A FOURTH ELEMENT CONCERNING THE THREE-PILLAR STRUCTURED

A FOURTH ELEMENT CONCERNING THE THREE-PILLAR STRUCTURED "PROTECT, RESPECT AND REMEDY"

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Abstract

This paper, outlining and examining the structure of the "Protect, Respect and Remedy" Framework aims to show that the three-pillar structured Framework lacks the base of authority that would allow a State or a business enterprise, the actors in a Framework context, to regard it as an authoritative source. The paper further points out that international or global policy concerns, which seem essential to help realize the Framework's goal of narrowing and bridging the governance gaps created by globalization, are sacrificed by the three-pillar structure. In addition, there may be elements which fail to be reflected in it because of the adoption of three-pillar structure. In order to overcome these deficiencies, the author proposes that a fourth element be conceived in the context of or an understanding about the Framework. This fourth element involves what could be called an international regime of 'business and human rights'.

Keywords: business and human rights, Protect, Respect and Remedy framework, governance gaps, international regime, multinational enterprise

1. Background of the issue

As negative impacts of transnational enterprises became a concern in the 1970s, initiatives to codify rules for transnational enterprises led to the formulations of the Guidelines for Multinational Enterprises by the OECD and the Tripartite Guidelines by the ILO. A panel was formed at that time in the United Nations which began to formulate a code of conduct for transnational enterprises. Negotiations continued for more than a decade but then ground to a halt and were eventually formally abandoned in 1992.

The 1990s witnessed a growing concern about human rights abuses and environmental destruction by transnational enterprises. In light of such claims, a working group within a sub-commission on the Promotion and Protection of Human Rights, a subsidiary body of the UN Human Rights Commission, was reinitiated in 1998 to establish a code for transnational enterprises. In 2003, the subcommittee unanimously approved the document titled 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprise with Regards to Human Rights (draft Norms).[1] The by then renamed Council of Human Rights got stuck faced with severe opposition from some governments and the business community.

John Gerald Ruggie was appointed in 2005 by the UN Secretary General as Special Representative (SRSG) on the issue of business and human rights with a wide mandate to identify and clarify international standards and policies in relation to business and human rights. The SRSG, having consulted with a wide variety of stakeholder groups including governments, businesses, and civil society

[1] 'Norms on the responsibilities of transnational corporations andother business enterprises with regard to human rights', adopted at the 22nd meeting, on 13 August 2003. UN Doc. E/CN.4/Sub.2/2003/12/Rev.2 (26 August 2003). As for the codification process, see the following: Weissbrodt, David, and Kruger, Maria, 'Norms on the responsibilities of transnational corporations andother business enterprises with regard to human rights[current development]', *American Journal of International Law,* Vol. 97 (2003), pp.901-907; Weissbrodt, David, 'The Beginning of a Sessional Working Group on Transnational Corporations Within the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities', Kamminga and Zia-Zarfi, eds., *Liability of Multinational Corporations Under International Law*, 119-138, Kluwer Law International, 2000.

organizations, submitted a report to the Council of Human Rights in 2008.[2] The framing concept which the SRSG proposed in the report is the "Protect, Respect and Remedy" Framework.

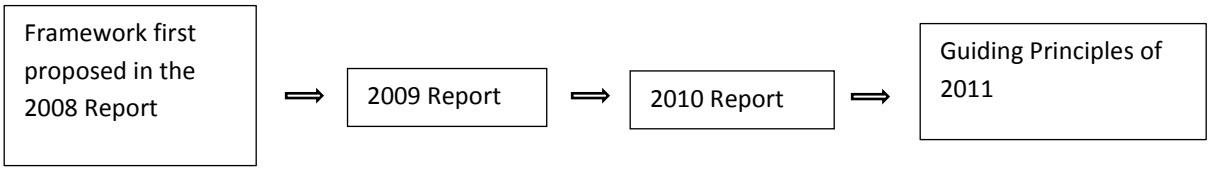
The framework proposal was supported by many governments, the business community and even the civil society. The year 2011 witnessed a new development. In its resolution adopted in June 2011, the UN Council of Human Rights endorsed a set of Guiding Principles for Business and Human Rights.[3] The Council's endorsement marks the completion of the SRSG mandate, and instead, a 5-member working group, which was launched in the same resolution of the Council, is to take over responsibility for implementing the framework, effectively disseminating the Guiding Principle, and playing an aligning function between governments and UN agencies.

2. Structural problems of the framework

How is the Framework structured? The basic concept of Framework was given in the SRSG's 2008 Report, according to which the Framework comprises the following three pillars: the State duty to protect against human rights abuses by third parties; the corporate responsibility to respect human rights; and effective access to remedies for victims of human rights. These three pillars form the core of the Framework.

Another structure of the 'Framework project', different from the Framework structure outlined above, can be identified. These two structures need to be distinguished for the purpose of the discussions that follow in this paper. The Framework project consists of four stages in which the SRSG first proposed the Framework in his 2008 Report. He subsequently made some recommendations on ways to operationalize the Framework in his Reports of 2009[4] and 2010[5], followed by the formulation and publication of the Guiding Principles in 2011. The project structure can be depicted by a timeline as indicated in Figure 1 below.

Figure 1: Structure of the 'framework project'



While the core parts of the Framework have remained intact, modifications or realignments of phraseology were made, however slight, in each stage, so that observers can find several differences between, for instance, the frameworks depicted in the 2008 2010 Reports respectively. With the Guiding Principles taking the form of a set of codes, it is not surprising that what can be grasped as a framework

[2] 'Protect, Respect and Remedy: a Framework for Business and Human Rights', Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, hereinafter referred to as the SRSG 2008 Report. UN Doc. A/HRC/8/5 (7 April 2008).

[3] 'Guiding Principles for Business and Human Rights: Implementing the United Nations "Protect, Respect, Remedy" Framework,'Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie. UN Doc. A/HRC/17/31 (21 March 2011).

[4] 'Business and human rights: Towards operationalizing the"protect, respect and remedy"framework', Report of the Special Representative of the Secretary-Generalon the issue of human rights and transnational corporationsand other business enterprises", hereinafter referred to as the SRSG 2009 Report. UN Doc. A/HRC/11/13 (22 April 2009).

[5] 'Business and Human Rights: Further steps toward the operationalization of the "protect, respect and remedy" framework', Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, hereinafter referred to as the SRSG 2010 Report. UN Doc. A/HRC/14/27 (9 April 2010).

through the SRSG Reports looks different from what appears in the form of a set of codes. How they differ, however, is not a main topic of this paper. What needs to be stressed here is that there can be different perceptions and interpretations of the content of the Framework.

3. The three pillars of the Framework

According to the SRSG Reports and the Principles, the three pillars of the Framework are summarized as follows:

State duty to protect: States have a duty under international law to protect the human rights of individuals within their territory or jurisdiction. International law requires States also to take necessary measures to protect human rights against abuses by State and non-State actors including business enterprises through appropriate polices regulation and adjudication.[6] International law experts disagree, however, on whether international law requires home States to help prevent human rights abuses abroad by businesses incorporated within their territory. The Reports of 2008 and 2009 confirm that international law does not prohibit States from regulating extraterritorial activities of businesses incorporated in their jurisdiction provided that there is a recognized jurisdictional basis with an overall test of reasonableness being met.[7] States are also obliged to take appropriate steps to ensure that in case human rights abuses occur within their territory or jurisdiction, the victims of such abuses have access to effective remedy.

Corporate responsibility to respect: The corporate responsibility to respect human rights means that business enterprises should avoid infringing on the human rights of others and should take adequate measures to address adverse human rights impacts with which they are involved.[8] The responsibility means to include that business enterprises should respect internationally recognized standards of human rights in their operations of business. As corporate responsibility to respect human rights is based on legal as well as moral or social responsibility grounds, a failure by a company to meet this responsibility may make the company subject not only to legal sanctions but also, the 2008 Report notes, to the "court of public opinions."[9]

The core part of the responsibility lies in carrying out human rights due diligence which could be part of broader corporate risk-management systems[10]. In case corporate activities go beyond the home State's territory, a business entity headquartering a corporate group should conduct appropriate due diligence through its supply chain networks, which may cover a global extension in order to prevent potential human rights abuses or detect a possible abuse at an early stage. This is in line with social expectations.

Access to remedy: Access to remedy, according to the 2009 Report, is "an important component of both the State duty to protect and of the corporate responsibility to respect."[11] It means that some kinds of judicial or non-judicial mechanisms should be made ready by State and business enterprises for the use of victims of human rights abuses. It includes State-based judicial mechanisms, State-based non-judicial mechanisms like NHRIs and NCPs, and non-State administered non-judicial grievance mechanisms, which may include an industry-led or a company-level grievance mechanism, aimed at detecting at an early stage a problem which otherwise could get worse, leading to a human rights abuse.[12]

4. Structural analysis of the Framework

The author will next anatomize the Framework. The two actors, the State and the business enterprise, will be singled out as main addressees of norms contained in the Framework or the

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[6]SRSG 2008 Report, paras. 18-22; SRSG2009Report, para. 13.
[7]SRSG 2008 Report, para. 19; 2009 Report, para. 15.
[8]SRSG 2010 Report, para. 57.
[9]SRSG 2008 Report, para. 54 ; 'the court of public opinion', Ruggie, John G., 'Business and Human Rights: the Evolving International Agenda,'*American Journal of International Law*, Vol. 101 (2007), p. 833.
[10]SRSG 2008 Report, para. 56; SRSG 2009 Report, para. 85. The OECD Guidelinesalso refer to the concept, stipulating as follows: "Enterprises should… [C]arry out human rights due diligence as appropriate to their size, the nature and context of operations and the severity of the risks of adverse human rights impacts."*OECD Guidelines for Multinational Enterprises,* Section IV, 2011 version.
[11]SRSG 2009 Report, para. 86.
[12]SRSG 2008 Report, paras. 82-103 ; SRSG 2009 Report, paras. 86-115; SRSG 2010 Report, paras. 89-113.

Principles, and four aspects will be identified in order to understand what the two actors are required to do in a Framework context, and how they should do it. They are: first, the content of obligation or responsibility; secondly, the kind of underlining norm; thirdly, the scope of the obligation or responsibility (scope); and fourthly, the kind of sanctions to be imposed in the event of breach of obligation or non-implementation of responsibility (sanctions). Table 1 shows how the two kinds of actors are linked to the four aspects.

Table 1 Actors' obligations, norms, scopes and sanctions

Actor	Obligation	Underlying norm	Scope	Sanctions
State	To protect (Remedy)	Legal norms (international law) Moral/social norms	Within territory in principle Abroad exceptionally	Sanctions possibly imposed by the international society
Business	To respect (Remedy)	Moral/social norms (home, abroad) Legal norms (home state, host state)	The land of operation Subsidiaries (home and abroad) Supply-chain	Sanctions by home or host states Sanctions by the public or civil society

Some explanations are in order. As for the content of obligation, for the State it is a duty to protect human rights, and for the business enterprise it is a responsibility to respect human rights, and each obligation covers each actor's duty or responsibility to take and operate appropriate remedial or grievance mechanisms for victims of human rights. The underlining norm for the State duty to protect is a legal norm as the State has a duty to protect human rights under international law.[13] An analysis of the Reports and the Guiding Principles indicates, however, that the documents use phraseology implying that States are bound by moral or social norms. The Guiding Principles differentiates the usage of the words 'must' and 'should' in relation to State actions. For instance, Principle 1 stipulates that States *must* protect against human rights abuses within their territory and/or jurisdiction by third parties, including business enterprises. Principles 2 through 10 stipulate that States *should* take certain actions. This implies that the actions a State should take do not have a legal grounding, but rather a social or moral one.

The main source of the corporate responsibility to respect is the moral or social norms existing in society. To the extent to which the responsibility has already been legally provided in the domestic laws of a State, though, the responsibility has a legal grounding. Principle 23 of the Guiding Principles includes the following phrase: [14]

> [B]usiness enterprises should: (a) Comply with all applicable laws and respect internationally recognized human rights, wherever they operate;

This part can be interpreted as reading that businesses should respect internationally recognized human rights by complying with all applicable laws. OECD's 2011 revised version of Guidelines for Multinational Enterprises provides: "Enterprises should, within the framework of internationally recognized human rights, the international human rights obligations of the countries in which they operate as well as relevant domestic laws and regulation: 1. Respect human rights, which means they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved."

What business enterprises should comply with is not only laws of the State where they operate, or the host State. Businesses are bound by laws of the State where they were incorporated, or the home

[13] SRSG 2008 Report, para. 9 and 18; SRSG 2009 Report, para. 13.
[14] 'Guiding Principles for Business and Human Rights', *supra* note 3.

State. The degree to which businesses are bound by their laws differs from State to State. Some European States, as the SRGS noted, have tried to formulate conditions for the State to help exercise jurisdiction over matters concerning their overseas business.[15]This is a matter of 'spacious scope' involving the actors shown in Table 1 above.

When a transnational enterprise operating in a global arena is found to be involved in a human rights abuse case occurring in a foreign country, the exposure of the incident by media reports may instigate a boycott movement by civil society organizations in markets of goods produced or retailed by the transnational enterprise. This shows clearly how the business enterprise is subject to the 'court of public opinions' to which the 2008 Report refers.

This aspect is closely related to the scope of the obligation and/or responsibility which differs between the State and the business enterprise. States are in principle allowed to exercise their jurisdiction only within their territory under international law. States have respected this principle when it comes to implementation jurisdiction. However, some European countries are trying to extend regulations by enacting laws whose effect will go beyond their territory in relation to corporate-related human rights abuses, enabling the law-enforcing authorities to exercise criminal jurisdiction in such cases. The United States' Alien Tort Claims Act is another example, under which plaintiffs can lodge a lawsuit against corporate entities which are alleged to be involved in a human rights abuse case occurring overseas. Several cases have been brought to court under the federal law.[16] This is why the phrases 'Within territory in principle' and 'Abroad exceptionally' are placed in the 'scope' column in Table 1 above.

A business enterprise controlling its business group should be aware that the scope of its responsibility to respect goes beyond the territory of the State where the headquarters are located, requiring it to take appropriate preventive measures against human rights abuses involving subsidiaries overseas. A specific procedure to do this is 'human rights due diligence'. The 'human rights due diligence' requires a business to carry out this not only for its own business operations but also for those of business partners, home and abroad, belonging to its supply chain network.[17] Few States have so far enacted laws making this a requirement, though more States are likely to do so in the near future.

Finally, in case of a violation by an actor of a human rights code or standard, what sanctions are to be imposed on the actor, and how. If a State fails to take necessary measures to prevent businesses from abusing human rights and/or fails to provide victims with access to remedy, the State could be subject to sanctions applicable under international law, though the possibility is limited in practice. The SRSG Reports, however, do not discuss the issue as far as the State is concerned. Nor does the Framework explicitly address the issue.

If a business enterprise gets involved in a human rights abuse, amounting to a situation where it fails to fulfill its responsibility to respect, the base of the sanctions to be applied is the enacted law of the State where the business was incorporated. A subsequent failure by the State to take action to prevent human rights abuses by third parties would lead to the possibility of the State being subject to sanctions.

It is hoped that these explanations will help give a clearer picture of the Framework's context.

5. An analysis of the Framework

（1）Features of the Framework

A bird's eye-view perspective shows that the Framework has three characteristics.

[15]SRSG 2008 Report, paras. 9 and 18; SRSG 2009 Report, para. 13.SRSG 2008 Report, para. 105.Voiculescu evidences some cases of legislative development taken by several European governmentsciting an Italian legislation, Netherland's Penal Code and Australia's Commonwealth Criminal Code At 1995. Voiculescu, Aurora., 'Human Rights and the New Corporate Accountability: Learning from Recent Developments in Corporate Criminal Liability,'*Journal of Business Ethics*, Vol. 87 (2009), p. 426.
[16]SRSG 2008 Report, para. 90; SRSG 2009 Report, para. 26;
[17]SRSG 2008 Report, paras. 56-72; SRSG 2009 Report, paras. 70-85; SRSG 2010 Report, paras. 79-86.

First, the Framework defines the contents and contours of the three pillars. The three pillars define respectively the State's duty to protect, corporate responsibility to respect, and access to remedy. As the content includes norms, we shall refer to 'norm content' in this paper, for the sake of convenience. To examine norm content involves a norm-source concern; establishing the source of a norm. This issue will be discussed later in the paper.

Secondly, the Framework defines relationships among the three pillars. The relationships were presented in clear terms in the SRSG Reports. According to the 2008 Report, the three pillars constitute a comprehensive whole with each complementing the other.[18] It describes the three kinds of responsibilities as "differentiated but complementary".[19]

Thirdly, the Framework does not define any relationship to an international system concerning human rights, which is thought to currently exist in relation to norms contained in the framework. The SRSG Reports refer to an international human rights regime or a human rights system several times.[20] This indicates that the Reports recognize that such a system or regime exists as an international human rights regime. However, the Reports do not specify what that regime is like in concrete terms.

(2) Norm source, authoritativeness, and effectiveness

This section attempts to show why States and business enterprises cannot consider the Framework a respectable source of authority. For that purpose, the author introduces the following three concepts: norm source, authority, and effectiveness. The concept of norm source is a concept which involves the possibility that a norm derives from a recognized, and thus valid, source. The State duty to protect human rights being provided under international law means that international law is the valid source of the norm. If a rule is commonly recognized in society as a moral norm *per se*, reflecting social expectations, the source of the rule is a moral norm or social expectations. If a rule can be attributed to a source other than international law or social expectations, the validity of the norm source of the rule needs to be established.

The concept of norm source is closely related to the concept of authoritativeness. Authoritativeness is a concept describing the level of authority a norm earns from its addressees; that is, the actors to which the norm is addressed.[21] A norm can be called authoritative when it has earned authority or respect from its addressees. Authority or authoritativeness is a matter of degree. The authoritativeness of a norm depends on the relationship between a norm and its addressees; a low authoritative norm attracts only a low level of power or authority from its addressees. Authoritativeness concerns the nature of a norm, and it goes hand in hand with a valid source of the norm. A norm acquires the nature of authority when its base is a valid norm source. Without a valid norm source base, a norm cannot be authoritative.

Authoritativeness does not provide a norm with security from violation. Even a high authoritative norm may be breached. If a rule is violated, sanctions may be imposed on the violator. Such sanctions should correct the deviating behavior and deter similar actions in the future. If a sanctions system functions as intended or designed – in other words, it deters rules violations - the system in which the rules are incorporated can be deemed effective. Law experts often argue that a norm has effectiveness or that the effectiveness is an attribute of a norm. Introducing the concept of authoritativeness, however, this paper regards effectiveness not as an attribute or the nature of a norm, but as the nature of the socio-political environment of a norm. The authoritativeness of a norm contributes in part to a determination of the effectiveness of the system incorporating the norm, but it cannot alone fully control the effectiveness of the system.

If addressees have acknowledged the authority of the norm, the possibility of an actor violating the norm is limited. Yet a violation may be triggered by another factor. As long as a sanctions system is

[18]SRSG 2008 Report, para. 9; SRSG 2009, para. 2.
[19]SRSG 2008 Report, para. 9.
[20]See, e.g.,the sentence that "[t]he human rights regime rests upon the bedrock role of States." SRSG 2008 Report, para 50.
[21]The author defines authority of a norm as follows: the authority of a norm is the norm's potential that motivates its addressees to observe or defer to the norm and that derives from addressees' recognition of the legitimacy of the norm. He thinks this definition can apply to a ruler or political system.

functioning, the possibility of an actor resorting to breaking norms remains marginal, which means the system is successful as a deterrent. Without such a sanctions system, the possibility of breaking a norm will increase as the level of deterrence decreases. A sanctions system can complement the authoritativeness of a norm, which is not the cause driving the system to operate. A sanctions system may be organized in a given situation or unorganized in another.[22] Unless a sanctions system functions to some extent, the authoritativeness of a norm cannot be adequately ensured.

（3）Testing the Framework

Next, the author will test the norm source validity and authority of the Guiding Principles and the Framework by using the concepts explained above.

First is the Guiding Principles. The Principles provide the State duty to protect as part of the norm content. As the State duty to protect, as examined above, is provided in international law, its valid norm source is apparently international law. An analytical examination of the Principles indicates that they are not a valid source of the State duty to protect because the normative document just borrows the concept from its original international law source. The same can be said of the corporate responsibility to respect. The norm source of the corporate responsibility to respect can be found either in society's expectations, the moral sense of individuals, or domestic legislation. The Principles also incorporate the norm concept, borrowing from outside of the Framework to present it as if it were original.

Since the Principles lack any base of source validity for the State duty to protect and for the corporate responsibility to respect, the normative content proper to the Principles is tantamount to nil: the Principles do not contain intrinsic normative information despite taking the form of code. Almost all the normative content of the Principles is borrowed from other sources.

Next to be tested is the Framework. As the scope and content of the Framework have not been defined in concrete terms in either the SRSG Report or the Guiding Principles, what the Framework denotes remains elusive and subject to different interpretations. The project development structure contributes to the elusiveness of the concept.[23] Wide and narrow interpretations could be made of the Framework. The narrowest interpretation sees the Framework as simply an analytical, explanatory concept because the concept is destined to play the role of explaining the three pillars and how they relate to each other. As such, it follows that it does not generate authority for its addressees.

A wider interpretation of the Framework sees it as a value-filled, normative concept whose content includes the State duty to protect and the corporate responsibility to respect. These norms, as mentioned earlier, are sourced outside of the Framework. It follows that it has some degree of authority, owing to the effects of the norm source that exists outside of the Framework. As long as its addressees comply with a norm, the norm can retain authority, while when its addressees do not comply with the norm, it loses authority, and this deviated situation may last until a sanctions system works to correct it. The Framework does not provide in and of itself any organized sanctions system, but there is a sanctions system, though less organized, working in the international arena.

To sum up, the concept which is recognized as the Framework, when grasped in a narrower sense, is only an explanatory concept with vacant content, thus having no valid source in it, resulting in a complete lack of authority. When it is perceived in a wider sense, all the normative content of the Framework originates from other valid sources like international law or social expectations. The Framework itself is not the source of the normative content, again resulting in having no authority.

The Framework and the Guiding Principles, which could be regarded as constituting part of the Framework by some observers, are most likely to not be valid norm sources in themselves. Given an

[22]The international society consisting of sovereign States is equipped with only unorganized sanctions systems while a domestic society usually is equipped with an organized sanctions system.

[23]See Figure 1above. Some may understand the Reports of 2008, 2009 and 2010 are the source of the Framework while others may think what the Guiding Principles provide is the final and legitimate content of the Framework, and some may consider that the Framework provides only a framework of a comprehensive picture of measures to address issues of business and human rights. The last interpretation represents the narrowest.

explanatory function, the Framework attracts little authority from its addressees. Provided that it is a valid source in itself, it may acquire authority to that extent, yet it lacks a proper sanctions system so that the base of authority of the Framework remains very fragile.

(4) An analysis of global elements

The negation of authority of the Framework does not necessarily mean that it does not have any significance. The Framework or at least Reports contain a number of relevant recommendations made by the SRSG from domestic and international policy coherence perspectives.[24] The problem is that these issues are unscrupulously put into the mold of the three-pillar structure. A typical example is shown below. The SRSG Reports focus on the negative effects of stabilization clauses inserted in most bilateral investment treaties (BITs) that host governments conclude to attract foreign investment.[25] A stabilization clause makes it difficult for a host government to strengthen domestic social environment standards, including those related to human rights, without fear of foreign investor challenge. The Reports claim that such a situation skews the balance between investor interest and the need of host States to discharge their human rights obligations.[26]

The SRSG urges that States, companies and institutions supporting investment should work towards developing better means to balance the two interests.[27] By raising an objection to the practice of inserting a stabilization clause into a BIT, the SRSG virtually recommends measures to help host governments make effective policies aimed at improving the human rights situation. The 2010 Report points out that a stabilization clause should meet the twin objectives of ensuring investor protection and providing the required policy space for States to pursue bona fide human rights obligations. It goes on to affirm that there is an urgent need for all parties to consider the human rights implications of long-term investment projects at the contracting stage.[28]

These suggestions or recommendations were incorporated into the Guiding Principles. Principle 9 stipulates:

> States should maintain adequate domestic policy space to meet their human rights obligations when pursuing business-related policy objectives with other States or business enterprises, for instance through investment treaties or contracts.

The 2010 Report refers to all the parties including States, corporate negotiators, and their legal and financial advisors, that are expected to meet the two objectives explained above.[29] BIT-related issues are covered in the Guiding Principles in the section of State duty to protect, but not in the section dealing with the corporate responsibility to respect.

The issue of securing policy space for the State to fulfill its duty to protect, as the SRSG raises in his Reports, may be an issue that can be discussed separately from the concept of State duty to protect. It should be noted, however, that the normative content of the State duty to protect provided in international law does not stipulate it in such detail. This leads the author to doubt the propriety of the SRSG's handling of a how-to-design question concerning BITs as an issue of State duty to protect. The issue of how to design BITs is not one that each State should address separately, but rather one that needs to be pursued collectively by the international community, with the shared consciousness of the many States concerned. Collective responses are also what corporate investors, contracting parties at the other end of BITs, should provide. In this sense, corporate investors are also morally bound to make concessions on the issue of balancing interests.

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[24]Scott Jerbi points out that "a significant number of references in the main report clearly adopt recommendationstyle language." Scott Jerbi, 'Business and Human Rights at the UN:What Might Happen Next?'*Human Rights Quarterly*, vol. 31, 2009.
[25]SRSG 2008 Report, paras.34-35; SRSG 2009 Report, paras. 31-32; SRSG 2010 Report, paras. 20-22.
[26]SRSG 2008 Report, paras.36-38; SRSG 2009 Report, paras. 36-37; SRSG 2010 Report, paras. 24-25.
[27]*Ibid.*
[28]SRSG 2010 Report, para. 24.
[29]Principle 9 and its Commentary cover the issue. 'Guiding Principles,' *supra* note 3.

In light of all this, it seems advisable to follow a different path from the one adopted by the Framework; namely, one in which all common elements are grouped together into each of the three pillars.

Another deficiency can be pointed out in a similar context. The SRSG raises the issue of international policy coherence. He says in his 2008 Report: "Effective guidance and support at the international level would help States achieve greater policy coherence", adding that the human rights treaty bodies can play an important role in making recommendations to States regarding the implementation of their obligations to protect rights vis-à-vis corporate activities.[30] The Report also says that, in order to promote more consistent approaches and increase their expectations of each other with regard to protecting rights against corporate abuse, "States are encouraged to share information about challenges and best practices."[31]

However, these issues of policy coherence had to be described under one of the three pillar categories in the Framework. In fact, the issue of international policy coherence and the roles of international organizations in relation to the improvement of human rights situations are explained in the Guiding Principles under the pillar of States' duty to protect. This is most typically represented by Principle 10 of the Principles, which provides States' obligations in relation to how they should act as a member of an international organization or a party to an international treaty. Principle 10 stipulates as follows:

> States, when acting as members of multilateral institutions that deal with business-related issues, should:
>
> (a) Seek to ensure that those institutions neither restrain the ability of their member States to meet their duty to protect nor hinder business enterprises from respecting human rights;
>
> (b) Encourage those institutions, within their respective mandates and capacities, to promote business respect for human rights and, where requested, to help States meet their duty to protect against human rights abuse by business enterprises, including through technical assistance, capacity-building and awareness-raising;
>
> (c) Draw on these Guiding Principles to promote shared understanding and advance international cooperation in the management of business and human rights challenges.[32]

A State that is a member of an international organization usually complies with the obligations under the constitutional treaty of the organization only as far as it is strictly obliged to, apart from obligations established under international law. Principle 10 of the Guiding Principles seemingly intends to impose additional obligations on a member State of an international body. The normative content of these additional obligations requires, as a general rule, that a State, as a member of an international body, work for or act toward the improvement of the human rights situation of member States, independently of the obligations which States undertake in a treaty.

This normative content cannot be regarded in the same way as an ordinary interpretation of the State duty to protect denotes. It is not directly related to the concept of State duty to protect human rights or duty to prevent third parties from committing abuses of human rights within the territory or jurisdiction. This responsibility of States to work for the international organization as a member of the body should instead be understood as part of their efforts to construct a global institutional entity concerning business and human rights.

Paragraph (C) of the Principle cited above, stipulating that States should " [d]raw on these Guiding Principles, to promote shared understanding and advance international cooperation in the management of business and human rights challenge," may also be awkwardly connected to what the State duty to protect stands for.[33] It could and should have been enshrined as a global effort for something which every

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[30]SRSG 2008 Report, para. 43.
[31]SRSG 2008 Report, para. 44.
[32]Principle 10 of the Guiding Principles, "Guiding Principles," *supra* note 3.
[33]'Guiding Principles,' *supra* note 3.

actor should cooperatively pursue. This would better suit the purpose of Paragraph (C) of advancing "international cooperation in the management of business and human rights challenges."

The author has shown earlier that the Framework, covering both the content of the SRSG Reports and the Guiding Principles, includes policy recommendations the SRSG made on top of normative content, and some of those recommendations are molded into the three-pillar structure, resulting in undermining propriety.

（5） Elements omitted by the Framework

There is an element which the Framework failed to incorporate, though the SRSG had presumably recognized its importance. One reason for the failure may concern the fact that the Framework takes the form of the three-pillar structure. The element involves an objective as to what common or shared responsibility States and business enterprises should have in relation to this topic.

John G. Ruggie contributed a monograph on the same topic to a 2007 volume of *American Journal of International Law*.[34] In the concluding part of the monograph, he cited a passage of Iris Marion Young on discussions of violation of labor rights in a global supply chain. "[B]ecause the injustices that call for redress are the product of the mediated actions of many, . . . they can only be rectified through collective action", and that requires a broader construction of "political or shared responsibility." Its aim is not "to assign individual blame for discrete acts through backward-looking judgments, but to change structural processes by reforming institutions or creating new ones that will better regulate the process to prevent harmful outcomes."[35] Following these cited passages, Ruggie positively assessed soft-law hybrid arrangements, saying that it is an important innovation to realize the concept. Ruggie did not, however, go into detail on the issue of "political or shared responsibility" or the need of a "broader construction" in the monograph. In his Reports, published after the monograph, he did not deal at all with the element of collective action or a broader construction of "political or shared responsibility."

On the one hand, the phrase "differentiated but common responsibility" was used a few times in his Reports, but on the other hand, the element of common responsibility to construct an institution of actors is not referred to at all. Despite a growing concern that States and business enterprises are expected, as members of a global community, to play roles in constructing a global institution concerning business and human rights, the Framework does not touch upon it. The reason for the omission may be attributed to the three-pillar structure of the Framework.

6. Countermeasures: the introduction of a fourth element

It should now be obvious that the three-pillar structure of the Framework, or an explanation on the base of this trilaterality, has deficiencies. Besides the lack of authority in the Framework and the elusiveness concerning the definition of the Framework, there are two structure-based problems looming. One is that international policy issues concerning business and human rights have inappropriately been molded into the three-pillar structure of the Framework. As a result, any international or global element that States should address collectively has to be handled by each State individually. Secondly, there is another global element that the trilateral structure of the Framework may find it difficult to appropriately incorporate. This paper aims not only to point out the deficiencies, but also to make suggestions as to how to overcome them.

In order to overcome these shortcomings, the author suggests that a fourth element should be extrapolated into the context of the three-pillar structured Framework.[36] More specifically, an international regime needs to be conceived that would be expected to develop as an overarching institution encapsulating the two actors, the State and the business enterprise. And the construction, improvement and sophistication of the institutional entity itself should be considered as a common objective which

[34]Ruggie, John Gerald,'Business and Human Rights: the Evolving International Agenda,' *American Journal of International Law*, Vol. 101. No. (2007), p. 839.
[35]*Ibid.*
[36]One of the author's works has already implied that there can be a fourth element to be identified in the Framework without going into details.

States and business enterprises should strive towards in the field of business and human rights. It should be an international or global regime in the sense that Stephan D. Krasner defined decades ago as "sets of implicit or explicit principles, norms, rules, and decision-making procedures around which actors' expectations converge in a given area of international relations."[37] It could embrace moral norms, principles and rules as incorporated in the Principles, and be equipped with some sort of sanctions system. It should also have the function of coordinating international policy as an organizational part of a global institution relating to business and human rights, including the possible development of accountability systems, domestic and/or international, for transnational enterprises, should they get involved in a case of human rights abuses.[38]

Drawing a full picture of the regime is not the aim of this paper. It simply aims to stress the need for such a regime. An international human rights regime has existed for decades. Scholars of international politics or relations, including John G. Ruggie, pointed out the existence of such a regime in the 1980s.[39] The international regime of business and human rights this paper is referring to ought to form part of the existing international regime of human rights. How both regimes are and can be connected or integrated is not the topic of this paper, but remains an issue for further study. Let the author, however, shed light on one element which he thinks should be part of this regime. It is the function of distribution of authority among the actors. An example of such a function involves the coordination or distribution of extraterritorial jurisdiction among States in relation to the issue of business and human rights.[40]

Whether the duty the State has under international law to protect human rights of individuals within its territory or jurisdiction can go beyond its territory is a topic the SRSG sheds light on in his Reports. International law, as his Reports recognize, does not prohibit States from exercising their criminal and/or civil jurisdiction over a human rights abuse case taking place overseas, involving a business enterprise incorporated in their States.[41] Some active governments are pushing for an extension of their jurisdiction in order to exercise certain control over corporate activities taking place overseas.[42] This may appear to be a State extension of jurisdiction beyond a territorial limit driven by the egoistic pursuit of national interest by a State. If an international regime could be established, however, it would be able to more smoothly coordinate and more clearly distribute jurisdiction among States than the existing laissez-faire system. This could constitute the base of reasoning for a State extension of jurisdiction reflecting an international or global interest, rather than the national interest of one State or another, and it could also involve policy discussion over how to design such a regime.

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[37]Krasner Stephan D., "Structural Causes and Regime Consequence: Regimes as Intervening Variables,"*International Organization*, Vol. 36. (Spring 1982), p. 185; Stephan D. Krasner, ed., *International Regimes* (Cornell University Press: 1985), p. 2. The definition is consistent with Keohane and Nye's definition: "sets of governing arrangements" that include "networks of rues, norms and procedures that regularize behavior and control its effects." Keohane and Nye, *Power and Interdependence: World Politics in Transition* (Little, Brown: 1977), p. 19. The regime concept of those days were state-centered so that, as Ruggie described later, whatever roles transnational actors might play in the context of international regimes ... were filtered through the prisms of their influence on governmental and intergovernmental processes. Ruggie, John G., 'Reconstituting the Global Public Domain---Issues, Actors and Practices,'*European Journal of International Relations,* Vol.10. No.4 (2004), p.501. The author of this paper insists that the original definition remains relevant even in the contemporary global situation which is still State-based but transnational or global actors including civil society organizations have gained presence to degree as global actors.

[38]Nina Seppala argues that "the extension ofthe international regime of human rights to companies hasnot changed the essentially state-centric nature of theregime" and that "states are the primary holdersof human rights obligations and have a key role in thedecision making and enforcement of the regime".Seppala, 'Business and the International HumanRights Regime: A Comparison of UNInitiatives,'*Journal of Business Ethics,* Vol. 87 (2009), p. 401. The author's argument that an international regime of business and human rights should be more inclusive and less State-centered is normative one so that it does not contradict with Seppala's conclusion.

[39]Donnelly, Jack, "International Human Rights: A Regime Analysis,"*International Organization*, Vol. 40. No. 3 (Summer 1986).

[40]The issue of extraterritoriality was intensively discussed in a SRSG addendum of 2007. UN Doc. A/HRC/4/35/Add.2 (15 February 2010). His observations on the issue made in his Reports of 2008 and 2009 reflect the discussions in the addendum. Credit seems taken to the following work: Zerk, Jennifer, *Extraterritorial Jurisdiction: Lessons for the Business and Human Rights Sphere from Six Regulatory Areas,* a report for the Harvard Corporate Social Responsibility Initiative to help inform the mandate of the UNSG's Special Representative on Business and Human Rights, Working Paper No. 59 (June2010).

[41]SRSG 2008 Report, para. 19; SRSG Report, para. 15.

[42]The excerpt from the SRSG 2008 Report that there is an expanding web of potential corporate liability for international crimes, reflecting international standards but imposed through national courts reflect such an extension. SRSG Report, para. 105. Also see Wouters, Jan and Ryngaert, Cedric, 'Litigation for overseas corporate human rights abuses in the European Union: the challenge of jurisdiction,'*The George Washington International Law Review*, Vol. 40, No. 4 (2009).

7. Concluding remarks

The Framework the SRSG proposed before the Human Rights Council was literally a breakthrough in the sense that it broke through a stalemate situation that existed earlier in the Council. A wide range of stakeholders expressed support for the Framework and its implementation in the real world. Democratic support for the initiative, however, does not ensure that the objectives of the Framework will successfully be realized.

Whether addressees will comply with the normative content of the Framework depends on socio-political conditions that are functional to the governance gaps which the Framework is set to solve. For the governance gap to be addressed, there needs to be a global regime which will emerge or develop outside of the Framework, but which will embrace the normative content of the Framework and have a mechanism to execute sanctions over divergent behaviors of States in the field of business and human rights. The construction of such a regime should be a common objective for both of the actors, the State and the business enterprise, to pursue.[43]

Without the development of such a regime, the goal of the Framework toward bridging the governance gaps will not be realized, and if the goal should be realized to a certain extent, such a regime must be formed to that same extent. The Framework is not likely to achieve the goal by itself, and so it needs to be followed by or complemented by the development of some kind of regime encompassing the normative content with a sanctions system.

In this paper the author points out deficient aspects of the Framework, but he does not intend to squarely negate the significance of the Framework. Rather, he appreciates its mission of "elaborating the implications of existing standards and practices for States and businesses" and "integrating them within a single, logically coherent and comprehensive template" concerning the issue of business and human rights.[44] The SRSG notes that the Framework could be "a common global platform for action, on which cumulative progress can be built, step-by-step, without foreclosing any other promising longer-term developments."[45] An international regime of business and human rights, whose development this paper proposes, may be seen in the future as a result of such cumulative progress or as a platform promising longer-term developments. For that to happen, the actors concerned, especially the State and the business enterprise, should be mobilized to collectively work with a common view to constructing a world in which human rights will be ensured.

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[43]Some scholars argue for corporations should assume responsibilities associated with governments and international organizations. For instance, Hsieh insists that corporations should have responsibility to promote well-ordered institutions in societies where they operate that are not well-ordered. Hsieh, 'Does Global Business Have a Responsibility to Promote Just Institutions?,'*Business Ethics Quarterly*, Vol. 19. No. 2 (2009), pp. 267-269. Also, de Jonge,'Transnational Corporations and International Law: Bringing TNCs out of the Accountability Vacuum,'*Critical Perspectives on International Business* (2011). This current paper shares such concern but argues that business enterprises should take responsibility for a more specific work, which involves the construction or development of an international regime of business and human rights.

[44]The part titled"Introduction to the Guiding Principles", 'Guiding Principles,' *supra* note 3, para. 14.

[45]*Ibid*., para. 13.

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