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Collective Responsibility and Transnational Corporate Conduct

Sara L. Seck

Corporations and other business enterprises are sometimes implicated in conduct that is considered criminally wrongful. At the domestic level, debates over corporate criminal liability often focus on the merits of holding corporations responsible for criminally wrongful conduct, as opposed to, or in addition to, convicting individuals for their role in the commission of corporate crimes. A second debate in the domestic context is over the significance of the distinction, if any, between a criminal and a regulatory offense when it comes to prosecuting and penalizing a legal person such as a business entity. In the international human rights context, however, the debates have focused on a different issue: whether corporations bear direct obligations under international human rights law for wrongful conduct that falls short of violating the egregious norms of international criminal law. This somewhat heated debate was recently settled at the United Nations Human Rights Council with the acceptance by states in June 2008 of the *Framework for Business and Human Rights*[1] developed by the Special Representative to the UN Secretary-General on Business and Human Rights, Professor John Ruggie. Curiously, it is international criminal law's preference for individual responsibility for mass crimes such as genocide that has opened the door to recognition of the legal responsibility of the corporation – a collective – for egregious human

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[1] John G. Ruggie, United Nations Human Rights Council, 8th Session, *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*, UN Doc. A/HRC/8/5 (April 7, 2008).

rights violations, while keeping the legal door closed where less serious human rights violations are concerned.

The *Framework* speaks of the corporate responsibility to respect all human rights as part of a corporation's social license to operate even when not mandated by law. Yet the *Framework* also highlights the state duty to protect rights from harmful conduct by nonstate actors, including business. This suggests that a study of collective responsibility in the business and international human rights law context should consider both the collective responsibility of corporations and the collective responsibility of states. This chapter takes up the challenge. Although I follow Mark Drumbl's definition of collective responsibility as implying "noncriminal sanctions that attach to groups whose misfeasance or nonfeasance is supportive of, acquiescent in, causally connected to, or necessary"[2] for violations to occur, I do not limit the analysis to egregious violations of international human rights law with the status of international criminal law norms.

Although the *Framework* recognizes the fundamental nature of the state duty to protect rights, an unresolved issue is the extent of the jurisdictional scope of the duty for home states of transnational corporations.[3] The *Framework* and subsequent reports of the Special Representative have identified uncertainty surrounding the permissible scope of extraterritorial jurisdiction in the business and human rights context.[4] Indeed, the Special Representative has described extraterritorial jurisdiction as the "elephant in the room" about which "polite people" prefer not talk.[5] Yet, this chapter argues that the real elephant in the room about which

[2] Mark Drumbl, "Collective Responsibility and Postconflict Justice," Chapter 1, this volume.

[3] A home state may be defined as a capital-exporting country, whereas a host state may be defined as a capital-importing country. All developed and many developing states are both capital-exporting and capital-importing states. The transnational corporation or multinational enterprise is the usual vehicle through which foreign direct investment flows occur. See Cynthia Day Wallace, *The Multinational Enterprise and Legal Control: Host State Sovereignty in an Era of Economic Globalization*, 2nd ed. (The Hague: Martinus Nijhoff, 2002), 102, 139.

[4] Ruggie, *Framework*, para. 19; John G. Ruggie, United Nations Human Rights Council, 11th Session, *Business and Human Rights: Towards Operationalizing the "Protect, Respect and Remedy" Framework*, UN Doc. A/HRC/11/13 (April 22, 2009): para. 15; John G. Ruggie, United Nations Human Rights Council, 14th Session, *Business and Human Rights: Further Steps Toward the Operationalizing of the "Protect, Respect and Remedy" Framework*, UN Doc. A/HRC/14/27 (April 9, 2010): paras. 46–49.

[5] John G. Ruggie, "Keynote Presentation at EU Presidency Conference on the 'Protect, Respect and Remedy' Framework" (Stockholm, November 10–11, 2009). Available at http://www.reports-and-materials.org/Ruggie-presentation-Stockholm-10-Nov-2009.pdf.

even the Special Representative is unwilling to talk is the imperative to recognize the existence of home-state obligations to exercise jurisdiction to prevent and remedy harm by transnational corporate actors. The significance of this issue is evident in recent debates in Canada over proposed regulation of Canadian extractive industries operating internationally.[6]

Part I outlines the debates in the domestic context over individual and corporate criminal liability and between corporate criminal and civil or regulatory liability. The purpose of this part is both to lay out the conceptual framework for an analysis of collective responsibility and to provide a domestic law comparator for the international human rights law discussion to follow. Part II examines the three interdependent principles of the *Framework*. This part will highlight the intertwined nature of the legal and moral responsibilities in the *Framework*, as well as the uncertainty surrounding the jurisdictional scope of the home-state duty to protect rights. Part III critiques the conceptualization of collective responsibility for home states of transnational corporations under international law. This part proposes that a better understanding of international law would recognize that the state duty to protect human rights must include the responsibility of all states that, as institutional agents,[7] are in a position to exercise agency to prevent and remedy human rights violations by transnational corporations.

COLLECTIVE RESPONSIBILITY OF CORPORATE ENTITIES

Although common law states have embraced differing versions of corporate criminal liability for more than 150 years, most civil law jurisdictions

[6] Sara L. Seck, "Home State Responsibility and Local Communities: The Case of Global Mining," *Yale Human Rights and Development Law Journal* 11 (2008): 179–85, describing the history of this issue from 2005 to 2007. For more recent developments, see Canada, Bill C-300, *An Act Respecting Corporate Accountability for the Activities of Mining, Oil or Gas in Developing Countries*, 2nd Sess., 40th Parliament, 2009. Available at http://www2.parl.gc.ca/HousePublications/Publication.aspx?Docid=4330045&file=4. Department of Foreign Affairs and International Trade Canada, *Building the Canadian Advantage: A Corporate Social Responsibility (CSR) Strategy for the Canadian International Extractive Sector*, March, 2009. Available at http://www.international.gc.ca/trade-agreements-accords-commerciaux/ds/csr-strategy-rse-stategie.aspx#8.

[7] The phrase "institutional agents" is drawn from the work of Toni Erskine. See Toni Erskine, "Assigning Responsibilities to Institutional Moral Agents: The Case of States and Quasi-States," *Ethics & International Affairs* 15 (2001): 67–87. See also Michael Green, "Institutional Responsibility for Moral Problems," in *Global Responsibilities: Who Must Deliver on Human Rights?*, ed. Andrew Kuper (New York and London: Routledge, 2005).

have until recently been averse to it.[8] Several civil law jurisdictions in continental Europe still make no provision for criminal liability of corporations (legal persons) in their penal codes,[9] although they do provide for administrative fines when a representative of the corporation committed a criminal offence.[10] Despite increasing convergence of legal systems due to the increased transnational interactions of the global economic order, there is no clear move toward standardization of corporate criminal liability.[11] In fact, some international agreements specifically provide that countries that do not provide for criminal responsibility of legal persons are obligated to ensure that legal persons are subject to "effective, proportionate and dissuasive noncriminal sanctions, including monetary sanctions."[12]

The discomfort with corporate criminal liability is reflected in debates over individual versus corporate criminal liability. Some legal scholars prefer individual over corporate criminal liability on the basis of principle: the theoretical foundations of criminal law presuppose that crimes involve an act and a culpable mental state, yet neither culpable acts nor culpable mental states can be attributed to a corporation because it is a mere legal fiction.[13] A related principled argument against corporate criminal liability is that only individuals can possess the moral blameworthiness necessary to commit crimes of intent.[14] Finally, it is argued that crime is

[8] Celia Wells, *Corporations and Criminal Responsibility*, 2nd ed. (Oxford: Oxford University Press, 2001), 127, 138. See generally Celia Wells, "Comparative and International Solutions," Chapter 7 in *Corporations and Criminal Responsibility* (see n. 4).

[9] Thomas Weigend, "*Societas delinquere non potest?* A German Perspective," *Journal of International Criminal Justice* 6 (2008): 928.

[10] Ibid., 930–31; Wells, *Corporations and Criminal Responsibility*, 138–40; V. S. Khanna, "Corporate Criminal Liability: What Purpose Does It Serve?," *Harvard Law Review* 109 (1996): 1490–91.

[11] Wells, *Corporations and Criminal Responsibility*, 140–41.

[12] Ibid., 143, citing as an example Article 3(2) of the *OECD Convention on Combating Bribery of Foreign Public Officials in International Transactions* (1997, in force 1999).

[13] Vincent Todarello, "Corporations Don't Kill People – People Do: Exploring the Goals of the United Kingdom's Corporate Homicide Bill," *New York Law School Journal of Human Rights* 19 (2003): 486; Weigend, "*Societas delinquere non potest?*," 937; Khanna, "Corporate Criminal Liability," 1479. This position is rooted in the philosophical position known as methodological individualism. See Brent Fisse and John Braithwaite, *Corporations, Crime and Accountability* (New York: Cambridge University Press, 1993), 19–31; Brent Fisse and John Braithwaite, "The Allocation of Responsibility for Corporate Crime: Individualism, Collectivism and Accountability," *Sydney Law Review* 11 (1988): 475–88. See also Larry May, "Vicarious Agency and Corporate Responsibility," *Philosophical Studies* 43 (1983): 69–82.

[14] Khanna, "Corporate Criminal Liability," 1479–80; Weigend, "*Societas delinquere non potest?*," 938. See especially Susan Wolf, "The Legal and Moral Responsibility of

necessarily an *ultra vires* act of a corporation; liability cannot be imputed to a corporation because a corporation cannot be legally formed for the purposes of committing a crime.[15]

Practical reasons relating to effectiveness are also put forward by legal scholars who prefer individual criminal liability. Deterrence, retribution, and rehabilitation are frequent justifications for criminal punishment, yet because corporate punishment most often involves the imposition of a fine, none of these justifications may be met.[16] In theory, fines should confiscate any and all illegal profits generated by the offense; include compensation for victims and the costs to repair damage attributable to the offense; and punish and deter future violations by the offender and other similarly situated companies.[17] In practice, fines are often too low to have any deterrent effect,[18] whether general (deterring other corporations from committing the same crime) or specific (deterring the corporation in question from reoffending).[19] Deterrence also presumes that a diligent principal can control the behavior of corporate agents, yet fear of individual criminal liability may do a better job.[20] Retribution, historically downplayed in the corporate context, is also difficult to reconcile with differential fines imposed for identical offences, otherwise justified on the grounds of special deterrence when corporations are of different sizes.[21] Retributive effect is reduced as the impact of corporate punishment is dispersed across a broad section of society, including employees, shareholders, and consumers.[22]

Organisations," in *Criminal Justice: Nomos XXVII*, ed. Roland Pennock and John Chapman (New York: New York University Press, 1985).

[15] Todarello, "Corporations Don't Kill People," 486; Khanna, "Corporate Criminal Liability," 1480.

[16] Todarello, "Corporations Don't Kill People," 484; Weigend, "*Societas delinquere non potest?*," 941; Bruce Welling, *Corporate Law in Canada: The Governing Principles*, 3rd ed. (Mudgeeraba, Australia: Scribblers Publishing, 2006), 172.

[17] James Gobert and Maurice Punch, *Rethinking Corporate Crime* (London: Butterworths LexisNexis, 2003), 232.

[18] Ibid., 215. See John Coffee, "No Soul to Damn: No Body to Kick: An Unscandalized Inquiry into the Problem of Corporate Punishment," *Michigan Law Review* 79 (1981): 390–91, discussing the "deterrence trap."

[19] Gobert and Punch, *Rethinking Corporate Crime*, 217–20.

[20] Howard E. O'Leary, Jr., "Corporate Criminal Liability: Sensible Jurisprudence or Kafkaesque Absurdity?," *Criminal Justice* 22 (2008): 27–28; Khanna, "Corporate Criminal Liability," 1494–95.

[21] Gobert & Punch, *Rethinking Corporate Crime*, 219, 229.

[22] O'Leary, "Corporate Criminal Liability," 28; Todarello, "Corporations Don't Kill People," 493. Todarello makes this argument with respect to a reduction in deterrent effect. On punishment and externalities, see Coffee, "No Soul to Damn," 401.

Another problem with fines as punishment is evident if attention is given to theories of rehabilitation that suggest that education and denunciation are important in the corporate context because of the importance of both corporate culture and corporate reputation in the public eye.[23] Fines do not promote the structural reforms and systemic change necessary for rehabilitation.[24] Moreover, they fail to convey the message that serious corporate offenses are socially intolerable, instead converting corporate criminality from a wrong against society into a cost of doing business.[25] To overcome the practical problems with fines, some scholars suggest that other types of punishments should be used more frequently or in conjunction with fines, including community service orders, remedial orders, reputation-oriented sanctions such as adverse publicity orders or advertising bans, and restraint-oriented sanctions including the ultimate sanction of forced liquidation or corporate capital punishment.[26]

Principled and practical arguments are also put forward in support of corporate criminal liability. Practically, because of the difficulties that arise in punishing responsible individuals, the law may impose corporate criminal liability to spur companies to undertake internal disciplinary action and impose individual accountability (private policing).[27] Some scholars note that civil liability (as opposed to criminal liability) is insufficient and particularly unlikely to deter corporate criminality where the cost of harm exceeds the damages that are likely to be imposed on the corporation. The stigma and censure that accompany a criminal conviction are more effective as deterrents than the costs of civil liability or reaching a settlement.[28] In principled terms, scholars point to the collective nature of the corporation as supporting its capacity for moral action. Following an organic model, the corporation is more than a collection of individuals, creating an entity that is different from the sum

[23] Gobert and Punch, *Rethinking Corporate Crime*, 220; but see Khanna, "Corporate Criminal Liability," 1497–99, suggesting that cash fines are normally optimal.

[24] Gobert and Punch, *Rethinking Corporate Crime*, 215.

[25] Ibid., 233; Wells, *Corporations and Criminal Responsibility*, 36–37.

[26] Gobert and Punch, *Rethinking Corporate Crime*, 233–45. See also equity fine proposal and adverse publicity discussion in Coffee, "No Soul to Damn," 413–34.

[27] Fisse and Braithwaite, "Responsibility for Corporate Crime," 511. This "enforced accountability" paradigm has a deterrence aim. Coffee, "No Soul to Damn," 387, suggesting that law enforcement officials can achieve economies of scale by targeting both individuals and the firm.

[28] Gobert and Punch, *Rethinking Corporate Crime*, 51–52; see also Khanna, "Corporate Criminal Liability," 1497–1512, on sanctioning characteristics; Fisse and Braithwaite, "Responsibility for Corporate Crime," 512. Shaming of individuals by corporations is more effective than sentences imposed by the state.

of its parts.[29] A corporation is a conglomerate with internal decision-making procedures, unlike an aggregate, which is merely a collection of people.[30] Conglomerates can be described by flowcharts of responsibility and possess policies, operating procedures, and practices that evidence corporate aims, intentions, and knowledge and that are not reducible to individuals within the conglomerate.[31] The organizational flowchart is not itself responsible for corporate actions, but it represents the corporate "mind" and thus a "special kind of intentionality, namely corporate policy."[32]

In practice, the organizational flowchart of the corporate mind is highly significant in the application of corporate criminal liability. This is evident if consideration is given to the exercise of prosecutorial discretion and sentencing considerations. Whether the attribution of conduct to a corporation is based on the principle of *respondeat superior* as in the United States[33] or a variation of the identification doctrine as in the United Kingdom[34] and Canada,[35] for example, the existence of an effective compliance program may be used as a counter-indication to prosecution or as a mitigating factor in sentencing.[36] The organizational flowchart is

[29] Wells, *Corporations and Criminal Responsibility*, 75–80; Gobert and Punch, *Rethinking Corporate Crime*, 49.

[30] Wells, *Corporations and Criminal Responsibility*, 78–80. See especially Peter French, *Collective and Corporate Responsibility* (New York: Columbia University Press, 1984); and Fisse and Braithwaite, "Responsibility for Corporate Crime," 483–90. See also discussion in Erskine, "States and Quasi-States," 70–72; and Steven Ratner, "Corporations and Human Rights: A Theory of Legal Responsibility," *Yale Law Journal* 111 (2001): 473–75.

[31] Wells, *Corporations and Criminal Responsibility*, 79–80.

[32] Fisse and Braithwaite, "Responsibility for Corporate Crime," 483.

[33] Khanna, "Corporate Criminal Liability," 1490–94; Wells, *Corporations and Criminal Responsibility*, 131–36.

[34] Celia Wells, "Corporate Liability in England and Wales," chapter 5 in *Corporations and Criminal Responsibility* (see n. 4).

[35] Todd L. Archibald, Kenneth E. Jull, and Kent W. Roach, "The Changing Face of Corporate and Organizational Criminal Liability," chapter 5 in *Regulatory and Corporate Liability: From Due Diligence to Risk Management* (Aurora, Canada: Canada Law Book, 2005).

[36] Wells, *Corporations and Criminal Responsibility*, 136; Archibald, Jull, and Roach, *Regulatory and Corporate Liability*, 12–20. This observation is based in part on research conducted by the author in the late 1990s comparing the exercise of prosecutorial discretion and sentencing considerations in corporate criminal liability prosecutions in Canada, the United States, Australia, and the United Kingdom. This suggests that even when legal responsibility is ostensibly based on a form of vicarious responsibility, the notion that the collectivity is itself the agent remains important. See also Erskine, "States and Quasi-States," 70; Toni Erskine, "Kicking Bodies and Damning Souls: The Danger

also sometimes explicitly acknowledged in offense provisions. For example, the Australian Criminal Code Act 1995 recognizes that the fault element may be attributed to the corporation on the basis of "corporate culture."[37] Moreover, if civil or "regulatory" offenses are considered as well as "true crimes," recognition of the organizational mind is evident in "due diligence" defenses that often accompany strict liability or hybrid offences.[38] What all these examples have in common is the emphasis on encouraging corporations to adopt and implement policies and programs that will prevent future problems, rather than punishing business enterprises for wrongful past conduct. To be sure, if the corporate entity has not introduced an effective compliance policy or if senior management has participated in or condoned criminal conduct, no defense or mitigation will be available. This may be the exceptional case, however, rather than the rule.

Despite the potential significance of the stigma associated with a criminal conviction, the distinction between corporate criminal offenses and corporate civil or regulatory offences is not self-evident, and the two have more in common than is sometimes supposed.[39] According to some scholars, what the distinction reflects most clearly is the social construction of crime and the relative valuing of behavior by society: "more serious" behavior attracts the criminal sanction.[40] Yet, different jurisdictions may decide that certain corporate conduct should be subject to criminal

of Harming 'Innocent' Individuals while Punishing 'Delinquent' States," Chapter 10, this volume; David Luban, "State Criminality and the Ambition of International Criminal Law," Chapter 2, this volume.

[37] *Criminal Code Act 1995*, (Cth.), s.12.3(c) and (d); Wells, *Corporations and Criminal Responsibility*, 137; see John C. Coffee, "Corporate Criminal Liability: An Introduction and Comparative Survey," in *Criminal Responsibility of Legal and Collective Entities*, eds. Albin Eser, Günter Heine, and Barbara Huber (Freiburg: Ius crim, 1999).

[38] By strict liability, I am referring to the Canadian terminology, which includes a due diligence defense, unlike strict liability in the United Kingdom for which there is no defense, and is known in Canada as absolute liability. See generally Archibald, Jull, and Roach, "Evolution and Classification of Offences," chapter 2 in *Regulatory and Corporate Liability* (see n. 31): 5:40:40 – 5:40:50 and 6:20:10 – 6:20:20; Wells, *Corporations and Criminal Responsibility*, 101–3. Discussing hybrid offenses that incorporate a due diligence defense.

[39] Wells, *Corporations and Criminal Responsibility*, 21–22; Coffee, "No Soul to Damn," 424, 447–48. See also Khanna, "Corporate Criminal Liability," arguing that corporate criminal liability no longer serves a useful purpose. However, see Archibald, Jull, and Roach, *Regulatory and Corporate Liabiliy*, 14:20, indicating support for the distinction between regulatory and criminal liability.

[40] Wells, *Corporations and Criminal Responsibility*, 23.

sanction, although the same conduct is subject to regulatory prosecution in another very similar jurisdiction.[41] Indeed, domestic legislation increasingly provides for both: thus, a corporation may be charged for committing a true crime and committing a regulatory offense in relation to the same event.[42] This may be attributed to the persuasiveness of the idea of a regulatory enforcement pyramid developed by John Braithwaite and Ian Ayres, with the base of the pyramid representing action designed to coax compliance by persuasion, gradually moving up the pyramid to civil monetary penalties, criminal prosecution, and, ultimately, at the tip, permanent revocation of the licence to operate.[43]

As Steven Ratner points out, many scholars whose work has focused on determining "what societies might legitimately expect from corporations as a basis for holding them responsible" have built on the philosophical work of Robert Goodin, who "rejects a concept of responsibility that is centered on blame," instead emphasizing "the actors' responsibility for different tasks and their ex ante duties to ensure that certain harms do not happen."[44] Consequently, the distinction between civil responsibility and criminal responsibility is less significant.[45] Interestingly, the difference between an international crime and an international delict under the international law of state responsibility has also been somewhat controversial.[46] If lessons from domestic law were to inform international human rights law in relation to business conduct, it is arguable

[41] For example, in research conducted by the author in the late 1990s, price fixing was considered a criminal offense in Canada, a regulatory offense in Australia, and was subject to prosecution in the United States as either a crime or a regulatory offence (or both). See also Weigend, "*Societas delinquere non potest?*," 942, noting that whether a sanction is regarded as criminal differs from jurisdiction to jurisdiction.

[42] See Coffee, "No Soul to Damn," 434–35; Wells, *Corporations and Criminal Responsibility*, 5; Archibald, Jull, and Roach, *Regulatory and Corporate Liability*, 6:20. It is generally easier to convict of a regulatory offense than a true crime. Archibald, Jull, and Roach, *Regulatory and Corporate Liability*, 6:20; Khanna, *Corporate Criminal Liability*, 1492, 1512–20.

[43] Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (New York: Oxford University Press, 1992), 35–36, 39. See also Archibald, Jull, and Roach, "Responsive Regulation, Restorative Justice and Regulatory Pyramids," chapter 14 in *Regulatory and Corporate Liability* (see n. 31); John Braithwaite, *Restorative Justice and Responsive Regulation* (New York: Oxford University Press, 2002).

[44] Ratner, "Corporations and Human Rights," 474–75. See Robert E. Goodin, "Apportioning Responsibilities," *Law & Philosophy* 6 (1987): 181–83.

[45] Ratner, "Corporations and Human Rights," 474–75.

[46] Anthony Lang, "Punishing Genocide: A Critical Reading of the International Court of Justice," Chapter 3, this volume.

that the types of global governance tools engaged in the international realm should include both corporate criminal punishment and regulatory tools designed to focus on the prevention of harm. Moreover, if the conglomerate collectivity model of the corporation is applied to states as suggested by Erskine,[47] then international law should support notions of collective responsibility not only of corporate actors but also of state institutional agents.

THE 2008 *FRAMEWORK FOR BUSINESS AND HUMAN RIGHTS*

In 2005, the United Nations Human Rights Commission (now Council) appointed Harvard Professor John Gerard Ruggie as the Special Representative to the UN Secretary-General on the issue of human rights and transnational corporations and other business enterprises (SRSG).[48] His appointment followed the divisive controversy surrounding the draft *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights*,[49] which were produced by the Sub-Commission on the Promotion and Protection of Human Rights in 2003.[50] In 2004, the UN Human Rights Commission rejected the *Norms*, describing them as a draft proposal of no legal standing that contained useful elements and ideas. According to the SRSG, his appointment was designed to move beyond the stalemate produced by the *Norms*.[51]

The SRSG's 2005 mandate included the need to "identify and clarify standards of corporate responsibility and accountability with regard to human rights," and to "elaborate on the role of states in effectively regulating and adjudicating business conduct with regard to human rights,

[47] Erskine, "States and Quasi-States," 70–72.

[48] John Gerard Ruggie, "Current Developments: Business and Human Rights: The Evolving International Agenda," *American Journal of International Law* 101 (2007): 821.

[49] The United Nations Sub-Commission on the Promotion and Protection of Human Rights, Doc. E/CN.4/Sub.2/2003/12/Rev.2 (August 26, 2003).

[50] David Weissbrodt and Muria Kruger, "Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights," *American Journal of International Law* 97 (2003); David Kinley and Junko Tadaki, "From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law," *Virginia Journal of International Law* 44 (2004).

[51] John G. Ruggie, United Nations Commission on Human Rights, 62nd Session, *Promotion and Protection of Human Rights: Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises,* UN Doc. E/CN.4/2006/97 (February 22, 2006): para. 55.

including through international cooperation."[52] The SRSG responded with reports to the UN Human Rights Council in 2006 and 2007.[53] Of note in the Ruggie 2007 report, *Mapping International Standards*, is the SRSG's explicit recognition of the existence of direct legal obligations for business under international criminal law, despite the lack of an international forum to hear these claims.[54] Corporate responsibility for international crimes is the direct result of the "expansion and refinement of individual responsibility by the international ad hoc criminal tribunals and the ICC statute," combined with developments in domestic law.[55] Because international criminal law can be enforced by domestic courts where implementing legislation exists, it can be enforced against corporations in domestic jurisdictions that incorporate corporate criminal liability.[56] Corporate entities may also be held liable civilly for violations of international criminal law norms, as evident in the cases brought in U.S. courts under the *Alien Tort Claims Act*.[57] However, enforcement of international criminal law in domestic courts may require a state to exercise extraterritorial jurisdiction, particularly if enforcement is directed against corporations that are not nationals of the enforcing state.[58] This type of enforcement is usually justified in the context of international crimes as an exercise of universal jurisdiction.[59] However, *Mapping International*

[52] Ibid., para. 1.

[53] Ibid.; and John G. Ruggie, United Nations Human Rights Council, 4th Session, *Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts*, UN Doc. A/HRC/4/35 (February 19, 2007).

[54] Ruggie, *Mapping International Standards*, paras. 21, 19–32. Notably, whereas the preparatory committee and the Rome conference on the establishment of the International Criminal Court debated a proposal that would have given the ICC jurisdiction over legal persons including corporations, no such provision was adopted because of differences in national approaches. Ibid., para. 21.

[55] Ibid., para. 22.

[56] Ibid., para. 24. Citing a survey of sixteen countries from a cross-section of regions and legal systems. See Anita Ramasastry and Robert C. Thompson, *Commerce, Crime and Conflict: Legal Remedies for Private Sector Liability for Grave Breaches of International Law – Executive Summary* (2006). Available at http://www.fafo.no/liabilities [hereafter *FAFO Survey*]. Of the 16, 11 were parties to the ICC and 9 had fully incorporated the three crimes of the Rome Statute; of these, 6 already provided for corporate criminal liability.

[57] Ruggie, *Mapping International Standards*, para. 27. Many of these concern allegations of complicity in the commission of a mass atrocity by "public or private security forces, other government agents, or armed factions in civil conflicts." Ibid., para. 30.

[58] Ibid., paras. 25, 29.

[59] Ibid., para. 25. See also *FAFO Survey*, which calculated that 11 jurisdictions adopted nationality jurisdiction, 5 universal jurisdiction, several both, and 9 also provided for some form of corporate criminal liability.

Standards also explicitly acknowledges that international law does not (yet) recognize direct legal obligations for business for violations of less egregious international human rights law norms. This is because there is no similar "observable evidence" of "national acceptance of international standards for individual responsibility" for other human rights violations.[60]

In June 2008, the SRSG presented the *Framework for Business and Human Rights*[61] to the UN Human Rights Council consisting of "differentiated but complementary responsibilities."[62] The *Framework* received unanimous approval from member states of the UN Human Rights Council, and the SRSG was given a renewed three-year mandate to build on and promote the *Framework* and to provide guidance for states, businesses, and other social actors on each of its three principles.[63] Despite the clear distinction in the Ruggie *2007* report between corporate obligations under international criminal law and in relation to other less egregious human rights norms, the *Framework* is aimed at all human rights. This is evident from its title, which speaks of "Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development," and from specific discussion of the scope of the corporate responsibility to respect rights.[64] The *Framework* is also explicitly designed to "assist all social actors – governments, companies, and civil society – to reduce the adverse human rights consequences of "institutional misalignments."[65] The SRSG emphasizes that "there is no silver bullet," and everyone must learn to do many things differently.[66] The "root cause" of the business and human rights predicament today, according to the SRSG, lies in "governance gaps created by globalization – between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences."[67]

The *Framework* consists of three core principles. The first and most fundamental is the state duty to protect against human rights abuses by nonstate actors, including business.[68] The second is the corporate responsibility to respect human rights,[69] and the third, the need for more effective access to remedy.[70] At first glance, the *Framework* appears to

[60] Ibid., para. 33 and generally paras. 33–44.
[61] Ruggie, *Framework*.
[62] Ibid., para. 9.
[63] Ruggie, *Towards Operationalizing*, para. 1.
[64] Ruggie, *Framework,* paras. 24, 52.
[65] Ibid., para. 17.
[66] Ibid., para. 7.
[67] Ibid., para. 3.
[68] Ibid., paras. 9, 27–50.
[69] Ibid., paras. 9, 51–81.
[70] Ibid., paras. 9, 82–103.

distinguish between the legal obligations of states under international human rights law (duty to protect) and the moral obligations of corporations (responsibility to respect) which legal pluralists might view as law, and business scholars might describe as corporate social responsibility. In fact, a legal/moral/pluralist mix of collective responsibilities appears throughout the *Framework*.[71]

The *Framework* describes the state duty to protect as having both legal and policy dimensions. From a legal perspective, "international law provides that states have a duty to protect against human rights abuses by non-state actors, including by business, affecting persons within their territory or jurisdiction."[72] International human rights treaty monitoring bodies "generally recommend that states take all necessary steps to protect against such abuse, including to prevent, investigate, and punish the abuse, and to provide access to redress."[73] Regulation and adjudication of nonstate actors are considered "appropriate" for the implementation of the state duty to protect, although states retain discretion as to exactly what measures to implement.[74]

Significantly, the precise jurisdictional scope of the state duty to protect is disputed, in particular as it concerns home states. According to the SRSG:

> Experts disagree on whether international law requires home States to help prevent human rights abuses abroad by corporations based within their territory. There is greater consensus that those States are not prohibited from doing so where a recognized basis of jurisdiction exists, and the actions of the home State meet an overall reasonableness test, which includes non-intervention in the internal affairs of other States. Indeed, there is increasing encouragement at the international level, including from the treaty bodies, for home States to take regulatory action to prevent abuse by their companies overseas.[75]

Although further refinements of the legal understanding of the state duty to protect by authoritative bodies at national and international levels are

[71] Notably, although Ruggie carefully distinguishes the corporate responsibility to respect from what is required by law, it is not clear that he considers it to be synonymous with a moral duty. Ruggie, *Towards Operationalizing*, para. 65.

[72] Ruggie, *Framework*, para. 18.

[73] Ibid. See further Ruggie, *Towards Operationalizing*, para. 14, noting that the state duty to protect is a standard of conduct, not a standard of result.

[74] Ibid.

[75] Ibid., para. 19. See further Ruggie, *Further Steps*, paras. 46–50, highlighting the importance of better understanding the acceptable scope of extraterritorial jurisdiction in the business and human rights context.

highly desirable, the *Framework* notes that at the same time, the policy dimensions of the state duty to protect "even within existing legal principles," require "increased attention and more imaginative approaches."[76] Accordingly, the *Framework* proposes that the question of how to foster a corporate culture respectful of human rights both at home and abroad should be an urgent policy priority of governments.[77] The *Framework* proposes four preliminary avenues to explore.

First, state governments can foster a corporate culture respectful of human rights by supporting and strengthening market pressures on companies to respect rights.[78] This might involve mandating sustainability reporting as part of stock-exchange listing requirements, redefining fiduciary duties in corporate law statutes so that companies owe duties to a broader range of stakeholders, and facilitating the consideration of shareholder proposals regarding human rights issues.[79] Governments could also redefine criminal accountability to reflect corporate culture in liability, sentencing, or prosecutorial discretion.[80] However, the SRSG implicitly suggests that fostering a corporate culture respectful of human rights is not part of current state obligations under international law, at least unless the business entity is a state-owned enterprise (SOE).[81] In this case, the SRSG notes that the state may be responsible for internationally wrongful conduct of the SOE if the SOE is an organ or agent of the state. Yet, even in the absence of legal obligation, states may experience reputational harm caused by SOEs, including the human rights impacts of investments by sovereign wealth funds.[82]

Second, the *Framework* suggests that changes need to be made to government policy alignment. At present, governments take on human rights commitments without regard to implementation (vertical incoherence), and government departments such as trade, investment promotion, development and foreign affairs work at cross-purposes with state agencies charged with implementing the state's human rights obligations (horizontal incoherence).[83] For example, bilateral investment treaties and

[76] Ibid., para. 21.
[77] Ibid., para. 27.
[78] Ibid., para. 30. See also Ruggie, *Further Steps*, paras. 33–43, identifying four policy tools that could address the systemic challenge of fostering rights-respecting corporate cultures and practices: "CSR policies, report requirements, directors' duties, and legal provisions specifically recognizing the concept of 'corporate culture.'"
[79] Ibid.
[80] Ibid., para. 31.
[81] Ibid., para. 32.
[82] Ibid. See also Ruggie, *Further Steps*, paras. 26–27, for similar comments but in the context of discussion of the state duty to protect when doing business with business.
[83] Ibid., para. 33.

host government agreements do not take into account the host government's duty to protect human rights because regulatory "freeze" provisions are routinely implemented in developing countries that are most in need of regulatory development.[84] Home-state export credit agencies (ECAs) finance or guarantee exports and investments in regions that are too risky for the private sector alone, yet few explicitly consider human rights.[85] This is despite the existence of a "strong nexus" between ECAs and the home state, which perform a public function mandated by the state.[86] Yet, again, the SRSG falls short of suggesting that ECAs are obligated under international law to "perform adequate due diligence on their potential human rights impacts," suggesting only that a "strong case" can be made for this on "policy grounds alone."[87]

Third, the SRSG highlights the need for more effective guidance and support for state policy coherence at the international level.[88] This includes recommendations and contributions to capacity building by international human rights mechanisms, as well as information sharing and capacity building between states.[89] Yet again, although the SRSG recommends partnerships between states with the "relevant knowledge and experience" and those who "lack the technical or financial resources to effectively regulate companies," particularly between home and host states, the SRSG does not suggest that international law obligates states to engage in this type of cooperation.[90]

Finally, the SRSG makes policy recommendations in relation to corporate conduct in conflict zones, where the "most egregious of human rights abuses" occur.[91] For example, the home state "could identify indicators to trigger alerts with respect to companies in conflict zones" and "could" then "facilitate access to information and advice" to help businesses address the "heightened human rights risks."[92] There may also be "a point at which the home state would withdraw its support altogether"

[84] Ibid., paras. 34–36. See further Ruggie, *Towards Operationalizing*, paras. 32–33; Ruggie, *Further Steps*, paras. 20–25. Notably, the discussion on this issue in Ruggie, *Further Steps*, is framed to focus on the host state's duty to safeguard its own ability to protect human rights, with no reference to the obligations of the other state party to the bilateral investment treaty.

[85] Ibid., para. 39.

[86] Ibid., para. 39.

[87] Ibid., para. 40. See also Ruggie, *Further Steps*, paras. 29–30, for similar commentary, but noting recent practice by the United States Overseas Private Investment Corporation as a sign of change.

[88] Ibid., para. 43.

[89] Ibid., paras. 43–44.

[90] Ibid., paras. 44–45.

[91] Ibid., para. 47.

[92] Ibid., para. 49.

from a company operating in a conflict zone.[93] However, the suggestions for home states are again not described as legal obligations. Moreover, the SRSG is careful to state that these suggestions would not detract from the host state's (legal) duty to protect against corporate violations of human rights.[94]

Although the state duty to protect is the core responsibility of the *Framework*, the SRSG stresses that active participation of business directly is also essential, and thus the second prong of the *Framework* is the corporate responsibility to respect rights. Because there are "few if any internationally recognized rights business cannot impact – or be perceived to impact – in some manner," companies should consider all rights.[95] The focus of the SRSG is on "identifying the distinctive responsibilities of companies in relation to human rights": "While corporations may be considered 'organs of society,' they are specialized economic organs, not democratic public interest institutions. As such, their responsibilities cannot and should not simply mirror the duties of States."[96]

The *Framework* describes the responsibility to respect rights as follows:

> In addition to compliance with national laws, the baseline responsibility of companies is to respect human rights. Failure to meet this responsibility can subject companies to the courts of public opinion – comprising employees, communities, consumers, civil society, as well as investors – and occasionally to charges in actual courts. 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.[97]

The corporate responsibility to respect exists independently of the state duties, so one is not primary and the other secondary. As a baseline expectation, a company cannot compensate for human rights harms by performing good deeds elsewhere. Moreover, "'doing no harm' is not merely a passive responsibility" but "may entail positive steps," including the adoption of specific policies or programs.[98]

[93] Ibid.

[94] Ibid. See also Ruggie, *Further Steps*, paras. 44–45. Noting that Ruggie has convened a group of states to participate in informal discussions on how to address problems in conflict-affected areas, including potential roles for home-country embassies, and closer cooperation between home-state agencies and with host-state agencies.

[95] Ibid., para. 52.

[96] Ibid., para. 53.

[97] Ibid., para. 54. See further Ruggie, *Towards Operationalizing*, paras. 45–85, and Ruggie, *Further Steps*, paras. 54–87, elaborating the corporate responsibility to respect.

[98] Ibid., para. 55.

To discharge the responsibility respect, companies must exercise "due diligence."[99] Due diligence requires a company to take steps to "become aware of, prevent and address adverse human rights impacts."[100] The scope of due diligence will depend on the country context, the type of human rights impacts associated with company activity, and whether the corporation might contribute to human rights abuse through "relationships connected to their activities, such as with business partners, suppliers, State agencies, and other non-State actors."[101] The substance is to be found in international human rights law instruments that embody the "benchmarks against which other social actors judge the human rights impacts of companies."[102] The corporate responsibility to respect rights "includes avoiding complicity" under both international criminal law standards and in nonlegal contexts.[103]

The third and final principle of the *Framework* is effective access to remedy. Effective grievance mechanisms play an important role in both the legal and policy dimensions of the state duty to protect and in the corporate responsibility to respect. State regulation has little impact without the ability to "investigate, punish, and redress abuses," and the corporate responsibility to respect "requires a means for those who believe they have been harmed to bring this to the attention of the company and seek remediation, without prejudice to legal channels available."[104] The solution proposed is a mix of legal and nonlegal grievance mechanisms that together could remedy the current "patchwork of mechanisms" with "different constituencies and processes" that reflect "intended and unintended limitations in competence and coverage."[105] Accordingly, the *Framework* discusses the implementation of grievance remedies in six sections:[106] (1) judicial remedies, including through home-state courts;[107]

[99] Ibid., para. 56.
[100] Ibid., para. 56.
[101] Ibid., para. 57.
[102] Ibid., para. 58.
[103] Ibid., paras. 73–81.
[104] Ibid., para. 82. See further Ruggie, *Further Steps*, paras. 96, 103, noting that states have the responsibility within their territory and/or jurisdiction under the state duty to protect to ensure access to remedy through "judicial, administrative, legislative or other appropriate means," including ensuring the "functionality and facilitating access" to judicial mechanisms.
[105] Ibid., paras. 87, 102–3.
[106] Ibid., paras. 88–101.
[107] See further Ruggie, *Towards Operationalizing*, paras. 93–98; Ruggie, *Further Steps*, paras. 103–13. However, the SRSG is clear that international law does not require states to adjudicate the extraterritorial activities of businesses incorporated in their jurisdiction. See John G. Ruggie, United Nations Human Rights Council, 11th Session, *Addendum: State Obligations to Provide Access to Remedy for Human Rights Abuses*

(2) nonjudicial grievance mechanisms, which must be legitimate, accessible, predictable, equitable, rights-compatible, and transparent;[108] (3) company-level grievance mechanisms, part of the corporate responsibility to respect;[109] (4) state-based nonjudicial mechanisms, including national human rights institutions and the Organization for Economic Cooperation and Development (OECD) National Contact Points (NCPS) for the OECD Guidelines on Multinational Enterprises;[110] (5) multi-stakeholder or industry initiatives and mechanisms of corporate financiers; and (6) possibly a global ombudsperson. The SRSG is careful to note that "non-judicial mechanisms play an important role alongside judicial processes" both in societies with "well-functioning rule of law institutions" and in those without.[111] Moreover, although "Non-state mechanisms must not undermine the strengthening of State institutions, particularly judicial mechanisms," what they can do is "offer additional opportunities for recourse and redress."[112]

ANALYSIS: COLLECTIVE RESPONSIBILITY OF HOME STATES

The *Framework* recognizes the collective moral responsibility of states and corporations and at times recognizes that these responsibilities are also legally binding obligations under international law. Although the corporate responsibility to respect rights may include a legal obligation for violations of international criminal law, the obligation is not a legal one (beyond compliance with domestic law) for other international human rights norms. The *Framework* recognizes that the state duty to protect rights from violations by nonstate actors is a foundational obligation

by Third Parties, Including Business: An Overview of International and Regional Provisions, Commentary and Decisions, UN Doc. A/HRC/11/13/Add.1, (15 May 2009): 4.

[108] See further BASESwiki, "Business and Society Exploring Solutions: A Dispute Resolution Community," http://www.baseswiki.org, an interactive online forum set up by the SRSG for sharing, accessing, and discussing information about nonjudicial mechanisms that address disputes between companies and their external stakeholders.

[109] See further Ruggie, *Further Steps*, paras. 91–95, noting that a "seventh principle specifically for company-level grievance mechanisms is that they should operate through dialogue and engagement rather than the company itself acting as adjudicator." Ibid., para. 94.

[110] See further Ruggie, *Towards Operationalizing*, paras. 102–4; Ruggie, *Further Steps*, paras. 96–102. "The universe of State-based non-judicial grievance mechanisms remains both under-populated and under-resourced." Ruggie, *Further Steps*, para. 101.

[111] Ruggie, *Framework*, para. 84.

[112] Ibid., para. 86. See further Ruggie, *Towards Operationalizing*, paras. 91–92; Ruggie, *Further Steps*, paras. 114–16.

under international human rights law. Yet the *Framework*'s focus is on policy recommendations for state implementation that are framed so as to resemble more closely state moral responsibilities than legal obligations, except perhaps where a state-owned enterprise is involved. Moreover, even the policy recommendations are couched in uncertainty because of disagreement over the jurisdictional scope of home state legal obligations. The *Framework*'s discussion of access to remedy suggests that although the possibility of legal remedy for breach of corporate legal obligations is clearly important (and currently lacking), legal remedy is only part of the puzzle. It would appear, then, that much of the *Framework* is structured in accordance with Mark Drumbl's plea for collective responsibility frameworks that "embrace multiple regulatory sites (international, national and local)" and integrate broad approaches to legal accountability as well as "quasi-legal or even fully extra-legal accountability mechanisms."[113] Curiously, from the perspective of this volume, critiques of the SRSG's approach to the problem of business and human rights sometimes call for what could be seen as the corporate equivalent of the individual "atrocity trial": an international court charged specifically with hearing cases addressing corporate abuse.[114]

For the purpose of this chapter, however, what is notably missing from the *Framework* is any discussion of how to ensure the collective responsibility of *states* that are in breach of obligations under the state duty to protect. Although one prong of the *Framework* is devoted to access to remedy, the remedies proposed all concern grievances brought against companies, not states. This is likely due at least in part to the uncertainty surrounding the scope of home-state obligations under international law, combined with the seeming futility of sanctioning those host states that, rather than being merely unwilling to regulate corporate conduct, in fact lack the capacity to do so effectively.[115] This omission is, however, also arguably due in part to the preoccupation in the business

[113] Drumbl, "Collective Responsibility," this volume.

[114] David Kinley, Justice Nolan, and Natalie Zerial, "'The Norms Are Dead! Long Live the Norms!' The Politics behind the UN Human Rights Norms for Corporations," in *The New Corporate Accountability: Corporate Social Responsibility and the Law*, eds. Doreen McBarnet, Aurora Voiculescu, and Tom Campbell (New York: Cambridge University Press, 2007), 467–68, 473–75. This is not to say that such a development should be discouraged. Moreover, Mark Drumbl specifically endorses Anthony Lang's call for a new international criminal court for groups that could adjudicate TNCs. See Drumbl, "Collective Responsibility," this volume; Anthony Lang, Jr., *Punishment, Justice and International Relations: Ethics and Order after the Cold War* (New York: Routledge, 2008).

[115] It may also be linked to a lack of clear guidance from the international human rights treaty bodies on state obligations in this context. See Ruggie, *Framework*, para. 43.

and human rights context with the need to sanction *business* for these failures, rather than even admitting to the possibility that *states* not only bear responsibility to regulate and adjudicate business but could – or even should – be sanctioned for failing to do so.[116] In this way, the contribution that the analysis in this section hopes to make is in keeping with David Luban's observation that the very nature of international law includes within it a "fetishism" of the state that international criminal law seeks to deflate.[117] Of course, the complexity of "enforcing" state obligations in the international human rights context must be recognized,[118] and with it the concerns raised by Toni Erskine over how to "effectively punish an institution while remaining faithful to the understanding of responsibility as nondistributive, which the model of institutional moral agency supports."[119] Because home-state institutional structures are designed to benefit citizens of the home state, it could be argued that citizens of the home state should be prepared to bear the burdens (or some types of burdens) that might accompany these benefits. Another approach would be to follow Erin Kelly's proposal to give up retributive notions of justice and seek reparative justice instead: "reparative justice articulates a conception of what wrongdoers could and should do: to repair the damage they have done, to address the needs of victims, or to prevent similar harms from occurring."[120]

Many would agree that the *Framework* is an accurate representation of current international law in the business and human rights context, and indeed the SRSG went to great pains to "map" the current state of international human rights law early on in his work.[121] The uncertainty over

[116] But see Ruggie, *Towards Operationalizing*, para. 87, noting in the context of a discussion of state obligations and access to remedy that states "may also be required to provide adequate reparation, including compensation, to victims."

[117] See generally David Luban, "State Criminality," this volume. According to Luban: "A full-fledged theory of state criminality would . . . blaspheme the sacred order of public international law, in which states are like gods."

[118] See, for example, Bruno Simma, "Human Rights and State Responsibility," in *The Law of International Relations: Liber Amicorum HansPeter Neuhold*, eds. August Reinisch and Ursula Kriebaum (Utrecht, The Netherlands: Eleven International Publishing, 2007), 359; and Jutta Brunnée, "International Legal Accountability through the Lens of the Law of State Responsibility," *Netherlands Yearbook of International Law* 36 (2005): 21, 31–34.

[119] Erskine, "Kicking Bodies," Chapter 10 this volume. However, note that Erskine raises her concerns while discussing the possibility of war as punishment, which is not under consideration here.

[120] Erin Kelly, "Reparative Justice," this volume.

[121] See Ruggie, *Mapping International Standards*, and four addenda submitted with the report (A/HRC/4/35/Add.1–4), including especially *State Responsibilities to Regulate and Adjudicate Corporate Activities under the United Nations' Core Human Rights*

the jurisdictional scope of home-state obligations is sometimes said to be due to the inherent limitations of the jurisdictional clauses of some international human rights treaties,[122] as well as misunderstandings regarding the scope of the permissive exercise of home-state jurisdiction under jurisdictional principles of public international law.[123] Yet, if international law is viewed as an exclusively state-based process, then all this means is that states, the primary subjects and objects of international law, have not consented to bind themselves with obligations to citizens in other states, nor do all states believe that they have given each other permission to protect the rights of citizens in other states. From a moral philosophy perspective that recognizes the collective responsibility of institutional moral agents like corporations and states, the justification for this limitation in law is not self-evident. Nor is it self-evident if the work of scholars who adopt Third World approaches to international law (TWAIL) is used to guide the interpretation of the international law principles of sovereign equality and noninterference in the territorial affairs of other states.[124]

There are other reasons to doubt the need for these limitations even from within traditional international law. For example, some

Treaties, UN Doc. A/HRC/4/35/Add.1. Whether the SRSG accurately mapped the corporate obligations under international human rights law is the subject of disagreement, as is the usefulness of such direct obligations for the protection of rights. On the accuracy of the mapping, see, for example, Kinley, Nolan, and Zerial, "The Norms are dead"; and David Bilchitz, "The Ruggie Framework: An Adequate Rubric for Corporate Human Rights Obligations?" (April 24, 2009). Available at Social Science Research Network: http://ssrn.com/abstract=1394367. On the usefulness of direct obligations, see, for example, Ratner, "Corporations and Human Rights," 465–71. There cannot be a state duty to protect human rights from violations by nonstate actors without nonstate actors having duties themselves; and see generally Andrew Clapham, "Corporations and Human Rights," chapter 6 in *Human Rights Obligations of Non-State Actors* (New York: Oxford University Press, 2006). However, see John H. Knox, "Horizontal Human Rights Law," *American Journal of International Law* 102 (2008): 47, suggesting that the current system of international law that places obligations indirectly on corporations to be enforced by states should be preserved and strengthened. This should be done by elaborating duties of governments with respect to corporations subject to their jurisdiction when these corporations violate human rights within the territory of governments unable or unwilling to regulate them adequately.

[122] F. Coomans and M. T. Kamminga, eds., *Extraterritorial Application of Human Rights Treaties* (Antwerp: Intersentia, 2004).

[123] Sara L. Seck, "Conceptualizing the Home State Duty to Protect Human Rights," in *Corporate Social and Human Rights Responsibilities: Global Legal and Management Perspectives*, eds. Karin Bhuman, Mette Morsing, and Lynn Roseberry (Palgrave Macmillan, forthcoming). See also Ruggie, *Further Steps*, paras. 46–50, highlighting the uncertainties associated with the permissive exercise of extraterritorial jurisdiction.

[124] See generally Sara L. Seck, "Unilateral Home State Regulation: Imperialism or Tool for Subaltern Resistance?," *Osgoode Hall Law Journal* 46 (2008), 598–603.

international law scholars contest the jurisdictional limitations said to exist within international human rights treaties,[125] whereas others note that the primary rules of international law in other contexts do not limit state obligations in the same way, particularly with regard to obligations to regulate and adjudicate nonstate actor conduct.[126] Two often-cited examples are international environmental law as applied to polluter responsibility[127] and antibribery law.[128] The limited nature of home-state obligations is also not clearly supported under the secondary rules of state responsibility under international law.[129] Moreover, if obligations extend to executive, legislative, and judicial organs of the state, as understood under the International Law Commission's *Draft Articles on Responsibility of States for Internationally Wrongful Acts* (*Draft Articles*),[130] it becomes unclear why any jurisdictional limitation makes sense in the business and human rights context. Clearly, the traditional approach of attempting to directly attribute the conduct of the TNC to the home-state

[125] See especially Sigrun I. Skogly, *Beyond National Borders: States' Human Rights Obligations in International Cooperation* (Antwerp: Intersentia, 2006); Sigrun I. Skogly and Mark Gibney, "Transnational Human Rights Obligations," *Human Rights Quarterly* 24 (2002): 781; Mark Gibney, Katarina Tomaševski, and Jens Vedsted-Hansen, "Transnational State Responsibility for Violations of Human Rights," *Harvard Human Rights Journal* 12 (1999); and Mark Gibney and Sigrun Skogly, eds., *Universal Human Rights and Extraterritorial Obligations* (Philadelphia: University of Pennsylvania Press, 2010).

[126] The SRSG has recently noted that in policy domains other than business and human rights, states "have agreed to certain uses of extraterritorial jurisdiction." However, this comment speaks to the permissive exercise of extraterritorial jurisdiction, not the mandatory obligation to regulate and adjudicate discussed here. See Ruggie, *Further Steps*, para. 46.

[127] See citations in Ratner, "Corporations and Human Rights," 479–81. See also John Knox, "Diagonal Environmental Rights," in Mark Gibney and Sigrun Skogly, eds., *Universal Human Rights and Extraterritorial Obligations*, 86: "It is difficult to see why a state which has caused environmental harm that rises to the level of a violation of human rights should avoid responsibility for its actions merely because the harm was felt beyond its borders."

[128] See Ratner, "Corporations and Human Rights," 482–83; Seck, "Unilateral Home State Regulation," 571–72.

[129] See Rick Lawson, "Life after Bankovic: On the Extraterritorial Application of the European Convention on Human Rights," in *Extraterritorial Application of Human Rights Treaties* (see n. 111), 85–86; Nicola Jägers, *Corporate Human Rights Obligations: In Search of Accountability* (Antwerp: Intersentia, 2002), 168–69; and Robert McCorquodale, "Spreading Weeds beyond Their Garden: Extraterritorial Responsibility of States for Violations of Human Rights by Corporate Nationals," *American Society of International Law Proceedings* 100 (2006): 99, n. 30.

[130] International Law Commission, United Nations GAOR, 56th Session, Supp. No. 10, *Draft Articles on Responsibility of States for internationally wrongful acts*, UN. Doc. A/56/10 (2001), 29–365.

under the *Nicaragua* test of direction or effective control,[131] reproduced in Article 8 of the *Draft Articles* and endorsed in the *Bosnia* case, is only possible in exceptional cases.[132] However, if instead of trying to directly attribute TNC conduct to the state, the home state responsibility analysis were to focus on the conduct of state organs themselves, a more accurate picture of the relationship between TNCs and home states would emerge.[133] Moreover, this picture would more accurately reflect the agency of the state itself, as a collective.[134]

Under the principle of independent responsibility,[135] a home state is directly responsible for its own wrongful conduct in failing to regulate or adjudicate a TNC so as to prevent and remedy human rights violations when required to do so under international law – that is, failing to exercise due diligence. However, this does not mean that the state is necessarily directly responsible for the conduct of the TNC. This understanding of responsibility is described by Tal Becker as responsibility under the nonattribution and separate delict theory[136] and parallels the

[131] International Court of Justice, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*, Merits, Judgment [1986] I.C.J. Reports, para. 115, cited with approval in International Court of Justice, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia & Herzegovina v. Serbia & Montenegro)*, Merits, Judgment [2007] I.C.J. Reports, para. 399.

[132] Indeed, the Commentaries to Article 8 explicitly exclude a state's initial establishment of a corporation by special law or otherwise as a sufficient basis for attribution to the state of the entity's subsequent conduct. See International Law Commission, *Draft Articles*, Commentaries to Article 8, para. 6. See Jägers, *Corporate Human Rights Obligations*, 169–72; Clapham, *Human Rights Obligations*, 243–44; Olivier De Schutter, "The Accountability of Multinationals for Human Rights Violations in European Law," in *Non-State Actors and Human Rights*, ed. Philip Alston (New York: Oxford University Press, 2005), 235–37; Robert McCorquodale and Penelope Simons, "Responsibility beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law," *Modern Law Review* 70 (2007): 609–10; Rüdiger Wolfrum, "State Responsibility for Private Actors: An Old Problem of Renewed Relevance," in *International Responsibility Today: Essays in Memory of Oscar Schachter*, ed. Maurizio Ragazzi (Leiden: Brill, 2005), 427–28; and Gibney, Tomaševski, and Vedsted-Hansen, "Transnational State Responsibility," 286. However, see Jägers, *Corporate Human Rights Obligations*, 171, arguing that the effective control test may be met due to the "economic, legal and political connection between the corporation and the home State."

[133] Indeed, this understanding may be evident in Ruggie, *Towards Operationalizing*, para. 14, where the SRSG indicates that the state duty to protect is a standard of conduct, not a standard of result.

[134] See distinction in Erskine, "States and Quasi-States," 70.

[135] International Law Commission, *Draft Articles*, Commentary to chapter 4, Commentary to Article 47, para. 3.

[136] Tal Becker, *Terrorism and the State: Rethinking the Rules of State Responsibility* (Oxford: Hart Publishing, 2006), 14–24, 19–41, and generally "State Responsibility

state responsibility accorded in the *Bosnia* case.[137] According to Becker, as the difference between a finding of direct responsibility and responsibility under the separate delict theory makes no difference in terms of the remedy available under international human rights law, the different theories of responsibility are often not clearly distinguished.[138] Although under certain circumstances, direct state responsibility for TNC conduct is possible,[139] the current "prevailing perception" is that the state "will be responsible for the conduct of its own organs or officials, but not for the conduct of non-State actors that is wholly private in nature. The State can, however, be held responsible for its own violations of a separate duty to regulate the private conduct."[140]

Accordingly, if home states are under a duty to regulate and adjudicate nonstate actor TNCs to prevent and remedy human rights violations, then the conduct of home state executive organs, legislative organs, and judicial organs must be subject to scrutiny.[141] The implications of this are broad, suggesting a rethinking of the role of not only government departments and agencies that provide support services to TNCs[142]

for Private Acts: the Evolution of a Doctrine," chapter 2. This type of responsibility is described by Scott as "indirect responsibility"; See Craig Scott, "Translating Torture into Transnational Tort: Conceptual Divides in the Debate on Corporate Accountability for Human Rights Harms," in *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation*, ed. Craig Scott (Oxford: Hart Publishing, 2001), 47.

[137] See discussion in Drumbl, "Collective Responsibility," this volume; Lang, "Punishing Genocide," this volume.

[138] Becker, *Terrorism and the State*, 57, 62.

[139] Two possibilities are under Article 16 of the *Draft Articles* for complicity; see McCorquodale and Simons, "Responsibility beyond Borders," 611–15; Gibney, Tomaševski, and Vedsted-Hansen, "Transnational State Responsibility," 293–94; and Becker's analysis of causal responsibility, see Becker, *Terrorism and the State*, 289–94.

[140] Becker, *Terrorism and the State*, 66. The distinction between separate delict and direct responsibility is not specifically endorsed in the *Draft Articles*, which provide that a State is responsible for "all the consequences, not being too remote, of its wrongful conduct." International Law Commission, *Draft Articles*, Commentary to Article 31, paras. 10, 13.

[141] International Law Commission, *Draft Articles*, Article 4.

[142] These services include executive branch negotiations of bilateral investment treaties; trade commissioner services, overseas development agencies, export credit agencies, and sovereign wealth funds. See McCorquodale, "Extraterritorial Responsibility of States," 100–1; and Ryan Suda, "The Effect of Bilateral Investment Treaties on Human Rights Enforcement and Realization," in *Transnational Corporations and Human Rights*, ed. Olivier De Schutter (Oxford: Hart Publishing, 2006), 143. On the legal obligations of export credit agencies see Özgür Can and Sara L. Seck, *The Legal Obligations with Respect to Human Rights and Export Credit Agencies* (ECA Watch, Halifax Initiative

but also the legislation governing these departments and agencies and legislation creating "private" entities such as stock exchanges, financial institutions, and TNCs themselves. This observation highlights the complementary relationship between the state duty to protect and the corporate responsibility to respect, as within the state duty to protect is an obligation to enable or facilitate implementation of the corporate responsibility to respect.[143] Although the SRSG appears to be taking some steps in the right direction,[144] his policy prescriptions for states remain couched as optional recommendations – wise choices but not mandatory steps without which states would (or at least should) face consequences.[145]

Because judicial organs are also implicated and states are under a duty to provide access to remedy, then home-state courts must also be under an obligation to facilitate this access.[146] This highlights the complementary relationship in the *Framework* between the state duty to protect and the need for effective access to remedy. Again, the SRSG appears to be taking steps in the rights direction, indicating clearly in the Ruggie 2010 report that: "Under their duty to protect, States must take appropriate steps within their territory and/or jurisdiction to ensure access to effective remedy through judicial, administrative, legislative or other appropriate means."[147] Yet other language is more equivocal,[148] and nowhere does the SRSG suggest that the failure of a state to ensure access to remedy should or even must lead to the sanctioning of that state. This is even more so for home-state courts and access to judicial remedy.[149]

Coalition, and ESCR-Net, 2006); McCorquodale and Simons, "Responsibility beyond Borders," 607–8.

[143] This is hinted at in the discussion of corporate cultures. Ruggie, *Framework*, para. 30.

[144] See generally Ruggie, *Further Steps*, paras. 20–43.

[145] See, for example, Ruggie, *Further Steps*, paras. 39, 41, 43.

[146] See generally Jan Paulsson, *Denial of Justice in International Law* (New York: Cambridge University Press, 2005); Christopher Greenwood, "State Responsibility for the Decisions on National Courts," in *Issues of States Responsibility before International Judicial Institutions*, eds. Malgosia Fitzmaurice and Dan Sarooshi (Oxford: Hart Publishing, 2004). State responsibility would only arise once all means of challenging a lower court decision within the national legal system were exhausted. Greenwood, "State Responsibility," 72–73. See also Ruggie, *Addendum: State Obligations*.

[147] Ruggie, *Further Steps*, para. 96. See also ibid., para. 103. "It is essential that both States and companies act in a manner supportive of the independence and integrity of judicial systems."

[148] See, for example, Ruggie, *Further Steps*, paras. 102, 113.

[149] Ruggie, *Addendum: State Obligations*, 4.

The *Draft Articles* also provide various justifications for states that are unable to meet their legal obligations,[150] yet it is not clear that any would provide an excuse for a host state that lacked the capacity to implement such obligations effectively. From a moral philosophy perspective, the fact that a state has the capacity to deliberate and act is not sufficient to allow moral agency to be exercised, because the state must also have the "freedom to act and some degree of independence from other actors."[151] Despite the fundamental nature of the principle of sovereign equality to both international law and international relations, the limited nature of the sovereignty of many postcolonial or Third World states has been recognized by both international relations theorists[152] and TWAIL scholars.[153] Recognition of this limited sovereignty is not clearly evident in the *Framework*, however. This is most notable in the discussion of a role for home states in conflict zones, which indicates that the tentative policy recommendations put forward for home states do not detract from host-state obligations.[154] Yet, in the conflict zone situation, the host state is likely to be severely incapacitated and might be considered a "failed" or "collapsed" state.[155] Although caution should be exercised when considering restricting the recognition of institutional moral agency (and similarly legal responsibility) of what Erskine refers to as weak or "quasi-states," this caution may not apply to TNC conduct in "failed" or "collapsed" states, although in practice defining which states qualify

[150] However, the six "circumstances precluding wrongfulness" may not preclude the wrongfulness of any act of state that is not in conformity with an obligation arising under a peremptory norm of international law. See International Law Commission, *Draft Articles*, Articles 20–25: consent; self-defense; countermeasures; *force majeure;* distress; and necessity.

[151] Erskine, "States and Quasi-States," 74.

[152] See, for example, Robert H. Jackson, *Quasi-States: Sovereignty, International Relations and the Third World* (New York: Cambridge University Press, 1990); see discussion in Erskine, "States and Quasi-States," 74–83, of quasi-states as institutional moral agents and Jackson's distinction between positive sovereignty (the freedom to act and deter); and negative sovereignty (freedom from outside interference), 76.

[153] See generally Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (New York: Cambridge University Press, 2005); Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance* (New York: Cambridge University Press, 2003); and discussion in Seck, "Unilateral Home State Regulation," 582.

[154] Ruggie, *Framework,* paras. 47–49.

[155] See Erskine, "States and Quasi-States," 79, discussing different terminology in relation to states that have "self-destructed by armed anarchy within."

as such may be not only complex but political.[156] This suggests that the recognition of home-state duties in all conflict-affected areas should be much stronger.[157]

On the other hand, as Erskine cautions, the role of the home state in relation to TNC conduct in "quasi-states," or states that lack the freedom to act because they are "deprived of the conditions necessary to realize [their] capacity to act," raises several concerns. Recognition of the disparate categories of "institutions similarly classified but differently situated" suggests that different states may have different capacities for exercising their moral agency and therefore for bearing duties.[158] Transnational corporations and First World home states are institutions generally considered to have a greater ability to exercise their institutional agency than Third World states.[159] Yet the *Framework* does not impose stronger duties on these actors, in relation either to egregious human rights violations or those of a lesser degree. Indeed, the obligations of both TNCs and home states appear weaker under the *Framework* than the obligations of host states, aside from the obligation of international cooperation and capacity building imposed on all states.[160] Indeed, the SRSG has explicitly stated that because corporations are "specialized economic organs, not democratic public interest institutions," their "responsibilities cannot and should not simply mirror the duties of States."[161] Yet, although home states are democratic public interest institutions, the public to whom they are generally held to account is a different public from the public subject to transnational corporate human rights violations in host states. The weakness in the *Framework* could be overcome, however, if uncertainties over the jurisdictional scope of state obligations were surmounted. Moreover, if the constraints felt by First World states in the global marketplace were also acknowledged, the solution would not

[156] For the problematic nature of the concept of "failed and collapsed" states from a TWAIL perspective, see James Thuo Gathii, "Review: Neoliberalism, Colonialism and International Governance: Decentering the International Law of Governmental Legitimacy," *Michigan Law Review* 98 (2000): 2021.

[157] Notably, although the SRSG discusses this issue as a problem in "conflict zones" in the Ruggie, *Framework*, the discussion in Ruggie, *Further Steps*, is focused on "conflict-affected areas," suggesting a more nuanced understanding of the problem.

[158] Erskine, "States and Quasi-States," 80–81.

[159] This is not to say that First World states might not feel circumscribed by the power of market forces, but as Erskine notes, "capacities for action and deliberation themselves, can exist in degrees." Ibid., 82.

[160] Ruggie, *Framework*, paras. 43–45.

[161] Ruggie, *Framework*, para. 53.

be to limit home-state obligations but rather to recognize that these obligations to protect human rights should extend to wherever home-state TNCs operate, not just to locations in developing countries or Third World states. This would be in keeping with the understandings of many TWAIL scholars that we need to move away from a geographic understanding of the Third World, and instead understand it as a "historical and continuing experience of subordination at the global level" that is shared by "groups of states and populations which self-identify as Third World."[162] It would also acknowledge the reality that home states are increasingly Third World states.

CONCLUSIONS

This chapter began by canvassing the legal debates over the merits of corporate criminal liability. The three responsibilities under the UN Human Rights Council's 2008 *Framework for Business and Human Rights* were then explored, revealing a complex mix of law and policy addressed to both states and corporations. Part III then turned to the limitations imposed by international law on the jurisdictional scope of the home-state duty to protect rights and argued that these limitations make no sense in the business and human rights context. As concluded earlier, this chapter highlights the collective responsibility of home states as institutional actors in a position to prevent harm and takes the position that the existence of limitations on the enforcement of this responsibility should not detract from the importance of articulating its existence. In the words of Toni Erskine:

> Oddly and often tragically, our attention is focused on issues of imputation *following* international crises. Yet, addressing how responsibilities can be distributed is necessarily a prior step to understanding what it means to blame institutions for actions or failures to act. It is imperative to have some sense of who, or what, can bear duties before we deal with questions of imputation, blame and even punishment when these duties are abrogated. It is when an analysis of prospective responsibility is neglected that charges or retrospective responsibility are misdirected – as when the "international

[162] Obiora Chinedu Okafor, "Newness, Imperialism, and International Legal Reform in Our Time: A TWAIL Perspective," *Osgoode Hall Law Journal* 43 (2005): 174. See also Balakrishnan Rajagopal, "Locating the Third World in Cultural Geography," *Third World Legal Studies* 1 (1998–99).

> community" is mysteriously imbued with agency and blamed for failing to respond to genocide, environmental crisis, or famine.[163]

Violations of human rights by transnational corporations are clearly linked to global crises, including not only genocide but also the most serious global crisis of our time, climate change.[164] As briefly alluded to in the introduction to this chapter, the question of whether home states such as Canada should enact legislation to regulate and adjudicate transnational corporate conduct in the extractive sector for compliance with international human rights and environmental standards is a highly controversial topic at present.[165] On the basis of this analysis, the answer is that Canada not only could but is mandated to do so under international law. The purpose of the chapter is to shed light on the blind spots of international law that shield the collective responsibility of home states as institutional agents of the global economic order, agents that are in the position to take prospective responsibility so that we might, in the future, "avoid . . . the need to speak retrospectively of responsibility in terms of guilt and culpability."[166]

[163] Erskine, "States and Quasi-States," 85.
[164] John H. Knox, "Climate Change and Human Rights Law," *Virginia Journal of International Law* 50 (2009), 9–11.
[165] See text at footnote 6.
[166] Erskine, "States and Quasi-States," 85.