

ARTICLE

MOVING FORWARD THE UN GUIDING PRINCIPLES FOR BUSINESS AND HUMAN RIGHTS: BETWEEN ENTERPRISE SOCIAL NORM, STATE DOMESTIC LEGAL ORDERS, AND THE TREATY LAW THAT MIGHT BIND THEM ALL

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INTRODUCTION

A. Summary Overview

From its inception, the Guiding Principles for Business and Human Rights (“GPs”)¹ have occupied a contentious and dynamic space.² It has become a widely accepted framework for managing the behaviors of business activities that may impact human rights.³ But it has also become either a gateway or an obstacle in a long battle about the production of international law and national legal regulation of the

1. U.N. Office of the High Commissioner of Human Rights [OHCHR], Guiding Principles on Business and Human Rights HR/PUB/11/04 (2011) [hereinafter Guiding Principles].

2. See, e.g., David Weissbrodt, *Business and Human Rights*, 74 U. CIN. L. REV. 55 (2005); David Weissbrodt, *Human Rights Standards Concerning Transnational Corporations and Other Business Entities*, 23 MINN. J. INT’L L. 135 (2014); John G. Ruggie, *Business and Human Rights: The Evolving Agenda*, 101 AM. J. INT’L L. 819 (2007); Rachel J. Anderson, *Reimagining Human Rights Law: Toward Global Regulation of Transnational Corporations*, 88 DENV. U. L. REV. 183 (2010).

3. I noted elsewhere:

During the transformation—from study, to normative framework, to Guiding Principles—important international human rights actors have also endorsed the approach. The European Union leadership has endorsed the framework. It is being incorporated into other soft law systems as a basis for interpretation, from that of the OECD Guidelines for Multinational Enterprises, to the corporate social responsibility frameworks of the International Organization for Standardization. Norway will “continue to support the Special Representative’s work both politically and financially.” The SRSG has begun to compile a list of examples of influential people and organizations that have applied the “Protect, Respect and Remedy” Framework.

Larry Catá Backer, *From Institutional Misalignments To Socially Sustainable Governance: The Guiding Principles For The Implementation Of The United Nations’ “Protect, Respect And Remedy” And The Construction Of Inter-Systemic Global Governance*, 25 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 69, 78-79 (2012). See generally, Human Rights Council Res. 17/4, Rep. of the Hum. Rts. Council, 17th Sess., June 16, 2011, U.N. Doc. A/HRC/RES/17/4 (July 6, 2011); Special Rep. of the Sec’y Gen., Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework, Hum. Rts. Council, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011).

activities of business enterprises.⁴ And it has been criticized for a lack of focus on the importance of domestic legal orders in the management of the human rights obligations of enterprises,⁵ or with respect to accountability.⁶ This Article considers the issues emerging from the front lines of these battlegrounds: (1) the conceptualization of the state duty to protect human rights through the framing of national action plans,⁷ (2) the operationalization of the corporate responsibility to respect human rights through the framing of societally constituted reporting and assessment programs,⁸ and (3) the re-invention of the GP project as an expression of two dimensional internationalized state power and its challenge to the GP's three dimensional project.⁹

This Article first examines the way states might approach their obligations to protect human rights as elaborated most recently in the GPs. Using the framework of National Action Plans ("NAPs") recently encouraged by the UN Working Group on the issue of human rights and transnational corporations and other business enterprises,¹⁰ the section suggests that these plans, and the approach undertaken by many states to implement the GPs may be misdirected.

This Article then turns to a consideration of the equally thorny issue of enterprise approaches to their obligations to respect human

4. See, e.g., Jean-Marie Kamatali, *The New Guiding Principles on Business and Human Rights' Contribution In Ending The Divisive Debate Over Human Rights Responsibilities of Companies: Is It Time For an ICJ Advisory Opinion?*, 20 CARDOZO J. INT'L & COMP. L. 437 (2012) (arguing that "while the work of the SRSG has made a significant contribution to the debate surrounding human rights violations by transnational corporations and other business enterprises, it has done little to offer an authoritative global standard solution to the long-standing and deeply divisive debate over the human rights responsibilities of companies."); Larissa van den Herik & Jernej Letnar Cernic, *Regulating Corporations Under International Law: From Human Rights to International Criminal Law and Back Again*, 8 J. INT'L CRIM. JUST. 725 (2010). These pick up strands of an older set of arguments. See, e.g., Paul Redmond, *Transnational Enterprise and Human Rights: Options for Standard Setting and Compliance*, 37 INT'L LAW 69 (2003).

5. See, e.g., Jernej Letnar Cernic, *Two Steps Forward, One Step Back: The 2010 Report by the UN Special Representative on Business and Human Rights*, 11 GERMAN L.J. 1264 (2010).

6. See Jena Martin Amerson, *'The End of the Beginning?': A Comprehensive Look at the U.N.'s Business and Human Rights Agenda From a Bystander Perspective*, 17 FORDHAM J. CORP. & FIN. L. 871 (2012).

7. *Infra* Part II.

8. *Infra* Part III

9. *Infra* notes 292-300 and accompanying text.

10. UN Working Group on the issue of human rights and transnational corporations and other business enterprises, National Action Plans, available at <http://www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx> (last visited Feb. 10, 2015).

rights under the GPs. Two are examined more closely: (1) the Human Rights Reporting and Assurance Frameworks Initiative (RAFI) Project, and (2) the World Federation of Exchanges' (WFE) new sustainability working group to consider an Investor Listing Standards Proposal. Both are promising yet might be modified to better operationalize the corporate responsibility to respect human rights.

The Conclusion turns to the effect of a move to supplement or supplant the GPs with a treaty framework. Yet, if the NAP framework and the RAFI/WFE processes can be most usefully understood as mapping projects preliminary to the hard substantive work of constructing rule of law norms in the legal and societal spheres, then the current treaty making effort represents both a culmination of the GP process and an effort to return to the state of things before the GP process started. That contradiction requires resolution.

This Article proposes a way in which the move toward treaty making may be integrated with the GPs state duty to protect and the discipline of NAPs and may help to frame interactions with the corporate responsibility. The current efforts to develop a treaty for business and human rights, then, might be most usefully understood and applied in this light—to use the treaty machinery to construct a well-integrated, long term, and ultimately comprehensive rule of law system for business and human rights, binding on all states, which can serve as a means of connection with the development of transnational business behavior norms that fall within the social (non-state) sphere. Together these three efforts suggest the current context of the project of business and human rights, a context in which the role of state, enterprise and international community remains fluid, contingent and undefined. The choices made by each of these critical players will determine the shape of business and human rights governance systems for some time to come.

B. *Context and Roadmap*

On 16 June 2011, the UN Human Rights Council endorsed¹¹ Guiding Principles on Business and Human Rights (the “GPs”)¹² for implementing the UN “Protect, Respect and Remedy” Framework.¹³

11. Guiding Principles, *supra* note 1.

12. *Id.* at iv. The Human Rights Council endorsed the Guiding Principles in its resolution 17/4 of June 16, 2011.

13. See U.N. Special Representative of the Secretary-General, Rep. of the Human Rights Council, Guiding Principles on Business and Human Rights: Implementing the United Nations

Developed under the mandate of Special Representative John Ruggie, the UN Secretary General on Human Rights and Transnational Corporations and Other Business Enterprises, the GPs provide—for the first time—a global standard for preventing and addressing the risk of adverse impacts on human rights linked to business activity.¹⁴ The Guiding Principles are framed as three related governance regimes—a First Pillar concerning state duty to protect human rights, a Second Pillar concerning corporate responsibility to respect human rights, and a Third Pillar obligation to provide effective remedies for breaches of human rights.¹⁵ These pillars:

... are grounded in recognition of (a) states' existing obligations to respect, protect and fulfill human rights and fundamental freedoms; (b) the role of business enterprises as specialized organs of society performing specialized functions, requiring to comply with all applicable laws and to respect human rights; and (c) the need for rights and obligations to be matched to appropriate and effective remedies when breached.¹⁶

Since their endorsement, the GPs have become an important standard by which to frame business and human rights discourse, and the values that they represent.¹⁷ This has not always been viewed as a positive development,¹⁸ especially by those who would have preferred

“Protect, Respect and Remedy” Framework, U.N. Doc. A/HRC/17/31 (March 21, 2011) (the Special Representative annexed the Guiding Principles to his final report to the Human Rights Council (A/HRC/17/31), which also includes an introduction to the Guiding Principles and an overview of the process that led to their development).

14. JOHN G. RUGGIE, *JUST BUSINESS: MULTINATIONAL CORPORATIONS AND HUMAN RIGHTS* 124-27 (2013).

15. U.N. Special Representative of the Secretary-General, Rep. of the Human Rights Council, *Protect, Respect and Remedy: a Framework for Business and Human Rights*, U.N. Doc. A/HRC/8/5 (Apr. 7, 2008).

16. Guiding Principles, *supra* note 1, at 1.

17. *UN Guiding Principles on Business and Human Rights*, INSTITUTE FOR HUMAN RIGHTS AND BUSINESS, available at <http://www.ihrb.org/project/eu-sector-guidance/un-guiding-principles.html> (“The Guiding Principles establish an authoritative global standard on the respective roles of businesses and governments in helping ensure that companies respect human rights in their own operations and through their business relationships The Guiding Principles have played a key role in the development of similar standards by other international and regional organizations, leading to global convergence around the standards they set out.”).

18. Carlos López, *The ‘Ruggie process’: from legal obligations to corporate social responsibility?*, in *HUMAN RIGHTS OBLIGATIONS OF BUSINESS: BEYOND THE CORPORATE RESPONSIBILITY TO RESPECT?* 58, 58 (Surya Deva & David Bilchitz eds., 2013) (“The GPs were warmly greeted by business representatives, but less so by the non-governmental organizations (NGOs) and other civil society groups represented in the HRC.”).

a formal treaty mechanism¹⁹ in place of the “soft” law polycentric approach of the GPs.²⁰ The conventional view among these constituencies is that the GPs, at best, serve as little more than a starting point for the attainment of agendas, usually clothed in the formalities of international law frameworks along traditional lines.²¹ As a consequence, from their inception, the GPs have remained controversial²²—at once setting the framework for operationalization of regimes of business and human rights by states and enterprises, and simultaneously posing as either as a gateway or obstacle to the production of international law and national legal regulation of the activities of business enterprises.²³

This Article considers the issues emerging from the front lines of these battlegrounds—all framed by the GPs. It specifically considers three such battleground campaigns: (1) the conceptualization of the state duty to protect human rights through the framing of national action plans, (2) the operationalization of the corporate responsibility to respect human rights through the framing of societally constituted reporting and assessment programs, and (3)

19. See, e.g., *Joint Civil Society Statement on the draft Guiding Principles on Business and Human Rights*, The International Federation for Human Rights, (Jan. 14 2011), http://www.fidh.org/IMG/pdf/Joint_CS0_Statement_on_GPs.pdf; David Bilchitz, *A Chasm between ‘is’ and ‘ought’? A critique of the normative foundations of the SRSG’s Framework and the Guiding Principles*, in *HUMAN RIGHTS OBLIGATIONS OF BUSINESS: BEYOND THE CORPORATE RESPONSIBILITY TO RESPECT?* 107, 137 (Surya Deva & David Bilchitz, eds., 2013).

20. Larry Catá Backer, *On the Evolution of The United Nations’ “Protect-Respect-Remedy” Project: The State, the Corporation and Human Rights in a Global Governance Context*, 9 *SANTA CLARA J. INT’L L.* 37, 42 (2011); Larry Catá Backer, *From Institutional Misalignments to Socially Sustainable Governance: The Guiding Principles for the Implementation of the United Nations’ “Protect, Respect and Remedy” and the Construction of Inter-Systemic Global Governance*, 25 *PAC. MCGEORGE GLOBAL BUS. & DEV. L.J.* 69, 74 (2012).

21. See, e.g., Robert C. Blitt, *Beyond Ruggie’s Guiding Principles on Business and Human Rights: Charting an Embrasive Approach to Corporate Human Rights Compliance*, 48 *TEX. INT’L L.J.* 33, 33-62. (2012).

22. Cf. BRYAN HARRIGAN, *CORPORATE SOCIAL RESPONSIBILITY IN THE 21ST CENTURY: DEBATES, MODELS AND PRACTICES ACROSS GOVERNMENT, LAW AND BUSINESS* 302-39 (2010).

23. See, e.g., *The United Nations and Transnational Corporations: From Code of Conduct to Global Compact*, Transnational Corporations, U.N. Doc. UNCTAD/DIAE/IA/2009/10; Mahmood Monshipouri et al., *Multinational Corporations and the Ethics of Global Responsibility: Problems and Possibilities*, 25 *HUM. RTS. Q.* 965, 980 (2003); see also Larry Catá Backer, *From Guiding Principles to Interpretive Organizations: Developing a Framework for Applying the UNGPs to Disputes that Institutionalizes the Advocacy Role of Civil Society*, in *BUSINESS AND HUMAN RIGHTS: BEYOND THE END OF THE BEGINNING* (César Rodríguez-Garavito ed., 2015, forthcoming).

the re-invention of the GP project as an expression of two dimensional internationalized state power and its challenge to the GP's three dimensional project.

Part II considers the quite thorny issue of the way States might approach their obligations to protect human rights as elaborated most recently in the GPs. Using the framework of National Action Plans recently encouraged by the UN Working Group on the issue of human rights and transnational corporations and other business enterprises, the section suggests that these plans, and the approach undertaken by many states to implement the GPs may be misdirected. Rather than focusing on inward discipline, transparency, and cohesion of domestic law and policy, states have tended to focus outward on efforts to regulate the corporate responsibility to respect human rights. In the process they ignore one of the most important elements of the state duty to protect human rights—the obligations of states to get their own governmental houses in order and to minimize governance and remedial gaps within the architecture of state power. The section concludes that national action plans may provide useful vehicles for states to conduct internal human rights due diligence and to build a sound governmental (and inter-governmental) foundation on which the management of the human rights behaviors of business might be most effectively undertaken. That might suggest that NAPs to focus on transparent and accessible human rights law and policy mapping, on the articulation of human rights sensitive governance operations for state owned enterprises and adequate contractual oversight of enterprises performing traditional governmental functions, and the appropriate management of sovereign investment (both internally in development and externally in foreign projects and markets).

Part III turns to a consideration of the equally thorny issue of the way enterprises might approach their obligations to respect human rights under the GPs. To that end it considers non-state initiatives, and in particular the potentially promising framework being developed through the Human Rights Reporting and Assurance Frameworks Initiative ("RAFI") Project,²⁴ and the recent efforts of the World

24. See *The Business And Human Rights Reporting And Assurance Frameworks Initiative* ("RAFI"): Project Framing Document, SHIFT PROJECT (November 2013). The U.N. Working Group has supported this initiative. It issued the following statement on its support:

The Working Group expresses its firm support for the 'Reporting and Assurance Frameworks Initiative' and is engaging with this project as part of its mandate to promote implementation of the Guiding Principles and as part of its strategy to collaborate with stakeholders to provide

Federation of Exchanges' ("WFE") new sustainability working group to consider an Investor Listing Standards Proposal.²⁵ The RAFI project represents an effort to provide guidance to companies that may be committed to better demonstrate their alignment with the GPs.²⁶ The Exchange based sustainability reporting seeks to provide a basis for the routinization of sustainability or ESG (environmental, social and governance) reporting as part of listing requirements for exchanges.²⁷ This section suggests that while both represents an essential advance in the project of providing a usable framework for

further clarification on the application of the Guiding Principles. The Working Group considers its participation in the Eminent Persons Group for the project as a positive step in furthering the implementation of the Guiding Principles by supporting the development of tools for companies to verify whether their processes are aligned with the Guiding Principles, and for auditors to review and verify company practices. The project was discussed during the Working Group's 5th session in Geneva in June 2013 during which the Working Group emphasised and was assured that any products resulting from the project would be free and non-proprietary, and that the development process should be transparent and engage all relevant stakeholders. The Working Group will review the findings of the project as appropriate. The Working Group understands that the resulting standards, including the qualification of assurance providers, will be overseen by an appropriate, independent governing body, whether existing or founded for this purpose.

U.N. Working Group Statement on its Support for the Reporting and Assurance Frameworks Initiative Led by Shift, *Mazars and the Human Rights Resource Centre for ASEAN*, SHIFT PROJECT, available at <http://shiftproject.org/sites/default/files/UN%20Working%20Group%20Support%20for%20RAFI.pdf>. The Working Group Statement is discussed in *Business and Human Rights, The Business and Human Rights Reporting and Assurance Frameworks Initiative ("RAFI"): Summary of Points Raised, With Clarifications, Responses and Emerging Priorities for Consultation Updated as of October 2013* pp. 8-9, available at <http://business-humanrights.org/sites/default/files/media/documents/summary-of-points-raised-oct-2013.pdf>.

25. See *Investor Listing Standards Proposal: Recommendations for Stock Exchange Requirements on Corporate Sustainability Reporting*, CERES (March 2014), <http://www.ceres.org/resources/reports/investor-listing-standards-proposal-recommendations-for-stock-exchange-requirements-on-corporate-sustainability-reporting>.

26. RAFI's developers' note:

As these dynamics develop, the inevitable question arises as to what good reporting on company alignment with the UN Guiding Principles – and good assurance of such reports – should involve. RAFI aims to help answer this question.

The proposed reporting and assurance frameworks will be public, meaning that they will be non-proprietary and publicly available to all companies and assurance providers to use in their work. They are intended to be relevant to, and viable for, all companies and auditors/assurance providers in any region, and to dovetail with existing reporting initiatives.

See RUGGIE, *supra* note 14, at 5.

27. See *id.* at 8.

practicing respect for human rights, the project remains a work in progress. Some areas that require continued attention. Among the most important are objectives based (neither can be all things to all stakeholders, and the effort to make it so make dissipate its usefulness). As important, to the extent that they seek to be used as a culture-changing project, these cultural components will have to be aligned to corporate interests more directly. Moreover, to the extent either can be understood as a mapping project, its structures may require some fine-tuning. Lastly, operationalization in the societal constitutional sphere always runs the danger of heroic instrumentalization, especially the danger of embracing a heroic approach to human rights reporting. The work of creating cultures of human rights sensitivities as a core basis of corporate culture requires fewer heroes and many more ordinary people who perform their roles in corporate operations without regarding the human rights sensitive portions of their work as “special” or extraordinary” or somehow not an ordinary part of their work. It is to that end that RAFI and Exchange reporting systems might judge its effectiveness as a vehicle for internal discipline and external disclosure. In that context the RAFI framework construct might be usefully understood as a prequel to the harder task of building a rule of law (non-state based) system of rules for the disciplining of business conduct with human rights detrimental effects in the social sphere. Its key value, then, is as a mapping exercise rather than as anything like a due diligence manual. And in that respect, RAFI responds to the same impulse, and ought to respond in the same way, as the Working Group’s construction of sound NAP frameworks. As self-reflexive mapping projects, they invite conversation on which action and governance decisions may be made, and from out of which more comparable and harmonizing techniques might be developed.

If the NAP framework and the RAFI/WFE projects point toward harmonization, does international law provide the key to the establishment of such a collective regime in the legal sphere? The Conclusion considers this question in the context of an important return of a most thorny issue indeed—a return to the ideological multilateral nationalism of the 1970s,²⁸ a return to the state, and a potential broadening of the schism between states that understand economic, social and cultural rights as a predicate for civil and

28. See *The United Nations and Transnational Corporations*, *supra* note 23.

political rights, and those which are convinced that civil and political rights are the predicate and framework through which economic, social and political rights may be realized. To that end it considers, in a brief and preliminary way, the embrace by the UN Human Rights Council of two related but quite distinct treaty making projects. One, signaling a victory for the tenacity of Ecuador produced a vote to “establish an open-ended intergovernmental working group on a legally binding instrument on transnational corporations and other business enterprises with respect to human rights, the mandate of which shall be to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises.”²⁹ This is an effort that has been praised by civil society elements³⁰ but criticized prominently by John Ruggie.³¹ The other was adoption of a resolution, sponsored by Norway, sought to move multilateral treaty efforts back within the architecture of the GP.³² Specifically it directed the UN mechanism currently charged with the elaboration of the GPs to prepare a report considering, among other things, the benefits and limitations of legally binding instruments.³³ These efforts have been interpreted by their respective proponents as a natural progression from the 2011 endorsement of the GPs. But each considers the efforts of the other as a rupture in that progression. Treaty proponents view the Guiding Principles framework as falling short in their aims to provide adequate remedies and resistance to their efforts as a means of sabotaging the necessary progression to the legal framework for the regulation of corporate conduct that would expose upstream corporate entities to liability well downstream in the

29. H.R.C. Res. Human Rights Council Draft Res., 26th Sess., U.N. G.A., A/HRC/26/L.1 (Jun. 25, 2014) (elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights); H.R.C., 26th Sess., *Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development*, Agenda item 3, A/HRC/26/L.22/Rev.1 (June 25, 2014). The resolution was sponsored by Bolivia, Cuba, Ecuador, South Africa, and Venezuela. *Id.*

30. *Global Movement for a Binding Treaty*, TREATY ALLIANCE <http://www.treatymovement.com> (last visited Feb. 25, 2015) (“Now is the time to join the chorus of global civil society calling for new strong international law and send the right message that powerful corporations must not violate human rights.”).

31. See John G. Ruggie, *A UN Business and Human Rights Treaty?: An Issues Brief by John G. Ruggie* (Jan. 28, 2014), available at <http://business-humanrights.org/sites/default/files/media/documents/ruggie-on-un-business-human-rights-treaty-jan-2014.pdf>.

32. H.R.C. Draft Res., 26th Sess., U.N. G.A., A/HRC/26/L.1, at 3 (June 23, 2014).

33. *Id.*

supply chain.³⁴ Treaty opponents view the move toward treaty discussions as a means of sabotaging a necessary progression for the operationalization of the GPs.³⁵

The Article ends by proposing that the current move toward developing comprehensive treaty instruments for business and human rights may be understood in context and harmonized with the GP process. Fashioning a comprehensive treaty might be most usefully understood and applied as an important movement forward to use the treaty machinery to construct a well-integrated, long term, and ultimately comprehensive rule of law system for business and human rights. Business and human rights treaties can help construct an international rule of law system binding on all states in equal measure, and which can serve as a means of connection with the development of transnational business behavior norms that fall within the social (non-state) sphere. Together, then, these three efforts suggest the possibilities and dangers of the current context of the project of business and human rights, a context in which the role of the state, enterprise and international community remains fluid, contingent and undefined. Indeed, the paths taken by international and national stakeholders in the construction of governance systems across these governance frameworks since 2011 suggest both the power of the logic of the GP framework, and its frailty. The choices made by each of these critical players—states, enterprises and international organizations—will determine the shape of business and human rights governance systems for some time to come.

34. On the former, see Conectas, Forum on Business and Human Rights Statement (Nov. 30, 2012), *available at* <http://www.conectas.org/en/actions/business-and-human-rights/news/un-forum-on-business-and-human-rights>. On the latter, see, Press Release, Friends of the Earth Europe, EU standing up for corporate interests instead of human rights at the UN (June 25, 2014) (“The EU is taking a strong, unified position to vote no to the Ecuador proposal, because this very effective proposal would ultimately mean starting negotiations for a binding Treaty with rules for transnational corporations, including many European corporations. The EU openly stated that, if the Ecuadorian resolution was adopted, the EU will refuse to cooperate, thereby actively undermining a democratic process and isolating itself.”).

35. Mark Fafo, *A Business and Human Rights Treaty? Why Activists Should be Worried*, INSTITUTE FOR HUMAN RIGHTS AND BUSINESS (June 4, 2014) (“Opposition to the idea of a treaty from states and business is to be expected. What is more surprising is the extent to which civil society appears to support the idea, apparently blind to the very real risks of derailing their own agenda I think activists around the world should be worried by a treaty process in Geneva as it is presently formulated: the substance of the process is way too broad and risks boxing all activism on corporate accountability into a protracted treaty process in which accountability will have to compete with other issues and activists will have less clout than in comparable processes.”)

I. ON THE PROBLEM OF THE STATE AND THE STATE DUTY TO
PROTECT HUMAN RIGHTS: THE WORKING GROUP AND
NATIONAL ACTION PLANS

As part of the Office of the High Commissioner for Human Rights ("OHCHR") mandate to lead the business and human rights agenda within the United Nations system and to further elaborate the GPs and its operationalization, the UN Human Rights Council, at its 17th session,³⁶ also established a Working Group on the issue of human rights and transnational corporations and other business enterprises, consisting of five independent experts, of balanced geographical representation.³⁷ In collaboration with the Working Group, OHCHR provides guidance on interpretation of the Guiding Principles.³⁸ In 2012, OHCHR issued an Interpretive Guide to the corporate responsibility to respect human rights.³⁹

It is within this administrative context that one expects to see much of the international institutional work of providing influential guidance for implementing the GPs by states, corporations and others. Yet, despite the polycentricity at the heart of the GPs (its recognition of multiple intersecting but autonomous behavior shaping regimes),⁴⁰

36. Human Rights Council Res. 17/4, Rep. of the Human Rights Council, 17th Sess., U.N. GAOR, A/HRC/RES/17/4, at ¶6 (July 6, 2011); *see also* Guiding Principles, *supra* note 1.

37. The members include Mr. Michael Addo, Ms. Alexandra Guaqueta, Ms. Margaret Jungk, Mr. Puvan Selvanathan, and Mr. Pavel Sulyandziga. *See Working Group on the issue of human rights and transnational corporations and other business enterprises*, UNITED NATIONS HUMAN RIGHTS, <http://www.ohchr.org/EN/Issues/Business/Pages/WGHRandtransnationalcorporationsandotherbusiness.aspx> (last visited Feb. 25, 2015).

38. *See, e.g.*, Human Rights Council Res. 21/5, Rep. of the Human Rights Council, 21st Sess., U.N. GAOR, A/HRC/RES/21/5 (Oct. 16, 2012) (discussing the contribution of the United Nations system as a whole to the advancement of the business and human rights agenda and the dissemination and implementation of the Guiding Principles on Business and Human Rights).

39. *See* U.N. Office of the High Comm'r for Human Rights, *The Corporate Responsibility to Respect Human Rights: An Interpretive Guide*, HR/PUB/12/02 (2012); U.N. Office of the High Comm'r for Human Rights, *The Issue of the applicability of the Guiding Principles on Business and Human Rights to minority shareholdings*, RRDD/DESIB/CM/ff (2013) (opinion issued by OHCHR in response to a request regarding the Guiding Principles and the financial sector); U.N. Office of the High Comm'r for Human Rights, *Allegations regarding the Porgera Joint Venture remedy framework* (July 2013) (opinion issued by OHCHR in response to letters regarding the Porgera remediation framework); U.N. Office of the High Comm'r for Human Rights, *Request from the Chair of the OECD Working Party on Responsible Business Conduct* (Nov. 27, 2013) (advising the OECD on the application of the Guiding Principles to the financial sector).

40. *See, e.g.*, Larry Catá Backer, *Transnational Corporations' Outward Expression of Inward Self-Constitution: The Enforcement of Human Rights by Apple, Inc.*, 20 *IND. J.*

the state (and its domestic legal orders) remains at the center of human rights systems. Sometimes, as I have argued elsewhere, that centrality can have perverse effects.⁴¹ Still, it remains fundamentally important to recognize the role of states in contributing to human rights enhancing behaviors—of itself and its governmental apparatus, of its citizens, and of the businesses over which it asserts authority.

The efforts of states under the GP are founded on the First Pillar duty⁴² to “protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises”⁴³ as a specific expression of the basic general state duty to “respect, protect and fulfill human rights and fundamental freedoms.”⁴⁴ They also extend to the Third Pillar duty to “take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy.”⁴⁵ Recently the Working Group has sought to encourage States to think more comprehensively about their role under GP Pillars I and III by engaging in the exercise of preparing “National Action Plans.”⁴⁶ These NAPs are understood to offer a tool for governments to articulate priorities and coordinate the implementation of the GPs, to effectively conduct a due diligence exercise in the furtherance of their duty to protect human rights:

The UN Working Group strongly encourages all States to develop, enact and update a national action plan as part of the State responsibility to disseminate and implement the Guiding Principles on Business and Human Rights.

GLOBAL LEGAL STUD. 805 (2013); cf. Julia Black, *Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes*, in 2 REG. & GOVERNANCE 137, 137-64 (June 2008) (developing an analysis of key elements of accountability and legitimacy relationships of polycentric regulatory regimes, especially where regimes are faced with the need to respond to multiple legitimacy and accountability claims); see also Kevin T. Jackson, *The Polycentric Character of Business Ethics Decisionmaking in International Contexts*, 23 J. BUS. ETHICS 123 (2000). See generally NICO KRISCH, *BEYOND CONSTITUTIONALISM: THE PLURALIST STRUCTURE OF POSTNATIONAL LAW* (2010).

41. See Larry Catá Backer, *The 2nd U.N. Forum on Business and Human Rights Live Streaming and Thoughts on Trends in Managing Business Behaviors*, LAW AT THE END OF THE DAY (Dec. 3, 2013), <http://lcbackerblog.blogspot.com/2013/12/the-2nd-un-forum-on-business-and-human.html>.

42. Guiding Principles, *supra* note 1, at 3.

43. *Id.* at 3.

44. *Id.* at 1.

45. *Id.* at 27.

46. U.N. Office of the High Commissioner of Human Rights [OHCHR], *State National Action Plans* (June 2014).

The Working Group recognises the challenges of producing a comprehensive and effective national action plan and it is willing to assist States in this process.⁴⁷

The Working Group has also recognized that such efforts can exact significant costs in terms of institutional resources that may be required to undertake the effort. Many states with modest means and institutional infrastructure, or with modest experience in the area, may find the task of NAP preparation harder.⁴⁸ To ease that burden, build capacity and promote harmonious development of national approaches (subject, of course, to the national context in which these exercises are undertaken), the Working Group, with the help of civil society, has sought to develop guidance for states in fashioning contextually relevant NAPs.⁴⁹ To that end, it set out an ambitious consultation and information gathering process.⁵⁰ It is in that context that it may prove useful to consider not merely the specific elements for guiding states in the preparation of NAPs, but also the fundamental premises that should serve as the base on which to build such plans. A consideration of those issues is the object here. In developing guidance for the preparation of NAPs it is useful to keep the principal objective in mind--a focus on developing those essential substantive and process elements of NAPs in the implementation of the GPs.⁵¹ These ought to include the sharing of early lessons, the identification of opportunities, risks and challenges in plan

47. *Id.*

48. See U.N. Working Group on Business and Human Rights, Guidance on National Action Plans on Business and Human Rights Ver. 1.0 (1 Dec. 1, 2014), available at http://www.ohchr.org/Documents/Issues/Business/UNWG_%20NAPGuidance.pdf. The Working Group launched a guidance program for states on December 1, 2014 at the Third Annual United Nations Forum on Business and Human Rights, held in Geneva from December 1-3, 2014.

49. See, e.g., International Corporate Accountability Roundtable (ICAR) and the Danish Institute for Human Rights (DIHR), "Toolkit for the Development, Implementation, and Review of State Commitments to Business and Human Rights Frameworks," available at <http://accountabilityroundtable.org/wp-content/uploads/2014/06/DIHR-ICAR-National-Action-Plans-NAPs-Report3.pdf> (making the case for NAPs); *id.* at 8-14.

50. These include a number of events between January 2014 and December 2016, open consultations, regional meetings, online communications, expert workshops and consultations, to launch draft guidance on national action plans. The Working Group will pilot the guidance for two years, review responses and deliver a final guidance on State national action plans in December 2016. See *id.*

51. This is in line with the mandate of the Working Group and with the expectations for the development of the GPs. See H.R.C. Res. 17/4, Human rights and transnational corporations and other business enterprises, 17th Sess., U.N. Doc. A/HRC/RES/17/4 (July 16, 2011).

construction, the development of a common understanding of essential NAP elements, the mapping of important policy options set out in the GPs, the framework within which the connections between the First and Third Pillars (state duty and remedies, respectively) ought to be addressed, and the focus on regulatory coherence (both internally and multi-laterally). As important, the NAPs ought to develop mechanisms for monitoring, assessing and transparency of national goals and efforts. This Third (Remedies) Pillar provides an opportunity to deepen an essential element of GP implementation--meaningful civil society participation, comprehensive buy-in from a broad cross section of government (including administrative and legislative functionaries), and effective accountability in ways that permit a constant re-assessment and development of GP implementation as national conditions change.

One of the great difficulties of the NAP process is to provide guidance on unpacking the fairly dense language of the GPs and their relevant commentaries in a way that adheres to the spirit and intent of the GPs. While that is the essence of operationalization, it also requires going beyond a narrow reading of the “rules” and embracing mechanisms and techniques that provide functional attainment of the GP’s objectives. This involves substantially more than regulatory “gap filling” or “interpretation”; it also requires further development of the GPs themselves in line with their functional premise. Here it becomes evident that the GPs become a powerful tool when they are understood not in formalist (and narrowly legal) terms, but in functional and policy terms. In this sense, lawyers play an important, but not an essential, part. The action may sound in the language of governance but the spirit must be rooted in policy. And the object of the exercise must be centered on the state itself first. The state is hardly in a position to undertake its duty to protect human rights if it is not functionally able to even effect this duty. The basic human rights due diligence exercise focused primarily on the state and its capacity for undertaking its duty successfully, then, is or ought to be at the heart of any NAP exercise. This approach is particularly important in four critical areas that will be considered here: (1) defining the principal focus of the state duty under the GPs (gaps, risks, regional considerations); (2) trade and investment agreements and procurement; (3) judicial and non-judicial mechanisms; and (4) due diligence and disclosure requirements.

A. *Defining the Principal Focus of the State Duty under the GPs
(Gaps, Risks, Regional Considerations)*

The core focus of NAP construction necessarily centers on the relationship of the GPs to state action. It has been all too common for the focus of this exercise to turn outward from the state to the objects of the regulatory exercise, that is to focus on the regulation of enterprises rather than on the scope of the state duty to protect human rights.⁵² As one commentator noted with respect to Poland, “Reasons for this omission include the conviction that human rights are not relevant in the case of Poland, due to higher legal standards in some areas; as well as the conviction that business would certainly oppose regulatory solutions. More prosaic reasons include expenditure cuts and insufficient staff numbers.”⁵³ Indeed, in both the Netherlands and the U.K., the development of the NAP was assigned to the foreign ministries, an indication that the focus was both on business management and outbound conduct.⁵⁴ The baseline for human rights rested on an otherwise unexamined domestic legal order. There thus appears to be a tendency to jump directly to GP Principles 1 and 2⁵⁵

52. For example, the UK National Action Plan focuses on the state’s regulation of its corporations to conform to human rights norms already part of the domestic legal order of the UK. *Good Business: Implementing the Guiding Principles on Business and Human Rights*, SECRETARY OF STATE FOR FOREIGN AND COMMONWEALTH AFFAIRS (September 2013), available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/236901/BHR_Action_Plan_-_final_online_version_1_.pdf (“It embodies our commitment to protect human rights by helping UK companies understand and manage human rights.”). The Dutch NAP also focuses on the scope of the state’s regulation of enterprises rather than on the state’s duty to protect human rights in light of international law and norms. NATIONAL ACTION PLAN ON BUSINESS AND HUMAN RIGHTS, available at http://www.netherlandsmission.org/binaries/content/assets/postenweb/v/verenigde_staten_van_amerika/the-permanent-mission-to-the-un/actionplanbhr.pdf. Its “Action Points” focused on the legalization of the corporate duty to respect human rights. *Id.* at 13-14.

53. Beata Faracik, *The Role of the State in Implementing the UN Guiding Principles on Human Rights and Business with Special Consideration of Poland*, 31 *POLISH YEARBOOK INT’L L.* 349, 386 (2011).

54. See *supra* note 52 and accompanying text. Likewise the Italian Ministry of Foreign Affairs has been charged with the drafting of the Italian National Action Plan. See THE FOUNDATIONS OF THE ITALIAN ACTION PLAN ON THE UNITED NATIONS “GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS” available <http://www.ohchr.org/Documents/Issues/Business/NationalPlans/NationalPlanActionItaly.pdf> (expressing “conviction that, without deducting any importance to national policies, only an authentically European dimension can bring about that political and contractual added value, allowing the field of human rights at global level to be really effective”).

55. Guiding Principles, *supra* note 1, at ¶ 1 (“States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises.”); *Id.* at ¶ 2 (“States should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their

without stopping for a moment to undertake the more difficult basic task of the General Principles of the GP.⁵⁶ The General Principles make clear that the overarching element of any state duty to protect human rights requires a focus on the political and administrative architecture of the State with respect to its existing legal obligations and policy objectives to protect and fulfill human rights and fundamental freedoms. But this omission is compounded by a tendency to see in GP Principle 1 no more than an obligation to use law to “harden“ a corporation’s obligations under Pillar II (the corporate responsibility to respect human rights).⁵⁷

In that exercise the State, and its duty, *disappear* within its object—the multinational corporation. These ideas are sometimes expressed in the form variations of the question: do states have a duty to compel a company to respect human rights?⁵⁸ But such an approach

operations.“). It is worth remembering that the focus on the enterprise is consequential rather than direct: “States’ international human rights law obligations require that they respect, protect and fulfill the human rights of individuals within their territory and/or jurisdiction. This includes the duty to protect against human rights abuse by third parties, including business enterprises.” *Id.* at 3.

56. General Principle (a) of the Guiding Principles expresses the basic principle that the business and human rights regulatory obligations of states are grounded in their existing legal obligations to “respect, protect and fulfill human rights and fundamental freedom.“ That provides a baseline and constraint for states grounded in their own legal relationship to international law and its transposition into their domestic legal orders. “Nothing in these Guiding Principles should be read as creating new international law obligations, or as limiting or undermining any legal obligations a State may have undertaken or be subject to under international law with regard to human rights.” Guiding Principles, *supra* note 1 at 1. But it also poses a challenge to states to consider the deficiencies in their domestic legal orders with respect to international consensus on the form and scope of human rights obligations recognized generally. *Id.* at ¶ 3 Commentary (“It is equally important for States to review whether these laws provide the necessary coverage in light of evolving circumstances and whether, together with relevant policies, they provide an environment conducive to business respect for human rights.”).

57. This tendency is evidenced by the approach of the states to the construction of their NAPs—one which focuses on the forms of state regulation of companies but ignores any consideration of the extent of a state’s duty to protect human rights and the relationship between that duty and the failures by a state to transpose international law and norms into their domestic legal orders. *See supra*, notes 42-43 and accompanying text. The Danish NAP provides a broader view of the state’s obligations but again the focus is on setting “out clear expectations to Danish companies that they must take responsibility to respect human rights when operating abroad- especially in developing countries where there can be an increased risk of having an adverse impact on human rights.” DANISH NATIONAL ACTION PLAN: IMPLEMENTATION OF THE GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS, 11 (March 2014), available at http://www.ohchr.org/Documents/Issues/Business/NationalPlans/Denmark_NationalPlanBHR.pdf.

58. *See, e.g.*, Joel Slawotsky, *Doing Business Around the World: Corporate Liability under the Alien Tort Claims Act*, MICH. ST. L. REV. 1065 (2005); Claudia T. Salazar, *Applying*

poses substantial risks to the GP project and threatens to distract States from their principal role as States within transnational and embedded systems of human rights regulation. Thus, consider the question in a different light, one that starts from the State duty and then proceeds to the expression of that duty in the management of its economy with fidelity to human rights regimes. From this perspective, starting from the regulation of companies and proceeding backwards to the law and policy from out of which this regulation emerges seems somewhat backwards. Yet, it also suggests the need to re-shift the focus of State duty frameworks from the objects to the subject of the State duty.⁵⁹

Indeed starting from the end point and moving backwards from the corporation to the State presents a number of potential perils. First, it provides no guidance about methods. Second, it suggests that the end of the state duty is merely the development of a corpus of corporate human rights related regulation, a conclusion at odds with the basic state duty. And most significantly it creates a very certain danger of sloppiness that could pervert the structures and premises of the GP. Specifically it can suggest that the principal object of the Second Pillar is to legislate a national approach to the Second Pillar.⁶⁰ In effect, this could turn the State duty into little more than a gateway to the nationalization of the second pillar, undermining the

International Human Rights Norms in the United States: Holding Multinational Corporations Accountable in the United States for International Human Rights Violations under the Alien Tort Claims Act, 19 ST. JOHN'S J. LEGAL COMMENT. 111 (2004); Lena Ayoub, *Nike Just Does It—And Why the United States Shouldn't: The United States' International Obligation to Hold MNCs Accountable for Their Labor Rights Violations Abroad*, 11 DEPAUL BUS. L.J. 395, 427 (1999).

59. For one effort in that direction, see Francesco Francioni, *An International Bill of Rights Why It Matters, How it Can be Used*, 32 TEX. INT'L L.J. 471. Interestingly, Professor Francioni's definition of an international bill of rights; Francioni, *supra*, 473-76, is different in some critical respects from the definition of the International Bill of Human Rights that serves as the normative core of the corporate responsibility to respect human rights of the Guiding Principle's Second Pillar. Guiding Principle ¶ 12. The issue of regulatory coherence is never far from the discussion of the state duty.

60. That appears to be the thrust of the NAPs. See *supra* notes 42-43, 46 and accompanying text. Audrey Gaughran, Director of Global Thematic Issues, Amnesty International, remarks delivered during the panel: Closing conversation: Strategic paths forward and next steps for the global business and human rights regime, 2014 United Nations Forum on Business and Human Rights (Dec. 3, 2014), available at <http://webtv.un.org/meetings-events/human-rights-council/forum-on-business-and-human-rights/watch/closing-conversation-strategic-paths-forward-forum-on-business-and-human-rights-2014/3925402002001> (starting at 32:50 min).

autonomous structures of both in the process.⁶¹ It also suggests a binary that was rejected by the core premises of the GP themselves—that regulation reflects a set of binary tensions in opposition: (i) voluntary versus mandatory regimes, (ii) business versus States, (iii) bad or self serving versus collective and serving others, and (iv) transnational versus national.⁶² These oppositions must be resolved in favor of law (and within) the State, which would be transformed into a vehicle for the application of international norms through their transposition into domestic legal orders and from there applied to corporate objects. But to state these propositions is to lay bare the basis for its rejection. It suggests that the object of the State duty is to conflate its objectives with the responsibilities of business under their social norm and international principles frameworks. That is both impossible. States may be conduits of international law but they are also active participants in policy choices about which international norms, if any, they are willing to transpose into binding domestic law or influential State policy that informs law making and the administration of State. It thus not only conflates two autonomous bases for applying human rights regimes but also distracts from the principal focus of the First Pillar, which centers on the development of formal law and policy structures for human rights and business against which business regulation may be robustly effected.⁶³ And in any case, it certainly provides little guidance to states.

It ought to follow, then, that a NAP ought to provide a roadmap for getting to the end objective rather than to start with it. Indeed the end objective of the State duty to protect human rights ought to be the expression of that duty in the management of a State's political economy (with sensitivity to the ideological basis of that system: free

61. See *infra* notes 292-300 and accompanying text. This is a position sometimes taken by business elements and perversely has been a foundation for civil society efforts to shift the focus of the GPs from its multi-systemic approach to one that is singularly focused on legality and the reform of the domestic legal orders of states through treaty making, a subject discussed in the Conclusion.

62. For example, the General Principles of the Guiding Principles state: “[t]hese Guiding Principles should be understood as a coherent whole and should be read, individually and collectively, in terms of their objective of enhancing standards and practices with regard to business and human rights so as to achieve tangible results for affected individuals and communities, and thereby also contributing to a socially sustainable globalization.”

63. See General Principles, *supra* note 1, 3. The Commentary notes: “[i]t is equally important for States to review whether these laws provide the necessary coverage in light of evolving circumstances and whether, together with relevant policies, they provide an environment conducive to business respect for human rights.” *Id.*

market, capitalist, socialist Marxist-Leninist, etc.).⁶⁴ But to start at the end may well imperil the GP project. The First Pillar instructs States that they must, as an initial matter, deal with the structures and substance of their own duty to protect human rights before they turn that aggregation of duty (expressed in law and policy) outward to regulatory objects. Thus every NAP ought to require States to look to themselves first. To do otherwise is to risk, by shifting the focus of the State duty to companies (and the Second Pillar), veiling the State duty and functionally risking privatization of the State duty itself. The NAPs focus on general principles, gap filling and risk raises other potential issues and complexities as well. First, unlike the Second Pillar which imposes a uniform definition of core human rights that make up human rights responsibilities of corporations (GP Principle 12), the First Pillar makes clear that the law and policy based human rights duties of States are contextual--that the First Pillar is grounded in rejection of any one size fits all premise. Yet, the very nature of NAP capacity building functions, especially for States with modest resources and little experience, risks the possibility of using NAPs as a means of creating unnecessary uniformity among NAPs. Such uniformity would likely tend to mirror the preferences and choices of developed states.

Indeed, there is a strain of thought that suggests—much in the manner of regulatory cram-down inherent in the Financial Stability Board system⁶⁵—that NAPs serve in way to provide templates from the Global North to the Global South. I can only hope that this approach might be avoided, and with it also avoiding creating NAP guidance that might be criticized as inadvertently neo-colonialist, and favoring a top down approach. Worse, if the international community uses Global North civil society as the means through which to effect this cram down, the resulting colonialism becomes a social and cultural--and polycentric--one in which the governance preferences of international civil society, global donors, and foundations, will be leveraged, and disguised as capacity building, substantially and

64. Cf. Larry Catá Backer, *China's Corporate Social Responsibility with National Characteristics: Coherence and Dissonance with the Global Business and Human Rights Project*, in *HUMAN RIGHTS AND BUSINESS: MOVING FORWARD, LOOKING BACK* (Jena Martin & Karen E. Bravo eds. forthcoming).

65. See Larry Catá Backer, *Private Actors and Public Governance Beyond the State: The Multinational Corporation, the Financial Stability Board and the Global Governance Order*, 18 *IND. J. GLOBAL LEGAL STUD.* 751, 785 (2011).

unnecessarily narrow, the choices for Global South States in fashioning their compliance with their First Pillar duties.

This tendency to veil the preferences of the Global North (both through national and non-state governance regimes) in capacity building structures might also be seen in the willingness to focus on extra-territoriality as an important element of First Pillar compliance.⁶⁶ Beyond its obvious (though sometimes hotly disputed) neo-colonialism and its implied acceptance of a power rank ordering of States to which the extent of unconstrained sovereignty is tied to rank among the “family of nations,” it ought to be applied with great caution to remain true to the spirit of the GPs. GP Principle VII does provide for extraterritoriality in those conflict zones where there is an absence of governance. There is something to be said about the duty of States to apply international law broadly, even without their borders.⁶⁷ But to extend national law into the territory of another state because the projecting states takes a different view of law and policy than the host state is to undo a century’s worth of crafting global political society based on the core principle of the equality of states.

This last point raises another important element of gap filling under the State duty—the obligation within the First Pillar of States to invoke multilateral and concerted effort to undertake their duty to

66. Guiding Principle, *supra* note 1, at 2. The Commentary suggests “strong policy reasons” for extraterritoriality, and support this view by reference to international treaties that sometimes acknowledge the possibility of its use. Yet it remains principally an instrument through which states can project their own domestic legal orders abroad, and absent a coherent set of domestic laws so exported, hosts states may well become a territory in which as many variations of law may be enforceable, beyond the laws of the host state, as there are foreign enterprises operating within its national territory. *See, e.g.*, Sara L. Seck, *Unilateral Home State Regulation: Imperialism or Tool for Subaltern Resistance?*, 46(3) OSGOODE HALL L. J. (2008). Beyond that, extraterritoriality has been something of a protean concept. At once it is understood as a means by which powerful states can project their legal structures outward and into the territory of other states. Where that projection targets states that were former colonies or which have been part of a traditional relationship of dependence, then it acquires something of a character of neo-colonialism. *See, e.g.*, ANTONY ANGHIE, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* 118 (2007). Recently, progressives have sought to recast extraterritoriality as a tool that can be used to project a set of global consensus values and norms by developed states (with higher capacity judiciaries) onto less developed states. *See, e.g.*, ANNE ORFORD, *INTERNATIONAL AUTHORITY AND THE RESPONSIBILITY TO PROTECT* 67-68 (2011); SIGRUN SKOGLY, *BEYOND NATIONAL BORDERS: STATES’ HUMAN RIGHTS OBLIGATIONS IN INTERNATIONAL COOPERATION* (2006).

67. *See, e.g.*, Larry Catá Backer, *Sara Seck on the Possibilities and Limits of Extraterritoriality in a Corporate Social Responsibility and Human Rights Context*, LAW AT THE END OF THE DAY (Sept. 6, 2012, 10:49 PM), <http://lcbackerblog.blogspot.com/2012/09/sara-seck-on-possibilities-and-limits.html>; *see also infra* notes 292-300 and accompanying text.

protect human rights. GP Principle 10 quite clearly expresses the value of shifting the focus of the state duty from efforts to build and apply national laws to companies to the creation of multilateral efforts to develop coherent frameworks within which corporations can operate between and among states.⁶⁸ The Commentary to GP X stresses the consequential importance of these efforts—coherence in the development and application of the GP project.⁶⁹ This focus also may play a significant role in efforts to add to the legal basis of the state duty to protect human rights through treaties.⁷⁰ It would be quite useful for the Working Group to determine the way that NAPs may be used to foster these activities.⁷¹

What might this mean for the construction of guidelines for NAP development? First, it suggests that NAPs might usefully serve as exercises in internal law and policy mapping. They ought to be used as a disciplinary technique through which the state apparatus can better know itself in its approaches to human rights (by whatever name human rights obligations are known in a particular state). Second, it also suggests that efforts be made to provide guidance for states to identify where singular and mandatory approaches are not necessary but where national context can produce deviation. It might effectuate this by focusing on a listing of human rights-related

68. Guiding Principles, *supra* note 1, at 12 (“Capacity-building and awareness-raising through such institutions can play a vital role in helping all States to fulfill their duty to protect, including by enabling the sharing of information about challenges and best practices, thus promoting more consistent approaches.”). GP 10 Commentary.

69. Guiding Principles, *supra* note 1 at 12 (“Greater policy coherence is also needed at the international level, including where States participate in multilateral institutions that deal with business-related issues, such as international trade and financial institutions. States retain their international human rights law obligations when they participate in such institutions.”). GP 10 Commentary.

70. *See infra* notes 292-300 and accompanying text.

71. In that context it is worth recalling the insight of Koldo Casla, though for a purpose other than where it was directed:

States play a key role in the process of international norm diffusion when they choose to embrace and promote certain standards of adequate behaviour. Yet, not all countries are equally important. When it comes to human rights law, European States play a key role in drawing the line between acceptability and unacceptability. We can safely say that no human rights norm has settled so far in spite of the lack of support from Western Europe. At a time when Europe muddles through and new powers emerge from the Global South, it is time to ask: Will a human rights norm ever emerge regardless of Western support?

Koldo Casla, *Ruggie versus Ecuador: Will a human rights norm ever emerge regardless of Western support?*, RIGHTS IN CONTEXT DERECHOS EN CONTEXTO (Feb. 9, 2014), <http://rightsincontext.eu/2014/02/09/ruggie-versus-ecuador-will-a-human-rights-norm-ever-emerge-regardless-of-western-support/>.

objectives rather than on the forms by which they objectives are met. Thus NAPs might be structured to best effect along functional rather than formal lines. These objectives may take any number of forms—focusing on impact, materiality, and internal capacity building, as well as on the institutional objectives necessary to provide a basis for these choices. If NAP roadmaps speak to objectives, state NAPs may make the policy choices necessary to express these objectives in contextually appropriate form. Second, NAPs should also serve as roadmaps for consultation and sector specific buy-in. This buy-in is necessary not just among national civil society elements and business, but also by all of the critical actors within the government. NAP guidance ought to provide toolkits for helping to structure such consultations and engagement. Lastly, NAPs ought to serve as a basis for determining the boundaries of actions that a state may engage in alone--and thus set a baseline for understanding the means by which multilateral activities might be effectively used.

Lastly, the WG will have to decide whether NAPs ought to be undertaken as a stand alone project, or whether they ought to be embedded in other more conventional documents. The WG has embraced the idea of NAPs as statements of evolving strategy developed by states.⁷² I suspect that there ought to be leeway here.⁷³ The particular conditions of a state may weigh heavily in favor of one or the other option.⁷⁴ The choice of form and placement ought not to distract from the critical focus on NAP function.⁷⁵ As long as NAP functionality is preserved, it ought to make little difference where the NAP is embedded, or if it stands alone. The danger, though, remains; as a mere policy document, prepared by or under the supervision of a

72. U.N. WORKING GROUP ON BUSINESS AND HUMAN RIGHTS, GUIDANCE ON NATIONAL ACTION PLANS, ii (Dec. 1, 2014).

73. Thus, for example, Phase 2 ¶ 6 requires states to identify gaps in state and business implementation of the Guiding Principles. *Id.* at 7. It provides that “[i]n the process of doing so, the Government should outline the various laws, regulations and policies it has in place in relation to each of the Guiding Principles addressing States in pillars I and III (Guiding Principles 1-10, 25-28, 30 and 31) and identify respective protection gaps.” *Id.*

74. *Id.* at 7.

75. This point was emphasized in International Corporate Accountability Roundtable and Danush Institute for Human Rights, National Action Plans on Business and Human Rights: A Toolkit for the Development, Implementation, and Review of State Commitments to Business and Human Rights Frameworks (June 2014), available at <http://accountabilityroundtable.org/wp-content/uploads/2014/06/DIHR-ICAR-National-Action-Plans-NAPs-Report3.pdf>. A human rights NAP will “Stronger legal frameworks, embracing firmer adhesion to international norms, more effective incorporation of human rights standards in domestic law, enhanced independence of the judiciary, and more effective rule of law.” *Id.* at 9.

single ministry, its value may lie more in the gesture itself, than in any significant substantive contribution the NAP might make to the reform of the domestic legal order of the State undertaking the NAP.

B. *Trade and Investment Agreements and Procurement*

One of the most difficult and complex areas in which it is necessary to transform the principles of the GP into concrete practice and policy is in the areas of trade and investment agreements and in the context of government procurement. Complexity emerges here in a number of dimensions.

First, trade and investment activities of states are generally undertaken in governmental functional “silos.” These siloed activities might be undertaken by officials with very little experience in human rights related work and perhaps with even a less developed taste for the development of the sort of human rights related sensitivities that the NAP project requires.⁷⁶ The sort of human rights due diligence exercised suggested above might be put to good effect in mapping those government functional silos which are cross cut by the need for human rights sensitivities. NAPs may provide a means of helping states determine how to manage mapping of this sort.

76. Guiding Principle 8 speaks to the issue of policy coherence. The Commentary speaks to the issue of “[h]orizontal policy coherence means supporting and equipping departments and agencies, at both the national and subnational levels, that shape business practices – including those responsible for corporate law. Guiding Principles, *supra* note 1, at 8 Commentary. John Ruggie noted the difficulties and need for policy coherence. A current BIT case illustrates the problem. European investors have sued South Africa under binding international arbitration, contending that certain provisions of the Black Economic Empowerment Act amount to expropriation, for which the investors claim compensation. A policy review examined why the Government had agreed to such BIT provisions in the first place. It explains that, among other reasons, “the Executive had not been fully apprised of all the possible consequences of BITs.” The same is often true for HGAs, which can remain in force a half-century. See H.R.C. Report 14th Sess: “Business and Human Rights: Further steps toward the operationalization of the ‘protect, respect and remedy’ framework” A/HRC/14/27 at ¶ 21, pp. 6 (Apr. 9, 2010); see also, e.g., U.N. Sec. Gen., *Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development: Protect, Respect and Remedy: A Framework for Business and Human Rights: Rep. of the Special Representative of the Secretary General*, ¶ 12, U.N. Doc. A/HRC/8/5 (Apr. 7, 2008) [hereinafter *Promotion*]; see also Piero Foresti, Laura De Carli and others v. Republic of South Africa (ICSID Case No. ARB/(AF)/07/1), (“The more than 2500 bilateral investment treaties currently in effect are a case in point. While providing legitimate protection to foreign investors, these treaties also permit those investors to take host States to binding international arbitration, including for alleged damages resulting from implementation of legislation to improve domestic social and environmental standards—even when the legislation applies uniformly to all businesses, foreign and domestic.”).

Second, mapping only exposes the problems, but they do not solve them. NAPs might, in a capacity building effort, also suggest toolkits that might be used by states to work through issues of building administrative operations that are coherent--especially in the trade and investment areas. To that end, the human rights due diligence structures of the Second Pillar⁷⁷ might be adapted to good effect as a process by which states may review trade and investment treaties for their human rights effects before they are negotiated to finality. The solution may tax a state's governance capacity in many respects, and patience may be required. Changing governmental cultures may be as challenging as changing corporate cultures at the heart of the GPs.

Third, complexity is compounded in the trade and investment area because of the way that these conflate both a substantive element (the nature of human rights obligations) and its remedial element (Pillar III). That conflation becomes problematic for some because the thrust of trade and investment treaties, favoring arbitration and other non-judicial remedies, may contradict the substantive human rights by opening an avenue through which states may constrain their sovereign discretion by opening itself to arbitration. Yet I suspect that this contradiction is more problematic in theory than in fact. It is certainly true that there is a possibility that a state may cede its human rights duty through trade and investment treaties (and especially through bilateral trade agreements (BITs)).⁷⁸ But this is a problem of sloppiness in administrative discipline and incoherence in governmental policy rather than a problem inherent in trade and investment treaties, or in arbitration to which the state may be bound. NAPs guidance might be developed to help states identify those points where administrative coordination is necessary and perhaps provide guidance through examples of means through which administrative structures might be organized to minimize the possibility of ceding a state human rights duty to protect through BITs and regional trade agreements.

Fourth, capacity building is necessary not just among government functionaries who work in the specific substantive areas affected by human rights. Administrative segmentation is a large

77. See Guiding Principles, *supra* note 1, at 17-25.

78. This was much on the mind of the SRSG as he developed the Protect, Respect and Remedy Project and its expression as the GPs. See *Promotion*, *supra* notes 50, 76 and accompanying text.

problem in human rights sensitive activities. “Translators” and “go-betweens” may be necessary within the state apparatus. It may also be necessary to help a state realize the mechanisms necessary to build capacity in critical but peripheral areas—embassies, military establishments, and national legislatures. NAPs may also suggest that way that states may both establish and utilize national human rights agencies as a facility to navigate among ministries and between the administrative and legislative organs to ensure coordination in the state’s duty to protect human rights.

Fifth, limiting consideration to trade and investment treaties, while important, does not entirely map the universe of economic activities in which the state duty to protect human rights comes into play. An important function that tends to be overlooked are state activities undertaken through sovereign wealth funds and related mechanisms. I have argued elsewhere that sovereign wealth funds have the potential to become great instruments of advancing human rights through sovereign participation in global markets (as well as in internal markets).⁷⁹

NAP guidance might be more useful by building on this possibility in constructive ways. This becomes important as international financial institutions have increasingly turned to sovereign wealth funds as a disciplinary tool for fiscal stability. Thus, there have been a growing number of States that have recently adopted sovereign wealth funds.⁸⁰ They increase in importance as SWF to SWF deals become a larger force in national development strategies through large-scale government projects.⁸¹ For NAPs that touch on sovereign wealth fund, this may also require efforts at the international level to engage the Santiago Principles, a set of voluntary principles (similar in their field to the GPs) for best practice sovereign wealth fund organization and operation. This in turn may

79. See, e.g., Larry Catá Backer, *Sovereign Investing and Markets-Based Transnational Rule of Law Building: The Norwegian Sovereign Wealth Fund in Global Markets*, 29 AM. U. INT’L L. REV. 1 (2013).

80. See, e.g., Larry Catá Backer, *Part 21 Sovereign Wealth Fund of Gabon (Fonds Souverain de la République Gabonaise)*—*Reimagining the State in the Global Sphere: An Inventory of Sovereign Wealth Funds as Regulator and Participant in Global Markets*, LAW AT THE END OF THE DAY (Mar. 9, 2014, 10:40 PM), <http://lcbackerblog.blogspot.com/2014/03/part-21-sovereign-wealth-fund-of-gabon.html>.

81. See, e.g., Larry Catá Backer, *Part 17 Russian SWFs—Reimagining the State in the Global Sphere: An Inventory of Sovereign Wealth Funds as Regulator and Participant in Global Markets*, LAW AT THE END OF THE DAY (Mar. 1, 2014, 11:09 AM), <http://lcbackerblog.blogspot.com/2014/03/part-17-russian-swfs-reimagining-state-in.html>.

suggest some utility in dialog between the Working Group and the International Forum for Sovereign Wealth Funds. Lastly, NAPs should generally also provide a focus on sovereign investing, in whatever form attempted.

Sixth, procurement practices present their own set of unique problems.⁸² To some extent a focus on procurement is well warranted—procurement activity represents a substantial amount of state economic activity.⁸³ It can be used to advance a “changing by example” strategy where the government leads by its own practice and takes the rest of society with it.⁸⁴ Indeed, procurement can be understood as an umbrella for privatized governmental services as well as a set of economic transactions for the provisions of goods and services necessary for the internal operation of the state itself. States, thus, can use procurement as a means of providing appropriate models for contractual provisions sensitive to human rights issues that might influence private sector business behaviors as well.

But procurement practices also offer an opportunity for polycentric governance.⁸⁵ Procurement relations are regulated both by law and by the contractual provisions of the agreement between the state and its contract partners. That interplay is written into the black letter of the GPs themselves. These provide for interplay between GP Principle III (regulation by law), GP Principle VI (regulation through contract), and GP Principle V (oversight and monitoring). The NAP guidance ought to provide states with mechanics for combining these multiple obligation points into an efficient system of contracting (grounded in law and policy) and with effective monitoring systems. To that end best practices and model agreements and rules may be useful.

The WG might consider guidance in NAPs that would treat procurement contracts like BITs. Procurement practices are also

82. Cf. ANDREW CLAPHAM, *HUMAN RIGHTS IN THE PRIVATE SPHERE* (1993).

83. See, e.g., Phoebe Bolton, *Government Procurement As A Policy Tool In South Africa*, 6 J. PUB. PROCUREMENT 193 (2006).

84. See, e.g., CHRISTOPHER MCCRUDDEN, *BUYING SOCIAL JUSTICE: EQUALITY, GOVERNMENT PROCUREMENT, & LEGAL CHANGE* (2007) (noting its use in the U.S., U.K., Canada and the E.U.); Christopher McCrudden, *Using public procurement to achieve social outcomes*, 28 NAT. RESOURCES F. 257 (2004).

85. Cf. Tom Campbell, *A Human Rights Approach to Developing Voluntary Codes of Conduct for Multinational Corporations*, 16 BUS. ETHICS Q. 255, 264 (2006) (“Moreover, such external accountability to civil society requires a back-up framework of legal support to enable these bodies to fulfill their monitoring and critical functions effectively, a process that is now referred to as ‘meta-regulation.’”).

tinged with issues that bump up against the corporate responsibility to respect human rights (in ways that may exceed the state duty to protect). Here it might be useful to provide a means of helping governments work through an NAP process that may incorporate human rights due diligence mechanisms (GP Principles XVII-XXI) as a basic part of the contractual provisions in procurement contracts (GP Principle VI), which can then serve as a basis for monitoring and reporting under GP Principles V and XXI.

Yet, getting the formal model right does not guarantee good practice. NAPs must consider not merely toolkits for good procurement practices (as law, policy and contract, perhaps with best practice forms and examples) but will also need to provide guidance for training and monitoring procurement officers, and procurement monitors. These officials may be both administrative officers and monitors from the legislative apparatus. In either case, NAP guidance ought to help states work through the issues of procurement in ways that are sensitive to the protection of human rights objectives of the Second Pillar. In this context, the NAPs ought to consider the articulation of detailed human rights impact analyses as a necessary element of government contracting.

C. Judicial and Non-judicial Mechanisms

At a theoretical level, many have argued that most states can hold multinational enterprises, corporations or individuals to account for gross violations of human rights (whatever their scope in each state).⁸⁶ Yet, the principles of the exclusive sovereignty of each state over its territory and the respect for the autonomous personality of corporations tend to constrain any transnational development of such bases of liability. States may not have the taste for or the power to extend their authority beyond their territory, even to locally domiciled enterprises. The policy of respect for the legal autonomy of enterprises may make it harder to extend liability to an enterprise made up of distinct corporations or other entities. At a practical level, however, such liability may be even harder to realize. Most states have developed substantial limits on access to justice—or more prosaically, on access to courts. The minimal transaction costs of accessing courts may be higher than what is feasible for people of

86. See, e.g., Diane Marie Amann, *Capital Punishment: Corporate Criminal Liability for Gross Violations of Human Rights*, 24 *HASTINGS INT'L & COMP. L. REV.* 327 (2000-2001).

modest means. In addition, process rules may also functionally limit the scope of available remedies. In the context of business and human rights, these include strong protections of separate corporate business personality,⁸⁷ *forum non conveniens* rules in some jurisdictions,⁸⁸ standards of proof (especially relating to proof of intent),⁸⁹ statutes of limitations that might substantially reduce the time available for investigation before a complaint is filed,⁹⁰ and choice of law rules.⁹¹

In addition, many States do not have national human rights institutes,⁹² established on the basis of the Paris Principles.⁹³ “National Human Rights Institutions (NHRIs) that comply with the principles relating to the status of national institutions, commonly known as the Paris Principles, are playing a crucial role in promoting and monitoring the effective implementation of international human rights standards at the national level, a role which is increasingly recognized by the international community.”⁹⁴ NAPs might serve as a useful tool for focusing government on the need for the establishment of an NHRI, or, if established, on the need to develop its authority in ways that enhance the state’s duty to protect human rights. In particular, the NAPs may be a good place to consider enhancing the role of NHRIs in effecting remedies, especially for individuals and communities that lack means or capacity. Beyond advocacy, they might serve as a place to establish a remedial mechanism.

87. See, e.g., Larry Catá Backer, *The Autonomous Global Enterprise: On the Role of Organizational Law Beyond Asset Partitioning and Legal Personality*, 41 TULSA L. J. 541 (2006).

88. See, e.g., Jeffrey Davis, *Justice Without Borders: Human Rights Cases in U.S. Courts*, 28 LAW & POL’Y 60, 73-74 (2006).

89. See, e.g., Stephen Wilkinson, *Standards of Proof in International Humanitarian and Human Rights Fact-Finding and Inquiry Missions*, GENEVA ACAD., available at <http://www.geneva-academy.ch/docs/Standards%20of%20proof%20report.pdf>.

90. See, e.g., Jan Arno Hessbruegge, *Justice Delayed, Not Denied: Statutory Limitations and Human Rights Crimes*, 43 GEO. J. INT’L L. 335 (2012).

91. See generally PETER MUCHLINSKI, *MULTINATIONAL ENTERPRISES AND THE LAW* 125-176 (2d ed. 2007).

92. See generally For National Human Rights Institutes.

93. U.N. OHCHR, *Paris Principles: 20 years guiding the work of National Human Rights Institutions* (May 30, 2013), (“The internationally agreed Paris Principles define the role, composition, status and functions of national human rights institutions. NHRIs must comply with the Principles which identify their human rights objectives and provide for their independence, broad human rights mandate, adequate funding, and an inclusive and transparent selection and appointment process. The Principles are broadly accepted as the test of an institution’s legitimacy and credibility.”).

94. U.N. OHCHR, *OHCHR and NHRIs*, <http://www.ohchr.org/en/countries/nhri/pages/nhrimain.aspx> (last visited Feb. 20, 2015).

Alternatively, NHRIs may usefully be empowered to bring actions before State judiciaries.

Beyond this, the NAP process may serve as a useful means of considering the value of alternative Second Pillar remedial mechanisms—principally the OECD based National Contact Point mechanism under the OECD Guidelines for Multinational Corporations. Yet this is itself a difficult project, made more difficult by the reluctance of many states to fully utilize the potential offered by the NCP facility in the context of human rights and corporate activity.⁹⁵ Lastly NAP processes may be a useful framework for engaging courts in the process of state-based human rights due diligence.

D. Due Diligence and Disclosure Requirements

Due diligence and disclosure have been at the heart of the human rights and business conduct project for some time.⁹⁶ The GPs focus on both disclosure (transparency) and due diligence (engagement). That focus appears in both the First Pillar's duty to protect and in the Second Pillar's corporate responsibility to respect human rights. Yet the main focus of many GPs appears to be on the corporate obligation of due diligence⁹⁷ and disclosure.⁹⁸ Due diligence and disclosure by states relating to its own duty to protect human rights is substantially ignored. In its place some would argue that the role of disclosure and due diligence must center on the role of the state in hard wiring (through law) the corporate responsibility to engage in human rights due diligence under the Second Pillar.⁹⁹ But this approach creates

95. See, e.g., Larry Catá Backer, *Introduction; The U.S. National Contact Point--Corporate Social Responsibility Between Nationalism, Internationalism and Private Markets Based Globalization*, LAW AT THE END OF THE DAY (Feb. 1, 2013, 10:59 PM), <http://lcbackerblog.blogspot.com/2013/02/introduction-us-national-contact-point.html>.

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

97. Guiding Principles, *supra* note 1 at 17-19.

98. Guiding Principles, *supra* note 1 at 20-21.

99. See U.N. Working Group on Business and Human Rights, *Guidance on National Action Plans* (Dec. 1, 2014):

Having in mind the actual business and human rights challenges, gaps in UNGP implementation by the State, as well as by business enterprises, should be identified The same should be done in regard to business enterprises active or based in the country's territory and their performance in regard to pillars II and III (Guiding Principles 11-24 and 28-31). This includes assessing

substantial tension and incoherence that may threaten the integrity and effectiveness of the GP system itself.

The tension and incoherence is embedded in the GP system itself—and in the basic incompatibility of the human rights regimes at the center of the Second Pillar and those of the First Pillar. This incompatibility makes substantially more implausible the possibility that states might effectively harden the Guiding Principles' Second Pillar human rights due diligence regimen through national legislation. It makes that effort potentially dangerous to the human rights and business enterprise. The danger lies in a simple but important difference in normative focus between the First and Second Pillars. The First Pillar is careful not to define the core of human rights obligations around which the state duty arises. The reason is simple—all states sometimes have a very different list of international law and norms which it has chosen to transpose into its domestic legal order as both externally binding on the state (as against other states) and as binding within the state (as law that may be invoked by individuals before courts and administrative bodies). It is, for example, well known that the United States has refused to ratify or transpose into its domestic law a number of key instruments of international human rights law that many other states have domesticated. In contrast, the Second Pillar concerning corporate responsibility is quite clear about the international law and norms that make up the core of human rights that enterprises have a responsibility to respect.¹⁰⁰

One can immediately see the problem. The First Pillar adopts a traditional and conventional approach to the state duty to protect human rights. That duty is limited by traditional concepts of applicability, which states have the power to modify as they see fit (except with respect to certain *jus cogens* obligations, to the extent that a state recognizes the concept of *jus cogens* at any rate).¹⁰¹ The

to what extent business enterprises carry out human rights due diligence and provide effective remedy through operational-level grievance mechanisms.

Id. at 7. Yet in doing so it effectively ignores the WPs equally applicable call for assessment of legal gaps in the state's domestic legal order with respect to human rights. *See id.*

100. Principle 12 of the Guiding Principles specifies that this minimum universe of rights includes the "International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labor Organization's Declaration on Fundamental Principles and Rights at Work." Guiding Principles, *supra* note 1, at 13-14.

101. *See generally* Alfred Verdross, *Jus Dispositivum and Jus Cogens in International Law*, 60 AM. J. INT'L L. 55 (1966); Karen Parker & Lyn Beth Neylon, *Jus Cogens: Compelling*

universe of human rights that a state is obligated to protect under the First Pillar, then, can vary substantially from state to state. Even when a state transposes international law into domestic law, it may, by reservation, substantially change its content. If that is the case, it is impossible for the state to serve as the regulatory source for efforts to harden the Second Pillar disclosure and due diligence rules. One cannot use the state to harden the Second Pillar disclosure and due diligence requirements because few states have recognized and incorporated into their domestic legal orders the entirety of the minimum universe of human rights law and norms specified in the Second Pillar.

What follows? On the one hand efforts to use the state to comprehensively regulate the Second Pillar obligations of enterprises will fail. They will fail because the scope of the state's universe of human rights is not the same (and usually narrower) than the corresponding obligations of corporations to respect human rights. This accounts, in part, for the objection of some commentators to the project, driven by some global civil society organizations and states that would seek to "legalize" second pillar obligations. For these commentators, that efforts amounts to an effort, inadvertent perhaps, to shrink the scope of the obligation of corporations to respect human rights in transnational economic activities. That, in itself, would undo a major foundation of the GPs themselves.

On the other hand, for those committed to state regulation of corporate obligations, the effort is reduced to piecemeal legislation. Thus, for example, there was great rejoicing when the U.S. included obligations of disclosure and reporting relating to conflict minerals.¹⁰² That sends a terrible signal to the corporate community, suggesting that no part of the Second Pillar has any effect unless it is transposed into law.. More importantly, that law may be challenged on the basis of the constitutional constraints of the domestic legal order seeking its

the Law of Human Rights, 12 HASTINGS INT'L & COMP. L. REV. 411 (1989); Anthony D'Amato, *It's a Bird, It's a Plane, It's Jus Cogens!*, 6 CONN. J. INT'L L. 1 (1990).

102. See Dodd-Frank Wall Street Reform and Consumer Protection Act, 31 U.S.C. § 1502 (2010) (discussing the reporting requirement on the sourcing of certain conflict minerals); and the rules relating to conflict minerals described in Conflict Minerals, 77 Fed. Reg. 56,274 (Sept. 12, 2012) (to be codified at 17 C.F.R. pts. 240 and 249b); see Melvin Ayogu & Zenia Lewis, Opinion, Conflict Minerals: An Assessment of the Dodd-Frank Act, BROOKINGS.EDU (Oct. 3, 2011), available at <http://www.brookings.edu/research/opinions/2011/10/03-conflict-minerals-ayogu>.

imposition.¹⁰³ The result is the functional evisceration of the Second Pillar, not just with respect to disclosure and due diligence, but with respect to the scope of the responsibility to respect as well. One need not wait for states to develop an autonomous social norm culture of respect for human rights among businesses. Fractionalization, piecemeal legislative interventions based on momentarily politically expedient measures, or national human rights law mapping is not likely a responsible answer.

If this is the case, what might be a better approach to the due diligence and disclosure projects for states under the First Pillar duty to protect human rights? In other words, what does this state duty project mean for the Working Group as it considers developing its roadmap for NAPs, understood as focused establishing a coherent framework for operationalizing the state duty? In the first instance, such a duty, touches on the larger issue of transparency, which is an important normative value in constitutional democratic states, especially when that duty is directed toward due diligence and disclosure.¹⁰⁴ For state action under NAPs, this translates to a need to: (1) map its human rights sensitive laws, regulations, and policies undergoing a rigorous human rights due diligence process on itself, (2) determine the deficiencies in laws, regulations, practices and policies that emerge from its due diligence exercise, (3) disclose this mapping and deficiency analysis widely and engage in broad based consultations within government and among relevant stakeholders; (4) develop the capacity to make readily and easily available to the most modest of its citizens functionally adequate access to all laws, regulations, policies, and practices that touch on the state's duty to protect human rights (and keep these updated), (5) disclose all of the state's relations with its state owned enterprises, the terms of all of its procurement agreements, and the practices and interventions related to both, and (6) fully disclose all actions, practices and rules relating to all forms of sovereign investing.

103. Again, consider conflict minerals disclosure, the rules for which were successfully challenged in part on the basis of its inconsistency with current interpretations of the U.S. Constitution. See Sarah N. Lynch & Lawrence Hurley, *U.S. Appeals Court Finds Conflict-Minerals Rule Violates Free Speech*, REUTERS, (April 14, 2014, 5:34 PM), <http://www.reuters.com/article/2014/04/14/us-court-sec-conflictminerals-idUSBREA3D13U20140414>.

104. See generally Mark Fenster, *The Opacity of Transparency*, 91 IOWA L. REV. 885 (2006); INCREASING TRANSPARENCY IN THE EUROPEAN UNION? (Veerle Deckmyn ed., 2002).

Finally, this approach does not mean that there is no room for hardening corporate responsibility through law, especially regarding due diligence and disclosure. On the contrary, there may well be space for targeted and limited legal structures. But these have to be constructed in ways that take advantage of the national context and political will of the states concerned. My own sense is that, with the understanding that these interventions will necessarily be piecemeal or grounded on national human rights mapping, the following diligence and reporting frameworks might prove useful: (1) treat human rights as a financial contingency that must be reported on financial statements already required to be produced under law, and explained in the corporate annual report; (2) provide tax incentives for human rights remediation that substantially reduces the transaction costs and access limitations to courts and judicial remedies; (3) require human rights due diligence mechanisms and human rights reporting as a listing requirement on all securities exchanges.

This basic approach to disclosure and due diligence focuses state efforts where it principally belongs—on the state itself and its construction and maintenance of an appropriate and functionally effective framework for protecting human rights within its jurisdiction. It targets due diligence and disclosure on the mechanics of state activity, and it allows for targeted legal interventions in ways that enhance rather than subvert the Second pillar obligations of enterprises. That these might be developed through a NAP would add coherence to the project. That the Working Group might build capacity in this respect would be a great benefit for the GPs and their evolution from theory to practice. This would fall squarely within those portions of its mandate emphasized in the 2014 UN Resolution, which extends the mandate of the Working Group.¹⁰⁵

It is with these thoughts in mind that one can conclude this section with a better sense of the appropriate scope of the direction of the state duty to protect. More importantly, the consequences of that approach can be profound, especially with respect to the mechanics of operationalizing the state duty in a coherent and harmonized way—through treaties, a subject taken up again in Section IV. The Working

105. H.R.C., 26th Sess. Human Rights and Transnational Corporations and Other Business Enterprises, Human Rights and Transnational Corporations and Other Business Enterprises, Human Rights Council, Twenty-sixth session, Agenda item 3, Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development, U.N. Doc. A/HRC/26/L.1 (June 23, 2014).

Group has been promoting, quite usefully, a set of mechanisms through which states, especially those with modest capacity, might be able to develop workable national approaches to the implementation of the GPs. Those mechanisms might best be articulated through the focused discipline of a national action plan. It is, indeed, only by transforming the GP from principle to action, especially institutionalized action at the national lever (First Pillar) and corporate action (Second Pillar) that the promise of embedding of basic human rights sensibilities in economic activity can be realized. The effort to create a “how to” for states is itself no small effort, and a roadmap for these roadmaps is also necessary. Even these few notes on considerations for the development of a roadmap for NAPs suggests only a small part of the enormity of the project and the capacity deficiencies in states that these might reveal.

To the end of producing a substantially functional NAP roadmap, this essay has suggested that, while the ultimate object of such roadmap, and the NAPs built thereon, is to enable states to better regulate corporate human rights behaviors, that ultimate objective cannot be achieved until states build their own regulatory and administrative capacities. Human rights capacity building is at the center of the state duty to protect human rights under the First Pillar and requires states to undertake their own assessment of their laws, legal cultures, and behaviors relevant to the exercise of human rights-affirming conduct in the economic and regulatory structures of states. NAPs that work toward building that capacity will provide a very firm foundation through which states might better fulfill their obligations with respect to corporate conduct within their jurisdiction.

II. ON THE PROBLEM OF THE ENTERPRISE AND THE CORPORATE RESPONSIBILITY TO RESPECT HUMAN RIGHTS: REGIMES OF REPORTING AND ASSURANCE FRAMEWORKS BEYOND THE STATE

While the focus of Section II was on the state duty to protect human rights, and its complexities, this Section turns to the other great source of human rights based conduct norms—the corporate responsibility to respect human rights. The efforts of corporations and other business enterprises under the GP are founded on the Second Pillar responsibility¹⁰⁶ to respect human rights, which requires

106. Guiding Principles, *supra* note 1, at 11-24.

corporations to “avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved”¹⁰⁷ as a specific expression of the general obligation of corporations “as specialized organs of society performing specialized functions, required to comply with all applicable laws and to respect human rights.”¹⁰⁸ They also extend to the responsibility to “provide for or cooperate in [the] remediation [of adverse human rights impacts] through legitimate processes”¹⁰⁹ and to the Third Pillar obligation to “establish or participate in effective operational-level grievance mechanisms for individuals and communities who may be adversely impacted.”¹¹⁰ “Operational-level grievance mechanisms perform two key functions regarding the responsibility of business enterprises to respect human rights. First, they support the identification of adverse human rights impacts as a part of an enterprise’s ongoing human rights due diligence Second, these mechanisms make it possible for grievances, once identified, to be addressed and for adverse impacts to be remediated early and directly by the business enterprise, thereby preventing harms from compounding and grievances from escalating.”¹¹¹

Unlike the state duty to protect human rights elaborated under the First Pillar, the corporate responsibility to respect human rights is better and more specifically defined. Yet that responsibility is complicated by the inherent polycentricity of the corporate responsibility to respect human rights.¹¹² On the one hand, all enterprises share a basic obligation to comply with applicable laws.¹¹³ The determination of the extent of legal obligation where more than one set of national laws may apply (as would be the case where a host state may apply its laws extraterritorially to reach corporate conduct that may also be subject to regulation by the law of the host state) remains unsettled and its resolution may sometimes be complex. Still, the basic obligation is both well understood and uncontroversial.

107. Guiding Principles, *supra* note 1, at 11.

108. *Id. supra* note 1, at 1.

109. *Id. supra* note 1, at 22.

110. *Id. supra* note 1, at 29.

111. *Id. supra* note 1, at 31-32.

112. See generally Larry Catá Backer, *Governance Without Government: An Overview and Application of Interactions Between Law-State and Governance-Corporate Systems, in Beyond Territoriality: Transnational Legal Authority, in AN AGE OF GLOBALIZATION 87-123* (Günther Handl, Joachim Zekoll & Peer Zumbansen eds., 2012).

113. Guiding Principles, *supra* note 1, at 23.

On the other hand, the responsibility to respect human rights extends beyond a mere obligation to comply with law. While the laws of the place where enterprises operate always serve as a baseline, the responsibility to respect is also and simultaneously grounded in a set of transnational norms that are themselves derived from international law and norms originally applicable under public law principles to states.¹¹⁴ The basis of that connection to international normative standards is embedded in the GPs.¹¹⁵

Though the obligation to comply with applicable law is highly contextual and may vary from jurisdiction to jurisdiction, “business enterprises have the same responsibility to respect human rights wherever they operate.”¹¹⁶ This autonomous responsibility, grounded in international norms, also informs the nature of the corporate obligation to comply with local law. The responsibility to respect human rights includes seeking “ways to honour the principles of internationally recognized human rights when faced with conflicting requirements”.¹¹⁷

The GPs specify three distinct though related undertakings of enterprises that seek to meet their responsibility to respect human rights.¹¹⁸ The GPs then provide substantial guidance for undertaking

114. This is what John Ruggie referenced as a social license to operate. See John G. Ruggie, *Protect, Respect and Remedy: A Framework for Business and Human Right*, MIT INNOVATIONS 189-212 (2008), available at <http://www.mitpressjournals.org/doi/pdf/10.1162/itgg.2008.3.2.18>. (“Whereas governments define the scope of legal compliance, the broader scope of the responsibility to respect is defined by social expectations—as part of what is sometimes called a company’s social license to operate.”); see generally Kathleen M. Wilburn & Ralph Wilburn, *Achieving Social License To Operate Using Stakeholder Theory*, 4 J. INT’L BUS. ETHICS 2, 3-16 (2011); Larry Catá Backer, *Transnational Corporations’ Outward Expression of Inward Self-Constitution: The Enforcement of Human Rights by Apple, Inc.*, 20 IND. J. GLOBAL LEGAL STUD. 805, 812 (2013).

115. Guiding Principles, *supra* note 1, at 12:

“The responsibility of business enterprises to respect human rights refers to internationally recognized human rights —understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organization’s Declaration on Fundamental Principles and Rights at Work.”

116. *Id. supra* note 1, at 23.

117. *Id. supra* note 1, at 23.

118.

These include:

- (a) A policy commitment to meet their responsibility to respect human rights;
- (b) A human rights due diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights;
- (c) Processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute.

the development of conforming policy commitments, on the structure of human rights, due diligence and the general approach to corporate based remediation.¹¹⁹ These form the heart of the manner through which corporations respect human rights in their operations.

But principles are not instructions in the appropriate way in which to undertake the crafting of policy commitments, the organization and operation of appropriately structured and routinized human rights due diligence, or the deployment of adequate remediation facilities. Moreover, principles, even those as tightly drafted as the GPs, require application--and in the application, interpretation of the GPs in context. Recently, important elements of civil society have undertaken a variety of approaches to the development of institutional and routinized structures within which corporations could seamlessly comply with their Second Pillar responsibilities. In some cases, corporations have sought to develop their own structures and to routinize them within their corporate cultures.¹²⁰ In many other cases, civil society, transnational private and international public organizations have sought to provide guidance.¹²¹

As these dynamics develop, the inevitable question arises as to what good reporting on company alignment with the UN Guiding Principles--and good assurance of such reports--should involve. Some existing reporting standards offer a number of human rights-related indicators--notably the Global Reporting Initiative's new G4 framework.¹²² So do various social audit protocols and sustainability assurance standards. And some industry or issue-specific initiatives have developed more detailed indicators in those focal areas. However, none of these initiatives, alone or in combination, cover the breadth of a company's responsibility to respect human rights as set out in the UN Guiding Principles.¹²³

Id. supra note 1, at 15.

119. *Id. supra* note 1, at 16-23.

120. See, e.g., *Supplier 2014 Responsibility Progress Report*, APPLE (January 2014) available at https://www.apple.com/supplierresponsibility/pdf/Apple_SR_2014_Progress_Report.pdf.

121. See, e.g., *ISO 26000 - Social Responsibility*, INTERNATIONAL ORGANIZATION FOR STANDARDIZATION, <http://www.iso.org/iso/home/standards/iso26000.htm> (last visited Feb. 25, 2015).

122. See generally *G4 Sustainability Reporting Guidelines*, GLOBAL REPORTING INITIATIVE, <https://www.globalreporting.org/reporting/g4/Pages/default.aspx> (last visited Feb. 25, 2015).

123. See RAFI Framing Document, *supra* note 13 at 5.

The proliferation of standards and approaches has produced markets in compliance.¹²⁴ They have also produced what Tim Mohin, the CSR director for Sun Microsystems, has called “collaboration,” which “means that companies can and will collaborate on CSR efforts when that is more efficient, while continuing to compete on their signature CSR programs.”¹²⁵ That is a perhaps necessary consequence of the anarchic nature of the transnational sector in which the corporate responsibility is situated.¹²⁶ Yet that center-less autonomy of norm system universes, even those revolving around a principles based center like the GP, has consequences. Where markets commodify the mechanisms of communication, then the possibility of speaking across platforms becomes more difficult:

This creates a risk to the clarity, predictability and global convergence that the UN Guiding Principles have fostered regarding companies’ baseline responsibility for human rights. Without a widely-accepted framework for reporting company implementation of the Guiding Principles, and a parallel framework for assuring such reports, we can expect to see a proliferation of interpretations in practice. Reports and audits will become highly divergent in their reflection of the Guiding Principles. This will undermine the ability of

124. See, e.g., Laura Albareda, *CSR governance innovation: standard competition-collaboration dynamic*, 13 CORPORATE GOVERNANCE 551–68 (2013).

125. Tim Mohin, *The Top Ten Trends for CSR in 2012*, FORBES (Jan. 18, 2012, 4:27 PM), <http://www.forbes.com/sites/forbesleadershipforum/2012/01/18/the-top-10-trends-in-csr-for-2012/>. He explains the nature of the societal context in which non-state CSR governance is forged and operates beyond law and legal structures:

As CSR becomes more of a differentiator, companies will both compete and collaborate on CSR issues . . . The numerous CSR ratings, together with data from the Reputation Institute’s 2011 “Pulse Survey,” which indicate that CSR is responsible for more than 40% of a company’s reputation, lay the basis for CSR competition. On the other hand, there are a plethora of associations and multi stakeholder networks that foster collaboration on CSR topics. Groups like the Electronics Industry Citizenship Coalition demonstrate how competitors can partner on CSR issues like conflict minerals. Why would they? Such issues are so massive that working together is clearly more efficient. On the other end of the spectrum are initiatives like GE’s ecomagination program, which furthers competitive advantage.

Id. at 5.

126. See Larry Catá Backer, *A Conversation About Polycentricity in Governance Systems Beyond the State*, LAW AT THE END OF THE DAY (Nov. 11, 2013), available at <http://lbackerblog.blogspot.com/2013/11/a-conversation-about-polycentricity-in.html>. See generally Larry Catá Backer, *Governance Polycentrism—Hierarchy and Order Without Government in Business and Human Rights Regulation* (Coalition for Peace and Ethics, Working Paper No. 1/1, 2014), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2373734.

the Guiding Principles to continue to drive improvements in practice, which in turn will be to the detriment of human rights, society and business.¹²⁷ This permits the elaboration of a horizontal and anarchic system of rulemaking outside the state and legal spheres, centered on the disciplining of business behaviors that touch on human rights detrimental actions.¹²⁸ Yet this is a system that might also require the sort of connectivity and harmonization—the coherence¹²⁹—that parallels the need for similar coordination among states seeking to operationalize their duty to protect human rights.¹³⁰ Together, the efforts at coherence within state and enterprise systems drive the overall aim of the Guiding Principles—coordination among state, international and private governance systems around the single normative framework of human rights.¹³¹

Even as market-based anarchy appears to have begun to threaten the operationalization of a cohesive corporate responsibility scheme to respect human rights, a number of efforts have been underway to serve a bridging role. Two are considered here as examples, the insights of which might be more broadly applied. The first is the Human Rights Reporting and Assurance Frameworks Initiative (“RAFI”),¹³² developed by Shift¹³³ and supported by the UN Working Group.¹³⁴ This project developed a draft framework and

127. RAFI Framing Document, *supra* note 13, at 5.

128. See generally Larry Catá Backer, *The Concept of Constitutionalization and the Multi-Corporate Enterprise in the 21st Century* (Coal. for Peace & Ethics, Working Paper No. 6/1, 2014) (positing system of polycentric constitutionalism).

129. See Guiding Principles *supra* note 1, at 16.

130. *Id. supra* note 1, at 8-10.

131. *Id. supra* note 1, General Principles (coherence), 3 (coordination), 4 (coordination), 5 (coherence), 7 (coordination), 8 (coherence), 10 (coherence), 12 (coordination), 13 (coordination), 23 (coordination), 24 (coordination), 28 (coordination), 30 (coherence). For a theoretical approach to the notion of inter-systemic coordination generally, see Gunther Teubner, *The Corporate Codes of Multinationals: Company Constitutions Beyond Corporate Governance and Co-Determination*, in *CONFLICT OF LAWS AND LAWS OF CONFLICT IN EUROPE AND BEYOND: PATTERNS OF SUPRANATIONAL AND TRANSNATIONAL JURIDIFICATION* (Rainer Nickel ed., 2009).

132. *Human Rights Reporting and Assurance Frameworks Initiative Overview*, SHIFT PROJECT, <http://www.shiftproject.org/project/human-rights-reporting-and-assurance-frameworks-initiative-rafi>.

133. *Who We Are*, SHIFT PROJECT, <http://www.shiftproject.org/page/who-we-are> (“Shift is an independent, non-profit center for business and human rights practice. We help governments, businesses and their stakeholders put the UN Guiding Principles on Business and Human Rights into practice. We share our learning by developing public guidance materials that help build the field globally.”).

134. U.N. Working Group Statement on its Support for the Reporting and Assurance Frameworks Initiative Led by Shift, *Mazars and the Human Rights Resource Centre for*

implementation guide in 2014¹³⁵ and launched its first final version (with embedded implementation guidance) in early 2015.¹³⁶ The second is the disclosure systems being attempted through securities exchanges, and specifically on the world federation of exchanges creation of a sustainability working group and the proposal to require extra financial disclosure. Each is discussed in turn.

A. RAFI

The RAFI project seeks to address this gap that is emerging as enterprises (and to some extent states) seek to contribute to the operationalization of the corporate responsibility to respect human rights by providing a variety of discretionary or mandatory (piecemeal mostly) frameworks within which respecting human rights may be undertaken, measured, reported and assessed. The RAFI project team represents a coordinated effort of civil society actors. It includes Shift and Mazars, who work in liaison with the Human Rights Resource Centre. Shift is an independent, non-profit center for business and human rights practice. Mazars is a global provider of audit, accountancy, tax, legal and advisory services. The Human Rights Resource Centre is a non-profit academic center working on human rights issues in the Association of South East Asian Nations (“ASEAN”). RAFI is overseen and steered by an Eminent Persons Group (“EPG”), which consists of leaders from a broad range of stakeholder backgrounds, globally and in ASEAN.¹³⁷

The RAFI team explained that its fundamental purpose was to confront the risk that the proliferation of methodologies to Second

ASEAN, SHIFT PROJECT, <http://shiftproject.org/sites/default/files/UN%20Working%20Group%20Support%20for%20RAFI.pdf>.

135. The draft Framework was published as UN Guiding Principles Reporting Framework (November 2014), available at http://business-humanrights.org/sites/default/files/documents/DRAFT_UNGPRReportingFramework_11Nov2014.pdf. The draft implementation guide was made available as The UN Guiding Principles Reporting Framework, Implementation Guide (Nov. 2014), available at http://business-humanrights.org/sites/default/files/documents/DRAFT_UNGPRReportingImplementationGuide_11Nov2014.pdf.

136. UN Guiding Principles Reporting Framework With Implementation Guidance (2015).

137. *The Business and Human Rights Reporting and Assurance Frameworks Initiative (“RAFI”) Project Framing Document*, supra note 14, at 10. The latest reported work of the RAFI team was summarized in Human Rights Reporting and Assurance Framework Initiative (RAFI), Takeaways From Consultations, August–December 2014, available at http://business-humanrights.org/sites/default/files/GPRF_TakeawaysFromFall2014_29Jan2015.pdf.

Pillar compliance would create “a risk to the clarity, predictability and global convergence that the UN Guiding Principles have fostered. . . . Reports and audits will become highly divergent [and] will undermine the ability of the Guiding Principles to continue to drive improvements in practice”¹³⁸ In place of this market for methodology, RAFI would offer a “widely-accepted framework for reporting company implementation of the Guiding Principles, and a parallel framework for assuring such reports”¹³⁹ to address the gap between principle and practice under the Second Pillar. Much of RAFI’s work has been widely distributed, in line with its objective of seeking wide consultation and engagement in developing its reporting framework.¹⁴⁰ Those consultations have suggested parameters within which critical stakeholders have considered the issue of human rights reporting, its objectives, utility, scope, and most importantly, its form.¹⁴¹ Those parameters included concerns about transparency, inclusiveness and seriousness of its consultation process, the utility of collaboration with other civil society organizations working on similar reporting systems, the scope of the RAFI framework as setting a floor rather than a ceiling for reporting and assurance, fear of non-compliance with overly complex reporting (a difficulty of other systems), and the importance of developing uniform parameters for reporting.¹⁴²

138. *Id.* at 5.

139. *Id.*

140. See *RAFI Publishes 2013 Take Away Document and Next Steps for 2014*, HUMAN RIGHTS RESOURCE CENTRE (Apr. 6, 2014), <http://hrrca.org/content/rafi-publishes-2013-take-away-document-and-next-steps-2014> (outlining the project’s next steps for the first half of 2014, including consultation plans).

141. *The Take-Aways from RAFI Consultations in 2013*, SHIFT PROJECT (February 2014), <http://hrrca.org/system/files/RAFIConsultations2013Takeaways.pdf>.

142. *Id.* Also particularly helpful, as part of that work, was a Report produced by Shift in June 2014. See generally SHIFT PROJECT, EVIDENCE OF CORPORATE DISCLOSURE RELEVANT TO THE UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS, (2014). Draft Paper for Discussion (June 2014). Its purpose was to “inform understanding of how companies currently report on their human rights performance, and how this maps against the UN Guiding Principles.” *Id.* at 4. It considered “the extent to which company disclosure covers information relevant to the ‘headline statement’ of each Guiding Principle [and an] assessment of supporting evidence provided by the company for . . . each Guiding Principle.” *Id.* at 5-6. The Report concluded, without much surprise, that though leading companies committed to human rights due diligence have been building disclosure and reporting systems, much of what is disclosed is general and policy based, the disclosure frameworks do not focus well on reporting specific impacts and responses, and virtually none reported on shareholder engagement. *Id.* at 6-7.

The UN Guiding Principles Reporting Framework (the Reporting Framework)¹⁴³ launched on February 24, 2015 in London.¹⁴⁴ The contours of the reporting and assurance framework were discernible in preliminary form by late 2014.¹⁴⁵ These closely follow the GP “headlines“ for Principles 16 through 23 with additional layers adding detail reflecting industry specific private efforts at implementation of the Guiding Principles.¹⁴⁶

At one level, the Reporting Framework is just what it says: a framework to help companies report on their human rights performance in line with the UN Guiding Principles. Yet it is also much more than that. . . . This Reporting Framework represents an indispensable contribution to the collective effort to embed the UN Guiding Principles into practice.¹⁴⁷

Indeed, this focus of the Reporting Framework has been well explained by its developers.¹⁴⁸ RAFI reporting standards would be organized around “(1) the content of the Human Rights Statement, (2) the identification and assessment of salient human rights risks, (3) public disclosure of how specific risks or impacts are addressed, and (4) additional information in the Statement.”¹⁴⁹ Its objectives focus on structuring information disclosure that is meaningful to stakeholders, viable for companies to follow, and that helps foster

143. UN Guiding *Principles Reporting Framework With Implementation Guidance* (2015), available at http://www.ungpreporting.org/wp-content/uploads/2015/02/UNGuidingPrinciplesReportingFramework_withimplementationguidance_Feb2015.pdf.

144. Shift Press Release, First Comprehensive Guidance for Companies on Human Rights Reporting Launches in London, Feb. 24, 2015, available at <http://shiftproject.org/news/first-comprehensive-guidance-companies-human-rights-reporting-launches-london>.

145. *UN Guiding Principles Reporting Framework* (November 2014), available at http://business-humanrights.org/sites/default/files/documents/DRAFT_UNGPRReportingFramework_11Nov2014.pdf.

146. See Draft Reporting Framework, *supra* note 135, at 4 (“The Reporting Framework is grounded in the Guiding Principles and aligned with the structure and content of the corporate responsibility to respect human rights. It is also designed to dovetail with various industry and issue specific initiatives related to business and human rights that provide some clarity about how the Guiding Principles apply in specific situations, as well as with broader reporting frameworks in the non-financial or integrated reporting fields.”).

147. Reporting Framework, *supra* note 136, at 6.

148. See Mazars & Shift, DEVELOPING GLOBAL STANDARDS FOR THE REPORTING AND ASSURANCE OF COMPANY ALIGNMENT WITH THE UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS 22 (2013), available at <http://business-humanrights.org/sites/default/files/media/documents/developing-global-standards-discussion-paper.pdf> (“Annex B—Elements of the Guiding Principles for Inclusion in the Reporting and Assurance Standards”).

149. *Id.* at 10-13.

internal dialog.¹⁵⁰ One level of detail might include the specific areas or sectors of greatest interest to the reporting entity. Another layer might add detail about the mechanics of human rights due diligence. An additional layer might provide space for relating specifics with respects to systems, claims and remediation. This would permit a heightened level of specificity about a reporting entity's human rights policy, the way in which the policy is embedded within its operations, and disclosure relating (at least in the aggregate) to the entity's salient human rights risks and their mitigation efforts. The structure would also encourage assessment of the entity's human rights mechanics. The assurance review is tied to the focus of reporting.¹⁵¹

This three-layer information hourglass disclosure system (Parts A-C of the Reporting Framework) forms the heart of the reporting structure contemplated under the draft RAFI framework.¹⁵² Part A is composed of two sections, each framed as a single general question followed by additional questions designed to elicit further detail.¹⁵³ Part B is meant to serve as a filter, in the sense that it is meant to narrow the focus to those of material significance to the reporting entity.¹⁵⁴ Part C is then designed to elicit more comprehensive reporting on this more narrowly framed set of human rights related issues and to lead the entity to effective responses.¹⁵⁵ The relationship among parts A, B, and C are also discussed.¹⁵⁶

The overarching questions in Parts A and C focus on general, relevant information on the company's efforts to meet its obligations to respect human rights. They are designed to enable responses from any company, including small companies and those at a relatively early stage in the process.¹⁵⁷ And like the Guiding Principles themselves, the bare bones question-disclosure framework of the Reporting Framework is augmented by a far more detailed set of commentaries that are meant to provide guidance for the guidance of

150. Draft Reporting Framework, *supra* note 135, at 4-5.

151. Mazers & Shift, *supra* note 148, at 13-18.

152. Reporting Framework, *supra* note 136, at 7-8; Draft Reporting Framework, *supra* note 144, at 5-6.

153. Reporting Framework, *supra* note 136, at 9.

154. *Id.* at 9.

155. *Id.* at 9-10.

156. *Id.* at 20

157. Reporting Framework, *supra* note 136, at 19; *see also* Draft Reporting Framework, *supra* note 135, at 5 (“Responding to these eight questions, in addition to the information requirement under Part B, is the basic threshold for using the UN Guiding Principles Reporting Framework.”).

the Reporting Framework.¹⁵⁸ The focus is on narrative exposition—no effort is undertaken (nor might it be possible) to adapt the qualitative disclosure framework of the Reporting Framework to the disciplines of standard financial reporting.¹⁵⁹ Indeed, the quantification necessary for financial statement reporting itself might pose the danger of reducing human rights due diligence to little more than an extension of risk reporting. That, in turn, would potentially reduce the value of the Reporting Framework as a means of focusing on identification prevention and remediation which constitute an important objective of the corporate responsibility to respect human rights.

It is far too early to tell how the RAFI Reporting Framework will advance uniformity and aid harmony in systems of reporting human rights due diligence under the GPs. To date only a few, but very important industry business culture leaders, have signaled their willingness to produce RAFI Framework reports.¹⁶⁰ More significantly, perhaps, investors, with \$3.91 trillion assets under management signed an “Investor Letter” in which they indicated their support of the RAFI Reporting Framework.¹⁶¹

Still, it is not too early, in this context, to usefully consider the form and challenges that face important projects like the RAFI Reporting Framework. The RAFI project is both necessary and realistic. It provides a mechanism that makes it easier for enterprises to develop and apply a robust human rights management system that are relatively uniform. RAFI intends its reporting platforms to serve as one of many non-financial reporting systems to “complement existing and on-going initiatives in this field.” Yet at the same time, the RAFI initiative could be incorporated as a component of a company’s financial reporting, through which RAFI reporting “could

158. See Reporting Framework, *supra* note 136, at 26-113. .

159. The Reporting Framework notes three overarching objectives: (1) to provide guidance on how best to engage in human rights due diligence reporting; (2) to ensure the feasibility of Framework disclosure; and (3) to help companies improve internal management systems. *Id.* at 14.

160. Press Release, First Comprehensive Guidance for Companies on Human Rights Reporting Launches in London, Shift (Feb. 24, 2015), available at <http://shiftproject.org/news/first-comprehensive-guidance-companies-human-rights-reporting-launches-london> (“Companies from five different industries are early adopters of the Guiding Principles Reporting Framework, including Unilever—the first adopter—plus Ericsson, H&M, Nestlé and Newmont.”).

161. *UN Guiding Principles Reporting Framework Investor Statement* (Feb. 24, 2015), available at <http://www.ungpreporting.org/early-adopters/investor-statement/>.

contribute to, and become a part of, integrated reporting through which companies communicate holistically on what may impact the sustainable value of the business.”¹⁶²

RAFI desires to tailor its reporting mechanisms to encourage reporting that is useful, but that appears to be both driven from the top (reflecting the GPs insight that ownership of human rights management at the very top of supply chains is critical to the success of the operationalization of a corporation’s second pillar responsibilities), but also be sensitive to the needs (in terms of information and system focus) of internal, external, private and governmental stakeholders. Simultaneously, the RAFI reporting mechanisms are meant to provide a means for improving reporting. It is useful as a gateway reporting and management system creation, but also encourages the development of more sophisticated and responsive systems (and the reporting that goes along with it). RAFI is focused on narrative reporting, paralleling in some small respect, the approach to management’s reporting of its internal oversight systems under the Sarbanes Oxley Act Section 404.¹⁶³ But this does not rule of quantitative measures (though it is unlikely that civil society will view quantitative measures without suspicion). The objective is clear and straightforward: “global and widely accepted process for companies to demonstrate whether their policies and processes are indeed aligned with the UN Guiding Principles and therefore capable of meeting their responsibility to respect human rights.”¹⁶⁴

Yet that goal of developing robust human rights management and reporting systems, and the value of the mechanisms developed through RAFI, are not undertaken in a vacuum. On one hand, RAFI’s success will have to be measured against the mechanisms, now deeply embedded in corporate and governmental cultures (of assessment and management) of financial reporting. There is no consensus yet on the forms and level of standardization, routinization and cultural embeddedness in business and human rights reporting and assessment of the sort that has effectively turned financial reporting as the most

162. Mazars & Shift, *supra* note 149, at 9.

163. Sarbanes Oxley Act of 2002 (Pub. L. 107–204, 116 Stat. 745), enacted July 30, 2002), 15 U.S.C. 7262.

164. Mazars & Shift, *supra* note 148, at 5.

legitimate basis of “seeing“ a corporation,¹⁶⁵ and the effects on which remain the most critical element of corporate decision making is the “gold standard“ against which any sort of non-financial organizational reporting, assessment and decisions will be measured. Such measurement will occur whatever the preferences of the human rights community, of civil society, of businesses, of governments or others. On the other hand, RAFI’s project is not limited to the same finite and discernable set of stakeholder communities to which financial reporting and management are directed. Global civil society, impacted communities, indigenous groups and others, with little direct interest in or use for financial reporting and management, have a significant stake in human rights management systems. And while financial reporting is directed outwards primarily to the investor and consumer communities, and to the state, human rights management has more of a public character in its scope and nature. Thus, the approach to human rights management reporting, even those grounded in the GPs, will have to share a similar set of functional objectives of financial reporting with respect to legitimacy, cultural embeddedness and effectiveness.

More importantly, human rights management reporting and assessment systems must be comparable. That is, one should be able to read and compare the reports of a variety of companies relating to their human rights management the way that one can compare the financial performance of the same companies. This is the key principle of accounting conventions and foundational to any system of reporting.¹⁶⁶ It may be structured formally in distinct ways that reflect the character, nature and scope of the needs of the communities served by or through such reporting. But the goal of

165. See Peter Hardi, Gergely Radacsi & Katharina Schmitt, *Evaluations of CSR Performance and Impact as Seen by Key Actors Other Than Business* at 12 (CSR Impact Working Paper 3, 2012), available at [http://csr-impact.eu/index.php?eID=tx_mpcsrimpactdl&tx_mpcsrimpactdl\[dldid\]=15](http://csr-impact.eu/index.php?eID=tx_mpcsrimpactdl&tx_mpcsrimpactdl[dldid]=15) (noting that “[t]he assessment of the economic, social and environmental outcomes and impacts of CSR activities is sporadic. There are almost no independent measurement tools and quantitative methods applied. If assessments are performed, these are done by reviewing managers’ personal observations, or publicly available company communications (such as CR reports).”).

166. Obaidullah Jan, *Comparability Principle*, ACCOUNTING EXPLAINED, <http://accountingexplained.com/financial/principles/comparability> (last visited Feb. 1, 2015) (“Comparability is one of the key qualities which accounting information must possess. Accounting information is comparable when accounting standards and policies are applied consistently from one period to another and from one region to another. The characteristic of comparability of financial statements is important because it allows us to compare a set of financial statements with those of prior periods and those of other companies.”).

producing functionally equivalent objectives (over the long term) through the development of formally distinct mechanics may prove challenging. The RAFI consultation process, however, appeared to point to a consensus against significant efforts in the direction of quantitative standardization.¹⁶⁷ More importantly, they appeared focused on the objective of transparency and the Reporting Framework as a process enhancer toward deeper engagement by companies with the Guiding Principles.¹⁶⁸

The challenge may be heightened where overarching objectives, system mechanics, and focus on audience may appear to be unresolved. The Draft Reporting Framework retains a focus on “headline statement coverage”¹⁶⁹ as the core element of reporting in the form of the core question-specifics format of Sections A and C.¹⁷⁰ “The opening “headline statement” to each Guiding Principle defines the overarching expectations of that particular Principle, and is then followed by bullet-pointed sub-elements that provide further detail on specific expectations.”¹⁷¹ Yet this approach may produce lots of paper and very few specifics and perhaps even less incentive toward implementation.¹⁷² More robust reporting may be resisted because of

167. *Takeaways From Consultation’s August–December 2014*, available at http://business-humanrights.org/sites/default/files/GPRF_TakeawaysFromFall2014_29Jan2015.pdf. “The focus on questions rather than indicators is the right one, given the challenges in designing indicators that are meaningful across all companies in all sectors and contexts. The draft questions are generally sound and sensible, while some would benefit from simpler language.” *Id.* at 1.

168. Thus the Reporting Framework noted:

It provides a practical set of questions and information requirements through which they can engage a company in a substantive and meaningful conversation about how it meets its responsibility to respect human rights. Company reporting against the Framework should provide a robust basis to deepen and focus those conversations, offering insights into a company’s culture, strategy and approach to key stakeholder relationships.

Reporting Framework, *supra* note 136, at 14.

169. *Evidence of Corporate Disclosure relevant to the UN Guiding Principles on Business and Human Rights 5* (Shift Project, Draft Paper for Discussion, 2014).

170. The UN Guiding Principles Reporting Framework, Implementation Guide, *supra* note 142.

171. Evidence of Corporate Disclosure *supra* note 169, at 5.

172. Consider in this light, for example, the supporting guidance for the Draft Reporting Framework Part C.1, The UN Guiding Principles Reporting Framework, Implementation Guide, *supra* note 135, 34. This is not to suggest that the resulting danger of paper compliance is fatal. The Draft Reporting Framework does seek to manage companies into compliance through the more specific questions that follow the general one. But the Reporting Framework does little to augment the disciplinary focus of the exercise in reporting. That, in part, results

the risk of increased liability. Yet the reporting framework itself is quite sensitive to risk, especially in the context of developing a hierarchy of salience in reporting.¹⁷³ Moreover, a headline statement approach may also suggest that the bulk of reporting focus on central office practices and policies, rather than on reporting and implementation that focuses on the operational levels down the supply chain. Moreover, a focus on leadership companies, while necessary to create cultural buy-in and further a lead-by-example from the top, may conceal the reality that most smaller and less well-resourced enterprises may have little incentive to report and fewer resources to report well.

There is also a tendency among some members of civil society and industry to disaggregate the GPs and view them as a set of tools for assessing specific risks.¹⁷⁴ The GPs may be understood, in this light, as little more than a template through which companies recognize their responsibility to avoid specific wrongs contextually driven by corporate operations. That approach avoids the need to understand the GPs as systemic in quality, and thus, as a template for framing general reporting and human rights management systems. As a consequence, human rights reporting can be disaggregated and reporting undertaken in a piecemeal way. This can produce little by way of information that may be assessed across companies or even internally against a general standard. It also misunderstands the fundamental nature of the Second Pillar in ways that could undo its value. Related to this approach is the idea that reports, in scope and focus, ought to be driven by investors, civil society, or other noisy stakeholders. This also has a tendency to fracture reporting (as well as the human rights management program) of an enterprise, and reshape human rights due diligence from an active obligation of

from the reluctance by the framers of the Reporting Framework to develop meaningful measures for comparability across reporting companies. *See supra* note 164.

173. Reporting Framework, *supra* 142, at 24.

174. *See generally* Matteo Tonello, *The Business Case for Corporate Social Responsibility*, THE HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE AND FINANCIAL REGULATION (June 26, 2011, 11:46 AM), <http://blogs.law.harvard.edu/corpgov/2011/06/26/the-business-case-for-corporate-social-responsibility/#5> (“As the SRI movement becomes more influential, CSR theories are shifting away from an orientation on ethics (or altruistic rationale) and embracing a performance-driven orientation. In addition, analysis of the value generated by CSR has moved from the macro to the organizational level, where the effects of CSR on firm financial performance are directly experienced.”); *see also* Min-Dong Paul Lee, *A Review of the Theories of Corporate Social Responsibility: Its Evolutionary Path and the Road Ahead*, 10 INT’L J. MGMT. REV. 53, 53-73 (2008).

business to a passive response to its loudest and most effective critics. There is no “system” in this approach; here is just a more broadly applied “active shareholder” template.

Fracture and human rights wrongs “hunting” inherent in these approaches may also produce perverse results. On the part of downstream supply chain partners, it produces a tendency to hide wrongs and the sort of quasi adversarial relationships one sometimes sees with aggressive downstream human rights and behavior control systems that require constant monitoring (and which reduces the likelihood that downstream managers will internalize human rights sensitive norms, which ought to be the object of these systems). On the part of home state operations, it produces a sense that these “wrongs” occur only in less developed, foreign, and downstream partners. As a consequence, there is less pressure to turn human rights management systems inward to review operations at the home state or in the human rights management system itself. On the part of system development, it creates a tension between a systems operation approach that is legislative in structure (human rights problems ought to be deduced and managed through rules that are enforced through policing) versus ones that are understood as judicial in structure (problems in practice serve as the basis for determining what is going wrong and its resolution provides a means for determining how to fix the problem). Companies use a bit of both, but the RAFI methodologies might be pushed to order these approaches in ways that may not reflect the diverse realities of enterprise operations in context.

What an outsider looking at the RAFI process as an exercise in identifying and solving an institutional behavior management problem, the diverse challenges may produce is a tendency toward the creation of pretty but sloppy systems. Worse, these systems may not be capable of comparison across companies. These difficulties may pose significant obstacles to the realistic attainment of the goals of coherence in the sense of furthering a routinization and institutionalization of systemic human rights management and reporting that is more than the aggregate of responses to the occasional human rights wrong.¹⁷⁵ They will appear to please

175. In effect, standardization, the principle advance of projects like RAFI, may be attained at the cost of furthering movement toward the routinization of reporting, and thus of the possibility of its institutionalization. The idea sounds in the mass production of law—something that produces legal certainty and the routine necessary to augment legitimacy and

everyone consulted, but effectively provide little other than optics that are most useful to corporate marketing and shareholder relations departments at the head office of global corporations. Indeed, from the summaries of prior consultations, it appears that pleasing all powerful constituencies may well produce contradictory movements that make construction of a management system nearly impossible. These unresolved binaries, with strong advocates on both sides, make progress difficult and compromise even more so. The failure to resolve these conflicts, or to explode them by making them irrelevant for reporting and system construction, revolve around a number of key issues in reporting structures creation and ultimately human rights management systems.¹⁷⁶ Taken together, these tensions suggest the greatest challenge to the RAFI project. Many of these systemic tensions may not be reconciled; some might be avoided. But a failure to acknowledge these tensions, and the choices they suggest, may weaken the project. It will certainly produce sloppiness in system construction, sloppiness that may substantially weaken the effectiveness of the RAFI reporting systems (and thus weakened, also weaken the assurance function). At worst, unresolved, these tensions might become contradictions that may produce a slide toward systemic paralysis--designed to please everyone by making all things possible, the system will please no one, and lose its cohesion as effective and normative coherent reporting system that encourages and improves reporting—and assurance/audit.

The RAFI Reporting Framework may expose another tension.. Reporting conflates two distinct regulatory systems within which the corporate enterprise must conform its behavior. The first is the law system of the states, home and host, in which it operates directly or indirectly through supply chain relationships. These obligations are legally binding but fragmented; and they may not be consistent across the operational scope of corporate activity within

reliance; cf. Sara Berglund, Ieva Gange, & Frans van Waarden, *Mass Production of Law. Routinization in the Transposition of European Directives: A Sociological-Institutionalist Account*, 13 J. EUROPEAN PUB. POL'Y, 692, 692-716 (2006); Nathalie Lazaric, *Routinization and Memorization of Tasks in a Workshop: The Case of the Introduction of ISO Norms*, 14 INDUS. & CORP. CHANGE 873, 873-96 (2005).

176. These systemic tensions include: (1) operation philosophy: economic project versus cultural project; (2) operation mechanics: problem solving versus top down and legislative; (3) responsiveness: reactive (wrongs driven) versus proactive (rules driven); (4) Output Projection: effective internal responses (data generation and assessment) versus transparency (information dissemination); and (5) functional targets: practical behaviors inside and outside enterprise versus ideology of human rights.

their value chains. Each jurisdiction will have formally distinct law and policy frameworks (some but not all of which may converge in the human rights field), only some of which may derive from national implementation of international obligations. Each jurisdiction may also impose distinct reporting regimes on some, but not all, human rights related activities. RAFI must incorporate these distinct and diverse reporting and normative obligations as part of its framework to make it in fact workable. The failure to make space for this may reduce its value to enterprises already obliged under a growing number of fragmented and distinct reporting and normative regimes seeping into the enterprise's Second Pillar responsibilities from the First Pillar state duty. The second are those human rights obligations that are derived from the responsibility to respect and touch on corporate social norms rather than legal obligations territorially constrained. These, as the GPs make clear, are transnational responsibilities and ought to infuse all decision making, irrespective of local legal and policy cultures.¹⁷⁷

Taken together, the drive toward reporting uniformity might mask operational fragmentation, which may diminish the power of the reporting framework. Alternatively, reporting uniformity in the face of distinct legal, policy and normative regimes may fragment reporting itself, so that it may be impossible to speak of a RAFI report, but instead to speak to RAFI Framework Reporting *approaches* to multi-purpose and multi-sourced reports. That might encourage universalism and harmonization at the level of Second Pillar norm responsibilities, but may also shear away law and policy based reporting in ways that diminish the overall power of a human rights management system. Yet that may be the only recourse under a First Pillar system that produces substantial variation in national legal orders approaches to their duty to protect human rights based on their national constitutions and norm systems (overlaid to varying degrees with international law and norms). In both cases, reporting that is pretty but (necessarily) sloppy is likely. Neither alternative is inevitable, but a solution requires both recognition of the issue and an effort to seek resolution, perhaps through categorical reporting mechanisms.

An equally thorny set of issues arises within the context of actually developing the framework within which reporting may be

177. See, e.g., Guiding Principles, *supra* note 1, at 25-26.

structured. Some of these issues arise in the shadow of the robustness and cultural predominance of financial reporting. For example, the issue of materiality is central to the culture of financial reporting and it has been built into the law of liability for disclosure fraud. The RAFI Reporting Framework seeks to avoid materiality in favor of salience, an important distinction that reminds enterprises that the object of reporting is not merely external, but also points to internal effects. Salience is not a term of art well known in the business community and it will take some effort to naturalize the concept among reporting entities.¹⁷⁸ Even then, the possibility that salience will be treated as an outward vectored form of materiality (material to those who experience human rights wrongs, for example) should not be underestimated.

In addition, the core objective of routinization and standardization may substantially affect the form and content of the RAFI Reporting Framework as it actually be applied by adhering enterprises.¹⁷⁹ The tendency of some in civil society is to make the RAFI narrative as extensive and detailed as possible. The tendency of enterprises might be to offer disclosure that limits risk (in the manner of approaching conventional disclosure for securities regulation purposes). Related to that is the notion that such narrative reporting ought to disclose specific instances of wrongs that might then be assessed for the appropriateness of remediation or response. Yet the utility of the reporting device as a means of internal control may suggest a distinct approach. In any case, overwriting narrative requirements can easily make the RAFI framework too complex or burdensome to be useful. It may please its drafters but it will produce disincentives to comply. Standardization and routinization is a contextually driven exercise that requires some certainty about core reporting framework issues: (1) which companies will actually engage in reporting (inducement function); (2) which stakeholders are going to read the reports (utility function); (3) which reporting frameworks are compatible with a RAFI system (syncing function); and (4) which approach to reporting will induce internalization of human rights norms (naturalization function). These components of routinization

178. See generally Adam Sulkowski & Sandra Waddock, *Beyond Sustainability Reporting: Integrated Reporting Is Practiced, Required, and More Would Be Better*, 10 U. ST. THOMAS L. J. 1060, 1060-85 (2013).

179. See, e.g., Alfred Tat-Kei Ho, *Reinventing Local Governments and E-Government Initiatives*, 62 PUB. ADMIN. REV. 434, 434-44 (2002) (in the public sphere).

are themselves dependent on corporate incentive structures for systems creation: there are few incentives for companies to engage in the operation of management systems unless they are required to by law, it is in their financial interests, or it forms part of their business culture. This was well understood in the development of the Second Pillar; the insights are as applicable to operational system building.

Thus, if the RAFI, or a system like it, is to build a human rights reporting system that furthers the core objectives of the GPs and the Second Pillar it is well worth considering the character of the construct for the reporting framework. In that context, the RAFI framework construct might be usefully understood as a prequel to the harder task of building a rule of law (non-state based) system of rules for the disciplining of business conduct with human rights detrimental effects in the social sphere. Its key value is as a mapping exercise rather than as anything like a due diligence manual. In that respect, RAFI responds to the same impulse, and ought to respond in the same way, as the Working Group's construction of sound NAP frameworks, also as self-reflexive mapping projects on which action and governance decisions may be made.

RAFI might be understood as developing mapping structures in five distinct and critically important areas that parallel the mapping categories of the NAP process for states. The first involves mapping internal company policy (derived from law/norms/culture/policy). This substance mapping serves a chapeau function from which the structure of the details of RAFI reporting follows. The second consists of mapping external manifestation/effects/occurrences (salience or material risk silos). This form or objective mapping serves a routing function for reporting. The third focuses on mapping operationalization (through rules and response procedures). This process mapping serves to routinize and describe the systems for application of company policy in context. The fourth considers mapping results or objectives manifestation universe (remedies/transparency/engagement). This process mapping serves to document end of cycle activity, the products of which affect the mapping of policy, manifestation and operationalization (mapping 1, 2 and 3). This forms an operational closed loop that can then build on itself through constant application and reapplication of the normative universe that fuels the project. The last recasts mapping as storytelling (discussion of actual events). This cultural mapping serves to normalize the mapping process and its behavior habits, making it

easier to internalize its normative structures within the corporation's institutions and the values of its employees.¹⁸⁰

Reconceiving RAFI-style programs as mapping permits the manifestation of that application as an exercise in solidifying abstraction through systems construction; that is, mapping is not a descriptive exercise, it is essentially normative. That normative element drives the RAFI project to a focus on institutional framing through its reporting structures, on the government of human rights, its law (policy), its apparatus (institutional structure), its process and its remedial universe. Focusing reporting on the government of human rights within enterprises avoids the rights versus risks debates on reporting organization by reframing the discussion as an institution building project.¹⁸¹ Rights, risks and action specificity become second order events. It also avoids the heroic approach to human rights reporting.¹⁸² As an institutional and communal exercise, it avoids the idea, far too often cultivated in some governance cultures, of reducing human rights compliance to individual effort--to the hero, the whistle blower, the critical person. Building institutional cultures broadens the class of people heavily invested in human rights projects within

180. Yet, if the RAFI project construct is usefully understood as a complex mapping exercise, then the project might benefit from fine-tuning to emphasize the mapping-organizing premise. To that end, two organizing principles may be useful: First, mapping is a process of aggregation. That is a useful way of understanding the salience standard (though not necessarily its object), and the lack of focus on granularity in reporting. Even storytelling is not an exercise in granularity; storytelling is a means to cultural normalization. Cf. Jeffrey S. Henderson, *CSR as Mythology* (UGSM -Monarch Business School, Working Paper Vol. 1, 2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1608682 (arguing that "true social change will not take place until society replaces the anachronistic archetypical myths that reinforce the orientation of conflict based economic systems for those of a more cooperative form" *Id.*, at 3); Herman Agunis & Ante Glavas, *Embedded Versus Peripheral Corporate Social Responsibility: Psychological Foundations*, 6 INDUSTRIAL AND ORGANIZATIONAL PSYCHOLOGY 314, 314-332 (2013).

181. I have been considering the power of disclosure as a tool to socialize business entities and others into compliance with emerging social norms (that is, to behavior rules that are not transposed into the laws of nation-states necessarily, but which have binding effect within social, economic and other communities). See, e.g., Larry Catá Backer, *From Moral Obligation to International Law: Disclosure Systems, Markets and the Regulation of Multinational Corporations*, 39 GEO. J. INT'L L. 591, 591-653 (2008).

182. See, e.g., Tarja Ketola, *Taming the Shadow: Corporate Responsibility in a Jungian Context*, 15 CORP. SOC. RESP. & ENVTL. MGMT. 199, 199-209 (2008); cf. Trish Ruebottom, *The Microstructures of Rhetorical Strategy in Social Entrepreneurship: Building Legitimacy through Heroes and Villains*, 28 J. BUS. VENTURING 98, 98-116 (2013). Even the heroic can be routinized within governance systems. Barbara G. Myerhoff & William R. Larson, *The Doctor as Culture Hero: The Routinization of Charisma*, 24 HUM. ORG. 188, 188-91 (2008).

enterprises. Lastly, it avoids dissimulation through narrative and obfuscation through data harvesting approaches.

B. Disclosure Systems and Securities Exchanges: On the World Federation of Exchanges Creation of a Sustainability Working Group and the Proposal to Require Extra Financial Disclosure

While RAFI provides an excellent example of the strength and character of societally constituted efforts to produce framing mechanics for corporate compliance with its responsibilities to respect human rights, it is also well-known that both state and non-state regulatory systems play an essential role.¹⁸³ Among the most important players in the context of structuring markets and business behavior expectations are the securities exchanges vital to the operation of global investment. The community of exchanges structures its operations and disciplines its members through an organization of exchanges, the World Federation of Exchanges. It is self-described as “the trade association for the operators of regulated financial exchanges. With more than 60 members from around the globe, the WFE develops and promotes standards in markets, supporting reform in the regulation of OTC derivatives markets, international cooperation and coordination among regulators. WFE exchanges are home to more than 45,000 listed companies.”¹⁸⁴ It thus operates both in the social sphere (as a source of cultural norms) and regulatory sphere (as the source of governance norms and structures) that can substantially affect the way in which enterprises operate and understand themselves. “The WFE is a central reference point for the securities industry, and for exchanges themselves. We offer member guidance in their business strategies, and in the improvement and harmonization of their management practices.”¹⁸⁵

183. See, e.g., Inge-Johanne Sand, *Polycontextuality as an Alternative to Constitutionalism*, in *TRANSNATIONAL GOVERNANCE & CONSTITUTIONALISM* 41-65 (Christian Joerges, Inger-Johanne Sand & Gunther Teubner eds., 2004); Gunther Teubner, *The Corporate Codes of Multinationals: Company Constitutions Beyond Corporate Governance and Co-Determination*, in *CONFLICT OF LAWS AND LAWS OF CONFLICT IN EUROPE AND BEYOND: PATTERNS OF SUPRANATIONAL AND TRANSNATIONAL JURIDIFICATION* (Rainer Nickel ed., 2009).

184. WFE, WFE Appoints Nandini Sukumar as New Chief Administrative Officer, May 30, 2014, <http://www.world-exchanges.org/insight/reports/wfe-appoints-nandini-sukumar-new-chief-administrative-officer>.

185. About Us, What We Do, WFE <http://www.world-exchanges.org/about-wfe/what-we-do> (last visited Nov. 7, 2014).

This role is particularly significant because of the way it affects the operating cultures of enterprises which seek to trade their securities on these exchanges. Though ostensibly targeting disclosure relating to price,¹⁸⁶ the decisions about what must be disclosed, and how and where those disclosures must be made, and to whom, play an enormously important role in the way enterprises approach their operations.¹⁸⁷ Each item of disclosure serves as an ingredient in the pricing calculus for buyers and sellers. If a matter is to be disclosed, then it is to serve a role in pricing securities. If it is not, its role in share pricing is more diffuse. Disclosure and, consequently, securities pricing, might serve as a key mode of incorporating human rights sensibilities (and sustainability) more robustly into the operating calculus of enterprises.¹⁸⁸ The techniques of societal constitutionalism, might be brought to bear to change the governance universe within which enterprises operate without the need to undertake a massive multilateral negotiation that might ultimately lead to the modification of the domestic legal orders of the states necessary to effect global changes in behavior.¹⁸⁹

To that end, in March 2014, the “World Federation of Exchanges (WFE) formed a new sustainability working group at its Working Committee meeting in Mumbai. The new Sustainability Working Group is comprised of representatives from a diverse array of global stock exchanges with a mandate to build consensus on the purpose, practicality, and materiality of Environmental, Social, and Governance (ESG) data.”¹⁹⁰ They explained that “[t]his new working group will continue that mission, undertake original research, publicize its findings, promote the debate over ESG issues among the members of WFE and make recommendations to the member

186. See About Us, Mission, WFE <http://www.world-exchanges.org/about-wfe/our-mission> (last visited Nov. 7, 2014).

187. Cf. Larry Catá Backer, *From Moral Obligation to International Law: Disclosure Systems, Markets and the Regulation of Multinational Corporations*, 39 GEO. J. INT’L L. 591, 591-653 (2008).

188. See Larry Catá Backer, *Global Panopticism: States, Corporations and the Governance Effects of Monitoring Regimes*, 15 IND. J. GLOBAL LEGAL STUD. 101, 136-141 (2008).

189. See Larry Catá Backer, *Transparency Between Norm, Technique and Property in International Law and Governance—The Example of Corporate Disclosure Regimes and Environmental Impacts*, 22 MINN. J. INT’L L. 1, 31-48 (2013).

190. *WFE Launches Sustainability Working Group*, WORLD FEDERATION OF EXCHANGES (Mar. 25, 2014), <http://www.world-exchanges.org/insight/reports/wfe-launches-sustainability-working-group>.

exchanges.¹⁹¹ The exchanges that initially committed to participate include an interesting global mix.¹⁹²

The work of the Sustainability Working Group (SWG) kicked into higher gear in March 2014, when Ceres,¹⁹³ “in collaboration with BlackRock and other major institutional investors, today announced an initiative to engage global stock exchanges via the World Federation of Exchanges (WFE) on a possible uniform reporting standard for sustainability reporting by all exchange members.”¹⁹⁴ The proposal was developed by Ceres’ Investor Network on Climate Risk, “and its member-driven Investor Initiative for Sustainable Exchanges. Over 100 institutional investors from six continents helped shape the listing standards proposal.”¹⁹⁵ The Investor Listing Standards Proposal: Recommendations for Stock Exchange Requirements on Corporate Sustainability Reporting,¹⁹⁶ focused on corporate sustainability reporting that means to institutionalize, routinize and harmonize sustainability reporting so that it might be used, like current financial reporting, to evaluate companies for purposes of making investment and other pricing related decisions. Sustainability (also denominated Environmental Social and Governance or “ESG”) is understood broadly to encompass “disclosures involving communities, human rights, resource inputs and outputs, climate change, discrimination and diversity issues, labor rights and employee relations, safety product integrity and privacy,

191. *Id.* (“The WFE and its 60 member exchanges have long engaged the investment and regulatory community on the efficacy of ESG disclosures in this effort, as part of its overall commitment to creating transparency and fairness in the capital markets.”).

192. *See id.* (explaining that the exchanges include BM&FBOVESPA, Borsa Istanbul, Bursa Malaysia, CBOE, CME Group, Deutsche Börse, IntercontinentalExchange/NYSE, Johannesburg Stock Exchange, NASDAQ OMX, National Stock Exchange of India, and the Shenzhen Stock Exchange).

193. *See* About Us, CERES <http://www.ceres.org/> (“Ceres is a non-profit organization advocating for sustainability leadership. We mobilize a powerful network of investors, companies and public interest groups to accelerate and expand the adoption of sustainable business practices and solutions to build a healthy global economy.”).

194. *World’s Largest Investors Launch Effort to Engage Global Stock Exchanges on Sustainability Reporting Standard for Companies*, CERES (Mar. 26, 2014), <http://www.ceres.org/press/press-releases/world2019s-largest-investors-launch-effort-to-engage-global-stock-exchanges-on-sustainability-reporting-standard-for-companies>.

195. *Id.*

196. *See* Investor Initiative for Sustainable Exchanges, Investor Listing Standards Proposal: Recommendations for Stock Exchange Requirements on Corporate Sustainability Reporting, CERES (March 2014), <http://www.ceres.org/resources/reports/investor-listing-standards-proposal-recommendations-for-stock-exchange-requirements-on-corporate-sustainability-reporting>.

supply chain and sub-contracting ethics, governance oversight pertaining to these categories and related issues.”¹⁹⁷

The Proposed Listing Standard is as broad as the categories it means to subsume within its disclosure regimes.¹⁹⁸ But there is a resonance with RAFI. It has three parts. The first requires the preparation of an “ESG Materiality Assessment.”¹⁹⁹ The second requires disclosure on each of 10 categories of ESG categories, using a comply-or-explain approach. Disclosures are to include qualitative and quantitative markers, with reference to policies, procedures, management systems and related corporate initiatives, with existing performance data, discussion of legal proceedings and anticipated controversies and strategic opportunities.²⁰⁰ The third requires preparation of an ESG performance index utilizing the Global Content Index or equivalent.²⁰¹

The Investor Listing Proposal is likely to receive some substantial push back from businesses, and there may be some effort by the largest companies potentially affected to enlist the aid of their home states to derail this specific project. This tactic has been used before, unfortunately quite effectively.²⁰² Enter the UN Global Compact. The UNGC reported on this effort to have the WFE adopt a proposal requiring extra financial disclosure for WFE listed companies. The UNGC is now looking to gather business input on the draft submission.²⁰³ Whatever the fate of this initiative, it is an important indication of the value of disclosure in the operationalization of the Second Pillar responsibility to respect human rights, and the centrality of the institutions that help structure economic markets in the development and disciplining of those efforts. Whatever the outcome of this societal governance effort, the issue of harmonization of securities disclosure is also a major public

197. *Id.* at 3.

198. *See id.* at 8-14.

199. *Id.* at 8-10.

200. *See id.* at 10-12.

201. *See id.* at 12-14.

202. *See, e.g.,* Larry Catá Backer, *Multinational Corporations, Transnational Law: The United Nation’s Norms on the Responsibilities of Transnational Corporations as Harbinger of Corporate Responsibility in International Law*, 37 COLUM. HUM. RTS. L. REV. 287-389 (2006).

203. UNGC, Press Release, http://www.unglobalcompact.org/docs/issues_doc/Financial_markets/Investor_Listing_Standards_Proposal_GC_Feedback_Form.pdf.

law project.²⁰⁴ And, indeed, multilateral action by securities exchanges through the International Organization of Securities Commissions adds a layer of public participation to the markets driven disclosure regimes of private sector efforts.²⁰⁵

Taken together, it is clear that RAFI and the Proposed Listing Standard present to distinct but related efforts to operationalize the Second Pillar responsibility to respect human rights in ways that promote changes to institutional cultures and naturalization of those changes within corporate work forces. They both suggest the importance of the structures of governance in the construction of such systems—that is, the centrality of standardization, routinization and comparability in the development of systems of human rights due diligence that will be effective. But those very characteristics lend themselves as easily to legality as they do to societally (non-state) constructed governance. Yet they also require more than efforts aimed at developing conversation, or discussion designed to increase transparency and engagement (as laudable as both of these goals may be). That suggests the possibilities for coordination built into the GPs. Like the NAP process and the state duty, the building of strong and effective human rights due diligence systems, systems that are as useful internally as they are for stakeholders seeking to hold enterprises accountable in societal space, face similar challenges. Both are especially susceptible to rhetorical flourish and symbolic gesture in place of the hard work of legislative drafting or governance construction.

It is clear that both sloppiness and an inclination to mold projects to please everybody can substantially weaken them—whether the legal project of the state duty or the societal governance project of the responsibility to respect human rights. Rigor and well articulated goals that target institution building around mechanics for exercising,

204. See, e.g., Uri Geiger, *The Case for the Harmonization of Securities Disclosure Rules in the Global Market*, 1997 COLUM. BUS. L. REV. 241 (1997); Hal S. Scott, *Internationalization of Primary Public Securities Markets*, Law and Contemporary Problems 63 LAW & CONTEMP. PROBS. 71-104 (2000); Eric C. Chafee, *Finishing the Race to the Bottom: An Argument for the Harmonization and Centralization of International Securities Law*, 40 SETON HALL L. REV. 1581 (2010).

205. Among its objectives, the IOSCO is to “cooperate in developing, implementing and promoting adherence to internationally recognized and consistent standards of regulation, oversight and enforcement in order to protect investors, maintain fair, efficient and transparent markets, and seek to address systemic risks.” IOSCO, *Objectives*, available at <http://www.iosco.org/about/>; see also Roberta S. Karmel, *IOSCO’s Response to the Financial Crisis*, March 2012, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2025115.

in practice, the corporate responsibility to respect human rights may well produce a significant advance to the routinization of human rights, like financial considerations, as basic to corporate decision making. Yet it is only the form of that rigor, rather than its practice that now have taken center stage. This may be a necessary intermediate step. One gets companies used to narrative descriptions of a kind similar to those already required in U.S. securities law disclosure. Perhaps one can then move toward comparable methodologies that mirror those of financial reporting. But it is too early to tell. It is to the challenges thus posed that the great challenge of the last half of the second decade of the 21st century will face—the effort to legalize the GPs within the normative system of international law. It is to this amalgamating inclination that this article turns next.

*III. AND A TREATY TO BIND THEM ALL—ON PROSPECTS AND
OBSTACLES TO MOVING FROM THE GPs TO A MULTILATERAL
TREATY FRAMEWORK, A PRELIMINARY ASSESSMENT*

At the time of the endorsement of the GPs, John Ruggie explained that the GPs represented the end of the beginning of the development of an integrated and polycentric system that in the aggregate could produce a coherent framework for the regulation of the human rights impacting behaviors of enterprises. It was to be centered on states in the area of public law, states were to coordinate their approaches to domestic regulation through the instrumentalities of multilateral engagement through human rights centered international organizations. But societally constituted organizations—enterprises and non-state organizations would also coordinate their governance systems through participation in the construction of customary premises and behavior expectations for human rights impacting behaviors. Thus central to the operationalization of the GPs, and fundamental to internal coherence in positing a complex polycentric governance universe within which the business of human rights would be disciplined, were the international organizations that would serve as the central nexus point for the development of the substantive and procedural norms that would coordinate all these systems.

But a large group of civil society actors had been critical of the thrust of the GPs at the time of their endorsement.²⁰⁶ They argued that the GPs were critically deficient, and chose the moment of the adoption of the draft GPs in early 2011, as the time to publicly declare their disagreement with the fundamental thrust of the GP project.²⁰⁷ They threatened that “[u]nless addressed, these gaps will prevent the Guiding Principles from effectively advancing corporate responsibility and accountability for human rights and so may fail to gain widespread acceptance by civil society.”²⁰⁸ The Joint statement included some of the most influential members of conventional global civil society—those organizations with tremendous global influence, and whose members were deeply embedded within networks of political elites.²⁰⁹ They tend to be treated as the incarnated manifestation of mass society and in this sense can exercise representative political authority in the national and international planes,²¹⁰ though not without criticism.²¹¹

These civil society actors distilled their critique of the GP project in five overarching categories. The first included a number of failures “provide clear recommendations to States consistent with internationally recognized human rights standards.”²¹² The failure was global and to some extent foreshadowed the approach of the current calls for an international business and human rights treaty, especially the emphasis on the GP failure to oblige states to enforce a well described set of international norms against transnational corporations and to change their domestic legal orders to comply. The

206. See Joint Civil Society, Statement on the Draft Guiding Principles on Business and Human Rights, January 2011, available at http://www.fidh.org/IMG/pdf/Joint_CS0_Statement_on_GPs.pdf.

207. See *id.*

208. *Id.*

209. See *id.* The Joint statement was produced by a coalition that included Amnesty International, CIDSE, ESCR-Net, the International Federation for Human Rights, Human Rights Watch, International Commission of Jurists and RAID. *Id.*

210. See TERRY MACDONALD, GLOBAL STAKEHOLDER DEMOCRACY: POWER AND REPRESENTATION BEYOND LIBERAL STATES (2008); Mathias Koenig-Archibugi, *Is Global Democracy Possible?*, 17 *EU. J. INT’L REL.* 519-42 (2011), Larry Catá Backer, Governance Polycentrism-Hierarchy and Order Without Government in Business and Human Rights Regulation (Coalition for Peace and Ethics, Working Paper No. 1/1 2014), available at <http://ssrn.com/abstract=2373734>.

211. See, e.g., Jonas Tallberg & Anders Uhlin, *Civil Society and Global Democracy: An Assessment*, in GLOBAL DEMOCRACY: NORMATIVE AND EMPIRICAL PERSPECTIVES (Daniele Archibugi, Mathias Koenig-Archibugi & Raffaele Marchetti, eds 2011).

212. Joint Civil Society, *supra* note 148, at 1-2.

second faulted the GPs for their failures to “address the governance gaps created by globalization.”²¹³ This is a curious critique and suggests not so much a failure to understand the thrust of John Ruggie’s work between 2006 and 2011, as it declares a rejection of the foundational structure of the GPs and their recognition of the importance of societally created governance systems as an important element in gap filling consistent with the logic of globalization and its effects on the distribution of power among state and non-state actors.²¹⁴ For these (mostly Western oriented) civil society actors the answer was clear, though appalling from the perspective of history—a mandatory extraterritoriality imposed on powerful states to act as global agents through their national courts to discipline multinationals operating anywhere.²¹⁵ More interesting still, these civil society elements sought to use their critique to advance another agenda—the inversion of traditional international law, positing a character of globalization as a global system in which international law was superior to and binding against national law, and in which states had an overarching obligation to apply international law (irrespective it appears to their willingness to accede to them).²¹⁶ The third, in a

213. *Id.* at 2.

214. Larry Catá Backer, *Governance Polycentrism—Hierarchy and Order Without Government in Business and Human Rights Regulation* (2014); Coalition for Peace and Ethics Working Paper No. 1/1 (2014) (“As a consequence, the problem of societally constituted organisms in a world once populated entirely by states and their creatures operating through the rigidly organized hierarchies of law, may well be the intrusion of law where it is neither necessary nor natural.”).

215. *Joint Civil Society Statement on the draft Guiding Principles on Business and Human Rights*, *supra* note 19, at 2 (“They should more specifically provide guidance for States to ensure that companies under their jurisdiction do not contribute to human rights abuses at home or abroad.”); *see also* Sara Seck, *Kiobel and the E-word: Reflections on Transnational Environmental Responsibility in an Interconnected World*, LAW AT THE END OF THE DAY (July 5, 2013, 11:25 AM), <http://lbackerblog.blogspot.com/2013/07/sara-seck-on-kiobel-and-e-word.html>; Daniel Augenstein and David Kinley, *When Human Rights ‘Responsibilities’ become ‘Duties’: The Extra Territorial Obligations of states that Bind Corporations*, in HUMAN RIGHTS OBLIGATIONS OF BUSINESS: BEYOND THE CORPORATE RESPONSIBILITY TO RESPECT? 271-94 (Surya Deva & David Bilchitz, eds., 2013). The GPs were grounded on a more benign form of extraterritoriality, though one that from the perspective of this author, still over-empowered powerful states to project their domestic laws and agendas on weaker states perpetuating systems of vertical power arrangements among states; *see* Olivier DeSchutter, *Extraterritorial Jurisdiction as a Tool for the Human Rights Accountability of Transnational Corporations*, CATHOLIC UNIVERSITY OF LOUVAIN AND THE COLLEGE OF EUROPE (Dec. 22, 2006), available at <http://cridho.uclouvain.be/documents/Working.Papers/ExtraterrRep22.12.06.pdf>.

216. *Joint Civil Society Statement on the draft Guiding Principles on Business and Human Rights*, *supra* note 9, at 2. This, at its best, might mirror the emerging school of Third

sense inconsistent with the second, demanded the GPs be “clearer on the human rights responsibilities of business enterprises.”²¹⁷ But the extent of this independent obligation appeared to focus on the need for these enterprises to consult with indigenous communities beyond any such obligation imposed by states through national law. The fourth, focused on the failures of the GP to provide more robust substantive guidance for a set of particularly vulnerable groups.²¹⁸ That the rights and protections of these groups might be the subject of other international treaty and norm making efforts appeared to have little effect on the critique. Rather, the GPs were faulted precisely because they failed to serve as a nodal point of those efforts.²¹⁹ The fifth and last set of critiques focused on deficiencies in the remedial pillar of the GPs.²²⁰ Civil society argued that irrespective of national law, international law established a substantial set of rights to remedy that ought to have been more forcefully articulated in the GPs. “Much of the focus of the guidance is on grievance mechanisms, with only a single principle (24) dealing with judicial mechanisms, which are necessarily at the core, albeit not the sole modality, of effective remedies under international law.”²²¹ The remedial provisions of the GPs were also faulted for their failure to demand states modify their dispute resolution systems to reduce obstacles to effective remedies “with a view to ensuring victims can exercise their right to an effective remedy, including by reducing or eliminating financial barriers to access public justice mechanisms, and by making the functioning and decisions of those mechanisms more effective.”²²²

World Approaches to International Law (TWAAIL). At its worst it represents a form of neo-colonialism, which the GPs sought to avoid. See also, Larry Catá Backer, *Sara Seck on the Possibilities and Limits of Extraterritoriality in a Corporate Social Responsibility and Human Rights Context*, LAW AT THE END OF THE DAY (Sept. 6, 2012, 10:49 PM) <http://lcbackerblog.blogspot.com/2012/09/sara-seck-on-possibilities-and-limits.html>.

217. Joint Civil Society Statement on the draft Guiding Principles on Business and Human Rights, *supra* note 19, at 2.

218. *Id.* (including women, children, Indigenous peoples, and human rights defenders).

219. *Id.* “Clear guidance should be provided by drawing from recommendations made by other UN Special Procedures, UN human rights treaty bodies, the UN Permanent Forum on Indigenous Issues, and the International Labor Organization. Further, explicit reference to relevant treaties and declarations, should be included in the Guiding Principles when articulating the sources of internationally recognized human rights that companies must respect (Principle 12 a).” *Id.*

220. *Id.* at 3.

221. *Id.* (“The Guiding Principles should take a comprehensive approach to remedies that include: effective legally-binding remedies consistent with international human rights law; voluntary mechanisms; and other measures that will ensure adequate remedies.” *Id.*).

222. *Id.*

This focus on the details of civil society grievances is not lightly undertaken. As events in 2014 were to show, these form the basis of the rejection of the GP framework after 2013 (by a broader coalition of civil society actors) and served as a substantive foundation of the business and human rights treaty movement that produced the adoption of a treaty exploration project by the Human Rights Council in June 2014,²²³ as well as the countermovement that sought to preserve the GP structure as the foundational framework for business and human rights in the international field.²²⁴ Also striking are the parallels between these objections, and the grounding premises of the previously rejected Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights.²²⁵

Non-governmental organizations (NGOs) championed the Draft Norms for a few key reasons: the promise of legally binding obligations on business, through an international treaty and subsequently national laws; the sweeping obligations on companies expected not only to 'respect' human rights, but to 'promote', 'protect', 'secure' and 'ensure respect' of human rights; and the monitoring and verification to be provided by international organizations, such as the UN, and national mechanisms. . . . To put it differently, no matter the possible shortcomings of the Norms initial draft in concept or formulation, they would pale in comparison with the importance of kick-starting the process.²²⁶

The business community and many OECD states had fiercely opposed these Norms and contributed to their abandonment in 2003.²²⁷

Initially, between 2011 and early 2013, these civil society actors were content to work through the Working Group system set

223. A/HRC/26/L.22/Rev.1, *supra* note 19.

224. A/HRC/26/L.1, *supra* note 21.

225. ECOSOC, 55th Sess., U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (Aug. 26, 2003). For a critical analysis, see Backer, *supra* note 144.

226. See Radu Mares, *Business and Human Rights After Ruggie: Foundations, the Art of Simplification and the Imperative of Cumulative Progress*, in THE UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS—FOUNDATIONS AND IMPLEMENTATION (Radu Mares, ed. 2012).

227. See, e.g., International Chamber of Commerce and International Organization of Employers, Joint views of the IOE and ICC on the draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, (March 2004), available at http://www.business-humanrights.org/Links/Repository/179848/link_page_view.

up to manage development of the GP system.²²⁸ However, in the years after 2011, a number of prominent civil society actors began to join together to work to move beyond the GPs, which were increasingly viewed as a failure to protect against the human rights abuses of transnational enterprises, at least as these civil society actors saw it.²²⁹ By 2013 these groups coalesced into a movement to seek multilateral action to take steps to revive the process of developing a treaty to regulate multinational corporations.²³⁰ The core civil society groups around which the so-called Treaty Alliance formed included CETIM, Dismantle Corporate Power Campaign, ESCR-Net, FIAN, FIDH, Franciscans International, Friends of the Earth International, and Transnational Institute.²³¹ By 2014 the Treaty Alliance had grown to over 600 organizations.²³²

The Treaty Alliance and its supporters sought to use the GPs as a springboard to resurrect the processes of drafting a binding international treaty regulating transnational business enterprises, a process that had produced first a rejected Code of Conduct on Transnational Corporations (in a process extending from 1972 through 1992), and had thereafter produced the rejected norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights (1998-2004).²³³ The coalition

228. *Joint Civil Society Statement on the draft Guiding Principles on Business and Human Rights*, *supra* note 19, at 3. (“We urge the Human Rights Council to create one or more Special Procedures or mechanisms to fulfill these functions, so as to ensure further development of robust, clear and workable guidance for the protection of human rights against business-related abuse.”).

229. *See* Joint Statement: Call for an international legally binding instrument on human rights, transnational corporations and other business enterprises, GLOBAL MOVEMENT FOR A BINDING TREATY, www.treatymovement.com/statement (“It represents the collective expression of a growing mobilization of global civil society calling for further enhancement of international legal standards to address corporate infringements of human rights. It welcomes the recent initiatives by States in the United Nations Human Rights Council to develop an international treaty on legally binding rules for TNCs on human rights issues.”); *see id.* for list of signatory organizations.

230. “Many groups, including many members of the ESCR-Net Corporate Accountability Working Group since it began 10 years ago, have been supporting the adoption of binding international instruments to address corporate human rights abuse. In Bangkok, at the ESCR-Net Peoples Forum on Human Rights & Business, participants formulated a Joint Statement that was signed by over 140 groups in less than one month.” GLOBAL MOVEMENT FOR A BINDING TREATY, <http://treatymovement.com/>.

231. *Id.*

232. Joint Statement: Call for an international legally binding instrument on human rights, transnational corporations and other business enterprises, *supra* note 171.

233. *History: Timeline of Key Developments in the Struggle to Establish an International System of Accountability for Transnational Corporate Human Rights Abuses*, GLOBAL

of civil society actors working toward that end made no secret of their effort to recast the history of thwarted efforts to develop a binding international treaty on the regulation of multinational corporations as an inevitable progress fighting against rear guard actions by certain states. They recast the process leading to the endorsement of the GPs in a more problematic light, arguing that at “the end of the second term of the SRSG, in June 2011, he presented Guiding Principles on Business and Human Rights to the Human Rights Council, which were said to operationalise the Framework presented in 2008. States on the Council did not oppose the Guiding Principles, even though they received strong criticism from civil society organisations in the lead up to the June session.”²³⁴ It was that effort, producing a “regressive approach towards the human rights obligations of States and the responsibilities of non-state actors“ required action to put the project of a legal framework for the regulation of multinational enterprises back on track.²³⁵

The efforts were ultimately reflected in a Joint Statement seeking an internationally binding instrument on business and human rights to which civil society actors were encouraged to join (the “Joint Statement”).²³⁶ The Joint Statement was straightforward drawing from the earlier civil society critique of the draft GPs.²³⁷ The call for an internationally binding instrument on human rights noted the continuing abuses and violations of human rights by enterprises, the disproportionate effect of these abuses on women and other marginal groups, the precarious position of human rights defenders, and the initiatives taken by states and human rights experts.²³⁸ It underscored its adherence to the political premise that existing States have “obligations under global and regional human rights treaties and the need to implement and complement those treaties to make them

MOVEMENT FOR A BINDING TREATY, (2014), <http://treatymovement.com/> (“Since the early 1970s there have been concerted efforts to develop binding international systems to regulate corporations for their human rights violations.”).

234. *Id.*

235. *Id.*

236. Joint Statement: Call for an international legally binding instrument on human rights, transnational corporations and other business enterprises, List of Signatories, *supra* note 171.

237. *See* Joint Civil Society Statement on the draft Guiding Principles on Business and Human Rights, *supra* note 19.

238. Joint Statement: Call for an international legally binding instrument on human rights, transnational corporations and other business enterprises, List of Signatories, *supra* note 171.

effective in the context of business transnational operations.”²³⁹ All of this serves to convince the drafters of the “need to enhance the international legal framework, including international remedies, applicable to State action to protect rights in the context of business operations, and mindful of the urgent need to ensure access to justice and remedy and reparations for victims of corporate human rights abuse.”²⁴⁰ That enhancement has three parts. First, states are called on to elaborate an international treaty that affirms the applicability of human rights obligations to transnational business, requires state monitoring of that obligation, including the imposition of a mandatory obligation to apply domestic law extraterritorially within the jurisdiction of other states, requires the expansion of judicial remedies to eliminate jurisdictional limits to hear cases coming under the treaty, and creates an international monitoring and accountability mechanism of unspecified character.²⁴¹ Second, it calls on the UN Human Rights Council to take up this treaty elaboration project.²⁴² Third, it calls on civil society to ensure the movement toward a treaty described.²⁴³ The nostalgia and reactionary character of this statement is hard to avoid. It derives its strength by looking back toward a world vision that pre-dates (and indeed rejects) globalization, and effectively seeks to leverage international public organizations to create a loosely structured global administrative state, operationalized through states but overseen through the normative direction, monitoring and discipline of the community of states organized through the UN system.

This civil society effort had a number of useful academic and other allies. These allies provided support, directly or indirectly, for projects that were aimed to move beyond or through the GPs to alternative or frameworks or alternative evolutionary paths (even if some of them appeared to look back rather than forward).²⁴⁴ Notable among them were David Weissbrodt, an instrumental figure in the creation of the Norms.²⁴⁵ His writings²⁴⁶ continued to defend

239. *Id.*

240. *Id.*

241. *Id.*

242. *Id.*

243. *Id.*

244. See generally Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect? (Surya Deva & David Bilchitz eds., 2013).

245. See David Weissbrodt & Muria Kruger, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, 97

the efforts to develop a treaty based framework that would impose direct international obligations on multinational enterprises—even if these would be realized only through transposition of international obligations within the domestic legal orders of states.²⁴⁷ Surya Deva nicely articulated the academic discontent with the GPs:

The SRSRG [John Ruggie] may pat his back for the ‘so-called’ consensus that he built around the ‘protect, respect and remedy’ framework and for the unanimous approval of the Guiding Principles by the Human Rights Council. However, the fact of the matter is that instead of setting global human rights standards for companies, the Guiding Principles leave it to companies to ascertain their human rights responsibilities on a case-by-case basis. This circular . . . approach is unsatisfactory.²⁴⁸

Professor Deva would instead welcome the formulation of corporate responsibility through a treaty creating binding law applicable to corporations from law bearing entities.²⁴⁹ These views, though by no means universally shared,²⁵⁰ are nonetheless quite

AM. J. INT’L L. 901, 904-907 (2003) “In 1999 the working group set its agenda for the next two years. The 1999 meeting ended by asking David Weissbrodt to prepare a draft code of conduct for transnational corporations.” *Id.* at 904; Professor Weissbrodt also contributed to the preparation of the Norms Commentary. *Id.* at 905.

246. *See, e.g.*, David Weissbrodt & Muria Kruger, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, *supra* note 235 (“the Norms are the first non-voluntary initiative [in the area of business and human rights] accepted at the international level.” *Id.* at 903, criticized in John G. Ruggie, *Business and Human Rights: The Evolving International Agenda*, 101 AM. J. INT’L L. 819 (2008) and Backer, *supra* note 144; David Weissbrodt, Keynote Address: International Standard-Setting on the Human Rights Responsibilities of Businesses, 26 BERKELEY J. INT’L L. 373 (2008); *see also* David Weissbrodt & Muria Kruger, *Human Rights Responsibilities of Businesses as Non-State Actors*, in NON-STATE ACTORS AND HUMAN RIGHTS 553 (Philip Alston ed., 2005). David Weissbrodt, *United Nations Charter-based Procedures for Addressing Human Rights Violations: Historical Practice, Reform, and Future Implications*, in THE DELIVERY OF HUMAN RIGHTS: ESSAYS IN HONOUR OF PROFESSOR SIR NIGEL RODLEY 13 (Geoff Gilbert, Françoise Hampson & Clara Sandoval eds., 2011).

247. For a sympathetic defense and analysis see David Kinley and Rachel Chambers, *The UN Human Rights Norms for Corporations: The Private Implications of Public International Law*, 6 HUM. RTS. L. REV. 447 (2006).

248. SURYA DEVA, REGULATING CORPORATE HUMAN RIGHTS VIOLATIONS: HUMANIZING BUSINESS 239 (2012).

249. *Id.* at 238-39; *see generally id.*; *see also* Robert C. Blitt, *Beyond Ruggie’s Guiding Principles on Business and Human Rights: Charting an Embracing Approach to Corporate Human Rights Compliance*, 48 TEX. INT’L L. J. 33 (2012).

250. *See, e.g.*, Ruggie, *supra* note 186; Backer, *supra* note 186. John Ruggie noted the pragmatism underlying much of his critique:

I noted in my earlier brief that enumerating these challenges is not an argument against treaties. But it is a cautionary note to avoid going down a road that

powerful and influential, are predicated in part on an open rejection of one of the key foundations of the GPs—its acceptance of a polycentric governance order effectively instituted within the logic of globalization that has empowered, as against the conventional law-state system, a (perhaps anarchic) system of societally self-constituted non-state governance organs, including enterprises, which interact with but the sources of norms for the organization and operation of which, are sourced outside of law and outside of the structures of states.²⁵¹ While academic writings might have been useful, it may be more plausible to suggest that this challenge to the primacy of the GP as the framework for business and human rights activities, was principally driven by civil society. There is irony here, of course, for that power of civil society evidences quite strongly the existence of the societally constituted and extra legal sphere,²⁵² the coordination with which had been at the center of the GP project.

None of this would have amounted to much except for the efforts of several states that also remained loyal to the 1970s project of the state-based economic development project of the New International Economic Order,²⁵³ and its vision of a march toward

would end in largely symbolic gestures, of little practical use to real people in real places, and with high potential for generating serious backlash against any form of further international legalization in this domain.

John G. Ruggie, A UN Business and Human Rights Treaty Update, Harvard Kennedy School 2 (May 1, 2014), <http://businesshumanrights.org/sites/default/files/media/documents/ruggie-un-business-human-rights-treaty-update-1-may-2014.pdf>.

251. See generally Larry C. Backer, *In Defense of the State and the International Legal Order: Reflections on Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect* (Surya Deva & David Bilchitz, eds. 2013), *LAW AT THE END OF THE DAY* (Dec. 1, 2013), <http://lbackerblogger.blogspot.com/2013/12/at-2nd-un-forum-on-business-and-human.html>.

[R]eflect the deep and unrelenting suspicion of non-law based governance systems. The concept of social norms and or societal constituted communities is viewed both as illegitimate and as ineffective against the ideal of law. . . . This puts the critics of the GP on a conceptual collision course with the underlying framework of the GP themselves.

Id.

252. See generally GUNTHER TEUBNER, *CONSTITUTIONAL FRAGMENTS: SOCIETAL CONSTITUTIONALISM AND GLOBALIZATION* (2012); Jaye Ellis, *Constitutionalization of Nongovernmental Certification Programs*, 20 *IND. J. GLOBAL LEGAL STUD.* (2013).

253. Declaration for the Establishment of a New International Economic Order: United Nations General Assembly document A/RES/S-6/320 (May 1, 1974), available at <http://www.un-documents.net/s6r3201.htm>. The New International Economic Order rested on a set of critical premises which are central to the to the movement seeking to replace the Guiding Principles with a comprehensive treaty. These include sovereign equality among

global order grounded in states but led by a norms-producing administration of global organizations representing the vanguard of progressive state elements, focused on the attainment of a particular vision of progress toward social, economic and cultural rights.²⁵⁴ Also useful was the move toward greater acceptance of the policy of top down internationalism—one pioneered in the course of the resolution of the financial crises that started in 2008.²⁵⁵ Led this time by the delegation from Ecuador,²⁵⁶ which undertook the hard diplomatic work of generating support among a sufficient number of HRC members, this group held together by their distrust of and distaste for the GP project was able to produce a change in the dynamics of international efforts at the operationalization of the GPs.

At the core of their strategy was a reconceptualization of the GPs, rejecting the GP project as an objective, asserting that they were

states, states as the driving force in the construction of a law based normative program, and the direct control by states of the national character of their domestic legal orders and their natural resources, the primacy of states as the center for the regulation and supervision of the activities of transnational corporations. *See id.* ¶ 4. Most prominently featured, though discretely, is Cuba, whose intellectual leadership in this area has been quite sustained since the 1970s, and whose former leader, Fidel Castro, was influential in the development of counter narratives to those of economic globalization. *See generally* Fidel Castro Ruz, Address By The President Of The Council Of State And Ministers Of The Republic Of Cuba, His Excellency Raul Castro Ruz, To The Mercosur Summit. Costa De Sauipe, Salvador, Bahia, Brazil, December 16, 2008 available <http://www.cuba.cu/gobierno/rauldiscursos/2008/ing/c161208i.html> (“We are well aware of the efforts demanded by such objectives when down the road they must face such major obstacles as the effects of a selfish and unfair international economic order favoring the developed countries and the interests of the large multinational corporations of which the current financial and economic crisis is the most serious and palpable manifestation.”); and note 250 *infra*.

254. *See generally* Larry Cata Backer, *Odious Debt Wears Two Faces: Systemic Illegitimacy, Problems and Opportunities in Traditional Odious Debt Conceptions in Globalized Economic Regimes*, 70 L. & CONTEMP. PROBS. (2007). The best ideological expression of this view, one most faithful to the world vision of the last expression of European Stalinist Marxism, was provided by Cuba, the last faithful disciple of Stalinist European Leninism. *Id.*

255. *See generally* Larry C. Backer, *Private Actors and Public Governance Beyond the State: The Multinational Corporation, the Financial Stability Board and the Global Governance Order*, 18 IND. J. GLOBAL LEGAL STUD. 751 (2011) (G20 can develop standards through complex public-private networks and then impose them through market and political power on states dependent on them for economic and other relations).

256. *See* Texaco/Chevron lawsuits (re: Ecuador), Business & Human Rights Resource Centre, (18 Feb. 2014), <http://business-humanrights.org/en/texacochvron-lawsuits-re-ecuador#c9332>. (Ecuador had its own agenda to further).; Ecuador: Inter-American Court ruling marks key victory for Indigenous Peoples, Amnesty International, (July 27, 2012), [http://www.amnesty.org/en/news/](http://www.amnesty.org/en/news/ecuador-inter-american-court-ruling-marks-key-victory-indigenous-peoples-2012-07-26)

[ecuador-inter-american-court-ruling-marks-key-victory-indigenous-peoples-2012-07-26](http://www.amnesty.org/en/news/ecuador-inter-american-court-ruling-marks-key-victory-indigenous-peoples-2012-07-26) (and it had its own human rights issues).

merely a gateway to a more permanent and quite distinct objective.²⁵⁷ “In August 2013, at the Regional Forum on Business and Human Rights for Latin America and the Caribbean, and later at UN Human Rights Council 24th session in September 2013, the representative of Ecuador before the UN made a declaration proposing that the UN begin work on a legally binding international instrument on business and human rights.²⁵⁸ That declaration²⁵⁹ also paralleled the joint civil society statement discussed earlier and was countered by John Ruggie himself.²⁶⁰ It welcomed the efforts around the GPs, but suggested that the increase in human rights related abuses by some multinational enterprises suggested the need to move beyond the GPs, and that this “beyond“ was a “legally binding framework to regulate the work of transnational corporations and to provide appropriate protection, justice and remedy to the victims of human rights abuses directly resulting from or related to the activities of some transnational corporations and other businesses enterprises“.²⁶¹ To that end, the GPs and their endorsement could only be understood as a “first step“ which necessarily must lead to a treaty. Necessarily because the

257. G.A. Res. 17/4, U.N. Doc. A/HRC/RES/17/4 (July 6, 2011).

For this purpose they could draw on the mandate for the establishment of the Working Group on the issue of human rights and transnational corporations and other business enterprises, resolution adopted by the Human Rights Council, human rights and transnational corporations and other business enterprises.

The Resolution adopted by the Human Rights Council:

[r]ecognizes the role of the Guiding Principles for the implementation of the Framework, on which further progress can be made, as well as guidance that will contribute to enhancing standards and practices with regard to business and human rights, and thereby contribute to a socially sustainable globalization, without foreclosing any other long-term development, including further enhancement of standards.

Id. at 2.

258. *See* Binding Treaty, Business and Human Rights Resource Centre, <http://business-humanrights.org/en/binding-treaty-pros-and-cons> (last visited Feb. 25, 2015).

259. *See* Transnational Corporations and Human Rights (September 2013), <http://business-humanrights.org/sites/default/files/media/documents/statement-unhrc-legally-binding.pdf> (statement on behalf of the African Group, the Arab Group, Pakistan, Sri Lanka, Kyrgyzstan, Cuba, Nicaragua, Bolivia, Venezuela, Peru and Ecuador).

260. *See* John G. Ruggie, A UN Business and Human Rights Treaty? An Issues Brief, Harvard Kennedy School (Jan. 28 2014), <http://www.business-humanrights.org/Links/Repository/1024755>. On January 28, 2014, the former UN Special Representative on business & human rights, Professor John Ruggie released an issues brief in response to Ecuador’s proposal for a legally binding instrument, and updates on the issue on May and on June 2014. *Id.*

261. *See id.*

GPs remain nothing more than “soft law,”²⁶² something that in the world view of the proposing states implied an inferior and unsatisfying means of regulation. Again rejecting polycentricity and embracing the premise that only law derived from state power had any legitimacy, the statement noted that the GP framework was hobbled by its lack of state power. What was required was a law-based system that clarified the obligations of transnational corporations, and of these enterprises in relation to states (that is affirmed the hierarchy of authority conventionally understood and thus produce a direct attack on polycentricity), and broadens substantially the jurisdiction of national courts over global enterprises.²⁶³

The push for a treaty to supersede the GPs produced the same divisions that had marked discussion a generation ago on the development of an international code for transnational enterprises and later shadowed the work on the Norms. These divisions echoed the old Cold War ideological rhetoric, but now clothed in the discursive tropes of globalization, human rights, development and “neo-liberalism,”²⁶⁴ continues to pit the old “third world” and the ancient “socialist camp” against the old established capitalist democracies and former imperial powers.²⁶⁵ Treaty advocates continue to see the world in old two dimensional ideological terms: states are pre-eminent but are bound to progress, led by a vanguard that through international engagement can set the substantive premises within which states will progress toward economic, social and cultural advancement appropriate to their circumstances, but which will free them from subservience to the old imperial powers. These powers now exercise authority indirectly, through the management of markets in which their economic enterprises dominate. Those enterprises may appear autonomous of their home states, but they are still seen as instruments

262. Cf. Jaye Ellis, *Shades of Grey: Soft Law and the Validity of Public International Law*, 25 LEIDEN J. INT'L. L. (2012).

263. See generally Ruggie, *supra* note 260.

264. Cf. Larry C. Backer, *Ideologies of Globalization and Sovereign Debt: Cuba and the IMF*, 24 PENN ST. INT'L. L. REV. (2006).

265. Cf. JACK DONNELLY, UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE 7-24 (2013).

of home state policies and therefore as attached to and subject to the control of home states.²⁶⁶

Treaty opponents continue to resist the idea of a comprehensive treaty for reasons of ideology and pragmatism. A generation of struggle in this respect has indicated that there is insufficient consensus for a treaty. Globalization has made treaty powers less important and elevated non-state governance systems in prominence. They also recognize the autonomy of institutional power beyond states, though some, especially the United States, continue to struggle in this respect. Much of the opposition efforts to supersede the GPs by a comprehensive treaty are pragmatic: treaty making vaunts formalism over functional results in ways that will likely produce an empty symbol rather than operationalizable systems with real effects on the ground, any effort to develop enforcement would require radical restructuring of the state system, the preservation of the prerogatives of which ironically fuel the move toward treaty alternatives, and that efforts to centralize enforcement in international public bodies are both impractical and inconsistent with the formal structures of power the treaty route is meant to embody.²⁶⁷ But some of the opposition is defensive—treaties are viewed as efforts to permit the mass of poor but numerous states to usurp power (through the democratic politics of multilateralism in international institutions) against the smaller number of rich and powerful states to set an agenda that might be incompatible with the ideological value hierarchies of these states (which tend to value civil and political rights over social, economic and cultural rights, especially the United States),²⁶⁸ and to seek to treat economic enterprises as instrumentalities of home states breaches a core ideological premise

266. Cf. Larry C. Backer, *Odious Debt Wears Two Faces: Systemic Illegitimacy, Problems and Opportunities in Traditional Odious Debt Conceptions in Globalized Economic Regimes*, 70 L. & CONTEMP. PROBS. 1(2007).

267. Cf. Ruggie, *supra* note 204.

268. See U.N., National Plans of Action for the Promotion and Protection of Human Rights, Norway, Plan of Action for Human Rights (2000-2005), <http://www.ohchr.org/EN/Issues/PlansActions/Pages/PlansofActionIndex.aspx>. But not just the United States. “The primary objective of the Norwegian Government’s human rights efforts is to ensure respect for and protection of human dignity. The traditional Western approach to human rights has been to focus on civil and political rights rather than economic, social and cultural rights. We need to recognize the fact that human rights constitute an indivisible, interdependent whole. Only when all rights are respected are human rights being fully protected.” *Id.* at 2.

of the framework of globalization that these states continue to advance.

Neither camp has thus far been able to defeat the other. Each continues to protect its interest within the governance architecture of the United Nations. The GPs and the treaty framework raised to supplant it are in a larger sense just another battleground in an old and unfinished battle for control of the discourse of constitutionalization and the role of states and non-state actors within it.²⁶⁹ These divisions are made clear by comparing the resolutions approved by the HRC of Ecuador, “Elaboration of an International Treaty” (Ecuador Resolution),²⁷⁰ and of Norway, continuing the GP work of the UN Working Group (Norway Resolution).²⁷¹ The parallels between the Ecuador Resolution and the several joint statements produced by civil society since January 2011 are unmistakable. They indicate not merely ideological solidarity and political alliance, but also quite clearly an effort to reject the normative premises that led to the construction of the GPs and the elaboration of a pragmatic and realistic approach to the regulation of the human rights detrimental conduct of enterprises consistent with the realities of governance as it is evolving in fact. The Ecuador Resolution presents an ideologically coherent, though anachronistic, expression of a world view that was at its peak in the 1970s when, for an instant, global consensus appeared to be moving toward an apotheosis of a global Westphalian order grounded in principles of command economies and the marginalization of private markets (the New International Economic Order),²⁷² now abandoned in favor of globalization and its open borders and polycentric governance. The ideological foundations—state supremacy, state based internationalism in the development of substantive principles for domestic law, and the primacy of international frameworks for the dismantling of colonial systems of state to state relations—are invoked first.²⁷³ These are meant to frame

269. *See generally* Larry Catá Backer, *The Concept of Constitutionalization and the Multi-Corporate Enterprise in the 21st Century* 1-27 (Coalition for Peace & Ethics, Working Paper 6/1, 2014, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2458965).

270. *See* G.A. Res, 26/3, U.N. Doc. A/HRC/26/L.22/Rev.1 (June 25, 2014) (the resolution was sponsored by Bolivia, Cuba, Ecuador, South Africa, and Venezuela).

271. *See* G.A. Res, 26/3, U.N. Doc. A/HRC/26/L.1 (June 23, 2014).

272. *See, e.g.*, G.A. Res, S-6/7, U.N. Doc. A/RES/S-6/3201 (May 1, 1974).

273. *See* G.A. Res, 26/3, U.N. Doc. A/HRC/26/L.22/Rev.1 (June 25, 2014). Most telling is the invocation of the right to development, a product of a mindset at the cusp of globalization in the mid 1980s and the last flower of the ideological campaigns of the socialist

the approach to the treaty elaboration that is the subject of this resolution.

The object then is to manage, if not eliminate the private sector, or at least to subordinate it to the command of the state and its direction, an ideology central to the economic policy of Ecuador, Cuba, Venezuela, and Bolivia, all core members of the ALBA trade group.²⁷⁴ That objective is to be realized, under ALBA ideology, through coordinated state control of economic operations.²⁷⁵ This more than anything should serve as a caution to those who would abandon the GPs for a treaty. Its movants have a definitive policy agenda that may be realized through business and human rights internationalization, but human rights might well be a means to the re-ordering of the global economic sector along lines that are substantially different from those that underlie economic globalization.²⁷⁶

But even as the premises of state supremacy and development are privileged, the GPs are cabined and minimized within these broader currents in two important respects. The GPs are contextualized as one expression of a long progress of efforts by the international community to regulate business enterprises—that is, as a part of “all previous Human Rights Council resolutions on the issues of human rights and transnational corporations and other business enterprises.”²⁷⁷ This makes plain the political objective of the developing states who formed the core of the state group advancing the Ecuadorian Resolution:²⁷⁸ the object of treaty making is not to develop a comprehensive regulation of economic activity with human rights implications, rather it is to develop methods for the control of

camp in the United Nations. *See* G.A. Res. 41/128, U.N. Doc. A/RES/41/128 (December 4, 1986).

274. *See generally* Larry Catá Backer & Augusto Molina, *Cuba And The Construction Of Alternative Global Trade Systems: ALBA And Free Trade In The Americas*, 31 U. PA. J. INT'L L. 679 (2010).

275. *See* G.A. Res. 26/3, U.N. Doc. A/HRC/26/L.1 (June 23, 2014). It is in this context that the expression of state supremacy in the Ecuadorian resolution acquires deeper meaning: “the obligations and primary responsibility to promote and protect human rights and fundamental freedoms lie with the State, and that States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including transnational corporations.” *Id.*

276. *Id.*

277. *Id.* at 1.

278. Ecuador Resolution, *supra* note 34. These include the Plurinational States of Bolivia, Cuba, Ecuador, South Africa, and Venezuela.

transnational corporations that are still viewed as instrumentalities of their home states and of these home states' sovereign investing goals. In that context they are also understood as essential to development through their "capacity to foster economic well-being, development, technological improvement and wealth, as well as causing adverse impacts on human rights."²⁷⁹

As such, the Ecuadorian Resolution seeks to refine the principles of non-interference in the right to development by constraining the foundational basis of globalization (free movement of capital, goods and investment) exercised through private markets, markets which are understood as subterfuges masking the projection of developed state power (through multinational enterprises) into developing states to exploit its resources and labor for the benefit of home states.²⁸⁰ These constraints are perfectly understandable given the political premises buried deeply within the quite politically charged words of the Ecuadorian Resolution. But it has caused confusion and led to criticism by other actors less aware of the deep political agenda that these choices represent. And indeed, for its opponents, this choice, made inevitable by the political framework within which the Ecuadorian Resolution was offered, clearly evidences its incompatibility with the foundational premises underlying the GPs.²⁸¹ It is a constraint that may well come back to haunt the resolution's drafter's—but one that is central to the ideology that Resolution embodies.

This foundation then produces the framework of the resolution and the context within which its work would be undertaken:

279. *Id.* at 2.

280. The theory is elegant and derived from an application of Cuban political theory, which has been largely suspicious of globalization and of developed states and the global financial system that they have created. *See, e.g.*, FIDEL CASTRO RUZ, ON IMPERIALIST GLOBALIZATION (2003) (arguing that globalization frames an imperialist world order, organized around new forms of economic exploitation, attacks on national sovereignty, cultural subjugation, and military aggression); FIDEL CASTRO RUZ, CAPITALISM IN CRISIS (2000) (condemning the deleterious systemic impact of economic globalization on developing states and advanced capitalist countries); Backer, *Odious Debt Wears Two Faces*, *supra* note 266.

281. "A fundamental flaw lies in Ecuador's insistence that the treaty focus on multinational companies, even though any company can cause problems and most standards, including the UN principles, don't draw this artificial distinction." ARVIND GANESAN, DISPATCHES: A TREATY TO END CORPORATE ABUSES, HUMAN RIGHTS WATCH (July 1, 2014).

To establish an open-ended intergovernmental working group on a legally binding instrument on transnational corporations and other business enterprises with respect to human rights, the mandate of which shall be to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises.²⁸²

While many might focus on the part of that resolution that establishes an mechanism for treaty making, it is the sort of treaty making envisioned, and its character, that should be of greater interest. For the objective (mandate) is to establish an international legally binding instrument to regulate in international law the activities specified. But consider the constraints inherent in that mandate: the treaty will produce international law, law that is binding on those states acceding to it to the extent not otherwise reserved. But it will have no internal domestic effect, except and to the extent that states domesticate these international obligations, under the principles of legality and state sovereignty that provides the framework for this resolution. Thus while it might serve to harden domestic law in some states, it does not guarantee transposition into domestic law. Yet this is precisely the condition one finds oneself with the GPs—which point to a framework that might well be transposed to domestic law, at the instance of the state, but which otherwise remains “soft” and binding only on the state (and not those resident or transient within it). Thus the greatest irony of the Resolution is that it is geared to do little but create potential law (in the sense that it is binding on individuals) and otherwise will produce nothing more than a framework for soft law from which custom may develop from the bottom up; functionally the equivalent position as the GPs. Here one vaunts symbolism and gesture over substance.

The Ecuadorian Resolution, then, presents irony. It rejects the central premises of the GPs, but offers nothing more substantive than the promise of an international instrument that will be used by its adherents and ignored by the rest of the states. It will then produce large margins of appreciation in standards for governing human rights related to business that will in turn contribute to a widening incoherence in those human rights standards that the GP project was itself meant to narrow. Efforts at international law making, perversely, will contribute to rather than reduce, policy and regulatory

282. Ecuador Resolution, *supra* note 34.

incoherence. That incoherence will be deepened by the likelihood of substantial differences in defining the scope of human rights subject to treaty treatment and those excluded. Beyond the issue of cataloguing, raised by John Ruggie in his critique of the Ecuadorian Resolution, lies the larger issue of ideology. The last half-century has seen a large chasm between states that have privileged social, economic and cultural rights and those that have privileged civil and political rights.²⁸³ That chasm is unlikely to be bridged soon. In the absence of treaty language that is so generalized as to be shaped to the desires of states that apply it, there is little likelihood that consensus will be possible. This is particularly the case with respect to the understanding of the nature and character of the transnational enterprise. Developing states and others will continue to see in the transnational corporation an instrumentality of their home states. That premise makes transnational corporations different in character from “domestic“ or local enterprises that operate within a domestic order. It suggests that asset partitioning and legal personality of multi-corporate enterprises might be more easily ignored and obligations more easily moved up and down supply and value chains. It also suggests that the activities of transnational enterprises are public and political as much as economic and market based. In that context, significant state regulation, including control of economic decision making makes sense. Developed states will continue to defend the autonomy of the corporate enterprise and that of private markets. That has consequences as well for the way in which one approaches the regulation of the human rights impacts of transnational corporations. The asset partitioning and autonomy of separately incorporated corporations, and the sanctity of contractual relations (as private law) will be defended. The private nature of economic activity will serve as a guiding premise that militates against significant efforts at state control of economic activity, rather than imposition of consequences for damages caused by human rights detrimental activity. Most importantly, the premises of globalization and private markets also make incomprehensible any distinction between transnational and domestic corporations or other enterprises.

283. Larry Catá Backer, *Realizing Socio-Economic Rights Under Emerging Global Regulatory Frameworks: The Potential Impact of Privatization and the Role of Companies in China and India*, 45 GEO. WASH. INT'L L. REV. 615, 617 (2013) [hereinafter *Realizing*] (discussing the chasm between states).

The Ecuadorian Resolution also contains within it a core insight that is quite powerful, though limited in scope. As we have seen in the context of the difficulties of attaining coherence in the project of developing NAPs that elaborate the state duty to protect human rights, state action is inherently a subject of legal discourse and operates best within the strictures of rule of law systems. NAPs also present difficult issues of compliance.²⁸⁴ That is their nature—at least legitimately constituted states (whatever their governing political ideology).²⁸⁵ It follows that state practice convergence can be made easier through treaty making. Confined to the ordering of the state duty to protect human rights, the treaty making imperative is sensible and useful. It serves to discipline the anarchic “natural” state of Westphalian state autonomy within the matrices of norm structures created and maintained by the community of states, norm structures that reflect a consensus among states respecting the sorts of behaviors expected of states as they engage in their duty to protect human rights. But notice here what this entails—the object is not the regulation of transnational corporations through treaties, it is the regulation of states that ought to be the object of the treaty making specified in the Ecuadorian Resolution. That is the great insight of Section II that may be applied to the GP project of state duty. The treaty making objectives of the Ecuadorean Resolution, then, can serve its highest purpose by seeking to develop a framework for disciplining states in the ordering of their domestic legal orders to more coherently regulate and discipline economic activity within their borders. Thus, the problem is not the transnational corporation and its abuses, it is the state and its failures. It is to the overcoming of those failures that treaty making ought to be directed by states for states.

In contrast, The Norway Resolution offers an alternative vision that is both sensitive to the needs of legalization of the standards for managing enterprise conduct at the international level, and to the realities of the open, porous, permeable and polycentric governance networks²⁸⁶ that now operate within globalization. The

284. *Realizing*, *supra* note 225 at 624.

285. *See, e.g.*, Larry Catá Backer, *Theocratic Constitutionalism: An Introduction to a New Legal Global Ordering*, 16 *IND. J. GLOBAL LEGAL STUD.* 85-172 (2009); Larry Catá Backer, *Party, People, Government, and State: On Constitutional Values and the Legitimacy of the Chinese State-Party Rule of Law System*, 30 *B.U. INT'L L.J.* 331-408 (2012).

286. *See* Larry Catá Backer, *The Structural Characteristics of Global Law for the 21st Century: Fracture, Fluidity, Permeability, and Polycentricity*, 17 *TILBURG L. REV.* 177-199

preliminary statements of the Norway Resolution seek to make the case for a quite distinct vision of the project of business and human rights, one that embraces the foundations of economic globalization, that is more suspicious of states as the principal source of human rights regulation of business, and more willing to coordinate with non-state governance systems to reach a functionally coherent multi-systemic approach to disciplining business behavior. It is certainly messier and less formally coherent than the vision presented by the ALBA states in the Ecuadorian Resolution, but it is also more functionally coherent and closer to the realities on the ground. Yet it is also important to remember that the Norway Resolution was meant to “extend the mandate of the Working Group on the issue of human rights and transnational corporations and other business enterprises as set out in Human Rights Council resolution 17/4 for a period of three years.”²⁸⁷ Within that objective, the Norway Resolution inverted the contextualization attempted in the Ecuador Resolution. Where the Ecuador Resolution sought to contextualize and lessen the importance of the GPs within a larger framework of work that appeared to lead to treaty making, the Norway Resolution sought to contextualize treaty making within the greater project of developing the GPs. Paragraph 8 of the Norway Resolution:

Requests the Working Group to launch an inclusive and transparent consultative process with States in 2015, open to other relevant stakeholders, to explore and facilitate the sharing of legal and practical measures to improve access to remedy, judicial and non-judicial, for victims of business-related abuses, including the benefits and limitations of a legally binding instrument, and to prepare a report thereon and to submit it to the Human Rights Council at its thirty-second session.²⁸⁸

Treaty-making thus is converted from a principal objective to a mechanism for moving the GP project forward. It also requested that the High Commissioner for Human Rights investigate the possibilities of extending legal frameworks to regulate the complicity of enterprises in gross human rights abuses, picking up the suggestion for targeted treaty making first proposed by John Ruggie as an alternative to the comprehensive treaty approach of the Ecuador

(2012); see generally JEAN L. COHEN, GLOBALIZATION AND SOVEREIGNTY: RETHINKING LEGALITY, LEGITIMACY AND CONSTITUTIONALISM (2012).

287. Norway Resolution, *supra* note 212 at 11.

288. *Id. supra* note 212 at 8.

Resolution.²⁸⁹ As for the rest, the Norway Resolution continued to emphasize the major premises of the GP project: embedding the GPs in governance institutions, greater efforts by states to conform their domestic legal orders to their duty to protect human rights, and greater emphasis on finding more effective remedial mechanisms. Many of these serve to answer some of the challenges raised by civil society and the Ecuador Resolution—the upsurge in human rights abuses by transnational corporations, the failures by states to operationalize the GPs, the difficulty of recourse to remedies. At the same time, the Norway Resolution went out of its way to emphasize a fundamental distinction between the GP and treaty processes. The GP process envisioned by the Norway Resolution includes a substantial space for participation by civil society and other non-state actors. It provides a space for meaningful dialogue and socialization among major stakeholders in systems of human rights behavior discipline—through law or non-law rule systems or the development of custom. In contrast, and by implication, a treaty-making process is necessarily opaque. Treaties are the business of states, and the process may be as transparent as states deem it wise to make them. The modern trend is to preserve secrecy.²⁹⁰

The Norway Resolution also opens the possibility to finding a way of converging adherence to the GP framework, structured around the activities of the Working Group, especially with respect to the state duty to protect human rights and its related Third Pillar elements, combined with the core insight of the Ecuador Resolution that a binding international legal instrument is necessary to produce coherence among states using the only discursive framework intelligible to states—law. The Ecuadorean Resolution speaks to the creation of an open-ended intergovernmental working group on a legally binding instrument on transnational corporations.²⁹¹ While a legally binding instrument, a treaty or convention in this case, sounds in the singular, it does not mean that the construction of that instrument must also be considered in the singular. It is possible to

289. *Id.* at 7. The objective is not a treaty but a report that might recommend moving toward treaty treatment of this specific issue; see also Ruggie, *supra* note 191.

290. See Larry Catá Backer, *The Trans-Pacific Partnership: Japan, China, the U.S. and the Emerging Shape of a New World Trade Regulatory Order*, 13 WASH. U. GLOBAL STUD. L. REV. 49-81 (2014), available at <http://digitalcommons.law.wustl.edu/cgi/viewcontent.cgi?article=1473&context=globalstudies> (discussing the process of negotiating the Trans-Pacific Partnership).

291. Ecuadorean Resolution, *supra* note 211 at 1.

conceive of the project of the production of a binding instrument as made up of any number of subparts. Each of these subparts may be negotiated separately and put forward provisionally or seriatim as part of the greater project of producing, in the aggregate, and as the final product of these efforts, the legal instrument referenced in the Ecuadorian Resolution. It is thus possible to implement the Ecuadorean Resolution in stages, stages that produce a series of specifically targeted treaties, each constructed as a component of what together will produce the integrated international legal instrument specified in the Resolution. That approach produces tremendous benefits to both those states seeking a legal basis for the construction of domestic legal rule of law orders in states that are coherent and harmonized between them. At the same time it would fit neatly into the GP regime by focusing treaty making on the ordering of state power and authority on states without foreclosing the continued development of the corporate responsibility to respect human rights, or the coordinating role of international organizations as spaces where consensus on substantive premises may be developed.

In this way it is possible to achieve coherence between the Norwegian and Ecuadorean Resolutions. In this way it will be possible to use the treaty making facility in ways most suited to its character—the disciplining of states by defining their legal obligations (to other states) and specifying their duty in the construction of their domestic legal orders. At the same time, it will avoid pretensions to comprehensiveness by avoiding efforts to move beyond the realm of law to the governance spaces reserved to societally constituted entities—transnational enterprises, civil society and other non-state actors with internal governance systems—which is the realm of the corporate responsibility to respect human rights. Lastly, it provides a basis for common ground between them in the construction of the dispute resolution mechanisms of the Third Pillar—through treat discipline for states, and otherwise for non-state actors. The remedial pillar requires some refocusing—from states and enterprises to the victims of human rights abuses. This has not been easy as states and enterprises focus on their needs and objectives. Here is one area where an international body may be appropriately constituted to provide interpretive guidance on the application of the GPs in the context of individual complaints, a

suggestion I have made elsewhere.²⁹² It is in the remedial pillar that the difficulties identified in Section II (with respect to states) and Section III (with respect to enterprises), suggests resolution beyond either and in the international organizations from which the normative content of the human rights obligations of both are best expressed.

CONCLUSION

In introducing the Protect/Respect/Remedy framework, John Ruggie argued presciently that the “business and human rights debate currently lacks an authoritative focal point. Claims and counter-claims proliferate, initiatives abound, and yet no effort reaches significant scale. Amid this confusing mix, laggards—States as well as companies—continue to fly below the radar.”²⁹³ He emphasized that there was no “silver bullet solution to the institutional misalignments in the business and human rights domain.”²⁹⁴ He warned of the danger of conflating state duties, corporate responsibilities and the leadership role of the international community in order to craft a system, conventionally reassuring but fairly well guaranteed to fail precisely because it was not responsive to the changed conditions brought on by globalization.²⁹⁵

The paths taken by international and national stakeholders in the construction of governance systems across these governance frameworks since 2011 suggest both the power of the logic of the GP framework, and its frailty. National Action Plans can serve as a unifying framework for developing the state duty to protect human rights. But it can also devolve into a means of avoiding that duty by a misguided focus on corporate regulation detached from the connections to unifying principles of human rights at the heart of the GP’s First Pillar. Reporting and assurance programs, on the one hand,

292. Larry Catá Backer, *From Guiding Principles to Interpretive Organizations: Developing a Framework for Applying the UNGPs to Disputes that Institutionalizes the Advocacy Role of Civil Society*, in *BUSINESS AND HUMAN RIGHTS: BEYOND THE END OF THE BEGINNING* (César Rodríguez-Garavito ed., 2015, forthcoming) (arguing for the establishment of a centralized mechanism for uniform interpretation of the Guiding Principles and for providing interpretive guidance to courts and other deliberative bodies).

293. U.N. Secretary-General, *Protect, Respect and Remedy: A Framework for Business and Human Rights*: Rep. of the Secretary General, U.N. Doc. A/HRC/8/5, at 4 (Apr. 7, 2008) [hereinafter *Protect*] (by John Ruggie).

294. *Id.* at 7.

295. *See, e.g., id.* at 50-52; *id.* at 54 (“Whereas governments define the scope of legal compliance, the broader scope of the responsibility to respect is defined by social expectations—as part of what is sometimes called a company’s social licence to operate.”).

and disclosure and access systems through exchange regulations on the other hand, offer a promise of operationalizing the corporate responsibility to respect human rights. But these can also degenerate into context specific and fact rich exercises that hide more than they reveal and that are grounded in protection from liability rather than discovery and remediation of human rights wrongs in the course of enterprise activity. Lastly, international standards can serve as the glue that binds both state duty and corporate responsibility by providing the basis for law (through state) and behavior rules (for enterprises) that reinforce each other within the GP framework. International fora serve as the nexus point for top-down and bottom-up law-rule making that is organically developed, internalized within societally constituted groups and embedded into domestic legal orders of states. But these efforts can devolve into a fruitless search for a theoretically pure and comprehensive legal and international framework for the regulation of business enterprises mashed into the formally constraining and limited mechanisms of formal treaty making.

In a speech marking the 60th anniversary of the Five Principles of Peaceful Coexistence²⁹⁶ held in Beijing June 28, 2014, President Xi Jinping “urged the international community to jointly promote the rule of law in international relations. ‘We should urge all parties to abide by international law and well-recognized basic principles governing international relations and use widely applicable rules to tell right from wrong and pursue peace and development,’ said the Chinese president.”²⁹⁷ This insight, by one of the states that voted in favor of the Ecuadorian Resolution, provides the foundational insight on which further work on implementing that resolution might well be undertaken.²⁹⁸ The Ecuador Resolution, then, might be most usefully understood and applied in this light—to use the treaty machinery to construct a well-integrated, long term, and ultimately comprehensive rule of law system for business and human rights.

296. In 1954, leaders of China, India and Myanmar initiated the Five Principles, including mutual respect for sovereignty and territorial integrity, mutual non-aggression, non-interference in each other’s internal affairs, equality and mutual benefit, and peaceful coexistence. See *Five Principles of Peaceful Co-Existence*, <http://english.people.com.cn/92824/92845/92870/6441502.html> (last visited Mar. 1, 2015).

297. See *Xi calls for greater democracy in int’l relations*, XINHUA (June 29, 2014), http://www.china.org.cn/world/2014-06/29/content_32803994.htm.

298. Protect, *supra* note 235 § 4.

Business and human rights treaties can help construct an international rule of law system binding on all states in equal measure, and which can serve as a means of connection with the development of transnational business behavior norms that fall within the social (non-state) sphere. That work would require, to begin with, the necessary but hard work of mapping the extent of the current landscape of the state duty to protect—a project at the heart of the Working Group’s NAP project²⁹⁹ and the operationalization of the GPs. It then requires a structuring of relations among states and non-state actors within their distinct realms of activities, sensitive to the realities of globalization at the heart of the GP’s corporate responsibility project and an important element of the Second Pillar.³⁰⁰ Within this foundational structure the community of states might then turn to the slow, careful, and logical crafting of a well conceived program of law making, through treaty, that would, when completed, produce the comprehensive treaty based approach to the state’s duty to protect human rights envisioned in the Ecuadorian Resolution. The product would be a system of interlocking treaties establishing the rule of law in international relations that together would serve as the legal baseline for state compliance with their duty to protect human rights in a coherent manner that would, in turn, be coordinated with the governance regimes of non-state actors now so critical to the functioning of the global economic order.

299. *Id.* at § 3.

300. *Id.*