2011

On the Evolution of the United Nations' 'Protect-Respect-Remedy' Project: The State, the Corporation and Human Rights in a Global Governance Context

Larry Cata Backer
Penn State Law

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Larry Catá Backer*

* W. Richard and Mary Eshelman Faculty Scholar and Professor of Law, Dickinson Law School, Professor of International Affairs, Pennsylvania State University. The author may be contacted at lcb911@gmail.com. My thanks to Frank Savoia (Penn State Law '10) for his excellent work on this project. An earlier version of this essay was presented March 12, 2010 as part of a symposium: Corporations and International Law, hosted by Santa Clara University School of Law. My thanks to David Sloss and to the board and staff of the Santa Clara Journal of International Law for organizing an excellent conference. A longer version of this essay will be published as Larry Catá Backer and Frank Savoia, *Operationalizing the United Nations' "Protect-Respect-Remedy" Project: Opportunities and Challenges in Establishing a Global Human Rights Based Framework for Regulating Transnational Corporations and Other Economic Enterprises* (on file with authors).

Abstract

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

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I. Introduction

At one time economic enterprises organized in the corporate form were the creatures of the state that regulated their existence.[1] Contemporary economic globalization has significantly altered the regulatory environment within which economic enterprises operate.[2] Economic enterprises are increasingly able to arrange their activities beyond the regulatory scope of any organization.[3] This gap in the operational and regulatory capacity has produced a sustained reaction. At the national level, efforts have been made to extend national law into extraterritorial jurisdiction,[4] to overhaul corporate law principles to extend to overseas operations of domestic corporations,[5] to make jurisdiction over foreign related entities easier to attain,[6] to widen the scope of disclosure with regard to overseas impacts,[7] and to impose some form of enterprise liability.

Substantive standards have also evolved at the national and international levels. At the national level in the form of corporate social responsibility,[8] disclosure and reporting,[9] sus-

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1. *See, e.g.*, First Nat. Bank of Boston v. Ballotter, 435 U.S. 765, 822-23 (1978) (Rehnquist, J., dissenting). The Supreme Court decided at an early date that a business corporation is a "person" entitled to the protection of the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 780 n.15. Similarly, the property of a corporation is protected by the Due Process Clause of the same Amendment. *Id.* at 822. Additionally, Mr. Chief Justice Marshall has described the status of corporations as "an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of creation confers upon it, either expressly, or as incidental to its very existence." *See* Dartmouth College v. Woodward, 17 U.S. (4 Wheat) 518, 636 (1819).
2. For a discussion of globalization and regulation, see JOSEPH E. STIEGLITZ, MAKING GLOBALIZATION WORK (2006); MAKING GLOBALIZATION GOOD: THE MORAL CHALLENGES OF GLOBAL CAPITALISM (John H. Dunning ed., 2003). *See also* THOMAS L. FRIEDMAN, THE LEXUS AND THE OLIVE TREE (1999).
3. *See* Larry Catá Backer, *The Autonomous Global Corporation: On the Role of Organizational Law Beyond Asset Partitioning and Legal Personality*, 41 TULSA L.J. 541 (2006).
4. For a discussion, see, for example, Larry Catá Backer, *Extraterritoriality and Corporate Social Responsibility: Governing Corporations, Governing Developing States*, LAW AT THE END OF THE DAY (Mar. 27, 2008, 23:47 EST), http://lcbackerblog.blogspot.com/2008/03/extraterritoriality-and-corporate.html.
5. *See, e.g.*, Foreign Corrupt Practices Act of 1977, 15 U.S.C. § 78dd-1 (amended 1988 and 1998).
6. For a discussion, see PHILLIP I. BLUMBERG, THE MULTINATIONAL CHALLENGE TO CORPORATE LAW: THE SEARCH FOR A NEW CORPORATE PERSONALITY (1993).
7. *See, e.g.*, Press Release, Securities and Exchange Commission, SEC Issues Interpretive Guidance on Disclosure Related to Business or Legal Developments Regarding Climate Change (Jan. 27, 2010), *available at* 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.*
8. 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 in 1989-1991. 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 (2005). For good descriptions, see, e.g., WILLIAM B. WERTHER & DAVID B. CHANDLER, STRATEGIC CORPORATE SOCIAL RESPONSIBILITY: STAKEHOLDERS IN A GLOBAL ENVIRONMENT (2d. ed. 2010).
9. *See What is GRI?*, GLOBAL REPORTING INITIATIVE, http://www.globalreporting.org/AboutGRI/WhatIsGRI/ (last visited Oct. 15, 2010) ("Global Reporting Initiative (GRI) is a network-based organization that has pioneered the development of the

tainability,[10] corporate citizenship and similar approaches,[11] state and non-state actors have sought to create substantive rules for the regulation of global operations of transnational corporations and related entities. At the international level, the United Nations sought to draft a set of Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights. That attempt was abandoned, which led to reframing international efforts, principally focusing on encouraging states to strengthen their legal regimes in this regard and framing increasingly comprehensive systems of soft-law governance at the transnational level. Transnational actors that have begun to fill this void include the Organization of Economic Cooperation and Development (OECD)[12] with its soft law Guidelines for Multinational Corporations.[13] The OECD framework has become more influential as it is developed from a system of principles-based norms, resulting in a system that is beginning to take on the characteristics of a substantially complete principles based rule code.[14] The United Nations system itself has not abandoned the field, moving from the Norms first to a stakeholder based, general principles based "Global Compact."[15]

This essay considers one of the most recent and more important efforts to detail a transnational regulatory framework for transnational corporations and other business enterprises through the United Nations system under the guidance of John Ruggie, the Special Representative of the Secretary-General (SRSG) on The Issue of Human Rights and Transnational Corporations and Other Business Enterprises.[16] That effort, the "protect, respect, and remedy" framework, is intended to produce a self-referencing and internally complete functionally differentiated governance system,[17] and be grounded in human rights while

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world's most widely used sustainability reporting framework and is committed to its continuous improvement and application worldwide.").

10. *See, e.g.*, Thomas Dyllick & Kai Hockerts, *Beyond the Business Case for Corporate Sustainability*, 11 BUS. STRAT. ENV. 130 (2002); Oliver Salzmann, Aileen Ionescu-Somers & Ulrich Steger, *The Business Case for Corporate Sustainability: Literature Review and Research Options*, 23 EUR. MGMT. J. 27 (2005).
11. *See, e.g.*, Dirk Matten & Andrew Crane, *Corporate Citizenship: Towards an Extended Theoretical Conceptualization*, *in* INTERNATIONAL CENTRE FOR CORPORATE SOCIAL RESPONSIBILITY RESEARCH PAPER SERIES, No. 04-2003; WORLD ECONOMIC FORUM, GLOBAL CORPORATE CITIZENSHIP: THE LEADERSHIP CHALLENGE FOR CEOS AND BOARDS (2002).
12. *See* ORGANIZATION OF ECONOMIC COOPERATION AND DEVELOPMENT (OECD), http://www.oecd.org/ (last visited Jan. 5, 2011).
13. *See Guidelines for Multinational Enterprises*, OECD, http://www.oecd.org/department/0,3355,en_2649_34889_1_1_1_1_1,00.html (last visited Jan. 5, 2011). For a discussion, see Jernej Letnar Cernic, *Corporate Responsibility for Human Rights: A Critical Analysis of the OECD Guidelines for Multinational Enterprises*, 4 HANSE L. REV. 71 (2008).
14. *See, e.g.*, Larry Catá Backer, *Rights and Accountability in Development ('RAID') v Das Air and Global Witness v Afrimex: Small Steps Toward an Autonomous Transnational Legal System for the Regulation of Multinational Corporations*, 10 MELB. J. INT'L L. 258 (2009).
15. 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 as it has gained a larger share of adherence by international organizations. *See* U.N. GLOBAL COMPACT, http://www.unglobalcompact.org/ (last visited Oct. 15, 2010).
16. For a biography of Dr. John Ruggie, see *John Ruggie—Profile*, HARVARD KENNEDY SCHOOL, http://www.hks.harvard.edu/about/faculty-staff-directory/john-ruggie (last visited Oct. 15, 2010) [hereinafter HARVARD]. For Dr. Ruggie's role in the development of the Protect-Respect-Remedy framework, see *infra* Part II.
17. On functional differentiation and non-state governance systems, see, for example, Anders Esmark,

also incorporating within its framework both public and private governance entities. The three pillars of the framework include the state duty to protect human rights, the corporate responsibility to respect human rights, and the provision of access to remedies for interference with human rights.

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. Polycentricity in governance results,[18] which considerably advances the development of autonomous transnational regulatory bases for corporate governance. Instead of suggesting further fragmentation of law at the transnational level,[19] the framework is an attempt to build simultaneous public and private governance systems as well as coordinate, without integrating, their operations.

This framework has the potential to influence the development of national and international governance systems involved with the human rights responsibilities of states and enterprises. Important parts of the European Union leadership have endorsed the framework.[20] It has also been used to interpret the principles of the OECD Guidelines for Multinational Corporations.[21] Governments have begun to use the framework in the context of developing approaches to corporate social responsibility; Norway will "continue to support the Special Representative's work both politically and financially."[22] In June 2008 the Hu-

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The Functional Differentiation of Governance: Public Governance Beyond Hierarchy, Market and Networks, 87 PUB. ADMIN. 351 (2009).

18. On polycentricity in governance, see, for example, Inger-Johanne Sand, *Polycontextuality as an Alternative to Constitutionalism*, *in* TRANSNATIONAL GOVERNANCE AND CONSTITUTIONALISM 41 (Christian Joerges et al. eds., 2004).
19. For a discussion, see, for example, 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).
20. SWEDISH PRESIDENCY OF THE EUROPEAN UNION, PROTECT, RESPECT, REMEDY—MAKING THE EUROPEAN UNION TAKE A LEAD IN PROMOTING CORPORATE SOCIAL RESPONSIBILITY 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.").
21. *See, e.g.*, UK National Contact Point for the OECD Guidelines for Multinational Enterprises, Final Statement: Complaint from Survival International against Vedanta Resources plc (Sept. 25, 2009), http://www.business-humanrights.org/Links/Repository/266990/jump (last visited Oct. 15, 2010) [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; [c]onsidering the human rights implications of projects before they begin and amend the projects accordingly to minimise/eliminate this impact; [m]ainstreaming the human rights policy throughout the company, its subsidiaries and supply chain; [and m]onitoring and auditing the implementation of the human rights policy and company's overall human rights performance.

Id. ¶ 78.

22. *See, e.g.*, Norwegian Ministry of Finance, Report No. 10 to the Storting: Corporate Social Responsibility in a Global Economy, 2008–09, at 78, *available at* http://www.regjeringen.no/en/dep/ud/Documents/Propositions-and-reports/Reports-to-the-

man Rights Council[23] 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.[24]

Important international human rights actors have also endorsed the approach.[25] The Business Leaders Initiative on Human Rights, comprised of thirteen global firms whose aim is to find "practical ways of applying the aspirations of the Universal Declaration of Human Rights within a business context," has also stated their support for the SRSG and the advancements of this framework.[26] A leading Wall Street law firm has issued legal commentary focusing mainly on the second pillar, corporate responsibility to respect human rights, and has concluded that "the basic concepts embodied in the Report are sound and should be supported by the business community . . . ."[27] Forty socially responsible investment funds wrote to the Human Rights Council, saying the framework helped promote increased disclosure of corporate human rights impacts along with appropriate steps to mitigate them.[28] ExxonMobil cited the corporate responsibility to respect pillar as a benchmark for its own employee operations.[29] Also, a joint civil society statement to the Human Rights Council noted the framework's value, while several signatories have invoked it in following advocacy work.[30]

Part II explores the history of the Protect-Respect-Remedy framework's development.

Storting/2008-2009/report-no-10-2008-2009-to-the-storting.html?id=565907.

23. U.N. HUMAN RIGHTS COUNCIL, http://www2.ohchr.org/english/bodies/hrcouncil/ (last visited Oct. 15, 2010).

> 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.

Id.

24. U.N. Human Rights Council, *Rep. of the Human Rights Council on its Eighth Session*, § 8/7, U.N. Doc. A/HRC/8/52 (Sep. 1, 2008) (by Alejandro Artucio), *available at* http://www2.ohchr.org/english/bodies/hrcouncil/docs/8session/A.HRC.8.52.doc.
25. 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, in Stockholm, Swed. (Nov. 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 RIGHTS: THE ETHICAL GLOBALIZATION INITIATIVE, http://www.realizingrights.org/index.php?option=content&task=view&id=75 (last visited Oct. 15, 2010).
26. John G. Ruggie, U.N. Special Representative for Business & Human Rights, Remarks at the Royal Institute of International Affairs, Chatham House, in London, U.K.: Next Steps in Business and Human Rights 4 (May 22, 2008), *available at* http://www.reports-and-materials.org/Ruggie-speech-Chatham-House-22-May-2008.pdf [hereinafter Chatham House Remarks].
27. *Id.*
28. U.N. Special Representative of the Secretary-General, *Business and Human Rights: Towards Operationalizing the "Protect, Respect and Remedy" Framework: Rep. of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, ¶ 4, *delivered to the Human Rights Council*, U.N. Doc. A/HRC/11/13 (April 22, 2009) [hereinafter *SRSG 2009 Report*].
29. *Id.*
30. *Id.* ¶ 5.

Part III examines the conceptual foundation of the framework on its own terms. This examination considers the evolution of the framework as evidenced through the SRSG's annual reports from 2006 to 2009. Part IV briefly suggests tensions and challenges that this emerging system of business and human rights is likely to face. These will affect the Three-Pillar framework's viability as a transnational autonomous regulatory soft law system.

II. History

> In 2005, responding to a request by the U.N. Commission on Human Rights (now Human Rights Council), Annan appointed Ruggie as the Secretary-General's Special Representative for Business and Human Rights, a post he continues to hold in the new U.N. administration of Ban Ki-Moon. In that capacity, his job is to propose measures to strengthen the human rights performance of the business sector around the world.[31]

This appointment, and work on what would become the current Protect-Respect-Remedy framework, was to some extent bound up in a previous effort to provide an international framework for the governance of multinational corporations—the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (the "Norms").[32]

The United Nations began working on the development of a set of rules which may directly bind multinational corporations to a set of mandatory obligations. The Norms were eventually based on principles of the direct application of human rights norms to multinational corporations and on a system that used binding contracts to create a global network of human rights obligations enforceable against multinational corporations.[33] These efforts were criticized, especially by developed states that believed the Norms proposal threat-

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31. HARVARD, *supra* note 16.
32. Econ. & Soc. Council [ECOSOC], Subcomm'n on Promotion & Prot. of Human Rights, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, U.N. Doc. E/CN.4/Sub.2/2003/L.8 (Aug. 7, 2003) (draft resolution by Alfonso Martínez et al.), *available at* http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/6b10e6a7e6f3b747c1256d8100211a60?Opendocument. This document was subsequently revised; *see* ECOSOC, Subcomm'n on Promotion & Prot. of Human Rights, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (Aug. 26, 2003), *available at* http://www.unhchr.ch/huridocda/huridoca.nsf/0/64155e7e8141b38cc1256d63002c55e8?OpenDocument (revised edition) [hereinafter *Norms*]. All references to the Norms are to the revised Norms issued August 26, 2003. For the official commentary on the Norms, see ECOSOC, Sub-Comm'n on the Promotion and Prot. of Human Rights, *Commentary on the* Norms *on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, U.N. Doc. E/CN.4/Sub.2/2003/38/Rev.2 (Aug. 26, 2003), *available at* http://www.unhchr.ch/Huridocda/Huridoca.nsf/(Symbol)/E.CN.4.Sub.2.2003.38.Rev.2.En?Opendocument [hereinafter *Commentary*]. For a report on the finalization of the statement of *Norms*, see ECOSOC, Sub-Comm'n on the Promotion & Prot. of Human Rights, *Report of the Sessional Working Group on the Working Methods and Activities of Transnational Corporations on its Fifth Session*, U.N. Doc. E/CN.4/Sub.2/2003/13 (Aug. 6, 2003), *available at* http://www.unhchr.ch/Huridocda/Huridoca.nsf/TestFrame/906e3013f1cb27eac1256d82004d7fe2?Opendocument.
33. For an analysis of the Norms and their applications, see Larry Catá Backer, *Multinational Corporations, Transnational Law: The United Nation's Norms on the Responsibilities of Transnational Corporations as a Harbinger of Corporate Social Responsibility as International Law*, 37 COLUM. HUM. RTS. L. REV. 287 (2006).

ened both sovereignty and current international law.[34] In the end, the Norms project was abandoned.

In 2003, a working group under the U.N. Sub-Commission on the Promotion and Protection of Human Rights drafted the Norms, which assumed that companies had legal obligations in relation to human rights. When the draft Norms were submitted to the member states of the U.N. Human Rights Commission in 2004, they were rejected. Several of the member states opposed holding non-state entities directly accountable for human rights violations as they felt this would dilute state responsibility. The Human Rights Commission made it clear that the draft entailed no legal obligations. Several of the member states did, however, point out that the draft Norms contained useful elements and ideas. It was against this backdrop, and following a resolution adopted by the U.N. Human Rights Commission, that the U.N. Secretary-General in 2005 appointed a Special Representative for human rights and business.[35]

The abandonment of the Norms project and its approach continues to be criticized by one of its principal architects.[36] An influential critic of the Norms proposal was John Ruggie. He agreed that the transnational corporate sector was a legitimate object of transnational governance.[37] He suggested that

> the Norms exercise became engulfed by its own doctrinal excesses. . . . Two aspects are particularly problematic in the context of this mandate. One concerns the legal authority advanced for the Norms, and the other the principle by which they propose to allocate human rights responsibilities between states and firms.[38]

This criticism was not rhetoric, but the foundation of a new approach to the develop-

34. *See id.* at 308.
35. Norwegian Ministry of Finance, *supra* note 22, at 76.
36. Ruggie's conclusion that the Norms were of little help in advancing the interests of business and human rights has drawn criticism from Professor David Weissbrodt, one of the architects of the Norms. Weissbrodt has complained that Ruggie has "embark[ed] on an extremely negative and unproductive critique of the Norms—inspired, if not copied word for word, from the advocacy of the International Chamber of Commerce and the International Organization of Employers" while also not citing one of these "mainstream international lawyers and other impartial observers," but rather relying on the biased views of lawyers employed by the International Chamber of Commerce. *See* David Weissbrodt, *U.N. Perspectives on "Business and Humanitarian and Human Rights Obligations,"* 100 AM. SOC'Y INT'L L. PROC. 135, 138 (2006). Weissbrodt finds that a lot of Ruggie's work has great potential to advance the interests of business and human rights, but he shows a general disdain for the way that Ruggie has derided the Norms in form and function. *Id.* at 139.
37. Ruggie suggested three causes. U.N. Special Representative of the Secretary-General, *Interim Rep. of the Special Rep. of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, ¶¶ 14–16, *delivered to the Economic and Social Council*, U.N. Doc. E/CN.4/2006/97 (Feb. 22, 2006), *available at* http://www1.umn.edu/humanrts/business/RuggieReport2006.html [hereinafter *SRSG 2006 Report*]. The first is that large firms have become major players around the globe and countervailing efforts have currently come from civil society actors. *Id.* Secondly, some companies have made themselves and their sector targets by doing bad things on a larger scale as a result of mistakes, shortsightedness and even malfeasance; which has generated an increased demand for corporate accountability. *Id.* Thirdly, the fact that it has global reach and capacity while simultaneously being capable of making and implementing decisions that neither governments nor international agencies can accomplish with such speed. *Id.*
38. *Id.* ¶ 59. He also noted that "[e]ven leaving aside the highly contentious though largely symbolic proposal to monitor firms and provide for reparation payments to victims, its exaggerated legal claims and conceptual ambiguities created confusion and doubt even among many mainstream international lawyers and other impartial observers." *Id.*

ment of a regulatory scheme at the supranational level, created to govern multinational corporations, while being based on the legal duties of states, the social responsibilities of corporations and the process obligations of both to their respective stakeholders.[39]

John Ruggie's first appointment as Assistant Secretary-General and chief advisor for strategic planning to the United Nations Secretary-General Kofi Annan from 1997–2001 was the beginning of events that led to the Protect-Respect-Remedy framework. During this appointment Mr. Ruggie was instrumental in developing, designing and overseeing the United Nations Global Compact.[40] The U.N. Global Compact is an initiative that was developed to encourage businesses worldwide to adopt ten universally accepted principles in the areas of human rights, labor, environment and anti-corruption within their operations and strategies.[41]

Mr. Ruggie also proposed and gained U.N. General Assembly approval for the Millennium Development Goals.[42] The MDGs had an ambitious agenda: To be something more than a mechanical benchmarking tool. They were to be "an instrument for broader social mobilization, generating innovative responses to society's systemic challenges by, and among, all social actors."[43]

The U.N. Global Compact and the Millennium Development Goals both served as a foundation for the critique of the Norms. That foundation became the framework for the construction of an alternative regulatory framework following the collapse of the Norms project. This shift in approach was also marked by a shift in the corporate human rights project from Geneva to New York. That shift was cemented with the appointment of John Ruggie as Special Representative of the Secretary-General on the issue of Human Rights and Transnational Corporations and Other Business Enterprise in 2005.[44] The SRSG's mandate began with a series of studies that were designed to elicit information from stakeholders including the corporate sector,[45] along with a set of fact-finding missions.[46]

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39. *But see* David Weissbrodt, *International Standard-Setting on the Human Rights Responsibilities of Businesses*, 26 BERKELEY J. INT'L L. 373 (2008).
40. It was during this first appointment that John Ruggie served as one of the main architects of the U.N. Global Compact. 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 29, 2005), *available at* http://www.un.org/News/Press/docs/2005/sga934.doc.htm [hereinafter Appointment Press Release].
41. One purpose of this initiative is to involve businesses, acting as private agents driving globalization, to "ensure that markets, commerce, technology, and finance advance in ways that benefit economies and societies everywhere." *Overview of Global Compact*, U.N. GLOBAL COMPACT, http://www.unglobalcompact.org/AboutTheGC/index.html (last visited Oct. 15, 2010).
42. These goals, signed into effect in 2000, require all of the participating nations to commit to eight goals to improve the standards and meet the needs of the world's poorest within a set of time-based targets with a deadline of 2015. *See Millennium Development Goals*, UNITED NATIONS, http://www.un.org/millenniumgoals/bkgd.shtml (last visited Oct. 15, 2010). The goals include: End Poverty and Hunger, Universal Education, Gender Equality, Child Health, Maternal Health, Combat HIV/AIDS, Environmental Sustainability, and Global Partnership. *Id.*
43. John G. Ruggie, Remarks at the 12th International Business Forum World Bank, in Wash. D.C.: Business and the rules of the game: From rule-takers to rule-makers? 2 (Oct. 8–10, 2007), *available at* http://www.reports-and-materials.org/Ruggie-remarks-World-Bank-9-Oct-2007.pdf.
44. Appointment Press Release, *supra* note 40.
45. 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

The SRSG abandoned the Norms' focus on the direct obligations of multinational corporations. Instead, he considered legal obligations, which flow from and through states, as well as other obligations, that affect corporate entities more directly under traditional legal concepts.[47] The object was to identify "the directions in which achievable objectives may lie."[48] Legal obligations were to focus on the identification and harmonization of legal standards; "achieving greater clarity of, and possibly greater convergence among, emerging standards is a pressing need."[49] At this early developmental point of the framework, the SRSG acknowledged that the mandate's scope goes beyond just the legal realm, but includes a "full range of governmental responsibilities and policy options in relation to business and human rights."[50] It includes all sources of corporate responsibility.[51] Now the SRSG realized that "a strategy for strengthening the corporate contribution to the protection and promotion of human rights that recognizes and leverages the dynamics at work in each of these spheres" was needed.[52]

The initial report produced by the SRSG in 2006 was based on his preliminary research and conceptualization of the mandate.[53] The SRSG emphasized the states' legal obligations to enforce law and corporations' obligations to comply with those legal requirements.[54] The object now was to avoid the policy tension that caused the Norms project to falter.[55]

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impact assessments. John G. Ruggie, Opening Remarks at the Wilton Park Conference on Business & Human Rights, in W. Sussex, U.K. 4 (Oct. 10–12, 2005), *available at* http://www.business-humanrights.org/SpecialRepPortal/Home/Speechesinterviews/2005. 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.*

46. *Id.* at 5.
47. The starting point is "corporate liability for abuses that amount to violations of international criminal or humanitarian law." John G. Ruggie, Remarks at the Business & Human Rights Seminar in Old Billingsgate, in London, U.K. (Dec. 8 2005), *available at* http://www.bhrseminar.org/John%20Ruggie%20Remarks.doc. The reasons for starting at this point is that it is a critically important issue on its own, where greater clarity is needed, while it may also shed light on the general strategy of legalizing corporate human rights obligations. *Id.*
48. *Id.*
49. *Id.*
50. *Id.*
51. Some sources of corporate responsibility include legal compliance as well as social norms, moral considerations and strategic behavior. *Id.*
52. *Id.*
53. *SRSG 2006 Report, supra* note 37, ¶ 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.*
54. The "premise that the objective of the mandate is to strengthen the promotion and protection of human rights in relation to transnational corporations and other business enterprises, but that governments bear principal responsibility for the vindication of those rights." *Id.* ¶ 7.
55. The two bookends of the debate include one position that "corporations cannot violate international human rights laws because they are only applicable to states." John G. Ruggie, U.N. Special Representative to the Secretary-General for Business & Human Rights, Remarks at Public Session, National Roundtable on Corporate Social Responsibility and the Canadian Extractive Industry in Developing Countries, in Montreal, Can. 2 (Nov. 14, 2006), *available at* http://www.reports-and-materials.org/Ruggie-speech-Canada-National-Roundtable-14-Nov-2006.pdf. Based on this reading, the only duty for companies is to comply with the national laws where they operate along with the voluntary initiatives they choose to undertake. *Id.* At the opposing position of the debate is the U.N. Norms, which seek "to impose on corporations the full range of international human rights standards that states have adopted for states, with identical obligations ranging from 'respecting' to 'fulfilling' those rights." *Id.* The debate between these two opposing views did not result in any light on the

The SRSG continued gathering information and consulting stakeholders. He conducted many events, including three regional multi-stakeholder consultations, civil society consultations on five continents, four workshops of legal experts, and many others.[56]

The 2007 Report addressed the four elements of the initial mandate.[57] It also outlined what was coming for the remainder of the mandate. Five clusters of standards were created that evolved into the current Three-Pillar framework.[58] 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.[59] The SRSG focused on accountability and interpretive mechanisms.[60]

The 2008 Report was based on fourteen multi-stakeholder consultations on five continents[61] with concern expressed for a common need among them all—"a common framework of understanding, a foundation on which thinking and action can build in a cumulative fashion."[62] In this report the three-pillar Protect-Respect-Remedy framework was unveiled.[63] The five clusters of standards from the 2007 report became the three most important principles. The complementary principles of the framework now include the state duty to protect, the corporate responsibility to respect, and access to remedies. The SRSG noted that it is necessary for all social actors involved in business and human rights to play an active role in addressing these issues.[64] This Report also explored governance gaps in more detail. These gaps have created an environment that permits wrongful acts by companies lacking a system of adequate sanctions or reparations; narrowing this gap is the

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subject nor movement in policy, which then resulted in the appointment of SRSG Ruggie. *Id.*

56. 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. In addition, the two Geneva-based consultations included work on the extractives and financial services industries. John G. Ruggie, Prepared Remarks at Clifford Chance, in London, U.K. (Feb. 19, 2007), *available at* http://www.reports-and-materials.org/Ruggie-remarks-Clifford-Chance-19-Feb-2007.pdf.
57. U.N. Special Representative of the Secretary-General, *Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Act: Rep. of the Special Rep. of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, ¶ 1, *delivered to the Human Rights Council*, U.N. Doc. A/HRC/4/35 (Feb. 9, 2007) [hereinafter *SRSG 2007 Report*].
58. John G. Ruggie, Remarks at International Chamber of Commerce Commission on Business in Society, in Paris, Fr. 2 (April 27, 2007), *available at* http://www.reports-and-materials.org/Ruggie-speech-to-ICC-27-Apr-2007.pdf.
59. *Id.* at 2–4.
60. Dr. Ruggie emphasized there is commonly an underdeveloped accountability mechanism within voluntary initiatives that affects the performance of the initiative in that companies cannot correct what they don't know is wrong. John G. Ruggie, Remarks at Annual Plenary, Voluntary Principles on Security & Human Rights, in Wash. D.C. 5 (May 7, 2007), *available at* http://www.reports-and-materials.org/Ruggie-remarks-Voluntary-Principles-plenary-7-May-2007.pdf.
61. U.N. Special Representative of the Secretary-General, *Protect, Respect and Remedy: A Framework for Business and Human Rights: Rep. of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, delivered to the Human Rights Council*, U.N. Doc. A/HRC/8/5 (Apr. 7, 2008) (by John Ruggie) [hereinafter *SRSG 2008 Report*].
62. Chatham House Remarks, *supra* note 26, at 4.
63. *SRSG 2008 Report, supra* note 61.
64. *Id.* ¶ 7.

fundamental challenge.[65]

The Human Rights Council (HRC) renewed the SRSG's mandate in 2008.[66] The 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."[67] It stressed that "the obligation and the primary responsibility to promote and protect human rights and fundamental freedoms lie with the State."[68] The HRC also emphasized "that transnational corporations and other business enterprises have a responsibility to respect human rights."[69]

The 2009 Report incorporates policy considerations that touch on the global economic crisis of 2008 and the resulting pressure on stakeholders to reduce the priority of human rights concerns.[70] The SRSG emphasized that the business and human rights agenda should be more closely aligned with the overall world economic policy agenda.[71] The 2009 Report considered mostly the issue of operationalization. A report is to follow in 2010 in which the SRSG is to release a set of applicable principles to aid in fulfilling the requirements of each pillar. The 2010 Report may also include suggestions for institutionalizing the framework within a to-be-developed governance framework.

III. Development of the Protect-Respect-Remedy Framework

The Three-Pillar framework is not just a reaction to the failed Norms project. It is also more than just an elaboration of voluntary principles-based codes of the Global Compact or the Millennium Development Goals. Careful review of the SRSG's reports suggests its character and nature is that of an institutionalized multi-level governance framework that the Protect-Respect-Remedy framework represents. For that purpose this section considers the framework as developed through the SRSG's 2006–2009 reports.

65. 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. *SRSG 2008 Report, supra* note 61, ¶ 3.
66. U.N. Human Rights Council, *supra* note 24.
67. John G. Ruggie, Remarks at the ICJ Access to Justice Workshops, in Johannesburg, S. Afr. 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.
68. *Rep. of the Human Rights Council on its Eighth Session, supra* note 24.
69. *Id.*
70. *SRSG 2009 Report, supra* note 28, ¶ 15.
71. 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 framework of understanding, a foundation on which thinking and action can build in a cumulative fashion." *Rep. of the Human Rights Council on its Eighth Session, supra* note 24. The Protect-Respect-Remedy framework resulted. *SRSG 2008 Report, supra* note 61. *See also* Chatham House Remarks, *supra* note 26.

A. The 2006 Report[72]

The 2006 Report elaborated on the SRSG's mandate.[73] It described current work and suggested a roadmap for the future. The SRSG began "work by conducting extensive consultations on the substance of the mandate as well as alternative ways to pursue it—with states, non-governmental organizations, international business associations and individual companies, international labor federations, U.N. and other international agencies, and legal experts."[74]

The 2006 Report intended "to frame the overall context encompassing the mandate as the SRSG sees it, to pose the main strategic options, and to summarize his current and planned program of activities."[75] A three part contextualization of the mandate was included: "the institutional features of globalization; overall patterns in alleged corporate abuses and their correlates; and the characteristic strengths and weaknesses of existing responses established to deal with human rights challenges."[76] Considerable space was devoted to distinguishing the efforts under his mandate from those that proposed the Norms project. The object was to suggest an abandonment of the core assumptions framing the Norms and to embrace a different conceptual starting point. Each is discussed in turn.

1. Context of the Mandate: Globalization

Globalization has affected the issue of business and human rights significantly. Today's world includes "a variety of actors for which the territorial state is not the cardinal organizing principle have come to play significant public roles."[77]

Three drivers exist that increase the attention that transnational corporations receive.

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72. *SRSG 2006 Report, supra* note 37, ¶ 1.
73. This initial mandate required Ruggie

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

Id.

74. The SRSG also conducted visits to countries around the world, formal meetings, and stakeholder consultations to deepen his understanding of the situations. His Fortune Global 500 survey was used to gain additional background information that may be relevant to his mandate. *Id.* ¶ 3.
75. *Id.* ¶ 6.
76. *Id.* ¶ 8.
77. *Id.* ¶ 10. This is most evident in the economic realm. "The rights of transnational firms—their ability to operate and expand globally—have increased greatly over the past generation, as a result of trade agreements, bilateral investment treaties, and domestic liberalization." *Id.* ¶ 12. Arms length transactions have decreased and more intra-firm trading is taking place while becoming a more significant share of overall global trade. *Id.* ¶ 11. What used to be external trade between national economies has now become internalized within the firms using supply chain management that functions in real time. *Id.*

The first is that "the successful accumulation of power by one type of social actor will induce efforts by others with different interests or aims to organize countervailing power."[78] Secondly, "some companies have made themselves and even their entire industries targets by committing serious harm in relation to human rights, labor standards, environmental protection, and other social concerns."[79] The third is the plain fact "that it has global reach and capacity, and that it is capable of acting at a pace and scale that neither governments nor international agencies can match."[80] The widening gap between global markets and societies' capacity to manage resulting consequences may be pressure political leaders to look within, but established global markets in shared values and institutional practices can achieve this outcome in a better manner.[81]

2. Context of the Mandate: Abuses and Correlates

The SRSG has recognized a lack of data which is impeding any chance of creating an empirically based solution to human rights abuses in business. It was implied that prior attempts proceeded without necessary hard data and expressed ideological and political preference. The SRSG argued that without a database for consistent, comprehensive, and impartial information, it is difficult to quantify any changes in business related abuses.[82] Thus, in the absence of data, policy choices cannot be developed legitimately.[83]

The SRSG offered one context for gathering data: Generally, economic development coupled with the rule of law is the best way to ensure the entire spectrum of human rights is recognized.[84] By going global, transnational firms must adopt a system embracing many corporate entities spread across and within many countries, leading some to believe that globalization has increased the potential transnational involvement in human rights violations. Networks now form within the firm and can increase firms' difficulty in managing the global value chain.[85] These transnational institutional features, if unaddressed, increase the likelihood that a company will violate its own principles or social expectations.[86]

Two implications for policy response designs became apparent. First, there are significant differences in industry sectors in terms of the types and magnitude of human rights challenges.[87] And secondly, there is a clear "negative symbiosis between the worst corporate-related human rights abuses and host countries that are characterized by a combina-

78. "At the global level today, a broad array of civil society actors has been in the lead. And when global firms are widely perceived to abuse their power . . . a social backlash is inevitable." *Id.* ¶ 14.
79. "This has generated increased demands for greater corporate responsibility and accountability, often supported by companies wishing to avoid similar problems or to turn their own good practices into a competitive advantage." *Id.* ¶ 15.
80. Other social actors are looking at how to leverage this to cope with pressing societal problems, often because governments are either unable or unwilling to perform their functions properly. *Id.* ¶ 16.
81. *Id.* This outcome is the broadest macro objective of the SRSG's mandate.
82. The abuses are just reported more extensively because there are more actors tracking them, and there is greater transparency than in the past. *Id.* ¶ 20.
83. *Id.*
84. Including civil, political, economic, social and cultural rights. *Id.* ¶ 21.
85. When the number of links in this chain increases, there are greater vulnerabilities for the global enterprise as a whole. *Id.* ¶ 22.
86. *Id.* ¶ 23.
87. *Id.* ¶ 29.

tion of relatively low national income, current or recent conflict exposure, and weak or corrupt governance."[88]

3. Context of the Mandate: Existing Responses

Initiatives have been adopted by firms both individually and in collaboration with other organizations.[89] Nearly eighty percent (80%) of the respondents of the SRSG survey of Fortune Global 500 firms report having a clear set of principles or management practices regarding human rights in their operations.[90]

The international human rights instruments referenced by company policy include: the International Labor Organization declarations or conventions, the Universal Declaration of Human Rights, the U.N. Global Compact and the OECD Guidelines for Multinational Enterprises.[91] This early sample shows an awareness that most major firms know of their human rights responsibilities, have adopted some form of policies, systematically think about them, and then institute some form of reporting system.[92]

4. Strategic Directions: The Norms

The SRSG aimed to describe the set of core conceptual issues that had to be addressed to move the human rights agenda forward. Governance standards were the most challenging issue. In two parts, the SRSG conceded that standards did not yet exist and that realizing new standards required an acknowledgement of past efforts—and especially the reasons for past failures. Thus, the Norms became an issue, eventually being found an impossible project.[93] "What the Norms have done, in fact, is to take existing state-based human rights instruments and simply assert that many of their provisions now are binding on corporations as well."[94] Not surprisingly, the Norms were disregarded by most businesses, human rights groups were in favor of it, and governments hoped to move beyond the deadlock.[95]

The SRSG viewed the Norms as allocating human rights responsibilities among states and corporations imprecisely.[96] That imprecision was then based on the failure to provide a set of principles for making such a differentiation.[97] "[I]n actual practice the allocation of responsibilities under the Norms could come to hinge entirely on the respective capacities of states and corporations in particular situations—so that where states are unable or unwilling to act, the job would be transferred to corporations."[98] The SRSG concluded that the Norms were not worth saving. A new conceptual structure was needed.

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88. *Id.* ¶ 30.
89. Such as business associations, non-governmental organizations (NGOs) and even governments or international organizations. *Id.* ¶ 31.
90. *Id.* ¶ 33.
91. *Id.* ¶ 34.
92. *Id.* ¶ 38.
93. *Id.* ¶ 55.
94. *Id.* ¶ 60.
95. *Id.* ¶ 55.
96. *Id.* ¶ 66.
97. *Id.* ¶ 67.
98. *Id.* ¶ 68.

5. Strategic Directions: Principled Pragmatism

The SRSG proposed an approach grounded in principled pragmatism.[99] This combines empiricism that was emphasized as an integral element of the mandate along with data-based principles applied to corporate operation realities within and between states under accepted economic globalization rules. The SRSG recognized an important issue, that companies are constrained by a double set of behavioral standards, legal standards and social/moral considerations.[100] This was a basic principle for creating a regulatory system designed to guide multinational corporations with respect to their human rights obligations. This grounded legal standards in the state—i.e., the political sector—and grounded social standards in corporations and international organizations—i.e., economic and social sectors or global society.

As this situation is in constant flux, normative judgments must be made. These judgments are based on a principled form of pragmatism: "an unflinching commitment to the principle of strengthening the promotion and protection of human rights as it relates to business, coupled with a pragmatic attachment to what works best in creating change where it matters most—in the daily lives of people."[101] The SRSG also pointed to social obligation sources which are directly applicable to corporations.[102] Also, a compendium of best practices compiled the most common practices around the globe.[103]

The conceptual basis of the mandate has become clear. "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."[104] The role of the state, and state-based legal regimes, remains "not only primary, but also critical."[105] An additional governance system—social, non-state based, and grounded between corporations and their stakeholder—would be required.

B. The 2007 Report[106]

The 2007 Report focused on the portion of the mandate to 'identify and clarify,' to 'research' and 'elaborate upon,' and to 'compile' materials—in short, to provide a comprehensive mapping of current international standards and practices regarding business and human rights.[107] The SRSG put this effort in context within globalization's dynamic rearrangements of power relationships. There is a well-understood misalignment between

99. *Id.* "It is essential to achieve greater conceptual clarity with regard to the respective responsibilities of states and corporations." *Id.* ¶ 70.
100. This includes "what companies must do, what their internal and external stakeholders expect of them, and what is desirable." *Id.* Each of these has a different basis in the fabric of society, exhibiting different operating modes, and is responsive to different incentive and disincentive mechanisms. *Id.*
101. *Id.* ¶ 81.
102. *Id.* These included individual company policies and voluntary initiatives while aiming to identify the best practices that have been adopted. The focus was to strengthen transparency and accountability mechanisms. *Id.* ¶ 74.
103. *See id.* ¶¶ 76-78.
104. *Id.* ¶ 75.
105. *Id.* ¶ 79.
106. *SRSG 2007 Report, supra* note 57.
107. *Id.* ¶ 5.

the power to act and the power to regulate.[108] This requires realignment among institutions—political, social and economic—involved in the production of benefits and burdens affecting people.[109]

The 2007 Report maps "evolving standards, practices, gaps and trends."[110] The Report addresses "five clusters of standards and practices governing 'corporate responsibility' . . . and 'accountability.' "[111] These clusters evolve and become the Three-Pillar regulatory framework.[112] The five clusters include are described in turn.

1. The State Duty to Protect

International law dictates that there is a duty of the state to protect against non-state human rights abuses.[113] "The regional human rights systems also affirm the state duty to protect against non-state abuse, and establish similar correlative state requirements to regulate and adjudicate corporate acts."[114] Concern remains as most states do not have solid policies or practices to protect human rights and simply rely on initiatives such as the OECD Guidelines or the U.N. Global Compact.[115] "In sum, the state duty to protect against non-state abuses is part of the international human rights regime's very foundation. The duty requires states to play a key role in regulating and adjudicating abuse by business enterprises or risk breaching their international obligations."[116]

2. The Corporate Responsibility and Accountability for International Crimes

The second cluster is based on individual liability included in the Statute of the International Criminal Court. Corporations can be held liable under similar principles that are

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108. *Id.* ¶ 3.

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

Id.

109. *See id.* ¶¶ 3-4. "The permissive conditions for business-related human rights abuses today are created by a misalignment between economic forces and governance capacity. Only a realignment can fix the problem." *Id.* ¶ 82.
110. *Id.* ¶ 5.
111. *Id.* ¶ 6. Corporate responsibility is understood to be "the legal, social or moral obligations imposed on companies" and corporate accountability is understood to include "the mechanisms holding them to these obligations." *Id.*
112. It is now clear how these five areas have now been tailored and developed into the current Protect-Respect-Remedy framework. *See infra* Part IV. The first cluster, the State Duty to Respect, has not changed at all. *Id.* The second and third, Corporate Responsibility and Accountability for International Crimes and Corporate Responsibility for Other Human Rights Violation under International Law have become the Corporate Responsibility to Respect in the new framework. *Id.* The fourth and fifth clusters, Self-regulation and Soft-law Mechanisms have become the third part of the framework, Access to Remedies; although the self-regulation cluster fits in with the corporate responsibility to respect as well. *Id.*
113. *SRSG 2007 Report, supra* note 57, ¶ 10.
114. *Id.* ¶ 16.
115. *See id.* ¶ 15.
116. *Id.* ¶ 18. It requires states to fulfill their duty as a key player in regulation and adjudication or risk breaching their international obligations. *Id.*

used to hold individuals liable for genocide, crimes against humanity, and war crimes.[117] Problems arise when corporations are uncertain which laws will apply to them—all the more reason for a universal law being adopted by all countries around the globe.[118] Further concern is that corporations may be held liable if their corporate culture expressly or tacitly permits commissions of an offence by an employee.[119] However, currently no uniform policy attaches liability to companies for its employees' actions.[120]

3. The Corporate Responsibility for Other Human Rights Violations under International Law

The third cluster is based on the currently evolving and growing national acceptance of international standards for individual responsibility.[121] Human rights instruments are traditionally viewed as only imposing indirect international responsibilities on corporations, which are based on states' international obligations.[122] It currently seems that international human rights instruments do not impose on corporations any direct legal responsibility, but corporations are under greater scrutiny therefrom.[123] Recently, some states have extracted soft-law standards from these instruments to develop future human rights laws.[124]

4. Soft-Law Mechanisms

These regulatory instruments do not create legally binding obligations on those that are subject to the 'law.' Three different soft-law arrangements exist: "the traditional standard-setting role performed by intergovernmental organizations; the enhanced accountability mechanisms recently added by some intergovernmental initiatives; and an emerging multi-stakeholder form that involves corporations directly, along with states and civil society organizations, in redressing sources of corporate-related human rights abuses."[125]

Some emerging multi-stakeholder systems of soft-law initiatives were identified, including: the Voluntary Principles on Security and Human Rights, the Kimberley Process Certification Scheme, and the Extractive Industries Transparency Initiative.[126] These soft-law mechanisms blur the line between voluntary and mandatory regulation, but still, soft-law initiatives are emerging as a norms developing method within the international community.[127]

117. *Id.* ¶ 19. Liability under the statute is generally in national courts within states that have adopted it into domestic law. *Id.*
118. *Id.* ¶ 28.
119. Similarly, in the United States, the U.S. Sentencing Guidelines take into account the corporate culture when assessing money penalties. *Id.*
120. Piercing the corporate veil is still difficult to accomplish, but there is now a greater risk that companies may be held liable for complicity in crimes. *Id.* ¶ 29.
121. *Id.* ¶ 33.
122. An alternative view is that these instruments impose direct legal responsibilities on corporations but just lack direct accountability mechanisms to make them effective. *Id.* ¶ 35.
123. *Id.* ¶ 44.
124. *Id.* ¶ 46.
125. *Id.*
126. These initiatives and those similar around the globe seek to close the gaps in regulation that contribute to, and permit, the human rights abuses. They also cross all boundaries in business and industry, host and home states, and many other kinds of institutions. *Id.* ¶ 54.
127. *Id.* ¶ 61.

5. Self-Regulation

This cluster involves policies and practices formed by companies to protect human rights in the business context. They are almost entirely voluntary and created by companies who recognize that human rights have become a greater issue. Three issues are considered in the accountability context: human rights impact assessments, materiality and assurance.[128] Impact assessments are vital to determine if adopted policies are having any effect.[129] Materiality refers to information being conveyed within company reports.[130] Assurance lets people know that the companies are being responsible with respect to human rights policies.[131]

The SRSG's evidence suggested that "not all state structures as a whole appear to have internalised the full meaning of the state duty to protect, and its implications with regard to preventing and punishing abuses by non-state actors, including business."[132] On the other hand, soft law initiatives and corporate self-regulation appear innovative but not systematic.[133] It appears that a gap has opened a space where corporations may exercise a duty with respect to human rights normally reserved to states.[134] The groundwork for the Three-Pillar framework is thus developed nicely—if there is no one silver bullet for the governance of the human rights obligations of business,[135] then it will be necessary to produce a polycentric (multi-layered and intertwined) system of governance. The skeleton of that system is unveiled in the next SRSG report.

C. The 2008 Report[136]

The 2008 Report represents a critical milestone in the development of the governance program proposed by the SRSG. Moving from reconceptualization of governance frame-

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128. *Id.* ¶ 76.
129. *Id.* ¶ 77.
130. *Id.* ¶ 78.
131. *Id.* ¶¶ 79-80. Assurance is also problematic when taking into account suppliers as they are not always required to follow the same policies and practices as the parent company. *Id.* ¶ 80.
132. *Id.* ¶ 86. "Nor do states seem to be taking full advantage of the many legal and policy tools at their disposal to meet their treaty obligations." *Id.*
133. *Id.* "For that to occur, states need to more proactively structure business incentives and disincentives, while accountability practices must be more deeply embedded within market mechanisms themselves." *Id.* ¶ 85.
134. In a crucial paragraph, the SRSG developed this idea and the consequence—multiple jurisdictional basis for regulation:

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

Id. ¶ 87.

135. "The extensive research and consultations conducted for this mandate demonstrate that no single silver bullet can resolve the business and human rights challenge." *Id.* ¶ 88.
136. *SRSG 2008 Report, supra* note 61.

works and empirical research that were at the core of the 2006 and 2007 Reports, the SRSG used the 2008 Report to unveil the Protect-Respect-Remedy governance framework for business and human rights.

The 2008 Report begins with context. The SRSG first acknowledges world-wide gaps in governance, caused by globalization, as the sources of human rights violations. As currently structured, the governance approaches of state and non-state actors produce a permissive atmosphere in which there is little repercussion from authority figures for violation of legal or market norms.[137] This gap exists between economic actors and forces on one side and the societies' capacity to manage adverse consequences on the other.[138]

The SRSG elaborated the Three-Pillar framework against the backdrop of alternative approaches earlier considered and rejected. Among the approaches considered and dismissed, with significant ramifications for the development of the Three-Pillar framework, were those dependent on the production and enforcement of a specific list of human rights affecting businesses.[139] Likewise, rules-based approaches—characteristic of American efforts—were rejected as substantially unworkable. Instead, the SRSG offered a framework for a principles based approach, one that rejected the false necessity and certainty of list and rules based approaches, and centered around three core principles.

1. State Duty to Protect

Corporate culture is a decisive topic that can help determine liability and use market pressures to force companies to act in human rights friendly ways. Policy alignment is important where governments develop or endorse human rights commitments but do nothing to implement them (vertical incoherence), and when various institutions within government cannot work together to fulfill their obligations to protect human rights (horizontal incoherence).[140] Consideration of effective guidance and support at the international level is important as it can help spread effective ideas globally through information

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

138. *SRSG 2008 Report, supra* note 61, ¶ 3.

139. *Id.* The SRSG took the position that businesses affect all areas of human rights and if the list were not all encompassing it would leave out essential areas of human rights that are affected, leaving those specific rights unprotected. *Id.*

> No industry, and no region, has a monopoly on corporate abuses; all have been implicated. Moreover, it is clear that companies can have adverse effects on virtually all internationally recognized rights, not only a relatively narrow range of labor standards or issues related to communities in the proximity of a business operation.

Chatham House Remarks, *supra* note 26.

140. *SRSG 2008 Report, supra* note 61, ¶¶ 33–40. Horizontal incoherence is present at two places, when dealing with host states and with home states. For host states, the problem develops when there are groups within the government trying to attract foreign investment and do not balance the need for foreign investment with an interest in human rights.

sharing about challenges faced and potential solutions to deal with them.[141]

2. Corporate Responsibility to Respect

The hurdle now is to determine which rights companies have the responsibility to bear. Proposals include companies shouldering *specific* responsibilities within all aspects of human rights, in stark contrast to the proposal that companies are responsible for *all* areas of specific human rights.[142] Respecting rights is the baseline responsibility for all companies and simply complying with national laws is not enough. This responsibility is separate from the state duty to protect and there is no primary state and secondary company obligation.[143]

Due diligence is also considered.[144] Its form is that of an entire process including policies,[145] impact assessments,[146] integration,[147] and tracking performance.[148] The SRSG also defines 'Sphere of Influence' and 'Complicity' in this context.[149] Consideration of these elements is essential when determining liability and responsibility for companies.

Complicity includes determining liability and can act hand-in-hand with corporate culture. A company that is complicit in a human rights violation can be held liable, but if a company performs a due diligence analysis, the likelihood of avoiding charges of complicity liability is greater.[150]

3. Access to Remedies

The third pillar ensures that the protection of human rights is carried out. It points out that grievance mechanisms must be effective for the two other pillars to have meaning.[151] Judicial mechanisms are considered, but it is often difficult to realize any remedies from this avenue.[152] Non-judicial mechanisms are considered too. The SRSG was concerned

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141. *Id.* ¶ 44.
142. *Id.* ¶ 51. An idea that would exclude many important aspects of human rights. *Id.*
143. *Id.* Also, doing no harm does not mean that companies can sit back passively and not violate human rights, what is required is a positive act by the company such as standards it must follow to protect human rights. *Id.*
144. *Id.* The scope of due diligence should include not only a company's own activities, but also the relationships connected with them—relationships with governments and other non-state actors. *See* Chatham House Remarks, *supra* note 26.
145. *SRSG 2008 Report, supra* note 61, ¶ 60 (providing detailed guidance in specific areas of human rights policy).
146. *Id.* ¶ 61. Companies must take proactive steps before conducting any activities to determine if there will be any impact on human rights. *Id.* If there will be an effect, companies should refine their plans to avoid or mitigate the human rights harms. *Id.*
147. *Id.* ¶ 62. Companies must integrate the human rights policy they develop into their overall policy. *Id.* They must be integrated into the entire company and not just one department. *Id.*
148. *Id.* ¶ 63. Monitoring and auditing performance is important as it allows companies to track the performance of ongoing developments in human rights policies. *Id.*
149. 'Sphere' refers to the actors and parties surrounding a corporation; and 'influence' refers to two things, impact and leverage. *Id.* ¶ 66.
150. *Id.* ¶ 73.
151. *Id.* ¶ 82. For if the grievance mechanism is ineffective, or even non-existent, there is no incentive for states or companies to protect or respect human rights. *Id.*
152. *Id.* ¶¶ 88–91. Reasons for difficulty in realizing remedies include: poor knowledge of the law by victims, few resources in developing countries to pursue charges, jurisdictional issues, and state matters. *Id.* ¶ 89. Victims usually lack a basis in the law to found a claim, and even if they do bring a

about legitimating such systems and identified certain criteria that must be met to be found credible. This criterion requires the mechanism to be: legitimate, accessible, predictable, equitable, rights-compatible, and transparent.[153] Company-level mechanisms will address issues before they evolve to larger disputes.[154] Companies are permitted to directly provide a grievance mechanism and also be involved in its administration.[155] State-based non-judicial mechanisms are significant as they can hold companies responsible, and if not, can advise and direct victims to aid in obtaining redress.[156]

Gaps in access are considered in this context. Many potential victims do not have access nor do they have knowledge of such mechanisms. A remedy for this involves various institutions, governments and other actors to improve the information flow to potential victims.[157]

D. The 2009 Report[158]

Having unveiled the core principles of the governance framework in the 2008 Report, the SRSG turned to issues of elaboration in the 2009 Report, and specifically focuses on a first cut at operationalizing the Three-Pillar framework. The 2009 Report begins with a consideration of methodologies and structures "to translate the framework into practical guiding principles."[159] For that purpose, states are assumed to act "through appropriate policies, regulation and adjudication."[160] Corporations are assumed to act "with due diligence to avoid infringing the rights of other."[161] And the remedial aspects of the framework are to lead to "greater access by victims to effective remedy, judicial and non-judicial."[162] The 2009 Report provides "an update on steps the Special Representative has taken towards operationalizing the framework, and it addresses of issues related to it that have emerged from ongoing consultations."[163] Context adds to the importance of the Three-Pillar framework. The financial crisis of 2008 underlines the importance of the proposed framework for addressing the worst effects of economic crises on those most vulnerable.[164]

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claim, it might be hindered by political, economic, or legal considerations. *Id.* ¶ 88.

153. *Id.* ¶ 92.
154. *Id.* ¶ 93. The mechanism should focus on a direct or mediated dialogue and there may be problems if the company acts as both defendant and judge. *Id.*
155. *Id.* ¶ 94. This may include the use of external resources, sometimes shared with other companies, such as hotlines, advisory services, and expert mediators; though it can also include external mechanisms. *Id.*
156. *Id.* ¶ 97.
157. *Id.* ¶ 102.
158. *SRSG 2009 Report, supra* note 28.
159. *Id.* ¶ 3.
160. *Id.* ¶ 2.
161. *Id.*
162. *Id.*
163. *Id.* ¶ 6.
164. *Id.* ¶ 10.

> However painful the near-term may be, going forward elements of the business and human rights agenda should become more clearly aligned with the world's overall economic policy . . . Because the business and human rights agenda is tightly connected to these shifts, it both contributes to and gains from a successful transition toward a more inclusive and sustainable model of economic growth.
>
> *Id.*

Operationalization issues are divided among the three core principles of the framework.

1. State Duty to Protect

The 2009 Report was "to provide views and recommendations on strengthening the fulfillment of the state duty to protect against corporate related human rights abuse."[165] The SRSG summarized the pillar's content and identified relevant business-related policy areas relevant to the duty.[166] The SRSG embraces the notion that "Governments are the most appropriate entities to make the difficult decisions required to reconcile different societal needs."[167]

States "have long been aware of the range of measures required of them in relation to abuse by state agents," but have failed to enact the necessary measures to incorporate international law into domestic obligations.[168] The SRSG describes this as broad ranging horizontal and vertical legal and policy incoherence that substantially detracts from the states' duty.[169] The SRSG continuously looks at other policy domains that are closely related to the states' duty to protect including: corporate law, investment and trade agreements, and international cooperation, for the most part with respect to conflict affected areas.[170]

2. Corporate Responsibility to Respect

Companies realize they must comply with laws for their legal license to operate, but some realize that it is not enough to maintain their social license to operate, especially with weak local law.[171] Social license emerges from prevailing social norms which may be just as important as legal norms. Social norms vary, but the one with near universal recognition is the corporate responsibility to respect human rights, or to not infringe on the rights of others.[172]

Companies are required to employ "an ongoing process of human rights due diligence, whereby companies become aware of, prevent, and mitigate adverse human rights impacts."[173] Three essential ranges of factors are necessary for due diligence. These include: the country and local context in which the business activity takes place; what impacts the company's own activities may have within that context, in its capacity as producer, service

165. *Id.* ¶ 12.
166. *Id.*
167. *Id.* ¶ 44.
168. *Id.* ¶ 17.
169. *Id.* ¶¶ 17–18. Vertical incoherence exists when states sign on to human rights obligations but then never implement them. *Id.* ¶ 18. It would normally seem as if there should be some accountability mechanism that requires countries that do adopt any obligations to actually fulfill those obligations without the adopted human rights program simply being viewed as tokenistic. Horizontal incoherence exists when different departments and agencies conduct their operations in isolation and know nothing about the government's obligations. *Id.* This is more difficult to address as it deals with the internal workings of a state government and policy makers. This is a difficult area to consider for operationalizing the framework as it then gets into the area of domestic policy creation which may be seen as an affront to sovereignty.
170. *Id.* ¶ 23.
171. *Id.* ¶ 46.
172. *Id.*
173. *Id.* ¶ 49.

provider, employer and neighbor, and understanding that its presence inevitably will change many pre-existing conditions; and whether and how the company might contribute to abuse through the relationships connected to its activities, such as with business partners, entities in its value chain, other non-state actors, and state agents.[174]

Two issues in understanding this pillar include: demystifying human rights and the understanding of due diligence. The issue is that states have developed human rights concepts for states, and not for companies, thus making it difficult for companies to understand them. As the framework is being used to split the complementary responsibilities of both states and companies, it is difficult to determine where each actor stands in the human rights agenda.[175]

The SRSG considered what is beyond respect. Though the responsibility to respect human rights is a baseline for corporate responsibility, corporations can undertake greater responsibility voluntarily.[176] However, it is still unclear which responsibilities should be attributed to companies. Further, a dilemma exists for companies when national law contradicts and does not offer the same level of protection as international human rights standards.[177]

With respect to due diligence, the SRSG addressed four issues in the context of human rights. The first touched on life cycle issues. The SRSG defined due diligence as "a comprehensive, proactive attempt to uncover human rights risks, actual and potential, over the entire *life cycle* of a project or business activity, with the aim of avoiding and mitigating those risks."[178]

The second set of issues touch on business role and size. The SRSG assumes that all companies should internalize human rights principles, though different methods may be employed.[179] The SRSG continues to explore how different sized businesses can affect human rights due diligence and is working to create an elaboration of it that can apply to all.[180]

Issues of methodology are considered: Should human rights policies be integrated into company conventional monitoring processes or remain free standing?[181] Two principles are critical: (1) companies must realize that human rights demand meaningful engagement with all parties affected within and beyond the company; and (2) oversight of the com-

174. *Id.* ¶ 50. All internationally recognized human rights should be included in the substantive content of the due diligence process known to companies. *Id.* ¶ 52.
175. *Id.* ¶¶ 57-58.
176. *Id.* ¶ 61. What is required from companies is not what is desired from them, though at the same time, if a company does what is desired of them, it does not offset what is required of them. *Id.*
177. *Id.* ¶ 66. National authorities may demand compliance with national law, while stakeholders and the company itself may prefer, due to principle or company policy, adherence to international standards. *Id.*
178. *Id.* ¶ 71. This definition of life cycle is important as the due diligence process will be more accurate and considerate of all factors that may take place over the entire life of a business activity that affects human rights. *Id.*
179. *Id.* ¶ 72. Small and medium sized companies must consider their human rights impacts as well, but the scale and complexity of their due diligence cannot compare with that of a larger company. *Id.* ¶ 74.
180. *Id.* ¶ 76.
181. *Id.* ¶ 77.

pliance method must have direct access to the company's leadership.[182]

The final issues concern liability: Whether companies, by following due diligence requirements, could expose themselves to potential liability by providing other parties with potentially harmful information that they would not otherwise have had.[183] A prudent company will follow the due diligence process outlined by the SRSG, which "encourages robust risk assessment that is . . . highly advisable from a business perspective in today's highly visible and transparent environment."[184] In other words, "done properly, human rights due diligence should create opportunities to mitigate risks and engage meaningfully with stakeholders so that disingenuous lawsuits will find little support beyond the individuals who file them."[185]

3. Access to Remedies

The third pillar is integral to the entire framework as it is used to enforce the other duties and responsibilities. Four segments exist in this pillar when considering the plan for operationalize.

State Obligations

States must take steps to investigate, punish and redress corporate-related abuses of human rights within their jurisdiction.[186] "[T]he State obligation applies to corporate abuse of all applicable human rights, it is unclear how far the individual right to remedy extends to non-State abuses."[187]

Interplay between Judicial and Non-Judicial Mechanisms

These are sometimes viewed as mutually exclusive, but in fact are more interactive, even complementary, reinforcing, sequential, or preventive.[188] Non-judicial mechanisms can be used more expediently than judicial processes and also when no cause for legal action exists. However, each mechanism has its own advantages and disadvantages which must be considered.

Judicial Mechanisms

States' legal systems are not enough to investigate, punish and redress abuses as significant barriers still exist.[189] The SRSG focused on prominent barriers that victims of corporate related human rights abuses face, including: insufficient capacity to deal with complex

182. *Id.* ¶ 79.
183. *Id.* ¶ 80.
184. *Id.* ¶ 81.
185. *Id.* ¶ 83. Additionally, other social actors can determine if a company facing criticism has undertaken a good faith effort to avoid human rights violations, which would limit the harmful effect to which following the due diligence requirements may expose the company. *Id.*
186. *Id.* ¶ 87. Without these steps, the access to remedy would be weak or even meaningless. *Id.*
187. *Id.* ¶ 88.
188. *Id.* ¶ 91.
189. *Id.* ¶ 93.

claims, costs of filing claims, loser pays policies, and receiving judgments.[190] The SRSG is continuing to research and conduct consultations on barriers to judicial remedy, while also looking at possible options to redress them.[191]

Non-judicial Mechanisms

Six grievance mechanism principles were considered from the 2008 Report: legitimacy, accessibility, predictability, equitability, rights-compatibility, and transparency. The newest and seventh principle maintains that the company should use dialogue and mediation instead of the company itself as an adjudicator.

At the company level, grievance mechanisms are an important part of the corporate responsibility to respect. They complement monitoring of human rights compliance and provide a channel for early warning signs.[192] The SRSG has welcomed efforts to develop principles for the operation of such systems by non-state transnational actors.[193] At the national level, National Human Rights Institutions (NHRIs) and the National Contact Points (NCPs) of states that adhere to OECD Guidelines are potentially important avenues for remedies.[194] Governments have not yet given these efforts sufficient support despite treaty obligations that seem to compel more support and institutionalization.[195]

Lastly, at the international level, many "voluntary industry codes, multi-stakeholder initiatives and investor-led standards have established grievance mechanisms."[196] The lack of information about grievance mechanisms is the major barrier to their use. BASESwiki.org was launched to address this issue. Many other proposals are outlined within the report. "[C]reating a single, mandatory, non-judicial but adjudicative mechanism at the international level poses greater difficulty[,]" though an alternate option would be to look at an existing body with international standing that could offer mediation of human rights disputes.[197] Grievance mechanisms serve as the heart of any remedy scheme. "They are essential to ensuring access to remedy for victims of corporate abuse."[198]

190. *Id.* ¶ 94.
191. *Id.* ¶ 98.
192. *Id.* ¶ 100. Companies can even track complaints to identify systemic problems to prevent future harms. *Id.*
193. *Id.* ¶ 101.
194. *Id.* ¶ 102.
195. *Id.* ¶ 104.
196. *Id.* ¶ 106.
197. *Id.* ¶¶ 111–12. Arbitration is also an option that is being given serious consideration. *Id.* ¶ 113.
198. *Id.* ¶ 115.

E. The 2010 Report[199] and the Guiding Principles[200]

The 2010 Report serves to refine the conceptualization of the Protect-Respect-Remedy framework and to provide the foundation for the development of a set of governance principles that will serve as the basis for operationalizing the framework.[201] Reflecting the format of the original mandate, the SRSG first focused on principled pragmatism as the core working method utilized to move closer to operationalizing the Three-Pillar framework.[202] The remainder of the Report distilled the essence of each of the pillars and the linkages between them. This was meant to provide the last official version of the conceptual framework from which the final product of the mandate will be drawn—the guiding principles.

The first part of the Report reminds its readers of the fundamental importance of the notion of "principled pragmatism" to the conceptualization of the mandate,[203] first announced in the 2006 Report.[204] The 2010 Report reminds its readers that principled pragmatism was at the heart of the conclusion of the 2008 Report of the impossibility of finding a unified approach to the issue of business and human rights in the context in which states and corporations occupied different regulatory spaces.[205] "As has been true throughout the mandate, the operationalization phase combines research, consultations and practical experimentation."[206]

The 2010 Report then turns to the state duty to protect. It "describes a portfolio of possible measures by States to promote corporate respect for human rights and prevent corporate-related human rights abuse."[207] These are grouped into

> five priority areas through which States should strive to achieve greater policy coherence and effectiveness as part of their duty to protect: (a) safeguarding their own ability to meet their human rights obligations; (b) considering human rights when they do business with business; (c) fostering corporate cultures respectful of rights at home and abroad; (d) devising innovative policies to guide companies operating in conflict-affected areas; and (e) examining the cross-cutting issue of extraterritorial jurisdiction.[208]

The corporate responsibility to respect is offered as both contrast and supplement to the state duty to protect human rights.[209] Companies have a fundamental responsibility to

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199. U.N. Special Representative to the Secretary-General, *Business and Human Rights: Further Steps Toward the Operationalization of the "Protect, Respect and Remedy" Framework: Rep. of the Special Representative of the Secretary-General of the U.N. on Human Rights and Transnational Corporations and other Business Enterprises, delivered to the Human Rights Council*, U.N. Doc. A/HRC/14/27 (Apr. 9, 2010) (by John Ruggie), *available at* http://www.reports-and-materials.org/Ruggie-report-2010.pdf [hereafter *SRSG 2010 Report*].
200. Press Release, United Nations, Draft Guiding Principles for Business and Human Rights Posted for Consultation (Nov. 22, 2010), *available at* http://198.170.85.29/Press-release-Ruggie-UN-draft-Guiding-Principles-22-Nov-2010.pdf [hereafter Guiding Principles].
201. *Id.*
202. *Id.* ¶¶ 4–15.
203. *Id.*
204. *See SRSG 2006 Report, supra* note 37, ¶ 81.
205. "But, he added, those things must cohere and generate an interactive dynamic of cumulative progress—which the framework is designed to help achieve." *SRSG 2010 Report, supra* note 199, ¶ 5.
206. *Id.* ¶ 7.
207. *Id.* ¶ 17.
208. *Id.* ¶ 19.
209. The SRSG explained in language somewhat more subtlety drawn than in the 2008 Report:

> The term "responsibility" to respect, rather than "duty," is meant to indicate that respecting rights is

comply with the laws of all host states.[210] This obligation exists even in the absence of a government (in which case the company is expected to fill the void).[211] It poses special problems where national law conflicts with international standards, a problem the solution to which remains elusive.[212] But actions that affect human rights may also collaterally affect the ability of a company top comply with law, producing community resistance that may delay otherwise lawfully operating companies.[213] Lastly, blind compliance with local law might expose companies to complicity in state violations of international human rights norms.[214]

The limitations on a company's obligations to comply with local law in all circumstances suggest the key characteristic of the corporate responsibility to respect human rights: Autonomy from both domestic law systems and from the state. The SRSG continues to emphasize that "responsibility exists independently of States' human rights duties. It applies to all companies in all situations."[215] This responsibility is framed by the International Bill of Rights combined with the ILO core Conventions,[216] but not limited to the principles contained therein.[217] Yet the SRSG resists expanding the scope of the responsibility to respect human rights to something more positive.

Lastly, the SRSG focuses on the Remedy pillar, arguably the most conceptually difficult of the three. The difficulty arises from the relationship between Remedy and the distinct source of obligation for human rights that attach to states and to corporations. For the 2010 Report, the SRSG chose process and organization. In connection with process, he focuses "on three types of grievance mechanisms that can provide avenues for remedy: company-level mechanisms and both non-judicial and judicial State-based mechanisms."[218]

Company level remedies are grounded in internal grievance mechanisms. These would be available both for internal problems and also as a method for outside stakehold-

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> not an obligation that current international human rights law generally imposes directly on companies, although elements may be reflected in domestic laws. At the international level, the corporate responsibility to respect is a standard of expected conduct acknowledged in virtually every voluntary and soft-law instrument related to corporate responsibility, and now affirmed by the Council itself.

SRSG 2010 Report, supra note 199, ¶ 55 (citing *SRSG 2008 Report,* supra note 61, ¶¶ 46–48).

210. *Id.* ¶ 66.
211. *Id.* ¶ 67.
212. *Id.* ¶ 68.
213. *Id.* ¶¶ 69–73 ("[H]uman rights are adversely impacted, serious corporate value erosion occurs and disclosure requirements and directors' duties may be breached. Clearly, better internal control systems and oversight are necessary."). *Id.* ¶ 73.
214. "For example, the more than fifty cases brought since 1997 against United States-based and other companies under the Alien Tort Statute have included allegations of complicity in genocide, slavery, extrajudicial killings, torture, crimes against humanity, war crimes and other egregious human rights violations." *Id.* ¶ 75.
215. *Id.* ¶ 57.
216. *Id.* ¶ 60. The International Bill of Rights consists 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.
217. "Depending on circumstances, companies may need to consider additional standards: for instance, they should also take into account international humanitarian law in conflict-affected areas (which pose particular challenges); and standards specific to 'at-risk' or vulnerable groups (for example, indigenous peoples or children) in projects affecting them." *Id.* ¶ 61 (citation omitted).
218. *Id.* ¶ 89.

ers to interact with the company, as a sort of early warning system.[219] To ensure process legitimacy, the SRSG imports traditional *Rechtsstaat* notions in the construction and operation of such systems: "Legitimacy, accessibility, predictability, equitability, rights-compatibility and transparency. A seventh principle specifically for company-level mechanisms is that they should operate through dialogue and engagement rather than the company itself acting as adjudicator."[220] States are also encouraged to create non-formal systems of dispute resolution.[221] The SRSG points to models that might be incorporated into state practice—from the national contact point system under the OECD Guidelines for Multinational Enterprises,[222] to the deployment of national human rights institutions.[223]

The SRSG then considers the appropriate scope of judicial remedies. These touch on a number of substantive issues. Ironically, having embraced the paramount role of the state system, and territorially bounded law-systems in the construction of the first pillar (state duty to protect human rights), the SRSG is confronted with the consequences of that necessary choice in the elaboration of the Remedial Pillar. These include difficulties relating to the consequences of respecting the distinct legal personalities of corporations,[224] the extra-territorial reach of the judicial power,[225] and the problem of prosecutorial resources when poorer states confront investigations on a global scale.[226] Additionally, practical considerations may effectively deny individuals (and states) adequate remedies through the invocation of formal judicial process. "Turning to practical obstacles, three are particularly problematic: costs; bringing representative and aggregated claims; and disincentives to providing legal and related assistance to victims. Their coexistence can make it almost impossible for victims to access effective judicial remedy."[227]

Lastly, the SRSG emphasizes complementarity in the remedial context. State-based formal and informal systems ought to be integrated in some way. [228] Likewise expanded and integrated private grievance mechanisms "can enable companies to increase the reach and reduce the costs of grievance mechanisms."[229] The SRSG notes the importance of collaboration across pillars—between states and companies, and the need to be sensitive to class, culture and context issues in designing remedial structures.[230]

The SRSG then points to the future. He will provide a set of guiding principles in the

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219. *Id.* ¶ 92.
220. *Id.* ¶ 94. The actual construction of such grievance mechanisms is left to the company. *Id.* ¶ 95.
221. "The importance of non-judicial, State-based mechanisms, alongside judicial mechanisms, is often overlooked, as regards both their complaints-handling role and other key functions they can perform, including promoting human rights, offering guidance, building capacity and providing support to companies and stakeholders." *Id.* ¶ 96.
222. *Id.* ¶¶ 98–100 (noting, however, the weaknesses of this system).
223. *Id.* ¶ 97.
224. The SRSG notes both the problem of dealing with corporate groups, *id.* ¶ 105, and parent subsidiary structures. *Id.* ¶ 106.
225. *Id.* ¶ 107
226. *Id.* ¶ 108.
227. *Id.* ¶ 109.
228. "State-based judicial and non-judicial mechanisms should form the foundation of a wider system of remedy for corporate-related human rights abuse." *Id.* ¶ 114.
229. *Id.* ¶ 115.
230. *Id.* ¶¶ 114–15.

2011 Report.[231] "The final report also will present options and recommendations to the Council regarding possible successor initiatives to the mandate."[232] The 2010 Report ends with a warning—all the conceptualization in the world is no substitute for the institutionalization and bureaucratization of the standards developed. In the absence of some sort of institutional structure, the work of the mandate will effectively die on the vine with the publication of the 2011 Guiding Principles.[233]

The Guiding Principles were distributed in draft form on November 22, 2010.[234]

> The Guiding Principles elaborate and clarify for companies, states, and other stakeholders how they can operationalize the UN 'Protect, Respect and Remedy' Framework, by taking practical steps to address business impacts on the human rights of individuals. The UN Human Rights Council had endorsed the Framework unanimously in 2008, and asked Ruggie to provide this additional concrete guidance.[235]

The Guiding Principles were presented as an elaboration of the implications of existing law and normative standards presented "within a single coherent and comprehensive template."[236] However, the Guiding Principles were not meant to be treated merely as a toolkit.[237]

IV. Challenges to the Protect-Respect-Remedy Framework

The SRSG has developed an innovative framework for supra-national governance. Focusing on a distinct governance community—economic actors within the emerging system of economic globalization—the SRSG has elaborated an integrated multi-sector governance framework that recognizes the distinct characteristics of state and non-state actors. Acknowledging the role of the state, the Three-Pillar framework seeks internal harmonization within the domestic legal orders of states while also creating incentives toward multi-state harmonization of legal regimes applied internally. Simultaneously, the Three-Pillar framework acknowledges the reality of non-state governance systems centered on the regulatory community of economic actors. For this regulatory community the SRSG builds a system that is not tied to the state or its law systems but rather grounded in social legitimacy and what might also be understood as disciplinary and culturally embedded tech-

231. *Id.* ¶ 124.
232. *Id.* ¶ 125. "The Special Representative will engage extensively with Member States and others in developing these ideas. Nevertheless, to sustain the momentum the mandate has achieved, he is flagging one recommendation now." *Id.*
233. *Id.* ¶ 126. "Resource constraints limit how much he and his small team have been able to do. However, even those limited efforts will come to a halt once his mandate ends unless an advisory and capacity-building function is anchored firmly within the United Nations." *Id.*
234. U.N. Special Representative of the Secretary-General, *Guiding Principles for the Implementation of the U.N. 'Protect, Respect and Remedy' Framework* (working paper, Nov. 22, 2010) (by John Ruggie), *available at* http://www.reports-and-materials.org/Ruggie-UN-draft-Guiding-Principles-22-Nov-2010.pdf [hereinafter Draft *Guiding Principles*]. A detailed analysis of the Guiding Principles is beyond the scope of this essay, which was prepared well in advance of the presentation of the Guiding Principles in final form. The Guiding Principles will be treated more fully in Larry Catá Backer & Frank Savoia, *Operationalizing the United Nations' "Protect-Respect-Remedy" Project: Opportunities and Challenges in Establishing a Global Human Rights Based Framework for Regulating Transnational Corporations and Other Economic Enterprises* (forthcoming).
235. Guiding Principles, *supra* note 200.
236. Draft *Guiding Principles*, *supra* note 234, ¶ 13.
237. *Id.* ¶ 14.

niques.[238] That essential governance binary then serves as the basis for building a structure of remedial rights and obligations—those of the state grounded in law and an expectation of legal harmonization (internally applied within domestic legal orders), and those of economic actors grounded in private webs of obligation to corporate stakeholders. The three governance approaches—legal, disciplinary, and remedial are intertwined.[239] But innovation presents challenges. This section briefly outlines a number of the most significant challenges that will be encountered as the Protect-Respect-Remedy framework moves from conceptualization to implementation.

A. State Duty to Protect

The first pillar, state duty to protect human rights, provides the foundational legal basis within the domestic legal orders of states for the vindication of international human rights norms. The challenges for the Three-Pillar framework are intimately connected traditional issues of state power—both internally directed to the elaboration of rules that make up its domestic legal order and externally directed to the hierarchy of law among and between states. Four specific issues will likely dominate a large part of the discussion over the scope and nature of the first pillar. The first touches on issues of vertical coherence—the role and authority of international obligations within the domestic legal order of states. The second is directed to issues of internal coordination, what the SRSG refers to as horizontal coherence. The third focuses on the extent to which the state legitimately may project its legal norms (whether harmonized or not to transnational standards) extraterritorially. The last touches on the connections between the character of the substantive standards that constitute the state duty to protect and those that make up the corporate responsibility to protect.

Issues of vertical coherence touch on the nature of the conception of the state and state power within the international system of states. It challenges the traditional notions of national supremacy in matters of law that apply directly to the people of any state without the acquiescence of national legislative power exercised in constitutionally appropriate ways by suggesting the mandatory and direct character of the substantive nature of the supra-national rights to which the state has a duty a protect.[240] The duty to protect is

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

239. The issue of linkages focuses on the extent and nature of these communicative mechanics. *SRSG 2010 Report, supra* note 199.

> Reflecting the format of the original mandate, the SRSG first focused on principled pragmatism as the core working method utilized to move closer to operationalizing the Three Pillar framework. The remainder of the Report distilled the essence of each of the pillars and the linkages between them. This was meant to provide the last official version of the conceptual framework from which the final product of the mandate will be drawn—the guiding principles.

Larry Catá Backer, *A Consideration of John Ruggie's 2010 Report to 14th session of UN Human Rights Council: "Business and Human Rights: Further steps toward the operationalization of the 'protect, respect and remedy' framework,"* LAW AT THE END OF THE DAY (May 1, 2010, 23:30 EST), http://lcbackerblog.blogspot.com/2010/05/consideration-of-john-ruggies-2010.html (citing *SRSG 2010 Report, supra* note 199, ¶¶ 4–15).

240. *See SRSG 2009 Report, supra* note 28.

grounded in international human rights law.[241] It does not derive directly from national law, except to the extent that such national constitutional traditions are compatible with international norms.[242]

These duties have vertical and horizontal dimensions. They apply vertically to govern relations between states and others within national territory. They also apply horizontally to manage the relations among non-state actors within state territory.[243] The SRSG emphasizes that "States are not held responsible for corporate related human rights abuses per se, but may be considered in breach of their obligations where they fail to take appropriate steps to prevent it and to investigate, punish, and redress it when it occurs."[244]

This approach suggests an interesting tension inherent in the first pillar duty to protect. That tension pits the assumption of the supremacy of international law against traditional notions of the supremacy of constitution and constitutional traditions of a state within which international legal obligations must be naturalized. This tension is better understood in two parts. First, the tension can be understood as one touching on the supremacy of international law over incompatible domestic legal measures. The second, and more difficult, tension can be understood as touching on the supremacy of international law (and its human rights obligations) over incompatible provisions of domestic constitutional law. The SRSG would invert the traditional hierarchy of law in both instances to favor a state duty to comply with a now superior obligation of international law. This approach is consistent with recent trends in conceiving the role of international law, especially as embraced by international bodies,[245] but one that is fiercely resisted by important states.[246]

This suggests the possibility that the first pillar duty to protect may be limited in the first instance, in some states, by the duty of state organs to give effect to their constitutions and to vindicate constitutional rights and duties in accordance with traditional interpretations. It also allows for the possibility of discretion in the internal application of international human rights norms by states that see their governments as mediators between the international obligations of states and the internalization of those obligations within their domestic legal orders.[247] It also suggests that those incompatibilities grow when constitu-

241. *Id.* ¶ 13. International law includes two sets of treaty obligations: (1) To refrain from violating a set of enumerated rights of persons within the national territory, and (2) to ensure the enjoyment of such rights by rights holders. *Id.*

242. Together, these provisions of international law "suggest[] that the State duty to protect applies to all recognized rights that private parties are capable of impairing, and to all types of business enterprises." *Id.* See Special Rep. of the Secretary-General, *Summary of Five Multi-Stakeholder Consultations, Addendum: Rep. of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, delivered to the Human Rights Counsel*, U.N. Doc. A/HRC/8/5/Add.1 (Apr. 23, 2008) for a listing of applicable law and commentaries thereof.

243. *See SRSG 2009 Report, supra* note 28, ¶ 18.

244. *Id.* ¶ 14.

245. *See, e.g.*, Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12, ¶¶ 121–48, at 51–60 (Mar. 31).

246. *See, e.g.*, Medellín v. Texas, 522 U.S. 491 (2008).

247. *See, e.g.*, Letter from Daniel Bethlehem QC, Legal Advisor, U.K. Foreign and Commonwealth Office, to John Ruggie, Special Representative on Human Rights and Transnational Corporations and Other Business Enterprises, Office of the High Commissioner for Human Rights (July 9, 2009), *available at* http://www.reports-and-materials.org/UK-Foreign-Office-letter-to-Ruggie-9-Jul-2009.pdf. Mr. Bethlehem conceded a state duty to protect against non-state abuses of specific rights, but only to the

tional orders have rejected one or more human rights instruments of international law or obligations,[248] or have reserved internal application of one or more substantive provisions of treaty obligations otherwise embraced.[249] The result is a substantial challenge to the project of legal harmonization of important substantive norms embraced through the first pillar. The effect may also impact the development of customary international law norms so important to the elaboration of the substantive rules that help frame the second pillar, corporate responsibility to respect human rights. These challenges to traditional conceptions of national power will be difficult to overcome.

Horizontal incoherence will present its own set of challenges. While the SRSG has focused on the technical challenges of horizontal incoherence—urging the establishment of institutional measures that permit greater coordination among regulatory sectors of a government[250]—the constitutional organization of states may present structural barriers as well. In the United States, for example, issues of federalism may limit the power to coordinate, especially where one of the organs of state power is reluctant to accede.[251] Even in the absence of structural and constitutional barriers to horizontal legal coherence, the technical issues surrounding administrative coordination remain a significant barrier to the realization of a state's duty to protect human rights. Horizontal incoherence is especially troublesome with respect to the regulation of corporations within domestic legal orders.[252]

While issues of horizontal incoherence present difficulties in the internalization of coordinated compliance with a state's first pillar duties, issues of extraterritorial application of domestic law present issues of coordination between states.[253] The issue of extraterritoriality derives in part from significant differences in the ability or willingness of states to comply with first pillar duties. The idea is that where states are unwilling or unable to comply, those states with some measure of regulatory control of non-state actors engaging in activity outside of the national borders might substitute their regulatory power for that of the host state. Extraterritoriality is therefore a sort of gap filler, grounded on an assumption that all states serve as agents of the international norms to which they all equally

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extent that a particular treaty so provides. *Id.* "The scope of those duties will depend primarily on the wording of the treaty provision in question and their proper interpretation." *Id.*

248. The United States, for example, has declined to ratify the International Covenant for Economic, Social, and Cultural Rights. G.A. Res. 2200A (XXI), U.N. Doc. A/6313 (Dec. 16, 1966), *available at* http://www2.ohchr.org/english/law/cescr.htm [hereinafter *CESCR*]. This is usually grounded in the application of the superior provisions of domestic constitutional law. *Cf.* Philip Alston, *U.S. Ratification of the Covenant on Economic, Social and Cultural Rights: the Need for an Entirely New Strategy*, 84 AM. J. INT'L L. 365 (1990).
249. *See, e.g.*, Chinese Reservations concerning *CESCR*, *supra* note 248 ("The application of Article 8.1 (a) of the Covenant to the People's Republic of China shall be consistent with the relevant provisions of the *Constitution of the People's Republic of China, Trade Union Law of the People's Republic of China* and *Labor Law of the People's Republic of China*[.]").
250. *SRSG 2009 Report*, *supra* note 28, ¶¶ 17–19.
251. *See, e.g.*, *Medellín*, 522 U.S. at 491.
252. *See, e.g.*, Larry Catá Backer, *Using Corporate Law to Encourage Respect for Human Rights in Economic Transactions: Considering the November 2009 Summary Report on Corporate Law and Human Rights Under the UN SRSG Mandate*, LAW AT THE END OF THE DAY (Jan. 4, 2010, 21:23 EST), http://lcbackerblog.blogspot.com/2010/01/using-corporate-law-to-encourage.html.
253. *See SRSG 2009 Report*, *supra* note 28, ¶¶ 15–16.

share an obligation to apply in equivalent measure.[254] However, the SRSG has noted that the issue of the extraterritorial legislation lawfulness remains unsettled as a matter of international law.[255]

The SRSG suggests that there are "strong policy reasons for home States to encourage their companies to respect rights abroad."[256] But such encouragement may also provoke strong negative reactions. Thus, the extraterritorial application of home state law can be characterized as a means of imposing hierarchical power relationships among states that essentially mimic the colonial relationships of the 19th century. When these projections are directed into states with a history of colonial rule, sensitivities might make these projections not just unpopular but also unlawful within the host state. As a consequence, states with weaker authority might be encouraged to subvert or resist first pillar duties for fear that it might serve as a means of subverting what there is of national legal authority. The SRSG suggests that these problems have been ameliorated by the internationalization of law—effectively harmonizing legal obligations and thus reducing the effect of projections of national power abroad[257]—and through the harmonizing effects of soft-law regimes.[258] Yet that ameliorative effect remains to be realized.

Issues of neo-colonialism also mark the challenge posed by the coordination of first and second pillar obligations. Recent application of international standards directly applicable to economic actors has suggested both the autonomy of the substantive norms applicable to such actors, the heart of the second pillar notion of corporate responsibility, and its application even in the face of compliance with all legal requirements imposed by a host state.[259] This raises the possibility that economic entities subject both the legal obligations of host state (through domestic law), home states (through the extraterritorial application of home state law) and international norms may find themselves unable to comply with all of them. Where emerging understanding of legal hierarchies suggest that international norms are superior to the norms of states (even within their own territories), the traditional authority of states is challenged. In those cases where the challenge applies to states that had been subject to colonial or quasi-colonial control, the result may be a substantial resistance to the imposition of such norms.[260] The SRSG suggests programs of legal and policy harmonization at the supranational level with "trickle down effects" to mitigate the problem. Harmonization from public transnational bodies will produce increasingly influential soft-law systems. The SRSG also noted the increasing importance of soft law ef-

254. 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." *Id.* ¶ 16.
255. *Id.* ¶ 15.
256. *Id.* ¶ 16.
257. *See id.* ¶ 20
258. *See id.* ¶ 21.
259. *See generally* Final Statement, *supra* note 21.
260. For a discussion in the context of the application of international norms to the activities of a United Kingdom parent corporation with respect to the activities of its subsidiary in India, see Larry Catá Backer, *Part II: The OECD, Vedanta, & the Indian Supreme Court—Polycentricity, Transnational Corporate Governance and John Ruggie's Protect/Respect Framework*, LAW AT THE END OF THE DAY (Nov. 3, 2009, 14:54 EST), http://lcbackerblog.blogspot.com/2009/11/part-ii-oecd-vedanta-indian-supreme.html.

forts in the construction of legal harmonization policy approaches. Benchmarking organizations and standards, and the commensurate official assistance, are said to encourage the adoption of corporate social responsibility policies that may produce legally cognizable effects.[261] These approaches might provide a normative foundation for state action. More likely, they may serve as links between the first pillar duties of states and the second pillar responsibilities of corporations. To that extent, building such links may go more successfully toward reducing regulatory incoherence between the first and second pillar than between or within states' legal systems.

B. Corporate Responsibility to Respect

The corporate responsibility to respect human rights is both the most innovative and the most difficult portion of the Protect-Respect-Remedy framework. As such, it will likely serve as the site of greatest challenge for the operationalization of the framework. The SRSG has sought to explore some of these challenges directly through global consultation, begun late in 2009, through an online forum.[262] These consultations are divided amongst foundation issues, questions relating to human rights due diligence, issues that arise on the elaboration of second pillar responsibilities, issues of implementation, and issues of gender, supply chain, finance and indigenous people. The greatest challenges posed by the second pillar cluster around its polycentricity, touching on the potential ramifications of the very construction of an autonomous system of corporate authority beyond the state and state regulatory structures.[263] These extend issues of multiple simultaneous governance from the coordinated hierarchy of public law based federal states and international multi-level organizations, like the European Union,[264] to multi-level governance systems that amalgamate public and private actors.[265]

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261. *See SRSG 2009 Report, supra* note 28, ¶ 21.

262. *The Corporate Responsibility to Respect Human Rights Online Forum*, SRSG CONSULTATION, http://www.srsgconsultation.org/ (last visited July 10, 2010).

> The forum is currently focused on the corporate responsibility to respect human rights, the second pillar of the framework. The forum is divided into sections, each of which contains multiple topics with space for discussion and comment. These topics will remain in place through February 2010, although the SRSG may amend them in response to how the discussion proceeds.

Press Release, Special Representative of the Secretary-General, New Online Forum for U.N. Business and Human Rights Mandate (Dec. 1, 2009), http://198.170.85.29/Ruggie-online-forum-launch-1-Dec-2009.pdf. The Online Forum was available from December 2009 through February 2010.

263. *See* Backer & Savoia, *supra* note 234.

264. There are overtones of changes in public law governance involving governance layers of state and international actors that, for example, character the European Union. This requires an effort to

> conceptualise the emerging field of European spatial policy discourse as an attempt to produce a new framework of spatialities—of regions within member states, transnational megaregions, and the EU as a spatial entity—which disrupts the traditional territorial order, and destabilises spatialities within European member states. The new transnational orientation creates new territories of control, expressed through the new transnational spatial vision of polycentricity and mobility.

OLE B. JENSEN & TIM RICHARDSON, MAKING EUROPEAN SPACE: MOBILITY, POWER AND TERRITORIAL IDENTITY 44 (2004).

265. *See, e.g.*, 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

Fundamentally, the content of the corporate responsibility pillar embodies the conceptual core of what separates the state duty to protect human rights from the corporate responsibility to respect human rights. However, that difference also highlights the difficulties of elaborating a polycentric governance system. Within the context of governance, the concept of a state duty to protect human rights is entirely understandable. The relationship between state, corporation and law is both conventional and well defined. States are believed to be the legitimate source of binding rules, which when enacted can impose corporate obligations that can produce considerable consequences. Just as important, those legal obligations were bounded both by rule of law limits and commonly embraced notions of legal effects mediated solely through the domestic legal orders of host or home states. Most importantly, corporations are stakeholders in markets for law.[266]

On the other hand, the second pillar corporate responsibility to respect appears to source the connection between entity and duty outside of the state and its domestic legal order. The responsibility to respect arises from what was previously considered an imprecise set of social obligations to which a number of norms would be appended after being derived from legal instruments not yet directly applied to corporations, in addition to other instruments with no precise legal effect. These will form the heart of a governance regime based on social order that will exist simultaneously with traditional law based governance orders derived from states' political authority.

This may appear to be too far a leap for traditionalists. Rules grounded in political legitimacy are understood as requiring obedience though the same has not been true of social license rules. Their force is felt but the rules of economics and self-interest have generally not been actionable before the courts of any state. The shift from a single governance center to multiple simultaneous centers with obligations derived from the application of different processes and with different effects, serving different but overlapping constituencies, can be unnerving. This is true even if none of the rules require substantial changes to corporate behavior or culture. For some, the preferred course may well entail a rejection of an autonomous source for any corporate responsibility to respect human rights that is not filtered through and managed by the state.

Yet for all that, the idea that states are the sole source of law has long been discredited, and it has a long history that goes back to the origins of modern systems of law in Europe.[267] Governance beyond law codes has been accepted as a vital foundation of administrative states since the early 20th century. Administrative regulation, monitoring, privatization of enforcement, and devolution of regulatory function is widely practiced;[268] the use of social markers in regulation has become a matter-of-fact-basis of governance even at the state level.[269] Polycentric governance, from its mildest forms in federalism to its most com-

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BEYOND: PATTERNS OF SUPRANATIONAL AND TRANSNATIONAL JURIDIFICATION 261 (Rainer Nickel ed., 2009).

266. They may lobby government, aid in the election of lawmakers and judges involved in the law making process, and seek to influence the electorate about the nature and scope of applicable law.

267. *See, e.g.*, PAOLO GROSSI & ARNO DAL RI J , MITOLOGÍAS JURÍDICAS DA MODERNIDADE (2004).

268. R.B. Hall & T.J. Biersteker, *The Emergence of Private Authority in the International System*, *in* THE EMERGENCE OF PRIVATE AUTHORITY IN GLOBAL GOVERNANCE (R.B. Hall & T.J. Biersteker eds., 2002).

269. The use of markers range from the family as a governance unit to religious and social communities. *See, e.g.*, MARY ANN GLENDON, THE TRANSFORMATION OF FAMILY LAW: STATE, LAW, AND FAMILY IN THE UNITED STATES AND WESTERN EUROPE (1989) (discussing family status and social class).

plex forms in public-private soft law regimes, is now established well enough that it is neither new nor frightening.[270] Still, this great gap in vision—between the conventional state-centered ideas of corporations as dependent subsidiary entities owned or managed by states (leaving only the question of a division of authority to govern) and the SRSG's idea of multiple sources of governance authority simultaneously exercised in contextually centered ways—will consume a substantial amount of discussion before it is accepted and implemented in any efficient form.

Polycentricity also produces tensions when governance systems communicate across their borders. Two particularly troublesome convergences, at least for the elaboration of the Three-Pillar framework, involve first the development of complicity norms and second the obligation to monitor and disclose as the functional heart of the second pillar responsibility to respect. Both exist separately but intertwine. In that intertwining some tensions might arise in the operationalization of any human rights governance system centered on an autonomous corporate normative governance system. This is briefly considered below.

The connection between the scope of the responsibility to protect and complicity is complicated by complexity in the meaning and application of complicity as both a legal and a social-norm concept. The legal basis of complicity remains unsettled as a matter of transnational law.[271] "Corporate complicity" is a relatively new concept. Although it has echoes in the law of accomplices in criminal law, those active in the area of business and human rights are seeking to describe what "corporate complicity" means in terms of legal policy, good business practices, and in different branches of the law. However, there remains considerable confusion and uncertainty about when a company should be considered to be complicit in human rights violations committed by others.[272] But complicity also carries

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270. *See* Elinor Ostrom, *Vulnerability and Polycentric Governance Systems*, NEWSL. INT'L HUM. DIMENSIONS PROGRAMME ON GLOBAL ENVIRONMENTAL CHANGE (International Human Dimensions Programme on Global Environmental Change, Bonn, Ger.), 2001, Nr. 3, *available at* http://www.ihdp.unibonn.de/html/publications/update/update01_03/IHDPUpdate01_03_ostrom.html. *See also* Larry Catá Backer, *Governance Without Government: A Preliminary Overview*, LAW AT THE END OF THE DAY (June 16, 2009, 23:15 EST), http://lcbackerblog.blogspot.com/2009/06/governance-without-government.html.

271. "The relationships dimension is linked to the topic of complicity, the legal meaning of which has been spelled out most clearly in the area of aiding and abetting international crimes, i.e., knowingly providing practical assistance or encouragement that has a substantial effect on the commission of a crime." Posting of the United Nations Special Representative of the Secretary-General on Business & Human Rights to the SRSG Consultation Online Forum, http://www.srsgconsultation.org/index.php/main/discussion?discussion_id=4; *SRSG 2008 Report, supra* note 61, ¶¶ 73-81.

272. *See* Ian Binnie, *Legal Redress for Corporate Participation in International Human Rights Abuses: A Progress Report*, 38 THE BRIEF 44, 47-48 (2009) (Justice Ian Binnie has been a member of the Supreme Court of Canada since 1998); Chimène Keitner, *Conceptualizing Complicity in Alien Tort Cases*, 60 HASTINGS L.J. 61 (2008); Andrew Clapham & Scott Jerbi, Speech at the U.N., in New York (March 21-22, 2001) (discussing categories of corporate complicity in human rights abuses). Justice Binnie suggested the reason for the confusion in the generality of the concept. *Id.* He suggested a possible useful effort at clarity in a recent International Court of Justice report that offered what he described as a three-part definition of complicity as applied to corporations:

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

with it a social meaning that is applied beyond the narrow legal definitions incorporated with state law codes.

> Just as the concept of impunity in the sphere of human rights has taken on a meaning so much more multi-faceted, sophisticated and colorful than the strict historical legal meaning of impunity, in the context of business and human rights, the concept of complicity is now used in a much richer, deeper and broader fashion than before.[273]

Legal standards apply to complicity where it is substantially contextualized, which is what the SRSG sought to generalize through the second pillar. For that purpose, framing "the potential culpability of companies in terms of specific forms of criminal liability widely recognized as a matter of international law, namely, aiding and abetting liability, joint criminal enterprise liability, and the doctrine of superior responsibility" critically reduces ambiguity.[274]

The SRSG focused his analysis on the aiding and abetting concepts of complicity.[275] This requires knowledge, the provision of practical assistance or encouragement, and the production of a substantial effect.[276] This legal standard is based in a harmonizing view of international criminal standards.[277] Yet the SRSG suggests that complicity has a social meaning as a well as a legal meaning. This governance polycentricity, contextually oriented, parallels the basic three-pillar structure of the Protect-Respect-Remedy framework. Just as a corporation has a duty to comply with state law, the corporation has an independent responsibility to respect.[278]

> In non-legal contexts, corporate complicity has become an important benchmark for social actors, including public and private investors, the Global Compact, campaigning organizations, and companies themselves. . . . In this context, allegations of complicity have included indirect violations of the broad spectrum of human rights—political, civil, economic, social, and cultural.[279]

> (ii) Exacerbates the specific abuses, . . . or
>
> (iii) Facilitates the specific abuses, meaning that the company's conduct makes it easier to carry out the abuses or changes the way the abuses are carried out, including the methods used, the timing or their efficiency.
>
> Second, the company or its employees actively wish to enable, exacerbate or facilitate the gross human rights abuses or, even without desiring such an outcome, they know or should know from all the circumstances, of the risk that their conduct will contribute to the human rights abuses, or are willfully blind to that risk.
>
> Third, the company or its employees are proximate to the principal perpetrator of the gross human rights abuses or the victim of the abuses either because of geographic closeness, or because of the duration, frequency, intensity and/or nature of the connection, interactions of business transactions concerned.

Id.

273. *See* 1 INTERNATIONAL COMMISSION OF JURISTS, REPORT OF THE ICJ EXPERT LEGAL PANEL ON CORPORATE COMPLICITY IN INTERNATIONAL CRIMES 3 (2008), *available at* http://www.icj.org/default.asp?nodeID=349&sessID=&langage=1&myPage=Legal_Documentation&id=22851.
274. Binnie, *supra* note 272.
275. *SRSG 2008 Report, supra* note 61, ¶ 74.
276. *Id.*
277. *See id.* ¶¶ 77, 79–80.
278. This independent responsibility is grounded in its ability to maintain its social license. *See, e.g., SRSG 2008 Report, supra* note 61.
279. *Id.* ¶ 75.

But social liability may not cover the same ground as legal liability: "[D]eriving a benefit from a human rights abuse is not likely on its own to bring legal liability. Nevertheless, benefiting from abuses may carry negative implications for companies in the public perception."[280]

The SRSG introduces a set of factors for avoiding legal/non-legal complicity.[281] One of the objectives is to make a stronger case for ordinary course due diligence. "In short, the relationship between complicity and due diligence is clear and compelling: Companies can avoid complicity by employing the due diligence processes described above—which, as noted, apply not only to their own activities but also to the relationships connected with them."[282] But this sort of due diligence raises a dilemma.[283] The SRSG uses "due diligence" not in the transactional sense of research undertaken before entering into a specific deal, but in its broader traditional meaning: "The diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or discharge an obligation."[284] On the one hand, the practice of due diligence is well understood by corporations. These entities have perfected all manner of internal control systems, the object being to harvest critical information in a timely manner to permit the company to avoid liability, anticipate problems and meet them before they produce significant disruption. On the other hand, companies are loath to harvest information for the benefit of third parties who would use this information in actions against the company. From the corporate perspectives, such activities would not serve the corporate interest. Sherman and Lehr suggest that the benefits of such systems for anticipating and ameliorating liability producing practices outweighs the risks of exposure to litigation. Moreover, a well maintained due diligence system ought to serve to limit the magnitude of the risk of exposure.[285] It is when human rights due diligence is considered in the context of external assessment and disclosure that corporate misgivings are at their greatest. In these contexts, human rights due diligence no longer functions merely as a mechanics of internal controls. Instead, it assumes a new role, as a basis for independent monitoring from corporate outsiders. In this context, resistance to due diligence as a form of operationalization becomes most problematic. The intensity of the resulting resistance only increases as the stakes grow—no more so than when issues of corporate complicity in state based violations of human rights is the issue.

The only use for merging legal and social standards for complicity is to advance the position that favors adopting a broader set of internal monitoring procedures as an integral part of corporate operations. The structure of the framework better effectuates a clear separation between legal standards for complicity and social standards, and for the development of linkages between legal and social complicity standards. This would serve to strengthen the core concepts that distinguish the state duty to protect from the corporate responsibility to respect. The latter is grounded in social norms that elaborate a broader

280. *Id.* ¶ 78.
281. *Id.* ¶¶ 77–81.
282. *Id.* ¶ 81.
283. *See generally* John F. Sherman III & Amy K. Lehr, *Human Rights Due Diligence, Is It Too Risky?*, THE CSR JOURNAL, Jan. 2010, at 6.
284. *SRSG 2008 Report, supra* note 61, ¶ 25 n.22 (citation omitted).
285. *See* Sherman & Lehr, *supra* note 283.

set of standards than those recognized under the legal framework that defines the state duty to protect.

One senses this difference in the way in which standards, such as those in the OECD's Risk Awareness Tools, are framed.[286] There is little reason to attach social standards for complicity to legal standards. A related but distinct development might benefit the overall goals of the framework more. This suggests both a potential conceptual ambiguity in the elaboration of a complicity concept within the framework, and the utility of complicity in strengthening the framework.

More importantly, complicity analysis is useful beyond its substantive implications. It also highlights the links between all pillars of the framework.[287] Complicity invokes issues of the state duty to protect, the autonomous responsibility of the corporation to respect, and the provision for the access to remedies for state and entity complicity violations. Scope issues implicate not merely context but also linkages, especially within the context of complicity. In this sense, at least, complicity and human rights due diligence suggests both the complexity and difficulties of framing an operating system grounded both in multiple sources of governance and overlaps. In the absence of effective systemic communication between systems and a clarity in the effect of resort to use of particular mechanisms across normative governance systems, complexity may overwhelm the system.

C. Obligation to Remedy

The obligation to provide a remedy is likely the most functional of the three pillars. While the first two pillars lay a conceptual foundation for the sources of behavior, their content, and those entities obligated under either, the third pillar remedial obligation applies to both corporations and states. Yet that application may apply distinctly to both. Furthermore, the actual scope and effect of such application may be dependent on the substantive rule system under which a right to a remedy arises. For the SRSG, grievance mechanisms serve as the heart of any remedy scheme. "They are essential to ensuring access to remedy for victims of corporate abuse."[288] Again, the distinction between states as law-system organs and corporations as social-system organs drives the analysis. States enforce through the elaboration of laws and standards enforced through its courts. Corporations enforce through the elaboration of governance systems that are grounded in surveillance and non-judicial remedies.[289] "But too many barriers exist to accessing judicial remedy, and too few non-judicial mechanisms meet the minimum principles of effectiveness."[290]

The remedial right actually embraces several separable aspects—a state obligation to

286. ORGANISATIONS FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, OECD RISK AWARENESS TOOL FOR MULTINATIONAL ENTERPRISES IN WEAK GOVERNANCE ZONES, § 6 (2006), http://www.oecd.org/dataoecd/26/21/36885821.pdf.

287. *See* Larry Catá Backer, *Business and Human Rights Part II—Thoughts on the Corporate Responsibility to Respect Human Rights*, LAW AT THE END OF THE DAY (Feb. 2, 2010, 22:12 EST), http://lcbackerblog.blogspot.com/2010/02/business-and-human-rights-part-ii.html.

288. *SRSG 2009 Report, supra* note 28, ¶ 115.

289. *Id.*

290. *Id.*

provide formal remedies through its judicial system, the state obligation to make available effective non-judicial remedies, the corporate obligation to provide grievance mechanisms that complement its own autonomous obligations to respect human rights to inside stakeholders (for example, employees) as well as to outside stakeholders (for example, communities affected by corporate activity), and international grievance and mediation mechanisms operated through international public and private bodies. The great tension here is the possibility that the pieces, so necessary in their own rights, will without adequate coordination produce remedial anarchy. A system whose remedies produce self-contradiction, complexity, and inconsistency will be substantially weakened.

Consider the overlap inherent in the proposed remedial system. States are required to take steps to investigate, punish and redress corporate-related abuses of human rights within their jurisdiction.[291] "[T]he State obligation applies to corporate abuse of all applicable human rights, it is unclear how far the individual right to remedy extends to non-State abuses."[292] For this purpose both judicial and non-judicial mechanisms are contemplated. The SRSG agrees with the conventional wisdom that judicial remedies are substantially effectively inadequate in many cases.[293] To fill the gap, non-judicial mechanisms are suggested. The relationship between these and judicial mechanisms remain to be fully explored. The model, however, is that of adjunct mediation now increasingly a part of dispute resolution in the United States, among other models.[294] These two mechanisms are sometimes thought of as mutually exclusive, but in fact, they are more interactive, even complementary, reinforcing, sequential, or preventive.[295]

At the company level, effective grievance mechanisms play an important part in the corporate responsibility to respect. They complement monitoring of human rights compliance and provide a channel for early warning signs.[296] In this sense they are closely linked to the human rights due diligence at the heart of the operational aspects of the second pillar responsibility to respect. These grievance mechanisms are meant to provide a flexible mechanism for providing some avenue for resolving disputes. They are meant to be contextually driven and operated by enterprises, civil society organizations and international organizations as well.[297] Due to the informal character of the relief envisioned and flexibility emphasized, issues of coordination do not arise. Here, the tension between system legitimacy and individual needs is acknowledged.[298] As well, the tensions between remedial

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291. *Id.* ¶ 87.
292. *Id.* ¶ 88.
293. *Id.* ¶¶ 93-98.
294. *See, e.g.*, Carrie Menkel-Meadow, *When Litigation is not the Only Way: Consensus Building and Mediation as Public Interest Lawyering*, 10 WASH. U. J.L. & POL'Y 37 (2002).
295. *SRSG 2009 Report, supra* note 28, ¶ 91. The SRSG argues, in line with a substantial amount of research and academic opinion, that non-judicial mechanisms can be used earlier and faster than judicial processes and where there is no cause for legal action. *Id.* But each mechanism has its own advantages and disadvantages which must be considered in the wide range of options based on needs and circumstances. *Id.*
296. *Id.* ¶ 100.
297. *Id.* ¶ 106. At the international level, many "voluntary industry codes, multi-stakeholder initiatives and investor-led standards have established grievance mechanisms[.]" *Id.*
298. *Id.* ¶ 104. To ensure credibility, flexibility should be limited by certain performance criteria outlined by the SRSG. *Id.*

functionality and the coordination of first and second pillar obligations remains under-theorized. The SRSG, for example, has acknowledged that even at this early stage governments have not given these efforts sufficient support, despite treaty obligations that appear to compel a greater level of support and institutionalization.[299] But the problem remains: Is it possible to provide the necessary coordination among remedial measures to enhance the power of remedy for individuals and the certainty and predictability necessary to ensure buy-in by states and economic entities? Polycentricity and the necessity of contextually driven flexibility in the form of remedy complicate the ability to produce a coordinated remedial structure. Yet its absence may well make effective access to justice difficult for individuals and economic entities alike. Lastly, these issues will also affect the fundamental character of this pillar. For the moment it is not clear whether the third pillar is merely the dependent on the substantive elaborations of the first and second pillars, or whether the third pillar serves as an independent source of substantive standards. It would seem that the latter approach is more in keeping with the work of the SRSG. But the temptation to reduce the third pillar to a set of mechanics is still strong.

V. Conclusion

Robert Davies nicely expressed a notion increasingly embraced, one that challenges the idea that "there is any such thing as 'values-free' business," and asserts "that all business and business leaders—for good or ill—are engaged in processes which underpin values in human behaviour. Business cannot divorce itself from its economic and social context, taking the privileged protection of corporate laws, yet not expecting to meet social expectations."[300] The Three-Pillar project provides an important step in the operationalization of these ideas. We move here from vague notions of corporate social responsibility applied in an ad hoc basis by individual corporate and state actors to the elaboration of a multi-level system of polycentric governance. The process from conception to elaboration has been complicated by the need to challenge the basis for conventional governance—one grounded in the idea of the singularity of the state. The SRSG has proposed a set of principles for the governance of economic actors operating within and beyond the state that is grounded on both public and private power. The coordination of these two sources of authority, and their development of systems of behavior control will be the great challenge for the emerging system of economic globalization in the coming decades.

299. *Id.*

300. Robert Davies, *The Business Community: Social Responsibility and Corporate Values, in* MAKING GLOBALIZATION GOOD, *supra* note 2, at 301.