-directory/john-ruggie>. For Dr. Ruggie’s role in the development of the Protect-Respect-Remedy framework, see Part II, below.

<sup>18</sup> On functional differentiation and non-state governance systems, see, e.g., Anders Esmark, *The Functional Differentiation of Governance: Public Governance Beyond Hierarchy, Market and Networks*, 87(2) PUBLIC ADMINISTRATION 351-370 (2009).

innovations of this framework. The resulting polycentricity in governance<sup>19</sup> substantially advances the march toward autonomous transnational regulatory bases for transnational corporate governance. But rather than suggest a further fragmentation of law at the transnational level,<sup>20</sup> the framework represents an attempt to both build simultaneous public and private governance systems and to coordinate their operations while retaining their respective autonomy.

This framework has the potential to become influential in the construction of national and international governance systems touching on the human rights responsibilities of states and enterprises. Important elements of the European Union leadership have endorsed the framework.<sup>21</sup> It has been applied to interpret the principles of the OECD Guidelines for Multinational Corporations.<sup>22</sup> Governments have begun to use the framework in the context of developing approaches to corporate social responsibility; Norway will “continue to support the Special Representative’s work both politically and financially.”<sup>23</sup> In June 2008 the Human Rights Council<sup>24</sup> has unanimously welcomed the Protect-Respect-Remedy framework and extended the SRSG’s mandate for the purpose of providing practical recommendations and concrete guidance, that is to transpose the framework from policy to system.<sup>25</sup>

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<sup>19</sup> On polycentricity in governance, see, e.g., Inger-Johanne Sand, *Polycontextuality as an Alternative to Constitutionalism*, in *TRANSNATIONAL GOVERNANCE AND CONSTITUTIONALISM* (Christian Joerges, Inger-Johanne Sand and Gunther Teubner, eds.) 41-65 (Oxford & Portland Oregon: Hart Publishing, 2004).

<sup>20</sup> For a discussion, see, e.g., Andreas Fischer-Lescano & Gunther Teubner, *Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law*, 25 *MICH. J. INT’L L.* 999 (2004).

<sup>21</sup> “The United Nations’ Protect, Respect and Remedy framework provides a key element for the global development of CSR practices. It constitutes a significant input to the CSR work of the European Union.” Swedish Presidency of the European Union, *Protect, Respect, Remedy – Making the European Union Take a Lead in Promoting Corporate Social Responsibility*, Nov. 11, 2009, available <http://esilgiel.files.wordpress.com/2009/11/eu-presidency-statement-on-protect-respect-remedy.pdf>.

<sup>22</sup> See, e.g., Final Statement by the UK National Contact Point for the OECD Guidelines for Multinational Enterprises: Complaint from Survival International against Vedanta Resources plc, 25 Sept. 2009, available <http://www.business-humanrights.org/Links/Repository/266990/jump> (“Final Statement”). The National Contact Point explained:

Vedanta should consider implementing John Ruggie’s suggested key steps for a basic human rights due diligence process: Adopting a human rights policy which is not simply aspirational but practically implemented; Considering the human rights implications of projects before they begin and amend the projects accordingly to minimise/eliminate this impact; Mainstreaming the human rights policy throughout the company, its subsidiaries and supply chain; [and] Monitoring and auditing the implementation of the human rights policy and company’s overall human rights performance.

Final Statement, *supra*, § 78.

<sup>23</sup> See, e.g., Norway, Ministry of Finance, Report No. 10 to the Storting, *Corporate Social Responsibility in a Global Economy 2008-2009*, Jan. 23, 2009, at 78, available <http://www.regjeringen.no/en/dep/ud/Documents/Propositions-and-reports/Reports-to-the-Storting/2008-2009/report-no-10-2008-2009-to-the-storting.html?id=565907>.

<sup>24</sup> “The Human Rights Council is an inter-governmental body within the UN system made up of 47 States responsible for strengthening the promotion and protection of human rights around the globe. The Council was created by the UN [General Assembly](#) on 15 March 2006 with the main purpose of addressing situations of human rights violations and make recommendations on them.” U.N. Human Rights Council, OHCHR Home, Human Rights Council Home. The Human Rights Council. Available <http://www2.ohchr.org/english/bodies/hrcouncil/>.

<sup>25</sup> HUMAN RIGHTS COUNCIL, Eighth session, Agenda item 1, Organizational and procedural matters, A/HRC/8/52, 1 September 2008; 8/7. Mandate of the Special Representative of the Secretary-General on

Important international human rights actors have also endorsed the approach.<sup>26</sup> The Business Leaders Initiative on Human Rights, which is comprised of thirteen global firms whose aim is to find "practical ways of applying the aspirations of the Universal Declaration of Human Rights within a business context" has also declared their support for Ruggie and the work being done on this framework.<sup>27</sup> Additionally, a leading Wall Street law firm has issued a legal commentary, which focuses mainly on the corporate responsibility to respect human rights, and has concluded that "the basic concepts embodied in the Report are sound and should be supported by the business community..."<sup>28</sup> Forty socially responsible investment funds wrote to the Human Rights Council, saying the framework helped promote greater disclosure of corporate human rights impacts, and appropriate steps to mitigate them.<sup>29</sup> ExxonMobil, commemorating the 60<sup>th</sup> anniversary of the Universal Declaration of Human Rights, cited the framework's corporate responsibility to respect principle as a benchmark for its own employees.<sup>30</sup> There was also a joint civil society statement to the Human Rights Council that noted the framework's value, while several signatories have invoked it in subsequent advocacy work.<sup>31</sup>

Part II explores the history of the development of the Protect-Respect-Remedy framework. Part III then examines the conceptual grounding of the framework on its own terms. This examination is grounded in the evolution of the framework as evidenced through the SRSG's annual reports between 2006 and 2009. Part IV considers the framework's viability as a transnational autonomous regulatory soft law system is then explored. The resulting issues of implementation under the framework are then examined, as national systems transpose international legal obligations in the governance of enterprises that are themselves independently subject to global systems of social norms, both of which are bound up in a remedial matrix. The paper ends by

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human rights and transnational corporations and other business enterprises June 18, 2008, at 30-32 (adopted  
without a vote), Available  
<http://www2.ohchr.org/english/bodies/hrcouncil/docs/8session/A.HRC.8.52.doc>.

<sup>26</sup> Mary Robinson, has noted that the "Protect, Respect, Remedy Framework has put in place the foundation upon which to build principled, but pragmatic solutions to a range of challenges at the interface of business and human rights." Mary Robinson, Remarks by Mary Robinson: Protect, Respect, Remedy: Swedish EU Presidency Conference on Corporate Social Responsibility, Stockholm, Sweden, 10-11 Nov. 2009, available, [http://www.realizingrights.org/pdf/Mary\\_Robinson-Protect\\_Respect\\_Remedy-Stockholm-Nov2009.pdf](http://www.realizingrights.org/pdf/Mary_Robinson-Protect_Respect_Remedy-Stockholm-Nov2009.pdf).

Ms. Robinson was President of Ireland (1990-1997), United Nations High Commissioner for Human Rights (1997-2002) and now on the Board of Directors of Realizing Rights, a civil society actor. See Realizing Rights, Our Board, Mary Robinson, available <http://www.realizingrights.org/index.php?option=content&task=view&id=75>.

<sup>27</sup> London May 2008 speech, p.6

<sup>28</sup> London May 2008 speech, p.6

<sup>29</sup> Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises. *Business and human rights: Towards operationalizing the "protect, respect and remedy" framework*, ¶ 4, U.N. Doc. A/HRC/11/13 (April 22, 2009).

<sup>30</sup> Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises. *Business and human rights: Towards operationalizing the "protect, respect and remedy" framework*, ¶ 4, U.N. Doc. A/HRC/11/13 (April 22, 2009).

<sup>31</sup> Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises. *Business and human rights: Towards operationalizing the "protect, respect and remedy" framework*, ¶ 5, U.N. Doc. A/HRC/11/13 (April 22, 2009).

examining the implications for the regulation of corporations raised by the proposed construction of this polycentric multilevel law-governance system.

## II. HISTORY.

As set out in John Ruggie's personal web site, "In 2005, responding to a request by the UN Commission on Human Rights (now Human Rights Council), Annan appointed Ruggie as the Secretary-General's Special Representative for Business and Human Rights, a post he continues to hold in the new UN administration of Ban Ki-Moon. In that capacity, his job is to propose measures to strengthen the human rights performance of the business sector around the world."<sup>32</sup> That appointment, and subsequent work on what was to become the Protect-Respect-Remedy framework, was to some extent bound up in the history of a previous effort to provide an international framework for the governance of multinational corporations—the *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights* (the "Norms").<sup>33</sup>

The elaboration of what became the Norms was itself bound up in a series of extraordinary events that began to be realized in the 1960s. Pressure for regulation at a supra-national level came from virtually every state, but their respective motivations were very different.<sup>34</sup> First, developed nations feared competitive threats from each other. In the 1960s Europeans feared American industrial power. In the 1970s the Japanese feared the effects of trade liberalization on their export driven economy. In the 1980s the U.S. feared Japanese penetration of its industrial sectors and developed states feared the power of multinational corporations to use the flexibility inherent in globalization to exploit differences in local wage labor markets to move their operations and jobs outside of high consumption states. Second, developing nations feared that the continuing economic influence of the old

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<sup>32</sup> Harvard University, Kennedy School of Government, John Ruggie, available <http://www.hks.harvard.edu/m-rcbg/johnruggie/index.html>.

<sup>33</sup> U.N. Econ. & Soc. Council (ECOSOC), Sub-Comm'n on Promotion & Prot. of Human Rights, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, U.N. Doc. E/CN.4/Sub.2/2003/L.8 (Aug. 7, 2003) (draft resolution prepared by Alfonso Martínez et al.), available at

<http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/6b10e6a7e6f3b747c1256d8100211a60?Opendocument>. This document was subsequently revised. See ECOSOC, Sub-Comm'n on Promotion & Prot. of Human Rights, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (Aug. 26, 2003), available at <http://www.unhchr.ch/huridocda/huridoca.nsf/0/64155e7e8141b38cc1256d63002c55e8?OpenDocument> [hereinafter *Norms*]. All references to the *Norms* are to the revised *Norms* issued August 26, 2003. For the official commentary on the *Norms*, see ECOSOC, Sub-Comm'n on the Promotion and Prot. of Human Rights, *Commentary on the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, U.N. Doc. E/CN.4/Sub.2/2003/38/Rev.2 (Aug. 26, 2003), available at [http://www.unhchr.ch/Huridocda/Huridoca.nsf/\(Symbol\)/E.CN.4.Sub.2.2003.38.Rev.2.En?Opendocument](http://www.unhchr.ch/Huridocda/Huridoca.nsf/(Symbol)/E.CN.4.Sub.2.2003.38.Rev.2.En?Opendocument) [hereinafter *Commentary*]. For a report on the finalization of the statement of *Norms*, see ECOSOC, Sub-Comm'n on the Promotion and Prot. of Human Rights, *Report of the Sessional Working Group on the Working Methods and Activities of Transnational Corporations on its Fifth Session*, U.N. Doc. E/CN.4/Sub.2/2003/13 (Aug. 6, 2003), available at <http://www.unhchr.ch/Huridocda/Huridoca.nsf/TestFrame/906e3013f1cb27eac1256d82004d7fe2?Opendocument> [hereinafter *Report of the Working Group, Fifth Session*].

<sup>34</sup> For an excellent summary, from which this paragraph draws, see Peter T. Muchlinski, *Multinational Enterprises and the Law* 123–72 (1995) at 1–11, 90–115, 573–604.

colonial powers would give rise to economic imperialism through multinational corporations.<sup>35</sup> Multinational corporations were said to be able to control global media to subvert national peculiarities.<sup>36</sup> Their ability to participate in internal political matters, especially through corruption and suborning local elites was feared.<sup>37</sup> Multinational corporations were also caught participating in violent overthrows of unreceptive governments of host states.<sup>38</sup> The popular media began to view multinational corporations as creatures worthy of suspicion and regulation.<sup>39</sup> Fourth, the issue of multinational regulation became caught up in a general debate about the emerging framework of globalization. Some began to characterize these entities as the latest stage in the march toward monopoly capitalism or as the vanguard of capitalist consumerism.<sup>40</sup> Moreover, the basic assumptions and methods of the so-called neo-liberal model, especially in connection with globalization through private amalgamations of economic power, were also questioned by high-status Western academics.<sup>41</sup>

It was against this background that the United Nations, through the human rights organs in Geneva began serious work on the production of a set of rules that might directly bind multinational corporations to a set of mandatory obligations. David Weissbrodt, one of the principal authors of the *Norms*, explained:

In parallel with increasing attention to the development of international criminal law as a response to war crimes, genocide, and other crimes against humanity, there has been growing attention to

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35. See Republic of Cuba, Permanent Mission to the United Nations and International Organizations With Headquarters in Switzerland, Note No. 461 to the Office of the UN High Commission for Human Rights, October 27, 2004. This concern was reflected in the work of various academics. See, e.g., Dine, *supra* note **Error! Bookmark not defined.**

36. Fleur Johns, *The Invisibility of the Transnational Corporation*, 19 Melb. U. L. Rev. 893, 906 (1994). These same practices infringe upon a state's people's right to self-determination, as history has shown TNCs "soliciting the assistance and protection of [foreign] troops," and "disturbing [the] traditional subsistence economies [of indigenous peoples], rendering them economically dependant upon corporate offerings . . . thus [making them] pliable to the corporate will." *Id.* at 908. "When foreign businesses come in they often destroy local competitors, quashing the ambitions of local businessmen who had hoped to develop homegrown industry. . . . [A]fter the international firm drives out the local competition, it uses its monopoly power to raise prices." Stiglitz, *supra* note **Error! Bookmark not defined.**, at 68.

<sup>37</sup> *Id.*, at 905-06.

38. See, e.g., T. Moran, *Multinational Corporations and the Politics of Dependence: Copper in Chile* 252-53 (1977); Anthony Sampson, *The Arms Bazaar* (2d ed. 1991).

39. See, e.g., the website maintained by the Business and Human Rights Resource Centre, <http://www.business-humanrights.org>. For a more formal discussion of the nature of corporate complicity in human rights and other abuses, see Andrew Clapham & Scott Jerbi, *Categories of Corporate Complicity in Human Rights Abuses*, 24 Hastings Int'l & Comp. L. Rev. 339 (2001). For an early example of the policy response to the perception of these abuses, see generally R.S. Barnett & R.E. Muller, *Global Reach: The Power of Multinational Corporations* (1974), analyzing the incentives and structure attributes of the multinational corporation that contribute to its power and lack of accountability on a global level.

40. See, e.g., John H. Dunning, *Global Capitalism at Bay?* (2001) (cataloguing the influence that both TNCs and national governments have on the technological, social, and institutional development of global capitalism); Bob Milward, *Globalisation? Internationalisation and Monopoly Capitalism: Historical Processes and Monopoly Capitalism* 25-36 (2003) (arguing that TNCs are the current manifestation of the drive toward consolidation in the search for profit that, because of the basic contradictions of capitalism, will result in the system consuming itself).

41. See, e.g., Douglass North, *Institutions, Institutional Change and Economic Performance* (1990); Amartya Sen, *On Ethics and Economics* (1987); Joseph E. Stiglitz, *Globalization and Its Discontents* 3-22 (2002).

individual responsibility for grave human rights abuses. *The creators of this ever-larger web of human rights obligations, however, failed to pay sufficient attention to some of the most powerful non-state actors in the world, that is, transnational corporations and other business enterprises.* With power should come responsibility, and international human rights law needs to focus adequately on these extremely potent international non-state actors.<sup>42</sup>

The Norms themselves were ultimately grounded on principles of direct application of human rights norms to multinational corporations and on a system of using binding contracts to establish a global network of human rights obligations enforceable against multinational corporations.<sup>43</sup> But the ultimate efforts were criticized, especially by developed states that thought the proposal threatened sovereignty and the current structure of international law.<sup>44</sup> The Norms project was ultimately abandoned.

In 2003, a working group under the UN Sub-Commission on the Promotion and Protection of Human Rights drafted the «Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights», which assumed that companies had legal obligations in relation to human rights. When the draft norms were submitted to the member states of the UN Human Rights Commission in 2004, they were rejected. Several of the member states opposed holding non-state entities directly accountable for human rights violations as they felt this would dilute state responsibility. The Human Rights Commission made it clear that the draft entailed no legal obligations. Several of the member states did, however, point out that the draft norms contained useful elements and ideas. It was against this backdrop, and following a resolution adopted by the UN Human Rights Commission, that the UN Secretary-General in 2005 appointed a Special Representative for human rights and business.<sup>45</sup>

The abandonment of the Norms project, and its approach continues to be criticized by one of its principal architects.<sup>46</sup>

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<sup>42</sup> David Weissbrodt & Muria Kruger, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises With Regard to Human Rights*, 97 Am. J. Int'l L. 901, 901 (2003) (emphasis added) (referencing in part Mary Robinson, High Comm'r for Human Rights, Second Global Ethic Lecture (Jan. 21, 2002)).

<sup>43</sup> For an analysis of the Norms and their applications, see, Larry Catá Backer, *Multinational Corporations, Transnational Law: The United Nation's Norms on the Responsibilities of Transnational Corporations as a Harbinger of Corporate Social Responsibility as International Law*, 37 COLUMBIA HUMAN RIGHTS LAW REVIEW 287 (2006).

<sup>44</sup> See, Id., at --.

<sup>45</sup> Norway, Ministry of Finance, Report No. 10 to the Storting, Corporate Social Responsibility in a Global Economy 2008-2009, Jan. 23, 2009, at 76, available <http://www.regjeringen.no/en/dep/ud/Documents/Propositions-and-reports/Reports-to-the-Storting/2008-2009/report-no-10-2008-2009-to-the-storting.html?id=565907>.

<sup>46</sup> Ruggie's conclusion that the Norms were of little help in advancing the interests of business and human rights, has drawn criticism from Professor David Weissbrodt, one of the architects of the Norms. Weissbrodt has complained that Ruggie has "embark[ed] on an extremely negative and unproductive critique of the Norms - inspired, if not copied word for word, from the advocacy of the International

Among the most influential critics of the Norms framework was John Ruggie. Mr. Ruggie agreed that the transnational corporate sector was a legitimate object of transnational governance.<sup>47</sup> He suggested that “the Norms exercise became engulfed by its own doctrinal excesses. . . . Two aspects are particularly problematic in the context of this mandate. One concerns the legal authority advanced for the Norms, and the other the principle by which they propose to allocate human rights responsibilities between states and firms.”<sup>48</sup> This was not idle criticism, but the foundation for an alternative approach to the construction of a regulatory matrix, at the supra-national level, for the governance of multinational corporations, grounded in the legal duties of states, the social responsibilities of corporations and the process obligations of both to their respective stakeholders.<sup>49</sup>

The initial appointment of Mr. John Ruggie as Assistant Secretary-General and chief advisor for strategic planning to the United Nations Secretary-General Kofi Annan from 1997-2001 began the long sequence of events that produced the Protect-Respect-Remedy framework. It was during this appointment that Mr. Ruggie was instrumental in developing, designing and overseeing the United Nations Global Compact.<sup>50</sup> The UN Global Compact is an initiative developed to encourage businesses worldwide to adopt within their operations and strategies ten universally accepted principles in the areas of human rights, labor, environment and anti-corruption.<sup>51</sup> The Global Compact is now the largest global corporate citizenship initiative in the world with 6500 signatories, 5000 from business and 1500 from civil society and other non-business organizations based in

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Chamber of Commerce and the International Organization of Employers" while also not citing one of these "mainstream international lawyers and other impartial observers," but rather relying on the biased views of lawyers employed by the International Chamber of Commerce. See David Weissbrodt, *UN Perspectives on "Business and Humanitarian and Human Rights Obligations,"* 100 AM. SOC'Y INT'L L. PROC. 135, 138 (2006). Weissbrodt does find that a lot of Ruggie's work has great potential to advance the interests of business and human rights, but he does show a general disdain for the way that Ruggie has derided the Norms in form and function. *Id.*, at 139.

<sup>47</sup> Ruggie suggested three causes. . The first is that large firms have become major players around the globe and countervailing efforts have currently come from civil society actors. Secondly, some companies have made themselves and their sector targets by doing bad things on a larger scale as a result of mistakes, shortsightedness and even malfeasance; which has generated an increased demand for corporate accountability. Thirdly, the fact that it has global reach and capacity while simultaneously being capable of making and implementing decisions that neither governments nor international agencies can accomplish with such speed. Oct 2005 speech p.3

<sup>48</sup> John Ruggie, Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, U.N. Doc. E/CN.4/2006/97 (2006) at ¶59, available <http://www1.umn.edu/humanrts/business/RuggieReport2006.html>. He also noted that "Even leaving aside the highly contentious though largely symbolic proposal to monitor firms and provide for reparation payments to victims, its exaggerated legal claims and conceptual ambiguities created confusion and doubt even among many mainstream international lawyers and other impartial observers." *Id.*

<sup>49</sup> But see, David Weissbrodt, *International Standard-Setting on the Human Rights Responsibilities of Businesses,* 26 BERKELEY J. INT'L L. 373(2008).

<sup>50</sup> It was during this first appointment that John Ruggie served as one of the main architects of the UN Global Compact. <http://www.un.org/News/Press/docs/2005/sga934.doc.htm>.

<sup>51</sup> One purpose of this initiative is to involve businesses, acting as private agents driving globalization, to "ensure that markets, commerce, technology, and finance advance in ways that benefit economies and societies everywhere." Overview of Global Compact, available at <http://www.unglobalcompact.org/AboutTheGC/index.html>.

135 countries.<sup>52</sup>

Mr. Ruggie also proposed and gained General Assembly approval for the Millennium Development Goals, which were signed into effect in 2000.<sup>53</sup> The Millennium Development Goals had an ambitious agenda; they were to be something more than a mechanical benchmarking tool, but also “an instrument for broader social mobilization, generating innovative responses to society’s systemic challenges by, and among, all social actors.”<sup>54</sup> But both the Global Compact and the Millennium Development goals also served as an operational foundation to the critique of the Norms approach.

That operational foundation became the framework for the construction of an alternative regulatory framework with the collapse of the Geneva based Norms project and the movement of corporate human rights based initiatives back to New York and the appointment in 2005 of John Ruggie as Special Representative to the Secretary-General on the issue of Human Rights and Transnational Corporations and Other Business Enterprise.<sup>55</sup> Ruggie began his mandate with a series of studies designed to elicit information from stakeholders, including the corporate sector,<sup>56</sup> and a set of fact finding missions.<sup>57</sup> Other organizations and governments also provided early assistance.<sup>58</sup>

Early on, Mr. Ruggie abandoned the Norm’s focus on the direct obligations of multinational corporations. Instead, he divided his focus between legal obligations, which flow from and through states, and other obligations, that more directly affect corporate entities under traditional conceptions of law.<sup>59</sup> The object was to identify “the

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<sup>52</sup> The top reason for organizations and businesses to engage in the Global Compact is ““integration on environmental, social and governance (ESG) issues,” reflecting a growing shift towards more proactive action, no longer simply viewing corporate responsibility as a reputation management function.” United Nations Global Compact Office, *United Nations Global Compact 2008 Annual Review* (March 2009) (prepared by Carrie Hall), 8. Available at <http://www.unglobalcompact.org/> (follow “Global Compact Annual Review 2008” hyperlink).

<sup>53</sup> These goals require all of the participating nations to commit to eight goals to improve the standards and meet the needs of the worlds poorest within a set of time-based targets with a deadline of 2015. The goals include: End Poverty and Hunger, Universal Education, Gender Equality, Child Health, Maternal Health, Combat HIV/AIDS, Environmental Sustainability, and Global Partnership. Millennium Development Goals Background, available at <http://www.un.org/millenniumgoals/bkgd.shtml>.

<sup>54</sup> Oct.2007 Washington Remarks, p.2

<sup>55</sup> Press documents, available at <http://www.un.org/News/Press/docs/2005/sga934.doc.htm>.

<sup>56</sup> He planned to conduct surveys of business policies and practices with regard to human rights to learn how businesses conceive of human rights, what standards they reference, and their use of impact assessments. Oct 2005 speech p.4. Legal teams were also contacted to determine how European and American courts understand the concepts of complicity and sphere of influence in this context. Id.

<sup>57</sup> Oct. 2005 speech p.5

<sup>58</sup> These organizations include Harvard Law School, The Corporate Social Responsibility Initiative at the Kennedy School, the Office of the High Commissioner, and the Government of Switzerland. Oct. 2005 speech p.5

<sup>59</sup> The starting point is “corporate liability for abuses that amount to violations of international criminal or humanitarian law.” Dec 2005 Speech The reasons for starting at this point is that it is a critically important issue on its own, where greater clarity is needed, while it may also shed light on the general strategy of legalizing corporate human rights obligations. Id.

directions in which achievable objectives may lie.”<sup>60</sup> Legal obligations would center on an identification and harmonization of legal standards; “achieving greater clarity of, and possibly greater convergence among, emerging standards is a pressing need.”<sup>61</sup> Even at this early point in the development of the framework, shortly after his appointment and the announcement of his mandate, Ruggie acknowledged that the scope of the mandate goes beyond simply the legal realm, and also includes a “full range of governmental responsibilities and policy options in relation to business and human rights.”<sup>62</sup> Additionally, it encompasses all sources of corporate responsibility including legal compliance as well as social norms, moral considerations and strategic behavior.<sup>63</sup> At this point, Ruggie realized that “a strategy for strengthening the corporate contribution to the protection and promotion of human rights that recognizes and leverages the dynamics at work in each of these spheres” was needed.<sup>64</sup>

In 2006, Ruggie produced the first of a set of annual reports based on his initial research and conceptualization of the mandate.<sup>65</sup> He emphasized the legal obligations of states to enforce law and of corporations to comply with legal requirements.<sup>66</sup> The object was to avoid the irreconcilable policy tension that doomed the Norms project.<sup>67</sup>

Following the delivery of the 2006 Report, Mr. Ruggie continued information gathering and consulting stakeholders. A number of events were conducted, including convening three regional multi-stakeholder consultations; civil society consultations on five continents; visits to the developing country operations of major multinational corporations in four industry sectors; four workshops of legal experts; two Geneva-based multi-stakeholder consultations, on the extractive and financial services

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<sup>60</sup> Speech.....Remarks by John G. Ruggie, Business & Human Rights Seminar, Old Billingsgate, London, December 8, 2005

<sup>61</sup> Dec 2005 Speech

<sup>62</sup> Speech Dec 2005 p.6

<sup>63</sup> Speech Dec 2005 p.6

<sup>64</sup> Speech Dec 2005 p.6

<sup>65</sup> Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises. *Interim Report, 2006*, U.N. Doc. E/CN.4/2006/97 (2006). Work on the mandate began by “conducting extensive consultations on the substance of the mandate as well as alternative ways to pursue it - with states, non-governmental organizations, international business associations and individual companies, international labor federations, UN and other international agencies, and legal experts.” *Id.*, at ¶ 3.

<sup>66</sup> The “premise that the objective of the mandate is to strengthen the promotion and protection of human rights in relation to transnational corporations and other business enterprises, but that governments bear principal responsibility for the vindication of those rights.” Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises. *Interim Report, 2006*, ¶ 7, U.N. Doc. E/CN.4/2006/97 (2006).

<sup>67</sup> The two bookends of the debate include one position that “corporations cannot violate international human rights laws because they are only applicable to states.” Based on this reading, the only duty for companies is to comply with the national laws where they operate along with the voluntary initiatives they choose to undertake. Montreal Nov.2006 speech p.2. At the opposing position of the debate is the UN Norms which seek “to impose on corporations the full range of international human rights standards that states have adopted for states, with identical obligations ranging from “respecting” to “fulfilling” those rights.” *Id.* The debate between these two opposing views did not result in any light on the subject nor movement in policy, which then resulted in the appointment of SRSG Ruggie. *Id.*

industries; and discussions with representatives of all relevant multilateral institutions and some government officials.<sup>68</sup>

The 2007 report to the UN Human Rights Council was targeted at addressing the four elements that the initial mandate.<sup>69</sup> It also set the foundation for what was to come during the next three years of the mandate. Five clusters of standards were developed that have evolved into the three-pillar framework.<sup>70</sup> These clusters include: the state duty to protect against human rights abuses by third parties, potential corporate responsibility and accountability for international crimes, corporate responsibility for other human rights violations under international law, soft law mechanisms, and self-regulation.<sup>71</sup> A focus was on accountability and interpretive mechanisms.<sup>72</sup> After announcing these standards at the International Chamber of Commerce, Commission on Business in Society in Paris in April 2007, Ruggie asked that the attendees “convene a global business and human rights forum for dialogue and information exchange” among the membership.<sup>73</sup> The influence of organizing work on the Global Compact is evident in this phase of work.<sup>74</sup>

Fourteen multi-stakeholder consultations on five continents led up to the 2008 Report<sup>75</sup> with concern expressed for a common need among them all – “a common framework of understanding, a foundation on which thinking and action can build in a cumulative fashion.”<sup>76</sup> The three-pillar Protect-Respect-Remedy framework was unveiled in the 2008 Report.<sup>77</sup> For that purpose the five clusters of standards from the previous report were pared down to the most formalistic and important principles. The

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<sup>68</sup> Regional multi-stakeholder consultation took place in Johannesburg, Bangkok, and Bogotá. The workshops including legal experts took place in London, Oslo, Brussels, and New York. And the two Geneva-based consultations included work on the extractives and financial services industries. Feb.2007 London speech p.1

<sup>69</sup> Report of the Special Representative to the Secretary General of the United Nations on human rights and transnational corporations and other business enterprises. *Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Act*, ¶ 1, U.N. Doc. A/HRC/4/035 (February 9, 2007).

<sup>70</sup> Paris speech. April 2007, p.2

<sup>71</sup> Paris speech. April 2007, pp.2-4

<sup>72</sup> Mr Ruggie emphasized there is commonly an underdeveloped accountability mechanism within voluntary initiatives that affects the performance of the initiative in that companies cannot correct what they don't know is wrong. May 2007 Washington speech, p.5.

<sup>73</sup> Paris speech. April 2007, pp.6

<sup>74</sup> This can be seen in the similarities between the concept of Local Networks that exist in the UNGC and the challenge that he puts forth to industry leaders in his speeches. Local Networks are systems and groups located around the globe that permit, at its most basic form, companies to work together as a support network and source of inspiration to improve the concept of business and human rights. Networks are also used to improve understanding and share experiences on the Ten Principles, as well as to report progress in these areas. United Nations Global Compact Office, *United Nations Global Compact 2008 Annual Review* (March 2009) (prepared by Carrie Hall), 18. Available at <http://www.unglobalcompact.org/> (follow “Global Compact Annual Review 2008” hyperlink).

<sup>75</sup> Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises. *Protect, Respect and Remedy: a Framework for Business and Human Rights*, U.N. Doc. A/HRC/8/5 (April 7, 2008).

<sup>76</sup> May 2008 speech, p.4

<sup>77</sup> Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises. *Protect, Respect and Remedy: a Framework for Business and Human Rights*, U.N. Doc. A/HRC/8/5 (April 7, 2008).

framework of complementary principles now includes the state duty to protect, the corporate responsibility to respect, and access to remedies. It is necessary that all social actors involved in business and human rights play an active role in addressing and attempting to resolve these issues.<sup>78</sup> The Report explored governance gaps in more detail.<sup>79</sup> These governance gaps have created a permissive environment for wrongful acts by companies without a system for adequate sanctions or reparations; narrowing this gap is the fundamental challenge.<sup>80</sup>

2008 also saw the renewal of the SRSG's mandate by the Human Rights Council.<sup>81</sup> The SRSG was directed to operationalize the framework, by providing "'practical recommendations' and 'concrete guidance' to states, businesses and other social actors on its implementation."<sup>82</sup> The Human Rights Council stressed "the obligation and the primary responsibility to promote and protect human rights and fundamental freedoms lie with the State."<sup>83</sup> The HRC also emphasized "that transnational corporations and other business enterprises have a responsibility to respect human rights."<sup>84</sup> The emphasis was on proper regulation produced by a proper source,<sup>85</sup> and a limited regulatory role for corporations.<sup>86</sup>

The 2009 Report followed.<sup>87</sup> The report incorporates policy considerations touching on the global economic crisis of 2008, and the resulting pressure on stakeholders to reduce the priority of human rights concerns. The SRSG emphasized that

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<sup>78</sup> Id., at ¶ 7.

<sup>79</sup> This gap is vast between "the scope and impact of economic forces and actors" on one side and "the capacity of societies to manage their adverse consequences" on the other. Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises. *Protect, Respect and Remedy: a Framework for Business and Human Rights*, ¶ 3, U.N. Doc. A/HRC/8/5 (April 7, 2008).

<sup>80</sup> Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises. *Protect, Respect and Remedy: a Framework for Business and Human Rights*, ¶ 3, U.N. Doc. A/HRC/8/5 (April 7, 2008).

<sup>81</sup> Human Rights Council, Eighth session, Agenda item 1, Organizational and procedural matters, A/HRC/8/52, 1 September 2008; 8/7. Mandate of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises June 18, 2008, at 30-32 (adopted without a vote). <http://www2ohchr.org/english/bodies/hrcouncil/docs/8session/A.HRC.8.52.doc>.

<sup>82</sup> S.A. Oct. 2009 speech, p.1

<sup>83</sup> Human Rights Council, Eighth session, Agenda item 1, Organizational and procedural matters, A/HRC/8/52, 1 September 2008; 8/7. Mandate of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises June 18, 2008, at 31.

<sup>84</sup> Id.

<sup>85</sup> The HRC recognized "that proper regulation, including through national legislation, of transnational corporations and other business enterprises, and their responsible operation can contribute to the promotion, protection and fulfillment of and respect for human rights and assist in channelling the benefits of business towards contributing to the enjoyment of human rights and fundamental freedoms." Id.

<sup>86</sup> The HRC expressed concern "that weak national legislation and implementation cannot effectively mitigate the negative impact of globalization on vulnerable economies, fully realize the benefits of globalization or derive maximally the benefits of activities of transnational corporations and other business enterprises and that therefore efforts to bridge governance gaps at the national, regional and international levels are necessary." Id.

<sup>87</sup> Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises. *Business and human rights: Towards Operationalizing the "protect, respect and remedy" framework*, at ¶ 15, U.N. Doc. A/HRC/11/13 (April 22, 2009), available <http://www2.ohchr.org/english/bodies/hrcouncil/docs/11session/A.HRC.11.13.pdf>.

that elements of the business and human rights agenda should be aligned more closely with the overall world economic policy agenda.<sup>88</sup> The body of the report considered issue of operationalization. This 2009 Report is to be followed by one in 2010 in which the SRSG is to unveil a set of applicable principles for fulfilling obligations under each of the three pillars. Included also may be suggestions for institutionalizing the framework within a to-be-developed governance framework.

### III. DEVELOPMENT OF THE PROTECT-RESPECT-REMEDY FRAMEWORK.

The Three Pillar framework is more than a reaction to the failed Norms. It is also more than an elaboration of voluntary principles-based codes of the Global Compact or the Millennium Development A careful review of the SRSG's reports suggest the character and nature of an institutionalized multi-level governance framework that the Three Pillar Framework represents. For that purpose this section considers more carefully the framework as developed through the SRSG's 2006-2009 reports.

#### A. 2006 Report.<sup>89</sup>

The 2006 initial interim report produced by SRSG elaborated on the mandate.<sup>90</sup> It also described current work and posited a roadmap for future work. The SRSG began "work by conducting extensive consultations on the substance of the mandate as well as alternative ways to pursue it - with states, non-governmental organizations, international business associations and individual companies, international labor federations, UN and other international agencies, and legal experts."<sup>91</sup> Ruggie's visits to countries around the world, holding formal meetings, and stakeholder consultations were all in an effort to deepen his personal understanding of the situations on the ground.<sup>92</sup> His survey of Fortune Global 500 companies was used to gain additional background information relevant to his mandate.<sup>93</sup>

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<sup>88</sup> It is pointed out quite clearly from the 14 consultations that "Every stakeholder group, despite their other differences, has expressed the urgent need for a common framework of understanding, a foundation on which thinking and action can build in a cumulative fashion." The result of this was the Protect, Respect and Remedy Framework. *Supra* note ????, at 4. Chatham house speech...

<sup>89</sup> Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises. *Interim Report, 2006*, ¶ 1, U.N. Doc. E/CN.4/2006/97 (2006), available <http://www1.umn.edu/humanrts/business/RuggieReport2006.html>.

<sup>90</sup> This initial mandate required Ruggie

"a) To identify and clarify standards of corporate responsibility and accountability for transnational corporations and other business enterprises with regard to human rights; b) To elaborate on the role of States in effectively regulating and adjudicating the role of transnational corporations and other business enterprises with regard to human rights, including through international cooperation; c) To research and clarify the implications for transnational corporations and other business enterprises of concepts such as "complicity" and "sphere of influence"; d) To develop materials and methodologies for undertaking human rights impact assessments of the activities of transnational corporations and other business enterprises; e) To compile a compendium of best practices of States and transnational corporations and other business enterprises."

*Id.*, ¶ 1.

<sup>91</sup> *Id.* at ¶ 3.

<sup>92</sup> *Id.* at ¶ 3.

<sup>93</sup> *Id.* at ¶ 4. The questions asked were whether these companies have human rights policies and practices in place, and if so, what standards they used to develop them.

The 2006 Report was intended “to frame the overall context encompassing the mandate as the SRSG sees it, to pose the main strategic options, and to summarize his current and planned program of activities.”<sup>94</sup> The SRSG suggested a three part contextualization for the mandate: “the institutional features of globalization; overall patterns in alleged corporate abuses and their correlates; and the characteristic strengths and weaknesses of existing responses established to deal with human rights challenges.”<sup>95</sup> The SRSG devoted substantial space to distinguishing the efforts under his mandate from those that produced the Norms. The object was not merely to suggest that the mandate work was intended to improve the provisions set out in the Norms, but rather to suggest an abandonment of the core assumptions animating the Norms and the embrace of a different conceptual starting point. Each is discussed in turn.

1. *Context of the Mandate: Globalization.* Globalization has led to a number of results that have affected the issue of business and human rights. Today’s global world includes “a variety of actors for which the territorial state is not the cardinal organizing principle have come to play significant public roles.”<sup>96</sup> Globalization has manifested itself in the form of over 70,000 transnational firms, about 700,000 subsidiaries, along with millions of suppliers spanning the globe.<sup>97</sup> Globalization has produced a number of positive effects as well.<sup>98</sup> And it is hardly surprising that the transnational corporate sector has attracted this much attention from other social actors, including civil society and states themselves.<sup>99</sup>

There are three distinct drivers behind the increased attention that transnational corporations are receiving. The first is that “the successful accumulation of power by one type of social actor will induce efforts by others with different interests or aims to organize countervailing power.”<sup>100</sup> Secondly, “some companies have made themselves and even their entire industries targets by committing serious harm in relation to human rights, labor standards, environmental protection, and other social concerns.”<sup>101</sup> The third and final driver is the simple fact “that it *has* global reach and capacity, and that it

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<sup>94</sup> Id. at ¶ 6.

<sup>95</sup> Id. at ¶ 8.

<sup>96</sup> Id. at ¶ 10. This is most evident in the economic realm. “The rights of transnational firms – their ability to operate and expand globally – have increased greatly over the past generation, as a result of trade agreements, bilateral investment treaties, and domestic liberalization.” Id. at ¶ 11. Arms length transactions have decreased and more intra-firm trading taking place while becoming a more significant share of overall global trade. What used to be external trade between national economies has now become internalized within the firms using supply chain management that functions in real time.

<sup>97</sup> Id. at ¶ 11. Arms length transactions have decreased and more intra-firm trading taking place while becoming a more significant share of overall global trade. What used to be external trade between national economies has now become internalized within the firms using supply chain management that functions in real time.

<sup>98</sup> Including higher standard of living and in some cases a significant opportunity for poverty reduction. Id. at ¶ 13.

<sup>99</sup> Id.

<sup>100</sup> “At the global level today, a broad array of civil society actors has been in the lead. And when global firms are widely perceived to abuse their power ... a social backlash is inevitable.” Id. at ¶ 14.

<sup>101</sup> “This has generated increased demands for greater corporate responsibility and accountability, often supported by companies wishing to avoid similar problems or to turn their own good practices into a competitive advantage.” Id. at ¶ 15.

is capable of acting at a pace and scale that neither governments nor international agencies can match.”<sup>102</sup> There is a widening gap between global markets and the capacity of societies to manage the resulting consequences; this may pressure political leaders to look inward, but entrenching global markets in both shared values and institutional practices is a better method to achieve this outcome.<sup>103</sup>

2. *Context of the Mandate: Abuses and Correlates.* The SRSG noted the dearth of data impeding an empirically based approach to the problem of human rights abuses. The implication, of course, was that prior attempts proceeded in the absence of necessary hard data and, perhaps then, expressed ideology and political preference. He argued that in the absence of a repository or database for consistent, comprehensive, and impartial information, it was difficult to say with certainty if abuses related to the corporate sector are increasing or decreasing.<sup>104</sup> In the absence of data, policy choices could not be legitimately developed.<sup>105</sup>

But data gathering requires context. And the SRSG offered one: It is generally believed that economic development, coupled with the rule of law, is the best way to guarantee the entire spectrum of human rights.<sup>106</sup> But there are grounds to suspect that the expansion and deepening of globalization has increased the possible involvement of transnational involvement in human rights violations.<sup>107</sup> By going global, transnational firms have to adopt a system that embraces many corporate entities spread across and within many countries. The result is that networks form within the firm, that although enhancing economic efficiency also increase the difficulty that firms have when managing the global value chain.<sup>108</sup> When the number of links in this chain increases, there are greater vulnerabilities for the global enterprise as a whole.<sup>109</sup> It is these institutional features of transnational corporations, which if left alone, increase the chance that the company will violate its own corporate principles or social expectations of responsible corporate behavior.<sup>110</sup>

The focus of study, then, had to relate to this concept of what constituted the core challenge of business and human rights lies—the creation of policy instruments of corporate and public governance that contain and reduce the human rights violations tendencies.<sup>111</sup> To that end, the SRSG began by surveying sixty-five instances recently reported by NGOs that involved alleged corporate human rights abuses.<sup>112</sup> The results of this survey showed two implications for the design of policy responses. First, there are

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<sup>102</sup> Other social actors are looking at how to leverage this to cope with pressing societal problems, often because governments are either unable or unwilling to perform their functions properly. *Id.* at ¶ 16.

<sup>103</sup> *Id.* This outcome is the broadest macro objective of the SRSG’s mandate.

<sup>104</sup> The abuses are just reported more extensively because there are more actors tracking them, and there is greater transparency than in the past. *Id.* at ¶ 20.

<sup>105</sup> *Id.*

<sup>106</sup> Including civil, political, economic, social and cultural rights. *Id.* at ¶ 21.

<sup>107</sup> Though this is also because of the absolute number of firms that are in existence now. *Id.*

<sup>108</sup> *Id.* at ¶ 22.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at ¶ 23.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at ¶ 24. These were likely the most egregious instances of abuse, so the reports are unlikely to demonstrate a representative sample of all situations, but more closely representative of the worst.

significant differences in the various industry sectors in terms of the types and magnitude of human rights challenges.<sup>113</sup> And secondly, there is a clear “negative symbiosis between the worst corporate-related human rights abuses and host countries that are characterized by a combination of relatively low national income, current or recent conflict exposure, and weak or corrupt governance.”<sup>114</sup>

3. *Context of the Mandate: Existing Responses.* Developing and instituting policies and practices to deal with human rights challenges has been an issue for some time. Firms have adopted initiatives both individually and in collaboration with business associations, NGOs and even governments or international organizations.<sup>115</sup> Ruggie conducted a survey of Fortune Global 500 firms though only 80 of the 500 has submitted responses by the time of the 2006 report. Nearly 80% of the respondents report having an explicit set of principles or management practices regarding the human rights dimensions of their operations.<sup>116</sup> By a ratio of two-to-one, human rights are included in the overall corporate social responsibility code or principles of major corporations, rather than being free-standing principles.<sup>117</sup>

When asked which international human rights instrument is referenced by the company policy, three-fourths cite the ILO declarations or conventions, 62% cite the Universal Declaration of Human Rights, 57% cite the UN Global Compact and 40% cite the OECD Guidelines for Multinational Enterprises.<sup>118</sup> Only four out of ten claim that they “routinely” conduct human rights impact assessments of their projects, with a slightly higher number of corporations claim that they do so “occasionally.”<sup>119</sup> The stakeholders that these policies include are employees (virtually all companies); suppliers, contractors, distributors, joint venture partners, and other in the value chain (90% of companies); surrounding communities (66%); and the country in which they operate (just under 60%).<sup>120</sup> It was evident from this early sample that most major firms are aware that they have some human rights responsibilities, have adopted some form of policies and practices, think about them systematically, and institute some form of internal and external reporting system as well.<sup>121</sup> There is also an emerging group of collaborative agreements involving firms and social actors in this area including the UN Global Compact,<sup>122</sup> OECD Guidelines for Multinational Enterprises,<sup>123</sup> and the ILO.<sup>124</sup>

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<sup>113</sup> Id. at ¶ 29.

<sup>114</sup> Id. at ¶ 30.

<sup>115</sup> Id. at ¶ 31.

<sup>116</sup> Id. at ¶ 33.

<sup>117</sup> Non-discrimination and workplace health and safety issues are included in most cases, followed closely by other core labor rights (85% of policies), right to health (56%), and the right to adequate standard of living (43%). Id.

<sup>118</sup> Id. at ¶ 34.

<sup>119</sup> Id. at ¶ 35.

<sup>120</sup> Id. at ¶ 36.

<sup>121</sup> Id. at ¶ 38.

<sup>122</sup> The largest social corporate responsibility initiative which engages firms in implementing ten universal principles in the areas of human rights, labor standards, environmental practices, and anti-corruption.

<sup>123</sup> Including National Contact Points, a group of “government offices in the participating countries that, among other functions, take up “specific instances” (complaints, in ordinary language) of company non-compliance with the Guidelines.”

Essentially, up to this point, it was only fragments of collaborative governance emerging in various sectors which were each tailored to their specific situations.<sup>125</sup>

4. *Strategic Directions: The Norms.* Having described the context in which the mandate would be interpreted and an approach to governance policy analyzed, the SRSG sought to describe the set of core conceptual issues that had to be addressed to move the human rights agenda forward. The most challenging issue centered on governance standards. This issue was broken down in two parts. First, the SRSG conceded that standards did not yet exist. Second, that moving forward on realizing standards required an acknowledgement of past efforts—and especially of the reasons for the failure of prior efforts to develop standards. This brought the SRSG squarely to the issue of the Norms.<sup>126</sup>

The Norms are comprised of 23 articles, drafted like a treaty, which set out human rights principles for companies in areas including international criminal and humanitarian law; civil, political, economic, social, and cultural rights; as well as consumer protection and environmental practices.<sup>127</sup> It included useful information: the summary of rights that may be affected by business, positively and negatively, and the collation of source documents from international human rights instruments as well as voluntary initiatives have considerable utility.<sup>128</sup> “Had the Norms exercise confined itself to compiling such an inventory, coupled with a set of benchmarks of what practices business must or should avoid, and what it could help to achieve, the subsequent debate might have focused on substantive issues.”<sup>129</sup> But the Norms sought to do more than that. The creators of the Norms asserted that they merely reflected and restated international legal principles that are applicable to businesses with regard to human rights, and on this basis developed what the SRSG described as a set of globally applicable “non-voluntary” rules “in some sense directly binding on corporations.”<sup>130</sup>

But the SRSG suggested this was an impossible project.<sup>131</sup> “What the Norms have done, in fact, is to take existing state-based human rights instruments and simply assert that many of their provisions now are binding on corporations as

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<sup>124</sup> Which has responsibility for labor rights for years and its Declaration on Fundamental Principles and Rights at Work is widely referenced by other initiatives.

<sup>125</sup> Some of these more narrowly tailored initiatives include the Extractive Industries Transparency Initiative (EITI)(dealing with revenue transparency), Kimberley Process Certification Scheme (KPCS)(created to stem the flow of conflict diamonds), and the Voluntary Principles on Security and Human Rights (VPs)(created to address the nexus between the legitimate security needs of companies in the extractive sector and the human rights of people in surrounding communities). *Id.* at ¶¶ 45-48.

<sup>126</sup> *Id.* at ¶ 55.

<sup>127</sup> *Id.* at ¶ 56.

<sup>128</sup> Any fair discussion of standards will inevitably cover some of the same grounds. *Id.* at ¶ 57.

<sup>129</sup> *Id.*, at ¶ 58.

<sup>130</sup> *Id.* at ¶ 60.

<sup>131</sup> “But taken literally, the two claims cannot both be correct. If the Norms merely restate established international legal principles then they cannot also directly bind business because, with the possible exception of certain war crimes and crimes against humanity, there are no generally accepted international legal principles that do so. And if the Norms were to bind business directly then they could not merely be restating international legal principles; they would need, somehow, to discover or invent new ones.” *Id.*

well.”<sup>132</sup> As such, the Norms became an ideological rather than an empirical instrument for approaching regulatory issues of multinational corporations. The “Norms exercise became engulfed by its own doctrinal excesses.”<sup>133</sup> The ensuing debate obscured rather than illuminated promising areas of consensus and cooperation among business, civil society, governments, and international institutions with respect to human rights.<sup>134</sup> It was no surprise, then, that the Norms were not accepted by most businesses, while human rights groups were in favor, or that governments currently using the SRSG’s mandate sought to move beyond the resulting stalemate.<sup>135</sup>

Still, it was possible to discern a certain “fluidity in the applicability of international legal principles to acts by companies.”<sup>136</sup> Though “[a]ll existing instruments specifically aimed at holding corporations to international standards . . . are of a voluntary nature,”<sup>137</sup> under customary international law, practice and opinion increasingly suggests that corporations may be liable for committing, or for their complicity in, human rights violations amounting to international crimes, including genocide, slavery, human trafficking, forced labor, torture and crimes against humanity.<sup>138</sup> Liability under domestic criminal law might also be evolving.<sup>139</sup> Lastly, direct corporate liability under international law might be considered within a surety or agency principle—especially where corporations operate in territories with weak or non-functioning governments.<sup>140</sup>

But the Norms would not be a sensible way to capture that dynamic flexibility in a governance forms. First, the Norms imprecisely allocated human rights responsibilities among states and corporations.<sup>141</sup> Second, the imprecision was attributed to the failure to provide a set of principles for making such differentiation.<sup>142</sup> And lastly, “in actual practice the allocation of responsibilities under the Norms could come to hinge entirely on the respective capacities of states and corporations in particular situations – so that where states are unable or unwilling to act, the job would be transferred to corporations.”<sup>143</sup> For the SRSG, the conclusion was clear—the Norms project was not worth salvaging. A different conceptual basis was needed.

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<sup>132</sup> Id.

<sup>133</sup> Id., at ¶ 59.

<sup>134</sup> Id. at ¶ 69.

<sup>135</sup> Id.

<sup>136</sup> Id., at ¶ 64.

<sup>137</sup> Id., at ¶ 61.

<sup>138</sup> Id. at ¶ 61.

<sup>139</sup> For example, the SRSG noted that the US Alien Tort Claims Act has been influential in its use to create liability for offenses under international standards but the mere fact that providing the possibility of a remedy has made a difference though it is a limited tool due to its expense and difficulty. Id. at ¶ 62.

<sup>140</sup> Id. at ¶ 65.

<sup>141</sup> Id. at ¶ 66.

<sup>142</sup> Id. at ¶ 67.

<sup>143</sup> Id. at ¶ 68.

5. *Strategic Directions: Principled Pragmatism.* To move beyond the Norms, the SRSG proposed an approach grounded in principled pragmatism.<sup>144</sup> This combines the empiricism that was emphasized as a central element of the mandate and data based principles applied to the realities of corporate operation within states and between them under accepted rules of economic globalization. To that end, the SRSG recognized an important element, that companies are constrained by a double set of behavior standards, legal standards as well as social/moral considerations.<sup>145</sup> This the SRSG offered as a basic principle for the construction of regulatory systems designed to guide the behavior of multinational corporations with respect to their human rights obligations. The effect of the distinction was to ground legal standards in the state, and thus in the political sector, and to ground social standards in the corporation and international organizations, that is in the economic and social sectors or global (national and transnational ) society.

Beyond that, the SRSG suggested the utility of the extension of an extraterritorial application of home country legal standards for abuses committed by domestic firms abroad.<sup>146</sup> The mandate is for the most part evidence based, but since these situations are in constant flux, normative judgments will have to be made. The basis for these judgments is a principled form of pragmatism: “an unflinching commitment to the principle of strengthening the promotion and protection of human rights as it relates to business, coupled with a pragmatic attachment to what works best in creating change where it matters most – in the daily lives of people.”<sup>147</sup> The SRSG pointed to several sources for emerging legal standards of corporate conduct, focusing on standards for corporate complicity in the human rights violations of others,<sup>148</sup> and labor standards.<sup>149</sup> He also pointed to sources of social obligation directly applicable to corporations. These included individual company policies and voluntary initiatives while aiming to identify the best practices that have been adopted. The focus was to strengthen transparency and accountability mechanisms.<sup>150</sup> In addition, a compendium of best practices was compiled to consider the most common practices around the globe.<sup>151</sup>

The conceptual basis of the mandate—and the scope of its empirical project—becomes clear. “The role of social norms and expectations can be particularly

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<sup>144</sup> “It is essential to achieve greater conceptual clarity with regard to the respective responsibilities of states and corporations.” *Id.*, at ¶ 70.

<sup>145</sup> This includes what companies must do, what their internal external stakeholders expect of them and what is desirable. Each of these has a different basis in the fabric of society, exhibiting different operating modes, and is responsive to different incentive and disincentive mechanisms. *Id.* at ¶ 70.

<sup>146</sup> *Id.* at ¶ 71. Though there could be problems with this as companies may then be subjected to differing international standards.

<sup>147</sup> *Id.* at ¶ 81.

<sup>148</sup> “With regard to emerging legal standards for establishing corporate complicity in human rights abuses, the SRSG will follow with interest the work of the expert panel convened by the International Commission of Jurists. Additionally, he is working with legal teams in several countries to examine case law in different jurisdictions.” *Id.* at ¶ 72

<sup>149</sup> “There can be little mystery about core labor standards; the ILO has actively addressed issues concerning work and related human rights for a very long time.” *Id.* at ¶ 73.

<sup>150</sup> *Id.* at ¶ 74.

<sup>151</sup> *Id.*, at ¶ 76-78.

important where the capacity or willingness to enforce legal standards is lacking or absent altogether.”<sup>152</sup> But the role of the state, and state based legal regimes remains “not only primary, but also critical.”<sup>153</sup> The role of the SRSG was principally evidence based<sup>154</sup>—providing information necessary to afford states the opportunity to effectively and thoroughly employ their authority to impose legal requirements on states through their domestic law systems.

But insofar as it involves assessing difficult situations that are themselves in flux, it inevitably will also entail making normative judgments. In the SRSG’s case, the basis for those judgments might best be described as a principled form of pragmatism: an unflinching commitment to the principle of strengthening the promotion and protection of human rights as it relates to business, coupled with a pragmatic attachment to what works best in creating change where it matters most – in the daily lives of people.<sup>155</sup>

For that purpose, an additional governance system—social, non-state based, and grounded in the nature of the relationships between corporations and their stakeholders, would be required. Subsequent Reports first elaborate this “principled pragmatism” and then develop the basis for implementing a multi-level governance framework that targets in distinct ways, states (as legal actors) and corporations (as social-economic actors).

#### B. The 2007 Report.<sup>156</sup>

The 2007 Report focuses on that portion of the SRSG’s mandate to ‘identify and clarify,’ to ‘research’ and ‘elaborate upon,’ and to ‘compile’ materials – in short, to provide a comprehensive mapping of current international standards and practices regarding business and human rights.<sup>157</sup> The SRSG starts by contextualizing this effort within the dynamic rearrangements of power relationships manifested through globalization. Globalization provides the parameters of the “problem” of the multinational corporation—its contribution to aggregate global poverty reduction and targeted costs on specific people and communities.<sup>158</sup> This results from a well-understood misalignment of the power to act and the power to regulate.<sup>159</sup> This necessarily requires realignment—and thus the objective of the mandate—among institutions, political, social and economic,

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<sup>152</sup> Id., at ¶ 75.

<sup>153</sup> Id., at ¶ 79.

<sup>154</sup> “As indicated at the outset, the SRSG takes his mandate to be primarily evidence based.” Id. at ¶ 81.

<sup>155</sup> Id. at ¶ 81.

<sup>156</sup> Report of the Special Representative to the Secretary General of the United Nations on human rights and transnational corporations and other business enterprises. *Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Act*, ¶ 1, U.N. Doc. A/HRC/4/035 (February 9, 2007), available <http://www.business-humanrights.org/Documents/SRSG-report-Human-Rights-Council-19-Feb-2007.pdf>.

<sup>157</sup> Id. at ¶ 5.

<sup>158</sup> Id., at ¶ 2.

<sup>159</sup> “Clearly, a more fundamental institutional misalignment is present: between the scope and impact of economic forces and actors, on the one hand, and the capacity of societies to manage their adverse consequences, on the other. This misalignment creates the permissive environment within which blameworthy acts by corporations may occur without adequate sanctioning or reparation.” Id., at ¶ 3.

involved in the production of benefits and burdens affecting people.<sup>160</sup>

Within this context the 2007 Report seeks to map “evolving standards, practices, gaps and trends.”<sup>161</sup> For the purpose, the Report is divided into “five clusters of standards and practices governing ‘corporate responsibility’ . . . and ‘accountability.’”<sup>162</sup> These five clusters provide the foundation for what would eventually emerge as the three pillar regulatory framework.<sup>163</sup> The five clusters include: State Duty to Protect, Corporate Responsibility and Accountability for International Crimes, Corporate Responsibility for Other Human Rights Violations under International Law, Soft Law Mechanisms, and Self-Regulation.<sup>164</sup> Each is described in turn.

1. *The State Duty to Protect.* It is firmly embedded into international law that there is a duty of the state to protect against non-state human rights abuses.<sup>165</sup> International law also allows states to exercise its jurisdiction as long as there is a basis for it.<sup>166</sup> “The regional human rights systems also affirm the state duty to protect against nonstate abuse, and establish similar correlative state requirements to regulate and adjudicate corporate acts”<sup>167</sup> There is still concern that states are unable to protect human rights and the answers from the initial surveys conducted just reinforce that idea. Most states do not have solid policies or practices in place to protect human rights and simply rely on other initiatives like the OECD Guidelines or the voluntary Global Compact.<sup>168</sup> “In sum, the state duty to protect against nonstate abuses is part of the international human rights regime’s very foundation. The duty requires states to play a key role in regulating and adjudicating abuse by business enterprises or risk breaching their international obligations.”<sup>169</sup>

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<sup>160</sup> Id., at ¶ 3-4. “The permissive conditions for business-related human rights abuses today are created by a misalignment between economic forces and governance capacity. Only a realignment can fix the problem.” Id., at ¶ 82.

<sup>161</sup> Ibid at ¶ 5.

<sup>162</sup> Ibid at ¶ 6. Corporate responsibility is understood to be “the legal, social or moral obligations imposed on companies” and corporate accountability is understood to include “the mechanisms holding them to these obligations.” Id.

<sup>163</sup> It is now clear how these five areas have now been tailored and developed into the current PRR Framework. The first cluster, the State Duty to Respect has not changed at all. The second and third, Corporate Responsibility and Accountability for International Crimes and Corporate Responsibility for Other Human Rights Violation under International Law have become the Corporate Responsibility to Respect in the new framework. The fourth and fifth clusters, Self-regulation and Soft-law Mechanisms have become the third part of the framework, Access to Remedies; although the self-regulation cluster fits in with the corporate responsibility to respect as well. See discussion, below at Part IV, *infra*.

<sup>164</sup> Id. In line with the strong evidentiary basis of principles development, the “report draws on some two-dozen research papers produced by or for the SRSG. He also benefited from three regional multi-stakeholder consultations in Johannesburg, Bangkok, and Bogotá; civil society consultations on five continents; visits to the operations of firms in four industry sectors in developing countries.” Id., at at ¶ 7

<sup>165</sup> Ibid at ¶ 10.

<sup>166</sup> This is permitted where the actor or victim is a national, where the acts have substantial adverse effects on the state, or where specific international crimes are involved. Ibid at ¶ 15.

<sup>167</sup> Ibid at ¶ 16.

<sup>168</sup> Ibid at ¶ 15..

<sup>169</sup> Ibid at ¶ 18. It requires states to fulfill their duty as a key player in regulation and adjudication or risk breaching their international obligations.

2. *The Corporate Responsibility and Accountability for International Crimes.* This responsibility is based on individual liability that is contained in the Statute of the International Criminal Court. Corporations can now be held liable under the same principles that individuals are liable for genocide, crimes against humanity, and war crimes.<sup>170</sup> And a growing number of countries are including laws such as these in domestic law and beginning to hold corporations liable just as individuals can be held liable.<sup>171</sup> Problems with this direction arise when corporations are uncertain about which laws will apply to them – all the more reason for a universal law being adopted by all countries around the globe.<sup>172</sup> A further cause of concern for corporations is that some may be held liable if their corporate culture expressly or tacitly permits the commission of an offence by an employee.<sup>173</sup> But there is currently no uniform policy that will attach liability to a company for its employees' actions; and piercing the corporate veil is still difficult to accomplish in this sense, but there is now a greater risk that companies may be held liable for complicity in crimes.<sup>174</sup>

3. *The Corporate Responsibility for Other Human Rights Violation under International Law.* This standard is based on the growing national acceptance of international standards for individual responsibility, and is currently evolving.<sup>175</sup> The traditional view of human rights instruments in the international context is that they only impose indirect responsibilities on corporations, which is based on the state's international obligations.<sup>176</sup> But now it seems as if current international human rights instruments do not impose any direct legal responsibility on corporations, while at the same time, corporations are under greater scrutiny from those same human rights mechanisms.<sup>177</sup> More recently, some states have been extracting soft-law standards from these instruments in an attempt to develop future human rights laws.<sup>178</sup>

4. *Soft-law Mechanisms.* These regulatory instruments do not create legally binding obligations on those that are subject to the "law." Three different kinds of soft-law arrangements exist: "the traditional standard-setting role performed by intergovernmental organizations; the enhanced accountability mechanisms recently added by some intergovernmental initiatives; and an emerging multi-stakeholder form that involves corporations directly, along with states and civil society organizations, in redressing sources of corporate-related human rights abuses."<sup>179</sup>

The Report also described emerging multi-stakeholder systems of soft-law initiatives. Identified among others were the Voluntary Principles on Security and

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<sup>170</sup> Ibid at ¶ 19. Liability under the ICC statute is generally in national courts within states that have adopted it into domestic law.

<sup>171</sup> Ibid at ¶ 24.

<sup>172</sup> Ibid at ¶ 28.

<sup>173</sup> Similarly, in the United States, the US Sentencing Guidelines take into account the corporate culture when assessing money penalties. Ibid.

<sup>174</sup> Ibid at ¶ 29.

<sup>175</sup> Ibid at ¶ 33.

<sup>176</sup> An alternative view is that these instruments impose direct legal responsibilities on corporations but just lack direct accountability mechanisms to make them effective. Ibid at ¶ 35.

<sup>177</sup> Ibid at ¶ 44.

<sup>178</sup> Ibid at ¶ 46.

<sup>179</sup> Ibid at ¶ 46.

Human Rights, the Kimberley Process Certification Scheme, and the Extractive Industries Transparency Initiative.<sup>180</sup> These initiatives and those similar around the globe seek to close the gaps in regulation that contribute to, and permit, the human rights abuses. They also cross all boundaries in business and industry, host and home states, and many other kinds of institutions.<sup>181</sup> The developmental problem with these soft-law mechanisms is rooted in their creation. It blurs the line between what is voluntary and mandatory regulation, but soft-law initiatives are becoming a method of developing norms within the international community.<sup>182</sup>

5. *Self-regulation.* Self-regulation is comprised of the policies and practices that are adopted by companies themselves to protect human rights in a business context. These are almost exclusively voluntary initiatives by the companies who recognize that human rights are becoming a more important issue in the global economy. Three issues are considered in the accountability context in self-regulation: human rights impact assessments, materiality and assurance.<sup>183</sup> Impact assessments are vital in order to determine if the policies are having an effect.<sup>184</sup> Materiality refers to the information that is being conveyed in company reporting.<sup>185</sup> And assurance lets people know that the companies are doing what they should be doing with regards to human rights policies.<sup>186</sup>

The SRSG derived a number of important conclusions from his investigations of the five clusters of standards and practices. First he drew on history for lessons of approaches of regulatory schemes that failed.<sup>187</sup> The SRSG concluded that to the extent that businesses were increasingly subject to liability for bad acts under national law, the results were accidental, “largely an unanticipated by-product of states’ strengthening the legal regime for individuals, and its actual operation will reflect variations in national practice, not an ideal solution for anyone.”<sup>188</sup> Indeed, the SRSG’s evidence suggested that “not all state structures as a whole appear to have internalised the full meaning of the state duty to protect, and its implications with regard to preventing and punishing abuses by nonstate actors, including business.”<sup>189</sup> On the other hand, soft law initiatives and corporate self-regulation appear innovative but not yet systematic.<sup>190</sup> Still, states appear unwilling to take advantage of the tools they have to meet their treaty obligations. “Insofar as the duty to the protect lies at the very foundation of the

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<sup>180</sup> Ibid at ¶ 52.

<sup>181</sup> Ibid at ¶ 54.

<sup>182</sup> Ibid at ¶ 61.

<sup>183</sup> Ibid at ¶ 76.

<sup>184</sup> Ibid at ¶ 77.

<sup>185</sup> Ibid at ¶ 78.

<sup>186</sup> Ibid at ¶ 79-80. Assurance is also problematic when taking into account suppliers as they are not always required to follow the same policies and practices as the parent company.

<sup>187</sup> Ibid at ¶ 83.

<sup>188</sup> Ibid at ¶ 84. The lack of consistency and harmonization among national approaches leaves corporate regulation to other governance forms – principally, the SRSG suggests, in courts of public opinion. Id.

<sup>189</sup> Ibid at ¶ 86. “Nor do states seem to be taking full advantage of the many legal and policy tools at their disposal to meet their treaty obligations.” Id.

<sup>190</sup> “For that to occur, states need to more proactively structure business incentives and disincentives, while accountability practices must be more deeply embedded within market mechanisms themselves.” Ibid at ¶ 85.

international human rights regime, this uncertainty gives rise to concern.”<sup>191</sup> As a consequence, state inaction or partial action appears to open a space where corporations may exercise directly a duty with respect to human rights otherwise reserved to states.<sup>192</sup> The groundwork for the pillar structure is thus developed nicely—if there is no one silver bullet for the governance of the human rights obligations of business,<sup>193</sup> then it will be necessary to produce a polycontextual system of governance. It is the skeleton of that system that is unveiled in the next SRSG report.

### C. The 2008 Report.<sup>194</sup>

This third report is the first of the “synthesis” reports. Drawing regulatory conclusions from the empirical and normative work of the prior two reports, the SRSG now introduces the Protect-Respect-Remedy Framework. The report pattern follows earlier efforts. The report first identifies that the gaps in governance around the world, which are caused by globalization, are the catalysts that have resulted in human rights being violated through a permissive atmosphere with little repercussion from authority figures.<sup>195</sup> This gap has been created between economic actors and forces on one side and the capacity of societies to manage the adverse consequences on the other.<sup>196</sup>

Within this context, the SRSG can consider and eliminate potential approaches to the construction of a governance framework, an effort that recalls the analysis and rejection of the Norms in the 2006 Report. Among the approaches considered and dismissed are

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<sup>191</sup> Ibid at ¶ 86.

<sup>192</sup> In a crucial paragraph, the SRSG developed this idea and the consequence—multiple jurisdictional basis for regulation:

Lack of clarity regarding the implications of the duty to protect also affects how corporate “sphere of influence” is understood. . . . [I]n exploring its potential utility as a practical policy tool the SRSG has discovered that it cannot easily be separated operationally from the state duty to protect. Where governments lack capacity or abdicate their duties, the corporate sphere of influence looms large by default, not due to any principled underpinning. . . . The soft law hybrids have made a singular contribution by acknowledging that for some purposes the most sensible solution is to base initiatives on the notion of “shared responsibility” from the start. . . .

Ibid at ¶ 87.

<sup>193</sup> “The extensive research and consultations conducted for this mandate demonstrate that no single silver bullet can resolve the business and human rights challenge.” Id., at ¶ 88.

<sup>194</sup> Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises. *Protect, Respect and Remedy: a Framework for Business and Human Rights*, U.N. Doc. A/HRC/8/5 (April 7, 2008), available <http://www.reports-and-materials.org/Ruggie-report-7-Apr-2008.pdf>.

<sup>195</sup> Mr. Ruggie has pointed out that there are three governance gaps. The first is structural as the global economy is comprised of globally integrated businesses while there is a territorially fragmented system of public governance. This limits the ability of any government from having a significant effect on business and human rights. The second stems from the fragmentation within governments, or a lack of policy coherence. This is comprised of the vertical and horizontal incoherence contained in the report. The last gap is capacity related, the state never implements the law or adopts the necessary legislation because it lacks the means or fears the consequences in the global economy. John Ruggie, UN Special Representative for the Secretary General for Business and Human Rights, Keynote Address at the 3<sup>rd</sup> Annual Responsible Investment Forum (Jan. 12, 2009) at 2.

<sup>196</sup> Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises. *Protect, Respect and Remedy: a Framework for Business and Human Rights*, at ¶ 3, U.N. Doc. A/HRC/8/5 (April 7, 2008).

ones that require the production of a specific list of human rights affecting businesses. The SRSG took the position that businesses affect all areas of human rights;<sup>197</sup> thus, if the list were not all encompassing it would leave out essential areas of human rights that are affected, leaving those specific rights unprotected. Rather than the certainty of lists and rules based approaches, the SRSG instead framed governance around three core principles.

1. *State Duty to Protect.* For instance, under the State Duty to Protect, corporate culture is a decisive issue as it can be used to determine liability and can use market pressures to force companies to act in ways that are not harmful to human rights. Policy alignment is an issue to consider where the government has developed or endorses certain human rights commitments, but then does nothing to implement them (vertical incoherence); and when various groups within government are unable to work together to fulfill their obligations to protect human rights (horizontal incoherence).<sup>198</sup> This imbalance is greatest in developing countries and should be addressed to ensure that host states are following their human rights obligations.<sup>199</sup> Effective guidance and support at the international level is also a serious consideration. This can help not only one country, but may spread effective ideas around the globe through the active encouragement to share information about challenges that are faced and the solutions that are used to deal with them.<sup>200</sup>

Additionally, conflict zones, areas with civil and economic strife, are important to keep in mind as they usually contain the most human rights violations.<sup>201</sup> The best policy would be to prevent harmful corporate involvement in conflict areas.<sup>202</sup> A way to deal with this is to identify possible triggers for companies that may indicate potential abuses.<sup>203</sup>

2. *Corporate Responsibility to Respect.* The great innovation of the 2008 Report was the elaboration of a corporate responsibility to respect human rights. The issue is to determine which rights companies have the responsibility to bear. Current ideas

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<sup>197</sup> "No industry, and no region, has a monopoly on corporate abuses; all have been implicated. Moreover, it is clear that companies can have adverse effects on virtually all internationally recognized rights, not only a relatively narrow range of labor standards or issues related to communities in the proximity of a business operation." John Ruggie, UN Special Representative for the Secretary General for Business and Human Rights, Remarks at the Royal Institute of International Affairs, Chatham House (May 22, 2008) at 2.

<sup>198</sup> *Supra* note 75 at ¶ 33-40. Horizontal incoherence is present at two places, when dealing with host states and with home states. For host states, the problem develops when there are groups within the government trying to attract foreign investment and do not balance the need for foreign investment with an interest in human rights.

<sup>199</sup> *Ibid* at ¶ 36.

<sup>200</sup> *Ibid* at ¶ 44.

<sup>201</sup> This also includes challenges present in low income countries, countries that have just emerged from, or are still in, conflict, and where the rule of law is weak and corruption is high. *Supra* note 5???????????????? Chatham house speech.

<sup>202</sup> SRSG notes that 'States need to do more to "promote conflict-sensitive practices in their business sectors"'. *Ibid*.

<sup>203</sup> "They could then provide or facilitate access to information and advice ... to help businesses address the heightened human rights risks and ensure they act appropriately when engaging with local actors." *Ibid* at ¶ 49.

surrounding this principle include forcing companies to shoulder *specific* responsibilities for all aspects of human rights, which is in contrast to the idea that companies are responsible for *all* areas of specific human rights – an idea that would exclude many important aspects of human rights.<sup>204</sup> Respecting rights is the baseline responsibility for all companies, not just simply complying with national laws. This responsibility is separate from the state duty to protect and there is no primary state and secondary company obligation.<sup>205</sup> Also, doing no harm does not mean that companies can sit back passively and not violate human rights, what is required is a positive act by the company such as standards it must follow to protect human rights.<sup>206</sup>

Due diligence is also considered.<sup>207</sup> This must take the form of an entire process that includes policies,<sup>208</sup> impact assessments,<sup>209</sup> integration,<sup>210</sup> and tracking performance.<sup>211</sup> Ruggie also defines ‘Sphere of Influence’ and ‘Complicity’ in this context. Sphere refers to the actors and parties that surround a company and influence refers to two things, impact and leverage.<sup>212</sup> These considerations are essential when determining liability and responsibility for companies.

Complicity also has to do with determining liability and can act hand-in-hand with corporate culture (if the corporate culture does enable complicit behavior). If a company is complicit in a violation of human rights they can be held liable as actors in the violation. Though this may seem easy to prove in many situations, the standards that must be developed will set the bar higher to prove corporate liability. For example, simply deriving a benefit for human rights violations is not sufficient to impose liability on a company.<sup>213</sup> Additionally, if a company does perform a due diligence analysis, it is much easier to avoid charges of complicity and thus, liability.<sup>214</sup>

3. *Access to Remedies.* This final pillar of the framework is used to ensure that the protection of human rights is carried out. The purpose of this element is to point out that grievance mechanisms must be effective for the two other principles to mean anything at all.<sup>215</sup> The SRSG included information and considerations on various

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<sup>204</sup> *Supra* note 75 at ¶ 51.

<sup>205</sup> *Ibid* at ¶ 55.

<sup>206</sup> *Ibid*.

<sup>207</sup> The scope of due diligence should include not only a company’s own activities, but also the relationships connected with them—relationships with governments and other non-state actors. *Supra* note 5, at 5???????????? Chatham house speech.

<sup>208</sup> adoption of human rights policies with detailed guidance in specific areas to give meaning to it. *Supra* note 75 at ¶ 60.

<sup>209</sup> companies must take proactive steps before conducting any activities to determine if there will be any impact on human rights. If there will be an effect, companies should refine their plans to avoid or mitigate the human rights harms. *Ibid* at ¶ 61.

<sup>210</sup> companies must integrate the human rights policy they develop into their overall policy. They must be integrated into the entire company and not just one department. *Ibid* at ¶ 62.

<sup>211</sup> monitoring and auditing performance is important as it allows companies to track the performance of ongoing developments in human rights policies. *Ibid* at ¶ 63.

<sup>212</sup> *Supra* note 75, at ¶ 66.

<sup>213</sup> *Ibid* at ¶ 78.

<sup>214</sup> *Ibid* at ¶ 73.

<sup>215</sup> *Ibid* at ¶ 82. For if the grievance mechanism is ineffective, or even non-existent, there is no incentive for states or companies to protect or respect human rights.

avenues to remedies to explore the different options for victims of human rights violations. Judicial mechanisms are looked at first, but as is shown, it is often difficult to realize any remedies from this avenue – reasons for this include: poor knowledge of the law by victims, few resources in developing countries to pursue charges, jurisdictional issues, and State matters.<sup>216</sup> Victims usually lack a basis in the law to found a claim, and even if they do bring a claim, it might be hindered by political, economic, or legal considerations. The law is beginning to evolve to allow claims where the acts or omissions of a parent company are related to the harm that was caused by their subsidiary.<sup>217</sup> But some companies defend themselves using *forum non conveniens* to show that there is a more appropriate forum for the claim.<sup>218</sup>

Non-judicial mechanisms are also considered. However, the SRSG was concerned about establishing the legitimacy of such systems. For that purpose, it was pointed out that they must meet a certain criteria before they will be found credible. This criterion requires the mechanism to be: legitimate, accessible, predictable, equitable, rights-compatible, and transparent.<sup>219</sup>

Company-level mechanisms must address issues before they even evolve to larger disputes, though there may be problems if the company acts as both defendant and judge.<sup>220</sup> A company can provide a grievance mechanism directly and also be involved in its administration; this may include the use of external resources, sometimes shared with other companies, such as hotlines, advisory services, and expert mediators; though it can also include external mechanisms.<sup>221</sup>

State-based non-judicial mechanisms are also important as they can hold companies liable where possible, and if not, they can provide advice and direction so victims can obtain redress.<sup>222</sup> The main organizations in this category are national human rights institutions (NHRIs). These are very important; where they are able to address grievances involving companies, they can begin to hold companies accountable.<sup>223</sup> Where they cannot handle grievances on their own, they can provide direction and advice on the avenue to obtain redress.<sup>224</sup>

Grievance mechanisms can also help check the performance of companies for human rights abuses when multi-stakeholder or industry initiatives and financiers are involved. But because there are few formal standards for companies to follow when integrating mechanisms, there is concern that most will just be tokenistic and not effective at the operational level.<sup>225</sup> As more initiatives are created, it is important that

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<sup>216</sup> Ibid at ¶ 88-89.

<sup>217</sup> Ibid at ¶ 90.

<sup>218</sup> Ibid.

<sup>219</sup> Ibid at ¶ 92.

<sup>220</sup> Ibid at ¶ 93. The mechanism should focus on a direct or mediated dialogue.

<sup>221</sup> Ibid at ¶ 94.

<sup>222</sup> Ibid at ¶ 97.

<sup>223</sup> Ibid at ¶ 97.

<sup>224</sup> Ibid.

<sup>225</sup> Ibid at ¶ 100.

they become collaborative to streamline the process for remedies while making them more effective for complainants.<sup>226</sup>

Gaps in access are another issue considered in this context. Many potential victims still do not have access to any mechanisms, nor do they have any knowledge of such mechanisms. This can be remedied by using various institutions, governments and other actors to improve the information flow to potential victims.<sup>227</sup> One proposal includes a global ombudsman that addresses all complaints, but there is also a large amount of consideration to be undertaken before something of this magnitude is implemented.<sup>228</sup> The criteria would be accessibility (though not the first step for complaints), effective processes without undermining the development of national mechanisms, timeliness for responses (though they will likely be far removed from complainants), and provide appropriate solutions that take into account different sectors, cultures and political contexts.<sup>229</sup>

The SRSG ends the 2008 Report by contextualizing the framework within the evidentiary finds of the 2006 and 2007 reports. He notes that both the public and private sectors have been seeking to find ways to better internalize human rights obligations within their respective systems.

Without in any manner disparaging these steps, our fundamental problem is that there are too few of them, none has reached a scale commensurate with the challenges at hand, there is little cross-learning, and they do not cohere as parts of a more systemic response with cumulative effects. That is what needs fixing. And that is what the framework of “protect, respect and remedy” is intended to help achieve.<sup>230</sup>

This does not require the development of a singular global law, but rather expand the scope of governance responses to include both public and private actors.<sup>231</sup> Systematization, coordination and collaboration between the governance systems of states and corporations becomes a necessary requisite to the incorporation of human rights within the legal systems of states and the social systems of corporations.

#### D. 2009 Report.<sup>232</sup>

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<sup>226</sup> Ibid at ¶ 101.

<sup>227</sup> Ibid at ¶ 102.

<sup>228</sup> Ibid at ¶ 103.

<sup>229</sup> Ibid.

<sup>230</sup> Ibid at ¶ 106.

<sup>231</sup> With a nod, again, to what the SRSG identifies as the fatal flaw in the conceptualization of the Norms, the SRSG acknowledges that the “United Nations is not a centralized command-and-control system that can impose its will on the world - indeed it has no “will” apart from that with which Member States endow it. But it can and must lead intellectually and by setting expectations and aspirations.” Id., at ¶ 107.

<sup>232</sup> Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises. *Business and human rights: Towards Operationalizing the “protect, respect and remedy” framework*, at ¶ 15, U.N. Doc. A/HRC/11/13 (April 22, 2009), available <http://www2.ohchr.org/english/bodies/hrcouncil/docs/11session/A.HRC.11.13.pdf>.

The most recent report outlines the strategic directions of the SRSG's efforts to operationalize the Protect-Respect-Remedy Framework. This direction is in part a product of prior reports as well as of the sentiments expressed on the renewal of the SRSG's mandate. "This marked the first time the Council or its predecessor had taken a substantive policy position on business and human rights."<sup>233</sup> To effectuate these objectives, the 2009 Report began the process of considering methodologies and structures for converting framing principles into governance orders, that is, "to translate the framework into practical guiding principles."<sup>234</sup> For that purpose, states are assumed to act "through appropriate policies, regulation and adjudication."<sup>235</sup> Corporations are assumed to act "with due diligence to avoid infringing the rights of other."<sup>236</sup> The remedial aspect of the framework are to lead to "greater access by victims to effective remedy, judicial and non-judicial."<sup>237</sup> The 2009 Report provides "an update on steps the Special Representative has taken towards operationalizing the framework, and it addresses of issues related to it that have emerged from ongoing consultations."<sup>238</sup>

To get to operationalization issues, the SRSG first had to consider the impact of the financial crisis of 2008 on the regulatory project represented by the Protect-Respect-Remedy framework. The SRSG suggested that the economic crisis proved his point of the consequences of a regulatory or governance gap.<sup>239</sup> More than that, the crisis suggested the importance of the framework for ameliorating the worst effects of economic crisis on the most vulnerable populations.<sup>240</sup> Indeed, the economic crisis itself

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<sup>233</sup> *Id.*, at ¶ 1. The mandate for the SRSG was renewed June 18, 2008 to continue from 2008 until 2011. This was a revised mandate including elements of the initial mandate but taken a step further. It now requires the SRSG (a) To provide views and concrete and practical recommendations on ways to strengthen the fulfillment of the duty of the State to protect all human rights from abuses by or involving transnational corporations and other business enterprises, including through international cooperation; (b) To elaborate further on the scope and content of the corporate responsibility to respect all human rights and to provide concrete guidance to business and other stakeholders; (c) To explore options and make recommendations, at the national, regional and international level, for enhancing access to effective remedies available to those whose human rights are impacted by corporate activities; (d) To integrate a gender perspective throughout his work and to give special attention to persons belonging to vulnerable groups, in particular children; (e) [To] Identify, exchange and promote best practices and lessons learned on the issue of transnational corporations and other business enterprises, in coordination with the efforts of the human rights working group of the Global Compact; (f) To work in close coordination with United Nations and other relevant international bodies, offices, departments and specialized agencies, and in particular with other special procedures of the Council; (g) To promote the framework and to continue to consult on the issues covered by the mandate on an ongoing basis with all stakeholders, including States, national human rights institutions, international and regional organizations, transnational corporations and other business enterprises, and civil society, including academics, employers' organizations, workers' organizations, indigenous and other affected communities and non-governmental organizations, including through joint meetings; and (h) To report annually to the Council and the General Assembly. Available at <http://www.business-humanrights.org/SpecialRepPortal/Home/Mandate>

<sup>234</sup> *Id.*, at ¶ 3.

<sup>235</sup> *Id.*, at ¶ 2.

<sup>236</sup> *Id.*

<sup>237</sup> *Id.*

<sup>238</sup> *Ibid* at ¶ 6.

<sup>239</sup> *Ibid* at ¶ 7.

<sup>240</sup> "However painful the near-term may be, going forward elements of the business and human rights agenda should become more clearly aligned with the world's overall economic policy." *Id.*, at ¶ 10. "Because the business and human rights agenda is tightly connected to these shifts, it both contributes to

appeared to present an opportunity, which the SRSG aims to identify “in the business and human rights domain and demonstrate how they can be grasped and acted upon.”<sup>241</sup>

1. *State Duty to Protect*. The object of the 2009 Report was “to provide views and recommendations on strengthening the fulfillment of the State duty to protect against corporate related human rights abuse.”<sup>242</sup> For this purpose, the SRSG summarized the duty’s content and identified relevant business-related policy areas relevant to that duty.<sup>243</sup>

The SRSG embraces the assumption that “Governments are the most appropriate entities to make the difficult decisions required to reconcile different societal needs.”<sup>244</sup> The state duty to protect, for the SRSG, is bound up in the supremacy of international law obligations of states over domestic legal considerations.<sup>245</sup> The State duty is grounded in international law, which both creates substantive rules and imposes on States a duty to transpose those substantive commands into domestic law.<sup>246</sup> Thus transposed, these legal requirements ought to protect individuals against abuses by any person or entity operating within a national territory.<sup>247</sup> On the other hand, the “extraterritorial dimension of the duty remains unsettled in international law.”<sup>248</sup> But neither does international law and legal principles proscribe the practice either, so long as there is some jurisdictional basis for it and the reasonableness test is satisfied.<sup>249</sup>

States “have long been aware of the range of measures required of them in relation to abuse by State agents.”<sup>250</sup> But they have failed to enact the broad range of measures necessary to transpose all of the requirements of international law into their domestic legal orders. The result is what the SRSG describes as broad ranging horizontal and vertical legal and policy incoherence that substantially detracts from the State’s duty.<sup>251</sup> Incoherence at all levels is a significant issue when considering the adoption of human rights standards. Vertical incoherence exists when states sign on to

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and gains from a successful transition toward a more inclusive and sustainable model of economic growth.”  
Id.

<sup>241</sup> Id., at ¶11.

<sup>242</sup> Id., ¶ 12.

<sup>243</sup> Id.

<sup>244</sup> Ibid ¶ 44.

<sup>245</sup> Ibid at ¶ 13.

<sup>246</sup> Id.

<sup>247</sup> Id.

<sup>248</sup> Id., at ¶ 15.

<sup>249</sup> Id. “Within these parameters, some treaty bodies encourage home states to take steps to prevent abuse abroad by corporations within their jurisdictions.” Id., citing to International Convention on the Elimination of all forms of Racial Discrimination, Consideration of Reports Submitted by States Parties Under Article 9 of the Convention, Concluding Observations of the Committee on the Elimination of Racial Discrimination, CERD/USA/CO/6 (2008), available <http://www1.umn.edu/humanrts/CERDConcludingComments2008.pdf>.

<sup>250</sup> 2009 Report, supra, at ¶ 17.

<sup>251</sup> Id., at ¶ 17.

human rights obligations but then never implement them.<sup>252</sup> Horizontal incoherence exists when different departments and agencies conduct their operations in isolation and know nothing about the government's obligations.<sup>253</sup> "Domestic policy incoherence is reproduced at the international level. This results in ambiguous and mixed messages to business and Governments and international organizations."<sup>254</sup>

The challenges to the realization of the State duty to protect has begun to be addressed by four legal developments studied in prior reports—the harmonization of international standards for global crimes, an emerging standard of corporate complicity in human rights abuses, the use of deviations from conventional corporate culture for determination of criminal responsibility, and a rise in civil cases brought in the courts of developing states against corporations for human rights abuses.<sup>255</sup> Policy developments have focused on the elaboration of increasingly complete corporate social responsibility projects.<sup>256</sup> These policy developments might provide a useful source for improving the state duty to protect.<sup>257</sup>

The SRSR continues to look to other policy domains that are closely related to the States' duty to protect; these include corporate law, investment and trade agreements, and international cooperation, for the most part with respect to conflict affected areas.<sup>258</sup> Each is described in turn.

Corporate law shapes what corporations do and how they do it; but there are always serious implications of it with respect to human rights.<sup>259</sup> There is now a shifting trend as governments and courts are introducing more public interest considerations into law.<sup>260</sup> Recent innovations in English and Danish law were highlighted, as were proposed legislation in India and caselaw in the United States were highlighted.<sup>261</sup>

Investment and Trade Agreements remain important engines of economic growth, but the hard part is to avoid the back and forth protectionist policies that will simply hinder any future growth.<sup>262</sup> Other problems arise when governments cannot fulfill certain policy obligations if they are constrained by treaties. This problem is exacerbated when investors have "stabilization provisions" or "host Government

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<sup>252</sup> Ibid at ¶ 18. It would normally seem as if there should be some accountability mechanism that requires countries that do adopt any obligations to actually fulfill those obligations without the adopted human rights program simply being viewed as tokenistic.

<sup>253</sup> Ibid. This is more difficult to address as it deals with the internal workings of a state government and policy makers. This is a difficult area to consider for operationalizing the framework as it then gets into the area of domestic policy creation which may be seen as an affront to sovereignty.

<sup>254</sup> Id., at ¶ 19.

<sup>255</sup> Id., at ¶ 20.

<sup>256</sup> Ibid at ¶ 21.

<sup>257</sup> Ibid at ¶ 21.

<sup>258</sup> Ibid at ¶ 23.

<sup>259</sup> Ibid at ¶ 24.

<sup>260</sup> Ibid. One example is publicly traded companies in the United States now being required to have programs that assess, manage, and report on material risks, which includes many human rights issues, even though not mentioned specifically. Ibid at ¶ 26.

<sup>261</sup> Id., at ¶¶ 25-26.

<sup>262</sup> Ibid at ¶ 28.

agreements” that give investors more predictability and other legal safeguards.<sup>263</sup> There is a difference in these cases if the country is an OECD or not. The SRSG has found that in recent agreements, OECD countries do not allow exemptions from new laws for investors, with minor exceptions that allowed the clauses to be tailored to preserve public interests.<sup>264</sup> In non-OECD countries, there is generally some protection from compliance with new environmental or social laws, or even provide compensation for compliance all to promote greater investment in that jurisdiction.<sup>265</sup> Ruggie is still consulting with experts on whether and how trade regimes can limit or enable the state duty to protect.

International Cooperation “involves States working together through awareness raising, capacity building and joint problem solving.”<sup>266</sup> But several factors currently limit the effectiveness of international cooperation efforts. States are not using existing forums as effectively as they could so it won’t be possible to enhance peer learning as required.<sup>267</sup> The SRSG is reaching out beyond UN Human Rights mechanisms and welcomes new ideas. Capacity-building within states is an important issue since most states do not put human rights high on the priority list.<sup>268</sup> This cooperation for joint problem-solving is important in conflict resolution areas, though this cannot be expected in societies with civil war or strife, which is why the most egregious human rights violations occur in countries torn apart.<sup>269</sup>

2. *Corporate Responsibility to Respect.* Companies know that they must comply with laws to maintain their legal license to operate, but some have realized that that is not enough to maintain their social license to operate, especially if the local law is weak.<sup>270</sup> Social license is based on prevailing social norms which can be just as important as legal norms. Many of these social norms vary by region and industry, but one has near universal recognition – the corporate responsibility to respect human rights, or to not infringe on the rights of others.<sup>271</sup> The corporate responsibility to respect exists independently of any state duty or variation of national law.

The SRSG asked companies if they had systems in place which would aid them in demonstrating claims of respect for human rights with a degree of confidence. What is required of companies “is an ongoing process of human rights due diligence, whereby companies become aware of, prevent, and mitigate adverse human rights impacts.”<sup>272</sup> There are three essential ranges of factors necessary for a company’s human rights due diligence process, including: the country and local context in which the business activity takes place; what impacts the company’s own activities may have within that context, in

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<sup>263</sup> Ibid at ¶ 32.

<sup>264</sup> Ibid.

<sup>265</sup> Ibid.

<sup>266</sup> Id., at ¶ 38.

<sup>267</sup> Ibid at ¶ 39.

<sup>268</sup> Ibid at ¶ 41.

<sup>269</sup> Ibid at ¶ 43. Ruggie has found that all stakeholders want some more guidance on how to prevent human rights abuses by companies in conflict affected areas.

<sup>270</sup> Ibid at ¶ 46.

<sup>271</sup> Ibid.

<sup>272</sup> Ibid at ¶ 49.

its capacity as producer, service provider, employer and neighbor, and understanding that its presence inevitably will change many pre-existing conditions; and whether and how the company might contribute to abuse through the relationships connected to its activities, such as with business partners, entities in its value chain, other non-State actors, and State agents.<sup>273</sup> The SRSG announced more consultations to further operationalize the corporate responsibility to respect human rights and other due diligence issues.

Two issues have arisen in understanding the corporate responsibility to respect human rights: demystifying human rights and the understanding of due diligence. The main problem is that States have developed human rights concepts for states, and not for companies, thus making it difficult for companies to understand them. As the Protect, Respect and Remedy Framework is being used to split the complementary responsibilities of both states and companies, it is difficult to determine where each actor stands in the human rights agenda.<sup>274</sup> The SRSG considers “Positive Acts” – acts by a company that require the use of due diligence to become aware of, prevent, and address adverse human rights impacts.<sup>275</sup> These underlying principles must always be considered, regardless of varying situational factors.

The SRSG then considered what is beyond respect. Though the responsibility to respect human rights is a baseline responsibility for all companies in all situations, companies can undertake greater responsibility voluntarily or in a philanthropic sense.<sup>276</sup> At this point it is still unclear which responsibilities should be attributed to companies. A dilemma exists for companies when national law contradicts and does not offer the same level of protection as international human rights standards.<sup>277</sup>

With respect to due diligence, on the other hand, the SRSG addressed four issues in the context of human rights. The first touched on life cycle issues. Due Diligence is commonly defined as ‘diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or to discharge an obligation.’<sup>278</sup> But Ruggie used the term more broadly: “a comprehensive, proactive attempt to uncover human rights risks, actual and potential, over the entire *life cycle* of a project or business activity, with the aim of avoiding and mitigating those risks.”<sup>279</sup>

The second set of issues touch on business role and size. The SRSG starts from the assumption that companies of all sizes should internalize human rights principles,

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<sup>273</sup> Ibid at ¶ 50. All internationally recognized human rights should be included in the substantive content of the due diligence process known to companies. Ibid at ¶ 52.

<sup>274</sup> Ibid at ¶ 57-58.

<sup>275</sup> Ibid at ¶ 59. This includes the requirement that a company have a forum for complaints to be brought.

<sup>276</sup> Ibid at ¶ 61. What is required from companies is not what is desired from them, though at the same time, if a company does what is desired of them, it does not offset what is required of them.

<sup>277</sup> Ibid at ¶ 66. National authorities may demand compliance with national law, while stakeholders and the company itself may prefer, due to principle or company policy, adherence to international standards.

<sup>278</sup> Ibid at ¶ 71.

<sup>279</sup> Ibid. This definition of life cycle is important as the due diligence process will be more accurate and considerate of all factors that may take place over the entire life of a business activity that affects human rights.

though the methods employed can be different and are not yet fully understood.<sup>280</sup> Small and medium sized companies must consider their human rights impacts as well, but the scale and complexity of their due diligence cannot compare with that of a larger company.<sup>281</sup> Suppliers must also be considered as companies want to avoid charges of complicity due to their suppliers' violations.<sup>282</sup> Ruggie has continued to explore how businesses of different sizes and roles can affect human rights due diligence and is working to create an elaboration of human rights due diligence that can apply to all businesses.<sup>283</sup>

The SRSG next considers issues of methodology, which he labels: Free Standing? The issue considers whether human rights policies be integrated into company conventional monitoring processes or whether it should be free standing.<sup>284</sup> A single policy is unlikely to fit all situations, but two principles are critical: 1- companies must realize that human rights demand meaningful engagement with all parties affected within and beyond the company; and 2- oversight of the compliance method must have direct access to the company's leadership.<sup>285</sup> As most due diligence policies would likely be similar for all companies, the use and integration of a human rights policy within companies would probably be similar. Thus a standard would likely emerge that all companies could follow successfully.

The last set of issues concerned liability: whether companies, through following human rights due diligence requirements, could expose themselves to potential liability because it could provide other parties with information they could use against the company that they would not otherwise have had.<sup>286</sup> A prudent company will follow the due diligence process outlined by the SRSG which "encourages robust risk assessment that is... highly advisable from a business perspective in today's highly visible and transparent environment."<sup>287</sup> "[D]one properly, human rights due diligence should create opportunities to mitigate risks and engage meaningfully with stakeholders so that disingenuous lawsuits will find little support beyond the individuals who file them."<sup>288</sup>

3. *Access to Remedies.* The third pillar of the Framework is integral to the entire framework as it is used to enforce the other duties and responsibilities. Four segments exist in this pillar that must be considered when determining how to operationalize.

*State Obligations:* States are required to take steps to investigate, punish and redress corporate-related abuses of human rights within their jurisdiction.<sup>289</sup> "[T]he

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<sup>280</sup> Ibid at ¶ 72.

<sup>281</sup> Ibid at ¶ 74.

<sup>282</sup> Ibid at ¶ 75.

<sup>283</sup> Ibid at ¶ 76.

<sup>284</sup> Ibid at ¶ 77.

<sup>285</sup> Ibid at ¶ 79.

<sup>286</sup> Ibid at ¶ 80.

<sup>287</sup> Ibid at ¶ 81.

<sup>288</sup> Ibid at ¶ 83. Additionally, other social actors can determine if a company facing criticism has undertaken a good faith effort to avoid human rights violations, which would limit the harmful effect that following the due diligence requirements may expose the company to.

<sup>289</sup> Without these steps, the access to remedy would be weak or even meaningless. Ibid at ¶ 87.

State obligation applies to corporate abuse of all applicable human rights, it is unclear how far the individual right to remedy extends to non-State abuses.”<sup>290</sup>

*Interplay between Judicial and Non-Judicial Mechanisms:* These two mechanisms are sometimes thought of as mutually exclusive, but in fact, they are more interactive, even complementary, reinforcing, sequential, or preventive.<sup>291</sup> Non-judicial mechanisms can be used earlier and faster than judicial processes and where there is no cause for legal action. But each mechanism has its own advantages and disadvantages which must be considered in the wide range of options based on needs and circumstances.

*Judicial Mechanisms:* The legal systems of States are not enough to investigate, punish and redress abuses as significant barriers still exist.<sup>292</sup> Ruggie focused on barriers that are prominent for victims of corporate related human rights abuses. Some problems included: insufficient capacity to deal with complex claims, costs of filing claims, loser pays policies, and receiving judgments.<sup>293</sup> When making claims against the subsidiaries of foreign parent companies it is even more difficult as there are jurisdictional standards to be used while parent companies use their leverage over governments.<sup>294</sup> With criminal proceedings, even if it is a valid claim, the state may not be willing, or able, to commit resources to the claim.<sup>295</sup> The SRSG is continuing to research and conduct consultations on barriers to judicial remedy, while also looking at possible options to redress them.<sup>296</sup>

*Non-judicial Mechanisms:* six grievance mechanism principles were considered from the 2008 report: legitimacy, accessibility, predictability, equitability, rights-compatibility, and transparency. The newest principle maintains that the company should operate through dialogue and mediation as opposed to the company itself as an adjudicator. Mechanisms exist at the company level, the national level and the international level.

At the company level, effective grievance mechanisms play an important part in the corporate responsibility to respect. They complement monitoring of human rights compliance and provide a channel for early warning signs.<sup>297</sup> A number of influential companies have begun experimenting with grievance mechanisms and related methodologies. The SRSG also welcomed efforts to craft principles for the operation of such systems by non-state transnational actors.<sup>298</sup> At the national level, national human rights institutions (NHRIs) and the National Contact Points (NCPs) of states that adhere to OECD Guidelines are potentially important avenues for remedies at the national

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<sup>290</sup> Ibid at ¶ 88.

<sup>291</sup> Ibid at ¶ 91.

<sup>292</sup> Ibid at ¶ 93.

<sup>293</sup> Ibid at ¶ 94.

<sup>294</sup> Ibid at ¶ 95.

<sup>295</sup> Currently, there is very little that victims can do about this situation. Ibid at ¶ 96.

<sup>296</sup> Ibid at ¶ 98.

<sup>297</sup> Companies can even track complaints to identify systemic problems to prevent future harms. Ibid at ¶ 100.

<sup>298</sup> Id., at ¶ 101.

level.<sup>299</sup> NCPs stress the need for flexibility in its operation that reflects the circumstances.<sup>300</sup> But governments have not given these efforts sufficient support, despite treaty obligations that appear to compel a greater level of support and institutionalization.<sup>301</sup>

Lastly, at the international Level, many “voluntary industry codes, multi-stakeholder initiatives and investor-led standards have established grievance mechanisms.”<sup>302</sup> A major barrier to access of grievance mechanisms is lack of information about them. The SRSG has launched a wiki (BASESwiki.org) to address this issue. A number of other proposals are outlined within the report. “[C]reating a single, mandatory, non-judicial but adjudicative mechanism at the international level poses greater difficulty”, though an alternate option would be to look at an existing body with international standing that could offer mediation of human rights disputes.<sup>303</sup> Currently, no solid plan has been identified that could be used to address the issues raised here.

For the SRSG, then, grievance mechanisms serve as the heart of any remedy scheme. “They are essential to ensuring access to remedy for victims of corporate abuse.”<sup>304</sup> Again, the distinction between states as law-system organs and corporations as social-system organs drives the analysis. States enforce through the elaboration of laws and standards enforced through its courts. Corporations enforce through the elaboration of governance systems that are grounded in surveillance and non-judicial remedies.<sup>305</sup> “But too many barriers exist to accessing judicial remedy, and too few non-judicial mechanisms meet the minimum principles of effectiveness.”<sup>306</sup>

#### IV. ANALYSIS OF THE PROTECT-RESPECT-REMEDY FRAMEWORK.

The Protect-Respect-Remedy framework acknowledges the special characteristics of regulation inherent in state and non-state actors, and then bends both toward the provision of an adequate remedial system in accordance with the respective governance characteristics of each. States govern through law and legal instruments.<sup>307</sup> Corporations govern through soft mechanisms, what the SRSG characterizes as social

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<sup>299</sup> Ibid at ¶ 102.

<sup>300</sup> Ibid at ¶ 104. To ensure credibility, flexibility should be limited by certain performance criteria outlined by the SRSG.

<sup>301</sup> Id., at ¶ 104.

<sup>302</sup> Ibid at ¶ 106.

<sup>303</sup> Ibid at ¶ 111. Arbitration is also an option that is being given serious consideration.

<sup>304</sup> Id., at ¶ 115.

<sup>305</sup> Id.

<sup>306</sup> Id.

<sup>307</sup> Yet, there is a touch of Foucault in the SRSG’s approach to this foundational element. “When we say that sovereignty is the central problem of right in Western societies, what we mean basically is that the essential function of the discourse and techniques of right has been to efface the domination intrinsic to power in order to present the latter at the level of appearance under two different aspects: on the one hand as the legitimate rights of sovereignty, and on the other, as the legal obligations to obey it.” Michel Foucault, *Two Lectures, Lecture Two 14 January 1976*, in MICHEL FOUCAULT, *POWER/KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITINGS 1972-1977* 92, 95 (Alessandro Fontana & Pasquale Pasquino, trans., Colin Gordon, ed., New York: Pantheon Books, 1980).

legitimacy and what might also be understood as disciplinary and culturally embedded techniques.<sup>308</sup> Both must necessarily provide mechanisms for the vindication of behavior obligations imposed through either system.<sup>309</sup> The basic division suggests both distinctions in ideology and in the character of the governance communities. Yet the three governance approaches—legal, disciplinary, and remedial are inextricably intertwined.<sup>310</sup> Within the totality of governance power, the three pillars effect a division of that power along the lines of the structural characteristics of the entities most responsible for each—according to each (state, corporation and judge) authority within the sphere of their power—while imposing certain limits of that power through enforced communication between them. This is both an innovative model, in the forms of power that are the foundation of governance and the entities vested with governance power, and also a traditional one, recalling the innovative political theory behind American political theories of “checks and balances” and “separation of powers.”<sup>311</sup>

The journey from the first SRSG report in 2006 to the current efforts to extract a governance system from an ordering framework developed for both state and non-state actors with respect to their respective human rights obligations has produced an innovative approach to governance. Grounded in the realities of current power relationships, and acknowledging the strong pull of the ideology that validates the state system as the superior form of governance, the SRSG has crafted what appears to be a workable, if complex, system of multi level, multi-structural and poly-governance framework. The contours of that system have been outlined in the SRSG’s reports. The resulting principles of governance that flow from this framework can already be seen in outline.

The focus of Section III had been on an extraction of the normative and evidentiary basis on which the Protect-Respect-Remedy framework was developed, as well as an initial attempt to suggest the parameters of that framework within its normative parameters. In this Section IV, the movement is from extraction to analysis. The critical focus is on the most innovative part of the three pillar framework, the Second pillar corporate responsibility to respect human rights.

#### A. The State Duty to Protect.

While the Second Pillar Corporate responsibility to Respect human rights is the most innovative and potentially more transformative of the three pillar framework, the First Pillar State duty to protect human rights provides the foundational legal basis within the domestic legal orders of states for the vindication of international human

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<sup>308</sup> MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 195–228 (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1977).

<sup>309</sup> From a systems theory perspective, these governance systems are both functionally differentiated and structurally coupled. On functional differentiation, see, e.g., . CITE. On the importance of communication between closed governance systems as institutionalization and recognition, see TEUBNER 20-22.

<sup>310</sup> The issue of linkages focused on the extent and nature of these communicative mechanics. See, e.g., CITE.

<sup>311</sup> For the clearest exposition, see MARBURY, and McColloCH. CITE

rights norms. I have briefly suggested the relationship between pillars.<sup>312</sup> In discussion of the First Pillar obligations of states, the SRSG has focused on the legal obligations of states derived from international law.<sup>313</sup> The duty to protect is grounded in international human rights law.<sup>314</sup> It does not derive directly from national law, including the constitutional traditions of the state, except to the extent that such national constitutional traditions are compatible with international norms. Taken together these provisions of applicable international law "suggests that the State duty to protect applies to all recognized rights that private parties are capable of impairing, and to all types of business enterprises."<sup>315</sup> International law, in turn, includes two sets of obligations through treaty: (1) to refrain from violating a set of enumerated rights of persons within the national territory, and (2) to ensure the enjoyment of such rights by rights holders.<sup>316</sup>

These duties have a vertical and horizontal dimension. They apply vertically to govern the relations between states and others within the national territory. And they apply horizontally to apply to manage the relations among non-state actors within the territory of the state.<sup>317</sup> While the vertical dimensions are well understood in international law--the horizontal dimension represents something that is newer. Even within the bounds of European law, for example, in the construction of the jurisprudence of "[direct effects](#)" of EU directives,<sup>318</sup> the European Court of Justice had resisted for a long time the extension of the vertical effects of the doctrine to include horizontal relations between non-state actors.<sup>319</sup>

This analogy is important within the conceptual framework of the duty to protect. The SRSG emphasizes the vertical elements of the transposition of international obligations to regulate the conduct of enterprises. "That is, States are not held responsible for corporate related human rights abuses per se, but may be considered in breach of their obligations where they fail to take appropriate steps to prevent it and to investigate, punish, and redress it when it occurs."<sup>320</sup> Thus understood, international law, to the extent it speaks to rules covering the behavior of corporate conduct, might

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<sup>312</sup> Larry Catá Backer, [Business and Human Rights Part II--Thoughts on the Corporate Responsibility to Respect Human Rights](#), Law at the End of the Day, Feb. 2, 2010.

<sup>313</sup> See Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, [Business and Human Rights: Toward Operationalizing the "Protect, Respect, Remedy" Framework](#), Summary, U.N. Doc. A/HRC/11/13 (April 12, 2009).

<sup>314</sup> Id., at par. 13.

<sup>315</sup> Id. See, [Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises - Addendum - Summary of five multi-stakeholder consultations](#), A/HRC/8/5/Add.1 (April 23, 2008) for a listing of applicable law and commentaries thereof.

<sup>316</sup> Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, [Business and Human Rights: Toward Operationalizing the "Protect, Respect, Remedy" Framework](#), Summary, U.N. Doc. A/HRC/11/13 (April 12, 2009), at para. 13.

<sup>317</sup> Id.

<sup>318</sup> On direct effects, see, e.g., S. PRECHAL, DIRECTIVES IN EC LAW (2<sup>nd</sup> ed., Oxford: Oxford University Press, 2005); M. Klamert, *Judicial Implementation of Directives and Anticipatory Indirect Effect: Connecting the Dots*, 43 CML REV. 1251 (2006).

<sup>319</sup> See, Takis Tridimas, "Black, White and Shades of Grey: Horizontality of Directives Revisited," in *Harmonizing Law in an Era of Globalization* 99-128 (Larry Catá Backer, ed., Durham, North Carolina: Carolina Academic Press, 2007).

<sup>320</sup> Id., para. 14.

appear to serve the same purpose as [directives](#) within the European Union governance system. "Within these parameters, States have discretion as to how to fulfill their duty."<sup>321</sup>

And indeed, the drawing of a parallel to the governance framework of the European Union suggests a possible and interesting conceptual tension inherent in the First Pillar duty to Protect. Simply stated, that tension pits the assumption of the supremacy of international law (and the resulting legal obligations derived therefrom) against traditional notions of the supremacy of constitution and constitutional traditions of a State within which international law obligations must be naturalized. This tension is better understood in two parts. First, the tension can be understood as one touching on the supremacy of international law over incompatible domestic legal measures. The second, and more difficult tension, can be understood as touching on the supremacy of international law (and its human rights obligations) over incompatible provisions of domestic constitutional law.

These issues have been most extensively developed within the jurisprudence of the European Union system. The issue of the supremacy of Community Law over incompatible domestic law has over a long period of time tended to be accepted as a basic feature of membership within the E.U.<sup>322</sup> In many Member States, the principle of the supremacy of Community law is accepted as a matter of domestic constitutional law as well--at least with respect to incompatible national legislation.<sup>323</sup> In some cases, the Member States have re-constructed their constitutional orders to explicitly accommodate Community Law Supremacy.<sup>324</sup>

But, the issue of the nature and extent of the primacy of Community law within the European Union, especially where such primacy may contravene basic principles of the constitutional order of a Member State has proven a difficult one in theory. Member States appear to reserve to themselves an authority to judge the extent of that authority, especially where it might affect the fundamental sovereign character of the state, or the basic human rights and organizational provisions of its constitutional order.<sup>325</sup> Most famously, perhaps, the Irish Supreme Court noted, "With regard to the issue of the balance of convenience, I am satisfied that where an injunction is sought to protect a constitutional right, the only matter which could be properly capable of being weighed in a balance against the granting of such protection would be another competing constitutional right."<sup>326</sup> On the other hand it has proven to be possible to sidestep these

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<sup>321</sup> Id.

<sup>322</sup> See, e.g., *Costa v. Ente Nazionale per L'Energia Elettrica (ENEL)*, Case 6/64, [1964] ECR 585.

<sup>323</sup> See, e.g., *SA Rothmans International France and SA Philip Morris France*, Rec. Leb. 1992.81 [1993] 1 CMLR 253, 255 (C.E. Feb. 28, 1992); *Orfinger v. Belgium*, Belgian Conseil d'Etat, Caseno. 62.9222, A.61.059VI-12.193, 200 Comm. Mkt. L. Rep. 612 (2000) (Nov. 5, 1996) (Supremacy of Treaty Law within Belgian constitutional order until Belgium renounces membership in the EU or renegotiates terms of membership).

<sup>324</sup> See for example, [German Basic Law](#) Art. 23; [Constitution of the French Republic](#) 88-1.

<sup>325</sup> See, e.g., *Bruner v. European Union Treaty*, (The Maastricht Judgment) German Constitutional Court, second senate Case 2 BvR 2134/92 & 2159/92 1 CMLR 57, 1993 WL 965303 Oct. 12, 1993; *In re Application of Wunsche Handelsgesellschaft (Solange II)*, 2 BvR 197/83, 73 BVerfGE 339, [1987] 3 CMLR 225 (Fed. Constitutional Court, second senate, Oct. 22, 1986).

<sup>326</sup> *Society for the Protection of Unborn Children (Ireland) Ltd. v. Grogan*, Irish Supreme Court, [1989] IR 753, [1990] 1 CMLR 689 Dec. 19, 1989 (per Finlay, C.J.).

conceptual questions through the adoption of a functional approach to the issue--combined with just in time amendments to Member State constitutions or Treaty accommodation the constitutional sensibilities of Member States.

But it is not clear that beyond the European Union and its deep system of collaborative internationalism, states will be willing to read the State duty to protect as importing an obligation to (at least in good faith) accept the supremacy of international law generally, or more specifically against an incompatible provision of international law. Less likely is a willingness, as a matter of constitutional policy, for states to commit to a policy of collaborative constitutionalism requiring attempts a constitutional revision or interpretation to ensure conformity with applicable international standards. An exception, though a telling one is South Africa. The South African Constitution famously requires its courts to consider international law in the interpretation of its own human rights provisions.<sup>327</sup> That approach, however, would certainly be rejected out of hand in at least two powerfully influential states--the United States on the basis of its current interpretation of its constitutional order<sup>328</sup> and the People's Republic of China on sovereignty grounds.<sup>329</sup> On the other hand, most states accept the proposition that international law, however transposed into the domestic legal order, are (or ought to be) binding as a matter of domestic law. In some, but not all constitutional order, international law, transposed by operation of law or action by an appropriate organ of state is deemed superior to domestic legislation.<sup>330</sup>

Where does that leave the First Pillar duty to protect human rights? At a minimum, it might suggest that the duty is limited in the first instance, in some states, by the overriding duty of state organs to give effect to the provisions of their constitution and to vindicate constitutional rights and duties thereunder in accordance with the interpretive traditions of that constitutional order. That may sometimes create incompatibilities with international law obligations. It also suggests that those incompatibilities grow within constitutional orders that have rejected one or more instruments of international law or obligation central to the global human rights project.<sup>331</sup> Several ratifying states have attached sometimes significant reserves on the internal application of significant international human rights law instruments, usually grounded in the application of the superior provisions of domestic constitutional law.<sup>332</sup> This will pull strongly against a strong harmonization of international human rights law harmonization. Yet it also suggests that international norms will have some

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<sup>327</sup> [South African Constitution](#), art. 39.

<sup>328</sup> (e.g., [Medellin v. Texas](#), 552 U.S. 491 (2008))

<sup>329</sup> [Premier Wen: China's climate action not subject to international monitoring](#), China View, Dec. 18, 2009. For a more cynical view, see, Mark Lynas, [How do I know China wrecked the Copenhagen deal? I was in the room](#), The Guardian UK, Dec. 22, 2009.

<sup>330</sup> See, e.g., [Constitution of the French Republic](#), Art. 55 ("Duly ratified or approved treaties or agreements shall, upon their publication, override laws, subject, for each agreement or treaty, to its application by the other party."); [German Basic Law](#), art. 25 (primacy of international law).

<sup>331</sup> The United States, for example, has declined to ratify the [International Covenant for Economic, Social, and Cultural Rights](#).

<sup>332</sup> See, e.g., [Chinese reservation](#) on the International Covenant for Economic, Social and Cultural Rights, ("The application of Article 8.1 (a) of the Covenant to the People's Republic of China shall be consistent with the relevant provisions of the *Constitution of the People's Republic of China*, *Trade Union Law of the People's Republic of China* and *Labor Law of the People's Republic of China* ").

impact on the conduct of states. It also suggests the importance of the constitution and elaboration of a coherent body of international human rights law as a foundation for the elaboration of customary international law that is critical to the Second Pillar responsibility of corporations to respect human rights beyond the more technical and constrained state duty to protect as enforced, in potentially varying ways, within the territorial borders of states.

These tensions suggest repercussions at the state level. The SRSG has noted two important repercussion issues relating to the State duty to protect. The first touches on the obligation of state not project their laws outside their territories and onto the effects of home state entities in host states.<sup>333</sup> The second looks to the nature of the internal transposition of international obligations--understood in terms of vertical and horizontal incoherence.<sup>334</sup> The SRSG suggests that the problems of extraterritoriality and legal incoherence has been ameliorated by the internationalization of law--effectively harmonizing legal obligations and thus reducing the effect of projections of national power abroad (since all law is effectively similar in effect),<sup>335</sup> and through the harmonizing effects of soft law regimes.<sup>336</sup>

Extraterritorial application is a reasonable response of high human rights value states to deficiencies in the incorporation of the obligations of First Pillar duties in other states. And it may be reasonably grounded on an extension of legal duties of the conduct of national corporate citizens when they travel and engage in activities abroad. The obligation is not for the benefit of the host state, but rather is deemed to be essential to the internal ordering of the state and the management of the conduct of its citizens. Yet to some extent, extraterritoriality of this sort also smacks of "status" legislation that has tended to be disfavored in the modern era within constitutional systems like that of the United States. The SRSG suggests that extraterritorial projects of human rights duties "can provide much-needed support to host States that lack the capacity to implement fully an effective regulatory environment on their own."<sup>337</sup> However, extraterritorial application of home state law can easily be (mis?)characterized as indirect projections of state power abroad. When such projections are directed at states with a history of colonial rule, sensitivities may make such projections not merely unpopular but unlawful within the territory of the host state. Yet the neo colonialist argument has been used selectively. It is easily applied to former colonial powers asserting extraterritorial powers, but tends to be overlooked when the projecting power is a state that can style itself as still "developing." The SRSG has noted that the issue of the lawfulness of extraterritorial legislation remains unsettled as a matter of international law.<sup>338</sup> Where the State itself is engaged in business abroad, the SRSG suggests that there are "strong policy reasons for home States to encourage their

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<sup>333</sup> Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, [Business and Human Rights: Toward Operationalizing the "Protect, Respect, Remedy" Framework](#), Summary, U.N. Doc. A/HRC/11/13 (April 12, 2009), at para. 15-16)

<sup>334</sup> *Id.*, para. 17-19.

<sup>335</sup> *Id.*, para. 20

<sup>336</sup> *Id.*, at 21.

<sup>337</sup> *Id.*, para. 16.

<sup>338</sup> *Id.*, at para. 15.

companies to respect rights abroad.<sup>339</sup> And indeed one might suggest that in those cases the State duty to protect necessarily embraces all state activities domestically and elsewhere and in whatever form conducted.

Legal incoherence remains a significant impediment to the realization of a State's First Pillar duty to protect human rights. "There is 'vertical' incoherence where Governments sign on to human rights obligations but then fail to adopt policies, laws, and processes to implement the."<sup>340</sup> But there is also vertical incoherence where states decline to sign up to important instruments of international human rights, or sign onto them with strong reservations. Vertical incoherence is tied significantly to the legal framework within which international norms can be internalized within a domestic legal order, a subject discussed above. "Even more widespread is 'horizontal' incoherence, where economic or business focused departments and agencies that directly shape business practices . . . conduct their work in isolation from and largely uninformed by their Government's human rights agencies and obligations."<sup>341</sup> Horizontal incoherence is especially troublesome with respect to the regulation of corporations within domestic legal orders.<sup>342</sup>

The SRSG's approach to mitigating this problem is both subtle and indirect. He suggests programs of legal and policy harmonization at the supra national level with "trickle down effects." harmonization, from public transnational bodies producing increasingly influential soft law systems. These included harmonization of an international framework for corporate criminal activity, standardization of norms for judging corporate complicity in the human rights violations of others, the importance of corporate culture in the context of civil and criminal prosecutions and its legal effects, and the willingness of states to permit individuals to seek private remedies against corporations through re-interpreted provisions of state law.<sup>343</sup> The SRSG also noted the rising importance of soft law efforts of entities like the OECD in the construction of policy approaches to legal harmonization. Benchmarking organizations and standards, and the official assistance in that context, are said to encourage the adoption of corporate social responsibility policies that might produce legal effects cognizable within the First Pillar.<sup>344</sup> These approaches may provide a normative foundation for state action. More likely, they may serve as bridges between the First Pillar duties of states and the Second Pillar responsibilities of corporations. To that extent, the bridge building of such efforts might go more successfully toward reducing regulatory incoherence between the First and Second Pillar than between or within states' legal systems.

#### B. Corporate Responsibility to Respect.

The Second Pillar corporate responsibility to respect human rights is both the most innovative and the most difficult of the governance framework developed by the

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<sup>339</sup> Id. at para. 16.

<sup>340</sup> Id., at para. 18.

<sup>341</sup> Id., para. 18.

<sup>342</sup> See, e.g., Larry Catá Backer, [Using Corporate Law to Encourage Respect for Human Rights in Economic Transactions: Considering the November 2009 Summary Report on Corporate Law and Human Rights Under the UN SRSG Mandate](#), *Law at the End of the Day*, Jan. 4, 2010.

<sup>343</sup> Id. at 20.

<sup>344</sup> Id., para. 21.

SRSG. This section approaches a number of the more interesting issues that have been considered in connection with the development of the assumptions underlying the Second Pillar and the construction of what will become the principles through which the second Pillar will be effectuated. The structure of this analysis is built around the questions and issues posed by the SRSG himself in the 2009-2010 effort to develop an online forum on the Second Pillar.<sup>345</sup> These are divided amongst foundation issues, questions relating to human rights due diligence, issues that arise on the elaboration of Second Pillar responsibilities, issues of implementation, and issues of gender, supply chain, finance and indigenous people.

1. *Foundations: The Corporate Responsibility to Respect Human Rights.* In looking at the foundational statement, in the most general terms, I will outline the parameters within which the relationship of corporate behavior to human rights is to be developed and applied. We begin with the understanding that the emerging framework governing business and human rights is not a free floating endeavor. It arises within the operations of an international organization whose members include virtually all members of the community of nations. The framework is thus well grounded in public law.

The scope of corporate responsibilities within this framework is also defined in both descriptive and principled terms. In *descriptive terms*, the scope of the corporate responsibility is bounded by all internationally recognized human rights. In terms of *principles*, the corporate responsibility is framed by the principle "not to infringe on the rights of others." The relationship between principle and description is clear--the principle, to avoid infringing the rights of others, acquires substance only by reference to its descriptor, that is, to internally recognized human rights. That construct - principle and descriptor - serves as a fundamental ordering element of the "corporate responsibility to respect" pillar.

The responsibility to protect, thus understood, does not exist as a free floating obligation with an ambiguous relationship to public international law, or to corporate obligations imposed by the domestic legal orders of states in which corporations operate. The responsibility to protect exists independent of a corporation's obligations to comply with the law of the states in which they operate. Indeed, the SRSG goes to some length to emphasize the different sources of governance power – for states a set of sources understood as legal and for corporations legal, and for corporations, the sources are understood as “social” that is, as inherent in the rules governing the relationships among stakeholders.

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<sup>345</sup> United Nations Special Representative of the Secretary-General on business & human rights. The Corporate Responsibility to Respect Human Rights, Online Forum, available <http://www.srsconsultation.org/>. “The forum is currently focused on the corporate responsibility to respect human rights, the second pillar of the framework. The forum is divided into sections, each of which contains multiple topics with space for discussion and comment. These topics will remain in place through February 2010, although the SRSG may amend them in response to how the discussion proceeds.” New Online Forum for U.N. Business and Human Rights Mandate, United Nations Press Release, New York and Geneva, Dec. 1, 2009, available <http://198.170.85.29/Ruggie-online-forum-launch-1-Dec-2009.pdf>. The Online Forum was available from December 2009 through February 2010.

The corporate responsibility is defined by reference to international norms, but is grounded in the social license of corporations. Corporations are legitimated as creatures of law by complying with the requisites of the law applicable to their organization and operation. Legitimation provides a corporation with certain rights under the domestic law of a state – legal personality, limited liability, the right to access the formal system of dispute resolution and others. Corporations are legitimated as economic entities by the actions of their principal stakeholders – investors, customers, employees, trade creditors, local governments and the like. That legitimation is effectuated by stakeholder action – investors purchase securities, customers purchase products, employees work, trade creditors extend credit, and so on. A corporation cannot exist as a viable entity in the absence of either legal or social "validation."

The expectations of both stakeholders and states bind corporations as a matter of law and economics. Human rights touches on the relationship of the corporation with its stakeholders in the context of the social license within which they operate. Those rights, sourced in global norms developed as a consensus among the community of nations, apply beyond the particular laws of a state. In some situations, corporations will face compliance with multiple sets of norms – state law and social license norms (the responsibility to protect). In other situations, especially where corporations operate in states with weak or ineffective government, or where corporations operate in conflict zones, the only norms that may guide corporate behavior may be those arising from their social license (and grounded in human rights). In the latter case, the level of protection that corporations will afford to society will generally not be the best for these groups of disadvantaged people.

Compliance with state laws is relatively easy. States tend to develop methods of enforcement that make it relatively easy to comply. In addition, the police power of states provides direct incentives to comply. But compliance with social norms is a more difficult matter. There is no state government apparatus or guidelines to follow. Stakeholders have no public power. They may cease to invest, purchase, lend or work, but those options are ineffective in the absence of knowledge of corporate compliance. Critical, then, to social norm compliance are systems of monitoring and disclosure. Yet, corporations tend to disclose only if compelled. States can compel through instruments of conventional law. Social norm disclosure becomes compelling only if states are willing to make them so, by ceasing to invest, purchase, lend, etc., unless corporations disclose. But in the absence of the coercion of law or of negative economic effects, corporations have little incentive to change their behavior. Still, the social-economic power of stakeholders, if directed, may be enough. That certainly has been the great lesson of the corporate social responsibility movement to the extent that it has seen limited success over the last decade. Yet here one confronts the great issue – the question of the responsibility to protect pillar – the responsibility to respect can be understood as effecting a power shift from corporations to stakeholders. To some extent it also shifts a measure of responsibility onto stakeholders – only those willing to ensure corporate compliance with social norm obligations may benefit from its imposition. The social license aspects of the second pillar suggest that corporate passivity in the face of possible human rights implications of its actions will be a function of stakeholder passivity in the face of corporate unwillingness to disclose or correct violations. The role

of the state in connection with the independent and autonomous responsibility to respect, and stakeholder obligations to protect their rights, remains one of some ambiguity.

More important perhaps, in the absence of monitoring, corporations would be unable to comply with their responsibility to respect. In this sense, human rights due diligence serves the same essential function as financial due diligence. Human rights due diligence ought to operate in a manner that is similar to internal financial management, and for the same reasons – in both cases, corporate financial performance is a function of maximizing knowledge of performance (financial or human rights oriented) providing the corporation with the power to effectively mitigate adverse effects that in either case will have a substantial impact on its financial performance. To some extent, corporations understand this. It is well known that "economic enterprises have begun to harvest and disclose vast amounts of information on their corporate behavior, well beyond that required by domestic law."<sup>346</sup> Everyone from credit rating agencies to investment bankers and consumer groups receive substantial amounts of information about a company and its operations. That this information is carefully crafted to the benefit of the corporation goes to the quality and use of the information rather than to the capacity of a corporation to generate, harvest and distribute such information.

But the notion of compliance with a corporation's social license – now understood by reference to a corporation's responsibility to respect human rights as defined by a normative framework grounded in public law principles – is not co-extensive with the entire possible range of corporate activity. Responsibility is understood as minimums (a baseline responsibility as Ruggie terms it) in the way that compliance with laws is understood as thresholds for behavior, above which, the state has nothing to say. However the willingness of a corporation to do more than comply with the bare minimum imposed by law in one respect cannot be used to absolve the corporation of its failure to comply with laws in other respects. In the same way, a corporation's willingness to do more than the minimum to comply with its social license obligations (responsibility to respect) with respect to one aspect of human rights does not absolve it from a failure to respect human rights in another respect.

Now unpacked, the basic framework of the responsibility to protect can be understood in its essential terms. The responsibility to respect is grounded in law based norms, but not those of domestic legal orders. Instead, they represent norms about which at least a rough consensus exists among the community of nations. These normative rules exist independent of the state and its government apparatus. It is intimately connected to the relationship between the corporation and its principle stakeholders rather than the connection between the corporation and the state. This relationship is economic rather than legal, in the sense that human rights obligations inform the nature of the relationship between the corporation and those actors who are affected by corporate activity. These relationships are well known and understood by

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<sup>346</sup> Larry Catá Backer, [From Moral Obligation to International Law: Disclosure Systems, Markets and the Regulation of Multinational Corporations](#), *Georgetown Journal of International Law*, Vol. 39:591-653 (2008) at 631.

corporations. Adopting a language of human rights deepens an understanding of those relationships rather than changing their fundamental terms.

2. *Foundations: Scope of the Corporate Responsibility to Protect and Complicity.* The SRSG has suggested an intensely contextual scope to the second pillar responsibility of corporations to respect human rights.<sup>347</sup> Yet, that contextual foundation of duty is neither exotic nor unknown to corporations. It serves as the essence of the application of law and is fundamental to basic legal notions – from "reasonableness," to "materiality" and "proportionality." More interesting is the connection between the scope of the responsibility to protect and complicity. The legal basis of complicity remains unsettled as a matter of transnational law.<sup>348</sup>

Corporate complicity" is relatively new concept. Although it has echoes in the law of accomplices in criminal law, those active in the area of business and human rights are seeking to describe what "corporate complicity" means in terms of legal policy, good business practices, as well as in different branches of the law. But there remains considerable confusion and uncertainty about when a company should be considered to be complicit in human rights violations committed by others.<sup>349</sup>

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<sup>347</sup> "The scope of a company's responsibility is determined by the impact of its **activities** on human rights, and whether and how the company might contribute to abuse through the **relationships** connected to its business. The national and local **contexts** in which the business operation takes place should alert the company to any particular human rights challenges it may face on the ground." United Nations Special Representative of the Secretary-General on business & human rights, [Scope of the Responsibility to Protect](http://www.srsgconsultation.org/index.php/main/discussion?discussion_id=4), available [http://www.srsgconsultation.org/index.php/main/discussion?discussion\\_id=4](http://www.srsgconsultation.org/index.php/main/discussion?discussion_id=4).

<sup>348</sup> "The relationships dimension is linked to the topic of **complicity**, the legal meaning of which has been spelled out most clearly in the area of aiding and abetting international crimes, i.e. knowingly providing practical assistance or encouragement that has a substantial effect on the commission of a crime." United Nations Special Representative of the Secretary-General on business & human rights, [Scope of the Responsibility to Protect](#); supra, citing to the SRSG's [2008 report](#), paragraphs 73-81.

<sup>349</sup> Justice Ian Binnie, *Legal Redress for Corporate Participation in International Human Rights Abuses: A Progress Report*, 38-SUM Brief 44, 47-48 (2009) (Justice Ian Binnie has been a member of the Supreme Court of Canada since 1998); Chimène Keitner, *Conceptualizing Complicity in Alien Tort Cases*, 60 *Hastings L.J.* 61 (2008); Andrew Clapham and Scott Jerbi, *Categories of Corporate Complicity in Human Rights Abuses*, based on a background paper for the Global Compact dialogue on the role of the private sector in zones of conflict, New York, 21-22 March 2001. Justice Binnie suggested the reason for the confusion in the generality of the concept. Id. He suggested a possible useful effort at clarity in a recent ICJ report that offered what he described as a three-part definition of complicity as applied to corporations:

First, by such conduct, the company or its employees contribute to specific gross human rights abuses, whether through an act or failure to act, and whatever form of participation, assistance or encouragement the conduct takes, it:

- (i) Enables the specific abuses to occur, . . . , or
- (ii) Exacerbates the specific abuses, . . . or
- (iii) Facilitates the specific abuses, meaning that the company's conduct makes it easier to carry out the abuses or changes the way the abuses are carried out, including the methods used, the timing or their efficiency.

Second, the company or its employees actively wish to enable, exacerbate or facilitate the gross human rights abuses or, even without desiring such an outcome, they know or should know from all the circumstances, of the risk that their conduct will contribute to the human rights abuses, or are willfully blind to that risk.

Third, the company or its employees are proximate to the principal perpetrator of the gross human rights abuses or the victim of the abuses either because of geographic

Complicity becomes better subject to the application of legal standards where it is substantially contextualized—the point that the SRSG seeks to generalize through the Second Pillar. For that purpose, framing “the potential culpability of companies in terms of specific forms of criminal liability widely recognized as a matter of international law, namely, aiding and abetting liability, joint criminal enterprise liability, and the doctrine of superior responsibility” critically reduces ambiguity.<sup>350</sup>

The SRSG focuses his analysis on the aiding and abetting framework of complicity.<sup>351</sup> This requires knowledge, the provision of practical assistance or encouragement, and the production of a substantial effect.<sup>352</sup> The legal standard is grounded in a harmonizing view of international criminal standards.<sup>353</sup> Yet, the SRSG suggests that complicity has a social meaning as well as a legal meaning. The polycontextuality parallels the basic three pillar structure of the Protect, Respect, and Remedy framework. Just as a corporation has a duty to comply with state law (flowing from its legal license), the corporation has an independent responsibility (flowing from its social license) to respect. “In non-legal contexts, corporate complicity has become an important benchmark for social actors, including public and private investors, the Global Compact, campaigning organizations, and companies themselves. . . . In this context, allegations of complicity have included indirect violations of the broad spectrum of human rights - political, civil, economic, social, and cultural.”<sup>354</sup> Still social liability may not cover the same ground as legal liability: “deriving a benefit from a human rights abuse is not likely on its own to bring legal liability. Nevertheless, benefiting from abuses may carry negative implications for companies in the public perception.”<sup>355</sup>

The SRSG then elaborates a set of considerations for avoiding legal/non-legal complicity.<sup>356</sup> One of the objectives is to make a stronger case for ordinary course due diligence. “In short, the relationship between complicity and due diligence is clear and compelling: companies can avoid complicity by employing the due diligence processes described above - which, as noted, apply not only to their own activities but also to the relationships connected with them.”<sup>357</sup>

It is not clear, though, that the amalgamation of legal and social standards for complicity is useful. The only use currently is for advancing the quite sensible position favoring adoption of a broader set of internal monitoring procedures as an integral part of corporate operations. The pillar structure of the framework lends itself better to a

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closeness, or because of the duration, frequency, intensity and/or nature of the connection, interactions of business transactions concerned.

Id.

<sup>350</sup> Justice Ian Binnie, *Legal Redress for Corporate Participation in International Human Rights Abuses: A Progress Report*, 38-SUM Brief 44, 47-48 (2009)

<sup>351</sup> SRSG's [2008 report](#), paragraphs 74.

<sup>352</sup> Id.

<sup>353</sup> See, id., at 77, 79-80.

<sup>354</sup> Id., at 75.

<sup>355</sup> Id., at 78.

<sup>356</sup> Id., at 77-81.

<sup>357</sup> Id., at 81.

clear separation between legal standards for complicity and social standards (as similar as they may be in effect), and for the development of linkages between legal and social complicity standards. This would serve to strengthen the core concepts that distinguish the state duty to protect – itself essentially bound by law and legal conceptions – from the autonomous and independent corporate responsibility to respect. The latter is grounded in the social norm that elaborates a broader set of standards than those recognized under the more limiting legal framework that defines the state duty to protect. One gets a sense of this difference in the way in which standards such as those in the OECD's Risk Awareness Tools are framed, for example the principles around the duty to speak out.<sup>358</sup> There is little reason to tether social standards for complicity to legal standards. A related but distinct development might better serve the overall goals of the three pillar project (framework). This suggests both a potential conceptual ambiguity in the elaboration of a complicity concept within the three pillar framework, and the utility of complicity in strengthening the three pillar framework.

More importantly, though, complicity analysis is useful beyond its substantive implications. It also highlights the links between the state duty to protect, the corporate responsibility to respect and the access to remedies pillars.<sup>359</sup> Complicity invokes issues of state duty to protect, the autonomous responsibility of the corporate obligation to respect, and the equally autonomous provision of remedies for complicity violations by entity and state. Indeed, complicity issues have become central to the private investing practices of governmental entities, particularly the Norwegian sovereign wealth fund.<sup>360</sup> Scope issues, then, implicate not merely context (the easy case) but also linkages, especially within the contextual linkage of complicity.

3. *Foundations: Content of the Corporate Responsibility to Respect.* The content of the corporate responsibility to respect ought to serve as one of the most contentious and volatile issues in the construction of a theory of corporate responsibility to respect. In a fundamental sense, the issue of the content of the responsibility to respect embodies the conceptual core of what separates the state duty to protect human rights from the corporate responsibility to respect human rights. But that difference also highlights the difficulties of elaborating a polycontextual governance system.

Traditionally, corporations tended to adhere to and protect the presumption of a "one corporation, one law, one governance" framework. It was this strongly held conception that has driven much of American corporate law, from the development of the "internal affairs rule" to the jurisprudence permitting a certain margin of appreciation for state regulation of corporate takeovers.<sup>361</sup> In the European Union, similar notions were at the heart of the interpretation of the E.U. Treaty's right of

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<sup>358</sup> OECD Risk Awareness Tools, Section 6.

<sup>359</sup> See, Larry Catá Backer, [Business and Human Rights Part II--Thoughts on the Corporate Responsibility to Respect Human Rights](#), Law at the End of the Day, Feb. 2, 2010.

<sup>360</sup> See, e.g., Chesterman, Simon, [The Turn to Ethics: Disinvestment from Multinational Corporations for Human Rights Violations - The Case of Norway's Sovereign Wealth Fund](#). American University International Law Review, Vol. 23, pp. 577-615, 2008; NYU Law School, Public Law Research Paper No. 08-25.

<sup>361</sup> See, e.g., [CTS Corp. v. Dynamics Corp. of America](#), 481 U.S. 69 (1987).

establishment starting with *Centros Ltd v Erhvervs- og Selskabsstyrelsen*.<sup>362</sup> The need for certainly, predictability and efficiency certainly contributed to the value of this presumption for corporations.

These presumptions were combined with the evolution of the relationship between the state – as the source and regulator of the nexus of privileges and contracts that defined the character of the corporation (and its relationships with its stakeholders). This combination tended to cement the idea that corporations, as creatures of the state (or of contracts derived from the legal framework within which such agreements would be given effect), were to look to the state both for its legal personality and for the extent of its obligations defined by, and through, law. Beyond that, there were effects but no obligation. These effects were organized along market principles but had no regulatory (public) status for which a remedy (other than the consequences of making bad choices in markets) was not available.

Within this context, the notion of a state obligation to protect human rights – and to produce law to implement these obligations with effects on the legal obligations of corporations – is perfectly understandable. The relationship between state, corporation and law is both conventional and well defined. States are understood as the legitimate source of binding rules (law) which when lawfully enacted may impose obligations on corporations that can produce substantial consequences. As importantly, those legal obligations were bounded both by rule of law limits and the commonly embraced notions of legal effects mediated exclusively through the domestic legal orders of states within whose territories a corporation was formed or operated. The rules are precise and there is a well-understood means for interpretation and enforcement of these enactments. Most importantly, perhaps, corporations, like natural persons, are stakeholders in markets for law. They may lobby government, aid in the election of lawmakers and judges involved in the law making process, and seek to influence the electorate about the nature and scope of applicable law. These notions of lawfulness and of territorial effects produced a well-contained, well understood and singular set of standards that could be managed by an entity operating within a variety of territories. From the perspective of a conventionally trained American lawyer, corporations have a duty to obey the law of jurisdictions that has power to reach corporate activity. But that duty is bounded by the lawfulness of the enactment and the means asserted for its enforcement.

On the other hand, the second pillar – the corporate responsibility to protect – appears to apply a substantially different framework to the relationship between entity and obligation. It seeks to apply an additional layer of governance that is neither confined within the well-known parameters of state-based lawfulness, nor bounded by the limits of conventionally legitimate assertions of political power. The usual connections between state, law and entity are absent. Applicable doctrine is identified and approached in a different way than under national law. The precision associated with law within domestic legal orders is absent. And the relationship between norm maker and object of behavior is attenuated.

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<sup>362</sup> Case C-212/97. See, Wymeersch, Eddy, [Centros: A Landmark Decision in European Company Law](#) (October 1999). Financial Law Institute Working Paper 99-15.

Moreover, the source of governance legitimacy is different. The responsibility to protect arises from what had previously been considered an imprecise set of social obligations to which would be appended a number of norms derived from legal instruments that had not been directly applied to corporations before, as well as other instruments with no precise legal effect. These are to form the nucleus of a social order based governance regime that will exist simultaneously with the traditional law based governance order derived from the political authority of states. Corporations understand the structure of political legitimacy but they are less sure about the substance and effect of social legitimacy.

For traditionalists this may appear to be too far a leap. Rules grounded in political legitimacy are understood as requiring obedience. The same has not been true of social license rules. Their force is felt, it is true, but the rules of economics and self interest have generally not been actionable before the courts of any state. From a single governance center to multiple simultaneous centers with obligations that are derived from the application of different processes and with different effects, serving different but overlapping constituencies can be unnerving, even if none of the rules are either aberrational or require substantial changes to corporate behavior or fundamental corporate culture. Thus, for some, the temptation in the face of this complexity is to retreat to the conceptual framework that reached its height immediately after the Second World War – rejecting a governance framework for a corporate responsibility to protect and resisting the imposition of what appears to be a legal framework for corporate social license (market and communal) rules.

Yet for all that, critiques of both an independent set of obligations under the second pillar – the responsibility to respect – and the content of that responsibility, tend to degenerate into a defense of formalism and an aggressive extension of the power of states to levels asserted before the Second World War but decisively rejected since the defeat of those states that were its grandest advocates. The notion that states are the sole source of law has long been discredited – and by action or acquiescence of virtually every state on the planet. The notion of governance beyond law codes has been accepted as a vital foundation of administrative states since the early part of the 20th century. Administrative regulation, monitoring, privatization of enforcement, devolution of regulatory function (to bodies from professional societies to banks) is widely practiced, and the use of social markers in regulation (from the family as a governance unit to religious and social communities) has become a matter of fact basis of governance even at the state level. Polycentric governance, from its mildest forms in federalism (as a domestic governance vehicle in the U.S., or as an instrument of international governance within the EU framework) to its most complex forms in public-private soft law regimes (for example under the OECD corporate governance framework), is now established well enough that it is neither new nor frightening.<sup>363</sup>

But what of the content of the corporate responsibility to respect? First, because they apply outside the state and comprise an additional and autonomous set of

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<sup>363</sup> See Elinor Ostrom, [Vulnerability and Polycentric Governance Systems](#), Newsletter of the International Human Dimensions Programme on Global Environmental Change, Nr. 3/2001. See, also, Larry Catá Backer, [Governance Without Government: A Preliminary Overview](#), Law at the End of the Day, June 16, 2009.

obligations, the issue of transposition of these norms into domestic legal orders is effectively irrelevant. Though such transpositions ought to be encouraged, the nature of the responsibility to respect is not grounded on that action. Second, though the content of the second pillar norms may not be binding even as instruments of international law, their value is not reduced. This is particularly the case with respect to the Universal Declaration of Human Rights, whose legitimacy and binding nature as principles of conduct are hard to refute (though not impossible). Third, the norms serving as the content of the responsibility to respect do not challenge the important human right of democratic legitimacy in its development and adoption. Each of the relevant instruments represents the product of consensus or adoption by elements of the community of nations. Lastly, each is sufficiently precise to be capable of providing guidance with respect to behavior. This last point is important to understand in context. The responsibility to protect is a principles based approach; law tends toward a rules basis. The nature of principles based governance necessarily requires a different sort of precision than what might be expected of rules based norms. This is especially appropriate to norms designed to inform conduct in the context of a social license to operate existing alongside a corporation's obligation to comply with law.

One last point, like all rules and principles, the content proposed for a corporate responsibility to respect human rights must necessarily be interpreted in order to be applied. In the absence of efforts to harmonize interpretation, it is possible that what appears to be a unitary set of principles and content can effectively produce a broad and inconsistent set of norms. One example will suffice. The second pillar responsibility to respect human rights is grounded in part in the Universal Declaration of Human Rights. In some states, the Universal Declaration might be interpreted only through the prism of the Cairo Declaration on Human Rights in Islam.<sup>364</sup> But the principles in the Cairo Declaration may be inconsistent with notions of Human Rights under other traditions. Under the Second Pillar principle it remains unclear how issues of interpretation of this kind are to be resolved. And underlying that issue is the greater one – the extent to which the second pillar, the corporate responsibility to respect, is meant to help elaborate a universal set of norms, the interpretations of which are harmonized.

4. *Human Rights Due Diligence: Foundational Issues.* In an essay well worth reading, John Sherman nicely described the dilemma of human rights due diligence.<sup>365</sup> On one hand, the practice of due diligence is well understood by corporations. These entities have perfected all manner of internal control systems, the object now is to harvest critical information in a timely manner to permit the company to avoid liability, anticipate problems, and meet them before they produce significant disruption. In this sense, due diligence as an internal control matter has always been used as a means of advancing the interests of the corporation and its stakeholders. Its principal benefit, of course, is to maximize the going concern value of the firm to its stakeholders. On the other hand, companies are loathe to harvest information for the benefit of third parties who would use this information in actions against the company. From the corporate

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<sup>364</sup> Cairo Declaration on Human Rights in Islam, Aug. 5, 1990, U.N. GAOR, World Conf. on Hum. Rts., 4th Sess., Agenda Item 5, U.N. Doc. A/CONF.157/PC/62/Add.18 (1993) [English translation]

<sup>365</sup> John F. Sherman III and Amy K. Lehr, [Human Rights Due Diligence: Is It Too Risky?](#), *The CSR Journal* 6 (Jan. 2010) (a publication of the ABA Section of International Law).

perspectives, such activities would not serve the corporate interest. Rather they serve the interests of third parties. "This concern may reflect a natural reluctance to ask questions about previously unappreciated risks, exacerbated by the relatively new appearance of human rights risk on the business agenda."<sup>366</sup>

Sherman and Lehr suggest that the benefits of such systems for anticipating and ameliorating liability producing practices outweigh the risks of exposure to litigation. Moreover a well maintained due diligence system ought to serve to limit the magnitude of the risk of exposure.<sup>367</sup> This view reflects emerging notions relating to the fiduciary duty of oversight under which a board of directors is required to create and maintain systems of information gathering. In Delaware, for example, the courts have elaborated an oversight responsibility, holding that such a duty is breached where "(a) the directors utterly failed to implement any reporting or information system or controls; or (b) having implemented such a system or controls, consciously failed to monitor or oversee its operations thus disabling themselves from being informed of risks or problems requiring their attention."<sup>368</sup> However, the Delaware courts have read this oversight obligation within the fiduciary duty of loyalty and good faith. As a consequence, liability attaches for breach of the oversight obligation only if a plaintiff can show "that the directors *knew* they were not discharging their fiduciary obligations or that the directors demonstrated a *conscious* disregard for their responsibilities such as by failing to act in the face of a known duty to act."<sup>369</sup>

Perhaps a useful way of thinking about human rights due diligence, in the context of the second pillar - the corporate responsibility to respect human rights - would be to distinguish between four distinct components of a complete due diligence system: (1) *scope of monitoring*; (2) *information gathering*; (3) *assessment*; and (4) *disclosure*.<sup>370</sup> By disaggregating the principal strands that contribute to systems of due diligence, including human rights due diligence, it may be possible to suggest the true contours of the dilemma of due diligence.

Scope of monitoring refers to the selection of those items that should be the subject of monitoring - for example, if a corporation faces liability for failure to meet environmental rules, it may choose to set up systems of information gathering that focus on actions that touch on these issues. The SRSG's efforts are directed principally to the scope of monitoring issues. He proposes that, like issues directly affecting operations (sales, quality issues, etc.) a corporation ought to include human rights issues within the core of its oversight efforts.

Information gathering, in contrast, refers to the precise information to be collected and the manner in which that information is collected. These are system issues. For corporations already well versed in the practices of information gathering (and it is the rare entity that is not well experienced in these functions), gathering

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<sup>366</sup> *Id.*, at 6.

<sup>367</sup> *Id.*

<sup>368</sup> *Stone v. Ritter*, 911 A.2d 362 (Del. 2006).

<sup>369</sup> *In re Citigroup Inc. Shareholder Derivative Litigation*, 964 A.2d 106 (Del. Ch. 2009).

<sup>370</sup> See, Larry Catá Backer, [Global Panopticism: States, Corporations and the Governance Effects of Monitoring Regimes](#), *Indiana Journal of Global Legal Studies*, Vol. 15, 2007.

human rights information involves little more than identifying the sorts of information that fall within this category and figuring out the most efficient way to harvest this information. Scope of monitoring and information gathering focuses on identification on the identity of the data to be gathered and the methods for its gathering.

Assessment, in contrast, is a values based function, requiring someone to "process" the information for the purpose of arriving at a judgment. In the case of human rights due diligence, the assessment would revolve around the human rights impacts of certain activities based on specific thresholds and effects that are judged against human rights standards.<sup>371</sup>

Lastly, disclosure focuses on issues of information dissemination. Dissemination issues apply to each of the elements of due diligence – scope of monitoring, information gathering and assessment. There is nothing in due diligence that compels disclosure to any one or more groups of stakeholders.

It is clear that when one looks closely at corporate discomfort with human rights due diligence, the core of that discomfort tends to settle on assessment and disclosure issues. Corporations tend to have less concern with scope of monitoring issues because many companies have become convinced that issues of corporate social responsibility may be good for business. And what is good for business tends to be a natural subject for monitoring. Moreover, expanding information harvesting to include new information sectors is only marginally disruptive. Where the potential benefits are greater than the marginal costs of expansion, corporations ought to be willing to expand the scope of their monitoring. Likewise, information gathering tends to pose little risk to companies. There is a risk of course; information gathered and preserved may be discovered by outsiders, for example in litigation which may lead to a higher probability of liability as a result of human rights violations where none may have been proven without the disclosure of information. But this is a well understood problem that companies have learned to deal with since the expansion of federal discovery rules in the 1930s.

Sherman and Lehr nicely describe the utility of due diligence in the contest of discovery in American Alien Tort Claims Act actions.<sup>372</sup> There is nothing new here, and corporate information management strategies are now well established. Even assessment, for all its discomforts and ambiguities for companies, presents little by way of additional liability risk for corporations. Corporations are in the business of harvesting information and assessing it for the purpose of maximizing the value of corporate operations. As the SRSG has been suggesting, information gathered from human rights due diligence can only help in the fundamental corporate function of alerting itself to liability producing conduct, minimizing that conduct, and mitigating the human rights effects of its actions. "The due diligence process described by the SRSG has much in common with other due diligence processes, such as the U.S. Sentencing Guidelines for Organizational Defendants, the internal controls derived from

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<sup>371</sup> On these human rights standards, see, Larry Catá Backer, [Business and Human Rights Part IV: Foundations--Content of the Corporate Responsibility to Respect](#), *Law at the End of the Day*, Feb. 4, 2010.

<sup>372</sup> See Sherman and Lehr, *supra*, at 7-8.

COSO (the Committee of Sponsoring Organizations of the Treadway Commission), as embodied in Section 404 of the Sarbanes Oxley Act, and the enterprise wide risk management processes set forth in the UK Turnbull Report.<sup>373</sup> Assessment, when understood as another mechanism of internal controls, should produce the same sort of positive benefit as any other tool of internal management.

It is when human rights due diligence is considered in the context of external assessment and disclosure that corporate misgivings are at their greatest. In these contexts, due diligence might cease to function as a mechanic of internal controls. Instead, it assumes a new role; a basis for independent monitoring from corporate outsiders. Corporations do not like to be second-guessed. And they like less to be put to the expense and effort of providing information to outside stakeholders that may then be used against them. Disclosure and external assessment raises the risk for corporations that their efforts will produce liability rather than contain it. Yet all publicly traded companies have long become accustomed to disclosure regimes with respect to their financial and related information under the disclosure rules of the Federal Securities Laws in the United States and their analogs elsewhere. Still, even in the financial information context, such disclosures can be burdensome. It is certainly expensive. For that reason some companies have gone private. Expense that also reduces the cost of increasing exposure to liability from actions by third parties tends to make corporations leery of disclosure (though again, not necessarily of monitoring, information gathering and assessment).

What becomes clear is the framework requires a reconstruction of notions of due diligence as exercised by corporations. No longer just a means for containing liability and managing firm conduct, it is to become a means to ensure against liability irrespective of the actions taken in the face of information.<sup>374</sup> There is a value in rewarding compliance with due diligence obligations, and perhaps an even greater value in rewarding actions undertaken on the basis of information harvested through the due diligence process. But as Sherman and Lehr suggest, there is also a great danger in such an approach that "elevates form over substance, which awards processes that do not result in better human rights outcomes."<sup>375</sup> They suggest, as an alternative, a rewarding process only where it has been reviewed and audited by a third party (the model is the requirement that management internal control systems be audited by outside auditors under Sarbanes Oxley Act Section 404.<sup>376</sup>

The problem of due diligence, then is likely much narrower than supposed. Disclosure and assessment, and the consequences of both, frame the problem. But the problem is important for its narrowness. The issue, as Sherman and Lehr well demonstrate, is usually framed as one of liability. But equally important, disclosure and outside assessment issues, and the potential consequent liability, suggest a different problem – that of the management of linkages between the state's duty to protect and

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<sup>373</sup> Sherman and Lehr, *supra*, at 6-7.

<sup>374</sup> See, e.g., Lucien J. Dhooge, *Due Diligence as a Defense to Corporate Liability Pursuant to the Alien Tort Statute*, 22 *Emory International Law Review* 455 (2008) (due diligence should insulate a company from liability for actions related to that diligence effort).

<sup>375</sup> Sherman & Lehr, *supra*, at 12.

<sup>376</sup> *Id.*, at 12.

the corporations responsibility to respect. In one sense, the principle object of human rights due diligence is to fulfill a corporation's responsibility to respect human rights, a responsibility is derived from its social license, which is grounded on norms that are independent of those imposed under law. To comply with its due diligence obligations under this standard, a corporation ought to tool its scope of monitoring, information gathering, assessment and disclosure to the content of second pillar norms – the basic principles of which are memorialized in international instruments. But the liability produced by corporate human rights due diligence appears to flow from the state duty to protect human rights pillar. The sources of that liability are memorialized in the law of domestic legal systems that vary from a state to state (at least to an important respect in their detail). That reality might require a corporation to change its approach to scope of monitoring, information gathering, assessment and disclosure, to meet the requirements of law, and also to the detriment of its responsibility to respect under the normative framework of the second pillar.

5. *Human Rights Due Diligence: Elements of Human Rights Due Diligence.* The SRSG has identified four core elements of human rights due diligence.<sup>377</sup> Together these make up foundation of the enforcement methods of the Second Pillar responsibility to protect human rights. These elements are described more as methodological elements rather than as rules based formulas in keeping with the overall principles approach to the Three Pillar Framework. These elements are meant to be objectives rather than prescriptions for particular outputs, since the latter will vary by company and context. For example, companies should assess human rights impacts on an ongoing basis, while not necessarily doing a discrete human rights impact assessment – although such an exercise may well be part of that activity.<sup>378</sup>

There is a strong emphasis on internal procedures and effective engagement of employees and other stakeholders. For this purpose, the importance of an effective grievance process is emphasized.<sup>379</sup> This reflects a pattern of governance that has been much in evidence in the reform of American securities law in the wake of the

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<sup>377</sup> These include statements of policy, assessing impacts, integration and tracking and reporting performance. United Nations Special Representative of the Secretary-General on Business & Human Rights, [Elements of Human Rights Due Diligence](http://www.srsgconsultation.org/index.php/main/discussion?discussion_id=8), available [http://www.srsgconsultation.org/index.php/main/discussion?discussion\\_id=8](http://www.srsgconsultation.org/index.php/main/discussion?discussion_id=8). These are analyzed in more detail below at text and notes ---.

<sup>378</sup> Id.

<sup>379</sup> Id.

In describing human rights due diligence, it is also worth mentioning the importance of effective company-level **grievance mechanisms**, which provide an ongoing feedback loop and early warning system that is an essential part of human rights due diligence. This can help companies identify risks of impacts and avoid escalation of disputes; many cases of corporate-related human rights abuse started out as far lesser grievances. Moreover, by tracking trends and patterns in complaints, companies can identify systemic problems and adapt practices accordingly. To meet their responsibility to respect human rights, companies must also seek to ensure that impacts identified via this feedback loop are effectively remediated.

Id.

enactment of the Sarbanes Oxley Act of 2002.<sup>380</sup> In this sense, what appears to be an advance or extension of corporate obligation is better understood merely as an extension of a pattern of behavior that already has become a significant part of corporate culture. And more importantly, a corporate culture whose parameters are set by the legal requirements of states.

6. *Elements of Human Rights Due Diligence: Statements of Policy.* The Statement of Policy is meant to embody specify the governance approach of the company with respect to its responsibility to respect Human Rights. It is a document that constitutes one of the governance documents of the corporation, "Corporations should adopt a statement of policy with regard to their responsibility to respect human rights, approved by the board or equivalent."<sup>381</sup> Its principal purpose is to "describe whatever means a company uses to set and communicate its responsibilities, expectations, and commitments: Some companies call these statements of principle, or codes of conduct, for example."<sup>382</sup>

The basic contents of this code of conduct is specified: "For a statement of policy to effectively guide a company towards meeting its responsibility to respect human rights, it should reflect the scope and content of its responsibility; the rights or rights-related issues that are particularly salient for its business (for example on a sectoral basis, e.g. privacy and free expression for the internet and telecommunications sector); and how those issues are managed within the company, including discussion of how the company considers the statement's applicability to partners and suppliers."<sup>383</sup> The scope of responsibility refers both to context and complicity.<sup>384</sup> The content refers to the cluster of international norms that define the borders of global behavior expectations relating to the corporate social license to operate.<sup>385</sup> Lastly, the Statement of Policy must deal with issues of distribution. A broad distribution is contemplated: "such a statement should be made available to all employees in all relevant languages, and incorporated into all relevant management and employee training."<sup>386</sup>

Taken together, the Statement of Policy is geared toward three principal objectives. The first objective is to articulate the contextually privileged reach of human rights due diligence for the corporation. The point is to define that cluster of information that the corporation ought to consider relevant to its human rights compliance. Relevance is then a function of two factors. The first is context –

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<sup>380</sup> See, Larry Catá Backer, *The Duty to Monitor: Emerging Obligations of Outside Lawyers and Auditors to Detect and Report Corporate Wrongdoing Beyond the Securities Laws*, *St. John's Law Review*, Vol. 77(4) 919, (2003).

<sup>381</sup> United Nations Special Representative of the Secretary-General on Business & Human Rights, [Statement of Policy](#).

<sup>382</sup> *Id.*

<sup>383</sup> *Id.*

<sup>384</sup> See, Larry Catá Backer, [Business and Human Rights Part III: Foundations--The Scope of the Responsibility to Protect](#), *Law at the End of the Day*, Feb. 3, 2010.

<sup>385</sup> See, Larry Catá Backer, [Business and Human Rights Part IV: Foundations--Content of the Corporate Responsibility to Respect](#), *Law at the End of the Day*, Feb. 4, 2010.

<sup>386</sup> United Nations Special Representative of the Secretary-General on Business & Human Rights, [Statement of Policy](#).

specifically, of the relation of human rights concerns to the operations of the entity. The second is normative framework – that is, the behaviors with human rights significance as a matter of governance norms. The second objective is to define the range of stakeholders with respect to which information is to be harvested and assessed. The point is to define the universe of actors with respect to which the corporation is deemed legitimately empowered to direct. That power is either a function of ownership interests (subsidiaries and related entities) or contract relations (suppliers and other entities with whom the corporation has a sufficiently close relationship that it may assert a position of direction and counsel, or whose actions may be affected through the terms of the contractual relation itself). The third is to define the group of stakeholders entitled to be informed of the corporation's human rights due diligence efforts. There is a presumption in favor of wide dissemination.

The elaboration of the form of the Statement of Policy suggests two issues worth considering. The first centers on the character of the Statement of Policy. On one hand, there is a sense that the Statement of Policy ought to be understood as a short and focused set of principles to which the corporation will adhere in implementing its responsibility to respect human rights. That would call for general statements of objectives and goals against which corporate performance can be assessed. On the other hand, there is also a sense that the Statement of Policy should be a working document – that it is to specify the procedures and methodologies through which the goals and objectives of the corporate responsibility to respect will be effectuated. That calls for a highly detailed statement of procedure, a manual for the harvesting and assessment of data. Both, of course, are necessary for a corporation to satisfy its responsibility to respect. But it is not yet clear that both must be a part of the same document.

The second issue focuses on dissemination. This issue is related to the first. It seems reasonable, and in accord with general patterns of behavior already well established, for corporations to widely disseminate statements of policy that suggest the principles and objectives underlying a particular corporate policy. Corporations ought to widely disseminate Statements of Policy understood as focused elaborations of contextualized principles and goals. However, it is not clear that the more technical sets of procedures for implementing this Statement of Policy ought to be as widely disseminated. To the extent that such procedures are intimately connected with the internal control mechanics of a corporation, it would be difficult to defend a policy of disclosure. The details of internal control may be both proprietary and reveal corporate operations and methods of advantage to competitors. Yet, to the extent that employees and other stakeholders have an important role to play in the process of harvesting and assessing information, then it makes sense to widely disseminate the procedures applicable to these individuals, at least to the extent that they affect these individuals. Still, it may also be argued that stakeholders generally affected by corporate operations ought to have both a right to participate in the creation of corporate human rights due diligence processes and to receive copies of all material information related to such due diligence efforts that are developed by the corporation.

Current corporate practice provides some useful insights. Corporations have created contract based autonomous systems of human rights related due diligence. In some of those cases, corporations have included civil society actors in the construction of human rights policies. They have been receptive to monitoring by outside elements of civil society. They have widely distributed statements of behavior principles and objectives, and have even made some of the monitoring procedures available. They have extended the reach of these policies to suppliers through arrangements that are formally private and traditional contracts, but that are, effectively, governance instruments among private entities.<sup>387</sup> The practice insights from the private sector, then, suggests the acceptability of a broad reach of human rights due diligence, reliance on disclosure and market stakeholders. It suggests that the most effective form of statement of policy includes both principles and goals and procedures for implementation. It is the identification of information to be gathered and the methods for gathering that information that lie at the heart of the implementary aspects of such statements. But it also suggests the importance of firmly centering the responsibility for fashioning and implementing the systems described in such statements in the affected corporation.

7. *Elements of Human Rights Due Diligence: Assessing Impact.* I have suggested that assessment is a critical function of due diligence, adding a critical judgment aspect to the basic function of data selection and gathering.<sup>388</sup> The assessment function can be broken down into four important components: (1) verification; (2) management; (3) exposure; and (4) confession. Information can be used to corroborate or confirm a condition, effort or the authenticity of factual assertions. Assessment is vital to the management of an enterprise or of problems with respect to which data harvesting is focused. Exposure touches on disclosure – assessment is critical to the task of determining what set of harvested facts are to be disclosed and how they are to be organized for transmission. Assessment can also have a confessional aspect – it can acknowledge a condition or action. Certification, acknowledgment of compliance with law or policy statements, common to American securities laws, nicely illustrates the confessional element of the assessment function.

The SRSG focuses assessment on the verification and management functions of assessment.<sup>389</sup> For that purpose, the SRSG suggests a set of assessment tools. "Specific

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<sup>387</sup> See, Larry Catá Backer, [Multinational Corporations as Objects and Sources of Transnational Regulation](#), ILSA Journal of International & Comparative Law, Vol. 14, No. 2, 2008.

<sup>388</sup> Larry Catá Backer, [Global Panopticism: States, Corporations and the Governance Effects of Monitoring Regimes](#), Indiana Journal of Global Legal Studies, Vol. 15, 2007.

Data is inert until used. Though the identification and harvesting of knowledge implicates judgment (and use), that use remains contingent until the active element is introduced. That active element blends time and agency. Data can sit for long or short periods of time—subject to the technologies of preservation and retrieval. Information use is contextual—who uses it in what cultural context colors the importance and character of the information at the moment of its deployment. That use is not merely consequential—it serves as the essence of the governance element of surveillance. This characteristic of making judgments and deploying those judgments within the community under observation can be understood as governance.

Id., at --.

<sup>389</sup> He notes

tools such as “human rights impact assessments” are one means to achieve this purpose,<sup>390</sup> but the important thing is the activity, not the form or tools by which the assessment is achieved.”<sup>391</sup>

Though the “tools” issue is important for assessment, it is far more important as a collection issue, and consequently on the ideology underlying determinations of the sort of data to be collected and the sort of information to be ignored. Thus, for example, if it is believed that “race” is constructed, then it doesn’t exist as a fact.<sup>392</sup> And data on race actually monitor the aggregate assumptions of those who use a variety of assumptions about classification to sort people. The data is actually a proxy for the judgment to support an ideology about race and race sorting. The controversy over the extent of reporting of executive compensation is a case in point. Though corporations report financial data, that reporting may focus on some areas and ignore or hide others. That produces incentives and opportunities to engage in strategically advantageous behavior.<sup>393</sup>

Lastly periodicity is important to the assessment function. Like assessment and disclosure under national securities laws regimes, periodic assessment and reporting are critical to the success of an assessment function.<sup>394</sup> It is not clear whether there is an exposure and confessional aspect to assessment. Certification might prove useful under the human rights due diligence exercise undertaken as part of a corporation’s responsibility to respect. Certifications, affirmations, and other swearings mark the principal documents used to register securities, to periodically report on the financial status of the registrant, and especially under the provisions of the Sarbanes Oxley Act, to attest to the financial condition of the company and critically, under Section 404 of the Sarbanes Oxley Act, to attest to the functioning of the internal system of surveillance

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Often problems arise because companies fail to consider the potential implications of activities and relationships before they begin -- or because complacency sets in once they’re established. Companies cannot know whether they are meeting their responsibility to respect human rights if they don’t take proactive steps to understand how existing and proposed activities may affect human rights.  
United Nations Special Representative of the Secretary-General on Business & Human Rights, [Assessing Impacts](#).

<sup>390</sup> see the SRSG’s 2007 [report](#) on the topic

<sup>391</sup> United Nations Special Representative of the Secretary-General on Business & Human Rights, [Assessing Impacts](#).

<sup>392</sup> See, e.g., Ian F. Haney Lopez, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 Harv. C.R.-C.L. L. Rev. 1, 6 (1994).

<sup>393</sup> See, e.g., [Roel C. Campos, Commissioner, SEC, Remarks Before the 2007 Summit on Executive Compensation](#) (Jan. 23, 2007) (“I’m sure that some are hopeful that the new disclosure rules will have the effect of lowering CEO compensation, and that might be the case, but I’m not sure. Laws and rules have curious unintended consequences.” Id.)

<sup>394</sup> “Moreover, human rights situations are dynamic and pre-existing conditions will change with the entry of a high impact business operation. Therefore, the assessment of impacts should take place regularly throughout the life of a project or activity, whether triggered by project milestones, regular cycles (e.g. periodic performance reviews), or changes in any of the issues related to the scope of a company’s responsibility to respect human rights: context, activities, and relationships.” Id.

from which data is drawn for both private purposes (participation by private stakeholders) and public purposes (regulatory control by the state).<sup>395</sup>

Likewise, the exposure elements of assessment might prove problematical for corporations. It might be useful to develop assert of principles governing the scope of disclosure. Disclosure control has an upstream and downstream vector. The upstream vector implicates internal control mechanics.<sup>396</sup> In this form, not all information harvested ought to be disclosed because the focus of information harvesting and assessment is internal. Yet, there is also a strong downstream vector to disclosure.<sup>397</sup> The disclosure element is strongest here. But disclosure does determine what information ought to be disclosed. Perhaps the contextual principle of the Second Pillar, responsibility to respect, might help in that regard. But application of that principle might suggest that all information harvested and used internally might not necessarily be available for downstream due diligence. Outside stakeholders, of course, would disagree. And resolution might require agreement by the corporation and outside stakeholders. The differences might be explained by the notion that insiders seeking information for the attainment of management goals will understand data in a way different from insiders seeking information for the attainment of production goals.

8. *Elements of Human Rights Due Diligence: Integration.* Integration is not so much about information harvesting or assessment as it is about international management control systems within which human rights due diligence is meant to be a part.<sup>398</sup> The concern expressed here is a special application of a general insight that the SRSG has well developed elsewhere – the policy and legal incoherence that tends to marginalize human rights in both the domestic legal orders of states and the management systems of corporations. In the former case the result is difficulty in meeting a state's duty to protect human rights. In the latter, it results in an inability to respect human rights, in fact, whatever the form of the effort by corporations.<sup>399</sup> Just as

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<sup>395</sup> See Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745, codified at various places in 15 U.S.C. See, Larry Catá Backer, [The Sarbanes-Oxley Act: Federalizing Norms for Officer, Lawyer and Accountant Behavior](#), St. Johns Law Review, Vol. 76, pp. 897-952, 2002.

<sup>396</sup> Larry Catá Backer, [Global Panopticism](#): supra. “The upstream vector encompasses elements of internal institutional control – that is, of self-control. The object is internal discipline. The beneficiaries of this form of surveillance are the internal stakeholders of the organization – employees and officers or organizations – or political subdivision – the bureaucrats and other staff that work for the apparatus of state.”

<sup>397</sup> Id. “The downstream element encompasses elements of external control by/through others. The object is external discipline. The beneficiaries of surveillance in this form include a number of actors. One class of beneficiaries are political communities – home state, host state, local communities, and supranational communities. Control systems originate in statute. Another group of beneficiaries includes outside stakeholders, including labor, lenders, and trade creditors. Downstream control systems originate in contract. The contract basis of observation permits the participation of a host of private actors.”

<sup>398</sup> The SRSG notes:

Human rights considerations are often isolated within a company, delegated to a single person or department. That can lead to inconsistent or contradictory actions: product developers may not consider human rights implications; sales teams may not know the risks of entering into relationships with certain parties; company lobbying may contradict commitments to human rights; and buyers may place conditions on suppliers that can't be met without violating labor rights.

United Nations Special Representative of the Secretary-General on Business & Human Rights, [Integration](#).

<sup>399</sup> “The second challenge flows from the first. If the normative basis of law systems is fundamentally inadequate, those political systems grounded solely in such systems must, by definition, also share the

states must consciously overcome horizontal and vertical legal incoherence by integrating human rights into their governance activities, so too, must corporations avoid due diligence incoherence (and managerial incoherence) by integrating human rights due diligence into their internal management and control systems.<sup>400</sup>

But integration in the context of human rights due diligence means more than just the methods of incorporation within a corporation's internal management system. It also touches on the way in which the procedures of human rights due diligence are constructed and the extent to which stakeholders are incorporated into the process. "There are lessons to be learned from those who have worked on business integration for issues like safety, environmental sustainability, ethics, and anti-corruption. Such efforts seem to indicate that it is important to consider key processes such as capital allocation and evaluation of employees and divisions; that clear accountability is critical; and that employees must be trained, empowered, and incentivized appropriately."<sup>401</sup> This may raise a number of interesting and complex issues relating to both the form and objectives of due diligence systems. It also suggests some possible tensions in the construction of such human rights due diligence systems as one that is principally meant to serve as a tool of internal corporate management or as one that is meant to serve as a tool of monitoring and engagement by outside stakeholders and the state. These two principal objectives do not necessarily produce compatible systems.

The focus of integration appears to be on the internal controls objectives of human rights due diligence. That is a powerful element in human rights due diligence. It is well known that top down human rights efforts tend to fail where they meet resistance at the middle management level and below. Where top management appears to direct human rights due diligence efforts outward, there is a likelihood that middle management might view that as a signal that the efforts have no effective inward value. They will then tend to act in accordance with that assessment. The result will substantially affect all aspects of monitoring – from the selection of information, to the methodologies and effectiveness of information harvesting, to the signaling to lower level employees that the process is for show, and to the assessment of information. Management will tend to receive what they expect to hear, and the probability that a constant stream of great successes will be reported, with no real effect on the internal operational culture of the enterprise. At its worst, an extreme emphasis on outward

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similar inadequacies. The principal inadequacy identified by Mr. Ruggie was what he termed legal and policy incoherence. "Governments currently lack adequate policies and regulatory arrangements for fully managing the complex business and human rights agenda. Although some states are moving in the right direction, overall their practices exhibit substantial legal and policy incoherence." Larry Catá Backer, [On Challenges to Operationalizing a Transnational Framework for Business and Human Rights--the View From Geneva](#), *Law at the End of the Day*, Oct. 13, 2009, referencing John Ruggie, [Opening remarks by UN Special Representative John Ruggie](#), October 5, 2009.

<sup>400</sup> "A company must ensure that human rights are integrated throughout a company -- not necessarily into every business unit and function, but so that its efforts to respect human rights aren't undermined, including by the company's very business model. The intent of integration is to make respecting human rights part of the parameters within which business is conducted -- like ethical behavior or compliance with the law." United Nations Special Representative of the Secretary-General on Business & Human Rights, [Integration](#).

<sup>401</sup> Id.

value due diligence might signal that management does not care about their lower level employees.

9. *Elaboration: What is Specific to Human Rights.* The SRSG has suggested a relationship between the conventional understanding of business risk management, and the management of the human rights risks of corporate operation. The basis of that relationship centers on *process* – patterns of approaches to managing risk. At the same time, the SRSG emphasizes the substantive differences between conventional fields of risk management, and human rights risk management.<sup>402</sup>

This process/substance convergence/divergence serves a fundamental template for approaching much of the elaboration of the Second Pillar responsibility to respect. While the substance of the responsibility may be new, the methods available to corporations to meet these responsibilities are well established in other, and similar, substantive contexts. That approach makes Second Pillar responsibilities both comprehensible, and the objects attainable without substantial costs to corporations in terms of learning new managerial behaviors.

The emphasis on process familiarity, and its substantive expansion is elaborated. "Companies that already have systems in place to manage risks and issues related to safety, ethics and environmental impacts often ask what else is needed to meet their responsibility to respect human rights – in other words, what is specific to human rights."<sup>403</sup> The SRSG suggests that the substantive distinction of human rights can be understood in two aspects – the rights to be incorporated into corporate managerial culture and the rights holders who are the object of corporate human rights management.

With respect to the scope of rights to be incorporated, the SRSG suggests that corporations, like states (under the First Pillar), must look to international law and policy, rather than strictly to the incorporation (in bits and pieces) of such law and policy within the domestic legal orders of the states in which they operate. Then, like states, companies are expected to transpose these international obligations into their own governance framework. In this sense, corporations and states are treated in parallel. Both look to the same sources for normative conduct rules. Both have an obligation to transpose those rules within their domestic or corporate legal orders. And both must meet these obligations without regard to obligations arising from the operation of domestic law on parts of the operations of multinational corporations.<sup>404</sup>

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<sup>402</sup> The SRSG has suggested

The term 'risk management' is familiar to companies. However, it generally refers to mitigating risks *to the business*, whereas human rights due diligence is about mitigating risks *to the rights of others*. While the two are often related, infringing the rights of others may not always present risks to the company. So while human rights can and should be incorporated into existing corporate processes where possible and appropriate, they cannot always be folded into systems for other business issues.

United Nations Special Representative of the Secretary-General on Business & Human Rights, [Elaboration: What is Specific to Human Rights](#).

<sup>403</sup> Id.

<sup>404</sup> "Human rights may overlap with issues already addressed in company practice, such as working conditions, but human rights go beyond labor rights and include topics that many companies do not

With respect to rights holders, the SRSG suggested the cultivation of a direct relationship between corporations and stakeholders grounded on the normative rules derived from human rights. Again, the parallel with the state duty to protect is inescapable. Corporations, like states, have responsibilities to those who operate within their jurisdictions. The jurisdictions of states, of course, are easy enough to discern—they are generally defined by the national territory. But the jurisdiction of functionally differentiated governance enterprises, like multinational corporations, are harder to discover. For that reason, it makes sense for the entity with the best sense of those jurisdictional limits—the corporation itself—to make those limits known. Just as states must be sensitive to the application of rights to individuals within its territory, so too must entities be sensitive to rights holders.<sup>405</sup>

10. *Elaboration: Applicability to All Business.* The SRSG has forcefully and correctly suggested that the Second Pillar responsibility to respect is not subject to thresholds of size or operation. "The corporate responsibility to respect human rights applies to all business enterprises regardless of size, industry, region or ownership. The scope of the responsibility to respect human rights is determined by a company's activities and relationships, not its revenues or number of employees. All companies have a responsibility to respect human rights, which requires human rights due diligence; but the resultant company activities will vary depending on the particular context and circumstances."<sup>406</sup>

Yet, the SRSG concedes that such a broad extension of the responsibility to protect raises special issues in at least two cases. The first are issues special to small and medium sized firms. The second are to state owned enterprises (SOEs). I would add two additional categories. The first are sovereign wealth funds, especially those holding a substantial portion of shares in companies that themselves might encounter human rights issues in the operations.<sup>407</sup> The second are small and medium sized enterprises whose operations do not cross borders.

Lastly, it might be important to consider issues of "reverse flow." It is well understood that larger corporations' responsibility to respect human rights extends downstream through the supply chain. Less well understood is the possibility of reverse obligation – that is of the responsibility of local companies, for example companies in host states, to respect human rights extending *upwards* in their relationships with larger enterprises.

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currently cover. Furthermore, human rights are a defined set of global norms, whereas other issues may arise in response to specific operational contexts or national or local legal requirements." United Nations Special Representative of the Secretary-General on Business & Human Rights, [Elaboration: What is Specific to Human Rights](#).

<sup>405</sup> "That, in turn, entails treating people with dignity and on the basis of equality and non-discrimination, and engaging them in informed and inclusive dialogue about activities affecting their lives." Id.

<sup>406</sup> United Nations Special Representative of the Secretary-General on Business & Human Rights, *Elaboration: Applicability to All Business*.

<sup>407</sup> The issues that are connected to these specific entity forms are discussed in more detail below at --.

It has become increasingly clear that the supply chain responsibilities of multinationals under the Second Pillar are to some extent better understood as *regulatory chains*. The multinational corporation effectively must use its own governance tools, principally contract based, to enforce human rights norms not only within its own operations, but also in the operations of entities with respect to which it has a strong economic relationship – not merely a legal one. This is an idea pioneered and developed to a sophisticated level by the OECD through its enforcement of its Guidelines for Multinational corporations.<sup>408</sup> The Second Pillar is organized on the assumption that the supply chain responsibilities of corporations run only in one direction—from the multinational corporation down to the smallest and most remote supplier. That parallels the understanding of the way power relationships run between multinationals and other enterprises with which they deal in the construction of non-state governance relationships.<sup>409</sup> Yet, it is not clear that such supply chain governance relationships ought to run solely in one direction. That approach encourages an unhealthy passivity in downstream entities. It also reinforces single vector chains of power relationships that might be embellished with a neo-colonialist or interventionist character, to the detriment of the Second Pillar project. Moreover, unidirectional obligation in supply chain contexts are inefficient. Just as the largest multinational corporation must internalize and promote human rights with all firms with which it deals, so ought all entities down the supply chain embrace the same responsibility. In this sense, downstream supply chain entities may be among the most important corporate stakeholders for the internalization of human rights issues at the multinational level. That relationship, though, might benefit from a specific institutionalization and privileging. Downstream supply chain entities might be accorded a privileged role in the construction of human rights due diligence at the multinational level. They might also be entitled to a broadened right to receive compliance information. They might even participate in the monitoring of human rights compliance throughout the supply chain. That sort of human rights integration is already understood as foundational within the Second Pillar.

*11. Elaboration, Effectiveness.* The SRSG has emphasized that "the components of human rights due diligence in place is necessary but not sufficient to meeting the corporate responsibility to respect human rights; there must also be guidance to support the effectiveness of those components."<sup>410</sup> These focus on the effectiveness of systems of monitoring, and the related issue of effectiveness of transparency (disclosure and engagement).<sup>411</sup> Of these issues of monitoring and transparency pose particularly potent issues for the design of the framework.

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<sup>408</sup> For a discussion in two recent specific instances, see, Larry Catá Backer, Case Note: *Rights And Accountability In Development (Raid) V Das Air (21 July 2008) And Global Witness V Afrimex (28 August 2008)*; *Small Steps Toward an Autonomous Transnational Legal System for the Regulation of Multinational Corporations*, 10(1) MELBOURNE JOURNAL OF INTERNATIONAL LAW 258 (2009).

<sup>409</sup> See, Larry Catá Backer, *Economic Globalization and the Rise of Efficient Systems of Global Private Law Making: Wal-Mart as Global Legislator*, 39(4) UNIVERSITY OF CONNECTICUT LAW REVIEW 1739 (2007).

<sup>410</sup> United Nations Special Representative of the Secretary-General on Business & Human Rights, *Elaboration: Effectiveness*.

<sup>411</sup> The SRSG noted:

Companies must internalize the fact that human rights due diligence is not a one-time activity, but constitutes an **ongoing, dynamic** process.

In the United States, as in many other states, monitoring and transparency have come to the forefront of both corporate governance reform efforts at the state level and as a regulatory method in its own right.<sup>412</sup> The basic duty to monitor ongoing operations--not just collecting information in the context of a particular corporate transaction--has become a more central part of corporate governance.<sup>413</sup> Yet it must also be noted that at least in the United States, this development of a director's duty to implement and monitor a system of oversight does not necessarily translate into a system of liability for breach of that duty. Corporate law tends to place great burdens on those seeking to prove that a breach of that duty can produce legal liability under corporate law standards.<sup>414</sup> For all that, the imposition of a monitoring and transparency norm with respect to the ongoing operations of an enterprise, especially one that focuses on human rights, can be effective with respect to the social rights obligations of corporations, even if their breach does not always produce legal liability under state law. What is clear, though, is that corporations can no longer argue convincingly that monitoring and reporting on an ongoing basis are tasks that are not part of the core business practices. Corporations know how to monitor. They understand they must monitor. States have increased the scope of mandatory monitoring. Additional monitoring then adds a marginal burden to corporate activity that would be substantially offset by the value added resulting from better compliance with human rights obligations.

But just as important, effectiveness suggests the critical role played by *linkages* among the distinct elements that contribute to the construction of a successful system of human rights due diligence. The SRSG suggests three important linkages - between consultation, transparency and integration. To be effective, a human rights monitoring system must look outward to stakeholders as well as inward to employees, shareholders and supply chain partners. It must be both internalized within corporate culture and externalized as a method of communication and relationship between the entity and the people and institutions with which it interacts. To some extent these linkages may be defined by law - and thus add a linkage between the First Pillar state duty to protect human rights and the Second Pillar corporate responsibility to protect. And monitoring obligations to be effective must be enforceable. This adds yet another linkage, between

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A company's management of risks to the human rights of individuals and communities must involve **meaningful engagement and dialogue** with those communities.

Because the very purpose of human rights due diligence is for the company to demonstrate that it is meeting its responsibility to respect human rights, a measure of **transparency and accessibility** to stakeholders will be required.

Corporate objectives, policies and systems must be aligned with the company's human rights policy, and not contradict or undermine it. Integration is one component of human rights due diligence, but should be applied to human rights due diligence broadly.

Id.

<sup>412</sup> Backer, Larry Catá, *Global Panopticism: States, Corporations and the Governance Effects of Monitoring Regimes*. *Indiana Journal of Global Legal Studies*, Vol. 15, 2007.

<sup>413</sup> Chancellor Allen's discussion in *In re Caremark International Derivative Litigation*, 698 A.2d 959 (Del. Ch. 1996) is worth remembering in this context: "But it is important that the board exercise a good faith judgment that the corporation's information and reporting system is in concept and design adequate to assure the board that appropriate information will come to its attention in a timely manner as a matter of ordinary operation, so that it may satisfy its responsibility."

<sup>414</sup> See *In re Citigroup Inc. Shareholder Derivative Litigation*, 964 A.2d 106 (Del. Ch. 2009).

the Second Pillar responsibility to protect and the Third Pillar obligation to render effective remedy. These linkages are all inherent in the common approaches to monitoring developed under American corporate law. Though the language is not that of human rights or due diligence, the pattern is usefully transposed to the Protect-Respect-Remedy framework.

Lastly, effectiveness suggests measurement and assessment. Effectiveness cannot be understood as a concept unmoored. Effectiveness requires a measure – if one cannot measure effect then there is no basis for judging conduct against objective. Mere measurement is insufficient, however. Effectiveness is devoid of meaning in the absence of a standard against which it can be measured. Thus understood, the American cases remind us that effectiveness requires both measure and standard in two senses. First, one must be able to measure the effectiveness of the system itself against a standard of minimum characteristics and mechanics. Second, one must be able to measure the effectiveness of the system in identifying and mitigating human rights irregularities. Communication of these measures to stakeholders completes the circle and ensures effectiveness through the accountability that follows from disclosure.

12. *Implementation; Consultation and Transparency.* The issue of stake holding is central to a consideration of business and human rights. The SRSG has explained: "One of the essential principles of human rights is that affected individuals and communities must be consulted in a meaningful way. Consultation is sometimes required for companies to obtain their legal license to operate, and many have found it essential to ensuring their social license to operate."<sup>415</sup> Stakeholding, in the form of consultation, is described as especially important where indigenous peoples are concerned.<sup>416</sup> In both cases, however, the scope and prerogatives are not absolute. "But as with transparency, there are situations where consultation may be limited."<sup>417</sup>

The issue of transparency, like that of stake holding, is central to a consideration of business and human rights.<sup>418</sup> But transparency might as easily violate human rights obligations as it serves to foster them. "At the same time, there are also real and perceived risks associated with disclosure of some information related to human rights – for example, risks to revealing the identity of complainants, risks to staff and assets, or of potential increased legal liability."<sup>419</sup> For that reason, transparency presents both an opportunity and a danger for companies under the Second Pillar. "Thus, while the principle of transparency is an essential feature of the corporate responsibility to respect

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<sup>415</sup> United Nations Special Representative of the Secretary-General on Business & Human Rights, [Implementation: Consultation](#).

<sup>416</sup> Id.

<sup>417</sup> Id.

<sup>418</sup> The SRSG has explained:

Transparency of information is essential to meaningful dialogue about potential human rights impacts, as well as to preventing human rights abuses and addressing problems at their inception. Moreover, in some instances companies may face liability for failing to disclose information relevant to human rights, for example where human rights impacts may expose the company to operational, reputational, or legal risk.

United Nations Special Representative of the Secretary-General on Business & Human Rights, [Implementation: Transparency](#).

<sup>419</sup> Id.

human rights, there may be situations where companies must limit what they disclose and to whom."<sup>420</sup>

13. *Implementation; Prioritizing.* One of the oldest problems bedeviling states has centered on implementation/enforcement. While the process of law formulation and enactment has always presented its own difficulties – even within tyrannies – the ability to substantially enforce rules has always eluded states. States have come closest to the ideal of perfect enforcement/implementation when it has had the smallest role to play in that enterprise – that is, when the objects of enforcement become their most diligent prosecutors. On one hand, when positive law meets strong popular disapproval, even the most technologically advanced regime will encounter significant difficulties with enforcement. The problem of drug control has proven nearly impossible to do more than manage in virtually every state. On the other hand, the American Republic (in contrast for example to states like Italy) is noted for having a high level of self enforcement of its tax paying obligations. No state has the resources to perfectly implement even the most well received political norm. To manage imperfect enforcement or even implementation of legislative or other legal commands, states have developed a number of techniques. Within the criminal law, the concept of prosecutorial discretion has played a large role in managing the limited resources of a prosecutor's office. But management tools are as capable of generating abuse as it is capable of successfully managing limited resources.<sup>421</sup>

A similar issue is said to attach to the obligations of corporations to respect human rights."Companies that have global operations, large physical footprints, a diverse range of businesses, or complex supply chains could affect the entire spectrum of internationally recognized human rights." <sup>422</sup> The SRSG has asked, "What guidance can be given on how to prioritize potential and actual company impacts on human rights?"<sup>423</sup>

It might be useful, in thinking through issues of priority, to consider a set of guiding principles and actions – (1) consistency across operations; (2) development and circulation of a corporate *Human Rights Priority Policy*; (3) stakeholder involvement in formulation of any prioritization policy; (4) minimization of administrative complexity; (5) articulation of principled rationale for choices among enforcement alternatives; (6) development of procedures for and principles through which deviation from priority policy is possible; and (7) balance among the kinds of rights enforced on a qualitative basis to avoid commodification of rights prioritization.

Consistency across operations is essential to any priority plan is consistency. Where a corporation is engaged in global operations it must ensure that its approach to human rights is consistent across its operations. That may be more difficult than it

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<sup>420</sup> Id.

<sup>421</sup> See, Daniel D. Ntanda Nsereko, [Prosecutorial Discretion Before National and International Tribunals](#).

<sup>422</sup> United Nations Special Representative of the Secretary-General on Business & Human Rights, [Implementation, Prioritizing](#). "While the corporate responsibility to respect requires respecting all rights, it is unlikely that all issues can be addressed simultaneously. Consequently, guidance may be needed on how to prioritize potential and actual impacts on human rights." Id.

<sup>423</sup> Id.

sounds. For example, enforcing policies that protect the rights of women across corporate operations may pose difficulties where operations exist in Bangladesh and Denmark. However, selective prioritization would likely be demoralizing and suggest a cynical approach to human rights naturalization within corporate culture that would be difficult to correct.

Development and circulation of a corporate *Human Rights Priority Policy* emphasizes transparency. A Human Rights Priority Policy that sets forth principles through which such priorities are established and periodically re-examined provides a public expression of commitment that may serve both internal and external corporate constituencies.

Stakeholder involvement in formulation of any prioritization policy is as important as the participation of corporate inside stakeholders. There is a well established pattern of stakeholder involvement in the development of corporate policies for supply chain policies. There is little reason that extension of that practice generally to the formulation of principles of human rights prioritization would be detrimental to either stakeholder or corporate interests.

Minimization of administrative complexity can have strongly normative effects. Priority policies can be used to make human rights enforcement easier and more efficient. It can also be used to hamper the corporate responsibility to respect. It is well known, for example, that one way to effectively deny welfare benefits to the poor is to increase the complexity of the rules required for application for benefits and the remoteness of the institutions charged with the administration of programs. A prioritization program can as easily be used to subvert the corporate responsibility to respect as it can be used to make that responsibility more effective.

Articulation of principled rationale for choices among enforcement alternatives is essential to transparency and consistency across operations. A company ought to be especially sensitive to issues of legitimacy when it engages in choices among human rights. One important method for legitimating choices is to articulate principles by which such priority choices are made.

Development of procedures for and principles through which deviation from priority policy is possible ensures fairness. The great failure of rules and principles are also their greatest strength – their specificity. But sometimes exceptions are necessary to ensure that justice principles, blindly applied, do not produce injustice. Any priority policy ought to have procedures in place to permit inside and outside stakeholders the opportunity to petition for deviation from the application of those principles.

Balance among the kinds of rights enforced: There is always a danger that prioritization will produce a hierarchy of rights, and that this hierarchy advantages a company or its stakeholders to the detriment of populations to be served. Prioritization ought not to serve as a basis for arranging human rights in orders of importance. For that reason, it might be useful to avoid prioritization by reference to rights, and other priority factors ought to be sought.

There are some useful resources for thinking through issues of prioritizing. One of the better developed was produced by the Business Leader's Initiative on Human Rights, *A Guide for Integrating Human Rights into Business Management*.<sup>424</sup> The BLIHR uses conventional business management techniques to develop tools for prioritizing human rights in business management. The Guide itself is "based on a conventional management system. It follows the Global Compact Performance Model, which is a map for responsible corporate citizenship."<sup>425</sup> It is meant to turn human rights "risk into opportunity is a key component of a strategic approach to human rights in business."<sup>426</sup> For this purpose the BLIHR has developed the Human Rights Matrix.<sup>427</sup> The Matrix itself is a comprehensive approach to assessment that is worth studying.<sup>428</sup>

But managing priorities within a business begs a fundamental issue - the development of a hierarchy of human rights values. During the 1980s, for example, it was fashionable to suggest that social and economic rights, especially in developing states, took precedence over political rights.<sup>429</sup> Companies that prioritize human rights may also effectively be creating hierarchies of rights. Where companies harmonize the management of human rights priorities within industrial sectors or in particular parts of the new world, then the possibility of creating a customary framework for human rights hierarchies is made stronger. But that is hardly the objective of the SRSG under the Second Pillar. It follows that any efforts to prioritize ought to avoid producing qualitative hierarchies of human rights.

14. *When International and National Norms Conflict.* The test of implementation of new systems tends to cluster around the limiting case. In polycentric systems, like that envisioned in the Three Pillar Protect/Respect/Remedy framework, that limiting case occurs when international and national norms conflict.<sup>430</sup>

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<sup>424</sup> Id., at 3. "The Business Leaders Initiative on Human Rights (BLIHR) is a business-led program that is developing practical tools and methodologies for applying human rights principles and standards across a range of business sectors, issues, and geographical locations." Id.

<sup>425</sup> Id., at 5.

<sup>426</sup> Id., at 13.

<sup>427</sup> Id. The Human Rights Matrix permits mapping of what a company "sees as its 'essential', 'expected,' and 'desirable' priorities against a broad spectrum of human rights categories. It allows risks and opportunities to be shown together and helps to identify the human rights content of a company's 'sphere of influence.'" Id. The concept of "essential" suggests an "action that must be taken by the company to follow relevant legal standards, e.g. international human rights law, national laws, and regulations, including in situations where a government is unwilling or unable to fulfill its obligations." Id. An expected action is one "which should be taken by the company to meet the expectations of, and accept its shared responsibilities to, relevant stakeholders." Id. The least compelling is a desirable action, one "through which the business could demonstrate real leadership." Id.

<sup>428</sup> See id., at 14-15.

<sup>429</sup> Rhoda Howard, *The Full-Belly Thesis: Should Economic Rights Take Priority Over Civil and Political Rights? Evidence from Sub-Saharan Africa*, 5 HUMAN RIGHTS Q. 467, 469 (1983); but see, e.g., See, e.g., *Indivisibility and Interdependence of Economic, Social, Cultural, Civil, and Political Rights*, G.A. Res. 44/130, U.N. GAOR, 44th Sess., Supp. No. 49, at 209, U.N. Doc. A/44/49 (1990) (human rights indivisible).

<sup>430</sup> The SRSG explains:

Companies sometimes face situations in which national law or local practice conflicts with international human rights principles. National authorities generally require compliance with their laws; local communities may demand observance of traditional practices; while

There are places in which law (including United Nations or home state sanctions) prohibits companies from operating, or where the risk of becoming involved in international crimes is so great that companies should refrain from doing business there. But the vast majority of cases do not fall into these categories, leaving companies left with the challenge of finding ways to honor the principles of international human rights standards without violating national law."<sup>431</sup>

Companies already face this polycentric dilemma. Under the OECD's Guidelines for Multinational Corporations, companies that comply with national law of the jurisdiction in which they operate may still violate their international obligations as assessed by the state organs of the jurisdiction in which the corporation is licensed.<sup>432</sup>

Still, the SRSG is right – this limiting issue is more likely the exception than the rule. And that insight might well serve to provide a framework for dealing with this possibility on the ground.<sup>433</sup> The SRSG offers alternatives undertaken by other companies, including closing facilities in host states, deliberately disobeying host state law, engaged in capacity building within their host state labor force, and working with human rights advocates in the civil society sector.<sup>434</sup>

The problem posed by the SRSG goes to the heart of the second pillar obligation of companies to respect human rights--the way in which that obligation is to be implemented. The SRSG defined implementation to **include** "topics that companies grapple with when working to meet their responsibility to respect human rights." [Welcome to the Online Consultation, Discussion Topics](#). Considered together, the questions posed suggest the contours of analysis. That analysis requires systematization

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others may advocate adherence to international human rights standards, as might the company itself for reasons of principle and consistency.

United Nations Special Representative of the Secretary-General on Business & Human Rights, [Implementation, When International and National Laws Conflict](#).

<sup>431</sup> Id.

<sup>432</sup> For a discussion of a recent example, see, Larry Catá Backer, Part I: The OECD, Vedanta, and the Supreme Court of India – Polycentricity in Transnational Governance--The Issue of Standing Law at the End of the Day, Nov. 1, 2009; Larry Catá Backer, [Part II: The OECD, Vedanta, & the Indian Supreme Court – Polycentricity, Transnational Corporate Governance and John Ruggie's Protect/Respect Framework Law at the End of the Day](#), Nov. 3, 2009.

<sup>433</sup> I have offered one approach in Larry Catá Backer, [When the Human Rights Obligations of Corporations Under National and International Standards Conflict: A Proposed Method for Analysis and Action](#), Law at the End of the Day, Jan. 23, 2010.

<sup>434</sup> In particular the SRSG noted among the approaches:

Some multinational companies left South Africa during Apartheid to avoid having to implement discriminatory practices, while others stayed and explicitly disobeyed segregation laws, challenging the government to enforce its own legislation.

To honor the spirit of freedom of association where it is curtailed by the government, some companies have encouraged workers to form their own representative structures, facilitated elections of worker representatives, provided education on labor rights, and trained local management on how to respond constructively to worker grievances.

Companies in the internet and telecommunications sector have responded to government challenges to free expression and privacy by working with human rights advocates to develop guidance on what steps companies should take when faced with such challenges.

United Nations Special Representative of the Secretary-General on Business & Human Rights, [Implementation, When International and National Laws Conflict](#).

of decision elements with respect to which companies are already well versed. What follows is an effort to pose a reasonable way of thinking through the issues at the heart of the question posed when companies face decision where national and international norms conflict. The analysis and framework owes much to [Christine Bader](#), whose work is gratefully acknowledged.

Complexity arises when national law conflicts with those international instruments, in which case legal compliance could undermine the responsibility to respect. In such situations, which have come up under South Africa's Apartheid regime and in relation to, *inter alia*, freedom of association, gender discrimination, and most recently free expression and privacy in the internet and telecommunications sectors, experience suggests a decision tree for companies.

Each stage of this process results in either an acceptable solution whereby the company can comply with domestic requirements without risking infringement of human rights, or suggests the framework within which further action can be considered. The process is designed both to confront the issue of conflict, reduce the contours of that conflict to its essential essence, and then refine the actual nature of the conflict with respect to its impact on human rights.

The decision analysis process can be understood as consisting of four analytical and decisions stages. Each is identified, and then amplified in more detailed in the "Commentary" section that follows. It is meant to provide a template for stakeholders (and their lawyers) for working through these situations in a way that minimizes conflict, and keeps the focus on the objective of maximizing human rights benefits to corporate decision making while respecting lawful state power within its own territory.

The Decision Framework would consist of the following four steps: (1) Explore whether there is a way to reconcile the conflict between standards; (2) If no reconciliation possible then attempt to negotiate an exception or solution with the State; (3) If mediation or informal discussion with State officials is unsuccessful, then challenge the law; and (4) Where challenge is unsuccessful consider whether operating in the jurisdiction in question is still feasible, assuming that the company is now forced to choose between national and international standards.

The exercise of reconciling standards van involve the efforts of a number of departments in the corporation. Lawyers might be tasked to determine whether there are reasonable ways to avoid conflict, or whether reasonable alternative interpretations of national or international law is feasible; industry standards or local practice might be reviewed; officials might reach out to international bodies or local civil society elements for interpretation. Additionally, the company might review its planned actions in light of its objectives. Many times it may be possible to find alternative means to the same objective that avoids conflict. These processes are usually informal but can also lead to a decision to invoke formal processes for definitive interpretation (and thus lead to stage two).

In this stage, there is an assumption that reconciliation is impossible and

alternative means of avoiding conflict are not feasible. Now both formal and informal contacts must be made with the appropriate State officials to seek top mediate the conflict. This may involve a number of alternative approaches, from negotiating an agreement with the State (with the object of reaching an agreement that avoids violation of human rights norms), to seeking protection under bilateral investment treaties that incorporate international standards, to seeking legislative change in an appropriate manner.

It is possible that discussions with State officials may not produce agreement that satisfies the requirements of international standards. In that event, the company must determine whether it ought to challenge the inconsistent national legislation. Challenge may take one of two forms in most cases. Usually this course suggests a legal challenge to inconsistent state law. Sometimes it may suggest political challenge. In the latter event, it may be important to solicit the help and counsel of local civil society elements. Special sensitivity ought to be exercised when engaging in challenge in countries with weak government or in conflict zones.

Only when lawful challenge proves unsuccessful does a company actually face the issue suggested by the problem--reconciling inconsistent national and international obligations to respect human rights. In that case, the company must make a decision based on the greater good in terms of human rights. The example of Google's well publicized initial determination to engage in business in China in the face of national censorship requirements provides a good illustration of the nature of the decision. In that case, Google decided that there was more human rights benefits to providing some greater amount of information to Chinese customers than to abandon China altogether.<sup>435</sup> It is important to remember that decisions made in this context are dynamic. They require constant review as circumstances change. Where the human rights benefits diminish in the face of continued inconsistency in legal requirements, then the company must reevaluate its business decision in order to meet its "respect" requirements under the three pillar mandate. Again, Google provides a good illustration. The Company publicly sought to reevaluate its agreement to comply with Chinese censorship rules in the aftermath of cyber attacks on its operations.<sup>436</sup>

All of these steps could be more effective if taken in collaboration with peer companies, nongovernmental allies, and where applicable the home state. This is especially useful where these collectives can develop models of decision and analysis that are context specific--the example for labor issues, or for issues peculiar to a particular industrial sector. It might also provide a useful area to stimulate collaboration between industry and civil society groups.

Engaging in the analysis suggested by this decision tree has a number of advantages. It clarifies issues relating to the decision. It helps to naturalize human rights within the conventional patterns of corporate routines for making business decisions. In a sense, the decision tree approach suggested here is similar to decision processes whenever businesses must make a decision in the face of conflict and uncertainty. It also

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<sup>435</sup> Google, [Testimony: The Internet in China](#), February 15, 2006.

<sup>436</sup> See, Google, [A New Approach to China](#), Jan. 12, 2010.

provides a method for minimizing the situations where conflicts of this kind actually arise. It is meant to provide an analytical framework for eliminating false conflict by rigorously reducing the scope of conflict to its essential elements. Lastly, it provides a method for reducing the danger of treating human rights issues as either unmanageable or special (in the sense that it represents a class of issues that are unnatural within the corporate decision making context).

*15. Issues; Supply Chain.* One of the most potentially transformative issues both for the governance of multinational corporations and for the management of the governance of the human rights responsibilities of corporations is the issue of supply chains. Supply chains provide a quite potent example of the great distinction between the legal obligations of corporations – the principal subject of the Pillar One state obligation to protect human rights – and the social obligations of corporations to respect human rights that serves as the foundation of Pillar Two obligations.

As a matter of corporate law in virtually every jurisdiction, the essence of legal personality, and the autonomy of separately chartered corporations serve as the bedrock any approach to the obligations of corporations to monitor and control the behavior of others. In essence, legal obligations extend to some extent to entities with respect to which a corporation owns a controlling interest. It extends in much more diluted form to entities with respect to which a corporation has a financial stake. It does not extend to entities with respect to which corporations merely have a contractual relationship. The policy objective supporting this approach is a strong one – the need to preserve the autonomy of corporate legal personality.<sup>437</sup>

However, from an operations perspective, it has long been understood that a corporation has relationships with a large number of entities, including controlling or governance relationships that are substantially broader than control afforded under the bare rules of law. In particular, the notion of "supply chain" has been used increasingly to refer to the cluster of those relationships extending throughout the operations of an enterprise that together account for the operations of an enterprise from production to sale to ultimate customers. Within this ordering framework, legal distinction gave way to economic constructions.<sup>438</sup>

The SRSG, in line with his emphasis on the social obligations of corporations, has taken a broad view of the governance obligations of corporations under the Second

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<sup>437</sup> *Salomon v. Salomon & Co.* Ltd. [1897] AC 22.

<sup>438</sup> Thus, for example, the Supply Chain Council, "a global non-profit association whose methodology, diagnostic and benchmarking tools help nearly a thousand organizations make dramatic and rapid improvements in supply chain processes," (Supply Chain Council, Overview) has developed a Supply Chain Operations Reference-model (SCOR) is a process reference model that has been developed and endorsed by the Supply Chain Council as the cross-industry standard diagnostic tool for supply chain management. SCOR enables users to address, improve and communicate supply chain management practices within and between all interested parties. SCOR is a management tool. It is a process reference model for supply chain management, spanning from the supplier's supplier to the customer's customer.

Supply Chain Council, [SCOR Framework](#).

Pillar with regard to supply chain relationships.<sup>439</sup> This approach is well in line with the fundamental policy of the Second Pillar. Still, the issue of a company's obligation to engage with host states to improve systemic conditions is a sensitive one. On the one hand, companies are in essence at the front line of operationalization, not merely of international and social norms, but also of the domestic law of host states. On the other hand, the long history of foreign multinational corporation's interference in the internal affairs of smaller and weaker host states, especially states recently emerging from colonialism might raise significant suspicions about motives. In addition, some substantial work might have to be done in some host states to convince local elites that, for example, multinational corporations are not the unofficial tools of their home states. With some sensitivity to these realities perhaps it can be possible to engage companies in this worthwhile role. For that purpose it might be useful to stress good behaviors - for example transparency, engagement not only with states but with directly affected stakeholders and procedures that enhance the appearance of sensitivity to local sovereignty.

16. *Issues; Indigenous People.* The issue of indigenous people's rights has become a matter of increasing interest to the international community. In 2007, the United Nations adopted a Declaration on the Rights of Indigenous Peoples.<sup>440</sup> The focus of the Declaration was on an international mediation of the rights of indigenous peoples in the context of the political states of which they were (whether they liked it or not) a part. Thus, for example, article 1 of the Declaration provides that "Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law."<sup>441</sup> Articles 6-8 also guarantee basic political rights to individuals who may claim membership in indigenous communities. The Declaration appears to preserve an equality of rights among all peoples within a political states regardless of status as indigenous<sup>442</sup> while preserving to indigenous peoples a right to self determination,<sup>443</sup> yet that right might appear to be limited to the power of such communities to preserve an autonomous status within states.<sup>444</sup> Ultimately, and unlike other distinct communities within a state, indigenous people are given a dynamic right to, from time to time, choose assimilation into the greater community or separation (the limits of which are ambiguous) therefrom. Thus article 5 provides: "Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State."<sup>445</sup> This is related to the protection against forced

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<sup>439</sup> "Despite the fact that suppliers are also companies, and therefore bound by the same responsibility to respect human rights as their buyers, companies face supply chain challenges around the world. The scope of a company's responsibility to respect human rights includes its relationships; therefore, part of human rights due diligence is examining, preventing, and mitigating potential infringements on human rights through suppliers and partners." United Nations Special Representative of the Secretary-General on Business & Human Rights, [Issues: Supply Chains](#).

<sup>440</sup> CITE

<sup>441</sup> CITE

<sup>442</sup> (article 2)

<sup>443</sup> (article 3)

<sup>444</sup> (article 4)

<sup>445</sup> CITE

assimilation in Article 8 of the Declaration. Indigenous people are also accorded collective rights superior to those of other organized communities within states, with respect to the preservation of their culture and institutions,<sup>446</sup> the management of information for consumption by internal audiences and projection to others,<sup>447</sup> and the right to preserve autonomous political institutions in the defense of what may be perceived to be matters affecting communal interest.<sup>448</sup>

Within this framework it is not surprising that the relationship between indigenous peoples and modern states, as well as between such communities and economic enterprises, remains deeply dynamic. The SRSG has suggested the importance of First pillar considerations as the foundation for ordering human rights:

States are responsible for upholding and implementing their national and international obligations to indigenous peoples. Where company activities may affect the rights of indigenous communities, companies also need to become aware of and understand the particular position of indigenous peoples and their rights in order to ensure that they meet their responsibility to respect human rights.

Issues that tend to arise where business and indigenous peoples meet are land use and ownership; cultural identity and development; the desire for sustainable livelihoods; consultation and the concept of "free, prior and informed consent" (FPIC).<sup>449</sup>

The SRSG's reference to "free, prior and informed consent" nods to Article 32 of the Declaration, which imposes on states a similar set of obligations.<sup>450</sup>

The question then arises: to what extent do the international obligations of states toward indigenous people extend directly to economic enterprises in their own right under the Second Pillar? The answer that the OECD has given, at least in the United Kingdom, in an interpretation of the OECD's Guidelines for Multinational Enterprises, has been that corporations owe an independent obligation to indigenous communities. More importantly, the OECD has taken the position that such independent obligation is to be interpreted under international standards rather than under the national standards. Thus, even where states transpose their international obligations toward

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<sup>446</sup> (Arts. 14-15)

<sup>447</sup> (art. 16)

<sup>448</sup> (arts. 18-20, 34)

<sup>449</sup> United Nations Special Representative of the Secretary-General on Business & Human Rights, Issues: Indigenous People.

<sup>450</sup> United Nations Declaration on the Rights of Indigenous Peoples. It provides in relevant part:

1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.
2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.
3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

Id.

indigenous peoples into domestic law, that transposition will not be dispositive with respect to the separate obligations of corporations involved with those indigenous communities under international standards.<sup>451</sup>

If economic enterprises may have an independent obligation to indigenous communities under international law, it is likely that corporations ought to be sensitive to issues touched on in the United Nations Declaration on the Rights of Indigenous Peoples. More immediately, corporations might profit from guidance contained in the Akwé Kon Guidelines (2004), produced by the Secretariat of the Convention on Biological Diversity. The Guidelines represent an effort by the state parties of the CBD "to develop, in cooperation with indigenous and local communities, guidelines for the conduct of cultural, environmental and social impact assessments regarding such developments."<sup>452</sup>

The Voluntary Guidelines were named by a Mohawk term meaning "everything in creation", so as to emphasize the holistic nature of this instrument. Indeed, the guidelines are intended to provide a collaborative framework ensuring the full involvement of indigenous and local communities in the assessment of cultural, environmental and social concerns and interests of indigenous and local communities of proposed developments. Moreover, guidance is provided on how to take into account traditional knowledge, innovations and practices as part of the impact-assessment processes and promote the use of appropriate technologies.<sup>453</sup>

For purposes of application of the Akwé Kon Guidelines, invoking parties prepare a cultural heritage assessment,<sup>454</sup> environmental impact assessments,<sup>455</sup> and social impact assessments.<sup>456</sup>

"Cultural heritage impact assessment is concerned with the likely impacts of a proposed development on the physical manifestations of a community's cultural heritage and is frequently subject to national heritage laws. A cultural heritage impact assessment will need to take into account, as the circumstances warrant, international, national and local heritage values."<sup>457</sup> Environmental impact assessments focus on the specific development proposal. "The direct impacts of the development proposal on local biodiversity at the ecosystem, species and genetic levels should be assessed, and particularly in terms of those components of biological diversity that the affected indigenous or local community and its members rely upon for their livelihood, well-

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<sup>451</sup> See, [Initial Assessment by the UK National Contact Point for the OECD Guidelines for Multinational Enterprises: Survival International and Vedanta Resources plc](#), March 27, 2009 (focusing on standing issues for bringing such claims) and [Final Statement by the UK National Contact Point for the OECD Guidelines for Multinational Enterprises: Complaint from Survival International against Vedanta Resources plc](#), 25 Sept. 2009 (focusing on the obligations owed to indigenous communities beyond national law). For a discussion, see, Larry Catá Backer, [Part II: The OECD, Vedanta, & the Indian Supreme Court—Polycentricity, Transnational Corporate Governance and John Ruggie's Protect/Respect Framework](#), Law at the End of the Day, Nov. 3, 2009.

<sup>452</sup> Akwé Kon Guidelines, *supra*, at 1 (Hamdallah Zedan Executive Secretary, Forward).

<sup>453</sup> *Id.*, at 1-2.

<sup>454</sup> (*Id.*, paras. 12-34)

<sup>455</sup> (*Id.*, Paras. 35-38)

<sup>456</sup> (*id.*, paras. 39-51).

<sup>457</sup> Akwé Kon, *supra*, at 13 (Para. 25).

being, and other needs."<sup>458</sup> Social impact assessments are to "take into account gender and demographic factors, housing and accommodation, employment, infrastructure and services, income and asset distribution, traditional systems and means of production, as well as educational needs, technical skills and financial implications."<sup>459</sup> Several of the baseline considerations for social impact assessment echo protections identified in the U.N. Declaration on the Rights of Indigenous Peoples.

The focus of the assessments is on the prior informed consent of the affected populations.<sup>460</sup> Prior informed consent is required at every phase of the impact assessment process and "should consider the rights, knowledge, innovations and practices of indigenous and local communities; the use of appropriate language and process; the allocation of sufficient time and the provision of accurate, factual and legally correct information."<sup>461</sup> Interestingly, the Akwé Kon Guidelines speak to conformity with national legal requirements, but only "to national legislation consistent with international obligations."<sup>462</sup> It does not specify how participants are to make a legitimate determination of such consistency, or to defend against national police actions taken against them on the basis of inconsistent national law. Also importantly is the need for transparency in the process.<sup>463</sup> Application of the Akwé Kon Guidelines, already suggested within the OECD voluntary governance framework, might be usefully integrated into corporate compliance with Second Pillar responsibilities to respect Human Rights.

*17. Issues; Gender.* The SRSG reminds us that his "mandate requests that he 'integrate a gender perspective throughout his work.'"<sup>464</sup> Though the request might be read as suggesting substantive elements, integration is posed, instead, as a methodological, rather than a conceptual, challenge. "Through formal and informal consultations, some experts have suggested that with regard to the corporate responsibility to respect human rights, integrating a gender perspective requires companies to 1) collect disaggregated data on their impacts, and 2) conduct multi-dimensional analyses with regard to their potential and actual impacts."<sup>465</sup>

Data disaggregation requires the collection of data broken down by gender. Data collection, though, is hardly a ministerial act. The choice of data suggests a normative privileging that itself might legitimate emphasis in one area of human rights over others. I have suggested the regulatory aspects of data collection in its guise as a subset of surveillance. "Surveillance is one of the critical mechanisms of this expansion of private power into what had been an exclusively public sphere. Increasingly, public bodies are requiring, or permitting, private entities to monitor and report on the conduct and activities of a host of actors. It has also come to serve public bodies as a substitute

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<sup>458</sup> Id., at para. 36.

<sup>459</sup> (id., para. 39).

<sup>460</sup> Id., para. 52.

<sup>461</sup> Akwé Kon Guidelines (2004), supra at para. 53.

<sup>462</sup> Id., para. 57.

<sup>463</sup> Id., at para. 62.

<sup>464</sup> United Nations Special Representative of the Secretary-General on Business & Human Rights, Issues: Gender.

<sup>465</sup> Id.

for lawmaking. Surveillance is a flexible engine."<sup>466</sup> Surveillance has both domestic<sup>467</sup> and transnational forms.<sup>468</sup> "Together, surveillance in its various forms provides a unifying technique with which governance can be effected across the boundaries of power fractures without challenging formal regulatory power or its limits."<sup>469</sup> As such, one could understand this emphasis as suggesting a prioritization of gender issues in the Second Pillar responsibility to respect.<sup>470</sup>

But the SRSG points to a more benign function for data gathering. "Some have suggested that only with disaggregated data can companies identify the relationship between gender and their human rights impacts. It is not part of a company's baseline responsibility to respect human rights to address the social formation of gender biases. However, human rights due diligence should identify differential impacts based on gender and consequently help companies avoid creating or exacerbating existing gender biases."<sup>471</sup> The subtle distinction might at first be startling – especially in an otherwise positive values based and behavior modifying approach to corporate behavior. But closer reflection suggests the strong connection between this position – that data be gathered to mind the corporation's behavior but not that of the society in which the corporation operates – and the foundational distinction between the legal rights regimes peculiar to the First Pillar and the social rights regimes at the heart of the corporate responsibility to respect human rights. This is made clearer by the SRSG's explanation of the meaning of a multidimensional approach to gender data. The multidimensional approach "means that human rights due diligence should include examination of gender issues at multiple levels – for example, the community (e.g. are women in a particular community allowed or expected to work); and the society (e.g. is there institutionalized gender discrimination, whether by law or religion)."

Issues of social organization, and communal mores, including those touching on the status of women, are matters for the state – and the First Pillar. Issues of corporate involvement in issues touching on the status of women – as realized within corporate operations – are matters at the heart of the Second Pillar. Those issues, in that context, give rise to an autonomous set of responsibilities, the touchstone of which is not necessarily dependent on the resolution of gender status issues within a particular state.

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<sup>466</sup> Larry Catá Backer, [The Surveillance State: Monitoring as Regulation, Information as Power](#) Law at the End of the Day, Dec. 21, 2007. See, Larry Catá Backer, [Global Panopticism: States, Corporations and the Governance Effects of Monitoring Regimes](#), 15 *Indiana Journal of Global Legal Studies* -- (forthcoming 2007). "It can be used to decide what sorts of facts constitute information, to determine what sorts of information ought to be privileged and which do not matter, to gather that information, to empower people or entities to gather information, to act on the information gathered." Id.

<sup>467</sup> "In its domestic form it can be used to assign authority over certain types of information to private enterprises and then hold those enterprises to account on the basis of the information gathered." Id.

<sup>468</sup> "In its transnational form it can be used to construct a set of privileged information that can be gathered and distributed voluntarily by private entities on the basis of systems created and maintained by international public or private organizations as an alternative to formal regulation and to provide a means of harmonizing behavior without law." Id.

<sup>469</sup> Larry Catá Backer, [The Surveillance State: Monitoring as Regulation, Information as Power](#) Law at the End of the Day, Dec. 21, 2007. See, Larry Catá Backer, [Global Panopticism: States, Corporations and the Governance Effects of Monitoring Regimes](#), 15 *Indiana Journal of Global Legal Studies* -- (forthcoming 2007).

<sup>470</sup> For a discussion of prioritization, see, Larry Catá Backer, *Business and Human Rights Part XVII--Implementation: Prioritizing, Law at the End of the Day*, Feb. 18, 2010.

<sup>471</sup> United Nations Special Representative of the Secretary-General on Business & Human Rights, *Issues: Gender*.

As such, data gathering and analysis is critical for the production of corporate action that may lead to treatment of women, and responses to concerns touching on the status and treatment of women, within the corporation in ways that are distinct from those presumed satisfactory elsewhere within the state in which a corporation operates. The object is to control the behavior of corporations, not to reform the social, political and legal structures of the states in which such corporations operate. This is an especially important distinction in cases where multinational corporations are operating within host states that have a long history of colonialism and a strong sensitivity to interference with sovereign prerogatives.

But this bifurcated approach also produces a set of potentially necessary tensions. First, at its limit, it may produce a situation where the corporate responsibility to respect is inconsistent with the obligations imposed through host state law.<sup>472</sup> Second, the distinction between the "social formation of gender biases" and "creating or exacerbating existing gender biases" through corporate policy may be both artificial and difficult to keep separate. Indeed, one recalls the approach of the Sullivan Principles was to focus directly on corporate behavior as a means of projecting social-cultural-and legal change into the host states in which these principles were applied. "General Motors was the largest employer of blacks in South Africa at that time, and Sullivan decided to use his position on the Board of Directors to apply economic pressure to end the unjust system. The result was the Sullivan Principles, which became the blueprint for ending apartheid."<sup>473</sup> The successor Global Sullivan Principles makes these connections explicit. The resulting political program inherent in application of corporate second pillar responsibilities may produce friction, especially if the methodological focus is understood as containing a substantive element targeting the host state. Lastly, the nature of gender rights remains highly contested. This produces fracture, even in the approach to data gathering. Consider, in this regard, the connection between the Universal Declaration of Human Rights and the Cairo Declaration on Human Rights in Islam. Their possible complementarity (or incompatibility) may substantially direct both the methodological framework within which gender issues are understood, and data harvested, as well as the analytics produced therefrom.

18. *Issues; Finance.* There is something of a disjunction between the SRSG's discussion of supply chain obligations of corporations, and the discussion of the obligations financial institutions involved in the financing of corporate activity. With respect to the former, the SRSG has proposed a broad sweep of obligations.<sup>474</sup> With respect to the later, the SRSG notes that "[w]hile financial institutions have a responsibility to respect human rights like every other company, they are generally at least one step removed from the human rights impacts of the business activities that they enable with their funds."<sup>475</sup> The SRAG suggests a difference between loan due

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<sup>472</sup> See, Larry Catá Backer, [Business and Human Rights Part XVI--Implementation: When International and National Norms Conflict](#), Law at the End of the Day, Feb. 17, 2010.

<sup>473</sup> The Sullivan Principles.

<sup>474</sup> United Nations Special Representative of the Secretary-General on Business & Human Rights, Issues: Supply Chains., discussed in Larry Catá Backer, [Business and Human Rights Part XVIII--Issues: Supply Chain](#), Law at the End of the Day, Feb. 19, 2010.

<sup>475</sup> United Nations Special Representative of the Secretary-General on Business & Human Rights, Issues: Finance.

diligence and operational due diligence.<sup>476</sup> “A bank’s human rights due diligence for a project loan will differ from that of the company operating the project – banks are unlikely to have the capacity to visit every site to which they provide capital. Nevertheless, banks must conduct human rights due diligence to meet their responsibility to respect human rights – and the human rights risks of a client may also become risks to the funder's liability, returns and reputation.”<sup>477</sup>

The difference, and a critical one, lies in the relationship between corporations and supply chain partners, on the one hand, and corporations and their financiers, on the other. It appears that corporations ought to have a strong responsibility to respect human rights in *downstream relationships* (suppliers and supply chain partners), but that there is a qualitative difference between downstream relationships involving operating companies and their suppliers, and that between financial institutions and their borrowers. I am not as sure that this qualitative difference ought to affect the scope of the responsibility to respect human rights. Banks are in the business of risk assessment. They are better at that than most operating companies. Banks are also in the business of surveillance and monitoring their borrowers. Loan agreements are cluttered with negative and positive covenants that can reach virtually all aspects of the operations of borrowers. Banks have routinely inserted clauses limiting corporate discretion with respect to all sorts of activity. And banks can reserve to themselves a right to approve certain fundamental corporate activity – from mergers to reorganizations and similar activities. It seems odd to suggest that an industry with such a sophisticated approach to the monitoring and control of borrowers would be incapable of adding another layer of monitoring and review – that centered on human rights – to an already well established list of risk assessment protocols. Indeed, it would seem that banks are in a better position to monitor compliance from their borrowers than companies might be able to monitor the conduct of their down chain supply chain partners.

An objection might be made that such an imposition – down from lenders to corporate borrowers – would increase the cost of capital. In the worst cases it might make capital impossible to obtain. Yet the same argument might be made with respect to the burdens of monitoring a supply chain. Conceptually, the problem is less that financial institutions are different and more that the framework of the Second Pillar is centered on operating companies and their downstream obligations. The Second Pillar does not recognize *upstream relationships* within its framework. That makes the relationship between corporations and their lenders problematic within the Second Pillar. If lenders create a downstream relationship with their borrowers, then the focus of the responsibility to respect might have to be refocused on the financial sector. But that does not make sense given the realities of economic activity. On the other hand, the financial sector ought not to be excluded from the Second Pillar. What that may suggest is the need to specify a special set of rules describing the nature of the relationship

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<sup>476</sup> “A bank’s human rights due diligence for a project loan will differ from that of the company operating the project – banks are unlikely to have the capacity to visit every site to which they provide capital. . . . Beyond banks lies an even more complex array of other lenders, investors, and asset managers, all of which have different means of engagement and leverage with companies.” *Id.*

<sup>477</sup> United Nations Special Representative of the Secretary-General on Business & Human Rights, Issues: Finance.

between the financial sector and the responsibility to respect human rights in lending activities.

And what about special financial entities – for example sovereign wealth funds. I have argued that these entities, though private in form, exercise public policy in ways that are different in quality from those exercised by private funds.<sup>478</sup> I have also suggested that sovereign wealth funds, together with integrated outbound activities of state owned enterprises, can serve as instruments of state policy effectuated through private, markets – reaping both economic profit and state political objectives.<sup>479</sup> This framework suggests that government owned entities of this sort might better be understood as subject to the First Pillar state duty to protect. Yet that is too simple a conclusion. Global institutions have been moving to treat state enterprises, like SWFs and SOEs that meet certain conduct norms like private entities. That movement ought to be respected within the Three Pillar Framework. What that suggests is not that SWFs and SOEs be treated strictly under the Second Pillar, but that such enterprises ought to have multiple sources of obligations – a duty to protect human rights co-extensive with the chartering state's own legal duties, and an autonomous and additional responsibility to respect human rights under the Second Pillar. The advantages of state ownership ought to come bundled with the obligations imposed on states, and with the freely undertaken decision to operate like a private enterprise ought to come the obligations arising from operating in that form.

Yet even that is too simple. Where sovereign wealth funds invest primarily in share of other entities, then, to that extent they ought to be subject to the same scope of responsibility as other funds of the same type. In that case the obligation would be that of a shareholder investor, and to a large extent, remote from the operations of the corporations whose shares are acquired in the market. Yet Norway has already shown that even in that context, a SWF can exercise fairly substantial human rights responsibilities, and to do that without substantially burdening the financial success of the SWF itself.<sup>480</sup> On the other hand, SWFs that own controlling interests in an enterprise ought to face substantially broader responsibilities. And SWFs that own financial operations – banks and the like – ought to be responsibility for their downstream operations like any other enterprise. For these entities though, the real issue relates to the linkage between their status and the application of First Pillar obligations, obligations that ought to be precise and mandatory in character.

#### B. Linkage Issues.

The SRSG has described the links between pillars in terms of complexity. “Human rights due diligence is one illustration of how the three framework pillars

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<sup>478</sup> See Larry Catá Backer, [Sovereign Wealth Funds as Regulatory Chameleons: The Norwegian Sovereign Wealth Funds and Public Global Governance Through Private Global Investment](#) (May 4, 2009). *Georgetown Journal of International Law*, Vol. 41, No. 2, 2009.

<sup>479</sup> See, Larry Catá Backer, [Sovereign Investing in Times of Crisis: Global Regulation of Sovereign Wealth Funds, State Owned Enterprises and the Chinese Experience](#). *Transnational Law & Contemporary Problems*, Vol. 19, No. 1, 2009.

<sup>480</sup> See, Simon Chesterman, [The Turn to Ethics: Disinvestment from Multinational Corporations for Human Rights Violations - The Case of Norway's Sovereign Wealth Fund](#).

interact: As states and others require companies to undertake human rights due diligence, companies will in turn demand greater clarity about their responsibilities are, which will in turn put more pressure on states to define and fulfill their own duties.”<sup>481</sup> There is a possible tension between defining the core substance of each of the pillars (and privileging the autonomy of each pillar) on one hand, and the need to produce an integrated system grounded in a strong set of interlocking relationships between the pillars on the other. This is a more subtle issue within the Protect, Respect and Remedy framework. The state system is still grounded in a monocentric view of law and regulation even while working to develop systems of soft governance that are designed to mitigate this traditional view of corporate regulation. “[T]he great difficulty is defining the scope of the obligations to be imposed, formally and socially, on enterprises. There is a great tension between the need for precision and certainty--the great foundation of law systems--and the reality that in practice all activity is intimately interconnected--the foundation of systems of social or customary norm systems.”<sup>482</sup>

At the core of the tension are notions of hierarchy and subordination. In a recently published essay on the social utility of ancient legal pedagogy, the American academic Paul Carrington nicely described a common understanding of the presumptions at the center of the problem:

In varying degrees, hierarchy is indispensable to all human endeavors entailing organized collaboration. Most that are worthwhile require it. . . . Many of our most valued freedoms depend on restraints imposed by hierarchs of one kind or another, and there is, therefore, nothing inherently wrong with reproducing it in a classroom devoted to professional training. Everything depends on the purpose of hierarchy and the fitness of its methods to that purpose.<sup>483</sup>

That same understanding of the presumptions underlying collective organization can produce in some the strongly held belief that hierarchy is an inevitable component in defining the relationships between states, corporations, and organs of dispute resolution within a complex system of overlapping governance norms. Order and rationality appear to compel a necessity to reorient horizontally constructed systems into vertically oriented ones. The power of a modern form of *Pandektenrecht*<sup>484</sup> can easily produce a move towards ordering based on the need to rank the authority of state-corporation-judge in a way that reduces both overlap. More importantly, it would tend to eradicate the possibility of multiple sources of obligation – reducing governance to a single linear equation governed in accordance

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<sup>481</sup> United Nations Special Representative of the Secretary-General on business & human rights, Links between the Framework Pillars, Online Consultation.

<sup>482</sup> Larry Catá Backer, On Challenges to Operationalizing a Transnational Framework for Business and Human Rights--the View From Geneva, Law at the End of the Day, Oct. 13, 2009.

<sup>483</sup> Paul D. Carrington, *The Pedagogy of the Old Case Method: A Tribute to 'Bull' Warren*, 59(3) JOURNAL OF LEGAL EDUCATION 457-466, 460 (February 2010).

<sup>484</sup> See, e.g., Aristides N. Hatzis, *The Short-Lived Influence of the Napoleonic Civil Code in 19th Century Greece*, 14(3) *European Journal of Law and Economics* 253-263 (2002).

with a principle not unlike that of the Marxist Leninist notion of democratic centralism, a concept much practiced in fact though not in form in the West.

Yet this striving for ordering is not what is at the heart of the Protect, Respect and Remedy framework. The organization evokes more, to some extent, the concepts underlying the very American ordering of authority within the federal government, than it does the singular ordering of a unified governance power. Separation of powers notions underlie the construction of the core of each pillar, and checks and balances suggests the basis of the relations among them and their inter relation. The pillar structure suggests a balancing of anti-tyranny (arbitrariness) principles and efficiency principles. States have a duty to protect. But that obligation cannot be used to subvert the obligation of corporations to take human rights into account within the broader to respect a broader understanding of human rights. Additionally, affected parties ought to be able to invoke the process of an autonomous dispute resolution system for effective remedies against either for their respective lapses. At the same time, the state duty to protect ought to produce a set of normative obligations that impact (and ease) the scope of a corporation's responsibility to respect, and both state and corporation ought to be intimately involved in the construction and maintenance of programs of dispute resolution that makes the obligations of both effective. Put differently, a state's duty to protect both helps define and is defined by the corporation's responsibility to protect human rights. The State Duty to Protect and the Corporate Responsibility to Respect are collaborative and complementary in so far as they must take into account the actions and effects of each other when developing systems of compliance and remedy. For if the two separate, yet intertwined, organizational systems do not work together to develop adequate remedial systems and standards for the protection of human rights, the result may be a situation in which a corporation's responsibility is at odds with the laws created under the state duty to protect.

Both state and corporation are intimately involved in the construction and maintenance of systems of dispute resolution. States may make their courts available for the resolution of second pillar obligations (through arbitration provisions for example and in the United States particularly, through the US Alien Tort Claims Act). The recent decisions from the U.K. National Contact Point under the OECD Guidelines for Multinational Corporations provide an illustration of the separation and interconnection of the three pillar structure within a horizontal power framework.<sup>485</sup> The company was obligated under the law of the Republic of India, as determined by its Supreme Court. The Company was simultaneously bound by principles of international human rights law beyond the Rules of the Indian domestic legal order. But those independent obligations would have direct application on the company's activities in India. The forum for resolution of the

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<sup>485</sup> See [Initial Assessment by the UK National Contact Point for the OECD Guidelines for Multinational Enterprises: Survival International and Vedanta Resources plc](#), March 27, 2009 and [Final Statement by the UK National Contact Point for the OECD Guidelines for Multinational Enterprises: Complaint from Survival International against Vedanta Resources plc](#), 25 Sept. 2009.

claims was maintained by a state but was open to a broad range of affected parties and not connected to the courts of the state.<sup>486</sup>

Yet the result is not legal and policy incoherence – the idea that states do not coordinate the expression of their policy in law or governance. “That leaves Mr. Ruggie in essentially new territory--one that rejects the monopoly of law systems within states and the conception of norm systems as non-binding.” Instead, polycentricity is emphasized among multiple systems of functionally differentiated governance communities that are required to interact with each other in complex and dynamic ways. “Incompatible systems, law and norm--must effectively find a way to communicate and to harmonize values and relevance for their constituting communities, whether these are citizens, consumer, employees, or investors.”<sup>487</sup>

Linkages exist within the elements of the model Human Rights Due Diligence process. These elements are described more as methodological elements rather than as rules based formulas in keeping with the overall principles approach to the Three Pillar Framework. “These elements are meant to be objectives rather than prescriptions for particular outputs, since the latter will vary by company and context.”<sup>488</sup> There is a strong emphasis on internal procedures and effective engagement of employees and other stakeholders. For this purpose, the importance of an effective grievance process is emphasized.

In describing human rights due diligence, it is also worth mentioning the importance of effective company-level **grievance mechanisms**, which provide an ongoing feedback loop and early warning system that is an essential part of human rights due diligence. This can help companies identify risks of impacts and avoid escalation of disputes . . . Moreover, by tracking trends and patterns in complaints, companies can identify systemic problems and adapt practices accordingly. To meet their responsibility to

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<sup>486</sup> See, Larry Catá Backer, Part I: The OECD, Vedanta, and the Supreme Court of India—Polycentricity in Transnational Governance--The Issue of Standing, *Law at the End of the Day*, Nov. 1, 2009, and Larry Catá Backer, Part II: The OECD, Vedanta, & the Indian Supreme Court—Polycentricity, *Transnational Corporate Governance and John Ruggie’s Protect/Respect Framework*, *Law at the End of the Day*, Nov. 3, 2009.

<sup>487</sup> Larry Catá Backer, *On Challenges to Operationalizing a Transnational Framework for Business and Human Rights--the View From Geneva*, *Law at the End of the Day*, Oct. 13, 2009.

The “protect, respect and remedy” framework lays the foundations for generating the necessary means to advance the business and human rights agenda. It spells out differentiated yet complementary roles and responsibilities for states and companies, and it includes the element of remedy for when things go wrong. It is systemic in character, meaning that the component parts are intended to support and reinforce one another, creating a dynamic process of cumulative progress – one that does not foreclose additional longer-term meaningful measures. [Opening remarks by UN Special Representative **John Ruggie**, October 5, 2009, at 5].

<sup>488</sup> United Nations Special Representative of the Secretary-General on Business & Human Rights, *Elements of Human Rights Due Diligence*. “For example, companies should assess human rights impacts on an ongoing basis, not necessarily do a discrete human rights impact assessment -- although such an exercise may well be part of that activity.” *Id.*

respect human rights, companies must also seek to ensure that impacts identified via this feedback loop are effectively remediated.<sup>489</sup>

This reflects a pattern of governance that has been much in evidence in the reform of American securities law in the wake of the enactment of the Sarbanes Oxley Act of 2002.<sup>490</sup>

Lastly, the linkages between Second Pillar due diligence and Third Pillar remedies is suggested. "Study of such mechanisms is part of the SRSG's work on the "Remedy" pillar of the U.N. "Protect, Respect, Remedy" framework."<sup>491</sup> Less strongly emphasized, though emphasized elsewhere, are the linkages between this Second Pillar human rights due diligence and the First Pillar state duty to protect.<sup>492</sup>

Grievance mechanisms as part of human rights due diligence suggest the strong linkages between the Second Pillar human rights due diligence mechanism, which originates in the social license responsibilities of corporations, and both First Pillar duties of states and Third Pillar obligations to effectuate credible remedial processes and adequate access to such remedies. The First Pillar linkages are suggested by the strong ties between the internal monitoring activities included in human rights due diligence and the constitutional traditions of the states in which they are implemented. These constitutional traditions may produce local rules that make simple-minded harmonization of due diligence processes across the global operations of large multinational enterprises difficult. As Wal-Mart learned at great cost, the free-wheeling anonymous denunciations and disclosure that is fundamental to American style systems of grievance and information gathering raises sensitive privacy issues in Germany and evokes the Nazi-Soviet eras of paranoia against which courts and state officials are quite sensitive.<sup>493</sup>

There are two additional points of linkage between the First Pillar state duty and the Second Pillar Responsibility to respect that are worth considering in the context of grievance mechanisms in human rights due diligence. The first deals with state regulation of information. In some larger states, the gathering and dissemination of information is not a matter of internal private governance. Also, in some states, the nation asserts much stronger control over information than is customary in the West. The ability of corporations operating in those jurisdictions to engage in fully robust human rights due diligence may be affected. At a minimum, it will suggest substantial sensitivity in implementing such systems. In China, for example, the harvesting of information and its internal use may be a matter of

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<sup>489</sup> Id.

<sup>490</sup> See, Larry Catá Backer, *The Duty to Monitor: Emerging Obligations of Outside Lawyers and Auditors to Detect and Report Corporate Wrongdoing Beyond the Securities Laws*. *St. John's Law Review*, Vol. 77(4) 919, (2003).

<sup>491</sup> For more information, visit BASESwiki, the SRSG's information and learning resource on company-level and other non-judicial mechanisms. United Nations Special Representative of the Secretary-General on Business & Human Rights, *Elements of Human Rights Due Diligence*.

<sup>492</sup> See, Larry Catá Backer, *Business and Human Rights Part V: Human Rights Due Diligence--Introduction*, *Law at the End of the Day*, Feb. 5, 2010.

<sup>493</sup> For the story of Wal-Mart in Germany, see, Larry Catá Backer, *Economic Globalization and the Rise of Efficient Systems of Global Private Lawmaking: Wal-Mart as Global Legislator*. *University of Connecticut Law Review*, Vol. 39, No. 4, 2007.

indifference to the state, but the dissemination of that information to people outside the corporation may violate the Chinese State Secrets Law. Thus, it has been suggested by Human Rights in China, an NGO critical of the State Secrets Law outside of China that by "classifying information as diverse as the total number of laid off workers in state owned enterprises; statistics on unusual deaths in prisons, juvenile detention facilities and re-education through labor facilities; guiding principles for making contact with overseas religious organizations; data on water and solid waste pollution in large and medium sized cities, the state secrets system controls the very information necessary for citizens and policy makers to effectively address the issues challenging China."<sup>494</sup>

The second deals with the conformity of state owned enterprises within the Second Pillar generally, and to the production of human rights due diligence specifically. This issue is part of a larger one – whether SOEs are to be understood and operated as private entities owned by the state, or as instrumentalities of the state operating in private form. If the former, then SOEs ought to conform to Second Pillar requirements like other entities. If the latter, then the issue becomes more complicated. On the one hand, all commercial enterprises ought to conform to a single set of requirements, including the Second Pillar responsibility to respect. On the other hand, if SOEs are better understood as commercially oriented instrumentalities of the state, then a state might be tempted to argue that its SOEs may only conform to Second Pillar norms only to the extent they reflect positive state policy. In particular, SOEs would not be responsible for complying with those portions of human rights applicable to corporations under the Second Pillar if the state owner of the SOE has rejected any of the sources. Thus, for example, both China and Mexico have placed reservations on their obligation to respect labor rights pursuant to the U.N. Covenant on Economic, Social and Cultural Rights (art. 8 to be interpreted in conformity with their respective constitutions). On that basis, a Mexican or Chinese SOE might determine that its Second Pillar obligations to respect are limited specifically to the scope of the state's First Pillar duty to protect.

Third Pillar (remedies) linkages are suggested by the connection between the information harvesting objectives of human rights due diligence and the use to which that information is put. Yet information harvesting solely for internal assessment, without disclosure, reduces the value of human rights due diligence in a way at odds with the pattern of information gathering and distribution at the heart of most systems of disclosure under the securities laws of states. Disclosure suggests the nature of the linkage between the responsibility to respect human rights and the obligation to provide effective remedies. The scope of that disclosure obligation suggests the ways in which management of information dissemination may impact the value of Second Pillar responsibilities. It suggests the need for balancing to maximize the attainment of the core objectives of each Pillar. Linkage here, then, suggests the ways in which designing systems meant to maximize the effectiveness of one Pillar may have a negative impact on the ability to maximize the way of another Pillar. If all information harvested is disclosed, the willingness of a

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<sup>494</sup> Human Rights in China, *A Report on Human Rights in China*. See generally Human Rights in China, *State Secrets China's Legal Labyrinth* (2007) (pdf).

corporation to meet its Second Pillar responsibilities might be adversely affected to the detriment of human rights. If no information is disclosed, then the ability of stakeholders to monitor and enforce human rights obligations and to deal effectively with corporations is substantially undermined.

## V. CONCLUSION.

A generation ago, the social responsibilities of corporations were well understood. Filtered through the superior obligation of corporate boards to optimize the interests of the shareholders (as a body) or the corporation (as the incarnation of that body), corporations were understood as having a certain flexibility to make charitable contributions for the good of society. Today, the social responsibilities of corporations are bound up in a complex network of domestic law, transnational law and policy and the social obligations of corporations as they interact in a variety of legal, social, and economic communities. The regulatory construct within which multinational corporations now operate has moved well beyond a singular reliance on law-state structures. All the same, the global community continues to resist replicating that legal structures of the state at the international level. Even the mild version of that attempt, in the form of the Norms, produced significant opposition. Nor are states willing to concede a formally public role for non-state entities. States and corporations continue to be viewed as distinct forms of bodies corporate, with distinct regulatory structures. More importantly, the difference suggests a hierarchy in which state-law systems remain superior to corporate-governance structures.

It was within this complex matrix of ideology and practice that the SRSG began the work of constructing a different framework for the governance of corporations with respect to human rights. Conceding to strength of the reality of the distinctions between law and governance and between corporation and states, the SRSG has produced a framework that recognized multiple and autonomous governance systems existing in complex communication within a soft hierarchy that admits the superiority of the state-law framework but suggests the importance of corporate governance.

Thus, the conceptual foundations of the mandate as elaborated by the STSG has found a way to be true to the notions expressed above, while breaking new ground. Since the SRSG's 2006 Report he has been clear that "[t]he role of social norms and expectations can be particularly important where the capacity or willingness to enforce legal standards is lacking or absent altogether."<sup>495</sup> But the role of the state, and state based legal regimes remains "not only primary, but also critical."<sup>496</sup> The role of the SRSG was principally evidence based. "As indicated at the outset, the SRSG takes his mandate to be primarily evidence based."<sup>497</sup> The SRSG provides information necessary to afford states the opportunity to effectively and thoroughly employ their authority to impose legal requirements on states through their domestic law systems.

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<sup>495</sup> [\(Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises. Interim Report, 2006, ¶ 1, U.N. Doc. E/CN.4/2006/97 \(2006\), available , at 75\).](#)

<sup>496</sup> *Id.*, at ¶ 75

<sup>497</sup> *Id.* at ¶ 81.

But insofar as it involves assessing difficult situations that are themselves in flux, it inevitably will also entail making normative judgments. In the SRSG's case, the basis for those judgments might best be described as a principled form of pragmatism: an unflinching commitment to the principle of strengthening the promotion and protection of human rights as it relates to business, coupled with a pragmatic attachment to what works best in creating change where it matters most – in the daily lives of people.<sup>498</sup> For that purpose, an additional governance system—social, non-state based, and grounded in the nature of the relationships between corporations and their stakeholders, would be required. This presents the future face of transnational corporate governance.

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<sup>498</sup> Id.