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From Governance Gaps to Interpretive Spaces in the UNGP: A Mapping Analysis for Commentary

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5.1 The UNGP's Interpretative Spaces

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.[1] 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.[2] Both provide remedial mechanisms as a necessary element for self-correction and the maintenance of legitimacy—as well as an "as applied" or phenomenological method of maintaining control of the meaning of their respective rule structures and expectations through grievance resolving organs of control.[3] Aggregated, these constitute what the SRSG characterized as the systems of social legitimacy, built on "elaborating the implications of existing standards," by "integrating them within a single, coherent, and comprehensive template," and in the process providing the basis for "identifying where the current regime falls short and how it should be improved."[4] The process might also be understood as disciplinary and culturally embedded techniques,[5] with the corporate responsibility to respect at its center (as a moving force for the framework, and within that, "Human rights due diligence is a potential game changer for companies."[6] 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.[7] At the heart of the system is an interactive sharing of risk based decision making, where risk is assessed against the core human rights based objectives.[8] Both must necessarily provide mechanisms

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[1] 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).

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

[3] See, e.g., Larry Catá Backer, 'Chroniclers in the Field of Cultural Production: Courts, Law, and the Interpretive Process,' (2000) 20(2) *Boston College Third World Law Journal* 291-343 ("Once we understand courts as part of the process of cultural production—that is, as the site for the identification and memorialization of cultural norms—we can focus more consciously on using them to engage in cultural dialogue" ibid., p. 294).

[4] Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John G. Ruggie, Draft Guiding Principles for the Implementation of United Nations "Protect, Respect, and Remedy" Framework, A/HRC/--- (N.D. circulated from November 2010) available [https://media.business-humanrights.org/media/documents/files/reports-and-materials/Ruggie-UN-draft-Guiding-Principles-22-Nov-2010.pdf'; or "https://menschenrechte-durchsetzen.dgvn.de/fileadmin/user_upload/menschenr_durchsetzen/bilder/Menschenrechtsdokumente/Ruggie-UN-draft-Guiding-Principles-22-Nov-2010.pdf], last accessed 25 February 2024, ¶ 13.

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

[6] John G. Ruggie, 'The Corporate Responsibility to Respect Human Rights,' Harvard Law School Forum on Corporate Governance (15 May 2010); available [https://corpgov.law.harvard.edu/2010/05/15/the-corporate-responsibility-to-respect-human-rights/], last accessed 20 April 2024).

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

[8] "The Framework provided an authoritative focal point around which the expectations and actions of the various players could converge in this debate – business, government, civil society, investors and beyond. At its foundations is good risk

for the vindication of behavior obligations imposed through either system.[9] In this case the specific focus is on State, enterprise, and civil society collectives, the cooperation of each and their coordination toward meeting their shared goals (as set out in the UNGP) is essential for its success—in whatever form that success is eventually produced. Alignment and inter-systemicity is inevitable.[10]

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.[11] Yet the three governance approaches—legal, disciplinary, and remedial are inextricably and dynamically intertwined[12] within the larger collective of stakeholders—producers and consumers—of economic activity, connected by the text that unities and separates their sub-systems.[13] And all of these interconnections are bound together by and through the fundamental objective of the UNGP—"enhancing standards and practices with regard to business and human rights so as to achieve tangible results for affected individuals and communities."[14] And they are grounded in a commitment to a starting point in contemporary legalities (for States legal obligations under international law; for enterprises compliance based obligations) which can evolve as a function of the attainment of the ultimate normative objective, achieving socially sustainable globalization.[15]

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"[16] 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

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management." John G. Ruggie, 1UN Guiding Principles for Business and Human Rights,' Harvard Law School Forum on Corporate Governance (9 April 2011), available [https://corpgov.law.harvard.edu/2011/04/09/un-guiding-principles-for-business-human-rights/], last accessed 19 April 2024.

[9] 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 .

[10] 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).

[11] 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.

[12] 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.

[13] "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.

[14] UNGP, General Principles.

[15] Ibid.

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

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. The SRSG specifically rejected what he saw as radicalism embedded in the *Norms*,[17] one that would either transform international law or the fundamental principles of economic activity in liberal democracy around private economic actors in privately driven markets.[18] Again, principled pragmatism serves as the structuring concept that drives both organization and reach.[19] 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.[20] 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.[21]

It may be helpful here to consider an insight from Miyamoto Misashi's *Five Rings*, and approaches to UNGP commentary. "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.[22] The UNGP offer a foundation on which it is possible to build pathways toward an ideal—the avoidance of adverse human rights harms (including now sustainability aspects). There will be substantial gaps in those pathways. Those gaps are grounded in distinctive ways of privileging sometimes quite different premises about humans and human organization. It follows that these distinct pathways toward a more or less shared vision of the ideal together represent the forms of the bias inherent in these distinctive approaches toward any ideal. In that context it is the metaphor of the bridge (connecting gaps by reference to the objective) rather than the perspective (what lies on either side of a gap) that assumes a critical role.

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[17] 2010 SRSG Draft Report UNGP-- Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John G. Ruggie, Draft Guiding Principles for the Implementation of United Nations "Protect, Respect, and Remedy" Framework, A/HRC/--- (N.D. circulated from November 2010) available [https://media.business-humanrights.org/media/documents/files/reports-and-materials/Ruggie-UN-draft-Guiding-Principles-22-Nov-2010.pdf'; or "https://menschenrechte-durchsetzen.dgvn.de/fileadmin/user_upload/menschenr_durchsetzen/bilder/Menschenrechtsdokumente/Ruggie-UN-draft-Guiding-Principles-22-Nov-2010.pdf], last accessed 25 February 2024, ¶ 59 ("engulfed by its own doctrinal excesses").

[18] Discussed in Chapter 4, supra.

[19] Discussed Chapter 3.1, supra.

[20] 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.

[21] Discussed Chapter 3, supra.

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

Commentary is best utilized to identify and bridge gaps; it is built on connecting these pathways toward or as a function of the core objectives. 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.[23] Just as the "meaning of a word is its use in the language,"[24] and "the meaning of a name is sometimes explained by pointing to its bearer,"[25] 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.[26] 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. All of this, of course, is possible only as a function of the ordering framework of starting point (legalities/compliance) and its objective—a socially sustainable globalization grounded in preventing-mitigating-remedying negative impacts.

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.

5.2. The Gaps Between Principle and Pragmatism in the UNGP

Viewed through the lends of human rights and sustainability norms, the SRSG could understand that the institutionalization of the system of globalization that emerged in the last decades of the 20th century as the great 21st century challenge for international institutions.[27] Within that larger challenge, the issues of business and human rights served as an important microcosm.[28] A number of those challenges remain pointed and unresolved

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[23] Jan M. Broekman, Meaning, Narrativity, and the Real: The Semiotic of Law and Legal Education IV (Dordrecht, Switzerland, 20169, p. 208-209 (meaning holism).
[24] Ludwig Wittgenstein, *Philosophical Investigations* (G.E.M. Anscombe (trans); NY: MacMillian, 1953); ¶ 43, p. 20.
[25] Ibid.,¶ 43 p. 21.
[26] 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.
[27] 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 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, ¶¶ 9-19 and discussion Chapter 3.2.2.
28. 2011 Report, *supra* note **Error! Bookmark not defined.**, at para. 2.

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, 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.[29] 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*,[30] can be the subject of international tribunals.[31] 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.[32] 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.[33] 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[34] is sometimes of help, but its jurisdiction is also limited and to some extent optional.[35]

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

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

30. *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).

31. *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.

32. 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).

33. *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).

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

35. *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.

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.[36] 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.[37] In some cases, the Member States have reconstructed their constitutional orders to explicitly accommodate Community Law supremacy.[38]

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.[39] 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."[40] 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.[41] 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

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

37. 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.).

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

39. 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*).

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

41. 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.

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.[42]

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[43] 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.[44] The focus is on vulnerable people, broadly defined.[45] 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,[46] 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

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

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

[44] 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.")

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

46. *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).

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."[47]

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.[48] 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 . . ."[49] 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,[50] 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.[51] 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.[52] 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

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47. 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).

48. 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.

49. *Id.*

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

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

52. 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.

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.

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 UNGP distinguish between the narrow formalism of legal constraints and the open-ended possibilities of policy considerations. The constraints of State legal obligations under international law remain unaffected by the State duty. The possibilities of building policy, to provide suggestions and best practices, can perhaps more effectively help 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 UNGP 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 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,[53] 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. The UNGP: 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.[54] 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."[55]

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

54. "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.

[55] 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.

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 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[56] 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.[57] 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. Domestic Corporate Law 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.[58] This suggests an alternative to the decades long drift of corporate governance towards the use of contract for regulatory effect.[59] 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

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

57. *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).

58. 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).

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

rights affecting activities of corporations.[60] 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.[61] 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 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.[62]

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.[63] 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.[64] 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.[65] Surveillance has both domestic[66] and transnational forms.[67] "Together, surveillance in its various forms provides a unifying technique with which governance can be effected

60. *See, e.g.*, Backer, *supra* note **Error! Bookmark not defined.**, at 1752.

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

62. *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).

63. 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).

64. 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.

65. 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.*

66. "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 65.

67. "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.*

across the boundaries of power fractures without challenging formal regulatory power or its limits."[68] As such, one could understand this emphasis as suggesting a prioritization of gender issues in the Second Pillar responsibility to respect.[69] 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.[70]

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?).[71]

Issues of social organization and communal mores, including those touching on the status of women, are matters for the state—and the First Pillar.[72] 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.[73] 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

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

69. 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-part-xvii.html.

70. 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.*

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

72. *Id.* at 4.

73. *Id.*

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.

Nonetheless, 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.[74] 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[75] 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."[76] The successor, Global Sullivan Principles,[77] 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[78] and the Cairo Declaration on Human Rights in Islam.[79] 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 Double Double Problem: State-Owned Enterprises and Conflict Zones

The UNGP lend themselves well to the constrained complexity of simple polycentricity—the coordination of law-state, social norm-corporate, and international systems.[80] 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 UNGP as an integrated system. The challenge is doubled when foreign SOEs operate in conflict zones. In the case of the private enterprise operating in conflict zones, the challenge is bound up in the heightened expectations shifted to the enterprise, on that pushes corporate expectations from the corporate responsibility to more intimate relationship with State duty. In the case of the SOE operating abroad, the challenge works in two directions. The first focuses on the corporate

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

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

76. *Id.*

77. *See id.*

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

79. 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.].

80. *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.

responsibility of a state commercial instrumentality, detached or not from any State duty. The second touches on the State duty and corporate responsibility of the State "owner" of the commercial enterprise. The third compound the problem, when the SOE operated in a foreign territory that is itself a conflict zone. The ability to catalog and differentiate between a State duty and a corporate responsibility. These may shift in a dynamic way as conditions within a conflict zone morph. The UNGP acknowledge the problems.

In the context of corporate activity in conflict-affected areas, the UNGP[81] tend to treat these entities the way international law treated states that were not members of the Family of Nations before 1945.[82] In effect, 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.[83] 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.[84] 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 UNGP tend toward a divide and manage principle.[85] 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.[86] 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.[87] 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.[88] 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.

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

82. 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 51, 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 . . .").

83. 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.

84. 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).

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

86. *Id.* at princ. 9 cmt.

87. *See id.* at princ. 14.

88. For the relevant discussion of the European approach in the context of the "golden share" cases, see Larry Catá

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,[89] 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 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.[90] 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,[91] 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.[92] 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

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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).

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

90. *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).

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

92. *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).

within these complex and overlapping governance structures of the rights bearers to those whose actions may adversely affect their interests.

5.3 Mapping Commentary/Interpretive Gaps in the UNGP

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. In discussion of the First Pillar obligations of states, the SRSG has focused on the legal obligations of states derived from international law.[93] The duty to protect is grounded in international human rights law.[94] 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."[95] 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.[96]

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.[97] 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,[98] 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.[99]

This analogy may serve as an 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

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[93] 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).
[94] Id., at par. 13.
[95] 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.
[96] 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.
[97] Id.
[98] 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).
[99] 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).

considered in breach of their obligations where they fail to take appropriate steps to prevent it and to investigate, punish, and redress it when it occurs."[100] 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."[101] It is at this point that the intersection between three sets of relationships produce substantial interpretive elasticity worth considering. The three consist of (1) a State's compliance with its legal obligations under international law (consensual and mandatory) balanced against the constitutional ordering of that State within its ideological-political model (e.g. Marxist Leninist, liberal democratic, theocratic, etc.); (2) the role of State policy and guidance balanced against the use of assessment and compliance, along with standard setting as a means of nudging behavior by effects rather than through the forms of law; and (3) the administration of standards and accountability systems through compliance based enterprise human rights due diligence systems balanced against international human rights norm compliance through markets driven transnational pathways.

Drawing of a parallel to the governance framework of the European Union suggests another potential 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.[102] 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.[103] In some cases, the Member States have re-constructed their constitutional orders to explicitly accommodate Community Law Supremacy.[104]

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.[105] 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

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[100] Id., para. 14.
[101] Id.
[102] See, e.g., Costa v. Ente Nazionale per L'Energia Elettrica (ENEL), Case 6/64, [1964] ECR 585.
[103] 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).
[104] See for example, German Basic Law Art. 23; Constitution of the French Republic 88-1.
[105] 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).

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."[106] 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.

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.[107] 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[108] and the People's Republic of China on sovereignty grounds.[109] 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.[110]

At this point one might make out the outlines of the State duty. Its outer edges are framed by contests over the nature, scope, and location of legality. At the center of those contests are disagreements about the relationship between international legal obligations of States and State duty to abide strictly by its constitutional order. For example, in one conception it might be suggested that the State 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.[111] 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.[112] This will pull strongly against a strong harmonization of international human rights law harmonization.

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[106] 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.).
[107] South African Constitution, art. 39.
[108] (e.g., *Medellín v. Texas*, 552 U.S. 491 (2008)
[109] 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.
[110] 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).
[111] The United States, for example, has declined to ratify the International Covenant for Economic, Social, and Cultural Rights.
[112] 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* ").

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 outside their territories and onto the effects of home state entities in host states.[113] The second looks to the nature of the internal transposition of international obligations--understood in terms of vertical and horizontal incoherence.[114] 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),[115] and through the harmonizing effects of soft law regimes.[116]

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."[117] 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.[118] 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.[119] 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

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[113] Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises, Business and human rights: Towards operationalizing the "protect, respect and remedy" framework A/HRC/11/13 (22 April 2009); available [https://undocs.org/en/A/HRC/11/13]; last accessed 25 February 2024, ¶¶ 15-16)
[114] Ibid., para. 17-19.
[115] Ibid., para. 20
[116] Ibid., at 21.
[117] Ibid., para. 16.
[118] Ibid., at para. 15.
[119] Ibid. at para. 16.

but then fail to adopt policies, laws, and processes to implement the."[120] But there is also vertical incoherence where states decline to sign up to important instruments of international human rights, or sign onto them with strong reservations. Vertical incoherence is tied significantly to the legal framework within which international norms can be internalized within a domestic legal order, a subject discussed above. "Even more widespread is 'horizontal' incoherence, where economic or business focused departments and agencies that directly shape business practices . . .conduct their work in isolation from and largely uninformed by their Government's human rights agencies and obligations."[121] Horizontal incoherence is especially troublesome with respect to the regulation of corporations within domestic legal orders.[122]

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.[123] 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.[124] 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. It is the portion of the UNGP that generated the most attention and the most contestation, notably by civil society elements and their academic intellectual allies.[125] 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

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[120] Ibid., at para. 18.
[121] Ibid., para. 18.
[122] 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 (4 Jan. 2010); available [https://lcbackerblog.blogspot.com/2010/01/using-corporate-law-to-encourage.html], last accessed 29 April 2024.
[123] Ibid. at 20.
[124] Ibid., para. 21.
[125] Perhaps representative is Amnesty International, Comments on the United Nations Special Representative of the Secretary General on Transnational Corporations and other Business Enterprises' Draft Guiding Principles and on post-mandate arrangements (December 2010), available [https://www.amnesty.org/en/documents/IOR50/002/2010/en/], last accessed 22 April 2024. They raised four main points: (1) addressing challenges of transnational business operations in the form of mandating human rights due diligence, (2) greater emphasis and guidance on regulatory measures, (3) particular guidance and rules for women and vulnerable populations, and (4) mandatory measures to ensure access to remedy.

Second Pillar.[126] 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 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

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[126] 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.

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."[127] 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

[127] 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.

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

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

5.3.2.2. Corporate Complicity. The SRSG has suggested an intensely contextual scope to the second pillar responsibility of corporations to respect human rights.[128] 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.[129]

At the time of the elaboration of the draft, the broadened concept of corporate "complicity" was relatively underdeveloped. The SRSG devoted time to the analysis of current practice and future trajectories, both of which he sought to bring into the UNGP.[130] These were, to some extent mapped against general obligations in conflict areas.[131] The interactions between concepts of complicity and conflict zone responsibilities related to human

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[128] "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.

[129] "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.

[130] See discussion Chapter 3. For the relevant SRSG reports, see, Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises, Clarifying the Concepts of "Sphere of influence" and "Complicity" A/HRC/8/16 (15 May 2008); available [https://undocs.org/en/A/HRC/8/16]; last accessed 25 February 2024;

[131] See discussion Chapter 3. See also Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John G. Ruggie, Business and human rights in conflict-affected regions: challenges and options towards State responses A/HRC/17/32 (27 May 2011); available [https://www.ohchr.org/en/special-procedures/wg-business/special-representative-secretary-general-human-rights-and-transnational-corporations-and-other]; last accessed 25 February 2025.

rights maps the terrain where interpretive flexibility is possible. 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. [132] 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 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.[133]

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.[134]

The SRSG focuses his analysis on the aiding and abetting framework of complicity.[135] This requires knowledge, the provision of practical assistance or encouragement, and the production of a substantial effect.[136]

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[132] 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.

[133] Discussed supra chapter 2.

[134] Justice Ian Binnie, *Legal Redress for Corporate Participation in International Human Rights Abuses: A Progress Report,* 38-SUM Brief 44, 47-48 (2009)

[135] Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises, Protect, Respect and Remedy: a Framework for Business and Human Rights A/HRC/8/5 (23 May 2008); available [https://undocs.org/en/A/HRC/8/5/Add.2], last accessed 25 February 2024, ¶ 74.

[136] Ibid.

The legal standard is grounded in a harmonizing view of international criminal standards.[137] 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."[138] 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."[139]

The SRSG then elaborates a set of considerations for avoiding legal/non-legal complicity.[140] 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."[141]

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 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.[142] 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.[143] 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

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[137] See, id., at 77, 79-80.
[138] Ibid., at 75.
[139] Ibid., at 78.
[140] Ibid., at 77-81.
[141] Ibid., at 81.
[142] OECD Risk Awareness Tools, Section 6.
[143] 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.

entities, particularly the Norwegian sovereign wealth fund.[144] 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. It represents not merely the mapping of the borders between public and private law, but between individual autonomy (expressed in this case through markets) and State management (expressed through its legalities, regulations, and management). The UNGP were based on the notion than an adjustment was necessary because of the fundamental changes to the old order already created by globalization (with its detachment of regulatory control from states). 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.[145] 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*.[146] The need for certainly, predictability and efficiency certainly contributed to the value of this presumption for corporations. On the other hand, certainty, predictability, and efficiency is not necessarily bound to any particular vision of the constitution and operation of aggregations of capital and labor engaged in economically productive activities (or for that matter any distinction between profit and non-profit human activity). That is, current *normative* content does not necessary predict its future expression, even holding constant the privileging of certainty, predictability, and efficiency.

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

Within this context, the notion of a state obligation to protect human rights – and to produce law to implement these obligations with effects on the legal obligations of corporations – is perfectly understandable. The relationship between state, corporation and law is both conventional and well defined. States are understood as the legitimate source of binding rules (law) which when lawfully enacted may impose obligations on corporations that can produce substantial consequences. As importantly, those legal obligations were bounded

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[144] 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, (2008) 23 *American University International Law Review* 577-615, 2008.

[145] See, e.g., CTS Corp. v. Dynamics Corp. of America, 481 U.S. 69 (1987).

[146] Case C-212/97. See, Eddy Wymeersch, Eddy Wymeersch, 'The Transfer of the Company's Seat in European Company Law, (2003) 40 *Common Market L Rev* 661-695.

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.[147]

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.[148] 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.

5.3.2.4. 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 economic activity. The basis of that relationship centers on *process* – patterns of approaches to managing risk. Risk, itself is created as a function of the deviation of economic activity from its normative ideals and routinized within the process structures of compliance. The SRSG emphasizes the substantive differences between conventional fields of risk management, and human rights risk management.[149] At the same time, the actions of the

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[147] 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: An Overview,' in Gunther Handl, Joachim Zekoll, Peer Zumbansen (eds) in *Beyond Territoriality: Transnational Legal Authority in an Age of Globalization* (Martinus Nijhoff Publishers, 2012), 87-123.

[148] 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]

[149] The SRSG has suggested:

corporation are to a great extent a function of the regulatory and policy environment in which its activities, and their risk profiles, are constructed.

This process/substance convergence/divergence serves a fundamental template for approaching much of the elaboration of the Second Pillar responsibility to respect. It also maps the interconnections between the *actions oriented corporate responsibility* and the *norm setting, guidance orienting, and compliance managing state duty*. That might be another way of approaching the substance/process binaries of the UNGP and their interlinking. 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."[150] 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.[151]

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

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

United Nations Special Representative of the Secretary-General on Business & Human Rights, Elaboration: What is Specific to Human Rights (2010).

[150] Id.

[151] "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.

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.[152]

5.3.2.5. Comprehensive Applicability to Business. The SRSG has forcefully and correctly suggested that the Second Pillar responsibility to respect is not subject to thresholds of size or operation. "The corporate responsibility to respect human rights applies to all business enterprises regardless of size, industry, region or ownership. The scope of the responsibility to respect human rights is determined by a company's activities and relationships, not its revenues or number of employees. All companies have a responsibility to respect human rights, which requires human rights due diligence; but the resultant company activities will vary depending on the particular context and circumstances."[153]

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.[154] 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.[155] 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.[156] 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

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[152] "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.

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

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

[155] 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).

[156] 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).

inefficient. Just as the largest multinational corporation must internalize and promote human rights with all firms with which it deals, so ought all entities down the supply chain embrace the same responsibility. In this sense, downstream supply chain entities may be among the most important corporate stakeholders for the internalization of human rights issues at the multinational level. That relationship, though, might benefit from a specific institutionalization and privileging. Downstream supply chain entities might be accorded a privileged role in the construction of human rights due diligence at the multinational level. They might also be entitled to a broadened right to receive compliance information. They might even participate in the monitoring of human rights compliance throughout the supply chain. That sort of human rights integration is already understood as foundational within the Second Pillar.

5.3.2.6. 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."[157] These focus on the effectiveness of systems of monitoring, and the related issue of effectiveness of transparency (disclosure and engagement).[158] 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.[159] 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.[160] 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.[161] 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

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[157] United Nations Special Representative of the Secretary-General on Business & Human Rights, Elaboration: Effectiveness.
[158] 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.

Ibid.
[159] Backer, Larry Catá, Global Panopticism: States, Corporations and the Governance Effects of Monitoring Regimes. Indiana Journal of Global Legal Studies, Vol. 15, 2007.
[160] 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."
[161] See *In re Citigroup Inc. Shareholder Derivative Litigation*, 964 A.2d 106 (Del. Ch. 2009).

an ongoing basis are tasks that are not part of the core business practices. Corporations know how to monitor. They understand they must monitor. States have increased the scope of mandatory monitoring. Additional monitoring then adds a marginal burden to corporate activity that would be substantially offset by the value added resulting from better compliance with human rights obligations.

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

5.3.2.7. 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."[162] Stake holding, in the form of consultation, is described as especially important where indigenous peoples are concerned.[163] Nonetheless, participation and governance are not interchangeable terms. And the rights of affected individuals and communities is not the same thing as the risks born by those who are deemed responsible (through some form of ownership of the risk). Rick ownership might carry with it the privilege of choosing risk minimization, even when that risk minimization requires the establishment of institutions of "stockholding" participation. The UNGP speak broadly of stake holding. Yet the risk basis of embedding human rights in economic decision making leaves only the risk bearing class of stakeholders exposed. That inequality of risk bearing, risk controlling, and risk responsibility maps the interpretive flexibility within the UNGP. In each case, however, the scope and prerogatives are not absolute. "But

[162] United Nations Special Representative of the Secretary-General on Business & Human Rights, Implementation: Consultation.
[163] Ibid.

as with transparency, there are situations where consultation may be limited."[164] Those borderlands are described but will be context dependent.

The issue of transparency, like that of stake holding, is also central to a consideration of business and human rights.[165] 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. "[166] For that reason, transparency presents both an opportunity and a danger for companies under the Second Pillar. "Thus, while the principle of transparency is an essential feature of the corporate responsibility to respect human rights, there may be situations where companies must limit what they disclose and to whom."[167] And, indeed, the concept of transparency in human rights has come to be understood as inherently self-limiting. On the one hand transparency is understood as an essential element of human dignity and social relations. On the other hand, transparency can itself constitute an adverse human rights impacts—usually understood as impacting the privacy (and thus human dignity) rights of persons or communities.

5.3.3 Human Rights Due Diligence

5.3.3.1. HRDD and Liability Shields. The SRSG has identified four core elements of human rights due diligence.[168] 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.[169]

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.[170] This reflects a

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[164] Ibid.

[165] 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.

[166] Ibid.

[167] Ibid.

[168] 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 ---.

[169] Ibid.

[170] Ibid.

> 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

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.[171] 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.

John Sherman, who worked closely with the SRSG, and Amy Lehr, nicely described an important dilemma of human rights due diligence.[172] 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."[173] Disclosure, then, maps a broader context of disclosure risk. The first touches on the risk to the enterprise of the appropriate construction and operation of internal control systems in the context of business and human rights. That includes the issues of data protection and data integrity (each also constituting potential areas of adverse human rights impacts). The second touches on the risk associated with the operation of the human rights based internal control system. The next three touch on the dilemma posed by Sherman and Lehr. One focuses on the generation of internal control data; the second focuses on the disclosure of that data; and the third touches on the legal framework within which it is possible to attach legal consequences to disclosure. In the case of human rights due diligence, legal consequences can attach directly to the human rights due diligence system, grounded in either the failure to establish or operate it . Legal consequences can attach indirectly as well. In that sense, disclosure provides an evidentiary basis for the application of other legal doctrines (veil piercing, agency, and the like) to extend corporate liability for acts . The contours of that exposure and the requisites of the performance of the corporate responsibility through human rights due diligence systems provide the framework within which a large scope of interpretive possibility emerges.

Sherman and Lehr offer a risk based mapping, They 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.[174] 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

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> 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.

Ibid.

[171] 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).

[172] 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).

[173] Ibid., at 6.

[174] Ibid.

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."[175] 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."[176]

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 disaggregate the system into its component parts: (1) *scope of monitoring*; (2) *information gathering;* (3) *assessment*; and (4) *disclosure*.[177] By disaggregating the principal strands that contribute to systems of due diligence, including human rights due diligence, it may be possible to refine the mapping of the contours of the dilemma of due diligence. This reframes the UNGP's categorization: policy commitment, identification and assessment, prevention and mitigation,

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

Information gathering, in contrast, refers to the precise information to be collected and the manner in which that information is collected. These are system issues. For corporations already well versed in the practices of information gathering (and it is the rare entity that is not well experienced in these functions), gathering 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.[178]

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

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[175] Stone v. Ritter, 911 *A.2d* 362 (Del. 2006).
[176] In re Citigroup Inc. Shareholder Derivative Litigation, 964 A.2d 106 (Del. Ch. 2009).
[177] See, Larry Catá Backer, 'Global Panopticism: States, Corporations and the Governance Effects of Monitoring Regimes,' (2007) 15 *Indiana Journal of Global Legal Studies* 101-148.
[178] 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 (4 February 2010); available [https://lcbackerblog.blogspot.com/2010/02/business-and-human-rights-part-iv.html], last accessed 30 April 2024.

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.[179] There is nothing new here, and corporate information management strategies are now well established. Even assessment, for all its discomforts and ambiguities for companies, presents little by way of additional liability risk for corporations. Corporations are in the business of harvesting information and assessing it for the purpose of maximizing the value of corporate operations. As the SRSG has been suggesting, information gathered from human rights due diligence can only help in the fundamental corporate function of alerting itself to liability producing conduct, minimizing that conduct, and mitigating the human rights effects of its actions. "The due diligence process described by the SRSG has much in common with other due diligence processes, such as the U.S. Sentencing Guidelines for Organizational Defendants, the internal controls derived from 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."[180] 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

[179] See Sherman and Lehr, supra, at 7-8.
[180] Sherman and Lehr, supra, at 6-7.

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.[181] 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."[182] 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.[183]

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 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.

5.3.3.2. 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 policy with regard to their responsibility to respect human rights, approved by the board or equivalent."[184] 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. "[185]

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

[181] 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).
[182] Sherman & Lehr, supra, at 12.
[183] Id., at 12.
[184] United Nations Special Representative of the Secretary-General on Business & Human Rights, Statement of Policy.
[185] Ibid.

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."[186] The scope of responsibility refers both to context and complicity.[187] 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.[188] 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."[189]

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 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

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[186] Id.

[187] 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.

[188] 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.

[189] United Nations Special Representative of the Secretary-General on Business & Human Rights, Statement of Policy.

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.[190] 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.

5.3.3.3.. HRDD Impact Assessment. 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.[191] The assessment function can be broken down into four important components: (1) verification; (2) management; (3) exposure; and (4) and 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.

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

[191] 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 --.

The SRSG focused assessment on the verification and management functions of assessment.[192] 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,[193] but the important thing is the activity, not the form or tools by which the assessment is achieved." [194] 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.[195] 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.[196]

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.[197] 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 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).[198]

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.[199] In this form, not all information

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[192] 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.

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

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

[195] 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).

[196] 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.)

[197] "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.

[198] 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.

[199] 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

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.[200] 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.

5.3.3.4. 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.[201] 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.[202] Just as states must consciously overcome horizontal and vertical legal incoherence by integrating human rights into their governance activities, so too, must corporations avoid due diligence incoherence (and managerial incoherence) by integrating human rights due diligence into their internal management and control systems.[203]

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stakeholders of the organization—employees and officers or organizations—or political subdivision—the bureaucrats and other staff that work for the apparatus of state."

[200] 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."

[201] 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.

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

[203] "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.

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."[204] 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.

5.3.3.5. HRDD Impacts Prioritization. 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, some states are noted for having a high level of self-enforcement of its tax paying obligations while others a very low level. 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.[205] Human rights and sustainability are subject to the same pressures—effectively, actors must choose between imperfect realization of everything, or (closer to) perfect realization of some. The consequence had produced a lively debate about prioritization of law and rights that was quite lively at the time of the SRSG's mandate.[206] That debate found its way into the mandate, and ultimately into the UNGP.

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[204] Id.

[205] See, Daniel D. Ntanda Nsereko, Prosecutorial Discretion Before National and International Tribunals.

[206] At the turn of the 21st century, that debate sometimes was centered on the difference between Asian and Western values. See, e.g., Hong Xiao, 'Values Priority and Human Rights Policy: A Comparison between China and Western Nations,'

At its heart was the problem of protection against very form of adverse human rights impact. "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." [207] The SRSG has asked, "What guidance can be given on how to prioritize potential and actual company impacts on human rights?" [208] The question was not advanced in a vacuum. The SRSG could point[209] to the rationalization of prioritization undertaken by the UN Global Compact, the Office of the High Commissioner for Human Rights, and the Business Leaders Initiative on Human Rights.[210] 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." [211] It is meant to turn human rights "risk into opportunity is a key component of a strategic approach to human rights in business." [212] For this purpose the BLIHR has developed the Human Rights Matrix.[213] The Matrix itself is a comprehensive approach to assessment that is worth studying.[214]

The SRSG considered that there might be some value , in the context of 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."[215] Though the UNGP eventually settled on the key notion of severity,[216] as a basis for prioritization,[217] the basis for prioritization remade contextually flexible and its

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(2005) 11(2) Journal of Human Values 87-102; and generally Joanne R. Bauer and Daniel A. Bell, *The East Asian Challenge for Human Rights* (CUP, 1999).

[207] 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." Ibid.

[208] Ibid.

[209] 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.

[210] Business Leaders Initiative on Human Rights, *A Guide for Integrating Human Rights into Business Management* (2d ed., UN & Geneva, 2009).

[211] Ibid., at 5.

[212] Id., at 13.

[213] 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.

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

[215] Ibid.

[216] UNGP, Principle 19.

[217] UNGP, Principle 24 (noting that priority does not waive responsibility to prevent, mitigate, or remedy).

modalities subject to flexible development in the sense that the UNGP does not include specific means of assessing either severity or the way it is assessed.

The SRSG offered a number of factors to be included in any development of a priority policy. These included consistency across operations, transparency, articulation of a principled rationale, minimization of administrative complexity, procedures for waivers from policy application, and stakeholder engagement. The SRSG was concerned that prioritization might become hardened into hierarchies 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."[218]

But managing priorities within a business does not eliminate the danger of the development of a hierarchy of human rights values. That has been a challenge, for example, where the European Court of Human Rights application of its Priority Policy,[219] adopted in 2009 as the SRSG was considering issues of priority in fashioning first the draft and then the final version of the UNGP[220]. One of the issues that might have arisen at the time was the way that resort to State-based non-judicial remedies, for example, arbitration, might reduce the priority of complaint.[221]

In any case, the issue of prioritization has been a staple of the human rights debates since the 1970s and the New International Economic Order was being leveraged into the international conversation.[222] During the 1980s, for example, it was fashionable to suggest that social and economic rights, especially in developing states, took precedence over political rights.[223] 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 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. The concepts of severity and the rejection of principles of waiver are meant to mediate against both inefficient approaches and the creation of hierarchies. Nonetheless, in the process the UNGP creates a large space for contextualized approaches to prioritization that shifts the calculus from action/inaction to identifying those human rights selected for prevention measures, mitigation measures, or remedial measures.

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[218] United Nations Special Representative of the Secretary-General on Business & Human Rights, Implementation, Prioritizing.
[219] European Court of Human Rights' 'Priority Policy', available at [https://echr.coe.int/Documents/Priority_policy_ENG.pdf], last accessed 30 April 2024.
[220] European Court of Human Rights, The Court's Priority Policy (ND; available [https://www.echr.coe.int/documents/d/echr/priority_policy_ENG], last accessed 20 April 2024.
[221] See, e.g., orna McGregor, 'Alternative Dispute Resolution and Human Rights: Developing a Rights-Based Approach Through the ECHR,' (2015) 26(3) *The European Journal of International Law* 607-634.
[222] United Nations General Assembly, Declaration on the Establishment of a New International Economic Order, Resolution 3201 (S-VI) (1 May 1974, 2229th Plenary Meeting), p. 3-5; United Nations General Assembly, Programme of Action on the Establishment of a New International Economic Order, UNGA Resolution 3202 (S-VI) (1 May 1974, 2229th Plenary Meeting), pp. 5-12; available [https://digitallibrary.un.org/record/218450?ln=en&v=pdf], last accessed 30 April 2024.
[223] 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).

5.4 Human Rights Framework Linkage Issues.

5.4.1. General 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."[224] 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."[225]

At the core of the tension are notions of hierarchy and subordination. Paul Carrington nicely described a common understanding of the presumptions at the center of the problem. For him, hierarchy is indispensable but then so is organized collaboration. The tensions between freedom and restraints, between rights and rules, are inherently contextual but unavoidable. Everything depends on the purpose of hierarchy and the fitness of its methods to that purpose.[226]

That same understanding of the presumptions underlying collective organization can produce in some the strongly held belief that hierarchy is an inevitable component in defining the relationships between states, corporations, and organs of dispute resolution within a complex system of overlapping governance norms. Order and rationality appear to compel a necessity to reorient horizontally constructed systems into vertically oriented ones. The power of a modern form of *Pandektenrecht*[227] 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.[228]

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

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[224] United Nations Special Representative of the Secretary-General on business & human rights, Links between the Framework Pillars, Online Consultation.

[225] 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.

[226] 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).

[227] 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).

[228] 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.

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.[229] The company was obligated under the law of the Republic of India, as determined by its Supreme Court. The Company was simultaneously bound by principles of international human rights law beyond the Rules of the Indian domestic legal order. But those independent obligations would have direct application on the company's activities in India. The forum for resolution of the 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.[230]

Nonetheless, 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."[231] 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. The SRSG noted in opening remarks to consultations held in Geneva October 2009, five key challenges for the business and human rights project; critical among them were the breadth of enterprise impact on human rights, the lack of state capacity for fully managing those impacts, the difficulty of internal management by enterprises, and the absence of grievance mechanisms

[229] 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.
[230] 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.
[231] 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 (13 October 2009); available [], last accessed 29 April 2024.

especially at the operational level.[232] The challenges might be met through linking capacities among systems rather than focusing on one element alone. The framework " 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."[233] The UNGP which followed, then, appeared to embed in its structures a highly flexible means for intertwining State regulatory realities with enterprise operational capabilities. "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."[234]

The SRSG invoked the imagery of feedback loops and linkages to describe the connections among the three Pillar Framework in the important context of human rights due diligence.

> 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."[235] 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.[236]

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[232] John G. Ruggie, Opening Remarks: Consultation on operationalizing the framework for business and human rights presented by the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises Palais des Nations, Geneva (5-6 October 2009); available [https://www.ohchr.org/sites/default/files/Documents/Issues/Business/Consultation2010/OpeningSpeechJohnRuggie.pdf], last accessed 17 April 2024, p.2-3.
[233] Ibid., p. 5.
[234] 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].
[235] 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.
[236] Id.

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.[237]

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."[238] 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.[239] 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.[240]

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."[241]

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

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[237] 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,' (2003) 77(4) *St. John's Law Review* 919.

[238] 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.

[239] 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.

[240] 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.

[241] 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).

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 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.

5.4.3. 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.[242] 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."[243] Articles 6-8 also guarantee basic political rights to individuals who may claim membership in indigenous communities. The Declaration appears to preserve an equality of rights among all peoples within a political states regardless of status as indigenous[244] while preserving to indigenous peoples a right to self-determination,[245] yet that right might appear to be limited to the power of such communities to preserve an autonomous status within states.[246] Ultimately, and unlike other

[242] CITE
[243] CITE
[244] (article 2)
[245] (article 3)
[246] (article 4)

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."[247] 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,[248] the management of information for consumption by internal audiences and projection to others,[249] and the right to preserve autonomous political institutions in the defense of what may be perceived to be matters affecting communal interest.[250]

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).[251]

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.[252]

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 had by then 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

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[247] CITE
[248] (Arts. 14-15)
[249] (art. 16)
[250] (arts. 18-20, 34)
[251] United Nations Special Representative of the Secretary-General on Business & Human Rights, Issues: Indigenous People.
[252] 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.

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.[253]

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."[254]

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.[255] For purposes of application of the Akwé Kon Guidelines, invoking parties prepare a cultural heritage assessment,[256] environmental impact assessments,[257] and social impact assessments.[258]

"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."[259] Environmental impact assessments focus on the specific development proposal. "The direct impacts of the development proposal on local biodiversity at the ecosystem, species and genetic levels should be assessed, and particularly in terms of those components of biological diversity that the affected indigenous or local community and its members rely upon for their livelihood, well-being, and other needs."[260] 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."[261] Several of the

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[253] 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.
[254] Akwé Kon Guidelines, supra, at 1 (Hamdallah Zedan Executive Secretary, Forward).
[255] Ibid., at 1-2.
[256] Ibid., paras. 12-34)
[257] Ibid., Paras. 35-38)
[258] Ibid., paras. 39-51).
[259] Akwé Kon, supra, at 13 (Para. 25).
[260] Ibid., at para. 36.
[261] Ibid., para. 39).

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.[262] 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."[263] Interestingly, the Akwé Kon Guidelines speak to conformity with national legal requirements, but only "to national legislation consistent with international obligations."[264] 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.[265] 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.

5.4.2 Gender.

The SRSG reminds us that his "mandate requests that he 'integrate a gender perspective throughout his work.'"[266] 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."[267]

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."[268] Surveillance has both domestic[269] and transnational forms.[270] "Together, surveillance in its various forms provides a unifying technique with which governance can be

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[262] Ibid., para. 52.
[263] Akwé Kon Guidelines (2004), supra at para. 53.
[264] Ibid., para. 57.
[265] Ibid., at para. 62.
[266] United Nations Special Representative of the Secretary-General on Business & Human Rights, Issues: Gender.
[267] Ibid.
[268] 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.
[269] "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.
[270] "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.

effected across the boundaries of power fractures without challenging formal regulatory power or its limits."[271] As such, one could understand this emphasis as suggesting a prioritization of gender issues in the Second Pillar responsibility to respect.[272]

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."[273] 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.[274] Second, the distinction between the "social formation of gender biases" and "creating or exacerbating existing gender biases" through corporate policy may be both artificial and difficult to keep separate. Indeed, one recalls the approach of the Sullivan Principles was to focus directly on corporate behavior as

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[271] 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).

[272] 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.

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

[274] See, Larry Catá Backer, Business and Human Rights Part XVI--Implementation: When International and National Norms Conflict, Law at the End of the Day (17 Feb 2010); available [https://lcbackerblog.blogspot.com/2010/02/business-and-human-rights-part-xvi.html], last accessed 1 April 2024.

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."[275] 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.

5.4.4. 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.[276] 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."[277] The SRAG suggests a difference between loan due diligence and operational due diligence.[278] "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."[279]

The difference, and a critical one, lies in the relationship between corporations and supply chain partners, on the one hand, and corporations and their financiers, on the other. It appears that corporations ought to have a strong responsibility to respect human rights in *downstream relationships* (suppliers and supply chain partners), but that there is a qualitative difference between downstream relationships involving operating companies and their suppliers, and that between financial institutions and their borrowers. I am not as sure that this qualitative difference ought to affect the scope of the responsibility to respect human rights. Banks are in the business of risk assessment. They are better at that than most operating companies. Banks are also in the business of surveillance and monitoring their borrowers. Loan agreements are cluttered with negative and positive covenants that can reach virtually all aspects of the operations of borrowers. Banks have routinely inserted clauses limiting corporate discretion with respect to all sorts of activity. And banks can reserve to themselves a right to approve certain fundamental corporate activity – from mergers to reorganizations and similar activities. It seems odd to suggest

[275] The Sullivan Principles.
[276] 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.
[277] United Nations Special Representative of the Secretary-General on Business & Human Rights, Issues: Finance.
[278] "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.
[279] United Nations Special Representative of the Secretary-General on Business & Human Rights, Issues: Finance.

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.[280] 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.[281] 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 the financial success of the SWF itself.[282] On the other hand, SWFs that own controlling interests in an enterprise

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[280] 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.

[281] 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.

[282] See, Simon Chesterman, 'The Turn to Ethics: Disinvestment from Multinational Corporations for Human Rights Violations - The Case of Norway's Sovereign Wealth Fund.,' (2007) 23(3) *American University International Law Review* 577-615.

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.

5.4.5 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.[283]

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."[284] 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.

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.[285] 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 was 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.[286] 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

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[283] 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.

[284] Id.

[285] 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.

[286] 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.

in the civil society sector.[287] 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."[288] 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.[289]

Complexity arises when national law conflicts with those international instruments, in which case legal compliance could undermine the responsibility to respect. In such situations, which have come up under South Africa's Apartheid regime and in relation to, *inter alia*, freedom of association, gender discrimination, and most recently free expression and privacy in the internet and telecommunications sectors, experience suggests a decision tree for companies. Each stage of this process results in either an acceptable solution whereby the company can comply with domestic requirements without risking infringement of human rights, or suggests the framework within which further action can be considered. The process is designed both to confront the issue of conflict, reduce the contours of that conflict to its essential essence, and then refine the actual nature of the conflict with respect to its impact on human rights.

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.[290] For companies, however, responsibility is not waived merely because of conflict. If the adverse impact cannot be prevented or mitigated because of the conflict of legalities, then it may have to be remedied. Perhaps for that reason the UNGP tend toward away from substantial encouragement, in its text, for bridging action in an effort to bend to the hierarchy of law that frames the Principles.

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[287] 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 (2010).

[288] Welcome to the Online Consultation, Discussion Topics.

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

290. 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.

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.[291] This instrumental balancing could proceed through four decision steps: (1) exploration of the possibility of reconciling the conflict between standards through interpretation;[292] (2) if reconciliation is not possible, negotiation of an exception or solution with the state;[293] (3) if mediation or informal discussion with state officials is unsuccessful, then challenge the law;[294] and (4) where 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.[295]

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.[296] 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.[297] 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

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

292. 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).

293. 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.

294. 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.

295. 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.

296. 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).

297 . 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.

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.[298]

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). Nonetheless, it is not required; and States might encourage, and enterprises might embrace, much simpler decision processes in which remediation after impact becomes the preferred approach.

5.4.6. Supply Chains.

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.[299]

However, from an operations perspective, it has long been understood that a corporation has relationships with a large number of entities, including controlling or governance relationships that are substantially broader than control afforded under the bare rules of law. In particular, the notion of "supply chain" has been used increasingly to refer to the cluster of those relationships extending throughout the operations of an enterprise that together account for the operations of an enterprise from production to sale to ultimate customers. Within this ordering framework, legal distinction gave way to economic constructions.[300]

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298 . *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.

299 *Salomon v. Salomon & Co*. Ltd. [1897] AC 22.

300 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

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.[301] 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. The UNGP provided room for both views.

5.4.7. 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.[302] 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 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.[303]

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

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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.

[301] "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.

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

303. 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.").

activities and through its relationships with third parties associated with those activities."[304] 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.[305] 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.[306] 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."[307] 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.[308] 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 enterprise within its production chains[309]. 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.[310] It might even spark debate about the value of asset partitioning itself.[311]

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.[312]

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

305. 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.

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

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

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

309 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.

310 Martin Petrin and Barnali Choudhury, 'Group Company Liability,' (2018) *19 European Business Organization Law Review* 771–796.

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

312. The idea is grounded in the concept of leverage. *Id.* at princ. 19(b)(ii); *see supra* text accompanying notes **Error! Bookmark not defined.-Error! Bookmark not defined.**. In the 2011 Draft Guiding Principles Commentary these ideas were

Importantly, protection from legal liability does not follow from compliance with the autonomous obligations derived from the corporate responsibility to respect.[313] 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."[314] 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.[315] 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. 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.[316] Likewise, companies may not balance the benefits of respecting human rights in one instance against their failures to respect human rights in others.[317] With these caveats, though, some room for incorporation within the risk management functions of corporate operations is permitted.[318]

All of these steps could be more effective if taken in collaboration with peer companies, nongovernmental allies, and, where applicable, in the home state.[319] This is especially useful where these collectives can develop

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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.

313. 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.

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

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

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

317. "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.

318. "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.

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

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.[320] That absence illustrates both the promise and the limits of the General Principles in its initial iteration.

5.3 Conclusion.

The UNGP were developed to bridge governance gaps.[321] 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.[322] 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.[323] 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.*

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.

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320. 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.

321 John G. Ruggie, 'Global Governance and "New Governance Theory": Lessons from Business and Human Rights,' (2014) 20 *Global Governance* 5–17.

322 Cf., Kenneth W. Abbott and Duncan Snidal, "Taking Responsive Regulation Transnational: Strategies for International Organizations," (2013) 7 *Regulation and Governance* 95–113.

323 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.

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.[324]

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.[325] 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."[326] But the role of the state, and state based legal regimes remains "not only primary, but also critical."[327] The role of the SRSG was principally evidence based. "As indicated at the outset, the SRSG takes his mandate to be primarily evidence based."[328] 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

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[324] 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)

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

[326] 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 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.

[327] Ibid., at ¶ 75

[328] Ibid. at ¶ 81.

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.[329] 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.

[329] Ibid.