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From Institutional Misalignments to Socially Sustainable Governance: The Guiding Principles for the Implementation of the United Nations' "Protect, Respect and Remedy" and the Construction of InterbySystemic Global Governance

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TABLE OF CONTENTS

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ABSTRACT

Once upon a time, and for a very short time, there was something that people in authority, and those who manage collective memory, considered a stable system of political and economic organization. It was grounded on a complex division of authority between states, economic entities, and social collectives. Contemporary economic globalization has destabilized this traditional system. Corporations are no longer completely controlled by the states that chartered them or within complex enterprises, even by those in which they operate. Social collectives now operate to change the political cultures that affect the public policy of states and the economic behavior of companies. These changes have produced a dynamic state in governance, one which has been characterized as furthering misalignment among governance regimes. These misalignments have the potential to detrimentally affect the welfare of individuals and groups. Over the last decade a number of efforts have been made to offer a new context for stability in the relationships between the political, economic, and social orders at the national and international levels. Among the most valuable proposals—one most likely to contribute significantly to the new governance order—has been an effort to elaborate a transnational regulatory framework for transnational corporations and other business enterprises: the United Nations' "Protect, Respect, and remedy" Framework. This framework system has been developed to reframe the way in which the political, economic, and social governance orders work together. Now reduced to a set of Guiding Principles, this framework seeks inter-systemic harmonization that is socially sustainable, and thus stable. The framework both recognizes and operationalizes emerging governance regimes by combining the traditional focus on the legal systems of and between states with the social systems of non-state actors and the governance effects of policy. This paper critically analyzes the Guiding Principles and its three key parts: the state duty to protect, the corporate responsibility to respect, and the access to remedies. Part I provides a

short introduction to the problems and issues that led to the development of a framework for governance regimes for business and human rights. Part II focuses on the development of the Guiding Principles from conception to articulation. Part III examines the Guiding Principles in detail. The examination begins with the report that introduced the Guiding Principles, and then turns to a section-by-section analysis of the Guiding Principles themselves. This examination serves as a basis for an overall assessment of the "Protect, Respect and Remedy" Framework as a viable, coherent, and comprehensive effort to frame a governance regime for business and human rights. The "Protect, Respect and Remedy" Framework operationalized through the Guiding Principles presents an innovative approach to governance. But its most forward looking and valuable characteristics are also ones that make the project vulnerable—for states, there is too great a recognition of the autonomy and power of social-norm systems. The framework laid out in the Guiding Principles represents a microcosm of the tectonic shifts in law and governance systems and the organization of human collectives confronting the consequences of globalization.

I. INTRODUCTION

Once upon a time, and for a very short time, there was something that people in authority, and those who manage collective memory, considered a stable system of political and economic organization.[1] It was grounded on a complex division of authority between states, economic entities, and social collectives. States had a monopoly of political authority exercised through law.[2] Economic entities exercised their authority through contract and the web of relationships with their stakeholders.[3] Lastly, through social collectives, "civil society" controlled the development of social norms that in turn impacted political choices by the citizens of states and the consumers of and investors in economic collectives.[4]

1. FREDERICK L. SCHUMAN, INTERNATIONAL POLITICS: THE WESTERN STATE SYSTEM IN MID-CENTURY 56-57 (5th ed. 1953).

2. JAMES WILFORD GARNER, INTRODUCTION TO POLITICAL SCIENCE: A TREATISE ON THE ORIGIN, NATURE, FUNCTIONS, AND ORGANIZATION OF THE STATE 316 (1910). For a classic description: "The original, primary, and immediate end of the state is the maintenance of peace, order, security, and justice among the individuals who compose it. This involves the establishment of a régime of law for the definition and protection of individual rights and the creation of a domain of individual liberty, free from encroachment either by individuals, or by associations, or by the government itself." *Id.*

3. *See generally, e.g.*, John Gerard Ruggie, *International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order*, 36 INT'L ORG. 379 (1982).

4. *See, e.g.*, GIDEON BAKER, CIVIL SOCIETY AND DEMOCRATIC THEORY: ALTERNATIVE VOICES 1-10 (2002); Muthiah Alagappa, *Civil Society and Political Change: An Analytical Framework*, *in* CIVIL SOCIETY AND POLITICAL CHANGE IN ASIA: EXPANDING AND CONTRACTING DEMOCRATIC SPACE 25-57 (Muthiah

Contemporary economic globalization has destabilized this traditional system. In place of coherence, there appears to be a fragmentation of law at the transnational level.[5] Corporations are no longer completely controlled by the states that chartered them.[6] Within complex enterprises, the largest corporations are not entirely controlled even by those states in which they operate. Social collectives now operate to change the political cultures that affect the public policy of states and the economic behavior of companies. These changes have produced a dynamic state in governance, one that has been characterized as furthering misalignment among governance regimes.[7] These misalignments have the potential to detrimentally affect the welfare of individuals and groups.[8]

Over the last decade, a number of efforts have been made to offer a new context for stability in the relationships between the political, economic, and social orders at the national and international levels. At the national level, states have responded by both expanding the nature and scope of their legislative control and by changing the nature of their regulation based on changes in policy. For example, efforts have been made to extend national law into extraterritorial jurisdiction,[9] to overhaul corporate law principles to extend to overseas operations of domestic corporations,[10] to make jurisdiction over foreign related entities easier to attain,[11] to widen the scope of disclosure with regard to overseas impacts,[12] and to impose some form of enterprise liability.[13] At the same time, significant changes in policy have been occurring. Corporate social responsibility has moved from an elaboration of issues of corporate charity to policy concerns

Alagappa ed., 2004).

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

6. *See* Larry Catá Backer, *The Autonomous Global Corporation: On the Role of Organizational Law Beyond Asset Partitioning and Legal Personality*, 41 TULSA L. REV. 541, 543-44 (2006).

7 *See, e.g.*, Vincent Cable, *The Diminished Nation-State: A Study in the Loss of Economic Power*, 124 DAEDALUS 23, 37 (1995), *available at* http://relooney.fatcow.com/0_New_8849.pdf.

8. *See, e.g.*, *id.*

9. *See generally, e.g.*, *Developments in the Law: Extraterritoriality*, 124 HARV. L. REV. 1226 (2011). In the context of business and human rights, *see, e.g.*, Larry Catá Backer, *Extraterritoriality and Corporate Social Responsibility: Governing Corporations, Governing Developing States*, LCBACKER BLOG (Mar. 27, 2008, 11:47 PM), http://lcbackerblog.blogspot.com/2008/03/extraterritoriality-and-corporate.html.

10. *See, e.g.*, Foreign Corrupt Practices Act of 1977, 15 U.S.C. § 78dd-1 (1998) (amended 1988 and 1998).

11. For a discussion, see PHILLIP I. BLUMBERG, THE MULTINATIONAL CHALLENGE TO CORPORATION LAW: THE SEARCH FOR A NEW CORPORATE PERSONALITY 197 (1993).

12. *See, e.g.*, *SEC Issues Interpretive Guidance on Disclosure Related to Business or Legal Developments Regarding Climate Change*, SEC. & EXCH. COMM'N (Jan. 27, 2010), http://sec.gov/news/ press/2010/ 2010-15.htm. The SEC voted to provide companies with interpretive guidance on disclosure requirements as they apply to business or legal developments relating to climate change. *Id.* With respect to climate change issues triggering reporting, companies are to take into account the impact of international accords. *Id.* "A company should consider, and disclose when material, the risks or effects on its business of international accords and treaties relating to climate change." *Id.*

13. Christopher D. Stone, *The Place of Enterprise Liability in the Control of Corporate Conduct*, 90 YALE L.J. 1, 7 (1980).

with the power to change the legal regulation of corporations.[14] Disclosure systems, once the sole province of state efforts to regulate transactions in securities and grounded in the traditional view that corporations had a primary obligation to maximize shareholder wealth,[15] have begun to serve as a base for broader systems of disclosure and reporting.[16] Policy issues grounded in sustainability,[17] corporate citizenship, and similar approaches are increasingly seen as a basis for regulation.[18]

At the international level, a decades-long project of the United Nations ("U.N.") sought to draft a set of Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights ("Norms"),[19] which was eventually abandoned.[20] In its place, international public and non-governmental actors began refining and elaborating non-binding systems of soft law that could be used by states and other actors as best practices or

14. The interest in corporate social responsibility, especially as it affects the obligations of multinational corporations, has grown exponentially in the years since the fall of the Soviet Union system from 1989 to 1991. For an early example, *see* JERRY W. ANDERSON, JR., CORPORATE SOCIAL RESPONSIBILITY: GUIDELINES FOR TOP MANAGEMENT (1989). For an example of a contrasting current approach, *see* JOHN M. KLINE, ETHICS FOR INTERNATIONAL BUSINESS: DECISION MAKING IN A GLOBAL POLITICAL ECONOMY 14 (2005). For good descriptions of groups with an interest in corporate social responsibility, *see, e.g.* WILLIAM B. WERTHER, JR. & DAVID CHANDLER, STRATEGIC CORPORATE SOCIAL RESPONSIBILITY: STAKEHOLDERS IN A GLOBAL ENVIRONMENT 3 (2d ed. 2011).

15. Dodge v. Ford Motor Co., 170 N.W. 668. (Mich. 1919) (corporate board owes a duty to make business decisions to profit shareholders, but the board of directors has broad discretion to determine the nature and character of those actions).

16. *See What is GRI?*, GLOBAL REPORTING INITIATIVE, https://www.globalreporting.org/information/about-gri/what-is-GRI/Pages/default.aspx (last visited Feb. 26, 2011) ("Global Reporting Initiative (GRI) is a network-based organization that has pioneered the development of the world's most widely used sustainability reporting framework and is committed to its continuous improvement and application worldwide.").

17. *See, e.g.*, Thomas Dyllick & Kai Hockerts, *Beyond the Business Case for Corporate Sustainability*, 11 BUS. STRATEGY & ENV'T 130, 130-31 (2002); Oliver Salzmann, Aileen Ionescu-Somers & Ulrich Steger, *The Business Case for Corporate Sustainability: Literature Review and Research Options*, 23 EUR. MGMT. J. 27, 27 (2005).

18. *See, e.g.*, Dirk Matten & Andrew Crane, *Corporate Citizenship: Towards an Extended Theoretical Conceptualization* (Int'l Ctr. for Corporate Soc. Responsibility, Research Paper Ser. No. 04-2003, 2003); WORLD ECONOMIC FORUM, GLOBAL CORPORATE CITIZENSHIP: THE LEADERSHIP CHALLENGE FOR CEOS AND BOARDS (2002), *available at* https://members.weforum.org/pdf/GCCI/GCC_CEOstatement.pdf.

19. U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm'n on the Promotion & Prot. of Human Rights, 55th Sess., Aug. 7, 2003, E/CN.4/Sub.2/2003/L.8 (Aug. 7, 2003), *available at* http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/6b10e6a7e6f3b747c1256d8100211a60?Opendocument (draft resolution prepared by Alfonso Martínez et al.). This document was subsequently revised; *see* U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm'n on the Promotion & Prot. of Human Rights, 55th Sess. Aug. 26, 2003, E/CN.4/Sub.2/2003/12/Rev.2 (Aug. 26, 2003), *available at* http://www.unhchr.ch/huridocda/huridoca.nsf/ 0/64155e7e8141b38cc1256d63002c55e8?OpenDocument [hereinafter *Norms*] (revised edition). All references to the Norms are to the revised Norms issued August 26, 2003.

20. For a history and discussion, *see* Larry Catá Backer, *Multinational Corporations, Transnational Law: The United Nations' Norms on the Responsibilities of Transnational Corporations as a Harbinger of Corporate Social Responsibility in International Law*, 37 COLUM. HUM. RTS. L. REV. 287, 331 (2006).

standards for modeling behavior.[21] These are understood as soft law in the sense that they are neither the product of national legislatures nor do they form part of the domestic legal orders of states.[22] The Organization of Economic Cooperation and Development ("OECD"),[23] with its soft law Guidelines for Multinational Enterprises,[24] has been among the most influential of the systems offered through international public law actors. Its influence has grown as it evolved from a system of principles-based norms to a system that is beginning to take on the characteristics of a substantially complete principles-based rule code.[25] The U.N. system itself has not abandoned the field, moving from the Norms to a stakeholder-based, general principles-based "Global Compact."[26]

The OECD's and U.N.'s principles-based approaches—*organizing* regulatory frameworks without appearing to change their character or nature—have served as the most successful models for advancing regulation.[27] Among the most creative recent proposals, one most likely to contribute significantly to the new governance order has been efforts to elaborate a transnational regulatory framework for transnational corporations and other business enterprises: the

21. *Id.* at 332-33.

22. But to call these "soft law" is to misunderstand their character and place within the constellation of regulatory regimes. What makes them "soft" is their position within the ideology and rules of the law-state system. *See, e.g.*, Kenneth W. Abbott & Duncan Snidal**,** *Hard and Soft Law in International Governance*, 54 INT'L ORG. 421, 421-56 (2000)**.** But outside of that system, for example, within the social-norm system of non-state communities, they can assume a compelling character, binding on the members of regulatory communities that accept their force and effect. For a discussion, *see, e.g.*, Larry Catá Backer, *Governance Without Government: An Overview and Application of Interactions Between Law-State and Governance-Corporate Systems,* (Pa. State Legal Studies Research, Paper No. 10-2010, 2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1568934&http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CCUQFjAA&url=http%3A%2F%2Fpapers.ssrn.com%2Fsol3%2FDelivery.cfm%3Fabstractid%3D1568934&ei=ZC1lT8n_IO_aiQL4xo2jDw&usg=AFQjCNFT9gOe15ZPGHGEpqjTh7x2C3Y7cg ; *see generally* Larry Catá Backer, *Inter-Systemic Harmonisation and Its Challenges for the Legal State*, *in* THE LAW OF THE FUTURE AND THE FUTURE OF LAW 427, 427-37 (Sam Muller et al. eds., 2011) [hereinafter Backer-*Harmonization*].

23. *See About the Organisation of Economic Co-operation and Development (OECD)*, OECD, http://www.oecd.org/pages/0,3417,en_36734052_36734103_1_1_1_1_1,00.html (last visited Mar. 19, 2012).

24. *See* OECD, OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES (2008), *available at* http://www.oecd.org/dataoecd/56/36/1922428.pdf. For a discussion, see Jernej Letnar Černič, *Corporate Responsibility for Human Rights: A Critical Analysis of the OECD Guidelines for Multinational Enterprises*, 4 HANSE L. REV. 71 (2008).

25. *See, e.g.*, Larry Catá Backer, *Rights And Accountability In Development ('RAID') v Das Air and Global Witness v Afrimex*: *Small Steps Towards an Autonomous Transnational Legal System for the Regulation of Multinational Corporations*, 10 MELBOURNE J. INT'L L. 258, 260-61 (2009).

26. *Human Rights*, UNITED NATIONS GLOBAL COMPACT, http://www.unglobalcompact.org/Issues/human_rights/The_UN_SRSG_and_the_UN_Global_Compact.html (last updated Dec. 22, 2011). The Norms have been disregarded by Special Representative of the U.N. Secretary-General Ruggie as unable to advance the interests of business and human rights, and the introduction of the U.N. Global Compact, the voluntary initiative, being followed more than other initiatives because it has gained a larger share of adherence by international organizations. *See* UNITED NATIONS GLOBAL COMPACT, http://www.unglobalcompact.org/ (last visited Mar. 17, 2012) [hereinafter U.N. GLOBAL COMPACT 2012].

27. *See* U.N. GLOBAL COMPACT 2012, *supra* note 26.

U.N.'s "Protect, Respect, and Remedy" Framework.[28] The "Protect, Respect and Remedy" Framework is organized as a set of three interlinked "pillars," each of which focuses on a particular aspect of the relationships between business, non-governmental actors, international organizations, and the state. The first pillar, "the state duty to protect against human rights abuses by third parties, including business,"[29] is built on the idea that there are international standards for such conduct which the state has a primary obligation to enforce. The second pillar, "the corporate responsibility to respect human rights,"[30] is grounded on the principle that corporations also have a primary obligation to order their affairs to conform to these international norms, both as a matter of conforming their activities to law and because corporations have an independent responsibility to conform. The third pillar, the remedial obligation, suggests the strong connection between the duty of states, the responsibilities of corporations, and their mutual obligation to make those obligations effective by providing "greater access for victims to effective remedy, [both] judicial and non-judicial."[31]

Taken together, this framework system has been developed to reorient the way in which the political, economic, and social governance orders work together. Collectively, this human rights framework suggests an arrangement whereby national legal orders incorporate and apply human rights norms while enterprises implement autonomous global systems of institutionalized social norms, with both providing mechanisms to remedy breaches of these governance systems within their respective jurisdictions. The elaboration of a corporate governance framework that is meant to apply concurrently with corporate obligations under the laws of the jurisdiction in which they operate is one of the greatest advancements of this framework. The framework is an attempt to build simultaneous public and private governance systems as well as coordinate, without integrating, their operations.[32]

The framework was developed by John Ruggie as Special Representative of the Secretary-General on the issue of Human Rights and Transnational Corporations and Other Business Enterprise ("SRSG"), who was appointed in 2005.[33] The SRSG's mandate began with a series of studies that were designed to

28. *See Taking Responsibility*, EUR. LAW., Feb. 2011, at 15, *available at* http://www.business-humanrights.org/media/documents/european-lawyer-interview-with-professor-ruggie-feb-2011.pdf.

29. *Id.*

30. *Id.*

31. *See infra* Part II.

32. On polycentricity in governance, *see* Inger-Johanne Sand, *Polycontextuality as an Alternative to Constitutionalism, in* TRANSNATIONAL GOVERNANCE AND CONSTITUTIONALISM 41 (Christian Joerges et al. eds., 2004). This considerably advances the development of autonomous transnational regulatory bases for corporate governance instead of suggesting further fragmentation of law at the transnational level. For a discussion, *see* Fischer-Lescano &Teubner, *supra* note 5.

33. Press Release, Secretary-General, Secretary-General Appoints John Ruggie of United States Special Representative on Issue of Human Rights, Transnational Corporations, Other Business Enterprises, U.N. Press Release SG/A/934 (July 28, 2005), *available at* http://www.un.org/News/Press/docs/2005/sga934.doc.htm.

elicit information from stakeholders including the corporate sector,[34] along with a set of fact-finding missions.[35] Its progress was elaborated in a series of reports from 2006 through 2011. In June 2008, the Human Rights Council[36] unanimously welcomed the framework and extended the SRSG's mandate to provide practical recommendations and concrete guidance; that is, to transpose the framework from policy to system.[37] With this encouragement and the support of key state actors,[38] Professor Reggie's work ultimately resulted in the production of a set of Guiding Principles.[39] The initial effort, a set of draft Guiding Principles ("Draft Principles") was circulated in November 2010, and introduced by a short Report ("2011 Report").[40] Thereafter, and incorporating the results of extensive consultation held over the winter, the Special Representative circulated a set of final Guiding Principles ("Guiding Principles") in March 2011, preceded by a short Introduction.[41] The U.N. Human Rights Council ("HRC") endorsed the Guiding Principles in June 2011.[42]

34. The SRSG planned to conduct surveys of business policies and practices with regard to human rights to learn how businesses conceive of human rights, what standards they reference, and their use of impact assessments. John G. Ruggie, Opening Remarks at Wilton Park Conference on Business & Human Rights 4 (Oct. 10-12, 2005), *available at* http://www.reports-and-materials.org/Ruggie-Wilton-Park-Oct-2005.doc. Legal teams were also contacted to determine how European and American courts understand the concepts of complicity and sphere of influence in this context. *Id.*

35. *Id.* at 5.

36. The Human Rights Council is an inter-governmental body within the UN system made up of 47 States responsible for strengthening the promotion and protection of human rights around the globe. . . . The Council was created by the UN General Assembly on 15 March 2006 with the main purpose of addressing situations of human rights violations and make recommendations on them.

United Nations Human Rights Council, UNITED NATIONS HUM. RTS., http://www2.ohchr.org/english/bodies/hrcouncil/ (last visited Mar. 20, 2012).

37. Rep. of the Human Rights Council, 8th sess., June 2-8, 2008, sec. 8/7, U.N. Doc. A/HRC/8/52 (Sept. 1, 2008) (prepared by Alejandro Artucio), *available at* http://www2.ohchr.org/english/bodies/hrcouncil/docs/8session/A.HRC.8.52.doc.

38. Some key state actors provided funding for portions of the work leading to the Guiding Principles. *See, e.g.*, John Ruggie, *Business and Human Rights: The Evolving International Agenda*, (John F. Kennedy Sch. of Gov't Faculty Research, Working Paper No. RWP07-029, 2007), *available at* http://web.hks.harvard.edu/publications/getFile.aspx?Id=262 (identifying the financial support of the governments of Canada, Belgium, Norway, Sweden, and United Kingdom; the Friedrich Ebert Stiftung, German Marshall Fund of the United States; and United Nations Foundation).

39. *See Taking Responsibility*, *supra* note 28.

40. Special Representative of the Secretary-General, *Guiding Principles for the Implementation of the United Nations 'Protect, Respect and Remedy' Framework*, U.N. Draft (Nov. 2010), *available at* http://www.reports-and-materials.org/Ruggie-UN-draft-Guiding-Principles-22-Nov-2010.pdf (by John Ruggie) [hereinafter 2011 Report].

41. Special Representative of the Secretary-General, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011), a*vailable at* http://www.business-humanrights.org/media/documents/ruggie/ruggie-guiding-principles-21-mar-2011.pdf (by John Ruggie) [hereinafter Guiding Principles].

42. Human Rights Council Res. 17/4, 17th Sess., July 6, 2011, U.N. Doc. A/HRC/RES/17/4 (July 6, 2011), *available at* http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/G11/144/71/PDF/G1114471.pdf?OpenElement. "In an unprecedented step, the United Nations Human Rights Council has endorsed a new set of

During the transformation—from study, to normative framework, to Guiding Principles—important international human rights actors have also endorsed the approach.[43] The European Union leadership has endorsed the framework.[44] It is being incorporated into other soft law systems as a basis for interpretation, from that of the OECD Guidelines for Multinational Enterprises,[45] to the corporate social responsibility frameworks of the International Organization for Standardization.[46] Norway will "continue to support the Special Representative's work both politically and financially."[47] The SRSG has begun to compile a list of

Guiding Principles for Business and Human Rights* designed to provide -for the first time- a global standard for preventing and addressing the risk of adverse impacts on human rights linked to business activity." *New Guiding Principles on Business and Human Rights Endorsed by the UN Human Rights Council*, UNITED NATIONS HUM. RTS. (June 16, 2011), http://www.business-humanrights.org/media/documents/ruggie/ruggie-guiding-principles-endorsed-16-jun-2011.pdf.

43. Mary Robinson has noted that the "Protect, Respect, Remedy Framework has put in place the foundation upon which to build principled, but pragmatic solutions to a range of challenges at the interface of business and human rights." Mary Robinson, Remarks at the Swedish EU Presidency Conference on Corporate Social Responsibility (Nov. 10-11, 2009), *available at* http://www.realizingrights.org/pdf/Mary_Robinson-Protect_Respect_Remedy-Stockholm-Nov2009.pdf. Ms. Robinson was President of Ireland (1990-1997), United Nations High Commissioner for Human Rights (1997-2002), and is now a civil society actor on the Board of Directors of Realizing Rights. *See Our Board*: *Mary Robinson*, REALIZING RTS., http://www.realizingrights.org/ index.php?option=com_content&view=article&id=75&Itemid=88 (last visited Mar. 20, 2012).

44. *Protect, Respect, Remedy: Making the European Union Take a Lead in Promoting Corporate Social Responsibility*, ESILIGIEL FILES WORDPRESS 1 (2009), http://esiligiel.files.wordpress.com/2009/11/eu-presidency-statement-on-protect-respect-remedy.pdf ("The United Nations' Protect, Respect and Remedy framework provides a key element for the global development of CSR practices. It constitutes a significant input to the CSR work of the European Union.").

45. *See, e.g.*, *Final Statement by the UK National Contact Point for the OECD Guidelines for Multinational Enterprises: Complaint from Survival International Against Vedanta Resources plc*, BUS. & HUM. RTS. RESOURCE CENTRE (Sept. 25, 2009), http://www.business-humanrights.org/Links/Repository/266990/jump [hereinafter Final Statement]. The National Contact Point explained:

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

Id. at sec. 78 (citations omitted).

46. *See ISO 26000—Social Responsibility*, INT'L ORG. FOR STANDARDIZATION, http://www.iso.org/iso/iso_catalogue/management_and_leadership_standards/social_responsibility/sr_discovering_iso26000.htm (last visited Mar. 20, 2012); Sandra Atler, *The Impact of the United Nations Secretary-General's Special Representative & the UN Framework on the Development of the Human Rights Components of ISO 26000* (John F. Kennedy Sch. of Gov't, Working Paper No. 64, 2011), *available at* http://www.hks.harvard.edu/m-rcbg/CSRI/publications/workingpaper_64_atler_june%202011.pdf.

47. *See, e.g.*, NORWEGIAN MINISTRY OF FOREIGN AFFAIRS, REPORT NO. 10 TO THE STORTING: CORPORATE SOCIAL RESPONSIBILITY IN A GLOBAL ECONOMY 78 (2009), *available at* http://www.regjeringen.no/en/dep/ud/Documents/Propositions-and-reports/Reports-to-the-Storting/2008-2009/report-no-10-2008-2009-

examples of influential people and organizations that have applied the "Protect, Respect and Remedy" Framework.[48] Now reduced to a set of Guiding Principles, this framework seeks inter-systemic harmonization that is socially sustainable, and thus stable. The framework both recognizes and operationalizes emerging governance regimes by combining the traditional focus on the legal systems of and between states with the social systems of non-state actors and the governance effects of policy.

This paper critically analyzes the Guiding Principles and the three-pillar "Protect, Respect and Remedy" Framework on which it is based. This initial section provides a short introduction to the problems and issues that led to the movement toward the development of a framework for governance regimes for business and human rights. Part II focuses on the development of the Guiding Principles from conception to articulation. It provides a brief description and analysis of the objectives, limitations, and context within which the "Protect, Respect and Remedy" Framework was developed, out of which the Guiding Principles were distilled.[49] Parts III and IV then examine the Guiding Principles in detail. Part III considers carefully the way in which the "Protect, Respect and Remedy" Framework developed in the Special Representative's reports from 2006 through 2010, and was transformed into principles that can be implemented by states, non-governmental organizations, international organizations, and corporations. The examination starts from the 2011 Report introducing the Draft Principles, and then turns to the distillation of the work of the Special Representative in the Introduction to the final version of the Guiding Principles submitted to the Human Rights Council. Part IV presents the heart of the analysis, which is a critical section-by-section review of the Guiding Principles themselves. Critical to that assessment is an evaluation of the changes between Draft Principles and Guiding Principles as ultimately endorsed. This analysis then serves as a basis for an overall assessment of the "Protect, Respect and Remedy" Framework as a viable, coherent, and comprehensive effort to frame a governance regime for business and human rights.

The journey from differentiation of the Ruggie project from the Norms in 2006, first to the development of the "Protect, Respect and Remedy" Framework in 2010, and then to the distillation of the framework in the form of implementable principles in 2011, suggests both the narrowness of the framework within which this project could be developed and the effects of the

to-the-storting.html?id=565907.

48. *See Special Representative of the United Nations Secretary-General for Business & Human Rights, Applications of the U.N. "Protect, Respect and Remedy" Framework*, BUS. & HUM. RTS. RESOURCE CENTRE, http://www.business-humanrights.org/media/documents/ruggie/applications-of-framework-1-mar-2011.pdf (last updated Mar. 1, 2011).

49. This analysis was developed more extensively in Larry Catá Backer, *On the Evolution of the United Nations' "Protect-Respect-Remedy" Project: The State, the Corporation and Human Rights in a Global Governance Context*, 9 SANTA CLARA J. INT'L L. 37 (2011).

limiting context in which these approaches can be effectuated. Principled pragmatism, the hallmark of the Ruggie project, produced both great innovation and vision in the "Protect, Respect and Remedy" Framework, and substantial compromise, with the offer of more muted implementation of the framework's vision in the form of the Principles ultimately endorsed.

For all its compromises, the "Protect, Respect and Remedy" Framework operationalized through the Guiding Principles still presents an innovative approach to governance. But the Guiding Principles represent innovation that is subject to substantial pressure to conform to conventional understandings of the arrangement of governance power within the state system that serves as the foundation of the international political order.[50] Indeed, the Guiding Principles' most forward-looking and valuable characteristics are also ones that make the project vulnerable. For states, there is too great a recognition of the autonomy and power of social-norm systems. For corporations, there is too great a recognition of the power of states beyond their own borders, of international norms in mediating their obligations to states and to their stakeholders, and a sense that the power of international norms is neither specific nor legitimate enough. And for non-governmental communities, there is too little emphasis on the forms and structures of law tied to states and on the subordination of non-state actors in all cases to the state-based law-norm system. The former ought to be obliged to incorporate international consensus within their domestic legal orders, and the latter ought to be bound by this domesticated global law within the legal systems of states. The Guiding Principles framework represents a microcosm of the tectonic shifts in law and governance systems, and the organization of human collectives confronts the consequences of globalization. States, corporations, and non-governmental organizations content with the current forms will try to bend the most innovative aspects of the Guiding Principles to suit their sense of the past. Whether this can work—and if so, how—will be the object of contention in theory and practice for the next decade.

II. FROM CONCEPTION TO ARTICULATION—THE GENESIS OF THE "PROTECT, RESPECT AND REMEDY" FRAMEWORK

What was to become the General Principles developed in the course of the work of the SRSG,[51] as he sought to apply "principled pragmatism" as a basis for

50. Typical, perhaps, was the U.S. statement in support of the resolution endorsing the GP. *See* Daniel Baer, *Businesses and Transnational Corporations Have a Responsibility to Respect Human Rights: Guiding Principles for Business and Human Rights*, HUM. RTS. (June 16, 2011), http://www.humanrights.gov/2011/06/16/businesses-and-transnational-corporations-have-a-responsibility-to-respect-human-rights/. "In highlighting the importance of the Guiding Principles, we also want to take this opportunity to emphasize the essential foundation of the human rights system that remains an important backdrop for the Special Representative's work, namely, State obligations under human rights law with respect to their own conduct." *Id.*

51. The history of the development of the Protect, Respect and Remedy framework is discussed in

thinking through the issue of governance across multiple state systems, an emerging international governance framework,[52] and systems of behavior developed by business in its activities across the world.[53] The SRSG's mandate began with a series of studies designed to elicit information from stakeholders, including the corporate sector,[54] along with a set of fact-finding missions.[55] This section provides a brief review of the development of the Guiding Principles from initial conceptualization to its realization in late 2010 by considering the evolution and refinement of the SRSG's mandate through the reports produced between 2006 and 2010.

The initial report produced by the SRSG in 2006[56] was based on his preliminary research and conceptualization of the mandate.[57] The initial object was to distance the conceptual framework of the SRSG's project from that which produced the failed Norms.[58] The 2006 Report reaffirmed the classical organization of public power, within which the law-state system held a primary position,[59] and with respect to which law, including international law, served as the most authoritative source of obligation.[60] But the Report also recognized the possibility of spaces for regulation under regimes other than law, where the state

greater detail in Backer, *supra* note 49.

52. The object was to identify "the directions in which achievable objectives may lie," the legal focus of which was to be on the identification and harmonization of legal standards, "achieving greater clarity of, and possibly greater convergence among, emerging legal standards is a pressing need." John Ruggie, Remarks at the Business & Human Rights Seminar in Old Billingsgate, London (Dec. 8, 2005), *available at* http://www.bhrseminar.org/John%20Ruggie%20Remarks.doc.

53. The starting point is "corporate liability for abuses that amount to violations of international criminal or humanitarian law." *Id.* The reason for starting at this point is that it is a critically important issue on its own, where greater clarity is needed, while it may also shed light on the general strategy of legalizing corporate human rights obligations. *Id.*

54. *See* Ruggie, *supra* note 34 and accompanying text.

55. *Id.* at 5.

56. Special Rep. of the Secretary-General, *Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, U.N. Doc. E/CN.4/2006/97 (Feb. 22, 2006), *available at* http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G06/110/27/PDF/G0611027.pdf?OpenElement (by John Ruggie) [hereinafter SRSG 2006 Report].

57. *Id.* at para. 3. Work on the mandate began by "conducting extensive consultations on the substance of the mandate as well as alternative ways to pursue it—with states, non-governmental organizations, international business associations and individual companies, international labor federations, U.N. and other international agencies, and legal experts." *Id.*

58. *Id.* at paras. 61-69. The SRSG devoted some attention to this aspect of the opening task of the project. "My major concern was the legal and conceptual foundations of the Norms, especially as expressed in the General Obligations section and the implications that flow from it. I judged them to be poorly conceived and, therefore, highly problematic in their potential effects." Opening Statement to United Nations Human Rights Council, Professor John G. Ruggie, Special Representative of the Secretary-General for Business and Human Rights, Geneva (Sept. 25, 2006), *available at* http://198.170.85.29/Ruggie-statement-to-UN-Human-Rights-Council-25-Sep-2006.pdf.

59. The "premise [is] that the objective of the mandate is to strengthen the promotion and protection of human rights in relation to transnational corporations and other business enterprises, but that governments bear principal responsibility for the vindication of those rights." SRSG 2006 Report, *supra* note 56, at para. 7.

60. *Id.* at para. 61.

and its domestic-international legal system were not directly involved.[61] But that space was not a public space; it was a space for private governance.[62] The possibility of bifurcating governance would permit the development of a further possibility—one creating a governance regime in which the several components of governance could be harnessed in a coordinated way. That possibility was to be explored on the basis of a distinct approach that the SRSG described as principled pragmatism.[63] Principled pragmatism served not just as a conceptual framework, but also as a methodological roadmap for the elaboration of a framework amalgamating the legal systems of states, the governance systems of international organizations, and the social norm systems of corporations.[64] The Report also set out the information gathering tasks that were to serve as the foundation for the SRSG's proposals.[65]

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61. "The role of social norms and expectations can be particularly important where the capacity or willingness to enforce legal standards is lacking or absent altogether." *Id.* at para. 75. But, as will become evident, the relationship between social norm systems and law-state systems will remain the most difficult framing issue of the SRSG project.

62. Early on the SRSG indicated a conceptual rejection of the notion of corporations as public actors.

> In the best case scenario, these formulations would do little more than keep lawyers in gainful employment for a generation to come. But in the worst case scenario, I fear, they would turn transnational corporations into more benign twenty-first century versions of East India companies, undermining the capacity of developing countries to generate independent and democratically controlled institutions capable of acting in the public interest—which to my mind is by far the most effective guarantor of human rights.

Opening Statement to United Nations Human Rights Council, *supra* note 58.

63. SRSG 2006 Report, *supra* note 56, at paras. 70-81.

64. The SRSG has described principled pragmatism:

> The very first time I ever made any remarks on this mandate I was asked to describe my approach to this, and I called it principled pragmatism. It is driven by principle, the principle that we need to strengthen the human rights regime to better respond to corporate-related human rights challenges and respond more effectively to the needs of victims. But it is utterly pragmatic in how to get from here to there. The determinant for choosing alternative paths is which ones provide the best mix of effectiveness and feasibility. That is what we have been trying to do with this mandate since 2005.

John Ruggie, *Business and Human Rights: Achievements and Prospects*, POL'Y INNOVATIONS (Oct. 28, 2008), http://www.policyinnovations.org/ideas/briefings/data/000089. On the understanding of the implementation of SRSG's principled pragmatism, see *Principled Pragmatism—the Way Forward for Business and Human Rights*, UNITED NATIONS HUM. RTS. (June 7, 2010), http://www.ohchr.org/EN/NewsEvents/Pages/PrincipledpragmatismBusinessHR.aspx. Principled pragmatism followed the framework through to the development of the Guiding Principles.

> Like the Framework, the Guiding Principles draw on extensive research and pilot projects carried out in several industry sectors and countries, as well as several rounds of consultations with States, businesses, investors, affected groups and other civil society stakeholders. All told, the mandate will have conducted 47 international consultations from beginning to end.

Special Rep. of the Secretary-General, *Guiding Principles for the Implementation of the United Nation's 'Protect, Respect and Remedy' Framework*, para. 12, U.N. Doc. DRAFT (Nov. 2010), *available at* http://www.ohchr.org/Documents/Issues/TransCorporations/GPs_Discussion_Draft_Final.pdf (by John Ruggie) [hereinafter Draft Principles].

65. Regional multi-stakeholder consultation took place in Johannesburg, Bangkok, and Bogotá. The workshops including legal experts took place in London, Oslo, Brussels, and New York. And the two Geneva-

The 2007 Report addressed the principal elements of the initial mandate.[66] Its object was to provide a comprehensive mapping of customary practices by states, international actors, and corporations to serve as a basis for extracting principle.[67] It elaborated a series of five clusters of standards, which were to serve as the basis of the "Protect, Respect and Remedy" Framework.[68] The SRSG also began to consider issues of implementation, focusing initially on accountability and interpretive mechanisms.[69] The importance of the 2007 Report lies not merely in the mapping, but rather in the organization of that mapping. That organization had strong substantive effects—creating the beginnings of a framework for conceptualizing the structure of global governance of corporate actions with human rights effects, and revealing the generally accepted content of this framework through the aggregate behavior rules of states, international bodies, and corporations.

The 2008 Report presented the first synthesis of the conceptualization and data gathering projects of the 2006 and 2007 Reports.[70] Its theme was the construction of "a common framework of understanding, a foundation on which thinking and action can build in a cumulative fashion."[71] It was the first real attempt to sketch out a multi-governance framework which would organize contributions by each of the major systemic stakeholders—states, businesses and non-governmental stakeholders—into a system which coordinated and harmonized the governance orders of each of the stakeholders' polycentric system of governance. Each system could then contribute to the objective of the mandate—the protection of human rights in economic intercourse—through their

based consultations included work on the extractives and financial services industries. John G. Ruggie, Prepared Remarks at Clifford Chance, London (Feb.19, 2007), *available at* http://www.reports-and-materials.org/Ruggie-remarks-Clifford-Chance-19-Feb-2007.pdf.

66. Special Rep. of the Secretary-General, *Report of the Special Representative of the Secretary-General of the United Nations on Human Rights and Transnational Corporations and Other Business Enterprises*, para. 5, U.N. Doc. A/HRC/4/35 (Feb. 19, 2007), *available at* http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G07/108/85/PDF/G0710885.pdf?OpenElement (by John Ruggie) [hereinafter SRSG 2007 Report].

67. *Id.* at paras. 3, 5.

68. These clusters include: the state duty to protect against human rights abuses by third parties, potential corporate responsibility and accountability for international crimes, corporate responsibility for other human rights violations under international law, soft law mechanisms, and self-regulation. John G. Ruggie, Remarks at International Chamber of Commerce Commission on Business in Society, Paris 2-4 (Apr. 27, 2007), *available at* http://www.reports-and-materials.org/Ruggie-speech-to-ICC-27-Apr-2007.pdf.

69. Mr. Ruggie emphasized that there is commonly an underdeveloped accountability mechanism within voluntary initiatives that affects the performance of the initiative in that companies cannot correct what they don't know is wrong. John Ruggie, Voluntary Principles on Security & Human Rights Remarks at Annual Plenary, Washington, D.C. 5 (May 7, 2007), *available at* http://www.reports-and-materials.org/Ruggie-remarks-Voluntary-Principles-plenary-7-May-2007.pdf.

70. Special Rep. of the Secretary-General, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, U.N. Doc. A/HRC/8/5 (Apr. 7, 2008) (by John Ruggie) [hereinafter SRSG 2008 Report].

71. John Ruggie, Special Rep. for Bus. & Human Rights, Next Steps in Business and Human Rights at the Royal Institute of International Affairs, Chatham House, London 4 (May 22, 2008) *available at* http://www.reports-and-materials.org/Ruggie-speech-Chatham-House-22-May-2008.pdf.

respective governance systems.[72] The object of this approach was practical, derived from the recognition emphasized in the fact-finding of the prior reports. As a result, multiple governance organs contributed to the maintenance of human rights.[73] The failure to coordinate between them, and to systematize their approach to human rights within each system, contributed significantly to the governance gaps that were at the heart of human rights governance failures.[74] The three-pillar "Protect, Respect and Remedy" Framework was first introduced as a response to this need.[75]

The first three reports, then, can be understood as forming a single unit that starts from a rejection of past efforts, and involves reframing, data gathering, and reconceptualization grounded in that data and an openness to coordinating polycentric systems within and beyond states and their legal orders. With the renewal of the SRSG's mandate by the HRC in 2008,[76] the focus changed from conception to operationalization.[77] It stressed that "the obligation and the primary responsibility to promote and protect human rights and fundamental freedoms lie with the State."[78] The 2009 Report[79] provided a first attempt at conceptualizing operationalization.[80] The emphasis was on the principal measures through which states and businesses operated as the starting point for framing issues of implementation. States operated through law and policy, and so operationalization required an emphasis on policy coordination and the aggressive implementation of law and legal obligation that bound states. Businesses operated through contract and the expectations of their principal stakeholders, regularized through markets. Operationalization required an emphasis on the mechanics through which these stakeholders could hold

72. SRSG 2008 Report, *supra* note 70.

73. *Id.* at paras. 6-8.

74. This gap is vast between "the scope and impact of economic forces and actors" on one side and "the capacity of societies to manage their adverse consequences" on the other. *Id.* at para. 3.

75. *Id.*

76. Rep. of the Human Rights Council, *supra* note 37.

77. HRC directed the SRSG to operationalize the framework, by "providing 'practical recommendations' and 'concrete guidance' to states, businesses and other social actors on its implementation." John G. Ruggie, U.N. Special Rep. for Bus. & Human Rights, Remarks for ICJ Access to Justice Workshop, Johannesburg, South Africa 1 (Oct. 29-30, 2009), *available at* http://www.reports-and-materials.org/Ruggie-remarks-ICJ-Access-to-Justice-workshop-Johannesburg-29-30-Oct-2009.pdf.

78. Rep. of the Human Rights Council, *supra* note 37.

79. Special Rep. of the Secretary-General, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, U.N. Doc. A/HRC/11/13 (Apr. 22, 2009) (by John Ruggie) [hereinafter SRSG 2009 Report].

80. It is pointed out quite clearly from the fourteen consultations that "[e]very stakeholder group, despite their other differences, has expressed the urgent need for a common conceptual and policy framework" of understanding, "a foundation on which thinking and action can build." SRSG 2008 Report, *supra* note 70, at para. 8; Rep of the Human Rights Council, *supra* note 37. The Protect-Respect-Remedy framework resulted. Ruggie, *supra* note 71.

companies accountable. The form chosen was the disclosure regimes already proven relatively effective in the regulation of securities markets on many states.

The 2010 Report[81] refined and developed the ideas of the 2009 Report. It considered the results of extensive consultations with governments, businesses, and civil society actors and refined the framework in response. The legal basis of the state's duty was made a more central element of the "Protect, Respect and Remedy" Framework. The emphasis on the corporate responsibility was more discernibly articulated through its disclosure obligations. The Report emphasized the state's paramount role in dispute resolution.[82] Corporate activity was relegated to the realm of the grievance and the management of the exotic. The remedial framework emphasized the importance of the formal judicial mechanism, and its more informal mediation variant, though the latter was meant to be administered through the court system.[83]

The 2009 and 2010 Reports, then, also can be understood as a single unit. With the 2010 Report, the structuring of the operationalization of the "Protect, Respect and Remedy" Framework is substantially elaborated. If the emphasis of the first three reports was on the principle part of principled pragmatism, the focus of the last two was on the practical aspects. For that purpose, the SRSG considered the practical element of each of the framework's pillars. The state duty to respect was practically conceived as centering on the issue of legal system coherence. States act through law/regulation, and that law/regulation system could only advance human rights objectives if it was internally coherent. Coherence also required an element of external coherence. External coherence is necessary to bind the distinct stakeholder systems together (state, international, and corporate).[84] The corporate responsibility was practically conceived through the device of human rights due diligence. This focus suggested both the governance character of the device—human rights due diligence was the expression of the "law" of corporate behavior within its operational framework—and the means through which it could enforce its norms and connect them to the governance systems of states and international actors. However, the SRSG appeared to increasingly focus on the third pillar of the framework—access to justice—as the place where the concepts of the framework could be practically realized on the ground. But that reduction of the access to remedy pillar also tended to reframe it as a consequential element of the state duty to protect and the corporate responsibility to respect human rights.

81. Special Rep. of the Secretary-General, *Report of the Special Rep. of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, A/HRC/14/27 (Apr. 9, 2010), *available at* http://www.reports-and-materials.org/Ruggie-report-2010.pdf (by John Ruggie) [hereinafter SRSG 2010 Report].

82. *See id*. at para. 96.

83. *See id.* at paras. 103, 113.

84. *Id.* at para. 52.

The "Protect, Respect and Remedy" Framework, then, is not just a reaction to the failed Norms project. Careful review of the SRSG's reports suggests its character and nature are that of an institutionalized multi-level governance framework that the "Protect, Respect and Remedy" Framework represents. But there is a potentially wide gulf between conceptualization and operationalization. The "Protect, Respect and Remedy" Framework as developed through the SRSG's 2006 through 2010 reports builds a framework grounded in the actual practices of state and non-state actors, gathering together the aggregate of practices and governance presumptions that together effectively regulate the behavior of states and corporations in matters relating to human rights. That exercise suggested both the important role of the state and the emerging role of corporations as governance centers. Though corporations are neither states nor public actors, and thus can neither exercise the privileges of states nor be burdened by state obligations, they emerge as autonomous actors, even in more modest form. The recognition of polycentric centers of governance—one law and state based and the other norm and non-state based—marks the principle innovative insight of the "Protect, Respect and Remedy" Framework project. It would find its expression in the elaboration of governance-tinged principles structuring a system that operationalizes these frameworks.

But that move from insight to a governance system required the approval of a state system based international body. In the march from framework to operational principles, one can discern a substantive movement away from the broadest possibilities of the framework to something perhaps more modest. This is reflected in the SRSG's last, 2011 Report.[85] It served as an introduction to the Draft Principles themselves, along with an Official Commentary. Its principal objective was to describe the transformation of "Protect, Respect and Remedy" from framework—an articulation of theory—to principle—a workable set of guiding norms that might be applied by states, corporations, and other stakeholders to implement the "Protect, Respect and Remedy" Framework.[86] Refined and finalized, the Guiding Principles were submitted with a short summary that was still the work of the SRSG from 2005. But in that process of transforming framework to principle, the substance of the project was also changed. In particular, the move toward greater horizontal parity between the state duty and the corporate responsibility to respect human rights was recast as a more conventionally hierarchical ordering in which state duty structures the human rights enterprise itself. Yet, the Guiding Principles mean to leave enough of an opening for the maintenance of a governance space in which corporate enterprises can develop and manage cultures of governance beyond the more narrowly tailored state and law-based structures of human rights norms. It is to

85. *See* Draft Principles, *supra* note 64.

86. 2011 Report, *supra* note 40, at paras. 12-15.

that movement, from principle to pragmatism, and its effects that this Article turns to next.

III. THE SYSTEM UNVEILED: THE GUIDING PRINCIPLES AND COMMENTARY ANALYZED.

The Guiding Principles were unveiled in two stages, separated by about half a year. The Draft Principles were circulated in November 2010.[87] They were introduced by the final report of the SRSG, summarizing the SRSG's work from 2005 to 2011, and presenting Guiding Principles for consideration by the Human Rights Council.[88] The SRSG circulated the final version of the Guiding Principles in March 2011.[89] The Guiding Principles represent a new approach to the framing of governance for multinational corporations within a complex system that, though grounded in the rules of the domestic legal orders of states, seeks to go beyond that to international and private governance regimes. True to the SRSG's intent to construct a framework grounded in principled pragmatism,[90] the Guiding Principles appear to be developed to strike balances among the multiple competing ideologies, governance approaches and stakeholders that have made the process from Norms to "Protect, Respect and Remedy" Framework, and ultimately to the Guiding Principles so complex. That balance posits a framework of inter-systemic harmonization[91] of a governance regime to which three autonomous but deeply related systems contribute—the law-state system, the international system and the social-norm system. That framework of inter-systemic harmonization is then itself implemented through an integrated but functionally divided system of dispute resolution that both reflects the autonomy of the governance systems that make up the regime, and the need for harmonization and connection of method. As such, the Guiding Principles are groundbreaking for reasons much greater than their utility in clarifying the private sector's responsibility for human rights.[92] The complexity of the movement to the Guiding Principles requires a close reading not merely of the Guiding Principles themselves, but also of the introductory statements through which the SRSG thought to set the stage for the understanding of and to provide an interpretive basis for the principles that follow. A close analysis of these introductory statements, as both theory and praxis, reveals both the nature and

87. Special Rep. of the Secretary-General for Bus. & Human Rights, *SRSG Submits Final Draft of Guiding Principles on Business & Human Rights,* BUS. & HUM. RTS. RESOURCE CENTRE (Mar. 7, 2011), http://www.business-humanrights.org/media/documents/ruggie/announcement-of-final-draft-guiding-principles-submitted-ruggie-7-mar-2011.pdf.

88. *Id.*

89. *Id.*

90. *See* discussion *supra* Part II; SRSG 2006 Report, s*upra* note 56.

91. On inter-systemic harmonization, *see* Backer-*Harmonization*, *supra* note 22, at 427-37.

92. NORWEGIAN MINISTRY OF FOREIGN AFFAIRS, *supra* note 47, at para. 7.1.1.

complexity of the breakthrough that the Guidelines represent and set the stage for the detailed analysis of the Guiding Principles themselves that follow.

A. The 2011 Report: The Maturation of Principled Pragmatism

The Draft Principles are introduced by the short 2011 Report that is meant to set the stage for the principles and commentary that follow.[93] It represents the distillation of the SRSG's project, the evolution of which was chronicled in detail in the Reports from 2006 through 2010.[94] It also suggests the theoretical policy foundations of the principles that follow, and its implementation. This section examines that 2011 Report and suggests the way in which it provides an important window to the Draft Principles, their character, and limitations.

The focus of the Report is business—not a particular form that business can take, such as a corporation, partnership, conglomerate, joint venture, value or supply chain, or the like—but business understood as a complex nexus of economics, law and politics.[95] That nexus is posited as having been at some sort of reasonable equilibrium in which the roles of the state and of non-state actors were aligned. But the last several decades have "witnessed growing institutional misalignments, from local levels to the global, between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences."[96] At the heart of this misalignment is the corporation, which has evolved to embody "complex forms that challenge conventional understanding and policy designs."[97] These changes have affected all regions and states; they have effectively shattered the old status quo.[98] Change is not merely expedient; change is necessary to restore the alignment between the economic, policy, political, and social forces represented by business and those represented by the state.

93. *See* 2011 Report, *supra* note 40.

94. See discussion *infra* Part II. For a more detailed examination, see *supra* note 49.

95. "Business is the major source of investment and job creation, and markets can be highly efficient means for allocating scarce resources, capable of generating economic growth, reducing poverty, and increasing demand for the rule of law, thereby contributing to the realization of a broad spectrum of human rights. " 2011 Report, *supra* note 40, at para. 1.

96. *Id.*

97. *Id.* The state, of course, also had evolved in an extraordinary way, becoming less stridently autonomous and more enmeshed in a growing web of supra national relationships and international consensus norms (both embodied in international hard and soft law) that have challenged the conventional notion of the state, sovereignty, democratic accountability, and law. *See, e.g.*, R.J. BARRY JONES, GLOBALISATION AND INTERDEPENDENCE IN THE INTERNATIONAL POLITICAL ECONOMY: RHETORIC AND REALITY 47-54 (1995); Oscar Schachter, *The Decline of the Nation-State and Its Implications for International Law*, 36 COLUM. J. TRANSNAT'L L. 7 (1997); José E. Alvarez, *Why Nations Behave*, 19 MICH. J. INT'L L. 303 (1998); Anne-Marie Slaughter, *Governing the Global Economy Through Government Networks*, *in* THE GLOBAL TRANSFORMATIONS READER: AN INTRODUCTION TO THE GLOBALIZATION DEBATE 189 (David Held & Anthony McGrew eds., 2nd ed. 2000).

98. 2011 Report, *supra* note 40, at para. 1.

This opening paragraph nicely sets the stage for the elaboration of both the theory and praxis that is to follow. Its purpose is specific—to focus on the problem of the governance of private aggregations of economic power. The logic of this construct is straightforward. Economic, political, and communal spheres operate best when they exist in a stable system in which each contributes to the social fabric and each is bound by a set of obligations that ensure the stability of the system and the likelihood that it will work towards maximizing the ability of this construct to contribute to the welfare of people and the stability of the state. But the logic of globalization[99] has changed the traditional alignment of these three communities. Though the SRSG focuses on the misalignment caused by the evolution of corporate power,[100] misalignment also has roots in the evolution of state and communal power. For example, regimes of free movements of capital, goods, and services has substantially altered the relationship between states and corporations, but has also changed the relationship of states with their populations and with other states as well. The burgeoning network of agreements among states has substantially altered the relationship between states and greatly augmented the institutional character and regulatory power of the community of states through increasingly effective international organizations, both public and private in character. The decentralization of power has substantially increased the number and character of stakeholders in global society.[101]

But the SRSG does not mean to set the world right. His object is more modest in scope, though not in aim. The sort of "epochal changes"[102] suggested by the description of changes in the global order is well represented in the microcosm of the transformation of the framework governance regimes for business and human rights.[103] The microcosm of business and human rights, as exemplary of the misalignments in governance regimes, proved irresistible—it provided a contained space within which new approaches could be developed

99. On globalization, *see generally, e.g.*, MANFRED B. STEGER, GLOBALISM: THE NEW MARKET IDEOLOGY (2002); the classic rendering is THOMAS L. FRIEDMAN, THE LEXUS AND THE OLIVE TREE (2000); and the classic critique is JOSEPH E. STIGLITZ, GLOBALIZATION AND ITS DISCONTENTS (2002).

100 . 2011 Report, *supra* note 40, at para. 1.

101. "We are beginning to abandon the hierarchies that worked well in the centralized, industrial era. In their place, we are substituting the network model of organization and communication, which has its roots in the natural, egalitarian, and spontaneous formation of groups among like-minded people." JOHN NAISBITT, MEGATRENDS: TEN NEW DIRECTIONS TRANSFORMING OUR LIVES 281 (1982).

102. 2011 Report, *supra* note 40, at para. 1

103. *Id.* at para. 2. The SRSG explains:

> Institutional misalignments create the permissive environment within which blameworthy acts by business enterprises may occur, inadvertently or intentionally, without adequate sanctioning or reparation. The worst corporate-related human rights abuses, including acts that amount to international crimes, take place in areas affected by conflict, or where governments otherwise lack the capacity or will to govern in the public interest. But companies can impact adversely just about all internationally recognized human rights, and in virtually all types of operational contexts.

Id.

and implemented "to map the challenges and recommend effective means to address them."[104]

However, something as simple in theory as human rights[105] proved more difficult in practice, where the aim was to "shift from institutional misalignments onto a socially sustainable path."[106] The SRSG thus moves from the description of the problem—misalignment—to the consequences of its resolution, requiring "operational and cultural changes in and among governments as well as business enterprises—to create more effective combinations of existing competencies as well as devising new ones."[107] Thus, the SRSG moves from the singular focus on business, where he started the report, to the implication of that focus: the need for governments as well as businesses to change their behavior.

In recognizing the need to implement socially sustainable governance, the SRSG also acknowledges that the international community must play a key role.[108] Additionally, business and human rights is acknowledged as new a policy domain as the international community is at the early stages of the journey to sustainable governance.[109] Business and human rights involve "all rights that enterprises can affect,"[110] include all rights holders,[111] and can invoke a broader range of regulatory tools than traditional state or international institutional actors.[112]

International institutional involvement is necessary because the traditional balance between business and state actors cannot be brought back into balance without its intervention. Moreover, because multiple regulatory systems are involved, the scope of the problem of business and human rights is considerably broader than the problems usually subject to the regulatory frameworks of the law-state. Globalization has produced something of a parity of power between companies and some states.[113] The result is that the issue of business and human rights is bound up with the issue of states and human rights—companies may be complicit in the legal system based human rights violations of states, and states may be involved in the human rights violations of companies.[114] The two distinct

104. *Id.*

105. "The idea of human rights is as simple as it is powerful: treating people with dignity." *Id.* at para. 3.

106. *Id.*

107. *Id.*

108. *Id.* at para. 4.

109. *Id.*

110. *Id.* It is thus distinguished from traditional human rights agendas at the international organization level, where organizes its regulatory agendas around a fixed set of particular rights.

111. *Id.* It is thus distinguished from states that can recognize the rights of particular groups.

112. *Id.* It is thus distinguished from regulatory regimes that focus solely on state-based human rights violations that are restricted to the methodologies of the law-state; it can invoke the regulatory methods of private actors as well.

113. *Id.* at para. 5.

114. The interrelationship has been made explicit in the ethics based determinations of the Ethics Council of the Norwegian Sovereign Wealth Fund. *See, e.g.*, Larry Catá Backer, *Part I: Developing a Coherent*

governance areas are thus intimately connected, yet each is also subject to governance regimes that, though overlapping, are not the same.[115] In addition, both law-state and corporate social-norm systems are intertwined with networks of regulation at the international level. Finally, the human rights obligations of states, corporations and international organizations are bound up in larger webs of legal and social norm constraints.[116]

For the SRSG, then, the problem of misalignment is the expression of a macro issue that is supported in some measure by the underlying structural incapacities of states: "State practices exhibit substantial legal and policy incoherence and gaps."[117] Policy incoherence is the outward expression of institutional incapacity in the face of changing circumstances.[118] At the international level, incoherence is evidenced by the disordered state of territorial limits of state action.[119] Extraterritoriality is at once valued both for its ordering effect on behavior across borders, and encouraged as a means of controlling the activity of business.[120] But it is also reviled as a means of projecting power from dominating to subordinated states.[121] The SRSG suggests a very narrow form of extraterritoriality—the power of the home state to assert regulatory authority over

Transnational Jurisprudence of Ethical Investing: The Norwegian Sovereign Wealth Fund Ethics Council Model, LCBACKER BLOG (Feb. 1, 2011), http://lcbackerblog.blogspot.com/2011/02/this-blog-essay-site-devotes-every.html.

115. The 2011 Report explains:

> States are under competing pressures when it comes to business, not only because of corporate influence but also because so many other legitimate policy demands come into play, including the need for investment, jobs, as well as access to markets, technology and skills. In addition, in the area of business and human rights States are simultaneously subject to several other bodies of international law, such as investment law and trade law. . . . At the same time, business conduct is shaped directly by laws, policies and sources of influence other than human rights law: for example, corporate law, securities regulation, forms of public support such as export credit and investment insurance, pressure from investors, and broader social action.

2011 Report, *supra* note 40, at para. 5.

116. *Id.*

117. *Id.* at para. 6.

118. The most prevalent cause of legal and policy incoherence is that the units of Governments that directly shape business practices—in such areas as corporate law and securities regulation, investment promotion and protection, and commercial policy—typically operate in isolation from, are uninformed by, and at times undermine the effectiveness of their Government's own human rights obligations and agencies.

Id.

119. *Id.* at para. 7. "States have chosen to act only in exceptional cases, and unevenly. This is in contrast to the approaches adopted in other areas related to business, such as anti-corruption, money-laundering, some environmental regimes, and child sex tourism, many of which are today the subject of multilateral agreements." *Id.*

120. "This enables a 'home' State to avoid being associated with possible overseas corporate abuse. It can also provide much-needed support to 'host' States that may lack the capacity to implement fully effective regulatory regimes on their own." *Id.* at para. 8.

121. For a discussion on extraterritoriality and neo-colonialism, *see, e.g.*, KAL RAUSTIALA, DOES THE CONSTITUTION FOLLOW THE FLAG?: THE EVOLUTION OF TERRITORIALITY IN AMERICAN LAW 6-7 (2009); RICHARD FALK, PREDATORY GLOBALIZATION: A CRITIQUE 35-47 (1999).

its citizens or the entities it has chartered.[122] The SRSG avoids the more aggressive versions of extraterritoriality and suggests, a superior alternative model: the substitution of inter-state consensus standards for projections of state power abroad.[123] And indeed, one can understand both the need for extraterritoriality as a tool and its solution, as there exists powerful evidence of the consequences of misalignment and the way it produces incentives to extend the subordination of smaller states by larger ones in the form of extraterritoriality. Misalignment is also the expression of a macro issue that is supported, in some measure, by the underlying structural incapacities of companies.[124] Thus, misalignment and incoherence involve not merely adjustments between public and private governance, but also among states and within the legal ordering of the community of states.

Having identified the scope and character of the problem, the SRSG theorizes a solution and posits a suggested approach to implementation.

> One major reason that past public and private approaches have fallen short of the mark has been the lack of an authoritative focal point around which the expectations and actions of relevant stakeholders could converge. Therefore, when the Special Representative was asked to submit recommendations to the Human Rights Council in 2008 he made only one: that the Council endorse the 'Protect, Respect and Remedy' Framework he had proposed, following three years of extensive research and inclusive consultations on every continent.[125]

The "Protect, Respect and Remedy" Framework is then described.[126] The relationship of the "Protect, Respect and Remedy" Framework with the problem of misalignment and the context of multiple autonomous governance regimes is examined.[127] The breadth of its influence also suggests its utility,[128] even before it has been operationalized.[129]

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122. Special Rep. of the United Nations Secretary-General for Bus. & Human Rights, *Online Forum*, cmt. John H. Knox 9 (Jan. 17, 2011), http://www.business-humanrights.org/media/documents/ruggie/online-forum-re-guiding-principles-nov-2010-to-jan-2011.pdf (Draft Guiding Principles (GPs) for Implementation of the U.N. "Protect, Respect and Remedy" Framework Online Consultation.).

123. *See* 2011 Report, *supra* note 40, at paras. 10-11.

124. Business consultancies and corporate law firms are establishing practices to advise clients on the requirements not only of their legal, but also their social, license to operate, which may be as significant to an enterprise's success. However, these developments have not acquired sufficient scale to reach a tipping point of truly shifting markets.

Id. at para. 9.

125. *Id.* at para. 10.

126. *Id.* at para. 11; *see also* discussion *supra* Part II.

127. The SRSG explained:

Each pillar is an essential component in supporting what is intended to be a dynamic system of preventative and remedial measures: the State duty to protect because it lies at the very core of

If the "Protect, Respect and Remedy" Framework provides the theoretical "authoritative focal point around which the expectations and actions of relevant stakeholders could converge"[130] then the Guiding Principles provide the operational focal point for the project. "The Guiding Principles that follow constitute the next step, providing the 'concrete and practical recommendations' for the Framework's implementation requested by the Council."[131] The nature of the Guiding Principles' contribution to the resolution of the problem that gave rise to the SRSG's project is complex and subtle. The Guiding Principles contribute to the "operational and cultural changes in and among governments as well as business enterprises—to create more effective combinations of existing competencies as well as devising new ones"[132] not by changing contemporary legal and social norm structures, but by providing a new organization for them. That organization is grounded in elaboration of existing practices and standards, their integration within a single framework, and the identification of areas that require further development.[133] But at the same time, the operationalization proposed (in the form of the Guiding Principles) is not meant to be what the SRSG described as a mere "tool kit, simply to be taken off the shelf and plugged in."[134]

And so the 2011 Report ends where it started—mindful of the difficulties of theorizing and implementing a single coherent and comprehensive framework that "will reflect the fact that we live in a world of 192 United Nations Member States, 80,000 transnational enterprises, ten times as many subsidiaries and countless millions of national firms, most of which are small and medium-sized enterprises."[135] The Draft Principles reflect these points of convergence,

> the international human rights regime; an independent corporate responsibility to respect because it is the basic expectation society has of business in relation to human rights; and access to remedy because even the most concerted efforts cannot prevent all abuse.

2011 Report, *supra* note 40, at para. 11.

128. The Framework has "become a common foundation on which thinking and action by stakeholders can build over time. Thus, the Framework has already influenced policy development by Governments and international institutions, business policies and practices, as well as the analytical and advocacy work of trade unions and civil society organizations." *Id.* at para. 12.

129. "In resolution 8/7 (June 2008), the Council was unanimous in welcoming this policy Framework, and in extending the Special Representative's mandate to 2011 in order for him to 'operationalize' and 'promote' it." *Id.*

130. *Id.* at para. 10.

131. *Id.* at para. 12.

132. *Id.* at para. 3.

133. *Id.* at para. 13. In the words of the SRSG:

> The Guiding Principles' normative contribution lies not in the creation of new international law obligations but in elaborating the implications of existing standards and practices for States and businesses; integrating them within a single, coherent and comprehensive template; and identifying where the current regime falls short and how it should be improved.\

Id.

134. *Id.* at para. 14.

135. *Id.*

autonomy, polycentricity, and flexibility both within the governance frameworks of each of the components of the system articulated, and within the proposed framework itself.

In the next section, we turn to an examination of the final version of the Guiding Principles themselves. First considered is the elaboration of the framework within which the Guiding Principles were meant to be read. The section then turns to a section-by-section analysis of the Guiding Principles. Critical to this analysis is a consideration of both the Guiding Principles themselves, and the changes that occurred from the Draft Principles to the Guiding Principles. Lastly, these analytical threads are woven together to consider the extent to which the Guiding Principles help "to secure the development of universally applicable and yet practical Guiding Principles in order to achieve the more effective prevention of and remedy for corporate-related human rights harm."[136]

B. The Principles Unveiled in Final Form: "Introduction to the Guiding Principles"

While the 2011 Report was written to serve both descriptive and advocacy objectives, the Introduction to the final form of the Guiding Principles was The Introduction to the Guiding Principles,[137] which serves an almost purely framing objective. Divided into sixteen paragraphs, it succinctly summarizes the framework and framing presumptions of the Guiding Principles. As such, it provides the most well developed synthesis and exposition of the business and human rights project begun by the Special Representative in 2005.[138] The first three paragraphs of the Introduction set the stage by suggesting the historical inevitability of the Guiding Principles. Paragraph 1 suggests the inevitability of the project, arising from a fundamental evolution of global society within which the "issue of business and human rights became permanently implanted on the global policy agenda in the 1990s, reflecting the dramatic worldwide expansion of the private sector at the time, coupled with a corresponding rise in transnational economic activity."[139] Paragraphs 2-3 are particularly important for distinguishing the Guiding Principles project from more aggressive earlier efforts,[140] and to confine them to a governance space that would not threaten any

136. *Id.* at para. 15.

137. Guiding Principles, *supra* note 41.

138. *Id.* at para. 3.

139. *Id.*

140. "One early United Nations-based initiative was called the Norms on Transnational Corporations and Other Business Enterprises. . . . Essentially, this sought to impose on companies, directly under international law, the same range of human rights duties that States have accepted for themselves under treaties they have ratified. . . ." *Id.* at para. 2.

of the principal stakeholders, particularly states.[141] This is important for setting the political context in which the Guiding Principles are framed—that they do not extend law or impose additional obligations on states or recognize a new status for non-state actors. The Special Representative stresses this point.[142] The Introduction itself is then presented as the final product of the alternative process initiated on the failure of the approach represented by the Norms.[143]

The next set of paragraphs then recount the process from concept to principle. Paragraphs 4 and 5 provide a distilled summary of the first two phases of the process that produced,[144] and by the method of its production, legitimated, the "Protect, Respect and Remedy" Framework on which the Guiding Principles are based.[145] Paragraph 4 is also important for its suggestion of the necessity of institutionalization of the Guiding Principles project—the informational (and legitimating) basis of the project is founded on knowledge of existing standards and practices "that has continued to the present."[146] The fruits of the second phase of the Project—"that the Council support the 'Protect, Respect and Remedy' Framework [the Special Representative] had developed following three years of research and consultations"[147]—was described in Paragraph 6.[148] Paragraph 6 sketches the three pillar framework in broad strokes. It provides a very generalized sense of the fundamental characteristics of the three pillar

141. "This proposal triggered a deeply divisive debate between the business community and human rights advocacy groups while evoking little support from Governments." *Id.* at para. 3.

142. The Guiding Principles' normative contribution lies not in the creation of new international law obligations but in elaborating the implications of existing standards and practices for States and businesses; integrating them within a single, logically coherent and comprehensive template; and identifying where the current regime falls short and how it should be improved.

Id. at para. 14.

143. "This is the final report of the Special Representative." *Id.* at para. 3.

144. The Special Representative outlined the three phases of work that led to the framework and the Guiding Principles. The first was an "identify and clarify" phase that was meant to distinguish the Special Representative's project from that which animated the Norms, and to reframe the project. The second phase is described in Paragraph 5—acceptance of the Human Rights Council's 2007 invitation to submit recommendations on the basis of the first phase standards and practices review. *Id.* at paras. 4-5.

145. "It has provided a broader and more solid factual basis for the ongoing business and human rights discourse, and is reflected in the Guiding Principles annexed to this report." *Id.* at para. 4.

146. *Id.* The information universe critical to the Guiding Principles enterprise includes:

mapping patterns of alleged human rights abuses by business enterprises; evolving standards of international human rights law and international criminal law; emerging practices by States and companies; commentaries of United Nations treaty bodies on State obligations concerning business-related human rights abuses; the impact of investment agreements and corporate law and securities regulation on both States' and enterprises' human rights policies; and related subjects.

Id.

147. *Id.* at para. 5. "The Council did so, unanimously 'welcoming' the Framework in its resolution 8/7 and providing, thereby, the authoritative focal point that had been missing." *Id.*

148. *Id.* at para. 6.

framework—grounded in two distinct but interlinked sources of obligation that are tied by the joint obligation to remedy breaches of obligation.[149]

Paragraph 7 returns to the issue of legitimization. It describes the breadth of formal acceptance of the framework by critical stakeholders in the public, non-governmental, and business sectors.[150] It suggests functional acceptance by international organizations that have drawn on the "Protect, Respect and Remedy" Framework "in developing their own initiatives in the business and human rights domain."[151] Paragraph 8 expands on the legitimization theme by cataloguing "the large number and inclusive character of stakeholder consultations convened by and for the mandate [that] no doubt have contributed to its widespread positive reception."[152] The object, of course, is to emphasize both substantive legitimacy—grounded in facts—and process legitimacy, derived from the adherence to generally accepted methods of stakeholder consultation as a substitute for the conventional processes of democratic governance in states.[153] Stakeholding legitimates action the way mass popular movements legitimate changes in government sometimes, in their active and representative capacities, who come "to constitute a global movement of sorts in support of a successful mandate."[154]

This legitimating acceptance led to phase three of the project—operationalizing the three pillar framework, "to provide concrete and practical recommendations for its implementation."[155] Those concrete and practical recommendations were to take the form of guiding principles.[156] These Guiding Principles were reinforced by (and reinforced) the approach taken to produce the "Protect, Respect and Remedy" Framework upon which the Guiding Principles are based.[157] As such, the Guiding Principles are grounded in the same sort of

149. The Special Representative put it this way:

> Each pillar is an essential component in an inter-related and dynamic system of preventative and remedial measures: the State duty to protect because it lies at the very core of the international human rights regime; the corporate responsibility to respect because it is the basic expectation society has of business in relation to human rights; and access to remedy because even the most concerted efforts cannot prevent all abuse.

Id.

150. *Id.* at para. 7.

151. *Id.*

152. *Id.* at para. 8.

153. *See*, *e.g.*, Caroline Bradley, *Consultation and Legitimacy in Transnational Standard-Setting*, 20 MINN. J. INT'L L. 480 (2011).

154. Guiding Principles, *supra* note 41, at para. 16.

155. *Id.* at para. 9.

156. "During the interactive dialogue at the Council's June 2010 session, delegations agreed that the recommendations should take the form of 'Guiding Principles'; these are annexed to this report." *Id.*

157. Thus, the Guiding Principles are informed by extensive discussions with all stakeholder groups, including Governments, business enterprises and associations, individuals and communities directly affected by the activities of enterprises in various parts of the world, civil society, and experts in the many areas of law and policy that

principled pragmatism that marked the development of the three-pillar framework, including the "road testing" of particular guidelines[158] and extensive consultations on the wording of the text. [159] "In short, the Guiding Principles aim not only to provide guidance that is practical, but also guidance informed by actual practice."[160]

And what result? The Special Representative suggested the principal objective of these efforts: to establish "a common global platform for action, on which cumulative progress can be built, step-by-step, without foreclosing any other promising longer-term developments."[161] The Introduction ends with a description of the Guiding Principles defining its scope and purpose by what the Guiding Principles are not, focusing on two characteristics in particular. The first has already been mentioned—the Guiding Principles are not a normatively positive project; their object is merely to integrate or to repackage the cluster of legal and social norms that already binds states and corporations (at least as these touch on issues of human rights), "within a single, logically coherent and comprehensive template; and identifying where the current regime falls short and how it should be improved."[162] Second, the fact that the Guiding Principles do not mean to create new legal obligations does not mean that it is no more than a more efficient codex; "the Guiding Principles are not intended as a tool kit, simply to be taken off the shelf and plugged in."[163] There is a certain amount of art involved in the application of the Guiding Principles, precisely because it involves the interactions of legal and social norms, of states and corporations, of national and international norms, and of rights and remedies within and beyond the law of states.[164] Neither normative system nor mere toolbox, then, the Guiding Principles are offered as "universally applicable and yet practical. . . [doctrines] on the effective prevention of, and remedy for, business-related human rights harm."[165] Whether, and to what extent, the Guiding Principles live up to their billing is the subject considered next. What emerge in the form of the General Principles are the beginnings of an articulation of the concepts first developed in the Special Representatives Reports from 2006 through 2011. These beginnings fall far short

the Guiding Principles touch upon.

Id. at para. 10.

158. *Id.* at para. 11.

159. *Id.* at para. 12.

160. *Id.* at para. 11.

161. *Id.* at para. 13.

162. *Id.* at para. 14.

163. *Id.* at para. 15.

164. While the Principles themselves are universally applicable, the means by which they are realized will reflect the fact that we live in a world of 192 United Nations Member States, 80,000 transnational enterprises, 10 times as many subsidiaries and countless millions of national firms, most of which are small and medium-sized enterprises.

Id.

165. *Id.* at para. 16.

of the promise of the framework as conceptualized, but as accepted by the state actors who populate the U.N. institutional edifice, the Guiding Principles are a remarkable movement toward the conceptual framework developed by the Special Representative and articulated in the "Protect, Respect and Remedy" Framework.

The work on the Guiding Principles, and its application within the United Nations System is not yet done. At the time the UNHRC endorsed the Guiding Principles, it also created "a Working Group on the issue of human rights and transnational corporations and other business enterprises, consisting of five independent experts, of balanced geographical representation, for a period of three years, to be appointed by the Human Rights Council at its eighteenth session, and requests the Working Group."[166] This Working Group is charged with a broad mandate. These include the "effective and comprehensive dissemination and implementation" of the Guiding Principles, the identification, promotion and implementation of "good practices," capacity building, and a role in the development of additional approaches to remedies.[167] The Working Group has now organized itself and is likely to produce additional commentary on the Guiding Principles in the next several years.[168]

In addition, "The Council also decided to establish a Forum on business and human rights under the guidance of the Working Group to discuss trends and challenges in the implementation of the Guiding Principles and promote dialogue and cooperation on issues linked to business and human rights, including challenges faced in particular sectors, operational environments or in relation to specific rights or groups, as well as identifying good practices."[169] The Working Group was tasked to guide the work of a Forum on Business and Human Rights,[170] which is "to discuss trends and challenges in the implementation of the Guiding Principles and promote dialogue and cooperation on issues linked to business and human rights, including challenges faced in particular sectors, operational environments or in relation to specific rights or groups, as well as identifying good practices."[171]

166. Human Rights Council Res. 17/4, U.N. Doc. A/HRC/RES/17/4 (July 6, 2011), para. 6, *available at* http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/144/71/PDF/G1114471.pdf?OpenElement.

167. *Id.* at paras. 6(a-c), (e).

168. *Working Group: Methods of Work*, UNITED NATIONS HUM. RTS. OFF. OF THE HIGH COMM'R FOR HUM. RTS., http://www.ohchr.org/EN/Issues/Business/Pages/WorkingMethods.aspx (last visited Apr. 20, 2012). The Working Group will submit its first annual report to the Human Rights Council in June 2012, and expects to submit an annual report to the UN General Assembly in October 2012.

169. *Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, UNITED NATIONS HUM. RTS. OFF. OF THE HIGH COMM'R FOR HUM. RTS., http://www.ohchr.org/EN/Issues/Business/Pages/WGHRandtransnationalcorporationsandotherbusiness.aspx (last visited Apr. 20, 2012).

170. Human Rights Council Res. 17/4, U.N. Doc. A/HRC/RES/17/4 (July 6, 2011), *supra*, at para. 6(i).

171. *Id.* at para. 12.

A section-by-section review of the Guiding Principles as it moved from draft to final version reveals both the extent of the retreat from the broadest readings of the "Protect, Respect and Remedy" Framework, and the extent that the advances of that framework are still preserved in the final document. It also suggests the drafting context within which the work of the Working Group and others will likely frame issues, where points of tension exist, and the likely places where modification may be attempted. This work has also already begun. In November, 2011, the Office of the High Commissioner for Human Rights distributed "The Corporate Responsibility to Respect Human Rights: An Interpretative Guide,"[172] an early effort to begin to produce authoritative glosses of the Guiding Principles. The SRSG himself, along with several members of his team has also continued to work on the Guiding Principles and its operationalization, helping to organize Shift, shortly after the HRC endorsed the Guiding Principles, as "an independent, non-profit center for business and human rights practice."[173] The move might be understood as establishing a non-state center of authoritative interpretation of the Guiding Principles alongside the public institutional efforts of the HRC.[174]

IV. THE SYSTEM REVEALED: THE GUIDING PRINCIPLES AND ITS COMMENTARY ANALYZED.

I have suggested that a substantial amount of principled pragmatism stands between the "Protect, Respect and Remedy" Framework and the final version of the Guiding Principles. The Guiding Principles, as finally endorsed, represent a substantial aggregation of compromises and choices made to avoid the fate of the Norms in 2005. The Guiding Principles do not fully implement a broad reading of the "Protect, Respect and Remedy" Framework, but does it preserve the essence of that framework? The answer emerges from a consideration of the movement from draft to final version of the Guiding Principles, and what emerges is a qualified yes. The Guiding Principles preserve the essence of the "Protect, Respect and Remedy" Framework, but at a price—shifting the center of gravity to the state duty to protect and recasting remedies as a consequential aspect of the state duty to protect. In the process, both the corporate responsibility to respect and the remedial pillar become more peripheral aspects. Thus the qualification: what remains preserves the structure of the "Protect,

172. Office of the High Commiss'r for Human Rights, The Corporate Responsibility to Respect Human Rights: An Interpretive Guide," Advanced Unedited Edition U.N. Doc. A/HRC/17/31(Nov. 2011), *available at* http:// www.ohchr.org/Documents/Issues/.../RtRInterpretativeGuide.pdf (hereafter "Interpretive Guide").

173. "Who We Are," SHIFT, http://www.shiftproject.org/page/who-we-are (last visited Apr. 21, 2012). "We help governments, businesses and their stakeholders put the UN Guiding Principles on Business and Human Rights into practice. We share our learning by developing public guidance materials that help build the field globally."

174. *Id.* "Our team was centrally involved in shaping and writing the UN Guiding Principles, and Prof. Ruggie is Chair of our Board of Trustees."

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

A. The Devil Is in the Detail—Section By Section Analysis—From Draft to Final Principles: Overall Structure and Capstone Principles.

1. Overall Structure of the Guiding Principles

The Draft Principles originally divided the Principles into two parts. The twenty-nine Principles themselves were placed in Part A; Part B provided a very short section of definitions.[175] Part A was divided into four parts, an Introduction and then a section devoted to each of the pillars of the framework: "The State Duty to Protect Human Rights,"[176] "The Corporate Responsibility to Respect Human Rights,"[177] and "Access to Remedy."[178] The working language of the Guiding Principles, at least in draft form, was English. That has caused some concern among non-English speakers,[179] both for reasons of access and for fear that the failure to translate the draft into the official languages of the U.N. would substantially affect the meaning of terms that might acquire legal or otherwise binding normative effect.[180]

175. Draft Principles, *supra* note 64.

176. *Id.* at princ. 1-11.

177. *Id.* at princ. 12-22.

178. *Id.* at princ. 23-29.

179. "This forum is a consultation of the global North, mainly. Most peoples in the global South are excluded from this forum and have no access to the Draft, because they do not speak English." Special Rep. of the United Nations Secretary-General for Bus. & Human Rights, *Online Forum*, cmt. Robert Grabosch (Jan. 28, 2011), http://www.business-humanrights.org/media/documents/ruggie/online-forum-re-guiding-principles-nov-2010-to-jan-2011.pdf (Draft Guiding Principles (GPs) for Implementation of the U.N. "Protect, Respect and Remedy" Framework Online Consultation.).

180. This point was made forcefully by the French Human Rights Commission:

> The problem we note is the fact that the English text of the Guiding Principles has not been translated into the other official languages of the United Nations, notably French, despite the fact that French is one of the UN's working languages. In addition to being a matter of principle which applies to all reports presented to the Human Rights Council, this problem is exacerbated by the fact that the document uses some ambiguous terms, meaning that 'official'

The Guiding Principles abandoned this structure in favor of a simpler one. It eliminates the Definition section and increases the number of Principles to thirty-one.[181] The Introduction is renamed "General Principles." But appearing to borrow from the toolbox of the German Pandectists and German legal science,[182] it continues to serve, now more explicitly, as the general principles of the Guiding Principles—that is, these now provide the interpretive framework for the thirty-one principles that follow. The remainder is devoted to each of the pillars of the framework: "The State Duty to Protect Human Rights,"[183] "The Corporate Responsibility to Respect Human Rights,"[184] and "Access to Remedy."[185] Each is divided between foundational and organization principles. The idea appears to be to create an internally cohesive interpretive structure within the Principles. The Principles of the broadest general applicability are contained in the opening section, "General Principles."[186] The Operational Principles in each section are to be interpreted first in light of these "General Principles" and then, more specifically, in light of the "Foundational Principles" of each section. The Foundational Principles of each section, in turn, are to be interpreted in light of the "General Principles." This system, familiar to civil lawyers in the interpretation of unified codes, will likely be less comprehensible to lawyers and policymakers from Common Law states.

> translation is vital in order to fully grasp their legal implications. In the first instance, the fact that the English is the only version restricts the degree to which other legal systems are taken into consideration, as well as imposing a dominant viewpoint, even though globalisation is in crisis. It also restricts the scope of the consultations, especially within the Frenchspeaking world, thus working against the document's own stated aim. In the second instance, this adds to the uncertainty over the fundamental legal concepts relating to 'international responsibility'.

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

181. Guiding Principles, *supra* note 41, at princ. 6-26.

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

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

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

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

186. *Id.*

2. Definitions

The Draft Principles provided definitions of only six terms.[187] The Draft Principles attempted to avoid highly technical and precise definitional issues. This suggests a fundamentally different approach from prior efforts.[188] Indeed, the definitions tended to stress the non-technical nature of the terms, rather than the use of the definitions section to provide technical precision. Thus, for example, the Draft Principles stressed that the key term, "corporate," was "used in the non-technical sense, interchangeably with 'business enterprises,' regardless of the entity's form."[189] "Business Enterprise" was also given a broad but general definition, consisting of "all companies, both transnational and others, regardless of sector or country of domicile or operation, of any size, ownership form or structure."[190] This has been criticized on a number of grounds.[191]

Likewise, "human rights" was defined as the "potential adverse impacts on human rights through a business enterprise's activities or relationships. Identifying human rights risks is comprised of an assessment both of impacts and—where they have not occurred—of their likelihood."[192] On the other hand, "internationally recognized human rights" was more specifically defined.[193]

The last set of definitions concerned grievance and grievance mechanisms. Again, the focus is on the general. "Grievance" is triggered by a "perceived injustice evoking an individual's or a group's sense of entitlement. . . ."[194] The intention was to avoid a definition that cabined grievance to either legal rights or the procedures of grievance resolution overseen by the state. Thus, entitlement to redress of injustice "may be based on law, explicit or implicit promises, customary practice, or general notions of fairness of aggrieved communities."[195]

187. In practical terms, only three terms are defined, the first dealing with what constitutes an Enterprise, the second concerning the meaning of human rights, and the third defining grievance and grievance mechanisms. *See* Draft Principles, *supra* note 64, at 27.

188. On the use of definitions in the Norms, see generally, Larry Catá Backer, *Multinational Corporations, Transnational Law: The United Nation's Norms on the Responsibilities of Transnational Corporations as a Harbinger of Corporate Social Responsibility as International Law*, 37 COLUM. HUM. RTS. L. REV. 287 (2006).

189. Draft Principles, *supra* note 64, at 27.

190. *Id.*

191. French Human Rights Commission Comments, *supra* note 180.

192. Draft Principles, *supra* note 64, at 27.

193. The term specifically

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

Id.

194. *Id.*

195. *Id.*

The broadness is necessary because the governance regime of the Draft Principles touched on both legal rights and the conduct obligations of social-norms among communities of stakeholders. This balancing of multiple sources of obligations also affects the definition of grievance mechanism.[196]

The Guiding Principles eliminated the definition section.[197] This is perhaps a result of the criticisms received[198] that the terms chosen to be defined were both over- and under-inclusive. Moreover, substantial objections were made to some of the definitions themselves.[199] Those criticisms reflected unease both about the definitions themselves, their interpretive consequences, and fundamental differences in the knowledge bases and perspectives of laws and non-lawyer policymakers. By eliminating the definitions, the Guiding Principles now provide a larger breadth of possible interpretation of key terms in the Guiding Principles. On the other hand, broader interpretive possibility also permits both deviation among those subject to the principles and implementation incoherence. This is particularly the case with respect to the definition of applicable human rights norms, which now find themselves described in Guiding Principle 12, but are nowhere defined for purposes of the state duty to protect human rights.[200] The response, of course, is found in Guiding Principle 1—that states have no obligation to protect human rights other than those to which they have bound themselves as a matter of law[201]—but that is disingenuous, given the important policy role played by key human rights instruments that are technically non-binding.

3. Introduction to the Draft Principles and General Principles of the Guiding Principles

In the Draft Principles, the Introduction provided a framing element to the substantive principles that follow. The Introduction has two principal purposes. The first is to set out the nature and character of the three fundamental substantive parts of the Guiding Principles and the relationship between them. The second is to elaborate a set of interpretive principles that are meant to guide individuals and entities that will apply the Guiding Principles as regulators or participants.[202]

196. "The term grievance mechanism is used to indicate any routinized, state-based or non-state-based, judicial or non-judicial process through which grievances related to business abuse of human rights can be raised and remedy can be sought." *Id.*

197. *See* Guiding Principles, *supra* note 41.

198. *See generally* French Human Rights Commission Comments, *supra* note 180.

199. *Id.*

200. *See* Guiding Principles, *supra* note 41, at princ. 12.

201. *Id.*

202. Draft Principles, *supra* note 64, at 5.

The Introduction to the Draft Principles described the ordering relationships among the three systems that constitute the governance regime of human rights applied to business. It suggests the autonomy of the law-state system and the social-norm system,[203] but also suggested an unequal relationship between them. The Guiding Principles are founded on the recognition of the "States' primary role in promoting and protecting all human rights and fundamental freedoms, including with regard to the operations of business enterprises."[204] It also specified that the principles be interpreted in light of the fundamental dual "role of business enterprises as specialized organs of society performing specialized functions."[205] In this dual role, business enterprises are understood to be "required to comply with all applicable laws and meet the societal expectation to not infringe on the human rights of others."[206] It also suggests the intimate connection between rights systems and remedies, as well as the central role of remedies in connecting the state duty to protect and the corporate responsibility to respect human rights.[207] Lastly, it suggested an unequal engagement in the development of the norm systems under which states and corporations operate. With respect to states, "[n]othing in these Guiding Principles limits or undermines any legal obligations a State may have undertaken or be subject to under international law with regard to human rights."[208] With respect to the state duty to protect human rights, the Guiding Principles were understood as a framework or a set of organizing principles, but not as the development of law, understood in the traditional sense of either domestic or international law. But with respect to the social norm system under which corporations operate, that is, with respect to the corporate responsibility to respect human rights, there is no corresponding explicit limitation. This follows from the dual obligation of corporations—to

203. "While companies may take on additional responsibilities voluntarily, and operational conditions may dictate them in specific circumstances, the corporate responsibility to respect human rights is the baseline responsibility of all companies in all situations. It exists independently of States' duties or capacity." *Special-Representative, Mandate on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, UNITED NATIONS GLOBAL COMPACT (May 2010), http://www.unglobalcompact.org/docs/issues_doc/human_rights/Resources/UNGC_SRSGBHR_Note.pdf. *See generally Human Rights*, *supra* note 26. Recall also the discussion of the autonomy of the law-state system and the social norm system developed by the SRSG in his reports. *See* Backer, *supra* note 22; *see also* Gunther Teubner, *The Corporate Codes of Multinationals Company Constitutions Beyond Corporate Governance and Co-Determination*, *in* CONFLICT OF LAWS AND LAWS OF CONFLICT IN EUROPE AND BEYOND: PATTERNS OF SUPRANATIONAL AND TRANSNATIONAL JURIDIFICATION (Rainer Nickel ed., 2009). *But see* Peter Goodrich, *Anti-Teubner: Autopoiesis, Paradox, and the Theory of Law*, 13 SOC. EPISTEMOLOGY no. 2, 1999, at 197-214.

204. Draft Principles, *supra* note 64, at intro. (a).

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

206. *Id.*

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

208. *Id.* at 5.

follow applicable law and to meet their obligations under the social-norm system to which they are bound.[209]

The interpretive principles described in the Introduction were to provide the roadmap for moving from theory to practice; to manage the operationalization of the Guiding Principles while setting out the borders within which the Guiding Principles system is meant to work. To understand and apply these interpretive principles is to recognize both the form and function of the system the SRSG is putting into place. First, the Guiding Principles introduce a unity principle as the foundational presumption of the Guiding Principles. Though divided into twenty-nine principles in three sections in draft form, the Guiding Principles are to be "understood as a coherent whole."[210] It also introduces two principles of construction. The first introduces a textual interpretive principle: the Guiding Principles "should be read, individually and collectively, in terms of their objective of enhancing standards and practices with regard to business and human rights so as to achieve tangible results for affected individuals and communities."[211] This is an inward looking interpretive principle that seeks to manage the meaning of the principles as a comprehensive and coherent body of self-referential standards, substantially complete in themselves.[212] The second introduces an effects-based interpretive principle: the Guiding Principles should be read "to support the social sustainability of business enterprises and markets."[213] This is a functionalist interpretive principle, one that looks out from the principles as a coherent body to their effects on those they are meant to affect. It is augmented by another functional interpretive principle: that the Guiding Principles "should be implemented in a non-discriminatory manner, with

209. The SRSG has emphasized the contextual and operational conditions that may affect both the extent and character of the baseline obligation of corporations under the social norm system to which they are bound. *See* Draft Principles, *supra* note 64, at 14. But the absence of limits does not suggest an open-ended substantive effect of the Draft Principles on corporate responsibility. The corporate responsibility is, to some extent, also bounded by the growing network of norms that reflect an emerging global consensus about corporate behavior with respect to human rights. The SRSG has noted the strong connection between the substance of the corporate responsibility to respect and the UN Global Compact. "In this regard, the UN Protect, Respect and Remedy framework provides further operational clarity for the two human rights principles championed by the Global Compact. Principle 1 calls upon companies to **respect** and support the protection of internationally proclaimed human rights; and Principle 2 calls upon them to ensure that they are not complicit in human rights abuses." *Special-Representative, Mandate on the Issues of Human Rights and Transnational Corporations and Other Business Enterprises*, *supra* note 194. ("Other guidance materials that can help with implementation of the responsibility to respect (and the voluntary commitment to support) human rights can be found at:

http://www.unglobalcompact.org/Issues/human_rights/Tools_and_Guidance_Materials.html").

210. Draft Principles, *supra* note 64, at 5.

211. *Id.*

212. *See generally* AUTOPOIETIC LAW: A NEW APPROACH TO LAW AND SOCIETY (Gunther Teubner ed., 1988).

213. Draft Principles, *supra* note 64, at 5.

particular attention to the rights and needs of, and challenges faced by, vulnerable and marginalized groups, and with due regard to gender considerations."[214]

The final version keeps the form and general objectives of the Draft Principles' Introduction, but in its final form was substantially reoriented to emphasize the primacy of the state role in human rights and a substantial reduction on the scope of that obligation.[215] Moreover, it now recasts the corporate social norm systems as autonomous bases of governance norms in a more marginal role. First, the state no longer has a role in promoting and respecting all human rights; instead its role is reduced to obligation. Specifically, the Guiding Principles now recognize merely the "States' existing obligations to respect, protect and fulfill human rights and fundamental freedoms."[216] The political scientist or sociologist might say that the formal changes in language do not necessarily affect the scope and character of the state's obligations in effect. The lawyer might suggest that the changes indicate a positive intention to reduce the scope of state obligation—not all human rights and fundamental freedoms, but only "existing obligations to respect, protect and fulfill human rights."[217]

Second, the obligations of business enterprises were changed in one quite significant respect—no longer required to "meet the societal expectations not to infringe on the human rights of others,"[218] such enterprises are required now only to "comply with all applicable laws."[219] The General Principles of the Guiding Principles, then, effectively seek to eliminate reference to the great innovative aspect of the "Protect, Respect and Remedy" Framework—the autonomous obligations of business organizations to comply with global social norms in the business.[220] The tag reference to the additional obligation to "respect human rights" is likely meant to preserve a wisp of the polycentric principle in the "Protect, Respect and Remedy" Framework. But that is an interpretive stretch at best. Moreover, the General Principles retain a potentially important lacuna—the omission of non-state actors that are organized but not in business. Still, with the definition section omitted, it might be possible to extend the definition of business enterprise to include businesses that are not profit making organizations, like Amnesty International, to the extent that they operate like businesses by hiring employees, owning property, and engaging in transactions.

As thus reduced in scope, the General Principles of the Guiding Principles articulate the assumption that had been written into the Special Representative's Reports since 2008—that the Guiding Principles apply to all states and all business enterprises. The Principles of Coherence and Sustainability remain

214. *Id.*

215. *See* Guiding Principles, *supra* note 41, at 6.

216. *Id.*

217. *Id.*

218. Draft Principles, *supra* note 64, at 5; Guiding Principles, *supra* note 41, at 6.

219. Guiding Principles, *supra* note 41, at 6.

220. *See, e.g.*, SRSG 2008 Report, *supra* note 70, at 51.

substantially unchanged in the final version of the Guiding Principles.[221] However, in line with the substantial change to the description of the fundamental character of the State duty to protect human rights, the final version substantially extends the limitations on the effects of the Guiding Principles, both at the time of enactment and, importantly, as an ongoing enterprise. The Guiding Principles broaden the Draft Principles such that the Guiding Principles would not be read to limit or undermine the legal obligations of states under international law and substitute a much broader limitation: "Nothing in these Guiding Principles should be read as creating new international law obligations, or as limiting or undermining any legal obligations a State may have undertaken or be subject to under international law with regard to human rights."[222] The Guiding Principles, then, must be read within the nexus of state obligation in the context in which human rights activity occurs. It may not serve as a basis for moving customary practice along. It becomes invisible.[223]

The interpretive stage is now set for the thirty-one principles of the Guiding Principles. First, the Guiding Principles are to be read in light of the existing obligations of states, as they might vary from state to state. Second, the subsidiary position of business enterprises within states is affirmed as "specialized organs of society performing specialized functions"[224] whose principal obligation is derivative. The Guiding Principles are to be interpreted through the foundational principle that business enterprises must obey the law of the state that applies to them. Third, rights and obligations are to be matched with "appropriate and effective" remedies, but oddly, to be triggered "when breached."[225] Fourth, the Guiding Principles "apply to all states and to all business enterprises."[226] Fifth, interpretation of the Guiding Principles is to be guided by the overarching principles of coherence, tangibility, and sustainability. Sixth, the Guiding Principles cannot be read either as the creation of new

221. Draft Principles, *supra* note 64, at 5; Guiding Principles, *supra* note 41, at 6.

222. Guiding Principles, *supra* note 41, at 6.

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

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

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

226. *Id.*

international law, nor, potentially, as the place from which such international law might arise; nor may they limit or undermine the legal obligations of states, even where these obligations are incompatible with human rights obligations. And seventh, the Guiding Principles impose a principle of non-discrimination, not to be applied for the benefit of states but rather for the benefit of individuals.[227]

B. The State Duty to Protect Principles

1. The State Duty to Protect Human Rights: Foundational Principles

The ten Guiding Principles touching on the state duty to protect human rights is divided into two sections, "Foundational Principles,"[228] and "Operational Principles."[229] The latter is subdivided into "General State regulatory and policy functions,"[230] "The State-business nexus,"[231] "Supporting business respect for human rights in conflict-affected areas,"[232] and "ensuring policy coherence."[233] These rearrange and modify the organization of the Guiding Principles in the Draft Principles,[234] principally by reinforcing the distinction between general principals, which must be applied in the interpretation of the operational principles that follow (and both, of course, to be interpreted in light of the "General Principles" section applicable to all of the Guiding Principles).

The state duty to protect human rights, the first pillar of the "Protect, Respect and Remedy" framework, is distilled in Guiding Principles 1 and 2. Guiding Principle 1 describes the state duty to protect human rights.[235] But Guiding Principle 1 appears to reflect a duty that is secondary rather than primary: states do not have a duty to protect against human rights abuses, including their own abuses. Instead, they merely have an obligation to protect against human rights abuses within their territories by third parties.[236] The Commentary, however, suggests a broader application than the black letter of the principle suggests.[237]

227. *Id.*

228. *Id.* at 1-2.

229. *Id.* at princ. 3-10.

230. *Id.* at princ. 3.

231. *Id.* at princ. 4-6.

232. *Id.* at princ. 7.

233. *Id.* at princ. 8-10.

234. The rearranging reflects both the shift in emphasis of the General Principles reflected in the first section, discussed above, and drafting refinement.

235. *Id.* at princ. 1.

236. "States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication." *Id.*

237. "States' international human rights law obligations require that they respect, protect and fulfill the human rights of individuals within their territory and/or jurisdiction. This includes the duty to protect against human rights abuse by third parties, including business enterprises." *Id.* at cmt. princ. It is not clear how the

The Commentary suggests that the duty to protect is a standard of conduct; that States are not responsible for the abuses of private parties; and that states do become liable as principles where the abuses can be attributed to them or where they fail to enforce against third party abuse in accordance with the standards of Guiding Principle 1.[238] Inexplicably, the Commentary also reads into the black letter of the principle a state duty to "protect and promote the rule of law."[239]

Guiding Principle 2 then describes the means by which states comply with their duty in their regulation of business enterprises within their territory or jurisdiction.[240] It represents a combination of the extraterritoriality provision of the original Draft Principles with the "clear expectations" principle of the first part of Draft Principle 5.[241] The strategic reasons for the move remain unclear—perhaps it was a means of softening the focus on extraterritoriality, a position that remained contested.

The principle focus of Guiding Principle 2, though, is extraterritoriality. The Commentary to Guiding Principle 2 makes clear that the principle is meant as a rather lukewarm endorsement of extraterritoriality.[242] This is a substantial retreat from both the language in the SRSG Reports and the Draft Principles.[243] The Commentary then suggests the policy reasons favoring Guiding Principle 2[244] and the approaches states have employed to implement the principle, including the use of extraterritorial principles, a backhanded approach to the endorsement of extraterritoriality nowhere explicit in the Principle itself.[245] Gone are references to the supply chain relationships and controlled entity concepts that were included in the Draft Principles and that strengthened the case for extraterritoriality.[246]

Commentary can be reconciled with the narrower language of the principle itself.

238. *See id.*

239. *Id.* at princ. 1 cmt. While these principles could be read into the "Protect, Respect and Remedy" Framework, it is hard to extract such a duty from the language of Principle 1. In any case, this obligation is understood to include a principle of equality before the law, fairness in application of law, and accountability, legal certainty and procedural and legal transparency. *Id.*

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

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

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

243. *See* discussion *infra* Part IV.

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

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

246. *See* discussion *infra* Part IV.

The Draft Principles reflected a somewhat different perspective in the elaboration of the fundamental provisions of the state duty to protect human rights. It is in those differences that one can discern the spaces between "Protect, Respect and Remedy" as a framework, the narrowing approach of the Draft Principles, and the final product. Together they provide a more principled basis for reading the Guiding Principles as ultimately endorsed. The foundational principles set the scope and nature of the state duty to protect human rights. Principle 1 is directed toward the state, rather than, as in the final version, the state's duty as against third parties.[247] It describes the state's obligations with respect to its incorporation of international human rights standards into its domestic legal order and to enforce that legal order. The obligations of Principle 1 are mandatory. Principle 2 is directed outward. It describes the fundamental relationship between the state, its legal system, and the businesses under its control. The obligations of Principle 2 are permissive—states are encouraged, but not required, to assert authority over businesses to the extent described in Principle 2. The remainder of the Draft Principles focused on the state duty to protect human rights then elaborated the two foundational principles, building on the mandatory principle of Draft Principle 1 and the permissive principle of Draft Principle 2 to frame the extent of the state duty to protect human rights at home and outside of its own territory.

Draft Principle 1 can be understood as made up of two parts. The first part sets out the extent of the duty: "States must protect against business-related human rights abuse within their territory and/or jurisdiction."[248] The second part describes the methodology that is to be used to comply with this obligation: states are required to take "appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, regulation, and adjudication."[249] The focus of Principle 1 is on the state's duty to prevent abuses of human rights by business.[250] The Commentary narrows the scope of the state duty described in Draft Principle 1 by distinguishing the duty to protect from "other State duties usually associated with human rights, such as the duties to promote and fulfill."[251] The duty to protect is understood as grounded in law and policy. The legal basis of the duty arises from the international law obligations of states,[252] and to some

247. *Compare* Draft Principles, *supra* note 64, at princ. 1 ("States must protect against business-related human rights abuse within their territory and/or jurisdiction by taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, regulation, and adjudication.") *with* Guiding Principles, *supra* note 41, at princ. 1 ("States must protect against human rights abuses within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication.")

248. Draft Principles, *supra* note 64, at 5.

249. *Id.*

250. *Id.* at 5-6.

251. *Id.* at 6.

252. *Id.* at 5-6. "The legal foundation of the State duty to protect against business-related human rights

extent from the imperatives of their domestic constitutional orders. The Commentary suggests that the international law obligations of states can be understood as requiring states to control their own behavior and also the behavior of persons or entities over which they might have control.[253] However, while states might have an obligation to control the conduct of others within their territory with respect to compliance with applicable human rights norms, the Commentary suggests that states will not be directly liable for the consequences of human rights abuses by others (within their control).[254] Lastly, the framework structure of the Draft Principles does imply a substantial amount of potential legislative and policy obligations on the part of states. These are framed as housekeeping obligations—the need to ensure legal and policy coherence by conforming law and policymaking to the obligations the state has undertaken.[255]

If Draft Principle 1 is directed inward—focusing on the legal obligations of states with respect to their domestic legal orders—Draft Principle 2 is directed outward—toward the policy obligations of states that flow from their legal obligation to protect human rights, and attach to persons or entities wherever they operate.[256] The Commentary notes that issues of extraterritoriality are complex and sensitive, though it does not elaborate on either.[257] Though the Commentary appears to take a cautious approach to the encouragement of assertions of extraterritorial jurisdiction, the approach is ambiguous enough to provide a cover for fairly aggressive interventions abroad.[258] That permission to project legislative power abroad, of course, is a function of the extent of a state's control over domestically chartered business operating abroad. The effect, then, is to provide a policy cover for the continued use of the power by developed states to project

abuse is grounded in international human rights law." *Id.*

253. *Id.* at 6 ("The specific language in the main United Nations human rights treaties varies, but all include two sets of obligations for States Parties: first, to refrain, themselves, from violating the enumerated rights of persons within their territory and/or jurisdiction, generally known as the State duty to respect human rights; second, to 'ensure' (or some functionally equivalent verb) the enjoyment or realization of those rights.").

254. States, however, might be liable for breach of their obligations under international law where their failure to ensure compliance by others within their control is itself a breach of the relevant treaty. *Id.*

255. *See id.* at 9-11; *see also* discussion *infra* Part IV.

256. *Id.* at 6. "States should encourage business enterprises domiciled in their territory and/or jurisdiction to respect human rights throughout their global operations, including those conducted by their subsidiaries and other related legal entities." *Id.*

257. The issue, however, was thoroughly vetted in the years leading to the production of the Draft Principles. *Id.*; *see, e.g.*, Jennifer A. Zerk, *Extraterritorial Jurisdiction: Lessons for the Business and Human Rights Sphere from Six Regulatory Areas* (Harvard Corporate Soc. Responsibility Initiative Working Paper No. 59, 2010), *available at* http://www.hks.harvard.edu/m-rcbg/CSRI/publications/workingpaper_59_zerk.pdf.

258. The Commentary is a study in ambiguity:

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

Draft Principles, *supra* note 64, at 6.

their legislative agendas in less developed states, which tend to serve as host states for foreign business operations. More importantly, the Commentary suggests a connection between the permissive actions of Draft Principle 2 with the mandatory provisions of Draft Principle 1, where the state is acting both as a regulator (Draft Principle 1) and a participant (Draft Principle 2) in activities beyond its borders.[259]

Still, the Commentary seeks to soften the effects.[260] It is also possible to argue that, within the context of Draft Principles, extraterritoriality should have no functional effect on the internal operations of the host state's legal system. In effect, extraterritoriality is merely a transitory step toward the necessary harmonization of law and policy inherent in the International Bill of Rights, which should produce a functionally equivalent global set of domestic legal orders. But that conclusion is founded on a number of assumptions with respect to which there might not yet be consensus in either theory or action. First, all states have an obligation in equal measure to incorporate international law within their domestic legal orders. Second, that bundle of international obligations is identical among all states. Third, all states understand the bundle of transposable obligations identically. Fourth, none of the obligations raise issues within the constitutional order of any state. Fifth, the bundle of international human rights obligations is consistent with all other international obligations of states (in effect, there exists a sufficiently well developed policy coherence at the international law level). Sixth, the process of incorporating these obligations will produce differences in form and process, but no substantial differences in function or effect on application in individual cases. And seventh, states will enforce these obligations subject to the peculiarities of their domestic legal order, in a substantially harmonized (though not uniform) manner, as a matter of law (binding obligation) and policy (comity).

The difficulty with the extraterritoriality provisions of the Principles, whether in draft or final form, of course, is that each of these assumptions remains highly contested, and states continue to "game" the system to their own advantage. States may not have the same set of legal obligations under international law and may not interpret their obligations under that law in the same way.[261] With respect to conventional law, not all states have acceded to every convention—many states have treaty relationships with other states, and states may have included

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

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

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

substantial reservations. States have very different understandings of the scope, applicability, and the nature of obligations under customary international law. Moreover, beyond issues of legal effect, the legal effect of non-binding international norms remains highly contested—as a matter of international law and in its effect on the domestic legal order of a state.[262] Indeed, as recent cases from the United States have shown, the relationship between international legal or normative obligation and the strictures of a constitutionally derived domestic legal obligation work against the incorporation of international law or norms in a uniform or harmonized way, if it is incorporated at all.[263] Other states take a different approach.[264] The potential for law and policy incoherence grows. More importantly, it is clear that, even within the assumption of the Guiding Principles framework, extraterritoriality can have a significant effect, especially for the transposition of developed state law through the instrumentalities of their chartered corporations operating in less developed host states.

2. *The State Duty to Protect Human Rights: Operational Principles—General State and Regulatory Policy Functions*

The Operational Principles comprise the bulk of the Guiding Principles touching on the state duty to protect. Principle 3 (Draft Principle 5) considers the general regulatory and policy functions of states. It lists four categories of actions to be undertaken by states that mean to honor their obligations under Principle 1. Two involve the construction and enforcement of law,[265] one defines the guidance obligations of states (that slips in an extraterritorial element),[266] and the last frames the construction of corporate disclosure obligations.[267] The structure is meant to describe a universe of obligation that includes not merely legal obligations but policy commitments as well. Most interesting is the principle, set out in Guiding Principle 3(a), that states have a due diligence obligation with

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

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

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

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

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

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

respect to the adequacy of their domestic legal orders in complying with the law enforcement obligations of Guiding Principles 2 and 3(a).[268]

The Commentary urges states to avoid being passive in fostering business respect for human rights, and counsels better enforcement of existing law, arguing that the failure to enforce has the effect of a legislative gap.[269] Most importantly, the Commentary takes direct aim at the conventional construction of corporate law—the shareholder welfare maximization basis of which may be inconsistent with the human rights privileging objectives of the Guiding Principles.[270] The Commentary also suggests a number of soft law techniques for state guidance of business enterprises to respect human rights,[271] invites states to make better use of their national human rights institutions to meet their duty to protect,[272] and suggests the contours of appropriate outcomes and best practices.[273] Lastly, the Commentary suggests changes in national and international accounting principles.[274] The Commentary does not focus attention on the principle's invitation for home states to regulate corporate conduct down the supply chain, but it does suggest the nature of such regulation through the corporate obligation to undertake human rights due diligence.[275] Taken as a whole, these suggestions are, at best, tall orders, and will require the concurrence of a number of stakeholders, many of which were not parties to the Guiding Principles process, and whose interests may be adverse to the objectives of the Guiding Principles.

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

269. *Id.*

270. The Commentary strengthens the suggestion made in the Draft Principles Commentary that there is a certain amount of flexibility, perhaps more than is warranted by the history of the application of law in many states, in the construction and interpretation of the shareholder welfare maximization principles of corporate law. *See* Larry Catá Backer, *Using Corporate Law to Encourage Respect for Human Rights in Economic Transactions: Considering the November 2009 Summary Report on Corporate Law and Human Rights Under the UN SRSG Mandate*, LCBACKER BLOG (Jan. 14, 2010, 9:23 PM), http://lcbackerblog.blogspot.com/2010/01/using-corporate-law-to-encourage.html.

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

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

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

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

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

The Draft Principles took a similar path, though it also included discussion of policy coherence, which was eventually moved to Guiding Principle 2. Draft Principle 5 sets out in more detail the methodologies of regulating business within the context of the duty to protect against human rights abuses. The basic principle is straightforward and applicable to national regulation domestically and extraterritorially.[276] The requirements of Draft Principle 5 can be divided into two distinct parts. The first is the requirement that states should set out their expectations. The second part requires states to take the necessary measures to "support, encourage, and . . . require" compliance with these expectations.[277] Four methods are identified as appropriate to meet these objectives. These methods reflect the fundamental division of the state duty to protect between law and policy that serves as the basic ordering framework of Draft Principle 1. Law-based methods include enforcing the law and ensuring that relevant law does not impede corporate respect for human rights.[278] Policy-based methods include providing guidance on how to respect human rights and how to communicate corporate human rights performance.[279]

These methodologies are grounded on a principle of state action (one consistent with Draft Principle 1, a focus now substantially lacking in the final version of Guiding Principle 1) that "States should not assume that businesses invariably prefer, or benefit from, State inaction."[280] With respect to enforcement of law and direction of policy, the Commentary suggests the need to harmonize laws relating to business with the overarching principles of human rights law. This derives both from the SRSG's emphasis on the need for policy and legal coherence, and on the recognition that the current model of business regulation—grounded in shareholder or enterprise welfare maximization—might frustrate the enterprise of transposing human rights norms into the law and policy systems of states.[281] The SRSG, at the same time, stresses the importance of practical guidance for businesses on respecting human rights, by providing that it "should indicate expected outcomes; advise on appropriate methods, including human rights due diligence; and help share best practices."[282] The point of guidance, as part of the state duty to protect, then, is closely tied to the responsibility of

276. Draft Principles, *supra* note 64, at 7. ("States should set out clearly their expectation for all business enterprises operating or domiciled in their territory and/or jurisdiction to respect human rights, and take the necessary steps to support, encourage and where appropriate require them to do so.").

277. *Id.*

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

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

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

281. For a critical discussion of these efforts and assumptions, see Backer, *supra* note 270.

282. Draft Principles, *supra* note 64, at 7-8.

business to respect human rights.[283] But more than that, it suggests an institutional hierarchy, in which the state retains some authority, or at least obligation, to help shape and manage the social norm system of corporate governance regimes. This form of connection between the state duty and corporate responsibility is made clear in the context of the obligation to encourage corporate communication on corporate human rights performance.[284]

3. The State Duty to Protect Human Rights: Operational Principles—The State-Business Nexus

The connections between the core duty of states to protect human rights, the corporate responsibility to respect human rights, and the role of international public and private actors, are developed in Guiding Principles 4 through 6. Guiding Principle 4 amalgamates the related Draft Principles 6 and 8 without substantive change. Guiding Principle 4 focuses on enterprises that are either owned or controlled by a state, or that are the recipients of substantial state aid (whether or not state-owned).[285] In both cases, the state "should take additional steps to protect against human rights abuses. . ."[286] These steps might include "requiring human rights due diligence"[287]—steps that would otherwise have a more compelling character in cases where enterprises are not state-owned.[288]

The Commentary, though modified from its draft form in some respects, does not change the focus of discussion. The Commentary is careful, again, to assuage the sensibilities of states as occupying the top of the governance hierarchy in this system.[289] But state-owned enterprises represent a nexus point for the state duty to protect and the corporate responsibility to respect human rights. Yet, given the change in Guiding Principle 1 from its draft version, it is easier to reconcile the two when incarnated in a state-owned to state-aided enterprise. Guiding Principle 1 reduces the state duty to one of protecting against human rights abuses

283. Guiding Principles, *supra* note 41, at 13-20.

284. Draft Principles, *supra* note 64, at 8.

285. Guiding Principles, *supra* note 41, at 9-10.

286. *Id.*

287. *Id.*

288. *Id.*; *see also id.* at 13 discussed *infra*.

289. Indeed, the Commentary does a nice job of suggesting the hierarchical ordering of governance roles between states and business enterprises in the context of the Guiding Principle normative framework.

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

Id. at 9-10.

committed by others. The corporate responsibility to respect applies only to the corporate entity and not necessarily to its owners, especially where the owners are states. As such, it makes perfect sense within this structure for states to require nothing more than a reminder to enforce their laws, even against entities in which they have an ownership or control interest, or those which they subsidize. The Commentary then appears to state the obvious—the state obligation to enforce its law (Guiding Principle 1) is made easier because managers of state-owned companies may have to report to state officials.[290]

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

> Where these agencies do not explicitly consider the actual and potential adverse impacts on human rights of beneficiary enterprises, they put themselves at risk—in reputational, financial, political and potentially legal terms—for supporting any such harm, and they may add to the human rights challenges faced by the recipient State.[291]

It is in this context that the Commentary suggests that "human rights due diligence is most likely to be appropriate where the nature of business operations or operating contexts pose significant risk to human rights."[292]

Guiding Principle 5 (Draft Principle 7) focuses on obligations of states with respect to business enterprises performing services that they outsource.[293] The consequences of failure to comply are identified as both reputational and legal.[294] Guiding Principle 6 (Draft Principle 9) focuses on respect for human rights by business enterprises when states engage in commercial transactions with them.[295]

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290. The Commentary puts it this way:

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

Id. at 9.

291. *Id.*

292. *Id.*

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

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

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

The only change from the Draft Principles was the inclusion, in the Commentary, of a limiting provision of the state's obligation—based on the particular obligation of a state under national and international law.[296]

4. The State Duty to Protect Human Rights: Operational Principles—Supporting Business Respect for Human Rights in Conflict Affected Areas

Guiding Principle 7 (Draft Principle 10 with minor revisions) relates to the state duty to protect human rights in conflict zones. After its justificatory introduction,[297] Guiding Principle 7 provides that states should ensure that businesses operating in conflict zones avoid involvement with human rights abuses.[298] It then offers four methods for achieving this result. These include early engagement with home-state businesses to manage their operations in the conflict zone, assistance to business in identifying and assessing the form of heightened risks of human rights abuse, denying public support and services to uncooperative home-state enterprises, and adjusting public policies and formal governance tools to enforce home-state business compliance with conduct interdictions abroad.[299] "All these measures are in addition to States' obligations under international humanitarian law in situations of armed conflict, and under international criminal law."[300]

This principle marks one of the conceptual outer edges of the state duty and corporate responsibility pillars of the "Protect, Respect and Remedy" Framework, at least as it touches on the current and conventional international system. Guiding Principle 7 concedes the supremacy of the state as the great active agent of enforcing collective norms. It also presumes the authority of the state to project its power through the business enterprises it controls. But it is not necessarily national power that is projected, but instead the projection of national power enforcing international norms. In essence, Guiding Principle 7 concedes the need for unilateral action by the dominant states, and their authority to provide governance in the absence of an indigenous government. In effect, the underlying principle of Guiding Principle 7 assumes the need for there to be a proper state for every territory in a world organized on the basis of states. Guiding Principle 7 provides a specific application of the extraterritorial principle of Guiding Principle 2. The state duty to protect assumes a state assigned to

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

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

298. *Id.*

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

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

every territory.[301] That implicates a related issue: which state ought to step in to supply law when a territory lacks a sufficient quantum of state power? The answer, of course, is implicit in Guiding Principle 2's extraterritoriality principle. Thus, Guiding Principle 7 effectively vests the state duty to protect authority to the state that controls businesses operating in conflict or weak state zones.[302]

The Commentary makes clear that the Guiding Principles framework and the web of international norms it represents provides an exception to the principle of internal sovereignty of states where there is no strong or stable government apparatus.[303] It then suggests the contours of the obligations of states to project their power through the private market activities of corporations domiciled in their territories.[304] That state power can be projected through the parent of such corporations where local activity is carried on by a subsidiary or the obligation can be applied as well to all supply chain downstream entities, combining this Guiding Principle 7 with the insights of Guiding Principle 3(c)).[305] Such assistance can come with a sting: the Commentary suggests that states "attach appropriate consequences to any failure by enterprises to cooperate in these contexts, including by denying or withdrawing existing public support or services, or where that is not possible, denying their future provision."[306] The conflict zone principle also serves another important purpose—the management

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

302. "Responsible businesses increasingly seek guidance from States about how to avoid contributing to human rights harm in these difficult contexts." Guiding Principles, *supra* note 41, at 10-11, princ. 7 cmt.

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

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

Id.

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

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

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

of the state's efforts to achieve internal and external policy coherence in line with the requirements of international human rights norms, an issue taken up explicitly in Guiding Principles 8-10.[307] The obligation to interpose itself in the territories of weak governance or conflict zones, then, is reconstituted as a part of the state duty to protect human rights. There is irony here, in deepening and extending the power of the state to protect human rights wherever there is a need. The Guiding Principles contribute to a vertically-ordered integration of states within a system in which intervention in the internal affairs of states is managed in those contexts, but it cannot or will not meet its international obligations. But those interventions are themselves bound not by the individual interests of the intervening state, but rather by the norms of international human rights. Extraterritoriality, then, as expressed in Guiding Principles 2 and 7, appears to strengthen states, but they actually serve to limit state authority to those norms having international authority.[308]

5. *The State Duty to Protect Human Rights: Operational Principles—Ensuring Policy Coherence*

Policy coherence was an important element of the "Protect, Respect and Remedy" Framework.[309] The Guiding Principles fully devote three principles to this issue. Together, they are meant to provide a structure for the development of internal state policy (Guiding Principle 8); of external policy in the development of bi-lateral relationships between states and other actors (Guiding Principle 9); and in the multilateral relations of states (Guiding Principle 10).

Guiding Principle 8 (Draft Principle 3) looks to internal or horizontal policy coherence: "States should ensure that governmental departments, agencies and other State-based institutions that shape business practices are aware of and observe the State's human rights obligations when fulfilling their respective mandates."[310] This obligation can be effectuated in part by providing relevant

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

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

309. *See, e.g.*, Backer, *supra* note 49, at 65.

310. Guiding Principles, *supra* note 41, at 11, princ. 8. The Commentary defines policy coherence in terms of the obligations of states:

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

Id. at 11, princ. 8 cmt.

governmental authorities with "relevant information, training and support."[311] The Commentary elaborates, condensing the discussion of vertical and horizontal coherence developed in the SRSG's Reports. In the process, the Commentary suggests both the realities of domestic law incoherence as a fundamental drag on the ability of a state to comply with even its indirect duty specified in Guiding Principle 1[312] and the failures of states to align their internal legal systems to their international legal obligations.[313]

There are several aspects to these principles that are worth highlighting. First, Guiding Principle 8 looks inward to the relationship of the state to its governance organs in a way that suggests a hierarchy of policy that places human rights at or near the top of a state's policy obligations.[314] Second, it reaches state practice at all levels of operation, irrespective of the division of power within a state. Guiding Principle 8 thus cuts across organizational structures from the division of authority between states and a federal government, to the powers reserved to regions under various incarnations of autonomy regimes.[315] Third, it also reaches, on the same principle, into the territory and law structures of semi-sovereigns, like indigenous peoples.[316] Fourth, all of these subordinate or related governance units are understood in the context of the overall obligations of Guiding Principle 1, the policy choices of which must be coordinated and subject to the hierarchy of values that privilege human rights.

Guiding Principle 9 (Draft Principle 4 without substantive change) focuses on the relationship of states with others in the context of implementing coherent policies. Guiding Principle 9 suggests that the coherence principles of Guiding Principle 8 extend externally—to the relationships between the state and other states or businesses. The Commentary describes that these "[e]conomic agreements concluded by States, either with other States or with business enterprises—such as bilateral investment treaties, free-trade agreements or

311. *Id.*

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

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

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

315. The Commentary speaks to the obligations of coherence as extending to "both the national and sub-national levels." Guiding Principle, *supra* note 41, at 11, princ. 8 cmt. It is also understood as an element of vertical coherence. Though its focus is on the coherence of policy between the state and international community, it reaches downward as well. "Vertical policy coherence entails States having the necessary policies, laws and processes to implement their international human rights law obligations." *Id.*

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

contracts for investment projects—create economic opportunities for States. But they can also affect the domestic policy space of governments,"[317] a policy space that has been complicated by the recognition of the need to protect investor rights.[318]

Lastly, the capstone provision of the Principles framing the state duty to protect human rights is elaborated in Guiding Principle 10. This principle looks toward the enlargement and deepening of international legal regimes founded on the dense network of international organizations managing the growing body of collective state law (that is, of international conventional and customary law) as an alternative, and perhaps as the more legitimate substitute, for the unilateralist extraterritoriality of Guiding Principles 2 and 7.[319] But Guiding Principle 10 serves to remind that, while unilateral action is permitted, collective action has greater legitimacy. The superiority of collective state action to the unilateral action of any single state (or group of powerful states) ought to be regarded as the better alternative, both for policing weak governance zones and for developing the set of duties to which states ought to be bound.

The effect might be to cabin the extraterritoriality impulse in Guiding Principles 2 and 10. The extraterritorial insight—that extraterritoriality bounded by international principles will tend to constrain rather than expand state discretionary authority—is made clear in Guiding Principle 10. But that impulse is also substantially constrained by the language of the Principle itself. First, the vertical ordering itself is understood in the "passive voice"—it is both weak and consequential. The Principle applies only where states are acting as members of multilateral institutions that deal with business related issues. It neither compels states to enter into such arrangements nor does it limit or order the importance of policy and legal obligations that may be derived from the actions of these institutions. To the extent that this is implied, it is buried in the Commentary of other principles.[320] Second, it treats these multilateral organizations as lacking an autonomous mission beyond the desires of the states that contribute to their organization.[321] And third, it assumes a coercively organized state system in

317. Guiding Principle, *supra* note 41, at 12, princ. 9 cmt. ("Therefore, States should ensure that they retain adequate policy and regulatory ability to protect human rights under the terms of such agreements, while providing the necessary investor protection.")

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

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

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

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

which international organizations are used instrumentally to coerce vertical harmonization at the insistence of dominant states.[322] Multilateralism is privileged—but it is guided by advanced states and, impliedly, coercively enforced against others. Guiding Principle 10 also implies that there is a need for the most "advanced" states to lead the others to a more developed internalization of norms that have been embraced by the leading states.

This Principle is meant to create a particularly focused set of incentives for the folding of the project of human rights back to the international level through the contributions of states—as members of the community of nations—to the development of an international legal framework, which each state is then bound to incorporate into their domestic legal orders. But the Principle does this in a way that would avoid offending states. It provides a three-part structure for multilateral efforts. The first part preserves upward vertical policy coherence by governing the international institutions through which the norms constituting the substantive obligations of the state duty to protect are developed.[323] The second part ensures downward vertical policy coherence by ensuring that international institutions promote the work of states in guarding against business related abuse (though not, it seems, of state-related abuse, except perhaps when undertaken through enterprises of some sort).[324] The third part is the "Protect, Respect and Remedy" Framework that serves as the basis of substantive innovation.[325] The Guiding Principles themselves, then, serve their highest purpose as the nexus point for horizontal and vertical coherence of law and policy.[326]

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

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

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

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

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

C. The Corporate Responsibility to Respect Principles.

1. The Corporate Responsibility to Respect Human Rights: Foundational Principles

If the first ten Guiding Principles touching on the state duty to protect are grounded in the language of regulatory and political primacy and broadly sketched role in the domestication of collective, the next five Guiding Principles concerning the responsibilities of business entities take an altogether different tone. Rather than the primacy within interlocking systems of state, international, and private power that mark the Guiding Principles for the state duty to protect, Principles 11 through 15 acknowledge a subordinated regulatory role for the corporation in which the obligations of the corporation are much more specifically detailed. The General Principles move here from the language of political discourse and governance, to the social norm discourse of surveillance, monitoring, disclosure and mediation—all under the eye of the state.[327] The state duty is couched in the language of law and policy. The corporate responsibility to respect is grounded in the language of due diligence.[328]

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

The foundational principles were originally organized in two principles, Draft Principles 12 and 13. These were divided and broadened into five principles in the final version (Guiding Principles 11 through 15). Guiding Principle 11 articulates the basic standard: "Business enterprises should respect human rights."[329] The standard is then defined: "This means that they should

327. *See id.* at princ. 11-15.

328. *See id.* at princ. 11-15 cmt.

329. *Id.* at princ. 11.

avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved."[330] The definition of the "responsibility to respect" standard of Guiding Principle 12 is particularly important in a number of respects. First, the standard is constructed in a way that emphasizes the autonomy of the rule standards for corporate responsibility, especially from the law-based system of states. The corporate responsibility consists of its own normative system, one that may interact and overlap with the legal system of states (and the international system), but one that remains separate from them as to sources of rules, the community that makes up the governance regimes subject to this autonomous responsibility, and the implementation of those governance norms. This is expressed in a number of ways. First, the Commentary stresses the autonomy of corporate social norm systems. "It exists independently of States' abilities and/or willingness to fulfill their own human rights obligations, and does not diminish those obligations."[331] Second, the corporate responsibility grounded in these social norm principles is not measured by the forms of responses required under the domestic law of states.[332] Third, the human rights social norm system, which is the object of the Guiding Principles, is only a part of the social norm system applicable to entities, which the Guiding Principles is not meant to constrain.[333] Lastly, responsibility carries with it the corollary that social norms should not undermine law-based human rights obligations of states, though the suggestion, by implication, is that corporations may undermine domestic governance that is not consonant with a state's duty to respect human rights.[334]

Guiding Principle 12 (Draft Principle 12(a) substantially unchanged) provides a definition of the scope of the responsibility to respect human rights. It is meant to refer to all human rights, but at a minimum to the International Bill of Human Rights and the eight ILO core conventions.[335] The specificity accorded to

330. *Id.*

331. *Id*. at princ.11 cmt. ("And it exists over and above compliance with national laws and regulations protecting human rights.").

332. *Id.* ("Addressing adverse human rights impacts requires taking adequate measures for their prevention, mitigation and, where appropriate, remediation.").

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

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

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

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

Id.

the definition of internationally recognized human rights, applicable to both states and corporations in the draft version, is now confined to corporations under the responsibility to respect principles. A justification is possible: states are bound only to those international human rights to which they have acceded or to the small group of additional standards that are accorded universal applicability. Beyond that, states may have policy reasons for incorporating human rights standards, but no legal obligations, either applicable internally or enforceable by the community of nations. The Commentary also suggests that its definition is merely a minimum default rule:[336] some circumstances may warrant expansion of the definition,[337] other circumstances may require corporations to "respect the human rights of individuals belonging to specific groups or populations that require particular attention, where they may have adverse human rights impacts on them."[338]

Guiding Principle 13 (Draft Principles 12(b) and 13, modified in part), further refines the nature of the responsibility to respect human rights by describing the relationship between the scope of the responsibility and the way in which business enterprises ought to behave in relation that that standard. Guiding Principle 13 specifies negative impacts and action. First, the corporation should "[a]void causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur."[339] Second, the corporation should "[s]eek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts."[340] The Commentary makes clear that the intent of this principle is to gather several concepts together and frame their relationships. Its primary objective is to address the scope of business activities within the scope of the corporate responsibility to respect human rights. The Principle suggests a broad scope, covering not merely the direct actions of the entity, but also the activities that produce adverse human rights impacts "as a result of their business relationships with other parties."[341] This both softens and changes the scope of the language in

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

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

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

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

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

341. *Id.* at princ. 13 cmt.

the draft, Draft Principle 12(b).[342] Rather than focusing on either "supply chain" or "value chain" concepts,[343] the final version of Guiding Principle 13 focuses on the consequences of activities and its relationship with the corporation by focusing generally on activities,[344] and on the construction of a structure for determining mitigation obligations set forth in Guiding Principle 19.

Guiding Principle 14 (Draft Principles 12(c), 13, and 15, modified in part) introduces a principle of proportionality to the calculus of responsibility.[345] A significant factor in addressing proportionality is the degree of connection between the entity and the effect. That was the subject of Guiding Principle 13. Guiding Principle 14 identifies two other factors. First, proportionality is based partly on corporate capacity, which, in turn, is based on the usual indicators—size, management structures, resources and the like.[346] But there are limits; balanced against capacity are considerations of the severity of the adverse human rights impacts of corporate activity. The "severity" constraints then bring the calculus back, in part, to the issue of connection. Yet, Guiding Principle 14 adds a layer of understanding to the basic insight of Guiding Principle 13, embracing the notion that legal relationships will not affect the determination of either capacity or severity, applying to "all enterprises regardless of their size, sector, operational context, ownership and structure."[347]

The Principle importantly, then, embraces a functionalist approach, eschewing any effort to adhere strictly to the law or legal consequences of corporate or enterprise organization at the heart of the domestic legal orders of states that have chartered these enterprises. The corporate responsibility applies "to all enterprises regardless of their size, sector, operational context, ownership and structure."[348] The state's duty, of course, is limited by the requirements of its

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

343. These ideas, however, do make their appearance elsewhere in the Commentary. *See, e.g.*, Guiding Principles, *supra* note 41, at princ. 17 cmt., discussed *infra*. The relationship between these concepts is difficult to discern.

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

Id. at princ.13 cmt.

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

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

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

348. Guiding Principles, *supra* note 41, at princ. 14.

legal obligations,[349] though it has an obligation toward legal coherence in light of its legal obligations with respect to human rights.[350] The provisions are thus in tension unless one understands that the responsibility to respect operates polycentrically. To the extent of the relationship between corporation and state, the corporation is bound by and its responsibilities for human rights limited by the legal framework within which it operates in any territory.[351] However, as to the extent of the responsibility among corporations and non-state parties in their own governance communities, the legal framework of states is no longer a constraint under the framework principles of Guiding Principle 11.

The coherence notions explicit in the relationships between a state and its legal obligations are also suggested by this construct in the relationships between legal systems and social norm systems. There is an element of direct interaction between international norms and the identification of the social norm rules applicable to corporations. This suggests an assumption in the Guiding Principles of an implicit acceptance of international political consensus, reflected in international norms, and accurately reflected in the norm framework for corporate behavior. More importantly, it also assumes that international norms (whether or not considered "law" within or by states) stand at the head of a hierarchy of norm creation applicable to corporations. While the community of corporate actors and their stakeholders may also develop social norms that control or affect their behavior, the articulation of those norms by public international actors tends to be presumed the most authoritative expression of those norms. Thus, while the normative rule universe of corporate responsibility is autonomous of state legal systems, it is assumed to interact directly with international actors for the production (or at least the articulation) of the norms making up the responsibility to respect. And third, there is an explicit understanding that the standards applicable to conduct under legal governance regimes may be different from those under the social norm regimes of corporate responsibility. This is particularly apparent in the context of complicity. Here, norm rule autonomy is emphasized by a recognition that complicity may be triggered both under the legal standard developing under domestic and international law regimes, and otherwise under notions of corporate social norm frameworks.[352]

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

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

351. *See id.* at princ. 2.

352. *Id.* at princ. 17 cmt. It explains:

> Questions of complicity may arise when a business enterprise contributes to, or is seen as contributing to, adverse human rights impacts caused by other parties. Complicity has both non-legal and legal meanings. As a non-legal matter, business enterprises may be perceived as being "complicit" in the acts of another party where, for example, they are seen to benefit from an abuse committed by that party.

Id.

Guiding Principle 15 rounds out the opening set of fundamental principles that define the corporate responsibility to respect human rights, moving the focus from the standard itself to its *expression*. If states manifest their policies and behavioral expectations through law and regulation, businesses express theirs through rules, policies, and contract.[353] Guiding Principle 15 addresses the enterprise's human rights responsibilities in the elaboration of its internal governance system: "In order to meet their responsibility to respect human rights, business enterprises should have in place policies and processes appropriate to their size and circumstances."[354] Guiding Principle 15 then specifies three areas of policy that require highlighting: an articulation of a policy commitment to human rights (presumably both in its legal and social norm aspects, though that is not clear from the principle itself),[355] the self-imposition of a human rights due diligence framework that is elaborated in some detail in Guiding Principles 16-24),[356] and the establishment of remediation processes.[357]

2. *The Corporate Responsibility to Respect Human Rights: Operational Principles, Policy Commitment*

The Foundational Principles of the corporate responsibility to respect human rights commit business entities to the development of a regulatory framework that operationalizes the respect commitment. Guiding Principle 16 (Draft Principle 14 substantially unmodified) focuses on the specifics of implementation. It specifies the so-called policy commitments of corporations, understood as built on the development of a policy statement with a fixed form and content.[358] It describes the five key elements of a corporate policy that embodies the responsibility to respect human rights.[359] These include policy approval at the most senior level of the business enterprise; consultation with relevant internal and external experts; a clear expression of the enterprise's expectations of personnel and business partners; effective communication of the policy internally and externally to all personnel, business partners, and relevant stakeholders; and incorporation within appropriate operational policies and

353. *See id.* at princ. 15 cmt.

354. *Id.*

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

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

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

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

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

procedures to embed it throughout the business enterprise.[360] These are not unusual and reflect an emerging set of practices already well incorporated in the global operation of the largest enterprises.[361] They are meant to embody, within the context of the corporate responsibility to protect, the principles of policy coherence[362] and disclosure[363] that also form part of the state duty to protect human rights.

Like legislation, policy pronouncements "should be publicly available. It should be communicated actively to entities with which the enterprise has contractual relationships; others directly linked to its operations, which may include State security forces; investors; and, in the case of operations with significant human rights risks, to the potentially affected stakeholders."[364] The Principle also suggests a proportionality standard.[365] Lastly, like states, the policy should reach from the lowest levels of operation to the highest.[366]

3. The Corporate Responsibility to Respect Human Rights: Operational Principles, Human Rights Due Diligence

The articulation of the governance framework provides the structure for the elaboration of the operational heart of the principles developing the corporate responsibility in Guiding Principles 17 through 21.

A corporation's commitment to human rights, grounded in the Guiding Principles framework, is evidenced by and measured against a set of requirements identified as *human rights due diligence*.[367] These detail the obligation of corporate human rights due diligence as the central operational feature of the corporate responsibility to respect. Human rights due diligence has four broad objectives: "to identify, prevent, mitigate and account for how they address their adverse human rights impacts . . . ."[368] Human rights due diligence

360. *Id.*

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

362. Guiding Principles*, supra* note 41, at princ. 16 cmt. ("Just as States should work towards policy coherence, so business enterprises need to strive for coherence between their responsibility to respect human rights and policies and procedures that govern their wider business activities and relationships.").

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

364. *Id.*

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

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

367. *Id.* at princ. 17.

368. *Id.*

must be directed to four principle functions: "assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed."[369] These objectives of human rights due diligence may be incorporated in other corporate monitoring and reporting systems, as long as they do not lose their distinctive character.[370] The diligence aspects should be ongoing and oriented ex ante.[371]

The extent of human rights due diligence is grounded in the fundamental scope rules of corporate responsibility as a whole. These limitations touch on three issues. First is the issue of coverage.[372] Second is a focus on issues of complexity and context of operations.[373] Third is the issue of time horizons in human rights due diligence.[374] It is in the context of coverage that the issue of supply and value chain liability resurfaces, mitigating liability where the connection between the corporation and the entity directly responsible are either too remote or where a control or influence relationship is unreasonable.[375] It also serves to develop a principle of corporate complicity for the adverse human rights impacts of others—including states.[376] The Commentary emphasizes the effects of polycentricity in the context of corporate liability. With respect to complicity, corporations must be aware of the distinct bases for complicity liability under legal regimes[377] and under social norm regimes.[378] There is irony

369. *Id.*

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

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

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

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

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

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

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

377. The Commentary states:

> As a legal matter, most national jurisdictions prohibit complicity in the commission of a crime, and a number allow for criminal liability of business enterprises in such cases. Typically, civil actions can also be based on an enterprise's alleged contribution to a harm, although these may not be framed in human rights terms.

here because the complicity relationship appears to proceed only in one direction.[379] Moreover, states' retention of control over the application of their legal obligations, including those relating to issues of complicity, can substantially affect the success of efforts to harmonize approaches. In the absence of harmonization of complicity principles among states, non-state actors can act strategically to minimize the impact of these principles on their operations. The connection between legal and social norm governance produces a tension for the human rights due diligence project that is recognized but not resolved.[380] This tension is common to supra-national soft law systems with a polycentric element, absent substantial harmonization between the legal regimes applied in a specific state and the global social norms applied under soft law regimes. This was recently illustrated in the context of both procedural[381] and substantive[382] rules under the OECD Guidelines for Multinational Corporations.[383]

The specific contents of human rights due diligence are then elaborated in Guiding Principles 18 through 21. These Principles are meant to provide more concrete guidance to enterprises that wish to undertake human rights due diligence within the Guiding Principles framework. Guiding Principle 18 (Draft Principle 16 substantively unmodified in significant respect) specifies the outputs of human rights due diligence by elaborating on issues of identification and assessment in human rights due diligence programs.[384] Following the guidance of Guiding Principle 17, Guiding Principle 18 specifies that assessment: (1) be undertaken in advance of action that might have a negative impact on human rights; (2) should identify those potentially affected and the issues the proposed

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

378. "As a non-legal matter, business enterprises may be perceived as being 'complicit' in the acts of another party where, for example, they are seen to benefit from an abuse committed by that party." *Id.*

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

380. The Commentary explains:

> Conducting appropriate human rights due diligence should help business enterprises address the risk of legal claims against them by showing that they took every reasonable step to avoid involvement with an alleged human rights abuse. However, business enterprises conducting such due diligence should not assume that, by itself, this will automatically and fully absolve them from liability for causing or contributing to human rights abuses.

Guiding Principles, *supra* note 41, at princ. 17 cmt.

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

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

383. *See* OECD, *supra* note 24, at pt. I, ch. IV.

384. "In order to gauge human rights risks, business enterprises should identify and assess any actual or potential adverse human rights impacts with which they may be involved either through their own activities or as a result of their business relationships." Guiding Principles, *supra* note 41, at princ. 18.

action raises; (3) should identify the relevant substantive standards that might be applied; and (4) undertake to understand the specific nature of the adverse human rights impact.[385] The Guiding Principles explain that such systems should utilize internal or external human rights experts and other resources. Systems should also seek to engage "with potentially affected groups and other relevant stakeholders," the latter with an explicit proportionality principle.[386] Assessment is required periodically and when there is a material change in operations.[387] This policy is similar to those triggering disclosure under the U.S. federal securities laws.[388] The stakeholder engagement provision in Guiding Principle 18 is broadly written to permit the use of civil society actors as legitimate intermediaries where direct engagement is not possible. But it leaves unresolved the issue of third party representative legitimacy or liability by civil society for misrepresenting either their authority to represent or their fidelity to the interests of those they represent.[389]

"The assessment of human rights impacts informs subsequent steps in the human rights due diligence process."[390] Guiding Principles 19 through 21 then move the process forward. Guiding Principle 19 (Draft Principle 17) shifts attention from outputs to action, identifying the two things a corporation must undertake in the face of an adverse human rights impact of its activities.[391] First, a corporation must assess the impact of the action,[392] and it must then take appropriate action on the basis of the assessment.[393] The objective is to prevent and mitigate potential adverse human rights effects of corporate activity by

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

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

387. The Commentary explains:

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

Id. at princ. 18 cmt.

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

389. "In situations where such consultation is not possible, business enterprises should consider reasonable alternatives such as consulting credible, independent expert resources, including human rights defenders and others from civil society." Guiding Principles, *supra* note 41, at princ. 18 cmt.

390. *Id.*

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

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

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

creating a structure by which assessments can be given effect.[394] The Principle makes a distinction between impacts to which the company (or its supply chain) have directly contributed and those where the connection is more indirect. Remediation (or prevention) is required for the former,[395] but a more nuanced approach is permitted for the latter.[396] The Commentary suggests that the corporation ought to rely on outsiders where the factors to be balanced in its risk, impact, and action assessments are complex.[397] A hierarchy of responsive action in the face of assessment suggests adverse human rights impacts of corporate activity proposed or undertaken.[398]

Guiding Principle 20 (Draft Principle 18 modified in part) adds a verification requirement.[399] The specified method of verification is tracking, which is required to exhibit two characteristics. First, it ought to "[b]e based on appropriate qualitative and quantitative indicators."[400] Second, it should "[d]raw on feedback from both internal and external sources, including affected stakeholders."[401] Principle 20 dropped an additional requirement that appeared in the draft version—that it "[i]nform and support continuous improvement processes."[402] The Principles understand verification as serving an important surveillance

394. The Commentary states:

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

Id. at princ. 19 cmt.

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

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

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

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

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

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

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

402. Draft Principles, *supra* note 64, at princ. 18(c).

function—tracking and analysis.[403] There is an expectation that data will be harvested from all phases of the human rights due diligence process and all contacts with affected stakeholders.[404] The Commentary urges integration into relevant reporting processes with a cross-reference to the corporation's remediation obligations.[405]

The surveillance obligations of human rights due diligence elaborated in Guiding Principle 20 lead to the disclosure and transparency requirements set forth in Guiding Principle 21 (modifying Draft Principle 19). This provision focuses on accountability through communication.[406] That communication is initially directed toward external, informal, and episodic communication when triggered by stakeholder concerns, but is also understood to include a formal reporting component for business enterprises "whose operations or operating contexts pose risks of severe human rights impacts . . . ."[407]

The final version of Principle 21 dropped an earlier suggestion that reporting should be regular,[408] substituting a more flexible, context-based requirement.[409] The frequency and form of disclosure is a function of the severity of the human rights impacts.[410] The object is not general transparency, but rather merely "a

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

404. The Commentary explains:

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

Id. at princ. 20 cmt.

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

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

407. *Id.* at princ. 21.

408. "Periodic public reporting is expected of those business enterprises whose activities pose significant risks to human rights . . . ." Draft Principles, *supra* note 64, at princ. 19 cmt.

409. Reporting should "[b]e of a form and frequency that reflect an enterprise's human rights impacts and that are accessible to its intended audiences." Guiding Principles, *supra* note 41, at princ. 21(a).

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

measure of transparency and accountability to individuals or groups who may be impacted and to other relevant stakeholders, including investors."[411]

4. The Corporate Responsibility to Respect Human Rights: Operational Principles, Remediation

The single principle that comprises this section considers the situation where assessment and ex ante action is insufficient. Guiding Principle 22 (Draft Principle 20 substantially unmodified) provides: "Where business enterprises identify that they have caused or contributed to adverse impacts, they should provide for or cooperate in their remediation through legitimate processes."[412]

This Principle articulates a simple liability standard for failures to respect human rights. The obligation to remediate is tied to the principal human rights due diligence obligation, though not limited by it.[413] In the draft version of this provision, the liability standard was not grounded in the law of any state. Nor was it dependent on the operation of a particular domestic legal order, either to determine liability or to calculate the measure of damages.[414] As a functional part of the autonomous responsibility to respect, these obligations flow directly from the autonomous imposition of responsibility of the second pillar. Yet, the processes of remediation are substantially meant to be tethered to the state apparatus, at least when injury is substantial.[415] The reason for this was simple and directly stated—a fear that in the absence of "vouching" by the organs of the state, the processes for remediation would be illegitimate.[416]

The final version of Principle 22 appears to be less autonomous. The Commentary describes the standard as "active engagement," which might be understood as something less than the "help ensure" standard in the draft Commentary. The reference to resort to operational level grievances remains the same.[417]

411. *Id.*

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

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

414. *See* Draft Principles, *supra* note 64, at princ. 20 cmt.

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

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

417. "Operational-level grievance mechanisms for those potentially impacted by the business enterprise's activities can be one effective means of enabling remediation when they meet certain core criteria, as set out in Principle 31." Guiding Principles, *supra* note 41, at princ. 22 cmt.

Yet,

> [w]here adverse impacts have occurred that the business enterprise has not caused or contributed to, but which are directly linked to its operations, products or services by a business relationship, the responsibility to respect human rights does not require that the enterprise itself provide for remediation, though it may take a role in doing so.[418]

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

5. The Corporate Responsibility to Respect Human Rights: Operational Principles, Issues of Context

The last two principles that make up the corporate responsibility to respect human rights target issues of context. Guiding Principle 23 (modifying Draft Principle 23) speaks to the legal obligations of the corporation within a polycentric context in which the governance norms applicable to it may not harmonize. It first recognizes the primacy of the state and domestic law over international law where a corporation is faced with conflicting issues of compliance.[419] It then suggests that, having honored the primacy of domestic law, corporations have a responsibility to honor—even if not obligated to comply with—internationally recognized human rights.[420] The standard tracks the concepts and principles approach of the OECD's Guidelines for Multinationals that was constructed to the same effect.[421] And lastly, corporations must treat all risk of gross human rights abuses, whether arising from legal or social norm standards, as a legal issue throughout their operations.[422]

418. *Id.*

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

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

421. *See* OECD, Guidelines for Multinational Enterprises (2011), Concepts and Principles, para. 2. This provisions starts, like the GP, with an overarching obligation to obey the state of the state in which the entity is operating. "However, in countries where domestic laws and regulations conflict with the principles and standards of the Guidelines, enterprises should seek ways to honour such principles and standards to the fullest extent which does not place them in violation of domestic law." *Id.*

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

The Commentary emphasizes several points. First, all business enterprises have the same responsibility to respect human rights, though application will vary widely in context. All businesses first have a duty to comply with domestic law that is applicable. That leaves open and unresolved the equally compelling obligation to comply with the extraterritorially applicable laws of home state regulators. The Commentary is silent on conflicts between the two. In the case of conflict between domestic and international law, business enterprises must comply with domestic law and find a way to honor the principles of international law, especially "the principles of internationally recognized human rights to the greatest extent possible in the circumstances, and to be able to demonstrate their efforts in this regard."[423] The Commentary supports the proposition that business enterprises treat human rights impacts as legal issues, "given the expanding web of potential corporate legal liability arising from extraterritorial civil claims, and from the incorporation of the provisions of the Rome Statute of the International Criminal Court in jurisdictions that provide for corporate criminal responsibility."[424] Yet this also complicates the simple hierarchy posed between domestic and international law set out in Guiding Principle 23(a), suggesting situations where compliance with domestic law might constitute a violation of international law that is subordinated to domestic law in the territory where it is enforced, but where that hierarchy is reversed elsewhere. In this case, polycentricity presents a potential trap. Special considerations apply in conflict zones—where the corporation may be called on to exercise augmented obligations and thus face potentially augmented liability regimes.[425] Finally, the utility of reliance on experts, emphasized in other corporate responsibility principles, is extended to issues of legal compliance.[426]

In draft form, this principle spoke to issues of operationalization standards for the human rights due diligence framework grounded in two action vectors—first the size of the enterprise, and second, the severity of human rights impacts.[427] These identify baseline rules for the implementation of context-specific action principles. The baseline includes four factors. The first touches on the heightened obligation to substitute for the host state with respect to the observation of

423. Guiding Principles, *supra* note 41, at princ. 23 cmt.

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

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

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

427. "[T]he scale and complexity of policies and processes for ensuring that business enterprises respect human rights will vary according to the enterprises' size and the severity of their human rights impacts . . . ." Draft Principles, *supra* note 64, at princ. 21.

internationally recognized human rights in weak states.[428] This parallels the state duty to project government into weak states or conflict zones.[429] The second obligates companies to "honor" human rights principles "where domestic legal compliance may undermine their responsibility to respect."[430] The third reminds entities that the responsibility applies in conflict zones.[431] And the fourth suggests that issues of human rights compliance are transformed into more conventional issues of legal compliance (under international law or the law of the relevant domestic legal order) where the conduct risks, causes, or contributes to international crimes.[432]

Finally, Guiding Principle 24 (Draft Principle 22) provides basic rules of prioritization. Where priority is necessary, the "business enterprises should first seek to prevent and mitigate those that are most severe or where delayed response would make them irremediable."[433] The context for prioritization is simultaneity,[434] but it applies only where specific legal guidance is unavailable, or better perhaps, unavailing.[435] And context is privileged; the severity of human rights is not measured against absolute values.[436]

Taken together, the corporate responsibility to respect principles drafts a more complex and dynamic governance framework that accepts a subordination to the law-state system described in the first ten principles, but which also

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

429. *See* Guiding Principles, *supra* note 41, at princ. 10; *see also* discussion *supra* Part III.B.

430. Draft Principles, *supra* note 64, at princ. 21(b). The Commentary notes: "Where legal compliance with domestic law puts the business enterprise in the position of potentially being involved in gross abuses such as international crimes, it should consider whether or how it can continue to operate with integrity in such circumstances." *Id.* at princ. 21 cmt.

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

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

Id. at princ. 21 cmt.

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

433. Guiding Principles, *supra* note 41, at princ. 24.

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

435. "In the absence of specific legal guidance, if prioritization is necessary business enterprises should begin with those human rights impacts that would be most severe, recognizing that a delayed response may affect remediability." *Id.* The Draft version included impacts "where the risk of irremediable impact is high." Draft Principles, *supra* note 64, at princ. 22 cmt.

436. "Severity is not an absolute concept in this context, but is relative to the other human rights impacts the business enterprise has identified." Guiding Principles, *supra* note 41, at princ. 24 cmt.

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

D. Access to Remedy Principles

1. Access to Remedy: Foundational Principles

The Guiding Principles describing the remedial obligations of states and corporations[437] present the most potentially dynamic element of the Guiding Principles framework. Yet, one must look carefully to extract that dynamic element from within the formal framing of remedial principles within the state and its dispute resolution apparatus. Reflecting the fundamental postulate of the primacy of states within the construct, the remedial prong of the "Protect, Respect and Remedy" Framework tends to filter substantially all remedial mechanics through the state, relegating alternative disputes mechanics to a subsidiary or residual space. Though corporations are accorded a limited role for remedial programs,[438] the subordination of those programs to the remedial power of states remains quite evident. Under this framework, states remain the paramount legitimating source and force for resolving disputes, settling claims and determining rights. Corporations may mediate harm, and may anticipate and remediate problems before they rise to the level of justiciable injury, but their role is clearly secondary. The effect on the ability of corporations, along with other non-state actors, to develop social norm-based remediation structures is thereby marginalized and diminished. So, perhaps, is the structural integrity of the remedial pillar as an autonomous foundation for the governance of the adverse human rights effects of state or corporate action.

The hierarchy producing tone of the remedial pillar is set quite clearly in Guiding Principle 25 (Draft Principle 23 substantively unmodified). States (but not corporations or other entities with duties or responsibilities under the Guiding Principles) are charged with the obligation to "take appropriate steps" to ensure

437. *See id.* at princ. 25-31; *see also* Draft Principles, *supra* note 64, at princ. 23-29.

438. *See* Guiding Principles, *supra* note 41, at princ. 28-30; *see also* Draft Principles, *supra* note 64, at princ. 26-28. All of which are closely tied to the foundational principle embracing the idea of the supremacy of the state and its domestic legal orders as the primary site of dispute resolution for human rights claims. *See* Guiding Principles, *supra* note 41, at princ. 25; *see also* Draft Principles, *supra* note 64, at princ. 20.

access to effective remedy by those affected by business related human rights abuses.[439] The obligation to take such steps is triggered when abuses occur within their territories or—in a nod to the extraterritoriality provisions that occur throughout the Guiding Principles—within their jurisdiction.[440] Appropriate steps may be effectuated through "judicial, administrative, legislative or other appropriate means."[441]

The Commentary elaborates the key points. The central focus is on the intimate and direct connection between the duty of states to protect (Guiding Principles 1 through 10) and the remedial principles of this section.[442] It follows conventional Western thinking by dividing the remedial provision into two parts—a procedural and a substantive element.[443] But the procedural and the substantive elements produce a potential tension with the fundamental proposition—that the remedial element is a core obligation encompassed *within* the domestic legal orders of states and the more innovative intimations of the Guiding Principles that suggest a conflation between the rule frameworks of the domestic legal order and international hard and soft law approaches. The objective is clear and laudable—to space as large a space as possible for the development of transnational systems of procedural and substantive remedies—but the form produces a conflation of irreconcilable systems (at least at a formal law based level) that diminishes the system-forming value of this part of the Guiding Principles. The confusion suggests a disjunction between the state-favoring thrust of the Principle and the more flexible and broad grievance-resolving structure of the Commentary.

Consider, for example, the procedural element. The overarching structure is conventional enough—"Procedures for the provision of remedy should be impartial, protected from corruption and free from political or other attempts to influence the outcome."[444] This is consonant with the black letter of the principle, elaborating a formal state-based process structure. But further generalized as "grievance mechanisms," the procedural element of access to remedy grounded in the obligations of states takes a curious turn.[445] First, it turns the focus of the principle from the State (a limiting condition of the black letter of GP Principle 25) to corporations and other non-state actors.[446] Second, it contemplates

439. Guiding Principles, *supra* note 64, at princ. 25.

440. *Id.*

441. *Id.*

442. "Unless States take appropriate steps to investigate, punish and redress business-related human rights abuses when they do occur, the State duty to protect can be rendered weak or even meaningless." *Id.* at princ. 25 cmt.

443. "Access to effective remedy has both procedural and substantive aspects." *Id.*

444. *Id.*

445. Recall, for these purposes, the overarching general principle that must be read into Guiding Principle 25 and its Commentary: "States' existing obligations to respect, protect and fulfil [*sic*] human rights and fundamental freedoms . . . ." *Id.* at 6.

446. "The term grievance mechanism is used to indicate any routinized, State-based or non-State-based,

administration by a host of organs and use of a variety of methods,[447] some of which may not be legitimate within the particular domestic legal order of a state (or at a minimum strictly restricted in jurisdiction),[448] or be accorded no legal effect within the domestic legal orders of states.[449]

The substantive element discussion in the Commentary also elaborates this curious tension. It prescribes a flexible range of remedies[450] that, again, may include choices unavailable under the laws of a state to which the duty applies.[451] More broadly, the definition of grievance, while in line with a foundational remedial approach that recognizes the autonomy and legitimacy of both law-based and social norm grievance mechanisms, spills out far beyond the limits inherent in both the General Principles and the state-based structure of the black letter of Guiding Principle 25 itself.[452]

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judicial or non-judicial process through which grievances concerning business-related human rights abuse can be raised and remedy can be sought." *Id.* at princ. 25 cmt.

> 447. State-based grievance mechanisms may be administered by a branch or agency of the State, or by an independent body on a statutory or constitutional basis. They may be judicial or non-judicial . . . Examples include the courts, . . . labour tribunals, [n]ational [h]uman [r]ights institutions, National Contact Points under the [OECD] Guidelines for Multinational Enterprises, many ombudsperson offices, and [g]overnment-run complaints offices.

Id.

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

449. The reference to the National Contact Points under the Guidelines for Multinational Enterprises of the Organization for Economic Cooperation and Development provides a case in point. *See, e.g.*, Backer, *supra* note 25, at 258-307. The Commentary does acknowledge the limiting effects of reliance of State law-systems as the foundation of remedial rights: "State-based grievance mechanisms may be administered by a branch or agency of the State, or by an independent body on a statutory or constitutional basis." Guiding Principles, *supra* note 41, at princ. 25 cmt. But it then conflates what many domestic legal orders deploy separately—remedial systems and soft law systems in which neither jurisdiction nor remedial authority is mandated.

> 450. The remedies provided by the grievance mechanisms discussed in this section may take a range of substantive forms the aim of which, generally speaking, will be to counteract or make good any human rights harms that have occurred. Remedy may include apologies, restitution, rehabilitation, financial or non-financial compensation and punitive sanctions (whether criminal or administrative, such as fines), as well as the prevention of harm through, for example, injunctions or guarantees of non-repetition.

Guiding Principles, *supra* note 41, at princ. 25 cmt.

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

452. "For the purpose of these Guiding Principles, a grievance is understood to be a perceived injustice evoking an individual's or a group's sense of entitlement, which may be based on law, contract, explicit or

Of course, the Commentary to Principle 25 may be read, in this respect, as purely descriptive, rather than proscriptive. One can then understand the Commentary as merely describing the potential ranges of process and substantive approaches, rather than prescribing the implementation of the full range of processes and remedies described—the actual availability of any of the suggestions remaining dependent on the domestic legal order of the state in which the remedy is sought (or is available). But there is a sense that a proscriptive approach is favored. Thus, for example, the Commentary presumes the possibility of positive obligations with respect to remedies.[453]

This proscriptive sense is deepened by a further oddity about Guiding Principle 25. Having devoted a substantial amount of effort to constructing a state-based remedial framework with perhaps a hint of supra-national bases for the outer bounds of remedial authority, the Commentary then hints that the system itself is part of a larger polycentric system of remediation in which the state plays a role, but not necessarily the only role. While non-state based remedies are nowhere to be found in the black letter of the principle itself, the Commentary provides that "State-based judicial and non-judicial grievance mechanisms should form the foundation of a wider system of remedy."[454] This tension between what appears to be the privileging of the state in the remedial pillar, with a nod toward non-state remedial regimes popping up at the margins, provides a disconcerting dissonance in the exposition of the remedial power, which is then mirrored in the development of the remaining principles of access to remedy, meant to operationalize this foundational principle.[455]

2. *Access to Remedy: Operational Principles—State-Based Judicial Mechanisms*

Having laid the foundation in Guiding Principle 25, Guiding Principles 26 and 27 flesh out the parameters of state-based remedies, including the paramount state obligation to oversee non-judicial remedial systems. Guiding Principle 26 (Draft Principle 24) considers state-based judicial remedies. It describes a principle of effectiveness: "States should take appropriate steps to ensure the effectiveness of domestic judicial mechanisms . . ."[456] Effectiveness is measured

implicit promises, customary practice, or general notions of fairness of aggrieved communities." Guiding Principles, *supra* note 41, at princ. 25 cmt.

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

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

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

456. *Id.* at princ. 26.

in terms of reductions of barriers of access to remedy before the judicial organs of a state.[457] The Commentary emphasizes the centrality of the judicial functions of states as the core of the access to remedy principles of the Guiding Principles because these institutions are legitimating, effective, and, when they work well, impartial.[458] The Commentary then focuses on the obligations of states to protect the legitimacy of the court system to render effective and impartial justice. In particular, the judicial system should avoid erecting barriers to access to justice.[459] States should also guard against corruption.[460] The Commentary also suggests the hortatory element of the principle.[461] These barriers also speak to the tension between the principle fully applied, and the constraints of the domestic legal orders of powerful, and powerfully influential, states.[462]

The suggestions for legal and policy changes identified in the Commentary are neither extraordinary nor unreasonable as matters of policy. They might be understood as grounded in the legal and policy dimensions of the fundamental obligations of the state in the context of their duty to protect.[463] Because the Guiding Principles place their greatest reliance on state-based, and especially judicial, remedial organs, individuals affected by human rights abuses have a smaller range of legitimate alternatives where states fail in their duty or remain indifferent to the barriers identified in the Commentary. Worse, states can avoid addressing these barriers by reference to the constraints of their constitutional orders or the limitations of law or custom in accordance with the framework Guiding Principles. Thus, while the Commentary suggests that Guiding Principle 26's obligation is to provide effective domestic judicial mechanisms, it is not clear that the principle incorporates a positive obligation—resident only in the

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

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

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

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

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

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

463. *See* Guiding Principles, *supra* note 41, at princ. 1-10; *see also* discussion *supra* Part IV.B.

Commentary—to also reform judicial mechanisms to reduce barriers to access grounded in the seven examples provided in the Commentary. The obligation to reduce the barriers identified in Guiding Principle 26's Commentary might have more authority if it was deemed to reflect an expression of the legal obligations of states under international law—the touchstone for state duty under the Guiding Principles. It is possible to read an effectiveness principle into the human rights obligations states are under a duty to protect, but to the extent that a state might take the position that this amounts to the creation of new international law obligations, it is unlikely that such obligations can be sourced in the Commentary to Guiding Principle 26.[464] There is a tension here, though, because the fundamental principles of the access to remedy provisions speak, in the Commentary, to the embeddedness of judicial mechanisms in a wider system of remedy.[465] Yet, within the context of the Guiding Principles, this can mean nothing more than that; beyond judicial mechanisms, there are additional means of grievance settlement that may be available beyond the purview of the state. And thus one returns to the starting point—the hortatory nature of much of the Commentary. Though hortatory instruments have played an enormously important role in the development of international norms, they are more likely to affect the approaches of business enterprises toward dispute resolution mechanisms than states. Yet states, and not business corporations, are the object of this provision. What remains then, is an elaboration of the best policy practices that might prove useful to non-governmental organizations working toward legal reform within a state.

3. Access to Remedy: Operational Principles—State Based Non-Judicial Mechanisms

Though the bedrock of the remedial right is state-based judicial remedy, Guiding Principle 27 recognizes that non-judicial state-based remedies "play an essential role in complementing and supplementing judicial mechanisms."[466] Guiding Principle 27 provides that "States should provide effective and appropriate non-judicial grievance mechanisms, alongside judicial mechanisms, as part of a comprehensive State-based system for the remedy of business-related human rights abuse."[467] The role of non-judicial state-based remedies is principally that of gap fillers, both in terms of the availability of remedy and to make appropriate accommodation for the idiosyncrasies of culture.[468] The

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

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

466. *Id.*

467. *Id.*

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

Commentary suggests a broad selection of mechanisms, many of which might be compatible with the rules of the domestic legal orders of several states but all of which are unlikely to be available in any one state.[469] The effectiveness of non-judicial, state-based mechanisms is the subject of its own principle, and is more elaborately constructed than the effectiveness criteria of state-based judicial remedies.[470] The issue of imbalances between parties, which tend to be avoided in the legal systems of states, is also discussed in the Commentary.[471]

4. Access to Remedy: Operational Principles—Non-State Based Grievance Mechanisms

Finally, Guiding Principles 28 through 30 turn from the state and its organization of remediation mechanisms, to non-state based grievance mechanisms. It is important to remember that, while these principles might have been considered autonomous of state systems and grounded in the social norms that are the foundation of the non-state governance norms of corporations highlighted in the corporate responsibility to respect provisions (as crafted in the access to remedy provision), it becomes clear that these mechanisms occupy a dependent and secondary role.[472] Guiding Principle 28 (Draft Principle 26 substantially unmodified) makes it clear that the state duty to protect human rights in its remedial role extends to the oversight of non-state based grievance mechanisms. "States should consider ways to facilitate access to effective non-state based grievance mechanisms dealing with business-related human rights harms."[473] The Commentary provides a listing of appropriate forms of such grievance mechanisms. One category includes mechanisms originating or controlled by the business entity at the center of the human rights harms.[474] The other includes mechanisms available through international organizations and other public non-state actors.[475]

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mechanisms." *Id.*

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

470. *Id.*

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

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

473. *Id.* at princ. 28.

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

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

It is here for the first time that the Commentary confronts one of the largest lacuna of the principles—the absence of remedial mechanisms for the human rights harms of state actions, especially by failures to comply with the state duty to protect. Regional and international human rights bodies "have dealt most often with alleged violations by States of their obligations to respect human rights. However, some have also dealt with the failure of a State to meet its duty to protect against human rights abuse by business enterprises."[476] While the oblique references to the necessity of moving beyond mechanisms that manage corporate compliance to those that also manage state compliance under the principles, this off-handed reminder might be insufficient to be effective. Moreover, the construction of the Guiding Principles framework itself appears to reject the notion that enforcement against states is an object of the framework.

The two Guiding Principles that follow turn to the obligations of companies in the construction and operation of non-state-based, non-judicial mechanisms. Guiding Principle 29 (Draft Principle 27 substantially unmodified) focuses on the obligation of businesses to provide "effective operational-level grievance mechanisms" to address grievances early and remediate directly.[477] Specifically, it speaks to the placement of the grievance mechanism within the corporate structure and to the timing of access to the non-judicial remedy made available.[478] The Commentary describes these mechanisms as existing independent of the remedies available by the State and can be quite flexibly constructed—the focus is on functional effectiveness within the context of the company's operations.[479] In addition, the Commentary suggests two important functions of these mechanisms that tie remedies to the corporate responsibility to respect human rights: the first is to support the monitoring function of human rights due diligence,[480] and the second is to provide for early remediation of grievances before harms are compounded.[481] These mechanisms are not bounded by either rules of procedure or substantive constraints that frame judicial mechanisms.[482]

476. *Id.*

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

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

479. *Id.* at princ. 29 cmt.

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

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

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

Lastly, Guiding Principle 30 (Draft Principle 28) suggests the value of industry or multi-stakeholder initiatives as a mechanism for effective grievance mechanisms.[483] This principle echoes the multilateral institution principles of a state duty to protect.[484] The focus is on the creation of substantive standards that further respect for human rights. "Such collaborative initiatives should ensure the availability of effective mechanisms through which affected parties or their legitimate representatives can raise concerns when they believe the commitments in question have not been met."[485] The issue is one of legitimacy—a theme that is threaded throughout the access to remedy provision, though never consistently.[486] "These mechanisms should provide for accountability and help enable the remediation of adverse human rights impacts."[487]

5. *Access to Remedy: Operational Principles—Effectiveness Criteria for Non-Judicial Grievance Mechanisms*

The last of the Principles, Guiding Principle 31 (Draft Principle 29), ties all of the non-judicial remedial provisions together under the criteria provisions for effectiveness. It sets out a list of legitimating characteristics of non-judicial grievance mechanisms, though it is not clear why these characteristics ought not also apply to state-based judicial remedial mechanisms. The characteristics include: legitimacy,[488] accessibility,[489] predictability,[490] equity,[491] transparency,[492]

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those who may be adversely impacted." *Id.*

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

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

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

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

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

487. *Id.* at princ. 30 cmt.

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

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

490. *Id.* at princ. 31(c) ("providing a clear and known procedure with an indicative timeframe for each

rights-compatibility,[493] and constant improvement.[494] A special additional characteristic is specified for operational-level mechanisms: dialogue and engagement.[495] "These criteria provide a benchmark for designing, revising or assessing a non-judicial grievance mechanism to help ensure that it is effective in practice."[496] The final criterion is specific to business-administered, operational-level grievance mechanisms and focuses on engagement and dialogue.[497]

Grievance mechanisms are defined as a term of art in the General Principles.[498] The term appears in the Commentary of Guiding Principle 20,[499] Guiding Principle 22,[500]and Guiding Principles 25, and 27 through 28.[501] "The term itself may not always be appropriate or helpful when applied to a specific mechanism, but the criteria for effectiveness remain the same."[502] Interestingly, effectiveness is also measured by the willingness of corporations and affected individuals to use grievance mechanisms, and their aggregate implementation as a basis for political action. "Regular analysis of the frequency, patterns and

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

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

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

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

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

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

496. *Id.* at princ. 31 cmt.

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

498. *Id.* at princ. 31 cmt.

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

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

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

502. Guiding Principles, *supra* note 41, princ. 31 cmt.

causes of grievances can enable the institution administering the mechanism to identify and influence policies, procedures or practices that should be altered to prevent future harm."[503] The possibility of using the Guiding Principles as the basis for political action, as well as for constraining behavior, opens possibilities that suggest an implicit limit on the General Principles' prohibition on the use of the Principles to create new international law. It appears that the Commentary here suggests that while the Principles themselves may not create new law, they may certainly serve as the basis for such creation through the traditional methods of convention or the development of customary international law.[504]

Taken together, the access to remedy provision presents a divided approach to remediation. On the one hand, it approaches the issue of state-based remedies cautiously and within the conventional perspective that states retain the ultimate authority to build their remediation systems as they like. But at the edges, the principles suggest subversion, either through the efforts to suggest the primacy of international norms as the basis for framing domestic legal order remediation, or by suggesting that grievance mechanisms themselves serve as a basis for political action. On the other hand, corporations are treated as subsidiary elements of this access to remedies framework. They serve two broad purposes—to institute systems that avoid the need to access remedies and to detect and prevent harm in the first place. International institutions serve a gap filler role as well, but also become useful as a place where international norms (and perhaps social norms affecting corporate behavior) may be developed with indirect effects on state domestic law as applied by its judicial and non-judicial mechanisms.

Yet, there is a hierarchy built into this balance. Throughout, it is clear that the state remains the focus of the access to remedy. And, while the corporation or international bodies may serve supporting or preventative roles, legitimacy is still very much tied to the courts of the states. But access to remedies is never developed in its own right. It serves the state duty to protect and the corporate responsibility to respect, but never finds its own normative justification for existing apart from either. And it could have—in contrast to the state duty and the corporate responsibility, access to remedy focuses on the third great stakeholder in the human rights enterprise: the individual or community affected by state or corporate activity having adverse human rights effects. It is to the remedial rights of that individual that the remedial provisions might have better focused—an object of discussion taken up in the concluding subsection of this part.

503. *Id.*

504. *See generally* JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW (2005) (providing background and analysis of customary international law and international agreements).

E. Principled Pragmatism and the Limits of Formal Innovation: A Preliminary Assessment.

The great challenge of the 21st century is that of the institutionalization of the system of globalization that emerged in the last decades of the 20th century. The SRSG astutely explained that the issue of business and human rights is a microcosm of that challenge.[505] A number of those challenges remain pointed and unresolved in the framing architecture of the Guiding Principles. This section examines a number of the more significant issues that are either raised by, or remain unresolved, in the Guiding Principles. 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.

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.[506] 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*,[507] can be the subject of international tribunals.[508] 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

505. 2011 Report, *supra* note 40, at para. 2.

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

507. *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).

508. *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.

ineffective unless the legislative body actually incorporates the convention's obligations into the domestic legal order.[509] 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.[510] 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[511] is sometimes of help, but its jurisdiction is also limited and to some extent optional.[512]

The limitations ultimately written into Guiding Principle 1 might be understood by drawing a parallel to the governance framework of the European Union. This tension is better understood in two parts. First, the tension can be understood as one touching on the supremacy of international law over incompatible domestic legal measures. The second, and more difficult tension, can be understood as touching on the supremacy of international law (and its human rights obligations) over incompatible provisions of domestic constitutional law.

The issue of the supremacy of Community Law over incompatible domestic law has, over a long period of time, tended to be accepted as a basic feature of membership within the E.U.[513] 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.[514] In some cases, the Member States have reconstructed their constitutional orders to explicitly accommodate Community Law supremacy.[515]

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

509. 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).

510. *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).

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

512. *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.

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

514. 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.).

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

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.[516] 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."[517] 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.[518] They are binding in those senses too. That binding effect is most prominently important in connection with the development of social norm systems that affect the corporate responsibility to respect human rights. It is also possible to assume that the documents that constitute the International Bill of Human Rights serve as a consensus of state obligations in a policy sense. But the International Bill of Rights does not constitute a legally binding set of documents equally applicable to all states, or even to all of the developed states.[519] As a legal rather than as a policy matter, the International Bill of Rights may create some obligations, but

516. 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*).

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

518. Draft Principles, *supra* note 64, 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.

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

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[520] 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.[521] The focus is on vulnerable people, broadly defined.[522] 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,[523] 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

520. Guiding Principles, *supra* note 41, at princ. 1 cmt.

521. 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.")

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

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

treatment. Extraterritorial application is a reasonable response of high human rights value states to deficiencies in the incorporation of the obligations of First Pillar duties in other states. And it may be reasonably grounded in an extension of legal duties to the conduct of national corporate citizens when they travel and engage in activities abroad. The obligation is not for the benefit of the host state, but rather is deemed to be essential to the internal ordering of the state and the management of the conduct of its citizens. Yet to some extent, extraterritoriality of this sort also smacks of "status" legislation that has tended to be disfavored in the modern era within constitutional systems like that of the United States. The SRSG suggests that extraterritorial projects of human rights duties "can provide much-needed support to host States that lack the capacity to implement fully an effective regulatory environment on their own."[524] 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.[525] 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 . . ."[526] 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,[527] 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

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

525. 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.

526. *Id.*

527. Guiding Principles, *supra* note 41.

system itself) between states from the 19th century.[528] 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.[529] Companies will be encouraged as well—not to look to compliance with the law of the host state, but rather to look to compliance with the law of the home state. One effect is positive in a sense; such encouragement will create incentives for harmonization of law by encouraging host states to conform their domestic law to that of home states with significant corporate activity in their territory. But the other effect might be less positive—especially in weak governance zones—the effect might be to encourage the transfer of the functions of the law state from the host to the home state. Rather than encourage the development of stronger or better government in the host state, the power of extraterritoriality might be to transfer that power to the outside regulating states, whose values, laws, and courts would substitute for that of the host state. This could deepen weak governance rather than encourage the development of stronger government in weak governance zones.

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 Guiding Principles distinguish between the narrow formalism of legal constraints and the open-ended possibilities of policy considerations. They serve, in the latter respect, to provide suggestions and best practices as a means of helping shape the universe of permissible responses to policy issues touching on the regulation of business and human rights without appearing to mandate this approach. The idea appears

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

529. 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.

to be to set the stage for an organic growth of rights conduct and policy without appearing to manage that movement.

It follows that one of the great innovations of the Guiding Principles is their recognition that states operate on two levels, both of which have some governance effects. The first level is the most traditional and well understood—the legal obligations of states both internally with respect to the organization and application of its domestic legal order, and externally with respect to the obligations of states under international law. The second is less well known and its role in managing conduct much more disputed in the conventional literature—the regulatory effects of state policy. While this second form of regulatory regime is beginning to be better manifested, for example in the operation of large sovereign wealth funds,[530] 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.

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

Soon after the Draft Principles were announced, Dr Peter Davis, who is the Ethical Corporation's politics editor, published an opinion piece that characterized the Guiding Principles as a handbook.[531] 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."[532]

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

530. *See, e.g.*, Backer, *supra* note 114.

531. "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.

532. John Knox, *The Ruggie Rules: Applying Human Rights Law to Corporations* 19 (Wake Forest Univ. Legal Studies Paper No. 1916664, 2011), *available at* http://ssrn.com/abstract=1916664.

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[533] 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.[534] 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.

4. The Character of Corporate Law Making

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.[535] This suggests an alternative to the decades long drift of

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

534. *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).

535. 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).

corporate governance towards the use of contract for regulatory effect.[536] Second, human rights due diligence serves an executive function, providing the information necessary for determining corporate action. Third, human rights due diligence serves as a monitoring device—available for use by both internal and external stakeholders—to make accountability more efficient. Lastly, human rights due diligence serves a fact-finding and remediation function—providing the basis for both the process and substantive content of resolving the consequences of human rights affecting actions. The SRSG makes clear that the principal audience for these efforts is not the state, but major corporate stakeholders—customers, investors, local communities, labor, and others—who might be affected by the human rights affecting activities of corporations.[537] 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.[538] 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.[539] 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.[540] 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.[541] 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

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

537. *See, e.g.*, Backer, *supra* note 361, at 1752.

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

539. *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).

540. 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).

541. 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 41, at 3. More field testing will likely produce additional sophistication in the development and deployment of the device.

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.[542]

Surveillance has both domestic[543] and transnational forms.[544] "Together, surveillance in its various forms provides a unifying technique with which governance can be effected across the boundaries of power fractures without challenging formal regulatory power or its limits."[545] As such, one could understand this emphasis as suggesting a prioritization of gender issues in the Second Pillar responsibility to respect.[546]

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

542. 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.*

543. "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 542.

544. "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.*

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

546. 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.

> based on gender and consequently help companies avoid creating or exacerbating existing gender biases.[547]

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?).[548]

Issues of social organization and communal mores, including those touching on the status of women, are matters for the state—and the First Pillar.[549] 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.[550] 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

547. 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 41, at princ. 20 cmt.

548. Guiding Principles, *supra* note 41, at princ. 4 cmt.

549. *Id.* at 4.

550. *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.

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.[551] 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[552] 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."[553] The successor, Global Sullivan Principles,[554] 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[555] and the Cairo Declaration on Human Rights in Islam.[556] 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.

551. SRSG 2008 Report, *supra* note 70.

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

553. *Id.*

554. *See id.*

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

556. 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.].

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

The Guiding Principles lend themselves well to the constrained complexity of simple polycentricity—the coordination of law-state, social norm-corporate, and international systems.[557] Where each operates autonomously and within the logic of its organization, coordination is possible and harmonization relatively easy to conceptualize, if not to realize. But difficulties multiply when institutions begin to act against type. The problems of state-owned enterprises and those of corporations operating in the absence of an effective government test the Guiding Principles as an integrated system. The Guiding Principles acknowledge the problems, but offer little to the state. This comes as something of a surprise.

In the context of corporate activity in conflict-affected areas, the Guiding Principles[558] tend to treat these entities the way international law treated states that were not members of the Family of Nations before 1945.[559] 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.[560] 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.[561] That the Guiding Principles do not suggest this as a baseline represents a bow to reality (pragmatism)—states engage in these activities and these regulatory projections with or without permission. That it suggests that such national projections of power can be constrained by norms that have an international component suggests a more subtle effort to manage national activity within an international framework; but the tension remains.

In the context of state-owned enterprises, the Guiding Principles tend toward a divide and manage principle.[562] States are urged to take additional steps when

557. *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.

558. *See* Guiding Principles, *supra* note 41, at princ. 7.

559. 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 528, 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 . . .").

560. The corporation is directed merely to beware the dangers of complicity on conflict zones. *See* Guiding Principles, *supra* note 41, at princ. 23 cmt.

561. 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).

562. *See* Guiding Principles, *supra* note 41, at princ. 7.

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.[563] 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.[564] 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.[565] 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.

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,[566] 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.[567] But that

563. *Id.* at princ. 9 cmt.

564. *See id.* at princ. 14.

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

566. *See* SRSG 2009 Report, *supra* note 79; *see also* Guiding Principles, *supra* note 41.

567. *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).

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,[568] 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.[569] But it tends to reduce the access to remedies to an instrumental application of the consequences of the normative objectives of the state duty to protect and the corporate responsibility to respect human rights. A richer approach might have recast the Third Pillar access to remedies away from the stakeholders at the center of the first two pillars—states, business enterprises, non-governmental organizations, public international organizations—and toward the critical object of this enterprise—individuals suffering adverse human rights impacts. The remedial provisions assume a more autonomous role by centering their provisions on the obligations and privileges of stakeholders who belong to that class of individuals or groups affected by state or corporate activity with human rights impacts. Thus, turned around, access to remedy becomes a more useful vehicle for the elaboration of the obligations of actors to avoid and remediate harm. That obligation, of course in accordance with the structure of the Guiding Principles, is limited to law (legislation and dispute resolution remediation) for states, and governance norm frameworks (social norms and contract policies, including the policies at the heart of human rights due diligence) for corporate actors. Within that framework, international organizations and other collectives organized to fashion standards and remediation that might also assume a greater place within the constellation of remedial alternatives available to individuals. One could try to interpret the current framework in that direction, but it is more likely that a consequentialist structure will be used. The result is the loss of mechanics, inherent in the development of the "Protect, Respect and Remedy" Framework, which might have fleshed out the relationship within these complex and overlapping governance structures of the rights bearers to those whose actions may adversely affect their interests.

568. *See* Guiding Principles, *supra* note 41, at princ. 28-30.

569. *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).

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.[570] 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.[571]

Second, autonomy of the corporate responsibility is also built into the scope of application rules of Draft Principle 12 (Guiding Principles 12 through 15). The responsibility "[a]pplies across a business enterprise's activities and through its relationships with third parties associated with those activities."[572] 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.[573] None of this is

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

571. 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.").

572. Draft Principles*, supra* note 64, at princ. 12(b).

573. 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

necessarily bad, but all of it suggests a basis in legitimacy well outside the construct of the legal system rules of domestic legal orders.[574] 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."[575] This portion of the standard effectively ignores the rules of legal personality on which the law of corporations in virtually every state is based. The standard collapses corporate personality into single enterprises—the legal consequences of any single enterprise action trigger 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. 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.

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.[576] Importantly, protection from legal liability does not follow from compliance with the autonomous obligations derived from the corporate responsibility to respect.[577] Thus, compliance with corporate

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.

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

575. Guiding Principles, *supra* note 41, at princ. 14.

576. The idea is grounded in the concept of leverage. *Id.* at princ. 19(b)(ii); *see supra* notes 391-98 and accompanying text. In the 2011 Draft Guiding Principles Commentary these ideas were grounded in notions of influence. It explains:

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

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

577. 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.

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."[578] 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.[579]

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.[580] Likewise, companies may not balance the benefits of respecting human rights in one instance against their failures to respect human rights in others.[581] With these caveats, though, some room for incorporation within the risk management functions of corporate operations is permitted.[582]

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.[583] But the Principles in this case tend to inhibit rather than encourage bridging action in an effort to bend to the hierarchy of law that frames the Principles.

Guiding Principles, *supra* note 41, at princ. 17 cmt.

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

579. Guiding Principles, *supra* note 41, at princ. 12 cmt.

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

581. "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 64, at princ. 12 cmt.

582. "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 41, at princ. 17 cmt.

583. Guiding Principle 23 seeks ways to honor principles of human rights when faced with conflicting requirements. *Id.* at princ. 23(b); *see supra* notes 568-69 and accompanying text. This is consistent with the overall framework of the Guiding Principles. *See* Guiding Principles, *supra* note 41, 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.[584] This instrumental balancing could proceed through four decision steps: (1) exploration of the possibility of reconciling the conflict between standards through interpretation;[585] (2) if reconciliation is not possible, negotiation of an exception or solution with the state;[586] (3) if mediation or informal discussion with state officials is unsuccessful, then challenge the law;[587] 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.[588]

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.[589] The example of Google's well

584. *E.g.*, Guiding Principles, *supra* note 41, at princ. 13-14.; *see supra* notes 568-70 and accompanying text.

585. 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).

586. 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.

587. 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.

588. 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*, N.Y. TIMES (Mar. 22, 2010), 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*, WALL ST. J. (Jan. 12, 2012), http://online.wsj.com/article/SB10001424052970203436904577155003097277514.html.

589. 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.*,

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.[590] It is important to remember that decisions made in this context are dynamic. They require constant review as circumstances change. When the human rights benefits diminish in the face of continued inconsistency in legal requirements, the company must then reevaluate its business decision in order to meet its "respect" requirements under the three pillar mandate. Again, Google provides a good illustration. The Company publicly sought to reevaluate its agreement to comply with Chinese censorship rules in the aftermath of cyber attacks on its operations.[591]

All of these steps could be more effective if taken in collaboration with peer companies, nongovernmental allies, and, where applicable, in the home state.[592] This is especially useful where these collectives can develop models of decision and analysis that are context specific—such as for labor issues or for issues peculiar to a particular industrial sector. It might also be useful to stimulate collaboration between industry and civil society groups. It is in this context that the General Principles missed an opportunity to mirror the multilateral governance provisions of the state duty to corporate responsibility, including the incorporation of the General Principles themselves in the work of multilateral corporate groups.[593] That absence illustrates both the promise and the limits of the General Principles in its initial iteration.

V. CONCLUSION

Innovation is never perfect—either in conception or implementation. Reality always serves as the ultimate limiting principle for both theory and practice. All innovative movements have confronted this reality. Those that have remained unbending have failed; those that have sought to preserve what they could to

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).

590. 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.

591. *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.

592. *Compare* Guiding Principles and discussion, *supra* note 41, at princ. 12.

593. 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.

advance their project in the face of the constraints that reality imposes tend to survive, and sometimes flourish. The SRSG's voyage of principled pragmatism has served the "Protect, Respect and Remedy" Framework well; its insights have produced the shortfalls examined at length in the body of this work, but have also marked the extraordinary success of the project itself. This is no small matter—despite the pessimism of all stakeholders—states, corporations, non-governmental, and public international—the SRSG was able to craft a coherent system of governance and obtain official endorsement of states acting through an international organization not known for its unity of vision or purpose. That alone will be the object of study by political scientists, institutional theorists, and sociologists for some time to come. The object of this article, however, was the framework itself. Articled as a set of dense principles, and regardless of their shortcomings, the Guiding Principles have opened a number of significant pathways to the development of law and governance frameworks. They accept that there are formal systems of governance beyond those of the state. They begin to make a pragmatic case for the interlacing of international law and domestic legal orders; they recognize the governance aspects of social norm systems and seek a method of institutionalizing that role; they broaden the scope of remediation in a systematic way and attempt to harmonize the principles that serve as markets of legitimacy and accountability for each. The Guiding Principles manage this within an overall framework that still grounds its operation in and through states and which continues to treat corporations and other actors as dependent on and subject to an exclusive (at least in the aggregate) control of states through law in ways that even states now find troublesome.[594] It is likely to play a significant role in the development of governance frameworks in this area for some time to come.

594. For a discussion, see Larry Catá Backer, *Private Actors and Public Governance Beyond the State: The Multinational Corporation, the Financial Stability Board, and the Global Governance Order*, 18 IND. J. GLOBAL LEGAL STUD. 751 (2011).