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From Governance Gaps to Interpretive Spaces in the UNGP: A Framing Analysis

> As long as you do not yet know the true Way [it does not matter] whether [it is] Buddhist Law or the laws of the world of men—you will think of them as correct ways, and believe them to be good things; however, from the perspective of the true 'Way,' the major "models" and standards of the world, seen together, are all biases of individual minds and, based on these distortions, go against the true Way.[1]

The UNGP's 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.[2] Corporations govern through private mechanisms, mechanisms that are 'soft' in relation to law and legal instruments, but which can harden, thorough private law, private relationships and social expectations.[3] Aggregated, these constitute what the SRSG characterized as the systems of social legitimacy and what might also be understood as disciplinary and culturally embedded techniques.[4] Yet they represent more than that—each constitutes a system of authoritative meaning-making within the collectives for whom such meaning may be embraced or against which they may be enforced.[5] Alignment and inter-systemicity is inevitable.[6] Both must necessarily provide mechanisms for the vindication of behavior obligations imposed through either system.[7]

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[1] Miyamoto Mushashi, *The Five Rings: Miyamoto Musashi's Art of Strategy* (David K. Groff (trans); NY: Cartwell Books, 2012), p. 210 (emptiness).

[2] 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).

[3] See, e.g., Roberta Kevelson, *Law as a System of Signs* (Plenum Press, 1988).

[4] Michel Foucault, *Discipline and Punish: The Birth of the Prison* 195–228 (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1977).

[5] See, e.g., Neil MacCormick and Ota Weinberger, *An Institutional Theory of Law: New Approaches to Legal Positivism* (Dordrecht: Springer, 1986).

[6] Kevelson, *Law as a System of Signs*, supra ("Contract is the coming together in the appropriate setting of addresser and addressee, with minimal noise, that is, minimal ambiguity, ellipses, or contradictions, in order to assent to the force of law." Ibid., p. 188).

[7] From a systems theory perspective, these governance systems are both functionally differentiated and structurally coupled. On functional differentiation, see, e.g., Niklas Luhmann, *Social systems* (Stanford (CA: Stanford University Press, 1995); Vladislav Valentinov, 'The Ethics of Functional Differentiation: Reclaiming Morality in Niklas Luhmann's Social Systems Theory,' (2019) 155 *Journal of Business Ethics* 105-114; On the importance of communication between closed governance systems as institutionalization and recognition, see Ricardo Valenzuela Gascón, "Constitutional sociology and corporations: A conversation with Gunther Teubner,(2019) 31(1) *Tempo Soc.* 323-334 .

The basic division between the structures and practices of a law-based State duty and an expectations and private agreement based corporate responsibility suggested both distinctions in ideology and in the character of the governance communities to which each is primarily attached.[8] Yet the three governance approaches—legal, disciplinary, and remedial are inextricably and dynamically intertwined[9] within the larger collective of stakeholders—producers and consumers—of economic activity, connected by the text that unities and separates their sub-systems.[10] 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, recalling the innovative political theory behind American political theories of "checks and balances" and "separation of powers"[11] to govern (in this case) a functionally differentiated community (economic actors). The polycentricity of this inter-communication, among systems with distinct if overlapping members, territories, and jurisdictions, creates incentives toward smart mixes of measures that through its dialectics both solidifies and transforms governance communities as their inter-connections become more intricate.

The journey from the first SRSG report in 2006 to the unveiling of the UNGP in 2011 did produce an innovative approach to governance. This innovative model, in the forms of power that are the foundation of governance and the entities vested with governance power, is also a traditional one, rejecting an approach that would either transform international law or the fundamental principles of economic activity in liberal democracy.[12] Again, principled pragmatism serves as the structuring concept that drives both organization and reach.[13] Nonetheless, at least in the area of business and human rights, its technologies and narratives, as well as its principles, are still in its early phases of development.[14] Grounded in the realities of current power relationships, acknowledging the strong pull of the ideology that validates the state system as the superior form of governance, and the centrality of markets as a manifestation of liberal democratic principles applied to economic activity, the SRSG 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.[15]

This brings the reader back to the chapter's opening quotation from Miyamoto Misashi's *Five Rings*, and approaches to UNGP commentary. Gaps in approaching the ideal or expected produce quite distinct ways of approaching the ideal, which together represent the form of the bias inherent in distinctive approaches to any ideal. In that context it is the bridge rather than the perspective that assumes a critical role. Commentary is built

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[8] Both the character of these differences and the ways in which the SRSG attempted to align them around the ordering principles of business and human rights were considered in Chapter 2, supra.

[9] Consider Robert Chia, 'A 'Rhizomic' Model of Organizational Change and Transformation: Perspective from a Metaphysics of Change,' (1999) 10 *British Journal of Management* 209–227.

[10] "Collectives in this sense might be understood "*as an ensemble of speech activities*. All linguistic qualifications of these speech phenomena, which occur in grammar, syntax, stylistic studies, and other elated viewpoints, belong to the citizen as a member of a" collective. Jan Broekman, *Rethinking Law and Language: The Flagship 'Speech'* (Cheltanham UK: Edward Elgar, 2019), pp. 96-97.

[11] For the clearest exposition, see 5 U.S. (1 Cranch) 137 (1803), and McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

[12] Discussed in Chapter 4, supra.

[13] Discussed Chapter 3.1, supra.

[14] Mareike Weiner, Robert Home, and Christian Schader, 'Smart Mixes for Sustainable Value Chain Management: An Evaluation of the Conflict Minerals, Palm Oil, and Green Bonds Sectors,' (2023) 13(1) *Sage Open* 4; Daniel Kinderman, 'Time for a reality check: Is business willing to support a smart mix of complementary regulation in private governance?' (2016) 35 *Policy and Society* 29-42.

[15] Discussed Chapter 3, supra.

on gaps. Gaps create separation but also interdependency—meaning is built not just in itself but as a function of the text with which it interacts or which interact with it.[16] Just as the "meaning of a word is its use in the language,"[17] and "the meaning of a name is sometimes explained by pointing to its bearer,"[18] the meaning of words and names may be explained, at least in part, by the way it is used, how it is borne, and by how that changes in relation to its fundamental expectations (its first principles) and its earlier efforts to set meaning through text.[19] Gaps, then, are sources of meaning; meaning fills the space created by the gaps. And gaps can exist in time (from daft to final product) and between its organizing principles and its final expression. These are important considerations in approaching any reading of the UNGP and in any attempt to capture and deploy the spirit of the UNGP.

The commentary around which this Chapter 5 is built focuses on some important gaps, and the interpretive spaces that these gaps open. The gap between the draft UNGP and the UNGP in final form is one gap. The gap between inductive pragmatism grounded in the "no fundamental transformation" principle and the normative principles of doing no harm as measured against adverse human rights impacts is another. These gaps are embedded, of course, in the text of the UNGP itself, as well as in the constitution of its "spirit." The gaps and its interpretive consequences constitute an important basis on which the sometimes substantial ranges of plausible interpretation of the UNGP principles are produced. These discussions follow in Chapters 6-9 and its more granular commentary on the UNGP in final form. It is important, however, to highlight the structuring of the core structures that produce the interpretive gaps at the heart of the granular commentary that follows. First it helps define the extent and form of the spaces within which such interpretive gaps exist as plausible readings of the UNGP and its spirit. Second, it highlights the fundamental dynamic element of the UNGP itself--an effort to bridge governance gaps that itself produces a dynamic dialectic that means to bridge the gaps between principle and pragmatism, between human rights and other core principles of economic organization and markets, between individual and collective rights and obligations, and between private autonomy and public policy.

Section 5.1 considers the evolution from draft text circulated in 2010 to the final version of the Guiding Principles presented in early 2011. Section 5.2 turns from the interpretive gaps presented in the movement from draft to final versions of the UNGP, to the gaps between principle and pragmatism which the UNGP attempts to bridge. These touch on the dilemmas of traditional law-state systems in matrices of global economic production, the law-policy conundrums of the state duty, the character of the principles themselves, the contradictions of the corporate person and its paradoxes when the state itself projects regulatory and productive power simultaneously. Section 5.3 then elaborates an initial commentary on the form and scope of interpretive gaps that emerge from the UNGP's efforts to bridge governance gaps using a framework that itself preserves the structures from which those gaps take form. These are meant to provide a foundation for the more detailed engagement of a close reading of the principles themselves, as well as of the spirit of the UNGP that emerges from the project itself.

5.1 From 2010 Draft Text to 2011 Guiding Principles: A Commentary on Textual Development

I have suggested that a substantial amount of principled pragmatism stands between the "Protect, Respect and Remedy" Framework and the final version of the Guiding Principles. The Guiding Principles, as finally endorsed, represent a substantial aggregation of compromises and choices made to avoid the fate of the *Norms* in 2005. The

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[16] Jan M. Broekman, Meaning, Narrativity, and the Real: The Semiotic of Law and Legal Education IV (Dordrecht, Switzerland, 20169, p. 208-209 (meaning holism).
[17] Ludwig Wittgenstein, *Philosophical Investigations* (G.E.M. Anscombe (trans); NY: MacMillian, 1953); ¶ 43, p. 20.
[18] Ibid.,¶ 43 p. 21.
[19] Michael Salter, 'Resources for a Dialectical Legal Semiotics?, in Anne Wagner and Jan M. Broekman (eds), *Prospects of Legal Semiotics* (Dordrecht: Springer, 2010); pp. 107-141.

Guiding Principles do not fully implement a broad reading of the "Protect, Respect and Remedy" Framework, but does it preserve the essence of that framework? The answer emerges from a consideration of the movement from draft to final version of the Guiding Principles, and what emerges is a qualified yes. The Guiding Principles preserve the essence of the "Protect, Respect and Remedy" Framework, but at a price—shifting the center of gravity to the state duty to protect and recasting remedies as a consequential aspect of the state duty to protect. In the process, both the corporate responsibility to respect and the remedial pillar become more peripheral aspects.

Thus the qualification: what remains preserves the structure of the "Protect, Respect and Remedy" Framework. It leaves an opening, smaller than that suggested by the framework, but clear enough, from out of which corporations and other non-state stakeholders might rework the Guiding Principles to more closely mirror the framework. This section considers the provisions of the Guiding Principles in the form endorsed by the HRC in detail. Subsection A examines the definitions created under the Draft Principles and abandoned in the Guiding Principles, along with the capstone principles that inform interpretation of the Guiding Principles as a whole. Subsection B then considers the Guiding Principles elaborating the state duty to protect human rights. Subsection C analyzes the Guiding Principles touching on the corporate responsibility to respect human rights, and subsection D considers the Guiding Principles touching on the remedial obligations of states and business entities.

5.1.1 The Devil Is in the Detail—Section By Section Analysis—Overall Structure and Capstone Principles.

5.1.1.1. Overall Structure. The Draft Principles originally divided the Principles into two parts. The twenty-nine Principles themselves were placed in Part A; Part B provided a very short section of definitions.[20] Part A was divided into four parts, an Introduction and then a section devoted to each of the pillars of the framework: "The State Duty to Protect Human Rights,"[21] "The Corporate Responsibility to Respect Human Rights,"[22] and "Access to Remedy."[23] The working language of the Guiding Principles, at least in draft form, was English. That has caused some concern among non-English speakers,[24] both for reasons of access and for fear that the failure to translate the draft into the official languages of the U.N. would substantially affect the meaning of terms that might acquire legal or otherwise binding normative effect.[25]

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20. Draft Principles, *supra* note **Error! Bookmark not defined.**.
21. *Id.* at princ. 1-11.
22. *Id.* at princ. 12-22.
23. *Id.* at princ. 23-29.
24. "This forum is a consultation of the global North, mainly. Most peoples in the global South are excluded from this forum and have no access to the Draft, because they do not speak English." Special Representative of the United Nations Secretary-General for Business & Human Rights, *Online Forum*, cmt. Robert Grabosch (Jan. 28, 2011), http://www.business-humanrights.org/media/documents/ruggie/online-forum-re-guiding-principles-nov-2010-to-jan-2011.pdf (Draft Guiding Principles (GPs) for Implementation of the U.N. "Protect, Respect and Remedy" Framework Online Consultation.).
25. This point was made forcefully by the French Human Rights Commission:

> The problem we note is the fact that the English text of the Guiding Principles has not been translated into the other official languages of the United Nations, notably French, despite the fact that French is one of the UN's working languages. In addition to being a matter of principle which applies to all reports presented to the Human Rights Council, this problem is exacerbated by the fact that the document uses some ambiguous terms, meaning that 'official' translation is vital in order to fully grasp their legal implications. In the first instance, the fact that the English is the only version restricts the degree to which other legal systems are taken into consideration, as well as imposing a dominant viewpoint, even though globalisation is in crisis. It also restricts the scope of the consultations, especially within the Frenchspeaking world, thus working against the document's own stated aim. In the second instance, this adds to the uncertainty over the fundamental legal concepts relating to 'international responsibility'.

The Guiding Principles abandoned this structure in favor of a simpler one. It eliminates the Definition section and increases the number of Principles to thirty-one.[26] The Introduction is renamed "General Principles." But appearing to borrow from the toolbox of the German Pandectists and German legal science,[27] it continues to serve, now more explicitly, as the general principles of the Guiding Principles—that is, these now provide the interpretive framework for the thirty-one principles that follow. The remainder is devoted to each of the pillars of the framework: "The State Duty to Protect Human Rights,"[28] "The Corporate Responsibility to Respect Human Rights,"[29] and "Access to Remedy."[30] Each is divided between foundational and organization principles. The idea appears to be to create an internally cohesive interpretive structure within the Principles. The Principles of the broadest general applicability are contained in the opening section, "General Principles."[31] The Operational Principles in each section are to be interpreted first in light of these "General Principles" and then, more specifically, in light of the "Foundational Principles" of each section. The Foundational Principles of each section, in turn, are to be interpreted in light of the "General Principles." This system, familiar to civil lawyers in the interpretation of unified codes, will likely be less comprehensible to lawyers and policymakers from Common Law states.

5.1.1.2. Definitions. The Draft Principles provided definitions of only six terms.[32] The Draft Principles attempted to avoid highly technical and precise definitional issues. This suggests a fundamentally different approach from prior efforts.[33] Indeed, the definitions tended to stress the non-technical nature of the terms, rather than the use of the definitions section to provide technical precision. Thus, for example, the Draft Principles stressed that the key term, "corporate," was "used in the non-technical sense, interchangeably with 'business enterprises,' regardless of the entity's form."[34] "Business Enterprise" was also given a broad but general definition, consisting of "all companies, both transnational and others, regardless of sector or country of domicile or operation, of any size, ownership form or structure."[35] This has been criticized on a number of grounds.[36]

Special Representative of the United Nations Secretary-General for Business & Human Rights, *Online Forum*, cmt. French Human Rights Commission (Jan. 27, 2011), http://www.business-humanrights.org/media/documents/ruggie/online-forum-re-guiding-principles-nov-2010-to-jan-2011.pdf [herein after French Human Rights Commission Comments] (Draft Guiding Principles (GPs) for Implementation of the U.N. "Protect, Respect and Remedy" Framework Online Consultation.).

26. Guiding Principles, *supra* note **Error! Bookmark not defined.**, at 2, at princ. 6-26.

27. *See, e.g.*, KONRAD ZWEIGERT & HEIN KÖTZ, AN INTRODUCTION TO COMPARATIVE LAW 105, 144-56 (Tony Weir trans., 3d ed. 1998). *See generally* Mathias Reimann, *Nineteenth-Century German Legal Science*, 31 B.C. L. REV. 837 (1990).

28. Guiding Principles, *supra* note 41, at princ. 1-10. Principles 1-2 are grouped under the subsection "Foundational Principles"; Principles 3-10 are grouped under the subsection "Operational Principles."

29. *Id.* at princ. 11-24. Like the Principles describing the State duty to protect, the principles covering the corporate responsibility are grouped under the subsections "Foundational Principles" (Principles 11-15) and "Operational Principles" (Principles 16-24).

30. *Id.* at princ. 25-31. Like the Principles describing the State duty to protect and the corporate responsibility to respect, the principles covering the remedial obligation are grouped under the subsections "Foundational Principles" (Principle 25) and "Operational Principles" (Principles 26-31).

31. *Id.*

32. In practical terms, only three terms are defined, the first dealing with what constitutes an Enterprise, the second concerning the meaning of human rights, and the third defining grievance and grievance mechanisms. *See* Draft Principles, *supra* note **Error! Bookmark not defined.**, at 27.

33. On the use of definitions in the Norms, see generally, 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 COLUM. HUM. RTS. L. REV. 287 (2006).

34. Draft Principles, *supra* note **Error! Bookmark not defined.**, at 27.

35. *Id.*

36. French Human Rights Commission Comments, *supra* note 171.

Likewise, "human rights" was defined as the "potential adverse impacts on human rights through a business enterprise's activities or relationships. Identifying human rights risks is comprised of an assessment both of impacts and—where they have not occurred—of their likelihood."[37] On the other hand, "internationally recognized human rights" was more specifically defined.[38]

The last set of definitions concerned grievance and grievance mechanisms. Again, the focus is on the general. "Grievance" is triggered by a "perceived injustice evoking an individual's or a group's sense of entitlement . . ."[39] The intention was to avoid a definition that cabined grievance to either legal rights or the procedures of grievance resolution overseen by the state. Thus, entitlement to redress of injustice "may be based on law, explicit or implicit promises, customary practice, or general notions of fairness of aggrieved communities."[40] The broadness is necessary because the governance regime of the Draft Principles touched on both legal rights and the conduct obligations of social-norms among communities of stakeholders. This balancing of multiple sources of obligations also affects the definition of grievance mechanism.[41]

The Guiding Principles eliminated the definition section.[42] This is perhaps a result of the criticisms received[43] that the terms chosen to be defined were both over- and under-inclusive. Moreover, substantial objections were made to some of the definitions themselves.[44] Those criticisms reflected unease both about the definitions themselves, their interpretive consequences, and fundamental differences in the knowledge bases and perspectives of laws and non-lawyer policymakers. By eliminating the definitions, the Guiding Principles now provide a larger breadth of possible interpretation of key terms in the Guiding Principles. On the other hand, broader interpretive possibility also permits both deviation among those subject to the principles and implementation incoherence. This is particularly the case with respect to the definition of applicable human rights norms, which now find themselves described in Guiding Principle 12, but are nowhere defined for purposes of the state duty to protect human rights.[45] The response, of course, is found in Guiding Principle 1—that states have no obligation to protect human rights other than those to which they have bound themselves as a matter of law[46]—but that is disingenuous, given the important policy role played by key human rights instruments that are technically non-binding.

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37. Draft Principles, *supra* note **Error! Bookmark not defined.**, at 27.
38. The term specifically

> refers at a minimum to the principles contained in the International Bill of Human Rights (consisting of the Universal Declaration of Human Rights and the main instruments through which it has been codified: the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural rights), coupled with the eight ILO core conventions that form the basis of the Declaration on Fundamental Principles and Rights at Work.

Id.
39. *Id.*
40. *Id.*
41. "The term grievance mechanism is used to indicate any routinized, state-based or non-state-based, judicial or non-judicial process through which grievances related to business abuse of human rights can be raised and remedy can be sought." *Id.*
42. *See* Guiding Principles, *supra* note **Error! Bookmark not defined.**.
43. *See generally* French Human Rights Commission Comments, *supra* note 25.
44. *Id.*
45. *See* Guiding Principles, *supra* note **Error! Bookmark not defined.**, at princ. 12.
46. *Id.*

5.1.1.3. Introduction to the Draft Principles and General Principles of the Guiding Principles. In the Draft Principles, the Introduction provided a framing element to the substantive principles that follow. The Introduction has two principal purposes. The first is to set out the nature and character of the three fundamental substantive parts of the Guiding Principles and the relationship between them. The second is to elaborate a set of interpretive principles that are meant to guide individuals and entities that will apply the Guiding Principles as regulators or participants.[47]

The Introduction to the Draft Principles described the ordering relationships among the three systems that constitute the governance regime of human rights applied to business. It suggests the autonomy of the law-state system and the social-norm system,[48] but also suggested an unequal relationship between them. The Guiding Principles are founded on the recognition of the "States' primary role in promoting and protecting all human rights and fundamental freedoms, including with regard to the operations of business enterprises."[49] It also specified that the principles be interpreted in light of the fundamental dual "role of business enterprises as specialized organs of society performing specialized functions."[50] In this dual role, business enterprises are understood to be "required to comply with all applicable laws and meet the societal expectation to not infringe on the human rights of others."[51] It also suggests the intimate connection between rights systems and remedies, as well as the central role of remedies in connecting the state duty to protect and the corporate responsibility to respect human rights.[52] Lastly, it suggested an unequal engagement in the development of the norm systems under which states and corporations operate. With respect to states, "[n]othing in these Guiding Principles limits or undermines any legal obligations a State may have undertaken or be subject to under international law with regard to human rights."[53] With respect to the state duty to protect human rights, the Guiding Principles were understood as a framework or a set of organizing principles, but not as the development of law, understood in the traditional sense of either domestic or international law. But with respect to the social norm system under which corporations operate, that is, with respect to the corporate responsibility to respect human rights, there is no corresponding explicit limitation. This follows from the dual obligation of corporations—to follow applicable law and to meet their obligations under the social-norm system to which they are bound.[54]

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47. Draft Principles, *supra* note **Error! Bookmark not defined.**, at 5.

48. "While companies may take on additional responsibilities voluntarily, and operational conditions may dictate them in specific circumstances, the corporate responsibility to respect human rights is the baseline responsibility of all companies in all situations. It exists independently of States' duties or capacity." *Special-Representative, Mandate on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, UNITED NATIONS GLOBAL COMPACT (May 2010), http://www.unglobalcompact.org/docs/issues_doc/human_rights/Resources/UNGC_SRSGBHR_Note.pdf. *See generally Human Rights*, *supra* note **Error! Bookmark not defined.**. Recall also the discussion of the autonomy of the law-state system and the social norm system developed by the SRSG in his reports. *See* Backer, *supra* note **Error! Bookmark not defined.**; *see also* Gunther Teubner, *The Corporate Codes of Multinationals Company Constitutions Beyond Corporate Governance and Co-Determination*, *in* CONFLICT OF LAWS AND LAWS OF CONFLICT IN EUROPE AND BEYOND: PATTERNS OF SUPRANATIONAL AND TRANSNATIONAL JURIDIFICATION (Rainer Nickel ed., 2009). *But see* Peter Goodrich, *Anti-Teubner: Autopoiesis, Paradox, and the Theory of Law*, 13 SOC. EPISTEMOLOGY no. 2, 1999, at 197-214.

49. Draft Principles, *supra* note **Error! Bookmark not defined.**, at intro. (a).

50. *Id.* at intro. (b).

51. *Id.*

52. The Introduction refers to the "reality that rights and obligations have little meaning unless they are matched to appropriate and effective remedies when breached." *Id.* at intro. (c).

53. *Id.* at 5.

54. The SRSG has emphasized the contextual and operational conditions that may affect both the extent and character of the baseline obligation of corporations under the social norm system to which they are bound. *See* Draft Principles, *supra* note **Error! Bookmark not defined.**, at 14. But the absence of limits does not suggest an open-ended substantive effect of the Draft Principles on corporate responsibility. The corporate responsibility is, to some extent, also bounded by the growing network of norms that reflect an emerging global consensus about corporate behavior with respect to human rights. The SRSG has noted the strong connection between the substance of the corporate responsibility to respect and the UN Global Compact. "In this regard, the UN Protect, Respect and Remedy framework provides further operational clarity for the two human rights principles

The interpretive principles described in the Introduction were to provide the roadmap for moving from theory to practice; to manage the operationalization of the Guiding Principles while setting out the borders within which the Guiding Principles system is meant to work. To understand and apply these interpretive principles is to recognize both the form and function of the system the SRSG is putting into place. First, the Guiding Principles introduce a unity principle as the foundational presumption of the Guiding Principles. Though divided into twenty-nine principles in three sections in draft form, the Guiding Principles are to be "understood as a coherent whole."[55] It also introduces two principles of construction. The first introduces a textual interpretive principle: the Guiding Principles "should be read, individually and collectively, in terms of their objective of enhancing standards and practices with regard to business and human rights so as to achieve tangible results for affected individuals and communities."[56] This is an inward looking interpretive principle that seeks to manage the meaning of the principles as a comprehensive and coherent body of self-referential standards, substantially complete in themselves.[57] The second introduces an effects-based interpretive principle: the Guiding Principles should be read "to support the social sustainability of business enterprises and markets."[58] This is a functionalist interpretive principle, one that looks out from the principles as a coherent body to their effects on those they are meant to affect. It is augmented by another functional interpretive principle: that the Guiding Principles "should be implemented in a non-discriminatory manner, with particular attention to the rights and needs of, and challenges faced by, vulnerable and marginalized groups, and with due regard to gender considerations."[59]

The final version keeps the form and general objectives of the Draft Principles' Introduction, but in its final form was substantially reoriented to emphasize the primacy of the state role in human rights and a substantial reduction on the scope of that obligation.[60] Moreover, it now recasts the corporate social norm systems as autonomous bases of governance norms in a more marginal role. First, the state no longer has a role in promoting and respecting all human rights; instead its role is reduced to obligation. Specifically, the Guiding Principles now recognize merely the "States' existing obligations to respect, protect and fulfill human rights and fundamental freedoms."[61] The political scientist or sociologist might say that the formal changes in language do not necessarily affect the scope and character of the state's obligations in effect. The lawyer might suggest that the changes indicate a positive intention to reduce the scope of state obligation—not all human rights and fundamental freedoms, but only "existing obligations to respect, protect and fulfill human rights."[62]

Second, the obligations of business enterprises were changed in one quite significant respect—no longer required to "meet the societal expectations not to infringe on the human rights of others,"[63] such enterprises are

championed by the Global Compact. Principle 1 calls upon companies to **respect** and support the protection of internationally proclaimed human rights; and Principle 2 calls upon them to ensure that they are not complicit in human rights abuses." *Special-Representative, Mandate on the Issues of Human Rights and Transnational Corporations and Other Business Enterprises*, *supra* note 194. ("Other guidance materials that can help with implementation of the responsibility to respect (and the voluntary commitment to support) human rights can be found at:
http://www.unglobalcompact.org/Issues/human_rights/Tools_and_Guidance_Materials.html").

55. Draft Principles, *supra* note **Error! Bookmark not defined.**, at 5.
56. *Id.*
57. *See generally* AUTOPOIETIC LAW: A NEW APPROACH TO LAW AND SOCIETY (Gunther Teubner ed.,1988).
58. Draft Principles, *supra* note **Error! Bookmark not defined.**, at 5.
59. *Id.*
60. *See* Guiding Principles, *supra* note **Error! Bookmark not defined.**, at 6.
61. *Id.*
62. *Id.*
63. Draft Principles, *supra* note **Error! Bookmark not defined.**, at 5; Guiding Principles, *supra* note **Error! Bookmark not defined.**, at 6.

required now only to "comply with all applicable laws."[64] The General Principles of the Guiding Principles, then, effectively seek to eliminate reference to the great innovative aspect of the "Protect, Respect and Remedy" Framework—the autonomous obligations of business organizations to comply with global social norms in the business.[65] The tag reference to the additional obligation to "respect human rights" is likely meant to preserve a wisp of the polycentric principle in the "Protect, Respect and Remedy" Framework. But that is an interpretive stretch at best. Moreover, the General Principles retain a potentially important lacuna—the omission of non-state actors that are organized but not in business. Still, with the definition section omitted, it might be possible to extend the definition of business enterprise to include businesses that are not profit making organizations, like Amnesty International, to the extent that they operate like businesses by hiring employees, owning property, and engaging in transactions.

As thus reduced in scope, the General Principles of the Guiding Principles articulate the assumption that had been written into the Special Representative's Reports since 2008—that the Guiding Principles apply to all states and all business enterprises. The Principles of Coherence and Sustainability remain substantially unchanged in the final version of the Guiding Principles.[66] However, in line with the substantial change to the description of the fundamental character of the State duty to protect human rights, the final version substantially extends the limitations on the effects of the Guiding Principles, both at the time of enactment and, importantly, as an ongoing enterprise. The Guiding Principles broaden the Draft Principles such that the Guiding Principles would not be read to limit or undermine the legal obligations of states under international law and substitute a much broader limitation: "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."[67] The Guiding Principles, then, must be read within the nexus of state obligation in the context in which human rights activity occurs. It may not serve as a basis for moving customary practice along. It becomes invisible.[68]

The interpretive stage is now set for the thirty-one principles of the Guiding Principles. First, the Guiding Principles are to be read in light of the existing obligations of states, as they might vary from state to state. Second, the subsidiary position of business enterprises within states is affirmed as "specialized organs of society performing specialized functions"[69] whose principal obligation is derivative. The Guiding Principles are to be interpreted through the foundational principle that business enterprises must obey the law of the state that applies to them. Third, rights and obligations are to be matched with "appropriate and effective" remedies, but oddly, to be triggered "when breached."[70] Fourth, the Guiding Principles "apply to all states and to all business

64. Guiding Principles, *supra* note **Error! Bookmark not defined.**, at 6.

65. *See, e.g.*, SRSG 2008 Report, *supra* note **Error! Bookmark not defined.**, at 51.

66. Draft Principles, *supra* note **Error! Bookmark not defined.**, at 5; Guiding Principles, *supra* note **Error! Bookmark not defined.**, at 6.

67. Guiding Principles, *supra* note **Error! Bookmark not defined.**, at 6.

68. The "no creation" principle can be understood narrowly as stating the obvious—the Guiding Principles are not law binding on states, but it can be understood as soft law with a potential effect on behavior leading to changes in international conventional or customary law. On the other hand, it can be read broadly to suggest that actions under the Guiding Principles cannot be applied to effectively create international law or custom.

69. Guiding Principles, *supra* note 41, at 6. Here the original broad understanding could be easily turned on its head—now as specialized social organs with specialized functions, the General Principles can as easily lend themselves to affirm the subordinate place of business enterprises within states as they can lend themselves to the affirmation of business enterprises as social organs that exist within and outside of states, a position suggested in the SRSG's 2008 and 2009 Reports at 6.

70. *Id.* It is not clear what this means. It can as easily suggest ex post as ex ante triggers for the remedial right. If the former, that would substantially decrease the scope of the Principles in framing preventative measures. With respect to the state duty, of course, that might be appropriate; with respect to the corporate obligation, that would seem at odds with the focus of human rights due diligence. On the other hand, this turn of phrase might also suggest a separation between the remedial

enterprises."[71] Fifth, interpretation of the Guiding Principles is to be guided by the overarching principles of coherence, tangibility, and sustainability. Sixth, the Guiding Principles cannot be read either as the creation of new international law, nor, potentially, as the place from which such international law might arise; nor may it limit or undermine the legal obligations of states, even where these obligations are incompatible with human rights obligations. And seventh, the Guiding Principles impose a principle of non-discrimination, not to be applied for the benefit of states but rather for the benefit of individuals.[72]

5.1.2. The State Duty to Protect Principles

5.1.2.1. Foundational Principles. The ten Guiding Principles touching on the state duty to protect human rights is divided into two sections, "Foundational Principles,"[73]and "Operational Principles."[74] The latter is subdivided into "General State regulatory and policy functions,"[75] "The State-business nexus,"[76] "Supporting business respect for human rights in conflict-affected areas,"[77] and "ensuring policy coherence."[78] These rearrange and modify the organization of the Guiding Principles in the Draft Principles,[79]principally by reinforcing the distinction between general principals, which must be applied in the interpretation of the operational principles that follow (and both, of course, to be interpreted in light of the "General Principles" section applicable to all of the Guiding Principles).

The state duty to protect human rights, the first pillar of the "Protect, Respect and Remedy" framework, is distilled in Guiding Principles 1 and 2. Guiding Principle 1 describes the state duty to protect human rights.[80] But Guiding Principle 1 appears to reflect a duty that is secondary rather than primary: states do not have a duty to protect against human rights abuses, including their own abuses. Instead, they merely have an obligation to protect against human rights abuses within their territories by third parties.[81] The Commentary, however, suggests a broader application than the black letter of the principle suggests.[82] The Commentary suggests that the duty to protect is a standard of conduct; that States are not responsible for the abuses of private parties; and that states do become liable as principles where the abuses can be attributed to them or where they fail to enforce against third party abuse in accordance with the standards of Guiding Principle 1.[83] Inexplicably, the Commentary also reads into the black letter of the principle a state duty to "protect and promote the rule of law."[84]

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function and the preventative one.

71. *Id.*
72. *Id.*
73. *Id.* at 1-2.
74. *Id.* at princ. 3-10.
75. *Id.* at princ. 3.
76. *Id.* at princ. 4-6.
77. *Id.* at princ. 7.
78. *Id.* at princ. 8-10.
79. The rearranging reflects both the shift in emphasis of the General Principles reflected in the first section, discussed above, and drafting refinement.
80. *Id.* at princ. 1.
81. "States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication." *Id.*
82. "States' international human rights law obligations require that they respect, protect and fulfill the human rights of individuals within their territory and/or jurisdiction. This includes the duty to protect against human rights abuse by third parties, including business enterprises." *Id.* at cmt. princ. It is not clear how the Commentary can be reconciled with the narrower language of the principle itself.
83. *See id.*
84. *Id.* at princ. 1 cmt. While these principles could be read into the "Protect, Respect and Remedy" Framework, it is

Guiding Principle 2 then describes the means by which states comply with their duty in their regulation of business enterprises within their territory or jurisdiction.[85] It represents a combination of the extraterritoriality provision of the original Draft Principles with the "clear expectations" principle of the first part of Draft Principle 5.[86] The strategic reasons for the move remain unclear—perhaps it was a means of softening the focus on extraterritoriality, a position that remained contested.

The principle focus of Guiding Principle 2, though, is extraterritoriality. The Commentary to Guiding Principle 2 makes clear that the principle is meant as a rather lukewarm endorsement of extraterritoriality.[87] This is a substantial retreat from both the language in the SRSG Reports and the Draft Principles.[88] The Commentary then suggests the policy reasons favoring Guiding Principle 2[89] and the approaches states have employed to implement the principle, including the use of extraterritorial principles, a backhanded approach to the endorsement of extraterritoriality nowhere explicit in the Principle itself.[90] Gone are references to the supply chain relationships and controlled entity concepts that were included in the Draft Principles and that strengthened the case for extraterritoriality.[91]

The Draft Principles reflected a somewhat different perspective in the elaboration of the fundamental provisions of the state duty to protect human rights. It is in those differences that one can discern the spaces between "Protect, Respect and Remedy" as a framework, the narrowing approach of the Draft Principles, and the final product. Together they provide a more principled basis for reading the Guiding Principles as ultimately endorsed. The foundational principles set the scope and nature of the state duty to protect human rights. Principle 1 is directed toward the state, rather than, as in the final version, the state's duty as against third parties.[92] It describes the state's obligations with respect to its incorporation of international human rights standards into its domestic legal order and to enforce that legal order. The obligations of Principle 1 are mandatory. Principle 2 is directed outward. It describes the fundamental relationship between the state, its legal system, and the businesses under its control. The obligations of Principle 2 are permissive—states are encouraged, but not required, to assert authority over businesses to the extent described in Principle 2. The remainder of the Draft Principles focused on

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hard to extract such a duty from the language of Principle 1. In any case, this obligation is understood to include a principle of equality before the law, fairness in application of law, and accountability, legal certainty and procedural and legal transparency. *Id.*

85. "States should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations." *Id.* at princ. 2.

86. *See* discussion below. The rationale for the clear expectations part of Guiding Principle 2 remain unchanged from the draft—"ensuring predictability for business enterprises by providing coherent and consistent messages, and preserving the State's own reputation." *Id.*

87. "At present States are not generally required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction. Nor are they generally prohibited from doing so, provided there is a recognized jurisdictional basis. Within these parameters some human rights treaty bodies recommend that home States take steps to prevent abuse abroad by business enterprises within their jurisdiction." *Id.*

88. *See* discussion *infra* Part IV.

89. The Commentary highlights predictability for business (and thus the preservation of a favorable business climate) and the reputational benefits to states. Guiding Principles, *supra* note 41, at princ. 2 cmt.

90. *Id.* Indeed, the Commentary in its third paragraph appears to upend the implications of the first paragraph of the Commentary by seeking to make the case for aggressive use of extraterritorial regulation in the guise of speaking to approaches that might be used to clarify the expectations of business behavior.

91. *See* discussion *infra* Part IV.

92. *Compare* Draft Principles, *supra* note **Error! Bookmark not defined.**, at princ. 1 ("States must protect against business-related human rights abuse within their territory and/or jurisdiction by taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, regulation, and adjudication.") *with* Guiding Principles, *supra* note 41, at princ. 1 ("States must protect against human rights abuses within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication.")

the state duty to protect human rights then elaborated the two foundational principles, building on the mandatory principle of Draft Principle 1 and the permissive principle of Draft Principle 2 to frame the extent of the state duty to protect human rights at home and outside of its own territory.

Draft Principle 1 can be understood as made up of two parts. The first part sets out the extent of the duty: "States must protect against business-related human rights abuse within their territory and/or jurisdiction."[93] The second part describes the methodology that is to be used to comply with this obligation: states are required to take "appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, regulation, and adjudication."[94] The focus of Principle 1 is on the state's duty to prevent abuses of human rights by business.[95] The Commentary narrows the scope of the state duty described in Draft Principle 1 by distinguishing the duty to protect from "other State duties usually associated with human rights, such as the duties to promote and fulfill."[96] The duty to protect is understood as grounded in law and policy. The legal basis of the duty arises from the international law obligations of states,[97] and to some extent from the imperatives of their domestic constitutional orders. The Commentary suggests that the international law obligations of states can be understood as requiring states to control their own behavior and also the behavior of persons or entities over which they might have control.[98] However, while states might have an obligation to control the conduct of others within their territory with respect to compliance with applicable human rights norms, the Commentary suggests that states will not be directly liable for the consequences of human rights abuses by others (within their control).[99] Lastly, the framework structure of the Draft Principles does imply a substantial amount of potential legislative and policy obligations on the part of states. These are framed as housekeeping obligations—the need to ensure legal and policy coherence by conforming law and policymaking to the obligations the state has undertaken.[100]

If Draft Principle 1 is directed inward—focusing on the legal obligations of states with respect to their domestic legal orders—Draft Principle 2 is directed outward—toward the policy obligations of states that flow from their legal obligation to protect human rights, and attach to persons or entities wherever they operate.[101] The Commentary notes that issues of extraterritoriality are complex and sensitive, though it does not elaborate on either.[102] Though the Commentary appears to take a cautious approach to the encouragement of assertions of extraterritorial jurisdiction, the approach is ambiguous enough to provide a cover for fairly aggressive interventions abroad.[103] That permission to project legislative power abroad, of course, is a function of the extent

93. Draft Principles, *supra* note **Error! Bookmark not defined.**, at 5.
94. *Id.*
95. *Id.* at 5-6.
96. *Id.* at 6.
97. *Id.* at 5-6. "The legal foundation of the State duty to protect against business-related human rights abuse is grounded in international human rights law." *Id.*
98. *Id.* at 6 ("The specific language in the main United Nations human rights treaties varies, but all include two sets of obligations for States Parties: first, to refrain, themselves, from violating the enumerated rights of persons within their territory and/or jurisdiction, generally known as the State duty to respect human rights; second, to 'ensure' (or some functionally equivalent verb) the enjoyment or realization of those rights.").
99. States, however, might be liable for breach of their obligations under international law where their failure to ensure compliance by others within their control is itself a breach of the relevant treaty. *Id.*
100. *See id.* at 9-11; *see also* discussion *infra* Part IV.
101. *Id.* at 6. "States should encourage business enterprises domiciled in their territory and/or jurisdiction to respect human rights throughout their global operations, including those conducted by their subsidiaries and other related legal entities." *Id.*
102. The issue, however, was thoroughly vetted in the years leading to the production of the Draft Principles. *Id.*; *see, e.g.*, Jennifer A. Zerk, *Extraterritorial Jurisdiction: Lessons for the Business and Human Rights Sphere from Six Regulatory Areas* (Harvard Corporate Soc. Responsibility Initiative Working Paper No. 59, 2010), *available at* http://www.hks.harvard.edu/m-rcbg/CSRI/publications/workingpaper_59_zerk.pdf.
103. The Commentary is a study in ambiguity:

of a state's control over domestically chartered business operating abroad. The effect, then, is to provide a policy cover for the continued use of the power by developed states to project their legislative agendas in less developed states, which tend to serve as host states for foreign business operations. More importantly, the Commentary suggests a connection between the permissive actions of Draft Principle 2 with the mandatory provisions of Draft Principle 1, where the state is acting both as a regulator (Draft Principle 1) and a participant (Draft Principle 2) in activities beyond its borders.[104]

Still, the Commentary seeks to soften the effects.[105] It is also possible to argue that, within the context of Draft Principles, extraterritoriality should have no functional effect on the internal operations of the host state's legal system. In effect, extraterritoriality is merely a transitory step toward the necessary harmonization of law and policy inherent in the International Bill of Rights, which should produce a functionally equivalent global set of domestic legal orders. But that conclusion is founded on a number of assumptions with respect to which there might not yet be consensus in either theory or action. First, all states have an obligation in equal measure to incorporate international law within their domestic legal orders. Second, that bundle of international obligations is identical among all states. Third, all states understand the bundle of transposable obligations identically. Fourth, none of the obligations raise issues within the constitutional order of any state. Fifth, the bundle of international human rights obligations is consistent with all other international obligations of states (in effect, there exists a sufficiently well-developed policy coherence at the international law level). Sixth, the process of incorporating these obligations will produce differences in form and process, but no substantial differences in function or effect on application in individual cases. And seventh, states will enforce these obligations subject to the peculiarities of their domestic legal order, in a substantially harmonized (though not uniform) manner, as a matter of law (binding obligation) and policy (comity).

The difficulty with the extraterritoriality provisions of the Principles, whether in draft or final form, of course, is that each of these assumptions remains highly contested, and states continue to "game" the system to their own advantage. States may not have the same set of legal obligations under international law and may not interpret their obligations under that law in the same way.[106] With respect to conventional law, not all states have acceded to every convention—many states have treaty relationships with other states, and states may have included substantial reservations. States have very different understandings of the scope, applicability, and the nature of obligations under customary international law. Moreover, beyond issues of legal effect, the legal effect of non-binding international norms remains highly contested—as a matter of international law and in its effect on the

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> States are not at present generally required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction, nor are they generally prohibited from doing so provided there is a recognized jurisdictional basis, and that the exercise of jurisdiction is reasonable. Various factors may contribute to perceived and actual reasonableness of States' actions, including whether they are grounded in multilateral agreement.

Draft Principles, *supra* note **Error! Bookmark not defined.**, at 6.

104. *Id.* ("Indeed, strong policy reasons exist for home States to encourage businesses domiciled in their territory and/or jurisdiction to respect human rights abroad, especially if the State is involved in the business venture.").

105. *Id.* ("Furthermore, the exercise of extraterritorial jurisdiction is not a binary matter but comprises a range of measures, not all equally controversial under all circumstances. The permissible options which may be available range from domestic measures with extraterritorial implications, such as requirements on "parent" companies to report on their operations at home and abroad, to direct extraterritorial jurisdiction such as criminal regimes which rely on the nationality of the perpetrator no matter where the offense occurs.").

106. *See cf.* Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136 (July 9, 2004).

domestic legal order of a state.[107] Indeed, as recent cases from the United States have shown, the relationship between international legal or normative obligation and the strictures of a constitutionally derived domestic legal obligation work against the incorporation of international law or norms in a uniform or harmonized way, if it is incorporated at all.[108] Other states take a different approach.[109] The potential for law and policy incoherence grows. More importantly, it is clear that, even within the assumption of the Guiding Principles framework, extraterritoriality can have a significant effect, especially for the transposition of developed state law through the instrumentalities of their chartered corporations operating in less developed host states.

5.1.2.2. Operational Principles—General State and Regulatory Policy Functions. The Operational Principles comprise the bulk of the Guiding Principles touching on the state duty to protect. Principle 3 (Draft Principle 5) considers the general regulatory and policy functions of states. It lists four categories of actions to be undertaken by states that mean to honor their obligations under Principle 1. Two involve the construction and enforcement of law,[110] one defines the guidance obligations of states (that slips in an extraterritorial element),[111] and the last frames the construction of corporate disclosure obligations.[112] The structure is meant to describe a universe of obligation that includes not merely legal obligations but policy commitments as well. Most interesting is the principle, set out in Guiding Principle 3(a), that states have a due diligence obligation with respect to the adequacy of their domestic legal orders in complying with the law enforcement obligations of Guiding Principles 2 and 3(a).[113]

The Commentary urges states to avoid being passive in fostering business respect for human rights, and counsels better enforcement of existing law, arguing that the failure to enforce has the effect of a legislative gap.[114] Most importantly, the Commentary takes direct aim at the conventional construction of corporate law—the shareholder welfare maximization basis of which may be inconsistent with the human rights privileging objectives of the Guiding Principles.[115] The Commentary also suggests a number of soft law techniques for state guidance of business enterprises to respect human rights,[116] invites states to make better use of their national human rights

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107. *Cf.* Juridical Condition and Rights of Undocumented Migrants, Advisory Opinion OC-18/03, Inter-Am. Ct. H.R. (ser. A) (Sept. 17, 2003).

108. *Cf.* Medellín v. Texas, 552 U.S. 491, 503-04 (2008).

109. *See State v. Makwanyane* 1995 (6) BCLR 665 (CC) at paras. 34-37 (S. Afr.).

110. States should "[e]nforce laws that are aimed at, or have the effect of, requiring business enterprises to respect human rights, and periodically to assess the adequacy of such laws and address any gaps." Guiding Principles, *supra* note 41, at 8. In addition, states should ensure that the other parts of its domestic legal order, and especially its corporate law, not constrain business respect for human rights. *Id.*

111. States should provide effective guidance to businesses on how to respect human rights "throughout their operations." *Id.* at 8. This is in addition to Guiding Principle 2's requirement that states set out clear expectations about respecting human rights. The reference to operations seems to focus interest on the supply chain operations of a business, but the Commentary fails to take this up, focusing instead on the effects of supply chain operations rather than identify them directly. *Id.* at 7.

112. States should encourage and might compel businesses to communicate how they address human rights impacts. *Id.* at 8.

113. This is described as an obligation to "periodically . . . assess the adequacy of such laws and address any gaps." *Id.*

114. *Id.*

115. The Commentary strengthens the suggestion made in the Draft Principles Commentary that there is a certain amount of flexibility, perhaps more than is warranted by the history of the application of law in many states, in the construction and interpretation of the shareholder welfare maximization principles of corporate law. *See* 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*, LCBACKER BLOG (Jan. 14, 2010, 9:23 PM), http://lcbackerblog.blogspot.com/2010/01/using-corporate-law-to-encourage.html.

116. States "should consider a smart mix of measures – national and international, mandatory and voluntary – to foster business respect for human rights." Guiding Principles, *supra* note 41, at 8.

institutions to meet their duty to protect,[117] and suggests the contours of appropriate outcomes and best practices.[118] Lastly, the Commentary suggests changes in national and international accounting principles.[119] The Commentary does not focus attention on the principle's invitation for home states to regulate corporate conduct down the supply chain, but it does suggest the nature of such regulation through the corporate obligation to undertake human rights due diligence.[120] Taken as a whole, these suggestions are, at best, tall orders, and will require the concurrence of a number of stakeholders, many of which were not parties to the Guiding Principles process, and whose interests may be adverse to the objectives of the Guiding Principles.

The Draft Principles took a similar path, though it also included discussion of policy coherence, which was eventually moved to Guiding Principle 2. Draft Principle 5 sets out in more detail the methodologies of regulating business within the context of the duty to protect against human rights abuses. The basic principle is straightforward and applicable to national regulation domestically and extraterritorially.[121] The requirements of Draft Principle 5 can be divided into two distinct parts. The first is the requirement that states should set out their expectations. The second part requires states to take the necessary measures to "support, encourage, and . . . require" compliance with these expectations.[122] Four methods are identified as appropriate to meet these objectives. These methods reflect the fundamental division of the state duty to protect between law and policy that serves as the basic ordering framework of Draft Principle 1. Law-based methods include enforcing the law and ensuring that relevant law does not impede corporate respect for human rights.[123] Policy-based methods include providing guidance on how to respect human rights and how to communicate corporate human rights performance.[124]

These methodologies are grounded on a principle of state action (one consistent with Draft Principle 1, a focus now substantially lacking in the final version of Guiding Principle 1) that "States should not assume that businesses invariably prefer, or benefit from, State inaction."[125] With respect to enforcement of law and direction of policy, the Commentary suggests the need to harmonize laws relating to business with the overarching principles of human rights law. This derives both from the SRSG's emphasis on the need for policy and legal coherence, and on the recognition that the current model of business regulation—grounded in shareholder or enterprise welfare maximization—might frustrate the enterprise of transposing human rights norms into the law and policy systems of states.[126] The SRSG, at the same time, stresses the importance of practical guidance for

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117. "National human rights institutions that comply with the Paris Principles have an important role to play in helping States identify whether relevant laws are aligned with their human rights obligations and are being effectively enforced, and in providing guidance on human rights also to business enterprises and other non-State actors." *Id.* at 8-9.

118. "[S]hould consider a smart mix of measures—national and international, mandatory and voluntary—to foster business respect for human rights." *Id.* at 8.

119. "Financial reporting requirements should clarify that human rights impacts in some instances may be 'material' or 'significant' to the economic performance of the business enterprise." *Id.*

120. "It should advise on appropriate methods, including human rights due diligence, and how to consider effectively issues of gender, vulnerability and/or marginalization, recognizing the specific challenges that may be faced by indigenous peoples, women, national or ethnic minorities, religious and linguistic minorities, children, persons with disabilities, and migrant workers and their families." *Id.* In the Draft Principles supply chain issues are discussed elsewhere.

121. Draft Principles, *supra* note **Error! Bookmark not defined.**, at 7. ("States should set out clearly their expectation for all business enterprises operating or domiciled in their territory and/or jurisdiction to respect human rights, and take the necessary steps to support, encourage and where appropriate require them to do so").

122. *Id.*

123. *Id.* at 7, princ. 5(a), (b).

124. *Id.* at 7, princ. 5(c), (d).

125. *Id.* at 7-8. True to the fundamental embrace of multiple sources of governance regimes, the Commentary suggests a "smart mix of measures." *Id.* These are founded on national law, the legal and policy transposition of international law, and the advancement of voluntary measures, this last a nod in the direction of non-state social norm governance systems. *Id.*

126. For a critical discussion of these efforts and assumptions, see Backer, *supra* note 115.

businesses on respecting human rights, by providing that it "should indicate expected outcomes; advise on appropriate methods, including human rights due diligence; and help share best practices."[127] The point of guidance, as part of the state duty to protect, then, is closely tied to the responsibility of business to respect human rights.[128] But more than that, it suggests an institutional hierarchy, in which the state retains some authority, or at least obligation, to help shape and manage the social norm system of corporate governance regimes. This form of connection between the state duty and corporate responsibility is made clear in the context of the obligation to encourage corporate communication on corporate human rights performance.[129]

5.1.2.3. Operational Principles—The State-Business Nexus. The connections between the core duty of states to protect human rights, the corporate responsibility to respect human rights, and the role of international public and private actors, are developed in Guiding Principles 4 through 6. Guiding Principle 4 amalgamates the related Draft Principles 6 and 8 without substantive change. Guiding Principle 4 focuses on enterprises that are either owned or controlled by a state, or that are the recipients of substantial state aid (whether or not state-owned).[130] In both cases, the state "should take additional steps to protect against human rights abuses. . ."[131] These steps might include "requiring human rights due diligence"[132]—steps that would otherwise have a more compelling character in cases where enterprises are not state-owned.[133]

The Commentary, though modified from its draft form in some respects, does not change the focus of discussion. The Commentary is careful, again, to assuage the sensibilities of states as occupying the top of the governance hierarchy in this system.[134] But state-owned enterprises represent a nexus point for the state duty to protect and the corporate responsibility to respect human rights. Yet, given the change in Guiding Principle 1 from its draft version, it is easier to reconcile the two when incarnated in a state-owned to state-aided enterprise. Guiding Principle 1 reduces the state duty to one of protecting against human rights abuses committed by others. The corporate responsibility to respect applies only to the corporate entity and not necessarily to its owners, especially where the owners are states. As such, it makes perfect sense within this structure for states to require nothing more than a reminder to enforce their laws, even against entities in which they have an ownership or control interest, or those which they subsidize. The Commentary then appears to state the obvious—the state obligation to enforce its law (Guiding Principle 1) is made easier because managers of state-owned companies may have to report to state officials.[135]

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127. Draft Principles, *supra* note **Error! Bookmark not defined.**, at 7-8.
128. Guiding Principles, *supra* note **Error! Bookmark not defined.**, at 13-20.
129. Draft Principles, *supra* note 64, at 8.
130. Guiding Principles, *supra* note 41, at 9-10.
131. *Id.*
132. *Id.*
133. *Id*; *see also id.* at 13 discussed *infra*.
134. Indeed, the Commentary does a nice job of suggesting the hierarchical ordering of governance roles between states and business enterprises in the context of the Guiding Principle normative framework.

> States individually are the primary duty-bearers under international human rights law, and collectively they are the trustees of the international human rights regime. Where a business enterprise is controlled by the State or where its acts can be attributed otherwise to the State, an abuse of human rights by the business enterprise may entail a violation of the State's own international law obligations. Moreover, the closer a business enterprise is to the State, or the more it relies on statutory authority or taxpayer support, the stronger the State's policy rationale becomes for ensuring that the enterprise respects human rights.

Id. at 9-10.

135. The Commentary puts it this way:

> Where States own or control business enterprises, they have greatest means within their powers to ensure that relevant policies, legislation and regulations regarding respect for human rights are implemented. Senior management typically reports to State agencies, and associated government departments have greater scope for scrutiny and oversight, including ensuring that effective human rights due diligence is

On the other hand, the Commentary draws a stronger connection between the direct obligations of states, under legal and policy rationales, where the state subsidizes business enterprises.

> Where these agencies do not explicitly consider the actual and potential adverse impacts on human rights of beneficiary enterprises, they put themselves at risk—in reputational, financial, political and potentially legal terms—for supporting any such harm, and they may add to the human rights challenges faced by the recipient State.[136]

It is in this context that the Commentary suggests that "human rights due diligence is most likely to be appropriate where the nature of business operations or operating contexts pose significant risk to human rights."[137]

Guiding Principle 5 (Draft Principle 7) focuses on obligations of states with respect to business enterprises performing services that they outsource.[138] The consequences of failure to comply are identified as both reputational and legal.[139] Guiding Principle 6 (Draft Principle 9) focuses on respect for human rights by business enterprises when states engage in commercial transactions with them.[140] The only change from the Draft Principles was the inclusion, in the Commentary, of a limiting provision of the state's obligation—based on the particular obligation of a state under national and international law.[141]

5.1.2. 4. Operational Principles—Supporting Business Respect for Human Rights in Conflict Affected Areas. Guiding Principle 7 (Draft Principle 10 with minor revisions) relates to the state duty to protect human rights in conflict zones. After its justificatory introduction,[142] Guiding Principle 7 provides that states should ensure that businesses operating in conflict zones avoid involvement with human rights abuses.[143] It then offers four methods for achieving this result. These include early engagement with home-state businesses to manage their operations in the conflict zone, assistance to business in identifying and assessing the form of heightened risks of human rights abuse, denying public support and services to uncooperative home-state enterprises, and adjusting public policies and formal governance tools to enforce home-state business compliance with conduct interdictions abroad.[144] "All these measures are in addition to States' obligations under international humanitarian law in situations of armed conflict, and under international criminal law."[145]

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implemented.

Id. at 9.

136. *Id.*

137. *Id.*

138. *Id.* at 10 provides: "States should exercise adequate oversight in order to meet their international human rights obligations when they contract with, or legislate for, business enterprises to provide services that may impact upon the enjoyment of human rights."

139. *Id.* at 10. The means to avoid these consequences are to give effect to guiding Principle 2. "As a necessary step, the relevant service contracts or enabling legislation should clarify the State's expectations that these enterprises respect human rights. States should ensure that they can effectively oversee the enterprises' activities, including through the provision of adequate independent monitoring and accountability mechanisms." *Id.*

140. "States should promote respect for human rights by business enterprises with which they conduct commercial transactions." *Id.* at 10. This obligation is described as a set of "unique opportunities to promote awareness of and respect for human rights by those enterprises" with which the state engages in transactions. *Id.*

141. *Id.* The result, of course, is the potential loss of policy coherence, as the legal obligations of states under national and international law vary widely, and vary more widely still in their interpretations of even similar legal obligations.

142. "Because the risk of gross human rights abuses is heightened in conflict-affected areas . . ." *Id.* at 10-11.

143. *Id.*

144. *Id.* at 10-11, princ. 7(a)-(d).

145. *Id.* at 11, princ. 7 cmt.

This principle marks one of the conceptual outer edges of the state duty and corporate responsibility pillars of the "Protect, Respect and Remedy" Framework, at least as it touches on the current and conventional international system. Guiding Principle 7 concedes the supremacy of the state as the great active agent of enforcing collective norms. It also presumes the authority of the state to project its power through the business enterprises it controls. But it is not necessarily national power that is projected, but instead the projection of national power enforcing international norms. In essence, Guiding Principle 7 concedes the need for unilateral action by the dominant states, and their authority to provide governance in the absence of an indigenous government. In effect, the underlying principle of Guiding Principle 7 assumes the need for there to be a proper state for every territory in a world organized on the basis of states. Guiding Principle 7 provides a specific application of the extraterritorial principle of Guiding Principle 2. The state duty to protect assumes a state assigned to every territory.[146] That implicates a related issue: which state ought to step in to supply law when a territory lacks a sufficient quantum of state power? The answer, of course, is implicit in Guiding Principle 2's extraterritoriality principle. Thus, Guiding Principle 7 effectively vests the state duty to protect authority to the state that controls businesses operating in conflict or weak state zones.[147]

The Commentary makes clear that the Guiding Principles framework and the web of international norms it represents provides an exception to the principle of internal sovereignty of states where there is no strong or stable government apparatus.[148] It then suggests the contours of the obligations of states to project their power through the private market activities of corporations domiciled in their territories.[149] That state power can be projected through the parent of such corporations where local activity is carried on by a subsidiary or the obligation can be applied as well to all supply chain downstream entities, combining this Guiding Principle 7 with the insights of Guiding Principle 3(c)).[150] Such assistance can come with a sting: the Commentary suggests that states "attach appropriate consequences to any failure by enterprises to cooperate in these contexts, including by denying or withdrawing existing public support or services, or where that is not possible, denying their future provision."[151] The conflict zone principle also serves another important purpose—the management of the state's

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146. This, of course, is the basic assumption of the state system on which national and international public law regimes are currently based. *See* STEPHEN D. KRASNER, SOVEREIGNTY: ORGANIZED HYPOCRISY (1999); Thomas C. Heller & Abraham D. Sofaer, *Sovereignty: The Practitioners' Perspective*, *in* PROBLEMATIC SOVEREIGNTY: CONTESTED RULES AND POLITICAL POSSIBILITIES 24, 26-27 (Stephen Krasner ed., 2001). For a critique in the African context, *see, e.g.*, Makau Wa Mutua, *Why Redraw the Map of Africa: A Moral and Legal Inquiry*, 16 MICH. J. INT'L L. 1113, 1134 (1995).

147. "Responsible businesses increasingly seek guidance from States about how to avoid contributing to human rights harm in these difficult contexts." Guiding Principles, *supra* note **Error! Bookmark not defined.**, at 10-11, princ. 7 cmt.

148. "Some of the worst human rights abuses involving business occur amid conflict over the control of territory, resources or a Government itself–where the human rights regime cannot be expected to function as intended." *Id.*

149.

> In conflict-affected areas, the "host" State may be unable to protect human rights adequately due to a lack of effective control. Where transnational corporations are involved, their "home" States therefore have roles to play in assisting both those corporations and host States to ensure that businesses are not involved with human rights abuse, while neighboring States can provide important additional support.

Id.

150.

> Where they identify gaps, States should take appropriate steps to address them. This may include exploring civil, administrative or criminal liability for enterprises domiciled or operating in their territory and/or jurisdiction that commit or contribute to gross human rights abuses. Moreover, States should consider multilateral approaches to prevent and address such acts, as well as support effective collective initiatives.

Id.; *see also id.* at 8, princ. 3(c).

151. *Id.* The Commentary also amplifies the obligations of states in the management of their home state corporations abroad. "States should warn business enterprises of the heightened risk of being involved with gross abuses of human rights in conflict-affected areas. They should review whether their policies, legislation, regulations and enforcement measures effectively address this heightened risk, including through provisions for human rights due diligence by business." *Id.* Thus there is a strong legislative component as well here, one that mirrors the legislative obligations of states under *id.* at 8, princ. 3(b).

efforts to achieve internal and external policy coherence in line with the requirements of international human rights norms, an issue taken up explicitly in Guiding Principles 8-10.[152] The obligation to interpose itself in the territories of weak governance or conflict zones, then, is reconstituted as a part of the state duty to protect human rights. There is irony here, in deepening and extending the power of the state to protect human rights wherever there is a need. The Guiding Principles contribute to a vertically-ordered integration of states within a system in which intervention in the internal affairs of states is managed in those contexts, but it cannot or will not meet its international obligations. But those interventions are themselves bound not by the individual interests of the intervening state, but rather by the norms of international human rights. Extraterritoriality, then, as expressed in Guiding Principles 2 and 7, appear to strengthen states, but they actually serve to limit state authority to those norms having international authority.[153]

5.1.2.5. Operational Principles–Ensuring Policy Coherence. Policy coherence was an important element of the "Protect, Respect and Remedy" Framework.[154] The Guiding Principles fully devote three principles to this issue. Together, they are meant to provide a structure for the development of internal state policy (Guiding Principle 8); of external policy in the development of bi-lateral relationships between states and other actors (Guiding Principle 9); and in the multilateral relations of states (Guiding Principle 10).

Guiding Principle 8 (Draft Principle 3) looks to internal or horizontal policy coherence: "States should ensure that governmental departments, agencies and other State-based institutions that shape business practices are aware of and observe the State's human rights obligations when fulfilling their respective mandates."[155] This obligation can be effectuated in part by providing relevant governmental authorities with "relevant information, training and support."[156] The Commentary elaborates, condensing the discussion of vertical and horizontal coherence developed in the SRSG's Reports. In the process, the Commentary suggests both the realities of domestic law incoherence as a fundamental drag on the ability of a state to comply with even its indirect duty specified in Guiding Principle 1[157] and the failures of states to align their internal legal systems to their international legal obligations.[158]

There are several aspects to these principles that are worth highlighting. First, Guiding Principle 8 looks inward to the relationship of the state to its governance organs in a way that suggests a hierarchy of policy that

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152. *See also id.* at 11-12, princ. 8-10. For example, the Commentary suggests "To achieve greater policy coherence and assist business enterprises adequately in such situations, home States should foster closer cooperation among their development assistance agencies, foreign and trade ministries, and export finance institutions in their capitals and within their embassies, as well as between these agencies and host Government actors." *Id.*

153. *Id.* at 7, princ. 2. "States should consider multilateral approaches to prevent and address such acts, as well as support effective collective initiatives," *Id.* at 10-11, princ. 7 cmt.

154. *See, e.g.*, Backer, *supra* note **Error! Bookmark not defined.**, at 65.

155. Guiding Principles, *supra* note **Error! Bookmark not defined.**, at 11, princ. 8. The Commentary defines policy coherence in terms of the obligations of states:

> Horizontal policy coherence means supporting and equipping departments and agencies, at both the national and sub- national levels, that shape business practices–including those responsible for corporate law and securities regulation, investment, export credit and insurance, trade and labour–to be informed of and act in a manner compatible with the Governments' human rights obligations.

Id. at 11, princ. 8 cmt.

156. *Id.*

157. "There is no inevitable tension between States' human rights obligations and the laws and policies they put in place that shape business practices. However, at times, States have to make difficult balancing decisions to reconcile different societal needs." *Id.*

158. "Vertical policy coherence entails States having the necessary policies, laws and processes to implement their international human rights law obligations." *Id.*

places human rights at or near the top of a state's policy obligations.[159] Second, it reaches state practice at all levels of operation, irrespective of the division of power within a state. Guiding Principle 8 thus cuts across organizational structures from the division of authority between states and a federal government, to the powers reserved to regions under various incarnations of autonomy regimes.[160] Third, it also reaches, on the same principle, into the territory and law structures of semi-sovereigns, like indigenous peoples.[161] Fourth, all of these subordinate or related governance units are understood in the context of the overall obligations of Guiding Principle 1, the policy choices of which must be coordinated and subject to the hierarchy of values that privilege human rights.

Guiding Principle 9 (Draft Principle 4 without substantive change) focuses on the relationship of states with others in the context of implementing coherent policies. Guiding Principle 9 suggests that the coherence principles of Guiding Principle 8 extend externally—to the relationships between the state and other states or businesses. The Commentary describes that these "[e]conomic agreements concluded by States, either with other States or with business enterprises—such as bilateral investment treaties, free-trade agreements or contracts for investment projects—create economic opportunities for States. But they can also affect the domestic policy space of governments,"[162] a policy space that has been complicated by the recognition of the need to protect investor rights.[163]

Lastly, the capstone provision of the Principles framing the state duty to protect human rights is elaborated in Guiding Principle 10. This principle looks toward the enlargement and deepening of international legal regimes founded on the dense network of international organizations managing the growing body of collective state law (that is, of international conventional and customary law) as an alternative, and perhaps as the more legitimate substitute, for the unilateralist extraterritoriality of Guiding Principles 2 and 7.[164] But Guiding Principle 10 serves to remind that, while unilateral action is permitted, collective action has greater legitimacy. The superiority of collective state action to the unilateral action of any single state (or group of powerful states) ought to be regarded as the better alternative, both for policing weak governance zones and for developing the set of duties to which states ought to be bound.

The effect might be to cabin the extraterritoriality impulse in Guiding Principles 2 and 10. The extraterritorial insight—that extraterritoriality bounded by international principles will tend to constrain rather

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159. That hardwiring of policy balancing in favor of a state's human rights obligations is implicit through the application of Guiding Principle 1. In many cases, it is also a necessary consequence of the application of the policy ordering implicit in the constitutional systems of the state. This might be the case, for example, in Germany, with its emphasis on human dignity. *See* GRUNDGEZETZ FUR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGEZETZ] [GG] [BASIC LAW] art. 1, May 23, 1949, BGBI. I (Ger.).

160. The Commentary speaks to the obligations of coherence as extending to "both the national and sub- national levels." Guiding Principle, *supra* note **Error! Bookmark not defined.**, at 11, princ. 8 cmt. It is also understood as an element of vertical coherence. Though its focus is on the coherence of policy between the state and international community, it reaches downward as well. "Vertical policy coherence entails States having the necessary policies, laws and processes to implement their international human rights law obligations." *Id.*

161. This requires combining the breadth of Guiding Principle 8 within the overall framework principles discussed above.

162. Guiding Principle, *supra* note **Error! Bookmark not defined.**, at 12, princ. 9 cmt. ("Therefore, States should ensure that they retain adequate policy and regulatory ability to protect human rights under the terms of such agreements, while providing the necessary investor protection.")

163. The Commentary for Guiding Principle 9 differs from its draft form in one important respect—it includes an obligation to balance the human rights effects of policy and law against the need to protect investors. That has wider implications, of course, including those that touch on a state's duty to revise its corporate laws to attain policy convergence in the context of human rights. *See id.* at 8, princ. 3(b) discussed *supra*.

164. *Id.* at princ. 2, 7, 10.

than expand state discretionary authority—is made clear in Guiding Principle 10. But that impulse is also substantially constrained by the language of the Principle itself. First, the vertical ordering itself is understood in the "passive voice"—it is both weak and consequential. The Principle applies only where states are acting as members of multilateral institutions that deal with business related issues. It neither compels states to enter into such arrangements nor does it limit or order the importance of policy and legal obligations that may be derived from the actions of these institutions. To the extent that this is implied, it is buried in the Commentary of other principles.[165] Second, it treats these multilateral organizations as lacking an autonomous mission beyond the desires of the states that contribute to their organization.[166] And third, it assumes a coercively organized state system in which international organizations are used instrumentally to coerce vertical harmonization at the insistence of dominant states.[167] Multilateralism is privileged—but it is guided by advanced states and, impliedly, coercively enforced against others. Guiding Principle 10 also implies that there is a need for the most "advanced" states to lead the others to a more developed internalization of norms that have been embraced by the leading states.

This Principle is meant to create a particularly focused set of incentives for the folding of the project of human rights back to the international level through the contributions of states—as members of the community of nations—to the development of an international legal framework, which each state is then bound to incorporate into their domestic legal orders. But the Principle does this in a way that would avoid offending states. It provides a three-part structure for multilateral efforts. The first part preserves upward vertical policy coherence by governing the international institutions through which the norms constituting the substantive obligations of the state duty to protect are developed.[168] The second part ensures downward vertical policy coherence by ensuring that international institutions promote the work of states in guarding against business related abuse (though not, it seems, of state-related abuse, except perhaps when undertaken through enterprises of some sort).[169] The third part is the "Protect, Respect and Remedy" Framework that serves as the basis of substantive innovation.[170] The Guiding Principles themselves, then, serve their highest purpose as the nexus point for horizontal and vertical coherence of law and policy.[171]

5.1.3. The Corporate Responsibility to Respect Principles.

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165. *See, e.g.*, *id.* at 10, princ. 7 cmt. (a broader interpretation of which is discussed above).

166. "States retain their international human rights law obligations when they participate in such institutions." *Id.* at 12, princ. 10 cmt. The flow-through nature of these organizations is emphasized further in the Commentary. "Capacity-building and awareness-raising through such institutions can play a vital role in helping all States to fulfil their duty to protect, including by enabling the sharing of information about challenges and best practices, thus promoting more consistent approaches." *Id.*

167. "Collective action through multilateral institutions can help States level the playing field with regard to business respect for human rights, but it should do so by raising the performance of laggards. Cooperation between States, multilateral institutions and other stakeholders can also play an important role." *Id.*

168. *Id.* at 12, princ. 10(a) provides that states should "Seek to ensure that those institutions neither restrain the ability of their member States to meet their duty to protect nor hinder business enterprises from respecting human rights . . ."

169. *Id.* at 12, princ.10(b) provides that states should "Encourage those institutions, within their respective mandates and capacities, to promote business respect for human rights and, where requested, to help States meet their duty to protect against human rights abuse by business enterprises, including through technical assistance, capacity-building and awareness-raising." *Id.*

170. *Id.* at princ.10(c) ("Draw on these Guiding Principles to promote shared understanding and advance international cooperation in the management of business and human rights challenges").

171. The Commentary makes this point explicit. "These Guiding Principles provide a common reference point in this regard, and could serve as a useful basis for building a cumulative positive effect that takes into account the respective roles and responsibilities of all relevant stakeholders." *Id.* at princ. 10 cmt.

5.1.3.1. The Corporate Responsibility to Respect Human Rights: Foundational Principles. If the first ten Guiding Principles touching on the state duty to protect are grounded in the language of regulatory and political primacy and broadly sketched role in the domestication of collective, the next five Guiding Principles concerning the responsibilities of business entities take an altogether different tone. Rather than the primacy within interlocking systems of state, international, and private power that mark the Guiding Principles for the state duty to protect, Principles 11 through 15 acknowledge a subordinated regulatory role for the corporation in which the obligations of the corporation are much more specifically detailed. The General Principles move here from the language of political discourse and governance, to the social norm discourse of surveillance, monitoring, disclosure and mediation—all under the eye of the state.[172] The state duty is couched in the language of law and policy. The corporate responsibility to respect is grounded in the language of due diligence.[173]

Yet, over the course of several years' reports, the SRSG developed the quite innovative insight that corporations operate autonomously from states, that such operation is subject to a well-developed governance system rooted in global social norms, and that such behavior norms are enforceable by the community of actors through which social norms are expressed. The Corporate responsibility Guiding Principles, however, muffle that insight in the service of states and their legal orders. Because the responsibility of corporations to respect human rights does not flow entirely from states, the legal arrangements enacted by states do not serve to shield corporations from their autonomous obligations, yet the extent of that obligation is bound by the law through which the state duty to protect is itself framed. The corporate responsibility to respect human rights suggests a potent innovation in governance, yet takes only a few steps toward an innovative institutionalization within the framework of international law. The Guiding Principles retain, importantly, a nod to the significance of an autonomous basis for human rights enforcement, but are careful to retain the primacy of at least the formal ties of corporate entities to the state and its remedial mechanics.

The foundational principles were originally organized in two principles, Draft Principles 12 and13. These were divided and broadened into five principles in the final version (Guiding Principles 11through 15). Guiding Principle 11 articulates the basic standard: "Business enterprises should respect human rights."[174] The standard is then defined: "This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved."[175] The definition of the "responsibility to respect" standard of Guiding Principle 12 is particularly important in a number of respects. First, the standard is constructed in a way that emphasizes the autonomy of the rule standards for corporate responsibility, especially from the law-based system of states. The corporate responsibility consists of its own normative system, one that may interact and overlap with the legal system of states (and the international system), but one that remains separate from them as to sources of rules, the community that makes up the governance regimes subject to this autonomous responsibility, and the implementation of those governance norms. This is expressed in a number of ways. First, the Commentary stresses the autonomy of corporate social norm systems. "It exists independently of States' abilities and/or willingness to fulfill their own human rights obligations, and does not diminish those obligations."[176] Second, the corporate responsibility grounded in these social norm principles is not measured by the forms of responses required under the domestic law of states.[177] Third, the human rights social norm system,

172. *See id.* at princ. 11-15.
173. *See id.* at princ. 11-15 cmt.
174. *Id.* at princ. 11.
175. *Id.*
176. *Id.* at princ.11 cmt. ("And it exists over and above compliance with national laws and regulations protecting human rights.").
177. *Id.* ("Addressing adverse human rights impacts requires taking adequate measures for their prevention, mitigation and, where appropriate, remediation.").

which is the object of the Guiding Principles, is only a part of the social norm system applicable to entities, which the Guiding Principles is not meant to constrain.[178] Lastly, responsibility carries with it the corollary that social norms should not undermine law-based human rights obligations of states, though the suggestion, by implication, is that corporations may undermine domestic governance that is not consonant with a state's duty to respect human rights.[179]

Guiding Principle 12 (Draft Principle 12(a) substantially unchanged) provides a definition of the scope of the responsibility to respect human rights. It is meant to refer to all human rights, but at a minimum to the International Bill of Human Rights and the eight ILO core conventions.[180] The specificity accorded to the definition of internationally recognized human rights, applicable to both states and corporations in the draft version, is now confined to corporations under the responsibility to respect principles. A justification is possible: states are bound only to those international human rights to which they have acceded or to the small group of additional standards that are accorded universal applicability. Beyond that, states may have policy reasons for incorporating human rights standards, but no legal obligations, either applicable internally or enforceable by the community of nations. The Commentary also suggests that its definition is merely a minimum default rule:[181] some circumstances may warrant expansion of the definition,[182] other circumstances may require corporations to "respect the human rights of individuals belonging to specific groups or populations that require particular attention, where they may have adverse human rights impacts on them."[183]

Guiding Principle 13 (Draft Principles 12(b) and 13, modified in part), further refines the nature of the responsibility to respect human rights by describing the relationship between the scope of the responsibility and the way in which business enterprises ought to behave in relation that that standard. Guiding Principle 13 specifies negative impacts and action. First, the corporation should "[a]void causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur."[184] Second, the corporation should "[s]eek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those

178. *Id.* ("Business enterprises may undertake other commitments or activities to support and promote human rights, which may contribute to the enjoyment of rights. But this does not offset a failure to respect human rights throughout their operations.").

179. *Id.* ("Business enterprises should not undermine States' abilities to meet their own human rights obligations, including by actions that might weaken the integrity of judicial processes.")

180. *Id.* at princ. 12. The Commentary elaborates:

> An authoritative list of the core internationally recognized human rights is contained in the International Bill of Human Rights (consisting of the Universal Declaration of Human Rights and the main instruments through which it has been codified: the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights), coupled with the principles concerning fundamental rights in the eight ILO core conventions as set out in the Declaration on Fundamental Principles and Rights at Work.

Id.

181. *Id.* ("Because business enterprises can have an impact on virtually the entire spectrum of internationally recognized human rights, their responsibility to respect applies to all such rights.").

182. *Id.* ("In practice, some human rights may be at greater risk than others in particular industries or contexts, and therefore will be the focus of heightened attention. However, situations may change, so all human rights should be the subject of periodic review." This is particularly true when corporations operate in conflict zones and may acquire obligations of a public character. "Moreover, in situations of armed conflict enterprises should respect the standards of international humanitarian law.").

183. *Id.* ("In this connection, United Nations instruments have elaborated further on the rights of indigenous peoples; women; national or ethnic, religious and linguistic minorities; children; persons with disabilities; and migrant workers and their families.").

184. *Id.* at princ. 13(a).

impacts."[185] The Commentary makes clear that the intent of this principle is to gather several concepts together and frame their relationships. Its primary objective is to address the scope of business activities within the scope of the corporate responsibility to respect human rights. The Principle suggests a broad scope, covering not merely the direct actions of the entity, but also the activities that produce adverse human rights impacts "as a result of their business relationships with other parties."[186] This both softens and changes the scope of the language in the draft, Draft Principle 12(b).[187] Rather than focusing on either "supply chain" or "value chain" concepts,[188] the final version of Guiding Principle 13 focuses on the consequences of activities and its relationship with the corporation by focusing generally on activities,[189] and on the construction of a structure for determining mitigation obligations set forth in Guiding Principle 19.

Guiding Principle 14 (Draft Principles 12(c), 13, and 15, modified in part) introduces a principle of proportionality to the calculus of responsibility.[190] A significant factor in addressing proportionality is the degree of connection between the entity and the effect. That was the subject of Guiding Principle 13. Guiding Principle 14 identifies two other factors. First, proportionality is based partly on corporate capacity, which, in turn, is based on the usual indicators—size, management structures, resources and the like.[191] But there are limits; balanced against capacity are considerations of the severity of the adverse human rights impacts of corporate activity. The "severity" constraints then bring the calculus back, in part, to the issue of connection. Yet, Guiding Principle 14 adds a layer of understanding to the basic insight of Guiding Principle 13, embracing the notion that legal relationships will not affect the determination of either capacity or severity, applying to "all enterprises regardless of their size, sector, operational context, ownership and structure."[192]

The Principle importantly, then, embraces a functionalist approach, eschewing any effort to adhere strictly to the law or legal consequences of corporate or enterprise organization at the heart of the domestic legal orders of states that have chartered these enterprises. The corporate responsibility applies "to all enterprises regardless of their size, sector, operational context, ownership and structure."[193] The state's duty, of course, is limited by the requirements of its legal obligations,[194] though it has an obligation toward legal coherence in light of its legal obligations with respect to human rights.[195] The provisions are thus in tension unless one understands that the

185. *Id.* at princ. 13(b).

186. *Id.* at princ. 13 cmt.

187. Draft Principle 12(b) provided that business responsibility to respect human rights: "[a]pplies across a business enterprise's activities and through its relationships with third parties associated with those activities." *Id.* The Commentary suggested the scope of the obligation was as broad as the corporate "value chain." Draft Principles, *supra* note 64, at princ. 12 cmt.

188. These ideas, however, do make their appearance elsewhere in the Commentary. *See, e.g.*, Guiding Principles, *supra* note **Error! Bookmark not defined.**, at princ. 17 cmt., discussed *infra*. The relationship between these concepts is difficult to discern.

189.

> For the purpose of these Guiding Principles a business enterprise's "activities" are understood to include both actions and omissions; and its "business relationships" are understood to include relationships with business partners, entities in its value chain, and any other non-State or State entity directly linked to its business operations, products or services.

Id. at princ.13 cmt.

190. *Id.* at princ. 14 cmt. ("The means through which a business enterprise meets its responsibility to respect human rights will be proportional to, among other factors, its size.").

191. *Id.* ("Small and medium-sized enterprises may have less capacity as well as more informal processes and management structures than larger companies, so their respective policies and processes will take on different forms.").

192. *Id.* at princ. 14. These notions were originally in Draft Principle 15 but moved here. Draft Principles, *supra* note 64, at 15.

193. Guiding Principles, *supra* note **Error! Bookmark not defined.**, at princ. 14.

194. *Id.* at princ. 1(a).

195. *Id.* at princ. 3(b).

responsibility to respect operates polycentric way. To the extent of the relationship between corporation and state, the corporation is bound by and its responsibilities for human rights limited by the legal framework within which it operates in any territory.[196] However, as to the extent of the responsibility among corporations and non-state parties in their own governance communities, the legal framework of states is no longer a constraint under the framework principles of Guiding Principle 11.

The coherence notions explicit in the relationships between a state and its legal obligations are also suggested by this construct in the relationships between legal systems and social norm systems. There is an element of direct interaction between international norms and the identification of the social norm rules applicable to corporations. This suggests an assumption in the Guiding Principles of an implicit acceptance of international political consensus, reflected in international norms, and accurately reflected in the norm framework for corporate behavior. More importantly, it also assumes that international norms (whether or not considered "law" within or by states) stand at the head of a hierarchy of norm creation applicable to corporations. While the community of corporate actors and their stakeholders may also develop social norms that control or affect their behavior, the articulation of those norms by public international actors tends to be presumed the most authoritative expression of those norms. Thus, while the normative rule universe of corporate responsibility is autonomous of state legal systems, it is assumed to interact directly with international actors for the production (or at least the articulation) of the norms making up the responsibility to respect. And third, there is an explicit understanding that the standards applicable to conduct under legal governance regimes may be different from those under the social norm regimes of corporate responsibility. This is particularly apparent in the context of complicity. Here, norm rule autonomy is emphasized by a recognition that complicity may be triggered both under the legal standard developing under domestic and international law regimes, and otherwise under notions of corporate social norm frameworks.[197]

Guiding Principle 15 rounds out the opening set of fundamental principles that define the corporate responsibility to respect human rights, moving the focus from the standard itself to its *expression*. If states manifest their policies and behavioral expectations through law and regulation, businesses express theirs through rules, policies, and contract.[198] Guiding Principle 15 addresses the enterprise's human rights responsibilities in the elaboration of its internal governance system: "In order to meet their responsibility to respect human rights, business enterprises should have in place policies and processes appropriate to their size and circumstances."[199] Guiding Principle 15 then specifies three areas of policy that require highlighting: an articulation of a policy commitment to human rights (presumably both in its legal and social norm aspects, though that is not clear from

196. *See id.* at princ. 2.
197. *Id.* at princ. 17 cmt. It explains:

> Questions of complicity may arise when a business enterprise contributes to, or is seen as contributing to, adverse human rights impacts caused by other parties. 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.

Id.
198. *See id.* at princ. 15 cmt.
199. *Id.*

the principle itself),[200] the self-imposition of a human rights due diligence framework that is elaborated in some detail in Guiding Principles 16-24),[201] and the establishment of remediation processes.[202]

5.1.3.2. Operational Principles, Policy Commitment. The Foundational Principles of the corporate responsibility to respect human rights commit business entities to the development of a regulatory framework that operationalizes the respect commitment. Guiding Principle 16 (Draft Principle 14 substantially unmodified) focuses on the specifics of implementation. It specifies the so-called policy commitments of corporations, understood as built on the development of a policy statement with a fixed form and content.[203] It describes the five key elements of a corporate policy that embodies the responsibility to respect human rights.[204] These include policy approval at the most senior level of the business enterprise; consultation with relevant internal and external experts; a clear expression of the enterprise's expectations of personnel and business partners; effective communication of the policy internally and externally to all personnel, business partners, and relevant stakeholders; and incorporation within appropriate operational policies and procedures to embed it throughout the business enterprise.[205] These are not unusual and reflect an emerging set of practices already well incorporated in the global operation of the largest enterprises.[206] They are meant to embody, within the context of the corporate responsibility to protect, the principles of policy coherence[207] and disclosure[208] that also form part of the state duty to protect human rights.

Like legislation, policy pronouncements "should be publicly available. It should be communicated actively to entities with which the enterprise has contractual relationships; others directly linked to its operations, which may include State security forces; investors; and, in the case of operations with significant human rights risks, to the potentially affected stakeholders."[209] The Principle also suggests a proportionality standard.[210] Lastly, like states, the policy should reach from the lowest levels of operation to the highest.[211]

5.1.3.3. Operational Principles, Human Rights Due Diligence. The articulation of the governance framework provides the structure for the elaboration of the operational heart of the principles developing the corporate responsibility in Guiding Principles 17 through 21.

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200. *Id.* at princ. 15(a) ("A policy commitment to meet their responsibility to respect human rights.").

201. *Id.* at princ. 15(b) ("A human rights due-diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights."); *id.* at princ. 15 cmt. (makes this clear: "Business enterprises need to know and show that they respect human rights. They cannot do so unless they have certain policies and processes in place. Principles 16 to 24 elaborate further on these.").

202. *Id.* at princ. 15(c) ("Processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute.").

203. *Id.* at princ. 16 ("As the basis for embedding their responsibility to respect human rights, business enterprises should express their commitment . . . through a statement of policy.").

204. *Id.* at princ. 16(a)-(e).

205. *Id.*

206. For a discussion in the context of the operations of Wal-Mart, *see*, Larry Catá Backer, *Economic Globalization and the Rise of Efficient Systems of Global Private Law Making: Wal-Mart as Global Legislator*, 39 U. CONN. L. REV. 1739 (2007).

207. Guiding Principles, *supra* note **Error! Bookmark not defined.**, at princ. 16 cmt. ("Just as States should work towards policy coherence, so business enterprises need to strive for coherence between their responsibility to respect human rights and policies and procedures that govern their wider business activities and relationships.").

208. *Id.* ("The term 'statement' is used generically, to describe whatever means an enterprise employs to set out publicly its responsibilities, commitments, and expectations.").

209. *Id.*

210. *Id.* ("The level of expertise required to ensure that the policy statement is adequately informed will vary according to the complexity of the business enterprise's operations.").

211. *Id.* This imports the notion of embedding from the "Protect, Respect and Remedy" Framework. "Through these and any other appropriate means, the policy statement should be embedded from the top of the business enterprise through all its functions, which otherwise may act without awareness or regard for human rights." *Id.*

A corporation's commitment to human rights, grounded in the Guiding Principles framework, is evidenced by and measured against a set of requirements identified as *human rights due diligence*.[212] These detail the obligation of corporate human rights due diligence as the central operational feature of the corporate responsibility to respect. Human rights due diligence has four broad objectives: "to identify, prevent, mitigate and account for how they address their adverse human rights impacts . . . ."[213] Human rights due diligence must be directed to four principle functions: "assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed."[214] These objectives of human rights due diligence may be incorporated in other corporate monitoring and reporting systems, as long as they do not lose their distinctive character.[215] The diligence aspects should be ongoing and oriented ex ante.[216]

The extent of human rights due diligence is grounded in the fundamental scope rules of corporate responsibility as a whole. These limitations touch on three issues. First is the issue of coverage.[217] Second is a focus on issues of complexity and context of operations.[218] Third is the issue of time horizons in human rights due diligence.[219] It is in the context of coverage that the issue of supply and value chain liability resurfaces, mitigating liability where the connection between the corporation and the entity directly responsible are either too remote or where a control or influence relationship is unreasonable.[220] It also serves to develop a principle of corporate complicity for the adverse human rights impacts of others—including states.[221] The Commentary emphasizes the effects of polycentricity in the context of corporate liability. With respect to complicity, corporations must be aware of the distinct bases for complicity liability under legal regimes[222] and under social norm regimes.[223] There

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212. *Id.* at princ. 17.

213. *Id.*

214. *Id.*

215. "Human rights due diligence can be included within broader enterprise risk-management systems, provided that it goes beyond simply identifying and managing material risks to the company itself, to include risks to rights-holders." *Id.* at princ. 17 cmt.

216. Thus, the Commentary suggests that "due diligence should be initiated as early as possible in the development of a new activity or relationship, given that human rights risks can be increased or mitigated already at the stage of structuring contracts or other agreements, and may be inherited through mergers or acquisitions." *Id.*

217. Human Rights due diligence "[s]hould cover adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships." *Id.* at princ. 17(a).

218. Human rights due diligence "[w]ill vary in complexity with the size of the business enterprise, the risk of severe human rights impacts, and the nature and context of its operations." *Id.* at princ. 17(b).

219. Human rights due diligence "[s]hould be ongoing, recognizing that the human rights risks may change over time as the business enterprise's operations and operating context evolve." *Id.* at princ. 17(c).

220. "Where business enterprises have large numbers of entities in their value chains it may be unreasonably difficult to conduct due diligence for adverse human rights impacts across them all." *Id.* at princ. 17 cmt. In those cases, corporations are advised to focus on issues with greatest human rights impacts effects, including: "general areas where the risk of adverse human rights impacts is most significant, whether due to certain suppliers' or clients' operating context, the particular operations, products or services involved, or other relevant considerations, and prioritize these for human rights due diligence." *Id.*

221. "Questions of complicity may arise when a business enterprise contributes to, or is seen as contributing to, adverse human rights impacts caused by other parties." *Id.* at princ. 17 cmt.

222. The Commentary states:

> 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 cases. Typically, civil actions can also be based on an enterprise's alleged contribution to a harm, although these may not be framed in human rights terms.

Id. at princ. 17 cmt. The Commentary suggests a movement toward a consensus on "aiding and abetting" standards for civil liability. *Id.*

223. "As a non-legal matter, business enterprises may be perceived as being 'complicit' in the acts of another party

is irony here because the complicity relationship appears to proceed only in one direction.[224] Moreover, states' retention of control over the application of their legal obligations, including those relating to issues of complicity, can substantially affect the success of efforts to harmonize approaches. In the absence of harmonization of complicity principles among states, non-state actors can act strategically to minimize the impact of these principles on their operations. The connection between legal and social norm governance produces a tension for the human rights due diligence project that is recognized but not resolved.[225]

This tension is common to supra-national soft law systems with a polycentric element, absent substantial harmonization between the legal regimes applied in a specific state and the global social norms applied under soft law regimes. This was recently illustrated in the context of both procedural[226] and substantive[227] rules under the OECD Guidelines for Multinational Corporations as then in effect.[228]

The specific contents of human rights due diligence are then elaborated in Guiding Principles 18 through 21. These Principles are meant to provide more concrete guidance to enterprises that wish to undertake human rights due diligence within the Guiding Principles framework. Guiding Principle 18 (Draft Principle 16 substantively unmodified in significant respect) specifies the outputs of human rights due diligence by elaborating on issues of identification and assessment in human rights due diligence programs.[229] Following the guidance of Guiding Principle 17, Guiding Principle 18 specifies that assessment: (1) be undertaken in advance of action that might have a negative impact on human rights; (2) should identify those potentially affected and the issues the proposed action raises; (3) should identify the relevant substantive standards that might be applied; and (4) undertake to understand the specific nature of the adverse human rights impact.[230]

The Guiding Principles explain that such systems should utilize internal or external human rights experts and other resources. Systems should also seek to engage "with potentially affected groups and other relevant stakeholders," the latter with an explicit proportionality principle.[231] Assessment is required periodically and

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where, for example, they are seen to benefit from an abuse committed by that party." *Id.*

224. *See* discussion *supra* of Guiding Principles 4-6.

225. The Commentary explains:

> 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. However, business enterprises conducting such due diligence should not assume that, by itself, this will automatically and fully absolve them from liability for causing or contributing to human rights abuses.

Guiding Principles, *supra* note **Error! Bookmark not defined.**, at princ. 17 cmt.

226. *See* Larry Catá Backer, *Part I: The OECD, Vedanta, and the Supreme Court of India–Polycentricity in Transnational Governance–The Issue of Standing*, LCBACKER BLOG (Nov. 1, 2009, 5:05 PM), http://lcbackerblog.blogspot.com/2009/11/part-i-oecd-vedanta-and-supreme-court.html.

227. *See* Larry Catá Backer, *Part II: The OECD, Vedanta, and the Indian Supreme Court–Polycentricity in Transnational Corporate Governance and John Ruggie's Protect/Respect Framework*, LCBACKER BLOG (Nov. 3, 2009, 2:54 PM), http://lcbackerblog.blogspot.com/2009/11/part-ii-oecd-vedanta-indian-supreme.html.

228. *See* OECD, *supra* note **Error! Bookmark not defined.**, at pt. I, ch. IV.

229. "In order to gauge human rights risks, business enterprises should identify and assess any actual or potential adverse human rights impacts with which they may be involved either through their own activities or as a result of their business relationships." Guiding Principles, *supra* note **Error! Bookmark not defined.**, at princ. 18.

230. *Id.* "In this process, business enterprises should pay special attention to any particular human rights impacts on individuals from groups or populations that may be at heightened risk of vulnerability or marginalization, and bear in mind the different risks that may be faced by women and men." *Id.*

231. *Id.* at princ. 18(a)-(b).

when there is a material change in operations.[232] This policy is similar to those triggering disclosure under the U.S. federal securities laws.[233] The stakeholder engagement provision in Guiding Principle 18 is broadly written to permit the use of civil society actors as legitimate intermediaries where direct engagement is not possible. But it leaves unresolved the issue of third party representative legitimacy or liability by civil society for misrepresenting either their authority to represent or their fidelity to the interests of those they represent.[234]

"The assessment of human rights impacts informs subsequent steps in the human rights due diligence process."[235] Guiding Principles 19 through 21 then move the process forward. Guiding Principle 19 (Draft Principle 17) shifts attention from outputs to action, identifying the two things a corporation must undertake in the face of an adverse human rights impact of its activities.[236] First, a corporation must assess the impact of the action,[237] and it must then take appropriate action on the basis of the assessment.[238] The objective is to prevent and mitigate potential adverse human rights effects of corporate activity by creating a structure by which assessments can be given effect.[239] The Principle makes a distinction between impacts to which the company (or its supply chain) have directly contributed and those where the connection is more indirect. Remediation (or prevention) is required for the former,[240] but a more nuanced approach is permitted for the latter.[241] The Commentary suggests that the corporation ought to rely on outsiders where the factors to be balanced in its risk,

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232. The Commentary explains:

> Because human rights situations are dynamic, assessments of human rights impacts should be undertaken at regular intervals: prior to a new activity or relationship; prior to major decisions or changes in the operation (e.g. market entry, product launch, policy change, or wider changes to the business); in response to or anticipation of changes in the operating environment (e.g. rising social tensions); and periodically throughout the life of an activity or relationship.

Id. at princ. 18 cmt.

233. The Guiding Principle disclosure requirements are less formal than those outlined in the United States' Securities Exchange Act of 1934 but follow the same periodic reporting rationale. United States corporations report annually (Form 10-K), quarterly (Form 10-Q), and as needed if material events of importance to investors and security holders warrant. *See* 15 U.S.C. §§ 78M, O(d) (2006).

234. "In situations where such consultation is not possible, business enterprises should consider reasonable alternatives such as consulting credible, independent expert resources, including human rights defenders and others from civil society." Guiding Principles, *supra* note **Error! Bookmark not defined.**, at princ. 18 cmt.

235. *Id.*

236. "In order to prevent and mitigate adverse human rights impacts, business enterprises should integrate the findings from their impact assessments across relevant internal functions and processes, and take appropriate action." *Id.* at princ. 19.

237. *Id.* at princ. 19(a).

238. *Id.* at princ. 19(b).

239. The Commentary states:

> The horizontal integration across the business enterprise of specific findings from assessing human rights impacts can only be effective if its human rights policy commitment has been embedded into all relevant business functions. This is required to ensure that the assessment findings are properly understood, given due weight, and acted upon.

Id. at princ. 19 cmt.

240. "Where a business enterprise contributes or may contribute to an adverse human rights impact, it should take the necessary steps to cease or prevent its contribution and use its leverage to mitigate any remaining impact to the greatest extent possible." *Id.* at princ. 19 cmt.

241. The Commentary suggests a more complex calculus, grounded by balancing "the enterprise's leverage over the entity concerned, how crucial the relationship is to the enterprise, the severity of the abuse, and whether terminating the relationship with the entity itself would have adverse human rights consequences." *Id.* at princ. 19 cmt. The standard does not require legal precision because no legal standard is invoked. Thus, concepts of "leverage" play into the calculus in ways that might not have been appropriate, either under the first pillar state duty to protect or with respect to the extent of the corporate responsibility beyond the corporation itself. *Id.* ("Leverage is considered to exist where the enterprise has the ability to effect change in the wrongful practices of an entity that causes a harm.").

impact, and action assessments are complex.[242] A hierarchy of responsive action in the face of assessment suggests adverse human rights impacts of corporate activity proposed or undertaken.[243]

Guiding Principle 20 (Draft Principle 18 modified in part) adds a verification requirement.[244] The specified method of verification is tracking, which is required to exhibit two characteristics. First, it ought to "[b]e based on appropriate qualitative and quantitative indicators."[245] Second, it should "[d]raw on feedback from both internal and external sources, including affected stakeholders."[246] Principle 20 dropped an additional requirement that appeared in the draft version—that it "[i]nform and support continuous improvement processes."[247] The Principles understand verification as serving an important surveillance function—tracking and analysis.[248] There is an expectation that data will be harvested from all phases of the human rights due diligence process and all contacts with affected stakeholders.[249] The Commentary urges integration into relevant reporting processes with a cross-reference to the corporation's remediation obligations.[250]

The surveillance obligations of human rights due diligence elaborated in Guiding Principle 20 lead to the disclosure and transparency requirements set forth in Guiding Principle 21 (modifying Draft Principle 19). This provision focuses on accountability through communication.[251] That communication is initially directed toward external, informal, and episodic communication when triggered by stakeholder concerns, but is also understood to

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242. "The more complex the situation and its implications for human rights, the stronger is the case for the enterprise to draw on independent expert advice in deciding how to respond." *Id.*

243. The Commentary speaks of these as involving the use of leverage—in an effort to contrast, perhaps, the law based discourse of ameliorative measured imposed on, by, and through states. It is a curious framework all the same. Irrespective of its value as a framing device, the hierarchy consists of prevention first, then mitigation (which might be augmented by obligations to capacity building among stakeholders), followed by terminating the relationship or activity causing the adverse human rights impact, "taking into account credible assessments of potential adverse human rights impacts of doing so." *Id.* Relationships crucial to the enterprise are subject to a different set of factor balancing, focused on the severity of the abuse. *See id.*

244. "In order to verify whether adverse human rights impacts are being addressed, business enterprises should track the effectiveness of their response." *Id.* at princ. 20.

245. *Id.* at princ. 20(a).

246. *Id.* at princ. 20(b).

247. Draft Principles, *supra* note **Error! Bookmark not defined.**, at princ. 18(c).

248. "Tracking is necessary in order for a business enterprise to know if its human rights policies are being implemented optimally, whether it has responded effectively to the identified human rights impacts, and to drive continuous improvement." Guiding Principles, *supra* note 41, at princ. 20 cmt. The tracking element is particularly important with respect to groups most likely to suffer adverse human rights impacts from corporate activity. "Business enterprises should make particular efforts to track the effectiveness of their responses to impacts on individuals from groups or populations that may be at heightened risk of vulnerability or marginalization." *Id.* at princ. 18 cmt.

249. The Commentary explains:

> Business enterprises might employ tools they already use in relation to other issues. This could include performance contracts and reviews as well as surveys and audits, using gender disaggregated data where relevant. Operational-level grievance mechanisms can also provide important feedback on the effectiveness of the business enterprise's human rights due diligence from those directly affected.

Id. at princ. 20 cmt.

250. *Id.* This suggestion, of course, must be read together with the earlier caution in the Guiding Principles about subsuming human rights due diligence within the risk management protocols of a business entity. *See, e.g.*, *id.* at princ. 17 cmt.

251. "Communication can take a variety of forms, including in-person meetings, online dialogues, consultation with affected stakeholders, and formal public reports. Formal reporting is itself evolving, from traditional annual reports and corporate responsibility/sustainability reports, to include on-line updates and integrated financial and non-financial reports." *Id.* at princ. 21 cmt.

include a formal reporting component for business enterprises "whose operations or operating contexts pose risks of severe human rights impacts . . . ."[252]

The final version of Principle 21 dropped an earlier suggestion that reporting should be regular,[253] substituting a more flexible, context-based requirement.[254] The frequency and form of disclosure is a function of the severity of the human rights impacts.[255] The object is not general transparency, but rather merely "a measure of transparency and accountability to individuals or groups who may be impacted and to other relevant stakeholders, including investors."[256]

5.1.3.4. Operational Principles, Remediation. The single principle that comprises this section considers the situation where assessment and ex ante action is insufficient. Guiding Principle 22 (Draft Principle 20 substantially unmodified) provides: "Where business enterprises identify that they have caused or contributed to adverse impacts, they should provide for or cooperate in their remediation through legitimate processes."[257] This Principle articulates a simple liability standard for failures to respect human rights. The obligation to remediate is tied to the principal human rights due diligence obligation, though not limited by it.[258] In the draft version of this provision, the liability standard was not grounded in the law of any state. Nor was it dependent on the operation of a particular domestic legal order, either to determine liability or to calculate the measure of damages.[259] As a functional part of the autonomous responsibility to respect, these obligations flow directly from the autonomous imposition of responsibility of the second pillar. Yet, the processes of remediation are substantially meant to be tethered to the state apparatus, at least when injury is substantial.[260] The reason for this was simple and directly stated–a fear that in the absence of "vouching" by the organs of the state, the processes for remediation would be illegitimate.[261]

The final version of Principle 22 appears to be less autonomous. The Commentary describes the standard as "active engagement," which might be understood as something less than the "help ensure" standard in the draft Commentary. The reference to resort to operational level grievances remains the same.[262] Yet,

> [w]here adverse impacts have occurred that the business enterprise has not caused or contributed to, but which are directly linked to its operations, products or services by a business

252. *Id.* at princ. 21.

253. "Periodic public reporting is expected of those business enterprises whose activities pose significant risks to human rights . . . ." Draft Principles, *supra* note **Error! Bookmark not defined.**, at princ. 19 cmt.

254. Reporting should "[b]e of a form and frequency that reflect an enterprise's human rights impacts and that are accessible to its intended audiences." Guiding Principles, *supra* note **Error! Bookmark not defined.**, at princ. 21(a).

255. "Formal reporting by enterprises is expected where risks of severe human rights impacts exist, whether this is due to the nature of the business operations or operating contexts." *Id.* at princ. 21 cmt.

256. *Id.*

257. *Id.* at princ. 22. "Some situations, in particular where crimes are alleged, typically will require cooperation with judicial mechanisms." *Id.* at princ. 22 cmt.

258. "Where a business enterprise identifies such a situation, whether through its human rights due diligence process or other means, its responsibility to respect human rights requires active engagement in remediation, by itself or in cooperation with other actors." *Id.*

259. *See* Draft Principles, *supra* note **Error! Bookmark not defined.**, at princ. 20 cmt.

260. "Business enterprises should have procedures in place to respond to such situations directly, where appropriate, and where possible should address problems before they escalate." *Id.*

261. That vouching is effected through the third pillar principles covering the remedial right to be treated below. "Operational-level grievance mechanisms for those potentially impacted by the business enterprise's activities can be an effective means of providing for such procedures when they meet certain core criteria, as set out in Principle 29." *Id.*

262. "Operational-level grievance mechanisms for those potentially impacted by the business enterprise's activities can be one effective means of enabling remediation when they meet certain core criteria, as set out in Principle 31." Guiding Principles, *supra* note **Error! Bookmark not defined.**, at princ. 22 cmt.

> relationship, the responsibility to respect human rights does not require that the enterprise itself provide for remediation, though it may take a role in doing so.[263]

This values (or supply chain remediation amelioration) provision would have been hard to reconcile with the Draft Principles' emphasis on supply chain responsibility. But having moved supply and value chain responsibility into the operational provisions and having strengthened and broadened the application of the proportionality rules, it is now more likely that a larger set of human rights impacts may not be subject to a remediation requirement in the ultimate parent corporation.

5.1.3.5. Operational Principles, Issues of Context. The last two principles that make up the corporate responsibility to respect human rights target issues of context. Guiding Principle 23 (modifying Draft Principle 23) speaks to the legal obligations of the corporation within a polycentric context in which the governance norms applicable to it may not harmonize. It first recognizes the primacy of the state and domestic law over international law where a corporation is faced with conflicting issues of compliance.[264] It then suggests that, having honored the primacy of domestic law, corporations have a responsibility to honor—even if not obligated to comply with—internationally recognized human rights.[265] The standard tracks the concepts and principles approach of the OECD's Guidelines for Multinationals that was constructed to the same effect.[266] And lastly, corporations must treat all risk of gross human rights abuses, whether arising from legal or social norm standards, as a legal issue throughout their operations.[267]

The Commentary emphasizes several points. First, all business enterprises have the same responsibility to respect human rights, though application will vary widely in context. All businesses first have a duty to comply with domestic law that is applicable. That leaves open and unresolved the equally compelling obligation to comply with the extraterritorially applicable laws of home state regulators. The Commentary is silent on conflicts between the two. In the case of conflict between domestic and international law, business enterprises must comply with domestic law and find a way to honor the principles of international law, especially "the principles of internationally recognized human rights to the greatest extent possible in the circumstances, and to be able to demonstrate their efforts in this regard."[268] The Commentary supports the proposition that business enterprises treat human rights impacts as legal issues, "given the expanding web of potential corporate legal liability arising from extraterritorial civil claims, and from the incorporation of the provisions of the Rome Statute of the International Criminal Court in jurisdictions that provide for corporate criminal responsibility."[269] Yet this also complicates the simple hierarchy posed between domestic and international law set out in Guiding Principle 23(a), suggesting situations where compliance with domestic law might constitute a violation of international law that is subordinated to domestic law in the territory where it is enforced, but where that hierarchy is reversed elsewhere.

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263. *Id.*

264. Business entities should "[c]omply with all applicable laws and respect internationally recognized human rights, wherever they operate." *Id.* at princ. 23(a).

265. The language is curious; business enterprises should "seek ways to honour the principles of internationally recognized human rights when faced with conflicting requirements." *Id.* at princ. 23(b).

266 See OECD, Guidelines for Multinational Enterprises (2011), Concepts and Principles, para2. This provisions starts, like the GP, with an overarching obligation to obey the state of the state in which the entity is operating. "However, in countries where domestic laws and regulations conflict with the principles and standards of the Guidelines, enterprises should seek ways to honour such principles and standards to the fullest extent which does not place them in violation of domestic law." (Id)..

267. Business enterprises should "[t]reat the risk of causing or contributing to gross human rights abuses as a legal compliance issue wherever they operate." *Id.* at princ. 23(c).

268. Guiding Principles, *supra* note **Error! Bookmark not defined.**, at princ. 23 cmt.

269. *Id.* "In addition, corporate directors, officers and employees may be subject to individual liability for acts that amount to gross human rights abuses." *Id.*

In this case, polycentricity presents a potential trap. Special considerations apply in conflict zones—where the corporation may be called on to exercise augmented obligations and thus face potentially augmented liability regimes.[270] Finally, the utility of reliance on experts, emphasized in other corporate responsibility principles, is extended to issues of legal compliance.[271]

In draft form, this principle spoke to issues of operationalization standards for the human rights due diligence framework grounded in two action vectors—first the size of the enterprise, and second, the severity of human rights impacts.[272] These identify baseline rules for the implementation of context-specific action principles. The baseline includes four factors. The first touches on the heightened obligation to substitute for the host state with respect to the observation of internationally recognized human rights in weak states.[273] This parallels the state duty to project government into weak states or conflict zones.[274] The second obligates companies to "honor" human rights principles "where domestic legal compliance may undermine their responsibility to respect."[275] The third reminds entities that the responsibility applies in conflict zones.[276] And the fourth suggests that issues of human rights compliance are transformed into more conventional issues of legal compliance (under international law or the law of the relevant domestic legal order) where the conduct risks, causes, or contributes to international crimes.[277]

Finally, Guiding Principle 24 (Draft Principle 22) provides basic rules of prioritization. Where priority is necessary, the "business enterprises should first seek to prevent and mitigate those that are most severe or where delayed response would make them irremediable."[278] The context for prioritization is simultaneity,[279] but it

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270. "Some operating environments, such as conflict-affected areas, may increase the risks of enterprises being complicit in gross human rights abuses committed by other actors (security forces, for example)." *Id.*

271. "In assessing how best to respond, they will often be well advised to draw on not only expertise and cross-functional consultation within the enterprise, but also to consult externally with credible, independent experts, including from governments, civil society, national human rights institutions and relevant multi-stakeholder initiatives." *Id.*

272. "[T]he scale and complexity of policies and processes for ensuring that business enterprises respect human rights will vary according to the enterprises' size and the severity of their human rights impacts . . . ." Draft Principles, *supra* note **Error! Bookmark not defined.**, at princ. 21.

273. *Id.* at princ. 21(a). "Observe internationally recognized human rights also where national law is weak, absent or not enforced." *Id.*

274. *See* Guiding Principles, *supra* note **Error! Bookmark not defined.**, at princ. 10; *see also* discussion *supra* Part III.B.

275. Draft Principles, *supra* note **Error! Bookmark not defined.**, at princ. 21(b). The Commentary notes: "Where legal compliance with domestic law puts the business enterprise in the position of potentially being involved in gross abuses such as international crimes, it should consider whether or how it can continue to operate with integrity in such circumstances." *Id.* at princ. 21 cmt.

276. *Id.* at para. 21(c). The Commentary reminds entities of their potential exposure to action under international criminal law in such situations where they are not careful.

> Some operating environments, such as conflict affected areas, may increase the risks of enterprises contributing to, or being complicit in, international crimes committed by other actors (for example, war crimes by security forces). Prudence suggests that companies should treat this risk as a legal compliance issue, given the expanding web of potential corporate legal liability arising from extraterritorial civil claims, and in the criminal sphere from the incorporation of the provisions of the Rome Statute of the International Criminal Court in jurisdictions that provide for corporate criminal responsibility.

Id. at princ. 21 cmt.

277. *Id.* at princ. 21(d). The Commentary suggests consultation with experts, and defines them broadly to include civil society actors. *Id.* at princ. 21 cmt.

278. Guiding Principles, *supra* note **Error! Bookmark not defined.**, at princ. 24.

279. "While business enterprises should address all their adverse human rights impacts, it may not always be possible to address them simultaneously." *Id.* at princ. 24 cmt.

applies only where specific legal guidance is unavailable, or better perhaps, unavailing.[280] And context is privileged; the severity of human rights is not measured against absolute values.[281]

Taken together, the corporate responsibility to respect principles drafts a more complex and dynamic governance framework that accepts a subordination to the law-state system described in the first ten principles, but which also suggests the outline of an autonomous governance framework beyond that, tied to the development of international (rather than national) norms. But such a framework requires structure, and the corporate responsibility to respect principles seeks to sketch one out—based on governance through the construction of policy systems and implementation through the human rights due diligence device. Nonetheless, both the state duty and the corporate responsibility require systems of resolving disputes and remediating adverse human rights effects for which they are responsible. It is to the construction of these systems that the final provisions of the Guiding Principles turn.

5.1.4 Access to Remedy Principles

5.1.4.1. Foundational Principles. The Guiding Principles describing the remedial obligations of states and corporations[282] present the most potentially dynamic element of the Guiding Principles framework. Yet, one must look carefully to extract that dynamic element from within the formal framing of remedial principles within the state and its dispute resolution apparatus. Reflecting the fundamental postulate of the primacy of states within the construct, the remedial prong of the "Protect, Respect and Remedy" Framework tends to filter substantially all remedial mechanics through the state, relegating alternative disputes mechanics to a subsidiary or residual space. Though corporations are accorded a limited role for remedial programs,[283] the subordination of those programs to the remedial power of states remains quite evident. States, under this framework, remain the paramount legitimating source and force for resolving disputes, settling claims and determining rights. Corporations may mediate harm, and may anticipate and remediate problems before they rise to the level of justiciable injury, but their role is clearly secondary. The effect on the ability of corporations, along with other non-state actors to develop social norm-based remediation structures is thereby marginalized and diminished. So, perhaps, is the structural integrity of the remedial pillar as an autonomous foundation for the governance of the adverse human rights effects of state or corporate action.

The hierarchy producing tone of the remedial pillar is set quite clearly in Guiding Principle 25 (Draft Principle 23 substantively unmodified). States (but not corporations or other entities with duties or responsibilities under the Guiding Principles) are charged with the obligation to "take appropriate steps" to ensure access to effective remedy by those affected by business related human rights abuses.[284] The obligation to take such steps is triggered when abuses occur within their territories or—in a nod to the extraterritoriality

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280. "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." *Id.* The Draft version included impacts "where the risk of irremediable impact is high." Draft Principles, *supra* note **Error! Bookmark not defined.**, at princ. 22 cmt.

281. "Severity is not an absolute concept in this context, but is relative to the other human rights impacts the business enterprise has identified." Guiding Principles, *supra* note **Error! Bookmark not defined.**, at princ. 24 cmt.

282. *See id.* at princ. 25-31; *see also* Draft Principles, *supra* note **Error! Bookmark not defined.**, at princ. 23-29.

283. *See* Guiding Principles, *supra* note **Error! Bookmark not defined.**, at princ. 28-30; *see also* Draft Principles, *supra* note **Error! Bookmark not defined.**, at princ. 26-28. All of which are closely tied to the foundational principle embracing the idea of the supremacy of the state and its domestic legal orders as the primary site of dispute resolution for human rights claims. *See* Guiding Principles, *supra* note **Error! Bookmark not defined.**, at princ. 25; *see also* Draft Principles, *supra* note **Error! Bookmark not defined.**, at princ. 20.

284. Guiding Principles, *supra* note **Error! Bookmark not defined.**, at princ. 25.

provisions that occur throughout the Guiding Principles—within their jurisdiction.[285] Appropriate steps may be effectuated through "judicial, administrative, legislative or other appropriate means."[286]

The Commentary elaborates the key points. The central focus is on the intimate and direct connection between the duty of states to protect (Guiding Principles 1 through 10) and the remedial principles of this section.[287] It follows conventional Western thinking by dividing the remedial provision into two parts—a procedural and a substantive element.[288] But the procedural and the substantive elements produce a potential tension with the fundamental proposition—that the remedial element is a core obligation encompassed *within* the domestic legal orders of states and the more innovative intimations of the Guiding Principles that suggest a conflation between the rule frameworks of the domestic legal order and international hard and soft law approaches. The objective is clear and laudable—to space as large a space as possible for the development of transnational systems of procedural and substantive remedies—but the form produces a conflation of irreconcilable systems (at least at a formal law based level) that diminishes the system-forming value of this part of the Guiding Principles. The confusion suggests a disjunction between the state-favoring thrust of the Principle, and the more flexible and broad grievance-resolving structure of the Commentary.

Consider, for example, the procedural element. The overarching structure is conventional enough—"Procedures for the provision of remedy should be impartial, protected from corruption and free from political or other attempts to influence the outcome."[289] This is consonant with the black letter of the principle, elaborating a formal state-based process structure. But further generalized as "grievance mechanisms," the procedural element of access to remedy grounded in the obligations of states takes a curious turn.[290] First, it turns the focus of the principle from the State (a limiting condition of the black letter of GP Principle 25) to corporations and other non-state actors.[291] Second, it contemplates administration by a host of organs and use of a variety of methods,[292] some

285. *Id.*
286. *Id.*
287. "Unless States take appropriate steps to investigate, punish and redress business-related human rights abuses when they do occur, the State duty to protect can be rendered weak or even meaningless." *Id.* at princ. 25 cmt.
288. "Access to effective remedy has both procedural and substantive aspects." *Id.*
289. *Id.*
290. Recall, for these purposes, the overarching general principle that must be read into Guiding Principle 25 and its Commentary: "States' existing obligations to respect, protect and fulfil [*sic*] human rights and fundamental freedoms . . . ." *Id.* at 6.
291. "The term grievance mechanism is used to indicate any routinized, State-based or non-State-based, judicial or non-judicial process through which grievances concerning business-related human rights abuse can be raised and remedy can be sought." *Id.* at princ. 25 cmt.
292.

> State-based grievance mechanisms may be administered by a branch or agency of the State, or by an independent body on a statutory or constitutional basis. They may be judicial or non-judicial . . . Examples include the courts, . . . labour tribunals, [n]ational [h]uman [r]ights institutions, National Contact Points under the [OECD] Guidelines for Multinational Enterprises, many ombudsperson offices, and [g]overnment-run complaints offices.

Id.

of which may not be legitimate within the particular domestic legal order of a state (or at a minimum strictly restricted in jurisdiction),[293] or be accorded no legal effect within the domestic legal orders of states.[294]

The substantive element discussion in the Commentary also elaborates this curious tension. It prescribes a flexible range of remedies[295] that, again, may include choices unavailable under the laws of a state to which the duty applies.[296] More broadly, the definition of grievance, while in line with a foundational remedial approach that recognizes the autonomy and legitimacy of both law-based and social norm grievance mechanisms, spills out far beyond the limits inherent in both the General Principles and the state-based structure of the black letter of Guiding Principle 25 itself.[297]

Of course, the Commentary to Principle 25 may be read, in this respect, as purely descriptive, rather than proscriptive. One can then understand the Commentary as merely describing the potential ranges of process and substantive approaches, rather than prescribing the implementation of the full range of processes and remedies described—the actual availability of any of the suggestions remaining dependent on the domestic legal order of the state in which the remedy is sought (or is available). But there is a sense that a proscriptive approach is favored. Thus, for example, the Commentary presumes the possibility of positive obligations with respect to remedies.[298]

This proscriptive sense is deepened by a further oddity about Guiding Principle 25. Having devoted a substantial amount of effort to constructing a state-based remedial framework with perhaps a hint of supra-national bases for the outer bounds of remedial authority, the Commentary then hints that the system itself is part of a larger polycentric system of remediation in which the state plays a role, but not necessarily the only role. While

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293. In the United States, for example, the resort to indigenous courts and court systems is both highly restricted and highly politicized. It has spawned a cottage industry of lawyers and policy activists on both sides of the issue of the extent and power of Indian Court systems. *See, e.g.*, Steven J. Gunn, *Contemporary and Comparative Perspectives on the Rights of Indigenous Peoples*, 19 WASH. U. J.L. & POL'Y 155, 161 (2005); Ralph W. Johnson, *Fragile Gains: Two Centuries of Canadian and United States Policy Toward Indians*, 66 WASH. L. REV. 643, 644 (1991); Laurie Reynolds, *Adjudication in Indian Country: The Confusing Parameters of State, Federal, and Tribal Jurisdiction*, 38 WM. & MARY L. REV. 539 (1997); Alex Tallchief Skibine, *The Dialogic of Federalism in Federal Indian Law and the Rehnquist Court: The Need for Coherence and Integration*, 8 TEX. J. C.L. & C.R. 1 (2003).

294. The reference to the National Contact Points under the Guidelines for Multinational Enterprises of the Organization for Economic Cooperation and Development provides a case in point. *See, e.g.*, Backer, *supra* note **Error! Bookmark not defined.**, at 258-307. The Commentary does acknowledge the limiting effects of reliance of State law-systems as the foundation of remedial rights: "State-based grievance mechanisms may be administered by a branch or agency of the State, or by an independent body on a statutory or constitutional basis." Guiding Principles, *supra* note **Error! Bookmark not defined.**, at princ. 25 cmt. But it then conflates what many domestic legal orders deploy separately—remedial systems and soft law systems in which neither jurisdiction nor remedial authority is mandated.

295.

> The remedies provided by the grievance mechanisms discussed in this section may take a range of substantive forms the aim of which, generally speaking, will be to counteract or make good any human rights harms that have occurred. Remedy may include apologies, restitution, rehabilitation, financial or non-financial compensation and punitive sanctions (whether criminal or administrative, such as fines), as well as the prevention of harm through, for example, injunctions or guarantees of non-repetition.

Guiding Principles, *supra* note **Error! Bookmark not defined.**, at princ. 25 cmt.

296. *See, e.g.*, Larry Catá Backer, *Indigenous Law and Global Constraints: Bolivia, Decolonization of Law, Constitutionalism and Human Rights*, LCBACKERBLOG (June 27, 2010, 9:04 PM), http://lcbackerblog.blogspot.com/2010/06/indigenous-law-and-global-constraints.html.

297. "For the purpose of these Guiding Principles, a grievance is understood to be a perceived injustice evoking an individual's or a group's sense of entitlement, which may be based on law, contract, explicit or implicit promises, customary practice, or general notions of fairness of aggrieved communities." Guiding Principles, *supra* note **Error! Bookmark not defined.**, at princ. 25 cmt.

298. "Ensuring access to remedy for business-related human rights abuses requires also that States facilitate public awareness and understanding of these mechanisms, how they can be accessed, and any support (financial or expert) for doing so." *Id.*

non-state based remedies are nowhere to be found in the black letter of the principle itself, the Commentary provides that "State-based judicial and non-judicial grievance mechanisms should form the foundation of a wider system of remedy."[299] This tension between what appears to be the privileging of the state in the remedial pillar, with a nod toward non-state remedial regimes popping up at the margins, provides a disconcerting dissonance in the exposition of the remedial power, which is then mirrored in the development of the remaining principles of access to remedy, meant to operationalize this foundational principle.[300]

5.1.4.2. Operational Principles—State-Based Judicial Mechanisms. Having laid the foundation in Guiding Principle 25, Guiding Principles 26 and 27 flesh out the parameters of state-based remedies, including the paramount state obligation to oversee non-judicial remedial systems. Guiding Principle 26 (Draft Principle 24) considers state-based judicial remedies. It describes a principle of effectiveness: "States should take appropriate steps to ensure the effectiveness of domestic judicial mechanisms . . ."[301] Effectiveness is measured in terms of reductions of barriers of access to remedy before the judicial organs of a state.[302] The Commentary emphasizes the centrality of the judicial functions of states as the core of the access to remedy principles of the Guiding Principles because these institutions are legitimating, effective, and, when they work well, impartial.[303] The Commentary then focuses on the obligations of states to protect the legitimacy of the court system to render effective and impartial justice. In particular, the judicial system should avoid erecting barriers to access to justice.[304] States should also guard against corruption.[305] The Commentary also suggests the hortatory element of the principle.[306] These barriers also speak to the tension between the principle fully applied, and the constraints of the domestic legal orders of powerful, and powerfully influential, states.[307]

The suggestions for legal and policy changes identified in the Commentary are neither extraordinary nor unreasonable as matters of policy. They might be understood as grounded in the legal and policy dimensions of the fundamental obligations of the state in the context of their duty to protect.[308] Because the Guiding Principles place their greatest reliance on state-based, and especially judicial, remedial organs, individuals affected by human rights

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299. *Id.* "Within such a system, operational-level grievance mechanisms can provide early-stage recourse and resolution. State-based and operational-level mechanisms, in turn, can be supplemented or enhanced by the remedial functions of collaborative initiatives as well as those of international and regional human rights mechanisms." *Id.*

300. "Further guidance with regard to these mechanisms is provided in Guiding Principles 26 to 31." *Id.*

301. *Id.* at princ. 26.

302. *Id.* ("considering ways to reduce legal, practical and other relevant barriers that could lead to a denial of access to remedy").

303. "Effective judicial mechanisms are at the core of ensuring access to remedy. Their ability to address business-related human rights abuses depends on their impartiality, integrity and ability to accord due process." *Id.* at para. 26 cmt.

304. "States should ensure that they do not erect barriers to prevent legitimate cases from being brought before the courts in situations where judicial recourse is an essential part of accessing remedy or alternative sources of effective remedy are unavailable." *Id.*

305. "They should also ensure that the provision of justice is not prevented by corruption of the judicial process, that courts are independent of economic or political pressures from other State agents and from business actors, and that the legitimate and peaceful activities of human rights defenders are not obstructed." *Id.*

306. The Commentary speaks of legal and practical barriers, as well as barriers grounded in the marginalizing of vulnerable groups, listing a number of specific forms of barriers to be avoided. *Id.*

307. This is particularly true, for example, with respect to the United States. *Compare* Medellín v. Texas, 552 U.S. 491 (2008) (international obligations of the United States are not binding as a part of the U.S. domestic legal order unless the treaty is self-executing or Congress has transposed the obligations; the decisions of the International Court of Justice are not binding within the United States even if they bind the government of the United States), *with* Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12 (March 31) (imprisoned Mexican nationals were entitled to review and reconsideration of their convictions and sentences because the State of Texas violated the obligations of the United States under a Treaty to which it was bound).

308. *See* Guiding Principles, *supra* note **Error! Bookmark not defined.**, at princ. 1-10; *see also* discussion *supra* Part IV.B.

abuses have a smaller range of legitimate alternatives where states fail in their duty or remain indifferent to the barriers identified in the Commentary. Worse, states can avoid addressing these barriers by reference to the constraints of their constitutional orders or the limitations of law or custom in accordance with the framework Guiding Principles. Thus, while the Commentary suggests that Guiding Principle 26's obligation is to provide effective domestic judicial mechanisms, it is not clear that the principle incorporates a positive obligation—resident only in the Commentary—to also reform judicial mechanisms to reduce barriers to access grounded in the seven examples provided in the Commentary. The obligation to reduce the barriers identified in Guiding Principle 26's Commentary might have more authority if it was deemed to reflect an expression of the legal obligations of states under international law—the touchstone for state duty under the Guiding Principles. It is possible to read an effectiveness principle into the human rights obligations states are under a duty to protect, but to the extent that a state might take the position that this amounts to the creation of new international law obligations, it is unlikely that such obligations can be sourced in the Commentary to Guiding Principle 26.[309]

There is a tension here, though, because the fundamental principles of the access to remedy provisions speak, in the Commentary, to the embeddedness of judicial mechanisms in a wider system of remedy.[310] Yet, within the context of the Guiding Principles, this can mean nothing more than that, beyond judicial mechanisms, there are additional means of grievance settlement that may be available beyond the purview of the state. And thus one returns to the starting point—the hortatory nature of much of the Commentary. Though hortatory instruments have played an enormously important role in the development of international norms, they are more likely to affect the approaches of business enterprises toward dispute resolution mechanisms than states. Yet states, and not business corporations, are the object of this provision. What remains then, is an elaboration of the best policy practices that might prove useful to non-governmental organizations working toward legal reform within a state.

5.1.4.3. Operational Principles—State Based Non-Judicial Mechanisms. Though the bedrock of the remedial right is state-based judicial remedy, Guiding Principle 27 recognizes that non-judicial state-based remedies "play an essential role in complementing and supplementing judicial mechanisms."[311] Guiding Principle 27 provides that "States should provide effective and appropriate non-judicial grievance mechanisms, alongside judicial mechanisms, as part of a comprehensive State-based system for the remedy of business-related human rights abuse."[312] The role of non-judicial state-based remedies is principally that of gap fillers, both in terms of the availability of remedy and to make appropriate accommodation for the idiosyncrasies of culture.[313] The Commentary suggests a broad selection of mechanisms, many of which might be compatible with the rules of the domestic legal orders of several states but all of which are unlikely to be available in any one state.[314] The effectiveness of non-judicial state-based mechanisms is the subject of its own principle, and is more elaborately constructed than the effectiveness criteria of state-based judicial remedies.[315] The issue of imbalances between parties, which tend to be avoided in the legal systems of states, is also discussed in the Commentary.[316]

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309. *See supra* notes 212-18 and accompanying text (Guiding Principles themselves are limited by a commitment to avoid extending or creating international law.).

310. Guiding Principles, *supra* note 41, at princ. 27 cmt.

311. *Id.*

312. *Id.*

313. *Id.* "Gaps in the provision of remedy for business-related human rights abuses could be filled, where appropriate, by expanding the mandates of existing non-judicial mechanisms and/or by adding new mechanisms." *Id.*

314. *See id.* "These may be mediation-based, adjudicative or follow other culturally-appropriate and rights-compatible processes—or involve some combination of these—depending on the issues concerned, any public interest involved, and the potential needs of the parties." *Id.*

315. *Id.*

316. *Id.* "As with judicial mechanisms, States should consider ways to address any imbalances between the parties to business-related human rights claims and any additional barriers to access faced by individuals from groups or populations at

5.1.4.4. Operational Principles–Non-State Based Grievance Mechanisms. Finally, Guiding Principles 28 through 30 turn from the state and its organization of remediation mechanisms, to non-state based grievance mechanisms. It is important to remember that, while these principles might have been considered autonomous of state systems and grounded in the social norms that are the foundation of the non-state governance norms of corporations highlighted in the corporate responsibility to respect provisions (as crafted in the access to remedy provision), it becomes clear that these mechanisms occupy a dependent and secondary role.[317] Guiding Principle 28 (Draft Principle 26 substantially unmodified) makes it clear that the state duty to protect human rights in its remedial role extends to the oversight of non-state based grievance mechanisms. "States should consider ways to facilitate access to effective non-state based grievance mechanisms dealing with business-related human rights harms."[318] The commentary provides a listing of appropriate forms of such grievance mechanisms. One category includes mechanisms originating or controlled by the business entity at the center of the human rights harms.[319] The other includes mechanisms available through international organizations and other public non-state actors.[320]

It is here for the first time that the Commentary confronts one of the largest lacuna of the principles–the absence of remedial mechanisms for the human rights harms of state actions, especially by failures to comply with the state duty to protect. Regional and international human rights bodies "have dealt most often with alleged violations by States of their obligations to respect human rights. However, some have also dealt with the failure of a State to meet its duty to protect against human rights abuse by business enterprises."[321] While the oblique references to the necessity of moving beyond mechanisms that manage corporate compliance to those that also manage state compliance under the principles, this off-handed reminder might be insufficient to be effective. Moreover, the construction of the Guiding Principles framework itself appears to reject the notion that enforcement against states is an object of the framework.

The two Guiding Principles that follow turn to the obligations of companies in the construction and operation of non-state-based, non-judicial mechanisms. Guiding Principle 29 (Draft Principle 27 substantially unmodified) focuses on the obligation of businesses to provide "effective operational-level grievance mechanisms" to address grievances early and remediate directly.[322] Specifically, it speaks to the placement of the grievance mechanism within the corporate structure and to the timing of access to the non-judicial remedy made available.[323] The Commentary describes these mechanisms as existing independent of the remedies available by the State and can be quite flexibly constructed–the focus is on functional effectiveness within the context of the company's operations.[324] In addition, the Commentary suggests two important functions of these mechanisms that tie

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heightened risk of vulnerability or marginalization." *Id.*

317. *See generally id.* at princ. 29 cmt. "Operational-level grievance mechanisms can be important complements to wider stakeholder engagement and collective bargaining processes, but cannot substitute for either. They should not be used to undermine the role of legitimate trade unions in addressing labour-related disputes, nor to preclude access to judicial or other non-judicial grievance mechanisms." *Id.*

318. *Id.* at princ. 28.

319. *Id.* at princ. 28 cmt. "One category of non-State-based grievance mechanisms encompasses those administered by a business enterprise alone or with stakeholders, by an industry association or a multi-stakeholder group." *Id.*

320. *Id.* "Another category comprises regional and international human rights bodies." *Id.*

321. *Id.*

322. *Id.* at princ. 29 cmt. "To make it possible for grievances to be addressed early and remediated directly, business enterprises should establish or participate in effective operational-level grievance mechanisms for individuals and communities who may be adversely impacted." *Id.*

323. *Id.* at princ. 29. "Operational-level grievance mechanisms are accessible directly to individuals and communities who may be adversely impacted by a business enterprise. They are typically administered by enterprises, alone or in collaboration with others, including relevant stakeholders." *Id.* at princ. 29 cmt.

324. *Id.* at princ. 29 cmt.

remedies to the corporate responsibility to respect human rights: the first is to support the monitoring function of human rights due diligence,[325] and the second is to provide for early remediation of grievances before harms are compounded.[326] These mechanisms are not bounded by either rules of procedure or substantive constraints that frame judicial mechanisms.[327]

Lastly, Guiding Principle 30 (Draft Principle 28) suggests the value of industry or multi-stakeholder initiatives as a mechanism for effective grievance mechanisms.[328] This principle echoes the multilateral institution principles of a state duty to protect.[329] The focus is on the creation of substantive standards that further respect for human rights. "Such collaborative initiatives should ensure the availability of effective mechanisms through which affected parties or their legitimate representatives can raise concerns when they believe the commitments in question have not been met."[330] The issue is one of legitimacy—a theme that is threaded throughout the access to remedy provision, though never consistently.[331] "These mechanisms should provide for accountability and help enable the remediation of adverse human rights impacts."[332]

5.1.4.5. Operational Principles—Effectiveness Criteria. The last of the Principles, Guiding Principle 31 (Draft Principle 29), ties all of the non-judicial remedial provisions together under the criteria provisions for effectiveness. It sets out a list of legitimating characteristics of non-judicial grievance mechanisms, though it is not clear why these characteristics ought not also apply to state-based judicial remedial mechanisms. The

325. *Id.* "They do so by providing a channel for those directly impacted by the enterprise's operations to raise concerns when they believe they are being or will be adversely impacted. By analyzing trends and patterns in complaints, business enterprises can also identify systemic problems and adapt their practices accordingly." *Id.*

326. *Id.* The Commentary suggests that "these mechanisms make it possible for grievances, once identified, to be addressed and for adverse impacts to be remediated early and directly by the business enterprise, thereby preventing harms from compounding and grievances from escalating." *Id.*

327. *Id.* These grievance "mechanisms need not require that a complaint or grievance amount to an alleged human rights abuse before it can be raised, but specifically aim to identify any legitimate concerns of those who may be adversely impacted." *Id.*

328. *See id.* at princ. 30 cmt. "Industry, multi-stakeholder and other collaborative initiatives that are based on respect for human rights-related standards should ensure that effective grievance mechanisms are available." *Id.* at princ. 30.

329. *See* discussion *supra* Part IV.B.5. The Commentary suggests the parallel, though only indirectly: "Human rights-related standards are increasingly reflected in commitments undertaken by industry bodies, multi-stakeholder and other collaborative initiatives, through codes of conduct, performance standards, global framework agreements between trade unions and transnational corporations, and similar undertakings." Guiding Principles, *supra* note 41, at princ. 30 cmt.

330. Guiding Principles, *supra* note 41, at princ. 30 cmt.

331.

> The legitimacy of such initiatives may be put at risk if they do not provide for such mechanisms. The mechanisms could be at the level of individual members, of the collaborative initiative, or both. These mechanisms should provide for accountability and help enable the remediation of adverse human rights impacts.

Id. The issue of mechanism legitimacy is treated more extensively in *id.* at princ. 31 cmts. (a), (e) and (h). The focus on legitimate processes was cross linked to the corporate responsibility to respect. *See id.* at princ. 22. Also, legitimacy was bound up in discussions of barriers to state supported remediation mechanisms. *Id.* at princ. 26.

332. *Id.* at princ. 30 cmt.

characteristics include: legitimacy,[333] accessibility,[334] predictability,[335] equity,[336] transparency,[337] rights-compatibility,[338] and constant improvement.[339] A special additional characteristic is specified for operational-level mechanisms: dialogue and engagement.[340] "These criteria provide a benchmark for designing, revising or assessing a non-judicial grievance mechanism to help ensure that it is effective in practice."[341] The final criterion is specific to business-administered, operational-level grievance mechanisms and focuses on engagement and dialogue.[342]

Grievance mechanisms are defined as a term of art in the General Principles.[343] The term appears in the Commentary of Guiding Principle 20,[344] Guiding Principle 22,[345]and Guiding Principles 25, and 27 through 28.[346] "The term itself may not always be appropriate or helpful when applied to a specific mechanism, but the criteria for effectiveness remain the same."[347] Interestingly, effectiveness is also measured by the willingness of corporations and affected individuals to use grievance mechanisms, and their aggregate implementation as a basis for political action. "Regular analysis of the frequency, patterns and causes of grievances can enable the institution administering the mechanism to identify and influence policies, procedures or practices that should be altered to

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333. *Id.* at princ. 31(a) ("enabling trust from the stakeholder groups for whose use they are intended, and being accountable for the fair conduct of grievance processes"). The Commentary speaks to the elements of trust and accountability as critical to legitimacy concerns. *Id.* at princ. 31 cmt.

334. *Id.* at princ. 31(b) ("being known to all stakeholder groups for whose use they are intended, and providing adequate assistance for those who may face particular barriers to access"). The Commentary speaks to barriers to access. *Id.* at princ. 31 cmt.; *see also id.* princ. 26.

335. *Id.* at princ. 31(c) ("providing a clear and known procedure with an indicative timeframe for each stage, and clarity on the types of process and outcome available and means of monitoring implementation"). The Commentary conflates trust and predictability, suggesting that the mechanisms should "provide public information about the procedure it offers. Timeframes for each stage should be respected wherever possible, while allowing that flexibility may sometimes be needed." *Id.* at princ. 31 cmt.

336. *Id.* at princ. 31(d) ("seeking to ensure that aggrieved parties have reasonable access to sources of information, advice and expertise necessary to engage in a grievance process on fair, informed and respectful terms"). The Commentary speaks to redressing the imbalance in resources between parties to improve perceptions of fair process. *Id.* at princ. 31 cmt. This is an issue addressed in other principles as well. *See, e.g.*, *id.* at princ. 26-27.

337. *Id.* at princ. 31(e) ("keeping parties to a grievance informed about its progress, and providing sufficient information about the mechanism's performance to build confidence in its effectiveness and meet any public interest at stake"). The Commentary speaks to the balance between demonstrating legitimacy and gaining trust through disclosure and protecting the confidentiality of information and parties according to the context of the grievance. It also suggests the value of record and statistics keeping. *Id.* at princ. 31 cmt.

338. *Id.* at princ. 31(f) ("ensuring that outcomes and remedies accord with internationally recognized human rights"). The Commentary speaks to reframing grievances appropriately. This extends the tensions between the limited nature of state obligations to enforce anything but those legal obligations transposed into the domestic legal order, social norms obligations of corporations that provide grievance mechanisms, and international norms that may inform the scope and nature of both. *Id.* at princ. 31 cmt.

339. *Id.* at princ. 31(g) ("drawing on relevant measures to identify lessons for improving the mechanism and preventing future grievances and harms"). The Commentary speaks to the utility of data analysis. *Id.* at princ. 31 cmt.

340. *Id.* at princ. 31(h) ("focusing on processes of direct and/or mediated dialogue to seek agreed solutions, and leaving adjudication to independent third-party mechanisms, whether judicial or non-judicial").

341. *Id.* at princ. 31 cmt.

342. *Id.* at princ. 31 (h) ("consulting the stakeholder groups for whose use they are intended on their design and performance, and focusing on dialogue as the means to address and resolve grievances").

343. *Id.* at princ. 31 cmt.

344. This relates to operational level grievance mechanisms as a means of feedback to verify human rights impacts. *See* discussion *supra* Part IV.C.3.

345. This relates to the use of operational level grievance mechanisms as effective means of enabling remediation. *See* discussion *supra* Part IV.C.4.

346. This relates to remediation mechanisms and grievance mechanisms. *See* discussion *supra* Parts IV.D.1-4.

347. Guiding Principles, *supra* note **Error! Bookmark not defined.**, princ. 31 cmt.

prevent future harm."[348] The possibility of using the Guiding Principles as the basis for political action, as well as for constraining behavior, opens possibilities that suggest an implicit limit on the General Principles' prohibition on the use of the Principles to create new international law. It appears that the Commentary here suggests that while the Principles themselves may not create new law, they may certainly serve as the basis for such creation through the traditional methods of convention or the development of customary international law.[349]

Taken together, the access to remedy provision presents a divided approach to remediation. On the one hand, it approaches the issue of state-based remedies cautiously and within the conventional perspective that states retain the ultimate authority to build their remediation systems as they like. But at the edges, the principles suggest subversion, either through the efforts to suggest the primacy of international norms as the basis for framing domestic legal order remediation, or by suggesting that grievance mechanisms themselves serve as a basis for political action. On the other hand, corporations are treated as subsidiary elements of this access to remedies framework. They serve two broad purposes—to institute systems that avoid the need to access remedies and to detect and prevent harm in the first place. International institutions serve a gap filler role as well, but also become useful as a place where international norms (and perhaps social norms affecting corporate behavior) may be developed with indirect effects on state domestic law as applied by its judicial and non-judicial mechanisms. Yet, there is a hierarchy built into this balance. Throughout, it is clear that the state remains the focus of the access to remedy. And, while the corporation or international bodies may serve supporting or preventative roles, legitimacy is still very much tied to the courts of the states. But access to remedies is never developed in its own right. It serves the state duty to protect and the corporate responsibility to respect, but never finds its own normative justification for existing apart from either. And it could have—in contrast to the state duty and the corporate responsibility, access to remedy focuses on the third great stakeholder in the human rights enterprise: the individual or community affected by state or corporate activity having adverse human rights effects. It is to the remedial rights of that individual that the remedial provisions might have better focused—an object of discussion taken up in the concluding subsection of this part.

5.2. The Gaps Between Principle and Pragmatism in the Development of the UNGP

The great challenge of the 21st century is that of the institutionalization of the system of globalization that emerged in the last decades of the 20th century. The SRSG astutely explained that the issue of business and human rights is a microcosm of that challenge.[350] A number of those challenges remain pointed and unresolved in the framing architecture of the Guiding Principles. These are the gaps that the UNGP project sought to bridge, but also the gaps that the UNGP also produced. This section examines a number of the more significant gaps that are either raised by, or remain unresolved, in the UNGP. This section also suggests the potentially significant institutional effects of the framework on the relationships between the state, the international community, and business in the context of globalization. These all contribute to the amplitude and possibility of a broad interpretive range.

5.2.1. The Dilemmas of the Law-State System in a Global Context.

The SRSG's Guiding Principles outline the extent of the state duty to protect human rights, and raise a number of challenges that reflect both the difficulties of moving forward, the contemporary culture of the law-state system,

348. *Id.*
349. *See generally* JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW (2005) (providing background and analysis of customary international law and international agreements).
350. 2011 Report, *supra* note **Error! Bookmark not defined.**, at para. 2.

and the conundrums of building a system on an acceptance of the basic assumptions on which that law-state system is built.

Guiding Principle 1 nicely suggests the difficulties. On its face, it suggests the obvious—that states are required to abide by their obligations under international law, whether they are obligations specifically undertaken pursuant to conventional law or treaty, or whether they are part of the complex of obligations understood as customary international law. However, this creates several problems. First, the state of customary international law remains contested. Some believe that customary international law does not exist.[351] Others believe that some elements of customary international law are binding, even on rejecting states, and that such binding customary norms, in the form of *jus cogens*,[352] can be the subject of international tribunals.[353] Second, many states apply the logic of their legal systems to substantially narrow the legal effect of both customary and conventional laws within their territories. Many states take the position that conventional law applies to them only to the extent that they have agreed to be bound. In some jurisdictions, that agreement to be bound is ineffective unless the legislative body actually incorporates the convention's obligations into the domestic legal order.[354] Additionally, even when a state agrees to be bound, it may condition that agreement on any number of reservations, the legal effects of which are still a subject of lively academic debate.[355] Most importantly, as a matter of law, international instruments that are neither treaties nor conventional law are not, strictly speaking, legally binding on states. Lastly, in the absence of a legitimate interpretative body, it is sometimes difficult to develop a consensus on the interpretation of treaties or conventions, or their application in specific circumstances. The International Court of Justice[356] is sometimes of help, but its jurisdiction is also limited and to some extent optional.[357]

The limitations ultimately written into Guiding Principle 1 might be understood by drawing a parallel to the governance framework of the European Union. 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.

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.[358] In many Member States, the principle of the supremacy of Community Law is accepted as a matter of domestic constitutional law as well—at

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351. John H. Knox, *The Human Rights Council Endorses "Guiding Principles" for Corporations*, INSIGHTS (Aug. 1, 2011), http://www.asil.org/pdfs/insights/insight110801.pdf.

352. *See, e.g.*, Bruno Simma & Philip Alston, *The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles*, 12 AUSTL. Y.B. INT'L L. 82 (1992).

353. *See* Juridical Condition and Rights of Undocumented Migrants, Advisory Opinion OC-18/03, Inter-Am. Ct. H.R. (ser. A) No. 18, (Sept. 17, 2003), *available at* http://www.corteidh.or.cr/docs/opiniones/seriea_18_ing.pdf.

354. This principle of non-self-executing treaties has been particularly well developed within the recent jurisprudence of the United States. *See, e.g.*, Medellín v. Texas, 552 U.S. 491 (2008).

355. *See e.g.*, Edward T. Swaine, *Reserving*, 31 YALE J. INT'L L. 307 (2006); Laurence R. Helfer, *Response: Not Fully Committed? Reservations, Risk, and Treaty Design*, 31 YALE J. INT'L L. 367 (2006).

356. *See* Robert Y. Jennings, *The International Court of Justice After Fifty Years*, 89 AM. J. INT'L L. 493 (1995).

357. *See, e.g.*, Emilia Justyna Powell & Sara McLaughlin Mitchell, *The International Court of Justice and the World's Three Legal Systems*, 69 J. POL., May, 2007, at 397.

358. Case 6/64, Costa v. ENEL, 1964 E.C.R. 585, 593.

least with respect to incompatible national legislation.[359] In some cases, the Member States have reconstructed their constitutional orders to explicitly accommodate Community Law supremacy.[360]

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 to be 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.[361] Perhaps the most famous example involves the Irish Supreme Court, which noted, "[w]ith 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."[362] On the other hand, it has proven to be possible to sidestep these conceptual questions through the adoption of a functional approach to the issue, combined with amendments to Member State constitutions or Treaty accommodations.

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, European law 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 at a constitutional revision or interpretation to ensure conformity with applicable international standards.

Another difficulty avoided centers on the identification of the aggregate of obligations that constitute applicable international human rights law. The Draft Principles define "internationally recognized human rights" in a political or sociological, or even cultural sense. But then the Guiding Principles appear to hold only non-state actors—and principally corporations—to that definition.[363] They are binding in those senses too. That binding effect is most prominently important in connection with the development of social norm systems that affect the corporate responsibility to respect human rights. It is also possible to assume that the documents that constitute the International Bill of Human Rights serve as a consensus of state obligations in a policy sense. But the International Bill of Rights does not constitute a legally binding set of documents equally applicable to all states, or even to all of the developed states.[364]

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359. CE, Feb. 28, 1992, Rec. Lebon 81(Fr.); Counseil D'Etat [CE] [Council of State] Nov. 5, 1996, Orfinger, No. 62.922, http://www.conseildetat.be/Arresten/62000/900/62922-vert.pdf#xml=http://www.conseildetat.be/apps/dtsearch/getpdf.asp?DocId=31785&Index=c%3a\software\dtsearch\index\arrets_nl\&HitCount=2&hits=1e+1f+&032282012121 (Belg.).

360. *See* GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBL. I, art. 23 (Ger.); 1958 CONST. art. 88-1(Fr.).

361. Bundesverfassungsgericht [BVerfGE] [Federal Constitutional Court] Oct. 12, 1993, 89 BVerfGE 155, 1993 (Ger.) (Commonly referred to as the *Maastricht* decision); Bundesverfassungsgericht [BVerfGE] [Federal Constitutional Court] Oct. 22, 1986, 73 BVerfGE 339, 1986 (Ger.) (Commonly referred to as *Solange II*).

362. Soc'y for the Prot. of Unborn Children (Ir.) Ltd. v. Grogan, [1989] I.R. 753 (Ir.).

363. Draft Principles, *supra* note **Error! Bookmark not defined.**, at 27. That was a significant concession to states from the original draft of the Guiding Principles in which the scope of the human rights instruments was included in a definitions section.

364. *See* Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc A/RES/217(III) (Dec. 10, 1948).

As a legal rather than as a policy matter, the International Bill of Rights may create some obligations, but may not obligate all states in the same way or to the same extent. These differences may serve as a basis for resistance by states to specific applications of some or all parts of the International Bill of Rights. They can also serve as a significant point of friction if State A seeks to effectively impose the requisites of the International Bill of Rights on State B through the extraterritorial application of the provisions on corporations hosted in State B. Where the extraterritorial application can be contrary to the constitutional norms of State B, the application of the Guiding Principles becomes more difficult. It is understandable, then, that the Guiding Principle1 Commentary speaks of the state duty[365] and has legal and policy dimensions. Depending on the state, the balance between the legal and policy pull of the International Bill of Rights which forms the core of the human rights obligations of states will vary considerably, and the potentially different regimes of rights to which a company is subject while operating in a host state can be even more pronounced. Indeed, unevenness in the recognition and application of the International Bill of Rights by states will likely be the norm, at least initially.

More interesting still, perhaps, are what appear to be early efforts to expand the list of human rights instruments that might fall within the corporate responsibility to respect beyond that specified in the GP.[366] The focus is on vulnerable people, broadly defined.[367] Vulnerability becomes a basis for the extension of responsibility binding on the corporation through inclusion in its human rights due diligence system irrespective of the obligation under the domestic law of the state in which the corporation operates. Polycentricity here is meant to effectively harmonize practices on the basis of international norms through layers of corporate governance directives that effectively supersede regulatory norms across territories. To the extent that these norms exceed the requirements of domestic legal orders, the stratagem is plausible; to the extent that such compliance might conflict with local law, corporations are put in that conflict position where they must either lobby for local change, negotiate tolerance or consider discontinuing operations.

The extraterritorial provisions, long supported by the SRSG,[368] continue the dilemma of managing the leakage of state power into the borders of other states within a system in which all states are ostensibly objects of equal dignity and treatment. 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 in an extension of legal duties to 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."[369]

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365. Guiding Principles, *supra* note **Error! Bookmark not defined.**, at princ. 1 cmt.

[366] Interpretive Guide, supra, at para. 1.4 ("Depending on the circumstances of their operations, enterprises may need to consider additional standards beyond the International Bill of Human Rights and core ILO Conventions, in order to ensure that they act with respect for human rights: for instance where their activities might pose a risk to the human rights of individuals belonging to specific groups or populations that require special attention.")

[367] Id. ("Examples of these groups can include children, women, indigenous peoples, people belonging to ethnic or other minorities, or persons with disabilities.")

368. *See generally* John G. Ruggie, Special Rep. of the Secretary-General for Business and Human Rights, Opening Statement to United Nations Human Rights Council, Geneva (Sept. 25, 2006).

369. John G. Ruggie, Special Representative of the Secretary-General for Business & Human Rights, Presentation of Report to United Nations Human Rights Council (June 2, 2009).

However, the extraterritorial application of home state law can easily be mischaracterized as an indirect projection 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.[370] Where the state itself is engaged in business abroad, the SRSG suggests that there are "strong policy reasons for home states to encourage their companies to respect rights abroad . . ."[371] 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.

One of the great markers of globalization is the change in the nature of the power of the state—still powerful but now more ambiguous, both within its own territory and projected onto the territory of other states. The Guiding Principles look both forward and backward on the issue of state power. On the one hand, the Guiding Principles continue to encourage the extraterritorial application of state power. Though the encouragement is permissive,[372] two distinct and not necessarily positive actions are encouraged. The first is the encouragement of the traditional system of subordination that marked the relationship (and the state system itself) between states from the 19th century.[373] Under Guiding Principle 2, strong and rich states will be encouraged to project their power through the businesses they control within the states in which those corporations operate.[374] Companies will be encouraged as well—not to look to compliance with the law of the host state, but rather to look to compliance with the law of the home state. One effect is positive in a sense; such encouragement will create incentives for harmonization of law by encouraging host states to conform their domestic law to that of home states with significant corporate activity in their territory. But the other effect might be less positive—especially in weak governance zones—the effect might be to encourage the transfer of the functions of the law state from the host to the home state. Rather than encourage the development of stronger or better government in the host state, the power of extraterritoriality might be to transfer that power to the outside regulating states, whose values, laws, and courts would substitute for that of the host state. This could deepen weak governance rather than encourage the development of stronger government in weak governance zones.

5.2.2. The law-policy conundrum of the state duty to protect.

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370. Special Representative of the Secretary-General, *Promotion of All Human Rights, Civil, Political, Economic, Social, and Cultural Rights, Including the Right to Development: Rep. of the Special Representative of the Secretary-General*, para. 15, U.N. Doc. A/HRC/11/13 (Apr. 2009), *available at* http://www2.ohchr.org/english/bodies/hrcouncil/docs/11session/A.HRC.11.13.pdf.

371. *Id.*

372. Guiding Principles, *supra* note **Error! Bookmark not defined.**.

373. WESTEL W. WILLOUGHBY, THE FUNDAMENTAL CONCEPTS OF PUBLIC LAW 309 (1924).

374. The reverse is unlikely—for example the extraterritorial control of corporate activity from small and less well-off states into larger and richer states. The reasons are obvious. More interesting is the possibility of clashes in business culture and values between values exporting states whose governance system values are not compatible. The battle for values dominance under the model of Guiding Principle 2 would occur neither in the halls of international institutions nor in the territories of the home states but would be fought in the territories of host states where both extraterritorial rivals would be competing for business. The best examples of that are the contests, already occurring, between Chinese, European, and American firms in Africa. *See, e.g.*, Jon W. Walker, China, U.S. and Africa: Competition or Cooperation? (Mar. 31, 2008) (unpublished Strategy Research Project, U.S. Army War College), *available at* http://www.dtic.mil/cgi-bin/GetTRDoc?Location=U2&doc=GetTRDoc.pdf&AD=ADA481365. For an example of the reporting in the popular press, *see, e.g.*, Antoaneta Becker, *China-EU Rivalry in Africa Sharpens*, INTER-PRESS SERVICE NEWS AGENCY (June 15, 2010), http://ipsnews.net/news.asp?idnews=51831.

The issue of the scope of human rights norms and the differences between the first pillar's legalism and the second pillar's functionalist internationalism highlight another tension within the state duty to protect pillar—that between state legal and policy obligations. That tension mimics, to some extent, those between the formal legal systems context of the state duty and the functionalist social norm-based context of corporate governance rules. The Guiding Principles distinguish between the narrow formalism of legal constraints and the open-ended possibilities of policy considerations. They serve, in the latter respect, to provide suggestions and best practices as a means of helping shape the universe of permissible responses to policy issues touching on the regulation of business and human rights without appearing to mandate this approach. The idea appears to be to set the stage for an organic growth of rights conduct and policy without appearing to manage that movement.

It follows that one of the great innovations of the Guiding Principles is their recognition that states operate on two levels, both of which have some governance effects. The first level is the most traditional and well understood—the legal obligations of states both internally with respect to the organization and application of its domestic legal order, and externally with respect to the obligations of states under international law. The second is less well known and its role in managing conduct much more disputed in the conventional literature—the regulatory effects of state policy. While this second form of regulatory regime is beginning to be better manifested, for example in the operation of large sovereign wealth funds,[375] it is not usually the object of operationalization precisely because it is not law or regulation and thus is not usually considered a legitimate source of state action that affects the conduct of the state and others. But the recognition of the policy obligations of states produces issues which are to some extent unavoidable.

5.2.3. Character of the Guidelines: Framework, Handbook, Roadmap or Law?

Soon after the Draft Principles were announced, Dr Peter Davis, who is the Ethical Corporation's politics editor, published an opinion piece that characterized the Guiding Principles as a handbook.[376] It is not clear that Dr. Davis is correct, but the point he raises is critically important for the evolution of the Guiding Principles as they move from acceptance toward implementation. Unless individuals can agree on the manner in which the Guiding Principles are to be read, the possibility of fragmentation in interpretation, even at the most fundamental level, remains quite likely. Likewise, John Knox noted both the underlying hope that the Guiding Principles would serve as the bridge between soft and hard law either through customary international law or treaty, but worried that "states would have to act consistently as if corporations were so bound, and states would have to do so on the basis of their understanding of their obligations under international law."[377]

This fractured Guiding Principles interpretation is most likely to mirror the fractures in approaches to law and law interpretation between legal systems that are still open to custom and organic growth through application, and those who approach the Guiding Principles like a Code—a self-contained and internally self-referencing system that more or less defines the entire possible universe of interpretive possibility within its provisions. The former would evolve through deductive reasoning principles, grounded in the aggregation of application of the Guiding Principles in state judicial and non-juridical business grievance structures, to the extent they are reported, policy reactions, and the work of international organs applying their related soft law frameworks which incorporate

375. *See, e.g.*, Backer, *supra* note **Error! Bookmark not defined.**.

376. "The result is effectively a handbook for the implementation of a comprehensive system for the management of business and human rights, with clear guidance for states and corporations." Peter Davis, *John Ruggie: A Common Focus for Human Rights,* ETHICAL CORP. (Jan. 27, 2011), http://www.ethicalcorp.com/stakeholder-engagement/john-ruggie-common-focus-human-rights.

377 John Knox, The Ruggie Rules: Applying Human Rights Law to Corporations, Wake Forest Univ. Legal Studies Paper No. 1916664, at 19, available http://ssrn.com/abstract=1916664.

the Guiding Principles. The latter would deepen the implications of the formal construction of the Guiding Principles as Code—using its hierarchically arranged principles structure as the basis through which it can be applied in particular context, without thereby moving beyond the parameters of the Guiding Principles themselves as the sole legitimate source of rules. The former can tolerate a considerable degree of difference in result in interpretation—certainly one of the permissible outcomes implicitly suggested in the Guiding Principles Commentary. The latter will require something like the institutionalized interpretive structure of the European Court of Justice system[378] to retain a stronger hand in the interpretive growth of the Guiding Principles.

The choice of the language of interpretation will have profound effects on the culture of application.[379] It is understood why the SRSG did not wade into those institutionalizing waters. Yet, the manner of institutionalization and guidance will be critical to the success of the Guiding Principles. One of the great projects that await those who would move the Guiding Principles from document to applied governance will be to gain a measure of control over the process of its application. At some point it will be necessary to order this heterodox and polycentric operation—not necessarily to unify it, but to ensure substantial coordination with a necessary flexibility.

5.2.4. The Character of Domestic Corporate Law Making and the International Responsibility to Respect.

The heart of the corporate responsibility to respect human rights is human rights due diligence. In the hands of the SRSG and as memorialized in the Guiding Principles, human rights due diligence is drafted into multiple services. In one sense, human rights due diligence, as the regularization of policy, serves a legislative function.[380] This suggests an alternative to the decades long drift of corporate governance towards the use of contract for regulatory effect.[381] Second, human rights due diligence serves an executive function, providing the information necessary for determining corporate action. Third, human rights due diligence serves as a monitoring device—available for use by both internal and external stakeholders—to make accountability more efficient. Lastly, human rights due diligence serves a fact finding and remediation function—providing the basis for both the process and substantive content of resolving the consequences of human rights affecting actions.

The SRSG makes clear that the principal audience for these efforts is not the state but major corporate stakeholders—customers, investors, local communities, labor, and others—who might be affected by the human rights affecting activities of corporations.[382] This is a consent-based system which is, in its own way, a reflection of the more formalized notions of legitimacy and consent that frame modern Western liberal constitutionalism.[383] Human rights due diligence, then, organizes and constitutes—in institutional form—a social norm system and makes it operative in a way that is attached to, but not completely dependent on, the state and its legal system. That

378. *But cf.* RENAUD DEHOUSSE, THE EUROPEAN COURT OF JUSTICE: THE POLITICS OF JUDICIAL INTEGRATION (1999).

379. *But cf.* KWAI HANG NG, THE COMMON LAW IN TWO VOICES: LANGUAGE, LAW, AND THE POSTCOLONIAL DILEMMA IN HONG KONG (2009) (discussing the complex relationship between juridical formalism, language and legal norms in Hong Kong).

380. On the formalization issues of multinational policy, *see, e.g.*, Anant R. Negandhi, *External and Internal Functioning of American, German, and Japanese Multinational Corporations: Decisionmaking and Policy Issues, in* GOVERNMENTS AND MULTINATIONALS: THE POLICY OF CONTROL VERSUS AUTONOMY 21 (Walter H. Goldberg & Ananti R. Negandhi eds., 1983); *see also* Larry Catá Backer, *Multinational Corporations as Objects and Sources of Transnational Regulation*, 14 ILSA J. INT'L & COMP. L. 499, 508-09 (2008).

381. *See, e.g.*, Backer, *supra* note 522.

382. *See, e.g.*, Backer, *supra* note 206, at 1752.

383. *See, e.g.*, HOWARD SCHWEBER, THE LANGUAGE OF LIBERAL CONSTITUTIONALISM 81-134 (2007).

system is grounded in the logic of the social norm system—constituted through and enforced by the collective actions of those critical stakeholders participating in the system itself, and based on disclosure.[384]

But vesting so much into one process or product may well overwhelm it. The regulation of self-regulation within a constraining international law normative field will likely require further development as the effective realities of globalized private governance continue to evolve.[385] This evolution is consistent with the facts-based principled pragmatism on which the system itself is based, but one that suggests a dynamic, rather than a static, element to the enterprise. Human rights due diligence will start off fairly well defined—but the logic of its many purposes will tend to vastly expand, and to some extent, distort the device.[386] At some point, and likely soon, the legislative and administrative agencies monitoring and remediating functions of human rights due diligence will have to be reframed and redeveloped along the lines of the logic of each.

A related issue touches on the mechanics of human rights due diligence, and specifically, the normative effects of data gathering—a subject left substantially unexplored in the Guiding Principles. This issue is most dramatically drawn in the context of the early focus on gender inequalities and the human rights regulation project of the Guiding Principles. Data collection, however, is hardly a ministerial act. The choice of data suggests a normative privilege that might legitimate the emphasis of one area of human rights over others. I have suggested that the regulatory aspects of data collection are, in its guise, 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 for lawmaking. Surveillance is a flexible engine.[387]

Surveillance has both domestic[388] and transnational forms.[389] "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."[390] As such, one could understand this emphasis as suggesting a prioritization of gender issues in the Second Pillar responsibility to respect.[391]

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384. *See, e.g.*, Larry Catá Backer, *From Moral Obligation to International Law: Disclosure Systems, Markets and the Regulation of Multinational Corporations*, 39 GEO. J. INT'L L. 591 (2008).

385. The Guiding Principles recognize that this evolution will occur within an imperative that looks "for ways of co-coordinating public and private rulemaking in such a way as to preserve both social autonomy and the public interest." HARM SCHEPEL, THE CONSTITUTION OF PRIVATE GOVERNANCE: PRODUCT STANDARDS IN THE REGULATION OF INTEGRATING MARKETS 32 (2005).

386. The SRSG recognized the difficulties of an all-purpose approach, as well as the allure of its simplicity for business and sought to road test the device. *See* Guiding Principles, *supra* note **Error! Bookmark not defined.**, at 3. More field testing will likely produce additional sophistication in the development and deployment of the device.

387. Larry Catá Backer, *The Surveillance State: Monitoring as Regulation, Information as Power*, LCBACKERBLOG (Dec. 21, 2007), http://lcbackerblog.blogspot.com/2007/12/surveillace-state-monitoring-as.html; *see*, Larry Catá Backer, *Global Panopticism: States, Corporations, and the Governance Effects of Monitoring Regimes*, 15 IND. J. GLOBAL LEGAL STUD. 101 (2008). "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.*

388. "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." Backer, *Global Panopticism*, *supra* note 387.

389. "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.*

390. Backer, *The Surveillance State*, *supra* note 529; *see*, Backer, *Global Panopticism*, *supra* note 529.

391. For a discussion of prioritization, *see*, Larry Catá Backer, *Business and Human Rights Part XVII—Implementation: Prioritizing*, LCBACKERBLOG (Feb. 18, 2010), http://lcbackerblog.blogspot.com/2010/02/business-and-human-rights-

> But the SRSG points to a more benign function for data gathering.
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> > 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.[392]

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 these positions—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?).[393]

Issues of social organization and communal mores, including those touching on the status of women, are matters for the state—and the First Pillar.[394] 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.[395] These issues, in this 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. 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

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part-xvii.html.

392. Larry Catá Backer, *Business and Human Rights Part XX–Issues: Gender*, LCBackerBlog (Feb. 21, 2010), http://lcbackerblog.blogspot.com/2010/02/business-and-human-rights-part-xx.html (quoting John Ruggie, Special Representative of the Secretary-General). This was a framework discussed in the SRSG's consultations with gender experts organized through the Ethical Globalization Initiative. *See Integrating a Gender Perspective into the UN "Protect, Respect and Remedy" Framework: Consultation Summary* (June 29, 2009), http://www.valoresociale.it/detail.asp?c=1&p=0&id=307. *But the perspective was dropped from the online consultation materials by mid-2010; see, United Nations Special Representative of the Secretary-General on Business & Human Rights: Gender, Wayback Machine http://www.srsgconsultation.org/index.php/main/discussion?discussion_id=17 (last visited Mar. 20, 2012).* However, the idea survived in the construction of the Guiding Principles themselves, principally through the heavy emphasis, in the principles applicable to the state duty to protect, that reaffirmed the principle of non-interference and the responsibility to respect principles that focus on impacts rather than on changing cultural or legal frameworks within which the corporation operates. In effect, the SRSG transformed the notion into one of formal non-interference and functional non-participation. The corporation could not seek to change the culture in which it operated, but at the same time it could not contribute to the norms—especially those that tended to marginalize on the basis of gender and other categories—that might be incompatible with the also applicable strictures of the International Bill of Human Rights. This transformation is nicely captured in the Commentary to Guiding Principle 20: "Tracking is necessary in order for a business enterprise to know if its human rights policies are being implemented optimally, whether it has responded effectively to the identified human rights impacts, and to drive continuous improvement. . . . This could include performance contracts and reviews as well as surveys and audits, using gender-disaggregated data where relevant." *Guiding Principles, supra note* **Error! Bookmark not defined.***, at princ. 20 cmt.*

393. Guiding Principles, *supra* note **Error! Bookmark not defined.**, at princ. 4 cmt.

394. *Id.* at 4.

395. *Id.*

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.[396] 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 that the approach of the Sullivan Principles[397] 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."[398] The successor, Global Sullivan Principles,[399] makes these connections explicit. The resulting political program inherent in the 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[400] and the Cairo Declaration on Human Rights in Islam.[401] Their possible similarities (or incompatibilities) may substantially direct both the methodological framework within which gender issues are understood, and data harvested, as well as the analytics produced therefrom.

5.2.5. The Problem of Double Character: State-Owned Enterprises and Corporations in Conflict Zones

The Guiding Principles lend themselves well to the constrained complexity of simple polycentricity—the coordination of law-state, social norm-corporate, and international systems.[402] Where each operates autonomously and within the logic of its organization, coordination is possible and harmonization relatively easy to conceptualize, if not to realize. But difficulties multiply when institutions begin to act against type. The problems of state-owned enterprises and those of corporations operating in the absence of an effective government test the Guiding Principles as an integrated system. The Guiding Principles acknowledge the problems, but offer little to the state. This comes as something of a surprise.

In the context of corporate activity in conflict-affected areas, the Guiding Principles[403] tend to treat these entities the way international law treated states that were not members of the Family of Nations before 1945.[404] In effect,

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396. SRSG 2008 Report, *supra* note **Error! Bookmark not defined.**.

397. *The Sullivan Principles*, MARSHALL U., http://muweb.marshall.edu/revleonsullivan/principled/principles.htm (last visited Mar. 20, 2012).

398. *Id.*

399. *See id.*

400. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948)

401. World Conference on Human Rights, July 31-Aug. 5, 1990, *Cairo Declaration on Human Rights in Islam*, U.N. Doc A/CONF.157/PC/62/Add.18 (Aug. 5, 1993) [English translation], *available at* http://www1.umn.edu/humanrts/instree/cairodeclaration.html [hereinafter Cairo Dec.].

402. *See generally* Nick Green, *Functional Polycentricity: A Formal Definition in Terms of Social Network Analysis*, 44 URB. STUD. 2077 (2007), *available at* http://usj.sagepub.com/content/44/11/2077.full.pdf.

403. *See* Guiding Principles, *supra* note **Error! Bookmark not defined.**, at princ. 7.

404. Department of Public Information, *60 Ways the UN Makes a Difference*, UNITED NATIONS (2011), www.un.org/un60/60ways/. For the classic explanation, *see* WILLOUGHBY, *supra* note 373, at 307-09 ("Such States may be said to occupy in the international system much the same position as persons subject to the disabilities of infancy or alienage occupy in municipal law, but their exact position is hard to define . . .").

in the absence of a local government, the government of the host state can control the activities of the corporation in the host state and thus control the effect of corporate economic activity abroad.[405] But it is hardly fitting for states in control of great corporate actors to use those entities as the vehicle through which these states can project regulatory and economic power outward. Multilateral action would be more appropriate to avoid the appearance of domination and incorporation.[406] That the Guiding Principles do not suggest this as a baseline represents a bow to reality (pragmatism)—states engage in these activities and these regulatory projections with or without permission. That it suggests that such national projections of power can be constrained by norms that have an international component suggests a more subtle effort to manage national activity within an international framework; but the tension remains.

In the context of state-owned enterprises, the Guiding Principles tend toward a divide and manage principle.[407] States are urged to take additional steps when there is an ownership relationship between states and enterprises. States are reminded that such enterprises are also subject to the obligations (including human rights due diligence obligations) of the Second Pillar, but the formal distinction between state and enterprise is preserved.[408] This is an odd result, particularly in the face of the functionalism at the core of the corporate responsibility to respect human rights that specifically eschews legal constructions in the application of the Guidelines to business entities.[409] But that difference in approach suggests a greater divergence—between the innate formalism of the state duty to protect principles and the more functionalist corporate responsibility to respect principles. That distinction, supported by the reality of custom and behavior, produces tension when entities straddle the state-corporate divide. A different approach might have been more in accord with European approaches to the issue of state involvement in economic activity, one which starts from the position that state involvement in activity changes its character from private to public. In this case, state-owned enterprises ought to be treated as subject to both the direct duty obligations imposed on states and to the respect obligations that derive from their organization as business enterprises.[410] That this imposes potentially greater obligations on state-owned enterprises merely mirrors the advantages they can also derive from that relationship unavailable to private enterprises.

5.2.6. Remedies

The access to remedies provisions present the least autonomous, and perhaps the least robust, link of the tightly integrated system that the Guiding Principles represent. Between the initial construction of the Third Pillar access to remedy of the "Protect, Respect and Remedy" Framework,[411] and the final version of the Guiding Principles, the access to remedies prong of the Guiding Principles became more an expression of the importance of the state as a legitimating source of remediation. This is not surprising, of course. To some extent this movement is bound

405. The corporation is directed merely to beware the dangers of complicity on conflict zones. *See* Guiding Principles, *supra* note **Error! Bookmark not defined.**, at princ. 23 cmt.

406. Indeed, the current framework supports the charge made by some states that the present system of globalization is meant to strengthen the hand of strong states to deal with weaker ones and reimpose the old system of hierarchy in the relations among states as a formal matter, or that the system itself is meant to favor the designs of global hegemons. *See, e.g.*, Larry Catá Backer, *Economic Globalization Ascendant and the Crisis of the State: Four Perspectives on the Emerging Ideology of the State in the New Global Order*, 17 BERKELEY LA RAZA L.J. 141, 154-62 (2006).

407. *See* Guiding Principles, *supra* note **Error! Bookmark not defined.**, at princ. 7.

408. *Id.* at princ. 9 cmt.

409. *See id.* at princ. 14.

410. For the relevant discussion of the European approach in the context of the "golden share" cases, see Larry Catá Backer, *The Private Law of Public Law: Public Authorities as Shareholders, Golden Shares, Sovereign Wealth Funds, and the Public Law Element in Private Choice of Law*, 82 TUL. L. REV. 1801 (2008).

411. *See* SRSG 2009 Report, *supra* note **Error! Bookmark not defined.**; *see also* Guiding Principles, *supra* note **Error! Bookmark not defined.**.

up with important ideological foundations of Western notions of rule of law and the legitimate constitutional order, both of which are deeply tied to the idea of an independent judiciary as the critical component in the protection of individual rights against others and against the state.[412] But that concept has less of a place where remediation is also meant to embrace other governance systems, providing individuals with a basis for complaint grounded in norms other than the law of a particular state. There is a strong nod in that direction in the General Principles,[413] but these mechanisms are clearly meant to serve a marginal role—either to prevent harm or to fill gaps. The remediation workhorse remains the state and its judicial apparatus.

None of this is illogical; and it reinforces conventional notions that were strong elements of the critique of important sectors of the non-governmental organization community.[414] But it tends to reduce the access to remedies to an instrumental application of the consequences of the normative objectives of the state duty to protect and the corporate responsibility to respect human rights. A richer approach might have recast the Third Pillar access to remedies away from the stakeholders at the center of the first two pillars—states, business enterprises, non-governmental organizations, public international organizations—and toward the critical object of this enterprise—individuals suffering adverse human rights impacts. The remedial provisions assume a more autonomous role by centering their provisions on the obligations and privileges of stakeholders who belong to that class of individuals or groups affected by state or corporate activity with human rights impacts.

Thus, turned around, access to remedy becomes a more useful vehicle for the elaboration of the obligations of actors to avoid and remediate harm. That obligation, of course in accordance with the structure of the Guiding Principles, is limited to law (legislation and dispute resolution remediation) for states, and governance norm frameworks (social norms and contract policies, including the policies at the heart of human rights due diligence) for corporate actors. Within that framework, international organizations and other collectives organized to fashion standards and remediation that might also assume a greater place within the constellation of remedial alternatives available to individuals. One could try to interpret the current framework in that direction, but it is more likely that a consequentialist structure will be used. The result is the loss of mechanics, inherent in the development of the "Protect, Respect and Remedy" Framework, which might have fleshed out the relationship within these complex and overlapping governance structures of the rights bearers to those whose actions may adversely affect their interests.

5.2.7. Inter-systemic Issues

The great challenge of polycentric structuring is the approach chosen for the ordering of the relationship between coordinating systems—that is, the challenge of the effectiveness of its structural coupling.[415] The issues of interactions among state and corporate governance systems, along with that of international public and private organizations that supplement and compete with both, present an important unresolved issue that parallels that of the future of legitimate interpretation of the Guiding Principles themselves. On the one hand, this process can be understood as organic, subject to the sum of the combination of the logic of the character of each of the actors. On

412. *See e.g.*, Louis Henkin, *A New Birth of Constitutionalism: Genetic Influences and Genetic Defects*, *in* CONSTITUTIONALISM, IDENTITY, DIFFERENCE, AND LEGITIMACY: THEORETICAL PERSPECTIVES 39, 40-42 (Michel Rosenfeld ed., 1994).

413. *See* Guiding Principles, *supra* note **Error! Bookmark not defined.**, at princ. 28-30.

414. *See e.g.*, Amnesty Int'l, *Comments in Response to the UN Special Representative of the Secretary General on Transnational Corporations and Other Business Enterprises' Guiding Principles—Proposed Outline (October 2010)*, AI Index IOR 50/001/2010, at 18-21 (Nov. 4, 2010) ("The Guiding Principles must be clear that there will be some corporate human rights impacts that *must* involve the State ensuring accountability and remedy.") *Id.* (emphasis added).

415. *See generally* Niklas Luhmann, *Operational Closure and Structural Coupling: The Differentiation of the Legal System*, 13 CARDOZO L. REV. 1419 (1992).

the other hand, the strong instrumentalist character of the Guiding Principles creates avenues for the indulgence of temptations by states, especially, to either attempt to commandeer the system, and in the process limit its application. It also opens the door, though less widely, for non-state actors to develop governance systems that de-center the state within governance systems with real effect in the ordinary lives of people. In either case, strategic behavior is likely at both ends of the governance spectrum.[416]

Second, autonomy of the corporate responsibility is also built into the scope of application rules of Draft Principle 12 (Guiding Principles 12 through 15). The responsibility "[a]pplies across a business enterprise's activities and through its relationships with third parties associated with those activities."[417] The validity of this scope is problematic at best under the rules of the domestic legal orders of most states. It disregards the complex and deeply embedded legal protections accorded to entities separately constituted as legal persons. It ignores principles of segregated assets that are built into the legal regimes of corporate limited liability. It ignores rules for piercing the corporate veil. It also converts contract law into governance relationships, especially to the extent it seeks to impose obligations to control behavior on the entity in the superior position within supply or value chains. Activity, rather than legal relationships, forms the touchstone of the scope of the responsibility to protect.[418] None of this is necessarily bad, but all of it suggests a basis in legitimacy well outside the construct of the legal system rules of domestic legal orders.[419] The essence of corporate personality and the character of its relationships with others are grounded in substantially different standards that are outside of the state legal system, rather than within it. Guiding Principle 12 is built on the recognition of this distinction.

Third, autonomy is also built into the construction of Guiding Principle 14's application to "all enterprises regardless of their size, sector, operational context, ownership and structure."[420] This portion of the standard might be understood as effectively sidestepping the rules of legal personality on which the law of corporations in virtually every state is based. In this reading, the standard collapses corporate personality into single enterprises—the legal consequences of any single enterprise action triggers the responsibility to respect within the entire enterprise. This is impossible under the domestic law of most states which, for example, would impose strict fiduciary duty rules on the boards of distinct corporations making up an enterprise.[421] The Guiding Principles suggest that, while corporate obligations may be grounded on the basis of particular standards according to the laws of the states in which they are domiciled or operate, the responsibility to respect human rights is not limited by those legal rules. Equally plausible is a reading in which the application provision is meant to be harmonized with existing corporate law principles of legal personality in any jurisdiction in which an entity operates. Harmonization is possible, for example, by application of rules of agency across the relationships of an

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416. This is what Bob Jessop has described in a related context as the tension between what is sometimes derided as market anarchy and organizational hierarchy. *See* Bob Jessop, *The Governance of Complexity and the Complexity of Governance: Preliminary Remarks on Some Problems and Limits of Economic Guidance*, *in* BEYOND MARKET AND HIERARCHY: INTERACTIVE GOVERNANCE AND SOCIAL COMPLEXITY 95-96, 113 (Ash Amin & Jerzy Hausner eds., 10th ed., 2010) ("inter-systemic concertation must be mediated through subjects who can engage in ex ante self-regulatory strategic coordination, monitor the effects of that coordination on goal attainment and modify their strategies as appropriate. On the other hand, such bodies can never fully represent the operational logic . . . of whole subsystems.").

417. Draft Principles, *supra* note **Error! Bookmark not defined.**, at princ. 12(b).

418. The commentary emphasizes, "The scope of the corporate responsibility to respect human rights extends across a business enterprise's own activities and through its relationships with other parties, such as business partners, entities in its value chain, other non- State actors and State agents. Particular country and local contexts may affect the human rights risks of an enterprise's activities and relationships." *Id.* at princ. 12 cmt.

419. *See, e.g.*, Backer, *Multinational Corporations*, *supra* note 522.

420. Guiding Principles, *supra* note **Error! Bookmark not defined.**, at princ. 14.

421 See, Henry Hansmann & Reinier Kraakman, The Essential Role of Organizational Law, (2000) 110 Yale LJ 387.

enterprise within its production chains[422]. It may also be harmonized by aligning state law on veil piercing, perhaps even to accord with the principles represented by the spirit of the UNGP.[423] It might even spark debate about the value of asset partitioning itself.[424]

Fourth, the basis of the responsibility to respect appears to be functional rather than formal. It is to some extent grounded in principles of power relationships. If a corporation has power over another in the context of their relationship, that corporation has a responsibility to respect human rights within the context of that power.[425] Importantly, protection from legal liability does not follow from compliance with the autonomous obligations derived from the corporate responsibility to respect.[426] Thus, compliance with corporate responsibility rules does not insulate a corporation from liability under the law-based rules of the states in which it is domiciled or operates.

Fifth, the functional element of the responsibility to respect and its autonomy from law is emphasized in the description of the governance universe that makes up the substantive element of the responsibility to respect. "Depending on circumstances, companies may need to consider additional standards."[427] These standards are sourced in international law rather than the domestic law of any state, with specific reference to international humanitarian law and the universe of U.N. instruments specific to vulnerable and/or marginalized groups, such as indigenous peoples, women, ethnic and religious minorities, and children.[428] That produces a gap in interpretation. It is possible to suggest a reading in which a corporation must apply international law standards in all instances , using domestic law only as a baseline. On the other hand, it is possible to understand autonomy of law as bifurcating the responsibility of a corporation between domestic obligations and international obligations, the later to be applied only outside the home state. It might also be possible to develop an alignment between the domestic legal order of a home state and the extent of the obligation of a corporation to respect human rights (except to the extent to host state law imposes higher requirements within its territory.

Lastly, the scope rules of the responsibility to respect human rights include a strong caution against a conventional approach to its effectuation, grounded in notions of risk assessment common to financial reporting.

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[422] See, e.g., Gay Jenson Farms Co. v. Cargill, Inc., 309 N.W.2d 285 (Minn. 1981); Martin Petrin, 'Assumption of Responsibility in Corporate Groups: Chandler v Cape plc,' (2013) 76(3) *Modern Law Review* 589–619; Gabriel Rauterberg, 'The Essential Roles of Agency Law,' (2020) 118 *Michigan Law Review* 609-653.

[423] Martin Petrin 1 · Barnali Choudhury, 'Group Company Liability,' (2018) 19 European Business Organization Law Review 771–796.

[424] Frank H. Easterbrook and Daniel R. Fischel, 'Limited Liability and the Corporation,' (1985) 52(1) *The University of Chicago Law Review* 89-117;

425. The idea is grounded in the concept of leverage. *Id.* at princ. 19(b)(ii); *see supra* text accompanying notes 236-243. In the 2011 Draft Guiding Principles Commentary these ideas were grounded in notions of influence. It explains:

> "Influence", where defined as "leverage", is not a basis for attributing responsibility to business enterprises for adverse human rights impacts. Rather, a business enterprise's leverage over third parties becomes relevant in identifying what it can reasonably do to prevent and mitigate its potential human rights impacts or help remediate any actual impacts for which it is responsible.

Draft Principles, *supra* note **Error! Bookmark not defined.**, at princ. 12 cmt.

426. Guiding Principle 17 commentary makes that point explicitly:

> 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. However, business enterprises conducting such due diligence should not assume that, by itself, this will automatically and fully absolve them from liability for causing or contributing to human rights abuses.

Guiding Principles, *supra* note **Error! Bookmark not defined.**, at princ. 17 cmt.

427. Draft Principles, *supra* note 64, at princ. 12 cmt.

428. Guiding Principles, *supra* note **Error! Bookmark not defined.**, at princ. 12 cmt.

The Commentary makes clear that a risk assessment approach should not be undertaken, especially one in which the costs of compliance are balanced against the benefits accruing to a failure to respect human rights.[429] Likewise, companies may not balance the benefits of respecting human rights in one instance against their failures to respect human rights in others.[430] With these caveats, though, some room for incorporation within the risk management functions of corporate operations is permitted.[431]

But this systemic autonomy bumps up against reality as well. One in particular is worth mentioning here—it is emblematic of the sort of tension that might threaten the Guiding Principles construct—the actions required of an enterprise where the laws of a domestic legal order conflict with the social or international norms to which the corporation might also be bound. The Guiding Principles do not focus on this issue directly, but the thrust of the approach is clear—the rules of the domestic legal order preempt competing norms.[432] But the Principles in this case tend to inhibit rather than encourage bridging action in an effort to bend to the hierarchy of law that frames the Principles.

For example, it might have been possible to suggest a more instrumental balancing when corporations are faced with conflicting requirements based on the sort of decision balancing procedures and proportionality principles already well embedded in the Principles.[433] This instrumental balancing could proceed through four decision steps: (1) exploration of the possibility of reconciling the conflict between standards through interpretation;[434] (2) if reconciliation is not possible, negotiation of an exception or solution with the state;[435] (3) if mediation or informal discussion with state officials is unsuccessful, then challenge the law;[436] and (4) where

429. *Id.* at princ. 16-17.

430. "The responsibility to respect does not preclude business enterprises from undertaking additional commitments or activities to support and promote human rights. But such desirable activities cannot offset an enterprise's failure to respect human rights throughout its operations and relationships." Draft Principles, *supra* note **Error! Bookmark not defined.**, at princ. 12 cmt.

431. "Human rights due diligence can be included within broader enterprise risk-management systems, provided that it goes beyond simply identifying and managing material risks to the company itself, to include risks to rights-holders." Guiding Principles, *supra* note **Error! Bookmark not defined.**, at princ. 17 cmt.

432. Guiding Principle 23 seeks ways to honor principles of human rights when faced with conflicting requirements. *Id.* at princ. 23(b); *see supra* notes 568, 569 and accompanying text. This is consistent with the overall framework of the Guiding Principles. *See* Guiding Principles, *supra* note **Error! Bookmark not defined.**, at princ. 1-3.

433. *E.g.*, Guiding Principles, *supra* note **Error! Bookmark not defined.**, at princ. 13-14.; *see supra* notes 568-70 and accompanying text.

434. The exercise of reconciling standards can 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 are 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).

435. 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 mediation of 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.

436. It is possible that discussions with State officials may not produce agreements that satisfy 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.

challenge is unsuccessful, consideration of the continued feasibility of operating in the offending jurisdiction, assuming that the company is now forced to choose between national and international standards.[437]

Only when lawful challenge proves unsuccessful does a company actually face the issue of 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.[438] 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 were more human rights benefits in providing some greater amount of information to Chinese customers than in abandoning China altogether.[439] It is important to remember that decisions made in this context are dynamic. They require constant review as circumstances change. When the human rights benefits diminish in the face of continued inconsistency in legal requirements, the company must then 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.[440]

All of these steps could be more effective if taken in collaboration with peer companies, nongovernmental allies, and, where applicable, in the home state.[441] This is especially useful where these collectives can develop models of decision and analysis that are context specific—such as for labor issues or for issues peculiar to a particular industrial sector. It might also be useful to stimulate collaboration between industry and civil society groups. It is in this context that the General Principles missed an opportunity to mirror the multilateral governance provisions of the state duty to corporate responsibility, including the incorporation of the General Principles themselves in the work of multilateral corporate groups.[442] That absence illustrates both the promise and the limits of the General Principles in its initial iteration.

5.3 The Textualization of Intent: A Preliminary Framing Commentary

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437. A useful though not wholly satisfying example was provided by Google, Inc., in its highly publicized dispute with the Chinese state, . See Miguel Helft and David Barboza,, *Google Shuts China Site in Dispute Over Censorship*, THE NEW YORK TIMES, March 22, 2010, available http://www.nytimes.com/2010/03/23/technology/23google.html. The move can be strategic. Two years after the strategic retreat, Google is seeking re-entry into the Chinese market. See, Amir Efrati and Loretta, *Google Softens Tone on China: Two Years After Censorship Clash, Company Renews Push to Expand in World's Biggest Internet Market*, THE WALL STREET JOURNAL, Jan. 12, 2012. Available http://online.wsj.com/article/SB10001424052970203436904577155003097277514.html.

438. The idea is well known in the business literature. *See e.g.*, THOMAS N. GLADWIN & INGO WALTER, MULTINATIONALS UNDER FIRE: LESSONS IN THE MANAGEMENT OF CONFLICT 206-12 (1981) (withdrawal from apartheid South Africa). These decisions are grounded in the application of social norm ideals. These are made evident through social mobilization and action by consumers, shareholders, and nongovernmental organizations that may affect public opinion and economic decision-making affecting corporate profitability. *See, e g.*, SUSANNE SOEDERBERG, CORPORATE POWER AND OWNERSHIP IN CONTEMPORARY CAPITALISM: THE POLITICS OF RESISTANCE AND DOMINATION 138-59 (2009) (speaking to what she labels the marketization of social justice illustrated by the case of the Sudan divestment campaign).

439 . Karen Wickre, *Testimony: The Internet in China*, GOOGLE BLOG (Feb. 15, 2006, 9:50 AM), http://googleblog.blogspot.com/2006/02/testimony-internet-in-china.html.

440 . *See* David Drummond, *A New Approach to China*, GOOGLE BLOG (Jan. 12, 2010, 3:00 PM), http://googleblog.blogspot.com/2010/01/new-approach-to-china.html.

441. *Compare* Guiding Principles and discussion, *supra* note **Error! Bookmark not defined.**, at princ. 12.

442. The closest provision, Guiding Principle 30, sets a substantive constraint on multi-stakeholder and other collaboration initiatives. It assumes such efforts without encouraging them or considering them important instrumental elements in furthering the framework, nor does it provide a structure for collaborations between them and business in the construction and implementation of their human rights due diligence programs. It does recognize these possibilities, but gently. It does suggest the similarity in issues of implementation, but does not focus on the connection with other related systems. *Id.* at princ. 30.

5.3.1.The State Duty to Protect Human Rights

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 rights norms. I have briefly suggested the relationship between pillars.[443] In discussion of the First Pillar obligations of states, the SRSG has focused on the legal obligations of states derived from international law.[444] The duty to protect is grounded in international human rights law.[445] 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."[446] 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.[447]

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.[448] 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,[449] 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.[450]

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,

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[443] 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.
[444] 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).
[445] Id., at par. 13.
[446] 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.
[447] 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.
[448] Id.
[449] On direct effects, see, e.g., S. PRECHAL, DIRECTIVES IN EC LAW (2nd ed., Oxford: Oxford University Press, 2005); M. Klamert, *Judicial Implementation of Directives and Anticipatory Indirect Effect: Connecting the Dots,* 43 CML REV. 1251 (2006).
[450] 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).

punish, and redress it when it occurs."[451] Thus understood, international law, to the extent it speaks to rules covering the behavior of corporate conduct, might 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."[452]

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.[453] 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.[454] In some cases, the Member States have re-constructed their constitutional orders to explicitly accommodate Community Law Supremacy.[455]

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.[456] 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."[457] On the other hand it has proven to be possible to sidestep these 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.

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[451] Id., para. 14.
[452] Id.
[453] See, e .g., Costa v. Ente Nazionale per L'Energia Elettrica (ENEL), Case 6/64, [1964] ECR 585.
[454] 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).
[455] See for example, German Basic Law Art. 23; Constitution of the French Republic 88-1.
[456] 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).
[457] 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.).

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.[458] 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[459] and the People's Republic of China on sovereignty grounds.[460] 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.[461]

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.[462] 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.[463] This will pull strongly against a strong harmonization of international human rights law harmonization. Yet it also suggests that international norms will have some 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 sot project their laws

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[458] South African Constitution, art. 39.
[459] (e.g., *Medellín v. Texas*, 552 U.S. 491 (2008)
[460] 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.
[461] 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).
[462] The United States, for example, has declined to ratify the International Covenant for Economic, Social, and Cultural Rights.
[463] 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* ").

outside their territories and onto the effects of home state entities in host states.[464] The second looks to the nature of the internal transposition of international obligations--understood in terms of vertical and horizontal incoherence.[465] 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 id effectively similar in effect),[466] and through the harmonizing effects of soft law regimes.[467]

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."[468] 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.[469] Where the State itself is engaged in business abroad, the SRSG suggests that there are "strong policy reasons for home States to encourage their companies to respect rights abroad.[470] 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."[471] 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

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[464] 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)
[465] Id., para. 17-19.
[466] Id., para. 20
[467] Id., at 21.
[468] Id., para. 16.
[469] Id., at para. 15.
[470] Id. at para. 16.
[471] Id., at para. 18.

rights agencies and obligations."[472] Horizontal incoherence is especially troublesome with respect to the regulation of corporations within domestic legal orders.[473]

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.[474] 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.[475] 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.

5.3.2 The Corporate Responsibility to Respect Human Rights

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 SRSG. This section approaches a number of the more interesting issues that have been considered ion 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.[476] 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.

5.3.2.1. Foundations. 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

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[472] Id., para. 18.
[473] 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.
[474] Id. at 20.
[475] Id., para. 21.
[476] United Nations Special Representative of the Secretary-General on business & human rights. The Corporate Responsibility to Respect Human Rights, Online Forum, available http://www.srsgconsultation.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.

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.

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."[477] 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

[477] 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.

by corporate activity. These relationships are well known and understood by corporations. Adopting a language of human rights deepens an understanding of those relationships rather than changing their fundamental terms.

5.3.2.2. 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.[478] Yet, that contextual foundation of duty is neither exotic nor unknown to corporations. It serves as the essence of the application of law and in 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.[479]

At the time of the elaboration of the draft, 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. [480] A decade after endorsement, however, notions of complicity have moved to a center of compliance strategies both within 2nd Pillar markets driven strategies and in 1st Pillar legislative enactments. Indeed, by the 2020's complicity expanded

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[478] "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, available http://www.srsgconsultation.org/index.php/main/discussion?discussion_id=4.

[479] "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.

[480] 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 *t*he role of the private sector in zones of conflict, *N*ew 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 closeness, or because of the duration, frequency, intensity and/or nature of the connection, interactions of business transactions concerned.

Id.

into a concept of facilitation that substantially broadened the scope of the concept of aiding and abetting as a matter of policy first, markets based compliance second, and tentatively legal compliance third.[481]

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.[482]

The SRSG focuses his analysis on the aiding and abetting framework of complicity.[483] This requires knowledge, the provision of practical assistance or encouragement, and the production of a substantial effect.[484] The legal standard is grounded in a harmonizing view of international criminal standards.[485] Yet, the SRSG suggests that complicity has a social meaning as a 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.″[486] 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.″[487]

The SRSG then elaborates a set of considerations for avoiding legal/non-legal complicity.[488] 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.″[489]

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 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

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[481] Discussed supra chapter 2.
[482] Justice Ian Binnie, *Legal Redress for Corporate Participation in International Human Rights Abuses: A Progress Report,* 38-SUM Brief 44, 47-48 (2009)
[483] SRSG's 2008 report, paragraphs 74.
[484] Id.
[485] See, id., at 77, 79-80.
[486] Id., at 75.
[487] Id., at 78.
[488] Id., at 77-81.
[489] Id., at 81.

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.[490] 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.[491] 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.[492] Scope issues, then, implicate not merely context (the easy case) but also linkages, especially within the contextual linkage of complicity.

5.3.2.3. Normative Content. 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.[493] In the European Union, similar notions were at the heart of the interpretation of the E.U. Treaty's right of establishment starting with *Centros Ltd v Erhvervs- og Selskabsstyrelsen*.[494] 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

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[490] OECD Risk Awareness Tools, Section 6.
[491] 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.
[492] 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.
[493] See, e.g., CTS Corp. v. Dynamics Corp. of America, 481 U.S. 69 (1987).
[494] Case C-212/97. See, Wymeersch, Eddy, Centros: A Landmark Decision in European Company Law (October 1999). Financial Law Institute Working Paper 99-15.

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.

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.[495]

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 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.[496] 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.

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[495] 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.

[496] 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]

5.3.2.4. Human Rights Due Diligence. In an essay well worth reading, John Sherman nicely described the dilemma of human rights due diligence.[497] 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 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."[498]

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.[499] 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."[500] 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."[501]

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*.[502] 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

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[497] 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).
[498] Id., at 6.
[499] Id.
[500] Stone v. Ritter, 911 *A.2d* 362 (Del. 2006).
[501] In re Citigroup Inc. Shareholder Derivative Litigation, 964 A.2d 106 (Del. Ch. 2009).
[502] See, Larry Catá Backer, Global Panopticism: States, Corporations and the Governance Effects of Monitoring Regimes. Indiana Journal of Global Legal Studies, Vol. 15, 2007.

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 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 vase 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.[503]

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. Here the tension among human rights becomes more acute, and the interpretive issues difficult. If the fundamental normative baseline of the corporate duty to respect is to do no harm, then does that apply only exogenously, or does the enterprise have the right to protect itself. If the later then the interpretation of the application of the prevent, mitigate, and remedy principle becomes more nuanced—requiring a balancing of negative impact. That is implied but so is the notion that external human rights take precedence over internal. Yet that is also not the case—entirely. First most jurisdictions do not recognize fundamental rights to enterprises or other legal persons; they extend only to natural persons, including the interests of natural persons in legal persons. The United States is an exception. Nonetheless the derivative rights of individuals who act by or through legal persons may also be entitled to a measure of respect. And thus a balancing is required. The UNGP provides its method—based on the principle of severity. But all harms ought to be either prevented, mitigated to remedied as a function of its severity.

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.[504] There is nothing new here, and corporate information management strategies

[503] 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.
[504] See Sherman and Lehr, supra, at 7-8.

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 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."[505] 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.[506] 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."[507] 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.[508]

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 the corporations responsibility to respect. In one

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[505] Sherman and Lehr, supra, at 6-7.
[506] 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).
[507] Sherman & Lehr, supra, at 12.
[508] Id., at 12.

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.

5.3.2.5 Elements of Human Rights Due Diligence. The SRSG has identified four core elements of human rights due diligence.[509] 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.[510]

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.[511] 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.[512] 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.

5.3.2.6. HRDD 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

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[509] 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, available http://www.srsgconsultation.org/index.php/main/discussion?discussion_id=8. These are analyzed in more detail below at text and notes ---.

[510] Id.

[511] 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.

[512] 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).

policy with regard to their responsibility to respect human rights, approved by the board or equivalent."[513] 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."[514]

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."[515] The scope of responsibility refers both to context and complicity.[516] 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.[517] 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."[518]

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 – 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

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[513] United Nations Special Representative of the Secretary-General on Business & Human Rights, Statement of Policy.
[514] *Id.*
[515] Id.
[516] 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.
[517] 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.
[518] United Nations Special Representative of the Secretary-General on Business & Human Rights, Statement of Policy.

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.[519] 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 implementation 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.

5.3.2.7. HRDD 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.[520] The assessment function can be broken down into four important components: (1) verification; (2) management; (3) exposure; and (4) and

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[519] See, Larry Catá Backer, Multinational Corporations as Objects and Sources of Transnational Regulation. ILSA Journal of International & Comparative Law, Vol. 14, No. 2, 2008.

[520] 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 --.

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.[521] For that purpose, the SRSG suggests a set of assessment tools. "Specific tools such as "human rights impact assessments" are one means to achieve this purpose,[522] but the important thing is the activity, not the form or tools by which the assessment is achieved." [523] 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.[524] 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.[525]

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.[526] 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 swearing 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

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[521] He notes:

> 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.

[522] See 2007 SRSG Report Mapping 4/35 on this topic.

[523] United Nations Special Representative of the Secretary-General on Business & Human Rights, Assessing Impacts.

[524] 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).

[525] 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.)

[526] "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.

Oxley Act, to attest to the functioning of the internal system of surveillance from which data is drawn for both private purposes (participation by private stakeholders) and public purposes (regulatory control by the state).[527]

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.[528] 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.[529] 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.

5.3.2.8. HRDD 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.[530] 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.[531] Just as states must consciously overcome horizontal and vertical

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[527] 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.

[528] 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."

[529] 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."

[530] 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.

[531] "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 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

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.[532]

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

5.3.2.9. 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. [534]

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the End of the Day, Oct. 13, 2009, referencing John Ruggie, Opening remarks by UN Special Representative John Ruggie, October 5, 2009.

[532] "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.

[533] Id.

[534] 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

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."[535] 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.[536]

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.[537]

5.3.2.10. 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

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> 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.

[535] Id.

[536] "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 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.

[537] "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.

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."[538]

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.[539] 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.

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.[540] 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.[541] 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

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[538] United Nations Special Representative of the Secretary-General on Business & Human Rights, Elaboration: Applicability to All Business.

[539] The issues that are connected to these specific entity forms are discussed in more detail below at --.

[540] 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).

[541] 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).

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.

5.3.2.11. 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."[542] These focus on the effectiveness of systems of monitoring, and the related issue of effectiveness of transparency (disclosure and engagement).[543] Of these issues of monitoring and transparency pose particularly potent issues for the design of the framework.

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.[544] 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.[545] 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.[546] 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

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[542] United Nations Special Representative of the Secretary-General on Business & Human Rights, Elaboration: Effectiveness.
[543] 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.
> 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.
[544] Backer, Larry Catá, Global Panopticism: States, Corporations and the Governance Effects of Monitoring Regimes. Indiana Journal of Global Legal Studies, Vol. 15, 2007.
[545] 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."
[546] See *In re Citigroup Inc. Shareholder Derivative Litigation*, 964 A.2d 106 (Del. Ch. 2009).

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 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.

5.3.2.12. 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."[547] Stakeholding, in the form of consultation, is described as especially important where indigenous peoples are concerned.[548] In both cases, however, the scope and prerogatives are not absolute. "But as with transparency, there are situations where consultation may be limited."[549]

The issue of transparency, like that of stake holding, is also central to a consideration of business and human rights.[550] 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."[551] 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

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[547] United Nations Special Representative of the Secretary-General on Business & Human Rights, Implementation: Consultation.
[548] Id.
[549] Id.
[550] 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.
[551] Id.

corporate responsibility to respect human rights, there may be situations where companies must limit what they disclose and to whom."[552]

5.3.2.13. Prioritizing Issues in HRDD. 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.[553]

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." [554] The SRSG has asked, "What guidance can be given on how to prioritize potential and actual company impacts on human rights?"[555]

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 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

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[552] Id.
[553] See, Daniel D. Ntanda Nsereko, Prosecutorial Discretion Before National and International Tribunals.
[554] 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.
[555] Id.

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.[556] 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."[557] It is meant to turn human rights "risk into opportunity is a key component of a strategic approach

[556] 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.
[557] Id., at 5.

to human rights in business."[558] For this purpose the BLIHR has developed the Human Rights Matrix.[559] The Matrix itself is a comprehensive approach to assessment that is worth studying.[560]

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.[561] 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.

5.3.2.14. 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.[562]

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."[563] Ultimately, however, the issue resolves itself. However one develops a strategy of compliance, it is clear that the most severe negative impacts ought to be addressed to favor prevention; and the others either mitigated or remedied. Balancing does not produce avoidance; it only changes the character of the corporate responsibility and whether it may be undertaken *ex ante* or *post facto*. The interpretation of the implementation of this framework, however, provides some room for interpretation. These include issues of valuing impacts, the nature of prevention, the alignment of choices and complicity, and the like.

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[558] Id., at 13.

[559] 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.

[560] See id., at 14-15.

[561] Rhoda Howard, The Full-Belly Thesis: Should Economic Rights Take Priority Over Civil and Political Rights? Evidence from Sub-Saharan Africa, 5 HUM. RTS. 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).

[562] 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 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.

[563] Id.

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.[564] Yet, again, that violation may go only to prevention, and perhaps mitigation. It may not relieve the enterprise of a remedial obligation.

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.[565] 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.[566]

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 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.[567]

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.

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[564] 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.

[565] 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.

[566] 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.

[567] The analysis and framework owes much to Christine Bader, whose work is gratefully acknowledged.

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.[568] 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.[569]

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 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).

5.3.2.15. 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.[570]

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"

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[568] Google, Testimony: The Internet in China, February 15, 2006.
[569] See, Google, A New Approach to China, Jan. 12, 2010.
[570] *Salomon v. Salomon & Co*. Ltd. [1897] AC 22.

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.[571]

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 Pillar with regard to supply chain relationships.[572] 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.

5.3.3. Human Rights Framework Linkage Issues.

5.3.3.1. 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.[573] 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."[574] 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

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[571] 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.

[572] "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.

[573] CITE

[574] CITE

as indigenous[575] while preserving to indigenous peoples a right to self-determination,[576] yet that right might appear to be limited to the power of such communities to preserve an autonomous status within states.[577] 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."[578] This is related to the protection against forced 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,[579] the management of information for consumption by internal audiences and projection to others,[580] and the right to preserve autonomous political institutions in the defense of what may be perceived to be matters affecting communal interest.[581]

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).[582]

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.[583]

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[575] (article 2)
[576] (article 3)
[577] (article 4)
[578] CITE
[579] (Arts. 14-15)
[580] (art. 16)
[581] (arts. 18-20, 34)
[582] United Nations Special Representative of the Secretary-General on Business & Human Rights, Issues: Indigenous People.
[583] 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.

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 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.[584]

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."[585]

The Voluntary Guidelines were named by invoking 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.[586] For purposes of application of the Akwé Kon Guidelines, invoking parties prepare a cultural heritage assessment,[587] environmental impact assessments,[588] and social impact assessments.[589]

"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."[590] 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

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[584] 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.
[585] Akwé Kon Guidelines, supra, at 1 (Hamdallah Zedan Executive Secretary, Forward).
[586] Id., at 1-2.
[587] (Id., paras. 12-34)
[588] (Id., Paras. 35-38)
[589] (id., paras. 39-51).
[590] Akwé Kon, supra, at 13 (Para. 25).

affected indigenous or local community and its members rely upon for their livelihood, well-being, and other needs."[591] 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."[592] 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.[593] 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."[594] Interestingly, the Akwé Kon Guidelines speak to conformity with national legal requirements, but only "to national legislation consistent with international obligations."[595] 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.[596] 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.

5.3.3.2 Gender. The SRSG reminds us that his "mandate requests that he 'integrate a gender perspective throughout his work.'"[597] 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."[598]

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 for lawmaking. Surveillance is a flexible engine."[599] Surveillance has both domestic[600] and transnational

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[591] Id., at para. 36.
[592] (id., para. 39).
[593] Id., para. 52.
[594] Akwé Kon Guidelines (2004), supra at para. 53.
[595] Id., para. 57.
[596] Id., at para. 62.
[597] United Nations Special Representative of the Secretary-General on Business & Human Rights, Issues: Gender.
[598] Id.
[599] 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.
[600] "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.

forms.[601] "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."[602] As such, one could understand this emphasis as suggesting a prioritization of gender issues in the Second Pillar responsibility to respect.[603]

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."[604] 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. 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.[605] Second, the distinction between the "social formation of gender biases" and "creating

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[601] "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.

[602] 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).

[603] 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.

[604] United Nations Special Representative of the Secretary-General on Business & Human Rights, Issues: Gender.

[605] 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.

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."[606] 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.

5.3.3.3 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.[607] 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."[608] The SRAG suggests a difference between loan due diligence and operational due diligence.[609] "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."[610]

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

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[606] The Sullivan Principles.
[607] 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.
[608] United Nations Special Representative of the Secretary-General on Business & Human Rights, Issues: Finance.
[609] "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.
[610] United Nations Special Representative of the Secretary-General on Business & Human Rights, Issues: Finance.

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 form 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 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.[611] 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.[612] 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 form 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

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[611] 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.

[612] 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.

the financial success of the SWF itself.[613] 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.

5.3.4. Three Pillar Framework 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 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."[614] 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."[615]

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.[616]

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

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[613] See, Simon Chesterman, The Turn to Ethics: Disinvestment from Multinational Corporations for Human Rights Violations - The Case of Norway's Sovereign Wealth Fund.
[614] United Nations Special Representative of the Secretary-General on business & human rights, Links between the Framework Pillars, Online Consultation.
[615] 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.
[616] 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).

of a modern form of *Pandektenrecht*[617] 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 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.[618]

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 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.[619] 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

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[617] 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).

[618] Patria M. Thornton, 'Of Constitutions, Campaigns and Commissions: A Century of Democratic Centralism under the CCP,' (2021) 248 *The China Quarterly* 52-72; Fiona Haig, 'Democratic Centralisms–Plural? A Comparative Analysis of Functional Communism in the French and Italian Communist Party Federations of Var and Gorizia, 1956,' (2020) 53(1) *Communist and Post-Communist Studies* 27-54.

[619] 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.

application on the company's activities in India. The forum for resolution of the 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.[620]

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."[621]

> 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."[622] 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 respect human rights, companies must also seek to ensure that impacts identified via this feedback loop are effectively remediated.[623]

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.[624]

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[620] 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.

[621] 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].

[622] 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.

[623] Id.

[624] 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).

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."[625] 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.[626]

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.[627]

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 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."[628]

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 entitles. If the latter, then the issue becomes more complicated. On the one hand, all commercial enterprises ought to conform

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[625] 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.

[626] 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.

[627] 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.

[628] 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).

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 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.

5.4 Conclusion.

The UNGP were developed to bridge governance gaps.[629] The first was the gap between public and private law; the second, the gap between the domestic legal orders of states and international law; the third was the gap between the responsibilities of legal persons whose relationships were determined as a function of ownership or contractual relations. Economic activity, then, represented the aggregated product of the nexus of a number of systems, none of which could assert comprehensive authority or control over the entire span of production.[630] None of this mattered much until the effort to develop fundamental principles (normative and methodological) of first principles became important toward the end of the 20th century.[631] As this impulse focused on the development of human rights, the consequences of gap governance became both more apparent and a greater challenge. *The challenge was to recognize and privilege a single set of universal human rights norms, and human rights privileging systems of governance while at the same time respecting the boundaries of authority from which the fundamental governance gaps arose.*

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[629] John G. Ruggie, 'Global Governance and "New Governance Theory": Lessons from Business and Human Rights,' (2014) 20 *Global Governance* 5–17.
[630] Cf., Kenneth W. Abbott and Duncan Snidal, "Taking Responsive Regulation Transnational: Strategies for International Organizations," (2013) 7 *Regulation and Governance* 95–113.
[631] Larry Catá Backer, 'Theorizing Regulatory Governance Within Its Ecology: The Structure of Management in an Age of Globalization,' (2018) 24(5) *Contemporary Politics* 607-630.

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.

The UNGP, then, was developed as a framework for "solving" the problem by respecting governance gap systems while at the same time developing bridging technologies that were meant to project an overarching normative set of human rights principles within and between these systems. It was to those ends that three pillars were developed—a recognition of the gaps both between systems (public, and private for example); and within them (variation in state reception of international law; variation in private law systems as a function of norm based compliance expectations/rules). The mediation, the bridging, was manifested in the core principles of the UNGP: (1) "do no harm;" (2) "prevent, mitigate, remedy," (3) build capacity and nudge (through public incentives and markets based expectations); and (4) cultivate compliance and accountability based cultures. Each was to operate within the legal fields of the state and public policy, the managerial fields of private ordering; and the equity based fields of remedial undertakings.[632]

Thus, the conceptual foundations of the mandate as elaborated by the STSG sought to find a way to be true to the notions expressed above, while breaking new ground.[633] 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."[634] But the role of the state, and state based

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[632] One encounters her what the SRSG himself noted as an evolution of his concept of embedded liberalism for which he had achieved a broad recognition during the third quarter of the 20th century. The transposition of its principles to international governance grounded in human rights was described in John R. Ruggie, 'Global Markets and Global Governance The Prospects for Convergence,' In Steven Bernstein, and Louis W. Pauley (eds), *Global Liberalism and Political Order: Towards a New Grand Compromise?* Pp. 23–48 (Albany: State University of New York Press, 2008) ("in contrast to the state-centric multilateralism of the international world that we are moving beyond, reconstituting a global version of embedded liberalism requires a multilateralism that actively embraces the potential contributions to global social organization by civil society and corporate actors" Ibid., p. 25)

[633] That was an underlying theme of the *travaux préparatoire* discussed at Chapter 3, supra.

[634] 2006 SRSG Report– Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises, Interim report of the Special Representative of the Secretary-General on the issue of human rights

legal regimes remains "not only primary, but also critical."[635] The role of the SRSG was principally evidence based. "As indicated at the outset, the SRSG takes his mandate to be primarily evidence based."[636] 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.

Nonetheless, the gaps, as well as the bridging concepts and text, produce interpretive challenges. It is to those that the Commentary focuses. The challenges take two distinct forms. The first include issues of identification and structuring of the gaps themselves. These include those concepts and issues that constitute an understanding of the spirit of the UNGP, it forms, flexibility, and application. The second include the scope of the meaning of the UNGP text itself. These include not merely ordinary textual interpretation, but also issues of plausibility in the scope of meaning. These, in turn, are a function of the relationship of text to the gaps they seek to bridge within the normative framework within which the UNGP (and the SRSG's mandate) was directed.

Gaps, then, and especially the gaps identified and explored in this Chapter 5, produce substantial room for comment—comment that reflects the possibilities of meaning that are not singular and fixed, but which exist within a spectrum of *possible plausibility*. There is more. *These gaps, and interpretive possibility, exist not just in space and place but also in tim*e. 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.[637] 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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and transnational corporations and other business enterprises E/CN.4/2006/97 (22 February 2006); available [https://undocs.org/en/E/CN.4/2006/97], last accessed 25 February 2024; ¶ 75.

[635] Id., at ¶ 75

[636] Id. at ¶ 81.

[637] Id.