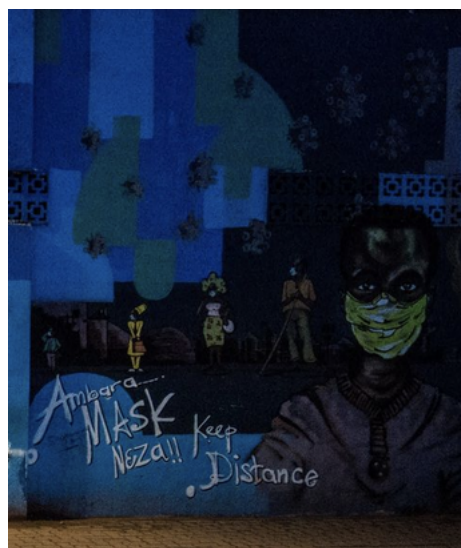


## Working Paper No. 10/1 (October 2020)

### **COVID, Control, and Complicity in Rwanda: Human Rights Intersectionality in the Dead Spaces between Legal and Markets Regimes**

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**Abstract:** Should a company enter into an agreement with a foreign state where its own quantitative and qualitative human rights due diligence and risk assessments suggest that such arrangements would aid in the alleviation of pandemic related illness and death but at the same time pose a risk that it might also be used to further political objectives that might constitute breaches of individual civil and political rights? If the enterprise does proceed will the benefit conferred on the community waive any liability, in law or otherwise, for any human rights harms actually experienced? To what extent are these harms and benefits the product of surveillance that itself may not violate the laws of the host state but may constitute human rights harms under the laws of a home state or in international law or norms? This essay examines the complexities of human rights enforcement raised by these questions. Those complexities are played out on the bodies of individuals and communities in developing states who find themselves at a nexus point of critical contradictions in the structuring of norms and mechanisms for overcoming the risks of human rights harms in the context of economic activity. Using the example of Rwanda's response to the challenge of the COVID pandemic, the essay considers how the human rights duties of states are both entangled and collide with the corporate responsibility or respect human rights. In the process the essay considers the way that the current construction of structures for enterprise compliance with human rights law and norms increase uncertainty and may produce unavoidable collisions of human rights principles. In the process the essay examines the relevance of emerging understanding of complicity as a legal and societal principle and its connection to the responsibilities of enterprises to respect human rights under the UN Guiding Principles of Business and Human Rights. Lastly it suggests that the resulting regulatory dead spaces are likely to be filled not by the traditional forms of multilateral consensus among states in international organizations, *but through the disciplinary power of the market driven by private actors onto which the burdens of responsibility have been delegated.*



"Rwanda's police force says the technology deployed in the fight against coronavirus will boost its ability to maintain order and security beyond the pandemic. 'Policing is more efficient with technology,' said police spokesman John Bosco Kabera. 'We are in a much better control of the situation than before.'"

"Rwanda has set the standard, said Dr. Diafuka Saila-Ngita, a professor of infectious diseases at Tufts University in Massachusetts. 'It's a model of what other low-income nations should do to respond better to health emergencies.'"<sup>1</sup>

How does one engage in human rights due diligence on a razor's edge? How does one balance values based objectives that become irreconcilable? How does one choose the values that must be balanced? To what extent are any such 'balancing'--the application of vaunted and much beloved principles of proportionality<sup>2</sup>--merely serve as the polite means of veiling a conflict between two quite distinct objectives: (1) human rights prioritization where advancing some rights produces harm to others, and (2) regimes of absolute liability for human rights harms?

The answer to these questions today depends in part in whether the questions are asked by states or by business enterprises. For states, the duty to protect human rights<sup>3</sup> is a function of their international obligations and their domestic constitutional traditions. It depends as well on the way such duties are applied consonant with their moral-political systems.<sup>4</sup> States balance rights<sup>5</sup> and their obligation is either grounded in the workings of their political system (e.g., elected officials lose elections; administrators receive instructions, etc.) or within the structures of international law,<sup>6</sup> even as principles of international law may be socialized within domestic orders.<sup>7</sup> The responsibility of enterprises to respect human rights,<sup>8</sup> however, are of a different character. These responsibilities are delegated and market driven. They are constrained by quite

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<sup>1</sup> Nicholas Bariyo, *Rwanda's Aggressive Approach to COVID Wins Plaudits—and Warnings*, The Wall Street Journal (29 September 2020) Available [https://www.wsj.com/articles/rwandas-aggressive-approach-to-covid-wins-plauditsand-warnings-11601372482?st=xfrnd6lsgan7a8&reflink=article\\_email\\_share](https://www.wsj.com/articles/rwandas-aggressive-approach-to-covid-wins-plauditsand-warnings-11601372482?st=xfrnd6lsgan7a8&reflink=article_email_share).

<sup>2</sup> See, e.g., Vicki C. Jackson, *Constitutional Law in an Age of Proportionality*, 124(8) Yale LJ 2680 (2015); David S. Law, *Generic Constitutional Law*, 89 Minn. L. Rev. 652 (2005).

<sup>3</sup> See UN Guiding Principles for Business and Human Rights (New York and Geneva, 2011) (hereafter UNGP), ¶¶1-10 (the state duty to protect human rights is co-extensive with the international and domestic obligations the state has undertaken and constrained by limiting principles of international and domestic law)..

<sup>4</sup> See, e.g., Larry Catá Backer, *Individuals as Instrumentalities of State and the Erosion of Human Rights Autonomy: Chinese Policy on the Arrest of Foreigners as a Part of its International Relationship Toolkit*, Law at the End of the Day (19 October 2020). Available <https://lbackerblog.blogspot.com/2020/10/individuals-as-instrumentalities-of.html>.

<sup>5</sup> Jocco Bomhoff, *Balancing Constitutional Rights* (Cambridge U Press, 2013); Stavros Tsakyrakis, *Proportionality: An Assault on Human Rights?*, 71 I\*CON 468 (2009).

<sup>6</sup> See, e.g., Benedict Kingsbury, *The Concept of Compliance as a Function of Competing Conceptions of International Law*, 19(2) Michigan Journal of International Law 19 (2): 345-72 (1998); Kal Raustiala, K., and Ann-Marie Slaughter, *Compliance, International Relations, and International Law*. In *Handbook of International Relations* (W. Carlsnaes, T. Risse, and B. Simmons (eds.), London: Sage, 2002).

<sup>7</sup> T Risse, and Katherine Sikkink, *The Socialization of International Human Rights Norms into Domestic Practices: Introduction*. In *The Power of Human Rights* (T. Risse, S. Ropp, and K. Sikkink (eds.) Cambridge, UK: Cambridge University Press, 1998), pp. 1-38.

<sup>8</sup> UNGP, *supra*; ¶¶11-24.

distinct legal-social local conditions, and subject to a compliance oriented principle of prevention-mitigation, and remediation<sup>9</sup> Enterprises engaged in economic activity across borders and with foreign states operate at the intersection of state duty and corporate responsibility—and these may not always point in the same direction.

These are the questions that ought to haunt those might seek to rationalize not the normative value of human rights in economic activity, but rather the *nesting of authority* to make political decisions among human rights consequences in the substance and process of business decisions. This deepens the tendency to legal entanglement<sup>10</sup> the private legal ordering of enterprises within global production chains, the public legal ordering of states, and the normative legalities of international public and private organizations.<sup>11</sup> It is particularly relevant to the gathering global consensus to make Europe the center of global authority for the (legal) disciplining of enterprise human rights activity through mandatory human rights due diligence statutes.<sup>12</sup> Yet it also entangles the legalities that are assuming a global dimension sourced in Marxist Leninist legalities and its extension along China's Belt and Road Initiative.<sup>13</sup> And it has transformed the character of law from a normative to a data driven project grounded in principles of compliance and accountability based on the transformation of normative principle into measurable indicators.<sup>14</sup>

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<sup>9</sup> The obligation is increasingly understood in terms of tort and compliance. Thus UNGP ¶ 11 sets out a core tort principle of avoiding harm, which when they occur must be addressed. UNGP ¶ 12 provides the normative standards that define the rights damage form the breach of which must be addressed. UNGP ¶ 13 advances the tort principle of compensation for harm as a means of creating regulatory incentives to avoid compensation producing behaviors. These are cast in the language of compliance and the principle of prevention and mitigation of activity with adverse human rights effects. UNGP ¶ 4 extends that responsibility to all economic enterprises (and by operation of UNGP ¶ 4 to state enterprises as well). It ties the concept of compensation harm (and the extent of prevention and mitigation to notions of severity and complexity. Lastly UNGP ¶ 15 describes the form that the delegation of this harm principle based responsibility ought to be incorporated within the internal governance structures of the enterprise (policies and processes). These are meant to transpose the “soft law” of international and national policy and standards to the hard law of internal rules that serve to comply with both legal and normative obligations. Both, in turn, are then to be undertaken with a mind to the expectations of states, and (market driven) stakeholders—investors, consumers, regulators, communities, etc.

<sup>10</sup> See, e.g., Peer Zumbansen, Neither ‘Public’ nor ‘Private’, ‘National’ nor ‘International’: Transnational Corporate Governance from a Legal Pluralist Perspective, 38(1) Journal of Law and Society 50–75 (2011); Nico Krisch, Beyond Constitutionalism: The Pluralist Structure of Postnational Law (Oxford: Oxford University Press, 2010).

<sup>11</sup> See, e.g., Larry Catá Backer, Governance Polycentrism or Regulated Self-Regulation –Rule Systems for Human Rights Impacts of Economic Activity Where National, Private and International Regimes Collide, In Contested Regime Collisions: Norm Fragmentation in World Society (Kerstin Blome, Andreas Fischer-Lescano, Hannah Franzki, Nora Markard, and Stefan Oeter, 198–225, Cambridge: Cambridge University Press, 2016).

<sup>12</sup> See, e.g., [Recommendations For New EU Legislation on Mandatory Human Rights and Environmental Due Diligence](#).

<sup>13</sup> Tomer Broude, Belt, Road and (Legal) Suspenders: Entangled Legalities on the ‘New Silk Road’ (November 17, 2019). Forthcoming, Nico Krisch (ed.), Entangled Legalities, Hebrew University of Jerusalem Legal Research Paper 20-01, Available at SSRN: <https://ssrn.com/abstract=3489749> or <http://dx.doi.org/10.2139/ssrn.3489749>.

<sup>14</sup> See, e.g., Larry Catá Backer, And an Algorithm to Entangle them all? Social Credit, Data Driven Governance, and Legal Entanglement in Post Law Legal Orders. January 1, 2020). Forthcoming, Nico Krisch (ed.), Entangled Legalities, Penn State Law Research Paper No. 05-2020, Available at SSRN: <https://ssrn.com/abstract=3512608> or <http://dx.doi.org/10.2139/ssrn.3512608>; Larry Catá Backer and Matthew McQuilla, The Algorithmic Law of Business and Human Rights: Constructing a Private Transnational Law of Ratings, Social Credit, and Accountability Measures Available at SSRN: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3684196](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3684196).

This essay considers these issues through the lens of a recent problem—the human rights risks of companies which provide products or services to states for use in the implementation of national anti-COVID measures but which may also be used to cause human rights harms. Discussion will focus on its real life analogue, the case of Rwanda where the issue of complicity and the use of enterprises to change state behavior, is much in evidence. The essay starts with the generic version of the problem and then considers the way that resolution of the challenges are structured in contemporary human rights frameworks. It suggests that the simultaneous development of siloed human rights tracks for economic activity—a public law based system of legal measures to advance a state duty to protect human rights, and a markets driven private law system of measures grounded in compliance tort principles (prevent-mitigate-and remedy) to advance enterprise responsibility to respect human rights—creates sometimes perverse incentives on states and their enterprise partners that effectively reverses the role of states and enterprises. In cases like the one considered, it falls to enterprises to exact compliance by states with human rights duties, but duties framed by the scope of corporate responsibility to respect human rights. The result produces a regulatory order in which enterprises acquire the obligations of states and states become the object of regulation applied by enterprises.

#### A. The Problem.

The urtext of the *problemmatique*<sup>15</sup> considered here is easy enough to relate. The idealized problem is designed to tease out the strands of subproblems that must be related and resolved in order to arrive at an assessment of resolution of the overarching problem presented.

Enterprise X produces Product Y with substantial surveillance capabilities. Usually these products are used by other enterprises to control theft and to ensure worker safety in plants. But recently state and municipal governments have been purchasing Product Y to implement policies of public safety, and more recently, of monitoring the behavior of local law enforcement personnel. Recently, and in response to the COVID pandemic, both private enterprises and governments have begun to use Product Y to implement mandatory policies for meeting the challenges of the pandemic. Product Y has proven quite useful in identifying potentially sick people, but even more effective in policing mandatory rules for social distancing, gathering sizes, and mask wearing. Enterprise X has made a lot of money through its rental and purchase programs of Product Y. More recently Enterprise X has also offered monitoring services as well as analytics capabilities along with rental or purchase of Product Y, all for additional fees.

The Republic of Z has recently contacted Enterprise X for the purpose of renting Product Y. The Republic of Z is a small developing state in Africa that has a long history of both democratic government, and of ethnic strife and political instability that has resulted in many deaths. The current government has

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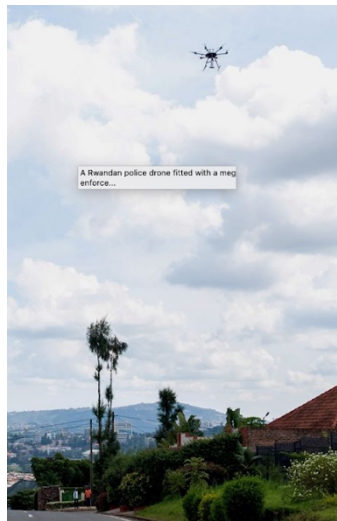
<sup>15</sup> Cf., John N. Warfield and George H. Perino, Jr., The Problemmatique: Evolution of an Idea, 16(3) Systems Research and Behavioral Science 221-226 (1999) (a structural model of relationships among members of a set of problems that may also be represented in graphical form).

been democratically elected but there have been complaints by some political actors of efforts by the government to intimidate or suppress their oppositional activities.

The Republic of Z, however, was also the first state in the region to meet the challenge of COVID, and to do so successfully. To that end it adopted measures for contact tracing and imposed a set of mandatory rules including social distancing rules, rules limiting in person meetings and prohibiting rallies of any sort, and mandatory mask wearing rules. In addition, the Republic of Z has mandated that all people within its territory register (as part of a contact tracing program), and download an app to their mobile devices that permits the Department of Health to track them at all times. People have complained that the Ministry of State Security has also been granted access to that database but only upon application for a writ to a court. Violation of the rules can result in civil and criminal penalties depending on the severity of the offense, as defined by law.

As a result of these measures the Republic of Z has developed what the World Health Organization has labelled a "gold star" response to COVID. Infection and hospitalization rates are the lowest in Africa, and the strain on medical facilities has been minimal. But it has also meant that the Republic of Z has closed its borders to all actors, and even representatives of foreign, international organization and civil society actors with programs in the Republic have had difficulty entering the country--and all are subject both to surveillance and a mandatory quarantine (at their expense) for 14 days. Recently reports have emerged that people have complained that the government has targeted its political enemies for especially harsh treatment using the anti-COVID provisions. If true, these measures and actions would constitute a clear breach of the civil and political rights of those individuals. Opposition figures also complain about the suppression of rallies and other meeting. But they have not been targeted and they have not been impeded in their use of all virtual means to continue their work. However, recent reports suggest that the police have looked the other way when the government hosted large gatherings and rallies.

The rental or sale of Product Y to the Republic of Z will clearly contribute significantly to the health of its residents. At the same time, the potential for abuse remains undiminished. Enterprise X believes that it may have a positive obligation to contribute to the continued health and safety of the residents of the Republic of Z, yet they understand that by aiding in the Republic's anti-COVID measures they may be complicit in the potentially severe breaches of civil and political rights of individuals in the Republic. Should Enterprise X enter into a lease or sale agreement for Product Y with the Republic of Z; would it make a difference if the sale or lease also included the provision of surveillance and analytics services?



A Rwandan police drone fitted with a megaphone flying in a Kigali neighborhood to enforce a coronavirus lockdown in April.  
Photo: Jean Bizimana/Reuters,

Rwanda's response to the COVID-19 serves as a great illustration of the problem that is the subject of these reflections. It highlights the way that the duty of states to protect human rights in pandemic may not merely fail to align with the corporate responsibility to respect human rights, but may create substantial human rights gaps--those spaces where the state duty to protect does not extend (by operation of the constraints of international law applied domestically to an unwilling state) as far as the corporate responsibility to respect (grounded in the International Bill of Human Rights but covering all international human rights). In that context, the risk falls not on the state, but rather on companies which provide goods and services to the state in ways that while alleviating one human rights risk (pandemic) may contribute to another (the deprivation of civil and political rights). The prevention, mitigation, and remedy principle then is converted into a delegation of global authority onto enterprises to serve as the risk bearers for the bad behavior of states. Where enterprises face a situation that produces human rights harms whatever they do, then the perverseness of the result becomes acute. That, of course, is precisely the case in the context of pandemic.

B. Resolution at the Intersection of state and enterprise, of law and markets, of compliance and tort and of the inversion of the relationships between states and economic actors.

This human rights fugue state is particularly important in the *context of complicity*.<sup>16</sup> The UN Guiding Principles for Business and Human Rights considered the issue from the perspective of business transactions.<sup>17</sup> "Questions of complicity may arise when a business enterprise contributes to, or is seen as contributing to, adverse human rights impacts caused by other

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<sup>16</sup> See, e.g., [Human Rights Without Chinese Characteristics and Global Production Chains Within China: Xinjiang and Badger Sportswear as a Harbinger of Dissonance in Human Rights Risk Management](#); [Disney criticised for filming Mulan in China's Xinjiang province](#) (Hong Kong pro-democracy activist Joshua Wong has also condemned Disney, tweeting that viewers watching Mulan are "potentially complicit in the mass incarceration of Muslim Uighurs")

<sup>17</sup> United Nations, UN Guiding Principles for Business and Human Rights (New York and Paris, 2011 ¶¶ 17-21.



parties.”<sup>18</sup> Complicity as a violation of (usually criminal) law<sup>19</sup> and as a societal wrong mark the current framing of the construction of the human rights responsibilities of business. Yet the approach was curious. It assumed autonomy and free will on the part of the enterprise, and assumed as well that complicity included both a legal duty and a societal responsibility, each with distinct operational and liability parameters. Complicity implies both that the actor is a criminal accomplice but also, especially in the context of business and human rights, “it has provided a tool to capture and explain in some simple terms the fact that companies can become involved in human rights abuses in a manner that incurs responsibility and blame.”<sup>20</sup> The UNGPs embedded this notion in its own principles.

Complicity has both non-legal and legal meanings. As a non-legal matter, business enterprises may be perceived as being “complicit” in the acts of another party where, for example, they are seen to benefit from an abuse committed by that party. As a legal matter, most national jurisdictions prohibit complicity in the commission of a crime, and a number allow for criminal liability of business enterprises in such case. . .<sup>21</sup>

That binary liability (legal and societal) could be managed through the application of a data driven assessment that put the burden (and potential liability) on the enterprise contemplating engagement in business activities, especially with state actors. “Conducting appropriate human rights due diligence should help business enterprises address the risk of legal claims against them by showing that they took every reasonable step to avoid involvement with an alleged human rights abuse.”<sup>22</sup>

Human Rights due diligence, in turn, is understood as the data driven qualitative and quantitative assessment by a business of the human rights (and sustainability) risks of economic activity connected to the fundamental objective of using due diligence to prevent, mitigate and remedy any harms that might result from engaging in such activity understanding the risk.<sup>23</sup>

Due diligence will not by itself absolve enterprises of responsibility to respect human rights, nor of any legal duty to avoid human rights violations. UNGP 23 provides a hierarchy of compliance within which due diligence judgments must be made. These require legal compliance with applicable law and simultaneous respect for internationally recognized human rights (beyond legal compliance).<sup>24</sup> Where that is not possible, due diligence is meant to provide a basis for developing means of honoring internationally recognized human rights principles in the face of

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<sup>18</sup> United Nations, UN Guiding Principles for Business and Human Rights (New York and Paris, 2011); ¶ 17 (Commentary).

<sup>19</sup> See Vuyelwa Kuuya, Corporate Complicity in Human Rights Abuses, Business Human Rights .org documents (Nov. 2008) available <https://www.business-humanrights.org/sites/default/files/media/documents/Fvuyelwa-kuuya-paper-on-complicity-nov-2008.doc>.

<sup>20</sup> Report of the International Commission of Jurists Expert Legal Panel on Corporate Complicity in International Crimes, Criminal Law and International Crimes Vol. 2, p. 1 (2008).

<sup>21</sup> See, United Nations, UN Guiding Principles for Business and Human Rights (New York and Paris, 2011); ¶ 17 (Commentary).

<sup>22</sup> See, [UN Guiding Principles for Business and Human Rights](#) ¶ 17 (Commentary).

<sup>23</sup> See, UNGP ¶ 15(b). Human rights due diligence is meant to be encouraged by states through their law and policy. UNGP ¶ 7 (Commentary).

<sup>24</sup> See, UNGP ¶ 23(a).

conflicting national law.<sup>25</sup> Where that is not possible the enterprise must “Treat the risk of causing or contributing to gross human rights abuses as a legal compliance issue wherever they operate.”<sup>26</sup> In the context of conflict, the UNGP ¶ 23 Commentary offers only the possibility of resolution through use of expertise and cross functional consultation, “including from Governments, civil society, national human rights institutions and relevant multi-stakeholder initiatives.”<sup>27</sup> In effect, then, enterprises must undertake sufficient investigation to credibly understand the risks, seek ways to harmonize conflicting compliance obligations, and where that is impossible to consult with relevant parties to avoid human rights harms (in this case by contributing to the ability of others to cause such harms) “and to be able to demonstrate their efforts in this regard.”<sup>28</sup>

The risk becomes more complex when economic activity produces the simultaneously risk of complicity in failing to advance human rights by refusing to engage in the transaction and contributing to human rights harms by participating in the transaction, especially where the benefit advanced and the harm caused affect quite distinct clusters of human rights. In that context, to avoid the transaction to avoid complicity in one way may exacerbate human rights harm in another, even as avoiding complicity in causing such harm by engaging in the transaction may lead to complicity in human rights wrongs. In such a context it is possible that causing harm is inevitable. But it may be managed. UNGP Principle 24 drives home the point: “While business enterprises should address all their adverse human rights impacts, it may not always be possible to address them simultaneously. In the absence of specific legal guidance, if prioritization is necessary business enterprises should begin with those human rights impacts that would be most severe, recognizing that a delayed response may affect remediability.”<sup>29</sup>

Increasingly, business activity is understood to carry with it the responsibility for making political determinations of future global consensus about the human rights consequences of governmental activities related--directly or indirectly--to their economic activities within that state. Those determinations are to be made with much more sensitivity to international rather than national norms (laws, treaties, declarations and the like whether or not they have been incorporated into the domestic legal order of the offending state) and to the domestic application of those norms (as law and policy) of either business home states or states that serve as key (economic or regulatory) markets.<sup>30</sup> Human rights due diligence expresses a number of objectives in this context. First it serves as the mechanism through which legal and normative objectives imposed by public bodies are then transposed into the private governance orders of enterprises and their management of their production chains. Second, it serves as the process through which such delegated duty and responsibility are transformed from jurisprudence to analytics, that is transformed from principles and objectives to measurable markers. Third, it provides the means for private rule making through the mechanics of developing the analytics that supports assessment under the general operative principle of prevent-mitigate-remedy. Fourth, it serves as a means of rank ordering and quantifying

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<sup>25</sup> See, *ibid.*, ¶ 23(b).

<sup>26</sup> See, [UN Guiding Principles for Business and Human Rights](#) ¶ 23(c).

<sup>27</sup> See, *Ibid.*, ¶ 23(c) (Commentary).

<sup>28</sup> *Ibid.*

<sup>29</sup> [UN Guiding Principles for Business and Human Rights](#) ¶ 24 (Commentary)).

<sup>30</sup> See, [Xinjiang in the Crosshairs of the West: H&M and the Norwegian Pension Fund Global Add to the Pressure on Chinese Officials to Meet the Allegations of Human Rights Abuses](#).



risk, both as to its severity, immediacy, and ultimate cost (both to those whose rights are harmed and to the enterprise itself).

The problem isn't that of Rwanda, in this case, it is on those enterprises through which Rwanda seeks to carry out its policies. The resulting legal entanglement produces a complex balancing among legal and normative claims, among public and private legalities, among qualitative and quantitative markers, and between the claims of individuals and the collectives in which they live.<sup>31</sup> The burden is shared as well—between Rwanda and its business partners. As well as between those business partners and their home states. The resulting set of responsibilities and duties point either toward substantial consultation (and the assertion of global business influence on the internal management of a sovereign government's policies) or their use of global enterprises as proxies for the advancement of the normative agendas of their home states

The difficulties become more acute in the shadow of pandemic. These have their origins in the tensions between the need to protect populations from a highly contagious pandemic the characteristics of which remain elusive against the need to preserve the (especially) civil and political rights of persons in states confronting pandemic. *The problem in the first instance is that of states*, who bear the public duty to protect their populations from the ravages of disease while ensuring that society continues to function in ways that does not otherwise threaten the economic, social and cultural rights of persons. . . and as well their political and civil rights. But states do not operate by means of magic--and even the use of the police power requires the instruments necessary to manifest power on its intended objects (mostly though not entirely individuals and group on the problematic nature of the later in the United States consider the New York City Mayors increasingly human rights tainted interactions with the local Jewish community.<sup>32</sup> Economic enterprises remain crucial links between the desire of states to implement policy and their ability to do so. Business sell medicines, professional services, technology, expertise, and other goods and services necessary for states to act. It is in this secondary role--business as the "procurers" of the state--that their human rights responsibilities become acute, and especially in the context of complicity.

Rwanda serves as a case in point.<sup>33</sup> Reporting for the Wall Street Journal, Mr. Bariyo notes that Rwanda has earned praise for its effective response to the challenges of pandemic in a developing state: "International health agencies and public-health experts have held up Rwanda—the most densely populated nation on the African mainland, where 13 million people live in an area roughly the size of Maryland—as a poster child for [how to tackle the coronavirus on the continent](#)." But that response, to be effective, has also required a certain level of ruthless focus on prevention, mitigation, and remediation. The ruthlessness results from the need to focus on the

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<sup>31</sup> See generally, Larry Catá Backer, Private Actors and Public Governance Beyond the State: The Multinational Corporation, the Financial Stability Board and the Global Governance Order, 18Ind. J. Int'l L. 751 (2011).

<sup>32</sup> See, e.g., [Jewish leaders slam de Blasio over comments about Brooklyn funeral in letter](#).

<sup>33</sup> Nicholas Bariyo, for the Wall Street Journal: "[Rwanda's Aggressive Approach to Covid Wins Plaudits—and Warnings: African country deployed drones and random testing to combat the pandemic, but some say the government is endangering civil liberties](#)".

<sup>34</sup> Ibid., citing Nicholas Bariyo and Joe Parkinson, In the World's Coronavirus Blind Spot, Fears of a Silent Epidemic, Wall Street Journal 30 August 2020). Available <https://www.wsj.com/articles/in-the-worlds-coronavirus-blind-spot-fears-of-a-silent-epidemic-11598806800>.

prevention, mitigation and remediation of a grave threat to human rights *to a national collective* (the right to health and the protection against disease and the preservation of public order in pandemic) that itself may produce grave threats to the *civil and political rights of individuals*.<sup>35</sup> I use those terms at the heart of the normative framework of business and human rights for all of its irony in this context. Indeed, it is precisely because of a single minded effort to prevent, mitigate and remedy--the COVID virus--that the state, it has been alleged, now has failed to prevent, mitigate or remedy another set of human rights wrongs: "its strategy, built on a tightly enforced lockdown and other restrictions that have led to the arrests of more than 70,000 people for coronavirus-related infractions, has alarmed human-rights advocates, who say some of the measures are overly aggressive and have led to abuse and violence of those detained."<sup>36</sup> And yet even that allegation is contested. "Even as they confront the COVID-19 pandemic, countries in Africa's Great Lakes Region continue to improve political, security and economic cooperation in line with a 2013 Framework agreement, UN Special Envoy Huang Xia told the Security Council on Tuesday."<sup>37</sup>

*That problem--*of Rwanda's duty to engage in some sort of human rights due diligence in furtherance of its comprehensive duty to protect (all) human rights--is one that tends to be left to the tender mercies of the politics of international relations. And in any case, Rwanda is free to take the position that it is complying fully with all of those human rights duties it has undertaken either through those (limited) treaties to which it has acceded and whose obligations it has transposed into its domestic legal order--but only to the extent consistent with its constitutional traditions. And there is nothing that anyone can fault Rwanda for that--except to suggest a misreading, or to urge Rwanda to change either the basket of its international obligations or the tenets of its constitutional ordering. That, indeed, is the essence of the First Pillar of the UN Guiding Principles for Business and Human Rights the general principles of which make this clear: "Nothing in these Guiding Principles should be read as creating new international law obligations, or as limiting or undermining any legal obligations a State may have undertaken or be subject to under international law with regard to human rights." If one is to discipline states in a global order where states may not discipline each other very well, then it requires looking elsewhere. That "elsewhere" is the enterprises, and the systems of global production, on which states are dependent, especially developing states, for political stability and economic development.

That fundamental difference between enterprises and states—*enterprises are not states*--makes all the difference here. Their responsibility to respect human rights is not limited to those recognized by the states with which they transact business, nor by the formal legal status of the norms they are expected to respect. It is in that human rights "dead space" between the human rights that enterprises are expected to respect and those that states have a duty to protect, where complicity can metastasize in ways that produce liability to enterprises--though not necessarily for the state. That space is populated by innocent enough transactions, the products of which might be used to further what--after the fact--are concluded to constitute uses that harm the human rights of

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<sup>35</sup> Human Rights Watch, Rwanda: Lockdown Arrests, Abuses Surge: End Media Crackdown, Mass Arbitrary Arrests (24 April 2020). Available <https://www.hrw.org/news/2020/04/24/rwanda-lockdown-arrests-abuses-surge>.

<sup>36</sup> See, "[Rwanda's Aggressive Approach to Covid](#)", *supra*.

<sup>37</sup> UN envoy outlines progress towards cooperation in Africa's Great Lakes Region, UN News (13 Oct. 2020). Available <https://news.un.org/en/story/2020/10/1075272> (quoting UN Special Envoy Huang Xia).

a population. There are any number of enterprises that might now have to exercise greater care in that respect: Bariyo reports, for example,

The government is using technology to minimize contact between patients and health workers. In several public hospitals, human-size robots, made by Belgium's ZoraBots, relay messages about patients' conditions to doctors, taking their temperature, delivering messages and detecting if patients aren't wearing masks. They can also deliver medicine and food. The government has hired 60 drones owned by San Francisco-based Zipline Inc. to transport protective gear and Covid-19 test samples, as well as to ferry intravenous fluids to and from hospitals.<sup>38</sup>

Both companies now face a dilemma, one in which they stand at the margins. Consider the following potential scenarios—the hired drones serve a crucial role in ensuring Rwanda meets its collective human rights to its population to protect its health in the face of pandemic threats. At the same time the provision of those drone might free up enough equipment and personnel to enable the state to engage in action in enforcing the social control features of Rwanda's COVID response that it poses a threat to individual civil and political rights—at least according to some.

For such enterprises, the failure to engage in appropriate human rights due diligence may not shield them either from accusation (and markets based consequences) but also to legal liability. And that human rights due diligence appears to require constant monitoring of the use to which enterprise services or goods are put. Thus, an enterprise may be satisfied that its transactions is human rights "clean" on sale but after determining that its product has been used to enable human rights harms. That might be the case in Rwanda--assuming, of course, that human rights harms have occurred--a determination that is not conclusive at the stage where accusations are made.

Human-rights groups say the government has stretched the boundaries of the law in arresting 70,000 people for coronavirus-related infractions such as violating night curfews, failing to wear masks or breaching social-distancing rules. Failure to wear a mask normally carries a \$26 fine on the first offense, but those violating the guidelines more than twice can be jailed for up to one year. Many of those arrested have been detained in sports stadiums, where they have spent nights listening to public-health messages over loudspeakers and under the watch of armed guards, activists say. Some have reported being beaten or raped while detained, according to Human Rights Watch. Authorities provide little or no legal justification for the arrests and release most people after a few days, say human-rights groups. Journalists and opposition activists have been detained for attempting to chronicle alleged police beatings, according to Human Rights Watch.<sup>39</sup>

Depending on the way that Rwandan authorities operate their COVID-19 interdiction program it is likely that not just providers of goods and services for any aspect of that initiative will be swept into the issue of human rights violations, but also collateral providers. Chief among them might

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<sup>38</sup> See, "[Rwanda's Aggressive Approach to Covid](#)", supra.

<sup>39</sup> See, "[Rwanda's Aggressive Approach to Covid](#)".

be internet platforms through which the policies are implemented (for example by the posting of pictures and the like).<sup>40</sup>

In such a context, the possibility of complicity is real, and the case for complicity grows with the production of evidence that the enterprise knew or should have known (through a reasonable human rights due diligence) of the *possibility* of the use of its products or services to cause human rights harms. At that stage the question centers on whether the product or service ought to be offered. But the answer is not simple--the company, by withholding product or services, might itself directly cause human rights harms by impeding Rwanda's ability to meet the challenge of COVID. The company may add conditions to the transaction, but in many cases that is unrealistic. It is here that UNGP Principle 22 comes into play. The company would have to engage in a severity analysis--which action (engage in the transaction or not) causes the most severe and most likely irremediable harm. On that basis it may act. But in so acting it remains liable either directly or as a complicit party, for the human rights harms caused by preventing a different set of human rights harms.

The same applies to decisions to cease providing services or products--especially in the context of pandemic--when a company becomes aware of its potential exposure as an enabler of human rights harms. And the harm trigger is measured against the corporate responsibility to respect rather than the state duty to protect human rights. The enterprise, in this cases, becomes the global insurer of human rights compliance--and the surety for the state. In effect, where human rights harms cannot be avoided it is the enterprise that bears the responsibility both to act to further one set of human rights and to remedy the resulting human rights harms thereby caused. The resulting business risk becomes legal risk when the severity of the consequences becomes great enough; and it will certainly become legal risk under mandatory human rights due diligence regimes whose reach will be projected from one sovereign entity (e.g. the EU) to another (e.g. Rwanda).

Human rights due diligence exposes the extent of the risk. It does not suggest a path forward in which a company may avoid a breach of its responsibility to respect human rights—even in the case where under Rwandan law and constitutional principle so such rights infringements are occurring. Here the company faces the possibility (at the limit in egregious cases) of potential interest by the International Criminal Court apparatus (admittedly an unlikely possibility for the moment in the Rwandan case). At the same time the companies may face action in the societal sphere. These might include investigations to exclude them (if publicly traded form the investment universe of influential sovereign wealth funds.<sup>41</sup> They might face a special instance action before one of the National Contact Points<sup>42</sup> administering the OECD's Guidelines for

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<sup>40</sup> See, e.g., Karin Buhmann & Roxana Olivera (2020) '[Human rights and social media platforms: the corporate responsibility to respect human rights in regard to privacy infringements involving photo posting](#),' *Australian Journal of Human Rights*, 26:1, 124-141.

<sup>41</sup> See, e.g., Larry Catá Backer, 'Sovereign Investing and Markets-Based Transnational Rule of Law Building: The Norwegian Sovereign Wealth Fund in Global Markets,' 29(1) *American University International Law Review* 1-122 (2013).

<sup>42</sup> See, e.g., Larry Catá Backer, 'Rights and Accountability in Development v DAS Air and Global Witness v Afrimex: Small Steps towards an Autonomous Transnational Legal System for the Regulation of Multinational Corporations' [2009] 10(1) *Melbourne Journal of International Law* 258 (2009).

Multinational Enterprises which incorporates the human rights provisions of the UNGP.<sup>43</sup> They might find their social ratings scores maintained by influential third party NGOs imperiled, and thus increasing the risk that their cost of capital might be affected. They might face investigation by the governments of their home states, or they might face other home state compliance issues including support through national Ex-Im Banks and the like.<sup>44</sup> Lastly, they actions may provoke recourse to the enterprises's own internal grievance mechanisms.<sup>45</sup>

This then exposes a certain perverse effect of the UNGPs and a much larger issue where the societal risk of noncompliance under the UNGP is transformed into legal risk under mandatory human rights due diligence statutes. It seems somewhat perverse that states (and in this case clusters of the richest states on earth) would produce a piece of legislation (for all the right reasons of course) that effectively shifts the costs of sovereign responsibility from the sovereign to the enterprises with which it deals. Yet that is effectively what regimes of complicity manage to accomplish (again for all the right reasons from a human rights perspective).

Even in states without mandatory due diligence provisions, informal and 'soft' policy may push enterprises into 'hardening' regimes of human rights due diligence. For example, in September 2020 the United States Department of State, distributed its *Guidance on Implementing the UN Guiding Principles for Transactions Linked to Foreign Government End-Users for Products or Services with Surveillance Capabilities*.<sup>46</sup> The resulting fugue state is remarkable: almost simultaneously the United States declines to embed the broad range of human rights under its UNGP First Pillar duty to protect human rights (as is its right and duty in fidelity to its own constitutional traditions) while encouraging the economic instrumentalists it creates or controls to apply those very human rights standards abroad in their economic activities under the UNGP Second Pillar. The resulting gap is consciously produced. The US State Department Guidance was very clear to distinguish legal from societal, that is market driven, liability.<sup>47</sup> At the same time, the Guidance suggested the *entanglement* of both forms of liability.

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<sup>43</sup> Organization for Economic Cooperation and Development, Guidelines for Multinational Enterprises (Paris, 2014) (Chp. IV).

<sup>44</sup> See, e.g., Canada's Enhanced Corporate Social Responsibility Strategy to Strengthen Canada's Extractive Sector Abroad, Available <https://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/csr-strat-rsc.aspx?lang=eng>.

<sup>45</sup> Office of the High Commissioner for Human Rights, Improving accountability and access to remedy for victims of business-related human rights abuse through non-State-based grievance mechanisms A/HRC/32 (19 May 2020). Available [https://www.ohchr.org/Documents/Issues/Business/ARP/ARPIII\\_MainReport\\_AdvanceEditedVersion.pdf](https://www.ohchr.org/Documents/Issues/Business/ARP/ARPIII_MainReport_AdvanceEditedVersion.pdf).

<sup>46</sup> U.S. Department of State, Bureau of Democracy, Human Rights and Labor, *Guidance on Implementing the UN Guiding Principles for Transactions Linked to Foreign Government End-Users for Products or Services with Surveillance Capabilities* (30 September 2020).

<sup>47</sup> The Guidance noted:

This guidance is not intended to, nor should it be interpreted as, imposing requirements under U.S. law or regulations. The language contained in this document should not be conflated with the regulatory requirements for exporters under the International Traffic in Arms Regulations (ITAR), Export Administration Regulations (EAR), or any other U.S. government export control regime. . . This guidance will be particularly helpful for U.S. businesses that want to undertake a human rights review where the U.S. government does not require an authorization for export.

These are no accidental results. A system that shifts risks to the larger enterprises on earth creates incentives for them to pressure (especially poor, developing) states or states that lack capacity, to comply with international standards satisfactory to developed states and to the non-governmental organizations based there. The universalization of a common position on human rights, then, would be effectuated not through multilateral consensus among states in international organizations, *but through the disciplinary power of the market driven by private actors onto which the burdens of responsibility have been delegated.*

This risk shifting (again from the fundamental character of corporate responsibility in tort and compliance) also shifts the regulatory burden from states to enterprises. States, in this case, may do as they like, at least consistent with the exercise of power under the conditions of their respective domestic legal orders. Enterprises on the other hand bear the responsibility for the harms caused by the actions of states as a function of the way in which they define their relationship with the state. In this context enterprises become the principal mechanism for the socialization and implementation of global norms (at least to the extent that these are interpreted and applied by an enterprise in a specific context) not in the way that they act, but in the way that they may influence the conduct, decisions, and policies of states. Yet by engaging in economic activities with the state, the enterprise retains the responsibility for human rights harms in its three compliance-tort manifestations (prevention, mitigation, and remedy). That is, before engaging in such transactions, enterprises bear the responsibility for mapping human rights risks of such transactions and seeking to structure their “deals” with the state-customer to enhance the probability of prevention. Simultaneously, during the course of such economic relations, enterprises might be understood to bear a continuing duty to ensure that states comply (here reversing the usual relationship and placing the enterprise in the role of the enforcer of compliance) and then taking steps to mitigate any harm. Lastly, the enterprise bears the burden of addressing harms caused despite efforts (even reasonable efforts ) to prevent and mitigate.

Where the economic transaction foreseeably may produce both human rights benefits and harms simultaneously, the situation becomes more complicated for the enterprise. Yet even through these complications, the enterprise remains responsible under theories of complicity by providing the materials and support that produces both harm and benefit. In this case the enterprise may have to apply *in addition* to the measures required respecting prevention-mitigation-remediation measures in fashioning their relationship with their state-customer, may have to apply a severity analysis. That severity analysis, in turn, requires the development of measures—quantifiable measures—to determine the way in which the transaction may be structured and longer term consequences monitored, to produce the largest aggregate benefit in ways that may be justified. And justified by data.<sup>48</sup> Yet that is precisely the sort of valuation of human rights that runs counter to the philosophy of human rights.<sup>49</sup>

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Guidance, *supra*, p.1

<sup>48</sup> Cf., William J. Aceves, Cost-Benefit Analysis and Human Rights, 95 St. John’s Law Review 431 (2018).

<sup>49</sup> See, e.g., Amartya Sen, Development as Freedom (1999) (the value of human rights under conditions of inefficiency); Anne Peters, Humanity as the  $\Lambda$  and  $\Omega$  of Sovereignty, 20 European Journal of International Law (2009).



For enterprises, that leaves little room for certainty. Complicity for the human rights violations of Rwanda presents a challenge not just respecting the extent of its occurrence and severity, conclusions that will likely be vigorously contested, but also respecting the extent of remedial obligation. A company might determine that mitigation consists precisely of engaging in acts of complicity, the value of which can be measured by the lives saved from the COVID pandemic. That calculus might itself be unacceptable to many. At the same time the company may view these complexities as an opportunity to engage in multilateral negotiations including themselves, and their home and host states. But the speed of the pandemic may make such negotiations a luxury in this context and might itself be viewed as producing human rights harms. The quantitative measures may themselves constitute human rights wrongs (e.g., the surveillance) but be an essential tool for measuring both mitigation and for targeting remedy. And human rights due diligence may not serve here to avoid harm; it may serve instead as a framework within which it may be possible to quantify, order, and account for harm as a function of benefit. These are conclusions that will not sit well with a human rights community committed to the core principle of human rights.<sup>50</sup>

### C. Conclusion.

The problem that is the object of this essay is meant to highlight emerging issues where the human rights responsibilities of enterprises and the state duty to protect human rights may not align. It also focuses on the consequences of the generation long project of delegating private regulatory authority to transnational actors through programs of compliance and reporting. The resulting shift in regulatory authority moves the center of human rights regulation from the public law of states and international actors to the private law of private actors managing transnational production chains. Lastly, it considers the consequences for human rights of the slow but steady move to a tort-compliance foundation for managing conduct in this field. That is, it examines the institutional behavior incentives when the state takes human rights risks but the enterprises bear the obligation to remedy resulting harms from that risk taking. This responsibility shifting at the heart of current approaches to the regulation of the human rights consequences of enterprise behaviors (even in the context of their relations with states) create an important conceptual dead space between the compliance based administrative regulatory model of public law and the markets driven tort model of private law.

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<sup>50</sup> See, e.g., Ron Dudai, Introduction—Rights Choices: Dilemmas of Human Rights Practice, 6(3) *Journal of Human Rights Practice* 389-398 (2014).