

6-7-2016

## *A Rejoinder to G. Skinner's Rethinking Limited Liability of Parent Corporations for Foreign Subsidiaries' Violations of International Human Rights Law*

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### Recommended Citation

Radu Mares, *A Rejoinder to G. Skinner's Rethinking Limited Liability of Parent Corporations for Foreign Subsidiaries' Violations of International Human Rights Law*, 73 *WASH. & LEE L. REV. ONLINE* 117 (2016), <http://scholarlycommons.law.wlu.edu/wlulr-online/vol73/iss1/2>

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# A Rejoinder to G. Skinner's *Rethinking Limited Liability of Parent Corporations for Foreign Subsidiaries' Violations of International Human Rights Law*

Radu Mares\*

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### *I. Skinner's Arguments and Their Merits*

Professor Gwynne Skinner puts forward a stringent, legally binding regime of corporate accountability characterized by a

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high-risk perspective on regulating multinational enterprises (MNEs) and a rightholder-centered perspective on remedies.<sup>1</sup> The proposal covers only parent-subsidiary relationships and thus does not extend to buyer-supplier relationships.<sup>2</sup> The proposal is also confined to customary law—a narrow band of human rights—which serves to reduce tensions with sovereign states that might not have ratified all human rights treaties. Skinner pushes the envelope on the standard of liability that questions the legal separation of entities—a bedrock principle of business law by advocating an exception based on public policy grounds; she justifies such an exception both conceptually and based on precedents carving such exceptions.<sup>3</sup>

These are all careful choices and delimitations that align well with the great currents in “business and human rights” (BHR) nowadays. Regarding the high-risk perspective, Skinner proposes that MNEs should be held liable when they operate in countries known to pose a high risk of human rights abuses. This argument aligns with several National Action Plans on BHR (NAPs),<sup>4</sup> the focus of corporate social responsibility (CSR) programs pursued by the Organisation for Economic Co-operation and Development (OECD),<sup>5</sup> or the UN Guiding Principles (UNGPs).<sup>6</sup>

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1. See generally Gwynne Skinner, *Rethinking Limited Liability of Parent Corporations for Foreign Subsidiaries’ Violations of International Human Rights Law*, 72 WASH. & LEE L. REV. 1769 (2015) (arguing for stricter liability for multinational companies).

2. As a difference from Skinner and for simplicity, I refer to parent companies and MNEs interchangeably to discuss the human rights responsibilities of such business enterprises regarding the operations of their business partners, primarily in developing countries.

3. See *id.* at 1786–878 (presenting Skinner’s main arguments).

4. See, e.g., MINISTRY OF FOREIGN AFFAIRS, NATIONAL ACTION PLAN ON BUSINESS AND HUMAN RIGHTS (2013) (outlining a plan to encourage businesses to respect human rights); GOVERNMENT OFFICES OF SWEDEN, ACTION PLAN FOR BUSINESS AND HUMAN RIGHTS (2015) (same).

5. For more information on OECD’s work on responsible business conduct in the Mineral, Agricultural, and Textiles supply chains, see The Guidelines in Action, OECD, <https://mneguidelines.oecd.org/implementation> (last visited Mar. 8, 2016) (reflecting the characteristics of different supply chains) (on file with the Washington and Lee Law Review).

6. See John Ruggie (Special Representative of the Secretary-General), Rep. on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, U.N. Doc. A/HRC/17/31, annex ¶ 24 (Mar. 21, 2011) [hereinafter Guiding Principles] (“Where it is necessary to prioritize actions to

Regarding the rightholder-centered perspective, Skinner's treatment reflects the plight of rightholders deprived of remedies in their country and the obstacles they face in seeking justice in the home country. This attention to remedies is captured in the UNGPs;<sup>7</sup> the current work of the OHCHR on the access to remedies;<sup>8</sup> the two resolutions of 2014 adopted by the UN Human Rights Council;<sup>9</sup> the French legislative proposal seeking to establish a duty of vigilance on French parent companies;<sup>10</sup> and, of course, the constant preoccupation of civil society groups pushing for corporate accountability.<sup>11</sup>

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address actual and potential adverse human rights impacts, business enterprises should first seek to prevent and mitigate those that are most severe or where delayed response would make them irremediable.”); see also Salient Human Rights Issues, UN GUIDING PRINCIPLES REPORTING FRAMEWORK, <http://www.ungpreporting.org/key-concepts/salient-human-rights-issues/> (last visited Mar. 9, 2016) (“The UN Guiding Principles Reporting Framework asks companies to focus their human rights reporting on their ‘salient human rights issues.’”) (on file with the Washington and Lee Law Review).

7. See Guiding Principles, *supra* note 6, at 26 (“States should take appropriate steps to ensure the effectiveness of domestic judicial mechanisms when addressing business-related human rights abuses, including considering ways to reduce legal, practical and other relevant barriers that could lead to a denial of access to remedy.”).

8. See OCHR Programme of Work to Enhance Accountability and Access to Remedy in Cases of Business Involvement in Human Rights Abuses, OFFICE OF THE UN HIGH COMMISSIONER FOR HUMAN RIGHTS (OHCHR), <http://www.ohchr.org/EN/Issues/Business/Pages/OverviewOfProjects.aspx> (last visited Mar. 9, 2016) (providing an overview of the OHCHR's work on remedies for human rights abuses in business operations) (on file with the Washington and Lee Law Review).

9. Human Rights Council, Elaboration of an International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights, A/HRC/26/L.22/Rev.1 (24 June 2014) (setting up an Intergovernmental Group with the mandate “to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of Transnational Corporations and Other Business Enterprises”). Human Rights Council, Human Rights and Transnational Corporations and Other Business Enterprises, A/HRC/26/L.1 (23 June 2014) (emphasizing the continuing the implementation of UNGPs as well as the issue of improved access to remedy, “including the benefits and limitations of a legally binding instrument”).

10. Danielle Auroi et al., *Rapport Relative au Devoir de Vigilance des Sociétés Mères et des Entreprises Donneuses D'ordre*, ASSEMBLÉE NATIONALE (Jan. 21, 2015), <http://www.assemblee-nationale.fr/14/rapports/r2504.asp> (last visited June 4, 2016) (on file with the Washington and Lee Law Review).

11. See generally GWYNNE SKINNER, ROBERT MCCORQUODALE, & OLIVIER DE SCHUTTER, *THE THIRD PILLAR: ACCESS TO JUDICIAL REMEDIES FOR HUMAN RIGHTS*

Skinner's contribution is doubtlessly ambitious as it seeks a strong regulatory regime; the fact that her approach is carefully delimited is helpful in the uphill battle to get acceptance for this legislative proposal. Thus Skinner's treatment is well-judged not only in what the proposal does but also in what it refrains from doing. Skinner is disinclined to expand this regulatory reasoning to the whole range of human rights through hard law tools of a coercive nature. In other words, she pursues what I called elsewhere a "narrow approach" to legalization, as contrasted to an "expansive approach" often embraced by human rights advocates.<sup>12</sup> The latter approach comes with its own trappings and is worth reflecting on in more detail in order to place Skinner's analysis in the wider context of legalizing corporate responsibilities.

For the legally inclined, strong regulatory proposals are attractive. They appear indispensable for moving the BHR field beyond 'soft law' and 'corporate voluntarism' and to ensure through coercive means that the minimum standards of human dignity enshrined in human rights are observed in the face of powerful profit-making motives and intense market competition. However, to make legalization proposals like Skinner's truly compelling and appreciated, the clear delimitations that Skinner performs should be duly noted and, I would suggest, also supplemented with a different legalization perspective; the latter should be able to cover the rest of the BHR field left untouched by Skinner's proposal and also explain why such strong legalization is unfeasible outside the territory Skinner carefully delineated. I assume here that some readers will still be tempted to apply more widely Skinner's strong legalization proposal—to the entire range of human rights and to all forms of direct and indirect involvement in abuse—in their search for holding MNEs legally accountable and offering remedies to victims. The dangers I perceive in such expansive treatments of corporate legal

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VIOLATIONS BY TRANSNATIONAL BUSINESS (2013) (arguing for corporate accountability for human rights violations).

12. See Radu Mares, *Legalizing Human Rights Due Diligence and the Legal Separation of Entities*, in *A Treaty on Business and Human Rights? Exploring its Contours* (Surya Deva & David Bilchitz eds., forthcoming 2016) (reviewing several streams of human rights works for the way in which they account for, and deal with, the legal separation of entities principle).

accountability consist of losing sight of first-order principles relevant to the transnational BHR domain.

This rejoinder places Skinner's analysis in a wider context to reflect on the legalization of the entire BHR field (encompassing all human rights as well as direct and indirect forms of MNE involvement in abuse) and on the historical evolution of legal reasoning around MNE responsibilities during the last two decades.

Below I outline three "baselines" that were drawn in the mid-2000s, in 2011, and the present that shape our thinking on the legalization of the BHR field and of corporate responsibilities. The first baseline is the result of the "classical international human rights law" mindset powerfully exposed in the UN Draft Norms<sup>13</sup> developed in the early 2000s and shelved in 2004 after encountering fatal opposition from states and businesses.<sup>14</sup> This was a legalistic project to expand the reach of international human rights law (IHRL) by defining expansive MNE obligations that mirrored the state's human rights obligations. The second baseline is marked by the UN mandate of John Ruggie, who dismissed the Norms and the entire legalistic approach of the previous period.<sup>15</sup> He came with a radically different take on global governance—and the role of international law therein<sup>16</sup>—as well as a new conceptual strategy to shape business conduct.<sup>17</sup> As the UNGPs received unanimous endorsement in the Human Rights Council, a second baseline was drawn in 2011. However, the legalization discussion was soon back on the UN table with a

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13. Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, U.N. Doc. E/CN.4/Sub.2/2003/38/Rev.2 (Aug. 26, 2003) [hereinafter UN Draft Norms].

14. Comm'n on Human Rights, Report of the Sub-Commission on the Promotion and Protection of Human Rights, ¶¶18–22, E/CN.4/2005/91 (Feb. 15, 2005).

15. See generally, e.g., John Gerard Ruggie, *Business and Human Rights: The Evolving International Agenda*, 101 AM. J. INT'L L. 819 (2007) (criticizing the Norms).

16. See *id.* at 840 ("[T]he interplay between systems of legal compliance and the broader social dynamics that can contribute to positive change needs to be carefully calibrated.").

17. See *id.* ("[T]he focal point in the business and human rights debate needs to expand beyond establishing individual corporate liability for wrongdoing.").

resolution adopted in 2014.<sup>18</sup> The resolution set up an Inter-Governmental Working Group dedicated to exploring an international legal instrument for BHR. The entire debate associated with its work is currently drawing a third legalization baseline. This setup offers an opportunity to take stock of the impact of the Ruggie mandate and a changing international business context. Arguably the choice for the legally inclined is either to revert to the first baseline drawn in the mid-2000s or come to terms with a more complex legalization perspective consistent with the thinking behind the UNGPs.

## *II. The First Baseline: The Legalistic Approach Behind the UN Draft Norms*

It could be said that the deliberately narrow coverage of Skinner's proposal absorbed the lessons of the UN Draft Norms. One could highlight the important works of Clapham, De Schutter and Weissbrodt as capturing the *Zeitgeist* of early 2000s where prominent human rights lawyers were driving the standard setting efforts of the UN on corporate human rights responsibilities. For example, Clapham's monography *Human Rights Obligations of Non-State Actors* places the discussion of MNE responsibilities and their legalization in the wider debates about ever-accelerating economic globalization.<sup>19</sup> Clapham captures vividly the discussions of the time on whether globalization entails the demise of the state, and how market freedom, privatization, and deregulation risked acquiring the status of sacrosanct values.<sup>20</sup> The book evokes the struggles of human rights lawyers to preserve the human rights gains of the last half-century in the face of increased economic interdependencies managed by powerful economic international organizations and spearheaded by MNEs.<sup>21</sup>

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18. *See supra* note 9 (discussing the UN Human Rights Council's resolutions).

19. *See generally* ANDREW CLAPHAM, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS (2006).

20. *Id.* at 9, 12.

21. *Id.* at 137–270.

In the approach formalized in the UN Draft Norms, the writers sought evidence of how IHRL “is developing” to cover non-state actors such as companies.<sup>22</sup> This “expansive” approach had a few traits that are worth singling out here in order to pinpoint some key differences with the later UN mandate of John Ruggie and the UNGPs. The thinking behind the Norms was to *reapply the respect-protect-fulfill* categories of human rights obligations falling on states; to look at *complicity* as the concept able to trigger the parent company’s responsibility when affiliates infringed rights as the parent company “contributed” or “benefited” from abuses; to embrace *sphere of influence* as the limiting concept for corporate responsibilities; and to put faith in the *traditional international rule-making process* often starting with states endorsing a “soft law” instrument expected to subsequently harden into law through an international treaty and national regulations. These traits are discussed and illustrated below.

For example, David Weissbrodt, one of the main drafters of the Norms, presented the Norms as a restatement of IHRL.<sup>23</sup> The Norms use a symmetrical, identical formulation of state and corporate responsibilities.<sup>24</sup> Andrew Clapham pursued a likeminded project of reapplying IHRL obligations to new actors.<sup>25</sup> Indeed, this was an effort to obtain a consistent and uniform international human rights law system where all actors—state and non-state—bearing human rights obligations; the same respect-protect-fulfill categories of obligations

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22. See *supra* note 19, at 222.

23. See David Weissbrodt & Muria Kruger, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, 97 AM. J. INT’L L. 901, 901, 911 (2003)

The Norms represent a landmark step in holding businesses accountable for their human rights abuses and constitute a succinct, but comprehensive, restatement of the international legal principles applicable to businesses with regard to human rights. . . . [The] Norms largely reflect, restate, and refer to existing international norms, in addition to specifying some basic methods for implementation. . . . The legal authority of the Norms derives principally from their sources in treaties and customary international law, as a restatement of international legal principles applicable to companies.

24. See UN Draft Norms, *supra* note 13, art. 1.

25. See CLAPHAM, *supra* note 19.



applicable to states would be relevant to companies too. Thus, Clapham resisted a narrowing of non-state actors' responsibilities down to "respect" only, as Sigrun Skogly suggested it would be appropriate for the obligations of international financial institutions.<sup>26</sup> Instead, he found support in customary law to say that one should avoid directly violating and being complicit in someone else's violation.<sup>27</sup>

To grasp the "expansive" approach that Clapham and others used to define corporate human rights responsibilities, one notices the key tool: the notion of complicity. Known in criminal law, complicity is the concept that is always stretched beyond legal notions of aiding and abetting (legal complicity) to cover non-legal dimensions of wrongful association with the wrongdoer ("beneficial" and "silent" complicity).<sup>28</sup> Indeed, as Clapham wrote, complicity "is not confined to direct involvement in the immediate plotting and execution of illegal acts by others,"<sup>29</sup> but also describes when a business benefits from human rights abuses committed by someone else. This is recognized in the Draft Norms, which clarify broad principles: Do not contribute, benefit, and inform yourself of activities so you can further avoid complicity.<sup>30</sup> It is this "accordion" concept of complicity—a secondary liability principle or scheme of attribution—that helps Clapham and other legal thinkers justify the entire respect-protect-fulfill range of corporate responsibilities; it helps in the task of reapplying IHRL to businesses and achieving consistency for an IHRL system that shall bind public and private actors to observe human rights.

However, not only does complicity overly expand the scope of obligations, but reliance on this concept also fails to guide thinking on legalizing the BHR field. Such choices put Clapham in the unfortunate position to identify, but not use, the doctrine of "reckless disregard,"<sup>31</sup> a concept much more able to cover entire

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26. *Id.* at 150–51.

27. *Id.* at 151.

28. Andrew Clapham & Scott Jerbi, *Categories of Corporate Complicity in Human Rights Abuses*, 24 HASTINGS INT'L & COMP. L. REV. 339, 347 (2001).

29. *Id.*

30. CLAPHAM, *supra* note 19, at 220, 232–33.

31. *Id.* at 261.

supply chains and clarify responsibilities for situations of indirect involvement by parent companies with abusive affiliates. That doctrine of tort law would have highlighted a much wider set of factors and policy considerations relevant to attaching liability to companies for creating foreseeable risk and to guiding reasoning about the scope of MNE obligations. Projects like the Norms, however, derive strength from international law sources they seek to reapply to new settings. In contrast, “reckless disregard” and other negligence doctrines are to be found at the domestic law level only. Clapham and other BHR thinkers found it difficult to escape the attraction of complicity: it allows an expansive take on corporate responsibilities, but it is also a principle present in international law branches of state responsibility and criminal law that are congruent in their standards of complicity.

For such writers engaged in the project of reapplying IHRL to the business sector and MNEs, the standards of liability were to come from international law, and the tool to secure their observance would be hard law, whether domestic laws or international laws. The Norms were seen as a declaratory instrument expected to harden into law, at national and international levels.<sup>32</sup> Clearly the backers of the Draft Norms had in mind the usual transition from general principles to specification—from soft to hard law—in a process in which legal experts identify, interpret, and apply international legal principles of responsibility to corporations.<sup>33</sup> As Olivier De Schutter wrote at the time of the Norms, “[a]lthough the final destination remains unknown, the general direction which we are taking emerges clearly from these developments.”<sup>34</sup> However, pushing the limits of human rights responsibilities and of the complicity notion in order to hold MNEs legally accountable for entire value chains runs against first order principles of international law, human rights law, and business law, as

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32. UN Draft Norms, *supra* note 13, art. 17.

33. For more on this topic, see generally Radu Mares, *A Review of a Classic Book: Andrew Clapham, Human Rights Obligations of Non-State Actors*, 1 BUS. & HUM. RTS. J. 379 (2016).

34. Olivier De Schutter, *Transnational Corporations as Instruments of Human Development*, in HUMAN RIGHTS AND DEVELOPMENT: TOWARDS MUTUAL REINFORCEMENT 403, 427 (Philip Alston & Mary Robinson eds., 2005.)

explained below.<sup>35</sup> It builds on the illusion that the expansion of corporate responsibilities happens in “virgin territory” ready to be conquered by legal interpretive maneuvers, rather than in territory densely populated by first order principles.

Such legalization of corporate responsibilities was of course meant to signify a break with the ‘voluntarism’ pervasive in the BHR area: States have adopted international soft law instruments on CSR (such as the OECD Guidelines and ILO Declaration and the UN Global Compact) and businesses creates codes of conduct (self-regulation by individual companies, by industry bodies, or by multistakeholder schemes). The undertone is that MNEs—profit-making, wealthy, and powerful entities—could only be subject to harder versions of legalization able to deliver deterrence and remedies, in order to counterbalance extremely strong incentives flowing from their profit-making nature and competitive market environments. Any “weaker” instruments—whether “soft” law or less coercive regulations like transparency laws—would be valued as a mere step towards coercive regulatory frameworks or seen as inherently inadequate (and betraying lack of political will to hold businesses accountable). From here came a lasting difficulty for human rights lawyers to valorize softer legalization strategies in BHR. In his passionate challenge, Clapham noted that human rights lawyers would rather put faith in the current state-centered system rather than a new, unknown, diffuse accountability arrangement.<sup>36</sup> Better to preserve the current state focus of international human rights law and augment it with a state duty to protect and citizen participation, than move to law as “multiplicity of communicative ‘processes,’ ‘world law,’ or ‘multilevel governance.’”<sup>37</sup> States should make international law and private actors should not enter law-making in an unmediated fashion.<sup>38</sup>

Perhaps a minority of human rights writers looked beyond the well-documented corporate abuses and clear threats that the global economy and MNE operations were posing to human

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35. *Infra* Part IV.A.

36. CLAPHAM, *supra* note 19, at 25.

37. *Id.* at 26–27.

38. *Id.* at 25, 27.

rights. Clapham for example, entertained the possibility that globalization might stimulate new forms of accountability as “top-down effects of more open markets for transnational actors” coexist with bottom-up demands of civil society groups and networks: “One could start to exploit the dynamics to ensure better respect for human rights.”<sup>39</sup> It was an illustration of his optimistic belief that IHRL standards are only contingently based on the international law, state-centered architecture and are inherently capable to adapt to a more multi-layered global governance architecture. Therefore, Clapham challenged fellow lawyers to shed contingencies—historical and conceptual—and find new ways to cover non-state actors and protect the individual against violence from the state and private actors. Touching on the power dimension, De Schutter wrote in 2005 that:

The power of transnational corporations fascinates. Our reaction to this power has been fed by much publicized situations in which, effectively controlled neither by their State or incorporation nor by the State where they operate, these global actors seemed to be able to commit human rights violations in complete impunity: our reaction has been to restrain that power, by imposing on transnational corporations obligations to comply with internationally recognized human rights. But, as we have discovered when we undertook to impose positive obligations on the State to protect and to fulfil [*sic*] human rights, power is not unidimensionally evil. It may also be exercised in the name of the good. TNCs could be seen also as a potential tool—and a powerful one no doubt—for the realization of the right to development.<sup>40</sup>

Such insights into the openings that the global economy presents for observing human rights however never truly permeated and became operationalized in the legalization concepts of this period. The legalization project of holding MNEs accountable under international law became tightly entangled with moving accountability upwards towards the parent company, with states as indispensable players in the strategy of change, and with coercive legal strategies indispensable to outdo the profit motive and market pressures. These *three reductionist*

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39. *Id.* at 7.

40. De Schutter, *supra* note 34, at 443.

*biases* characterize the first legalization baseline in BHR. They ensured that the legalization project would struggle to valorize softer legalization and non-legal strategies of change, to conceive MNEs playing a more constructive part in the strategy of change. The biases explain why legalizing the transnational BHR field might inherently require fewer linear regulatory regimes with multiple moving parts. The early 2000s period driven by a classic human rights law mindset found its expression in the UN Draft Norms. A first legalization baseline was drawn. The Norms did not find traction within the UN, and the mindset behind them was challenged head-on by a UN mandate-holder: John Ruggie, a political scientist specialized in international relations with vast UN experience.

### *III. The Second Baseline: The Polycentric Approach Behind the UN Guiding Principles*

Appointed in 2005 as Special Representative of the Secretary General for business and human rights, Ruggie began by dismissing the UN Draft Norms as conceptually misconceived and strategically inadequate. Ruggie concluded the Norms made exaggerated legal claims in their mission to reapply IHRL to the private sector.<sup>41</sup> Furthermore, the Norms got the equation wrong: Not overly broad corporate responsibilities for a limited range of human rights, but narrower responsibilities regarding all human rights.<sup>42</sup> This is warranted given that business operations potentially infringe all human rights<sup>43</sup> and that excessively broad obligations misconstrue the functional role of business in society. Fundamentally, not only did the treaty-making aspirations behind the Norms appear to Ruggie as

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41. See generally Ruggie, *supra* note 15.

42. Human Rights Council, 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, ¶ 51, U.N. Doc. A/HRC/8/5 (Apr. 7, 2008).

43. Michael Wright, *Corporations and Human Rights: A Survey of the Scope and Patterns of Alleged Corporate-Related Human Rights Abuse*, Addendum to the SRSG's Report to the Human Rights Council, U.N. Doc. A/HRC/8/5 (2008).

politically intractable and therefore doomed to fail if reattempted in his mandate,<sup>44</sup> but he looked at the Norms as symptomatic of a misguided legalization mindset. He found inspiration in Amartya Sen's work who, in Ruggie's words, insisted that:

[H]uman rights are much more than laws antecedents or progeny. Indeed, [Sen] states, such a view threatens to "incarcerate" the social logics and processes other than law that drive public recognition of rights. My work, including the Guiding Principles, has sought to contribute to the freeing of human rights discourse and practice from these conceptual shackles, by drawing on the interests, capacities and engagement of states, market actors, civil society, and the intrinsic power of ideational and normative factors.<sup>45</sup>

In "polycentric governance" Ruggie saw the way forward to advance the cause of human rights in the global economy. Ruggie explained that in BHR, there are three systems that develop CSR standards and require their observance: "Public governance" encompassing law and policy, "corporate governance" reflecting risk management, and "civil governance" reflecting social expectations of stakeholders.<sup>46</sup> For Ruggie, "the intellectual and policy challenge was to construct a conceptual and normative platform whereby the three governance systems become better aligned in relation to business and human rights, compensate for

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44. John Gerard Ruggie, *Incorporating Human Rights: Lessons Learned, and Next Steps*, in BUSINESS AND HUMAN RIGHTS: FROM PRINCIPLES TO PRACTICE (Justine Nolan & Dorothea Baumann-Pauly eds., forthcoming 2016) (explaining the "foundational logics" of his mandate and signalling his belief that if such "premises are ignored and the process reverts to prior conventional modalities, it could well revert to prior failures as well").

45. John G. Ruggie, *Life in the Global Public Domain: Response to Commentaries*, JAMES G. STEWART (Feb. 5, 2015), <http://jamesgstewart.com/life-in-the-global-public-domain-response-to-commentaries/> (last visited Mar. 9, 2016) (on file with the Washington and Lee Law Review).

46. See JOHN GERARD RUGGIE, JUST BUSINESS: MULTINATIONAL CORPORATIONS AND HUMAN RIGHTS xliii–xliv (2013)

The most fundamental [aspect when developing the Guiding Principles] was to recognize and build on a core feature of the governance of multinational corporations . . . . Three distinct governance systems affect their conduct in relation to human rights: the system of public law . . . a civil governance system . . . and corporate governance. . . . [E]ach of these governance systems needs to be mobilized and pull in compatible directions.

one another's shortcomings, and play mutually reinforcing roles from which cumulative change can evolve over time."<sup>47</sup>

By comparing the first baseline—Draft Norm's legalistic approach—with the second baseline—Ruggie's polycentric approach—a paradigmatic shift is notable. The shift Ruggie produced in BHR can be traced to three elements: First, the expansion of *BHR governance beyond law* achieved through the polycentric governance approach; second, the rather *broad definition of corporate responsibilities* that would include a MNE's "leverage" over business partners; and third, the wrapping these elements in a *credible narrative* of human rights in the global economy—a multifaceted narrative that accounts for both risks and opportunities created as the world integrates economically. Each of these three elements will be expanded on below. By framing the international BHR field in a sufficiently broad and evolutionary way, Ruggie's approach left space for further legalization. Ruggie's correction to the BHR field eliminated the three reductionisms of the first baseline and clarified the necessity of a different legalization approach to follow up the UNGPs.

First, the expansion of BHR governance beyond law through polycentric governance as the strategy of change was a strategic choice Ruggie made early on in his mandate in response to, and in stark contrast to, the legalization project of the first baseline. At once he eliminated two reductionisms that came to haunt the first baseline: Its complete reliance on *state action* to kick-start and fuel the evolution of BHR field and its inclination towards *hard legalization, coercive regulations* targeting MNEs. As shown above, these reductionisms made it difficult for the first baseline to move beyond rather raw versions of legal pluralism in BHR and to valorize softer legalization and non-legal incentives for change.

Ruggie's polycentric governance outlook contrasts with the classic international law approach of kick-starting the human rights project with a (comprehensive) international instrument that states would negotiate, ratify, and implement domestically, while international monitoring bodies would constantly interpret and further specify its provisions through "constructive dialogue"

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47. Ruggie, *supra* note 44.

with states and possibly individual complaint mechanisms. For Ruggie, the decades of states negotiating unsuccessfully an instrument on MNE responsibilities offered enough empirical evidence and motivation to break with a state-centered modality of rule-making and rule-enforcement in the BHR field. Polycentrism was the way forward to bypass state paralysis.

As Ruggie lost the state-centric bias of the first baseline, that also eliminated the second reductionism of overdependence on hard legalization. Ruggie took issue with two “doctrinal positions”: “Only international legal measures can produce significant change” and “an overarching international legal framework through a single treaty instrument governing all aspects of transnational corporations in relation to human rights (‘a global constitution of sorts’).”<sup>48</sup> As Ruggie bet on polycentrism, he naturally had no problem with accommodating softer legalization and non-legal incentives as drivers and facilitators of change in BHR. In contrast, the legalistic project could not truly make sense of non-coercive forms of state action. Softer legalization and soft law would be dismissed as inherently weak or seen as mere stepping stones towards hard, coercive law that would appear as the only adequate state/legal response to globalization, power and market pressures.

Second, Ruggie’s definition of corporate responsibilities is narrower than the respect-protect-fulfill responsibility of the first baseline. Taking a closer look, however, Ruggie’s responsibility to respect human rights is still rather broad as it includes “leverage.” Ruggie thus maintained that each and every business, like any other actor, should—at the minimum—respect human rights. Notably, this corporate responsibility to not infringe human rights would not be a responsibility to refrain from harm imposed on each legal entity, but—for those influential entities, such as parent companies—would contain a responsibility to exercise leverage over the affiliates, and if needed, to terminate relationships with them. This incorporated in the corporate responsibility to respect what to human rights lawyers appears as a well-delimited responsibility to protect (similar to Skogly’s

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48. John Gerard Ruggie, *Regulating Multinationals: The UN Guiding Principles, Civil Society, and International Legalization*, in BUSINESS AND HUMAN RIGHTS: BEYOND THE END OF THE BEGINNING (César Rodríguez-Garavito ed., forthcoming 2016).



proposal that Clapham dismissed).<sup>49</sup> As a result, Ruggie's corporate responsibility would not be indefensibly narrow and out of touch with social expectations from MNEs to clean up their act and their value chains. While the first baseline sought to reapply categories of obligations well established in IHRL, Ruggie sought a concept of responsibility that is more attuned to the functional role of business in society and went for "respect" only.

This eliminated another reductionism inherent in the first baseline: the delocalization and upward allocation of liability to parent companies for abuses of human rights throughout value chains. Deliberately Ruggie resisted such a narrowing of the BHR discourse. The first baseline moved in this direction by working the scheme of attribution—mainly by using the "accordion" concept complicity—and constantly gravitating towards stricter forms of liability for the parent company, seen as the default responsible party when affiliates infringe human rights.<sup>50</sup> The overall thrust was coming perilously close to holding the parent company liable more or less by default. Instead, Ruggie's more limited corporate responsibility including a responsibility to exercise leverage in global value chains not only eliminated a reductionism of the first baseline, but opened the way for expanding the BHR field of vision to the responsibilities of other actors able to exercise leverage on value chains through legal, policy and non-legal incentives: host and home states, IGOs, NGOs, market participants and all other stakeholders. This expansion was further enabled by a multifaceted narrative of globalization that Ruggie put forward.

Third, the narrative in which the actors and tools for change (states and coercive law in the first baseline versus the polycentrism and a fuller toolbox in the second baseline) couple with the corporate responsibility (very broad in first the baseline and reasonably broad in the second baseline) is another determinant factor that ensured the legacy of the Ruggie mandate. The first baseline was predisposed to confine itself to coercive law and to allocate liability to the parent company. The

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49. See CLAPHAM, *supra* note 19, at 150–151 (discussing Skogly's argument).

50. See UN Draft Norms, *supra* note 13 (addressing the responsibilities of transnational corporations and business entities throughout).

narrative predisposed to lean against markets, globalization, corporate power/size, home states, and MNEs compounded a restricted view on BHR. As quoted above, Clapham and De Schutter took tentative steps away from this direction and began inquiring about the new opportunities brought by globalization and MNEs to promote respect for human rights and the right to development.<sup>51</sup> However, embracing the brand of legalism of the first baseline seeking to reapply IHRL to companies hindered their efforts. The result was a uni-dimensional view of the global economy and its relation to the observance of human rights. A rather restricted legalization perspective followed.

In contrast, Ruggie's project was not a legalistic one, to begin with, and it was not about making the buck stop with the parent companies. Ruggie's project would be one of mobilizing many more sources of leverage for the protection of human rights, rather than moving liability upwards towards the parent company. To succeed, this "leverage project" would require a multifaceted narrative of globalization that accounted explicitly for its threats and opportunities for protecting human rights transnationally.<sup>52</sup> Even before his SRSG mandate, Ruggie would state that his main intellectual interest was in new transnational arrangements that intersect to address global governance gaps.<sup>53</sup> In this way, Ruggie's approach invited a more nuanced legalization perspective to support his project of harvesting leverage for human rights in an interconnected global economy.

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51. See *supra* notes 34–40 and accompanying text (discussing the legalization of corporate responsibilities).

52. See *generally* Ruggie, *supra* note 43 (explaining the "foundational logics" of the UNGPs and suggesting that a compelling narrative rather than the "soft" character of the UNGPs explains the traction the UNGPs got with states and businesses).

53. "My main intellectual preoccupation nowadays is the relationship between the transnationalization of capital, the transnationalization of social movements and civil society actors, and the issues of global governance." CARNEGIE COUNCIL ON ETHICS AND INTERNATIONAL AFFAIRS, *THE IMPACT OF CORPORATIONS ON GLOBAL GOVERNANCE* 11 (2004). Subsequently Ruggie referred to his goal to merge trends in transnational civil society and private governance schemes in which businesses are involved. "How is it possible to marry world civic politics with global private governance, in the pursuit of a larger public space at the global level (a space of contestation, of challenge, of debate, and possibly of resolution) in order to deal with some of the major governance challenges, governance gaps, and governance failures before us? There is a potentially 'progressive' platform here." *Id.* at 14.

With the conclusion of the SRSG mandate—and the UNGPs endorsed by the UN and many other stakeholders—the next steps are about specification of the UNGPs to particular settings as well as legalization, which is one form of institutionalizing BHR. Legal incentives are much needed to move companies towards compliance. Having cleared the BHR field of the reductionisms of the first baseline, Ruggie’s polycentrism comes with the enormous task of securing alignment and mutual reinforcement among the three governance systems.<sup>54</sup> States and legalization will have a significant part to play in this task and it will be for the third legalization baseline to provide answers.

But before delving in this third baseline, it is important to note Ruggie’s position on legalization. Commenting on the international legalization process the UN commenced in 2014, Ruggie wrote: “As the business and human rights agenda continues to evolve, further legalization is an inevitable and necessary component of future developments. But in light of the failure of past treaty efforts in this domain, we need to ask ourselves what form legalization should take at the international level.”<sup>55</sup> Ruggie favored legalization: “Further international legalization in business and human rights is inevitable as well as being desirable in order to close global governance gaps. About that there can be little doubt. The critical questions are how to get from here to there, and in what direction the ‘there’ should lie.”<sup>56</sup> He emphasized the importance of NGO leadership: “[W]hen states are this divided and ambivalent, NGO leadership is badly needed. Hence, NGOs need to reflect on their own positioning.”<sup>57</sup> He also warned that a workable legalization perspective is essential: “[I]f there is to be any hope of further international legalization in the business and human rights domain, civil

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54. See *supra* note 47 (articulating this challenge)

55. Ruggie, *supra* note 44.

56. John G. Ruggie, *Get Real or We'll Get Nothing: Reflections on the First Session of the Intergovernmental Working Group on a Business and Human Rights Treaty*, BUS. & HUMAN RIGHTS RESOURCE CTR., <http://business-humanrights.org/en/get-real-or-well-get-nothing-reflections-on-the-first-session-of-the-intergovernmental-working-group-on-a-business-and-human-rights-treaty> (last visited May 22, 2016) (on file with the Washington and Lee Law Review).

57. *Id.*

society needs to help by advancing workable proposals that states cannot ignore or dismiss out of hand.”<sup>58</sup> He thus highlighted the perils of not having a sound legalization perspective:

Such demands are so far removed from reality that they become playthings for some states, and reasons for others to ignore the process. To avoid being instrumentalized in this fashion and to provide the needed leadership, NGOs would serve the business and human rights agenda well by re-examining and refining their platform.<sup>59</sup>

In sum, the contrast between the first and second baselines in BHR becomes clearer. However worthwhile the conceptual efforts of international lawyers elaborating corporate human rights responsibilities in a globalizing economy and however justified and urgent the attention to negative impacts on human rights by institutions driving the global economy, this paradigm succumbed to several forms of reductionism wrapped in a uni-dimensional narrative of globalization. As Ruggie came with his polycentric governance narrative and a reasonably broad corporate responsibility, he drew a second baseline that eliminated those reductionisms and thus reset the BHR field. That made it easier to think of BHR in a broader and conceptual way (not a declaratory manner) and to seek new openings and interactions able to maximize leverage for human rights (not remain faithful to a legalization paradigm that might be ill-equipped to detect and account for such openings and interactions).

Ruggie came with a BHR paradigm that was not about elaborating MNE’s (legal) responsibilities, but was a comprehensive paradigm about summoning leverage and directing it through old and new pathways across borders. This aligned with a stream of literature sensitive to the limits of *both* law and CSR<sup>60</sup> that tried to link private and public governance in

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58. *Id.*

59. *Id.*

60. *See generally, e.g.*, DAVID KINLEY, CIVILISING GLOBALISATION: HUMAN RIGHTS AND THE GLOBAL ECONOMY (2009); DAVID VOGEL, THE MARKET FOR VIRTUE: THE POTENTIAL AND LIMITS OF CORPORATE SOCIAL RESPONSIBILITY (2005); S. ZADEK, THE CIVIL CORPORATION – THE NEW ECONOMY OF CORPORATE CITIZENSHIP (Earthscan, London, 2001); Kernaghan Webb, *ISO 26000 Social*

a new BHR paradigm. In sum, the BHR narrative that Ruggie began to articulate appears better attuned to promoting human rights in a transnational value chain context than that of predecessors and requires a more nuanced and complex legalization perspective. Ruggie's polycentric approach was not an alternative to legalization favoring voluntarism; it was an alternative to the legalistic project of the first baseline. It might prove the better way to kick-start the evolution of the BHR regime and to think more deeply about the regulatory mixes appropriate in this transnational BHR context. Arguably the challenge for the third baseline is about adding a legalization layer to the UNGPs in a way that avoids replicating the reductionisms of the first baseline. It is about imagining a new legalization perspective that complements and builds on the UNGPs rather than reverse thinking back to the first baseline.

#### *IV. The Third Baseline: The Two-Track, Multi-Channel Legalization Perspective*

Since 2014, the legalization discussion is back on the UN agenda and a third baseline will be drawn. Two questions could be asked: (1) What has changed in the global economy in the last 10 years since the first legalization baseline was drawn that might suggest the need for a different legalization perspective? (2) How would this new legalization perspective relate to the second baseline drawn by the Ruggie mandate?

##### *A. The Context of the Third Legalization Baseline*

Regarding what has changed in the global economy, one could start by referring to Ruggie's observations regarding the

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*Responsibility Standard as "Proto Law" and a New Form of Global Custom: Positioning ISO 26000 in the Emerging Transnational Regulatory Governance Rule Instrument Architecture*, 6 *TRANSNAT'L L. THEORY* 466 (2015); Burkard Eberlein et al., *Transnational Business Governance Interactions: Conceptualization and Framework for Analysis*, 8 *REG. & GOVERNANCE* 1 (2014); André Nollkaemper & Dov Jacobs, *Shared Responsibility in International Law: A Conceptual Framework*, 34 *MICH. J. INT'L L.* 359 (2013); J. G. Ruggie, *Reconstituting the Global Public Domain — Issues, Actors, and Practices*, 10 *EUR. J. INTERNAT'L REL.* 499 (2004).

shifting BHR context. In a speech made to the 2014 UN Forum on Business and Human Rights, Ruggie drew attention to some key “characteristics of the institutional landscape that any attempt at further legalization needs to bear in mind if it is to have any practical effect.”<sup>61</sup> One aspect regards the MNE that “no longer falls easily into the North-South cleavage.”<sup>62</sup> “One of the most profound global geo-economic shifts today is the rapid increase of transnational corporations based in so-called emerging markets.”<sup>63</sup> Another aspect is that the MNEs

are no longer the entities they once were: vertically integrated, multidivisional organizations structured in the form of a pyramid. The 21st century transnational corporation is a far more complex economic entity. In addition to its traditional relationships with subsidiaries, joint ventures are commonplace, many with state-owned or other national companies. But the biggest change has occurred through non-equity relationships. Here what you see today is the corporation as a bundle of contracts . . . .<sup>64</sup>

Yet another aspect is that state adherence to human rights is uneven, which has consequences on a comprehensive BHR treaty:

Not all states that can make the biggest difference have signed on to the full range of human right standards. Those who haven’t are unlikely to impose them on their corporations as a matter of hard law. That not only results in an ineffective treaty, of which there are many. It also risks undermining the broad state support achieved by the Guiding Principles for addressing all internationally recognized rights at the level of policy and practice.<sup>65</sup>

Assessing the current BHR context could continue by accounting more broadly for recent promising developments in a

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61. John Ruggie, *Closing Plenary Remarks, UN Forum on Business and Human Rights*, JAMES G. STEWART (Jan. 27, 2015), <http://jamesgstewart.com/closing-plenary-remarks-un-forum-on-business-and-human-rights> (last visited June 4, 2016) (on file with the Washington and Lee Law Review).

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

multitude of policy fields, fields that have a direct or indirect bearing on BHR and MNE responsibilities. Elsewhere, in an attempt to arrive at a more comprehensive and updated picture of the BHR policy context, I accounted for five policy streams: international trade law, development aid, international human rights law, home state laws with extraterritorial effects, and corporate social responsibility.<sup>66</sup> New openings are appearing in the BHR landscape as some experiments come to maturity (e.g., in CSR) or new policies that were almost inconceivable years ago are a reality now (e.g., in trade agreements, including labor clauses and home states' regulations of MNEs). Overall, it is notable that human rights appear as a legitimate concern in old and new transnational policy channels. Traditional channels promoting human rights, such as the international human rights law system and development aid, are more focused now on BHR. Significantly, economic channels that previously shunned human rights concerns have evolved: trade agreements and the value chains of MNEs have progressed to incorporating more and better human rights safeguards.

Also, some excesses of international economic law and policy are being addressed. Thus, reflecting on recent developments, Sauvants noted a recalibration and evolution of legal investment regimes:

[D]uring the 1970s and early 1980s, the watchword was "control," while during the later 1980s and 1990s, "liberalization" at the national level and "protection" at the international level was viewed as most important. Since 2000, national policies have become more nuanced, international guidelines have been strengthened and new ones added, and some agreements have become more cautious, although an increasing number is aiming for more liberalization. Rule making may therefore be haphazard, messy and uneven, depending on what is needed and what is feasible in a given constellation of interests and forces. But, hopefully, over time, the combination of various instruments add up to a regime that covers, comprehensively and in a balanced manner,

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66. For a more in-depth review of these policy streams, see generally Mares, *supra* note 33.

the range of issues related to international investment, including issues related to human rights.<sup>67</sup>

The argument so far emphasized some structural transformations in the landscape of MNEs as well as promising developments in various policy fields bearing on BHR. Beginning to draw the third legalization baseline requires keeping abreast of such changes and a sharpened sensitivity to a rapidly evolving context for BHR. But the third legalization baseline should pay attention also to the specific context of transnational BHR. This is the third prong of the contextual analysis in this section.

The transnational BHR context presents peculiarities and poses challenges for policymakers that are significantly different from a purely domestic context of a local company employing local workers and supplying the domestic market. Regulating to secure human rights in the transnational BHR context requires the strengthening of two sets of laws: domestic and transnational. Domestic laws in host countries mainly target affiliates of MNEs for their harmful practices through the usual labor laws, environmental protection laws, land laws, civil laws, and criminal laws. Laws with transnational effects adopted in home states target parent companies for their impacts abroad through reporting laws, due diligence regulations, and civil and criminal laws for offences committed overseas. Much of the regulation of MNEs discussions obviously deal with the transnational laws aspects; such home states' laws appear as an important part of the emerging BHR regime, are at the heart of the project of holding MNEs accountable, and are essential for closing the jurisdictional and governance gaps that MNEs sometime exploit. However, promoting the adoption of such home state laws with transnational effects comes with its own challenges. Therefore the specificity of the transnational BHR context needs to be recognized. Here, I propose not losing sight of three "first order principles," or foundational aspects that should not be overlooked, of public international law, business law, and international human rights law.

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67. Karl P. Sauvant, *Looking Back, Looking Ahead: What Lessons Should We Learn from Past UN Efforts to Adopt a Code of Conduct for Business?*, INST. HUMAN RIGHTS & BUS. (Apr. 16, 2015), <http://www.ihrb.org/commentary/looking-back-looking-ahead.html> (last visited May 22, 2016) (on file with the Washington and Lee Law Review).



To pinpoint the application of these three principles and how they affect the third legalization baseline, it is important to recall that the UNGPs defined a reasonably broad corporate responsibility, which rightly encompasses direct and indirect involvement of MNEs in human rights abuses. Through Principle 13, the UNGPs make a distinction between direct involvement in the form of causality and contribution (complicity) situations where the company is expected to cease harmful conduct and remediate the harm, and situations of indirect involvement in the form of lesser contributions or no causality at all (“beneficial and silent complicity” in Clapham’s categorization)<sup>68</sup> where the company should exercise leverage over business partners or terminate the relationship. This distinction is of high relevance to the project of legalizing parent company responsibilities. For direct involvement, coercive legal solutions could be adopted to compel the company to desist and remedy the harm caused; for situations of indirect involvement such hard legalization options are problematic.

The reason for difficulty in this “indirect involvement” regime has to do with three “first order principles” of the transnational BHR setting: legal separation of entities (business law), state sovereignty (international law), and protection of rightholders by legislative and other measures (international human rights law). These principles are inescapable in a transnational BHR context because of the possibility—or even likelihood—that global value chains will redirect should the parent company be held legally liable for failure to exercise leverage over business partners. Indeed, the parent company would be asked to monitor and influence its affiliates as a matter of legal obligation; if this obligation is backed by a hard sanction such as major fine or liability for harm, it is possible that the company will chose to comply by redirecting value chains away from high-risk zones.

In a nutshell,<sup>69</sup> one can assume that proposals to hold MNEs accountable bore fruit. A home state will thus impose on *its* MNEs a legal obligation to exercise leverage over affiliates to ensure observance of human rights through its value chains. If

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68. Clapham & Jerbi, *supra* note 28, at 345–48.

69. See generally Mares, *supra* note 12 (discussing in more detail the three principles and their interaction in the transnational BHR context).

the obligation has a broad scope (to cover indirect involvement in abuse) and is stringently enforced with strong liabilities, this will remove the protection offered by the legal separation principle on which companies rely to take risks and expand operations. This offers the choice to the MNE to comply with its obligation by redirecting its value chains away from states with problematic human rights records. This compliance decision in effect would penalize those states and restrict the possibility of such sovereign states to integrate in global value chains as they seek economic growth and national development. Furthermore, if value chains get redirected, this could harm rather than assist the rightholders by narrowing their opportunities to seek a better life. Such undesirable and unintended effects would run counter to a first order principle of IHRL that seeks increased *protection of rightholders*. Indeed, IHRL requires states to take the full range of measures, legislative and other measures, to secure respect for human rights. This principle is also recognizable in the UNGPs as they seek established and new modalities to amass maximum leverage to increase the protection of rightholders. The redirection of value chains would foreclose a set of measures and leverage that could be used to improve protection of human rights.

Highlighting these three first order principles relevant for situations of indirect involvement of MNEs in rights abuses begins to problematize the use hard legalization strategies towards MNEs as a way to harvest MNE leverage. It boils down to an uncomfortable dilemma looming over the third legalization baseline: hard legalization in search of MNE accountability creates frictions with the three principles, and softer legalization might simply be insufficient to change MNE behavior and to make a significant contribution to securing human rights. So between backfiring and insignificance, the third legalization baseline requires a more complex regulatory understanding than merely (coercively) legalizing the responsibility to exercise HRDD of MNEs. This would depart from the simplistic message that legalization is merely about turning soft law (UNGPs) into hard law, and that law should be coercive enough to overcome the profit motive, the market competition dynamics, and the power of MNEs. The transnational BHR setting is different from a

domestic corporate accountability setting because of the three first order principles.

To briefly exemplify all three first order principles, frictions with the state sovereignty of both home and host states can be detected in previous hard legalization attempts. The 1996 Massachusetts ban on public procurement from companies operating in Myanmar created disputes between the US and European states.<sup>70</sup> The Alien Tort Claims Act (ATCA) litigation also raised extraterritoriality concerns from other home states of MNEs.<sup>71</sup> Regulating MNEs to protect human rights abroad might also create frictions with the sovereignty of host states, as the OECD Guidelines' reference to protectionism shows.<sup>72</sup> Drawing

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70. This is an example of hard legalization instituting a ban on “tainted goods” (such legal prohibition is more stringent than mandating HRDD). The result was a protest not from Burma but from the EU, which had its own strategy of seeking change in Burma: “The EU and its member States had specially chosen not to ban such activities in favor of other policy measures toward Burma.” Brief for the European Communities and their Member States as *Amici Curiae* Supporting Plaintiff, *Nat'l Foreign Trade Council v. Baker*, 26 F. Supp. 2d 287 (D. Mass. 1998) (No. 98-CV-10757). The EU framed its concerns in terms of sovereignty and drew on an EU-US agreement requiring parties to not pass “economic sanctions legislation based on foreign policy grounds which is designed to make economic operators of the other behave in manner similar to that required of its own economic operators” and instead “target such sanctions directly and specifically against those responsible for the problem.” United States/European Union Joint Statement on Transatlantic Partnership on Political Cooperation, 1 PUB. PAPERS 804, 805 (May 18, 1998).

71. The *Amicus* filed by the UK, Australia, and Switzerland shows them opposed to “broad assertion[s] of extraterritorial jurisdiction” over aliens because of considerations of national sovereignty and legal uncertainty: “As global trading and investment nations [the three countries are concerned] about interference with our own domestic dispute resolutions choices.” Brief of the Governments of the Commonwealth of Australia, the Swiss Confederation and the United Kingdom of Great Britain and Northern Ireland as *Amici Curiae* in Support of the Petitioner at 2, 28, *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (No. 03–339).

72. The OECD Guidelines state, “Governments adhering to the Guidelines should not use them for protectionist purposes nor use them in a way that calls into question the comparative advantage of any country where multinational enterprises invest.” OECD, OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES 18 (2011). Furthermore,

[g]overnments have the right to prescribe the conditions under which multinational enterprises operate within their jurisdictions, subject to international law. The entities of a multinational enterprise located in various countries are subject to the laws applicable in these countries. When multinational enterprises are subject to conflicting

on his experience during his six-year UN mandate on BHR, Ruggie wrote: “[S]tate conduct makes it abundantly clear that they do not regard extraterritoriality to be an acceptable means to address violations of the entire array of internationally recognized human rights. It makes little difference whether the states in question are located in the North, South, East, or West.”<sup>73</sup>

Some human rights proposals, such as those contained in the 2011 Maastricht Principles, see the extraterritorial obligations on home states to hold their MNEs accountable for infringements of human rights abroad as the “missing link” of the IHRL architecture.<sup>74</sup> While these Principles do not seem much concerned with possible frictions with host state sovereignty,<sup>75</sup> other scholars are much more cautious in this respect.<sup>76</sup>

One could argue that such objections grounded in extraterritoriality would be solved by an international treaty on BHR. Indeed, host and home states would consent and define acceptable transnational effects of home state laws, clearly separating thus legitimate from illegitimate exercises of extraterritorial authority through regulating MNEs. However, a first hurdle must be overcome by persuading both home and host

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requirements by adhering countries or third countries, the governments concerned are encouraged to co-operate in good faith with a view to resolving problems that may arise.

*Id.*

73. Ruggie, *supra* note 56.

74. ETOS, MAASTRICHT PRINCIPLES ON EXTRATERRITORIAL OBLIGATIONS OF STATES IN THE AREA OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS 3 (Jan. 2013).

75. For a discussion of this issue, see generally Mares, *supra* note 12.

76. Larry Catá Backer found the extraterritorial obligations strategy “to close a structural regulatory gap—by unleashing the particularized interests of states against enterprises operating within the territories of other states unable or unwilling to conform to the desires of the intervening state” deeply troubling. Larry Catá Backer, *An Institutional Role for Civil Society Within the U.N. Guiding Principles?: Comments on César Rodríguez-Garavito and Tatiana Andía Business and Human Rights: Beyond the End of the Beginning*, BROWN U. (Mar. 10, 2014), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2407787](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2407787). Another scholar, Janet Dine, sought to pre-empt extraterritoriality objections to extraterritorial obligations of home state to regulate parent. Therefore, she proposed that the parent company should be obliged to require adherence at least to local standards and to report why it is necessary to depart from the standards of the home state. See CLAPHAM, *supra* note 19, at 239.

states to take on the risk of being left out of global value chains, as MNEs might redirect their operations as a compliance strategy.

The human rights principle of protecting rightholders through legislative and other measures creates its own implications for hard legalization attempts. Arguably, after the HRC's unanimous endorsement of the UNGPs, the overriding aim in the BHR field is to mobilize all forms of private and public leverage to systematically increase the protection of the rightholder. Ruggie's "principled pragmatism" approach<sup>77</sup> and the polycentric governance outlook was an expression of this principle. Rightholders and those acting in their support can see redirecting value chains away from high risk zones as generally unproductive and therefore desirable only as a last resort or in rather extreme circumstances.

Such unintended effects of legalization of MNE's responsibilities for their indirect involvement in abuses were visible on several occasions. Even the relatively undemanding transparency requirements of the 2010 Dodd-Frank Act (US) on minerals imported from the Democratic Republic of the Congo lead buyers to stop sourcing some of their minerals from the DRC.<sup>78</sup> From a human rights perspective, remaining in a business relationship and exercising leverage is preferable to disengagement, as clearly reflected in the UNGPs<sup>79</sup> and UN Norms.<sup>80</sup>

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77. Ruggie embraced a "principled form of pragmatism: an unflinching commitment to the principle of strengthening the promotion and protection of human rights as it relates to business, coupled with a pragmatic attachment to what works best in creating change where it matters most – in the daily lives of people." *Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, U.N. Doc. E/CN.4/2006/97, ¶ 81 (2006).

78. The EU, as it contemplated legalizing parent company's responsibilities regarding conflict minerals in conflict-torn DRC, noted: "We want to avoid companies disengaging from such regions as an easy way to comply with the Regulation." *Frequently Asked Questions: Responsible Sourcing of Minerals Originating Conflict-Affected and High-Risk Areas: Towards an Integrated EU Approach*, EUROPEAN COMM'N (Mar. 5, 2014), [http://europa.eu/rapid/press-release\\_MEMO-14-157\\_en.htm](http://europa.eu/rapid/press-release_MEMO-14-157_en.htm) (last visited May 22, 2016) (on file with the Washington and Lee Law Review).

79. Principle 19, Commentary, clarifies that the responsible course of action for a company that does not cause or contribute to infringements, is first to exercise leverage, and second to disengage from that abusive suppliers. This

Finally, regarding the legal separation of entities principle, recent noteworthy judgments about parent company liability in tort law reaffirm its significance. The courts in the *Cape* and *Hudbay* cases<sup>81</sup> found or contemplated a parent company's duty of care leading to its liability for a subsidiary's damaging operations. However, in both cases the courts write explicitly and at length that this is not a challenge to the legal separation principle. Far from being a vindication of "enterprise liability" reasoning, the judgements put forward a liability for the parent's own faulty conduct. The policy considerations raised by holding the parent liable were explicitly recognized by the *Hudbay* court.<sup>82</sup> Therefore such judicial developments remain confined to direct involvement situations and have no bearing on indirect involvement situations.

The 2011 OECD Guidelines offer another reminder of the continuing significance of the legal separation principle in BHR. The OECD updated the Guidelines to bring them in line with the UNGPs, but significantly added a new sentence regarding the parent company's responsibilities: "This is not intended to shift responsibility from the entity causing an adverse impact to the enterprise with which it has a business relationship."<sup>83</sup> Clearly, the third legalization baseline has to account for the continued significance of the legal separation principle and the strong policy considerations it embodies.

The legalization baseline can avoid dealing with this principle only if it drastically reduces its ambitions to cover the entire BHR field. Thus, the baseline could confine itself to direct involvement situations (causality and legal complicity) without generating frictions, as the *Cape* and *Hudbay* cases demonstrate. Or it might confine itself to the most severe abuses of human

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sequencing reflects a first order principle of human rights that the rightholders should be supported through all sources of leverage possible. U.N., GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS 21–22 (2011).

80. Comm'n on Human Rights, *supra* note 14, at ¶¶ 18–22.

81. See Skinner, *supra* note 1, at 1834–40 (analyzing these cases).

82. The court indicated that there were "clearly competing policy considerations in recognizing a duty of care" between a Canadian mining company and individuals harmed by security personnel at its foreign operations. *Choc v. Hudbay Minerals Inc.*, 2013 ONSC 1414, para. 75 (Can. Ont. Sup. Ct. J.). For further discussion of this case, see generally Mares, *supra* note 12.

83. OECD, *supra* note 72, at 20.

rights in the manner Skinner proposed, an exception from the principle, justifiable on public policy grounds for gross abuses in high risk countries. But if the legalization baseline aims for comprehensiveness and coverall human rights and direct and indirect involvement situations, it cannot proceed uniformly coercively: for indirect involvement situations, obscuring the policy considerations behind the legal separation principle raises the specter of redirection of value chains which in turn triggers the two other first-order principles and thus together doom a hard legalization proposal.

The analysis so far drew attention to several aspects of context that the third legalization perspective needs to remain mindful of: first, some structural changes in the global economy that defy the simplicity of older views on MNEs as hierarchical organizations headquartered-in-the-West; second, a range of openings in several policy channels with a bearing on BHR; and third, the specificity of the transnational BHR setting among the broader debates around corporate accountability. These three reflections on the context of legalization in BHR further draw on the previous sections that analyzed the evolution of thinking in BHR from the first legalization baseline to the second one drawn by the Ruggie mandate. The third legalization baseline should be mindful of these four aspects in order to remain attuned to the context of BHR in 2016.

The third legalization baseline should not succumb to the same reductionisms displayed by the first legalization baseline: an over-emphasis on coerciveness, parent companies, and unidimensional narrative on the global economy. Instead, the third legalization baseline should reflect a more complex regulatory understanding of legalizing the BHR field. Such understanding has to avoid repeating the reductionisms of the first baseline and find ways to expand beyond the MNE (abandon the moving liability upwards project), beyond the coercive (not discard softer legalization and non-legal strategies of change), and beyond a unidimensional view of the global economy (avoid a narrative that uniformly pitches MNEs and markets, augmented by trade and investment policies, against human rights). Instead, as proposed below, the third baseline should fundamentally manage to valorize softer legalization and other strategies, encompass multiple transnational channels to maximizing

leverage for human rights, and offer a multi-dimensional narrative capable of taking advantage of openings in the global economy. The result would be a baseline that is better attuned to the transnational BHR context, that avoids relapsing in the weaknesses of the first baseline, and that reinforces the strengths of the second baseline.

*B. A BHR Legalization Perspective to Match the Context*

The third legalization baseline could be facilitated by adopting a “two track, multichannel perspective on BHR legalization” that I have outlined elsewhere.<sup>84</sup> In a nutshell, this is an analytical effort that begins by separating two contexts of BHR depending on the direct or indirect involvement of a company in its business partners’ harmful operations. It continues by explaining and justifying the use of different legalization strategies, ranging from the hard and coercive to the softer and more complex policy mixes. The task then becomes about accounting for other transnational channels co-evolving together with the intra-firm channel of MNEs in a narrative of globalization that enables rather than discourages such inquiries and institutional innovations. The next subpart will then caution and re-emphasize that the third legalization baseline cannot be reduced to “just legalize the HRDD” from the UNGPs and the perils such reasoning entails.

1. Regarding the two different settings in BHR—direct and indirect involvement of parent companies—the previous subpart explained how each setting affects the availability of harder or softer legalization strategies. Indeed, indirect involvement cases have difficulties to accommodate hard legalization (either outright bans or holding the parent company liable for harm) because of frictions with three first order principles under the specter that value chains will be redirected. Softer legalization and other non-legal strategies of change are essential then to reduce such frictions.

The HRDD contained in the UNGPs could be legalized in a more or less coercive manner depending on how the regulatory

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84. See generally, e.g., Mares, *supra* note 12; Mares, *supra* note 33.



regime is structured in terms of standards of due diligence, defenses, and sanctions for non-compliance.<sup>85</sup> To avoid and reduce the risk of redirection, and set a “reasonable” burden on the parent company, a less coercive and less demanding HRDD legal regime could be proposed. Furthermore, transparency laws requiring companies to state how they identify and manage their impacts on human rights would represent a softer legalization strategy.<sup>86</sup> Also, other contractual measures and a multitude of incentives could be designed to encourage companies to undertake HRDD. The legalization perspective would still have to figure out how such softer legalization could count in the big picture of securing human rights. What would be the true value of such softer legalization in safeguarding the human rights of those endangered or harmed by affiliates’ operations?

In essence, such softer legalization of HRDD will be an obligation to act rather than remain passive and it will activate some leverage from the parent company, but probably it will still harvest insufficient leverage to ensure that human rights are genuinely secured in business partners’ operations. One will naturally hesitate between the temptation to dismiss such softer legalization of HRDD as inadequate and the difficulty to imagine how a legalistic perspective could valorize the limited leverage created by HRDD.

The two-track perspective herein holds that the value of softer legalization should be regarded differently: for direct involvement cases, softer legalization could well be seen as a stepping stone towards the ideal of coercive, hard legalization

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85. See generally Mares, *supra* note 12 (analyzing the Parliamentary debates in France around the legislative proposal on the “duty of vigilance”).

86. An EU transparency directive advances “a flexible and non-intrusive approach” of a “comply or explain” nature:

Companies may use existing national or international reporting frameworks and will retain their margin of manoeuvre to define the content of their policies, and flexibility to disclose information in a useful and relevant way. When companies consider that some policy areas are not relevant for them, they will be allowed to explain why this is the case, rather than being forced to produce a policy.

EUROPEAN COMM’N, PROPOSAL FOR A DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL AMENDING COUNCIL DIRECTIVES 78/660/EEC AND 83/349/EEC AS REGARDS DISCLOSURE OF NON-FINANCIAL AND DIVERSITY INFORMATION BY LARGE COMPANIES AND GROUPS 2 (Apr. 16, 2013).

measures, and/or as lack of political will from states to hold companies accountable; for indirect involvement cases, softer legalization has an indispensable role in mobilizing leverage of MNEs and in managing frictions with “first order principles” characteristic to transnational BHR. The next step then is to explain how softer legalization would make a difference in indirect involvement situations. The multichannel perspective herein offers a way to begin valorizing softer legalization: such legalization of MNE responsibilities should not be regarded in isolation, but in relation to other transnational channels that are carrying their own leverage for human rights.

2. Regarding the multichannel perspective, the recent developments in different policy fields show the activation of multiple policy channels. The transnational channels mentioned previously<sup>87</sup> increasingly incorporate human rights standards. At the same time, such provisions are not hard legalization given that they do not create new coercive arrangements or stringent remedies for victims. The picture that might well emerge is that softer legalization of MNE responsibilities is merely joined by further soft legalization in other transnational channels. So even with the expended field of vision that the multi-channel perspective delivers, even by keeping abreast of latest developments in multiple channels, an unsatisfactory picture of generalized soft legalization prevails. However, this multichannel perspective goes further: it draws attention to the myriads of cross references and joint programs indicating that channels increasingly align and interact, and direct their combined leverage towards root causes of human rights infringements.

Given that policy channels have potential to align and interact, or actually already exhibit these features, a “roping metaphor” can be used to impress gaining strength out of weaker threads.<sup>88</sup> The challenge for the third legalization baseline is to capitalize on these openings in the global economy and devise a

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87. See generally *supra* Part IV.A; Mares, *supra* note 33 (providing examples from the five policy channels).

88. See Mares, *supra* note 33, at 196 (explaining the “roping” strategy: “a regulatory regime coming to terms with the multiple, though limited, tools in its arsenal and therefore seeking to gather strength by bundling together weak strands (soft legal institutionalization options) into a “rope” that targets root causes of problems rather than their symptoms”).

regulatory perspective on BHR that encompasses inter-state channels and intra-MNE channels and knits a protective network for rightholders.

Such “rope” thinking explains the “policy mixes” rhetoric in CSR and takes seriously the “policy coherence” ambitions that the European Union (EU), for example, has been espousing more and more in the last 10 years. The EU Trade Commissioner is currently having this type of discourse<sup>89</sup> and builds on the 2015 *Trade for All* strategy paper. Also, the EU CSR strategy papers that commenced in 2001 can be taken as a case study of legalization in CSR; in 2011, the EU lost the “voluntary basis” definition of CSR and moved to towards “policy mixes,” which in turn made much more meaningful and credible the multichannel and policy coherence aspects that were already present in the 2006 CSR white paper.

Regarding softer legalization and non-legal developments, there is a jungle of new developments happening in multiple transnational channels that needs to be accounted for and made sense of. The argument herein is that softer legalization can be strengthened through a roping strategy that seeks the alignment and interaction of channels. In examining these new regulatory dynamics, the legalization perspective should pay attention to whether these channels address root causes or not, and whether there is potential or even actual alignment and interaction among channels.<sup>90</sup> It is important to resist reductionism in several guises: assess each channel in isolation from the others, brand ‘soft legalization’ on them, and therefore summarily dismiss them as inadequate for securing human rights. Instead, the interest should be in roping the transnational channels and thus valorizing better soft legalization given the specific of the context (transnational BHR context marked by the three first order principles).

3. Regarding the multi-dimensional narrative, the third legalization baseline should employ a narrative capable to facilitate taking account and advantage of openings in the global

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89. See Cecilia Malmström, *Responsible Supply Chains: What's the EU Doing?*, EUR. COMM'N (Dec. 7, 2015).

90. See generally Mares, *supra* note 33 (providing an in-depth explanation of these arguments).

economy. The openness, interdependencies, and ubiquity of economic exchanges make it slightly harder for public and private decision-makers to avoid scrutiny and responsibility for their decisions' impacts on human rights. Recent policy developments indicate fresh opportunities to harvest leverage for human rights. Also, the Ruggie mandate employed such a multi-dimensional narrative and thus cleared the way to develop a new legalization perspective on BHR.

If the ambition is for a more comprehensive legalization perspective extending beyond the most direct forms of involvement in abuse or beyond worst abuses, the challenge is to come with an understanding not only on how to uniformly curtail corporate power through hard legalization, but how to leverage MNE power in the current transnational context through legalization. The narrative on legalizing BHR should encourage an updated and broad field of vision.

This Article explains soft legalization not as a symptom of a persistent lack of political will to get tough against MNEs, although that clearly can be a factor, but as a way of reducing frictions with first order principles revolving around the redirection of supply chains. This, however, raises questions. Yes, soft legalization creates less friction and can contribute something that is better than nothing, but this in itself will not be enough for victims deprived of access to justice and for companies determined to maximize profits at the expense of human rights. The answer is to account for soft legalization of parent companies' responsibility, not in isolation but in conjunction with other weak threads that could be bundled in a rope to gain strength. Yes, one might retort, however this alignment of channels is not only recent, but also patchy: it is far from a majority of home and host states that purposefully seek to promote human rights through a multitude of channels, especially economic channels promoting trade agreements with human rights safeguards. Furthermore, some developing countries appear to pursue rapid development and seek integration in global markets with minimum sensitivities to human rights. The answer is to admit getting closer to what might be a major and fundamental divergence of development models based on national sovereignty. That, however, is no reason to discard out of hand recent developments in several

policy channels, but on the contrary to seek with even more determination new sources of leverage and new ways of combining them to protect human rights transnationally.

Avoiding the reductionisms of the first baseline is a good start towards designing a multi-dimensional narrative on which the third legalization baseline could build. The second baseline that Ruggie drew reset the state and offered this much needed multi-dimensional narrative. The task now is to resist the temptation to revert to the first legalization baseline; therefore, this article concludes with some cautionary remarks.

### *C. Towards Genuine Complementarity with the UNGPs*

In light of the three first order principles and the specter of MNEs complying by redirecting value chains, using coercion in a hard legalization strategy to make human rights due diligence (HRDD) mandatory is not as straightforward a task as might appear. This problematizes the search and rhetoric for a uniformly coercive regime of holding MNEs accountable for their direct and indirect involvement in abuses. The legalization task is far more complicated in indirect involvement situations. The first legalization baseline was involved in a project of reapplying to MNEs the expansive “respect-protect-fulfill” obligations of states under IHRL, and depicting all kinds of involvement in abuse as “complicity,” and thus fundamentally in moving liability upwards to the parent company. The third baseline will have to avoid repeating this project and will have to look *beyond the MNE* to other transnational channels for indirect involvement situations.

The third legalization baseline should not be blinded by the pursuit of coercive strategies to hold companies accountable. The specificity of the transnational BHR setting requires a different treatment from the domestic corporate accountability setting. The baseline should look beyond the coercive forms of legalization. The third legalization baseline should find ways to valorize softer legalization and non-legal strategies of change and deliver more advanced versions of legal pluralism attuned to the transnational BHR setting. Soft law and non-legal drivers for change are indispensable in the transnational BHR context and genuinely valuable if “roped,” as this can deliver systemic transformation.

The first legalization baseline did not quite succeed to move beyond a rather raw legal pluralism despite attempts to account for soft and hard law, as well as self-regulation and other forms of private governance. As the project was to delocalize and move liability upwards towards the parent company, inherently it would be only coercive regulations that could match and reverse the profit motive and market competition.

The third legalization baseline will have to come to terms with harder and softer legalization strategies and their relative position and justification in the BHR regime. Harder legalization will be confined to certain settings: where there is direct involvement of the parent company (causation and legal complicity) or involvement is indirect but a trading ban or a strict liability regime are justified (dealing with abusive parties involved in worst abuses, such as forced labor).<sup>91</sup> This confined scope for harder legalization is not simply due to home states' legislatures lacking political will to regulate "their" MNEs or lawmakers giving in to powerful MNEs, but mainly because of frictions with three "first order principles." Discussing corporate accountability in the transnational BHR context has to keep distinct direct and indirect involvement situations separate because the legalization options will be different. A narrative about a uniformly coercive legal regime to hold MNEs accountable obscures the fault line between direct and indirect involvement. It would move one closer to repeating the error of the first legalization baseline and disregard the fundamental distinction contained in the UNGPs Principle 13. For keeping the two BHR regimes separated, Skinner's treatment is salutary in the way it explains and carefully delimits the area where a plaintiff-friendly, coercive legal regime is warranted. This coercive strategy, however, evolves in the realm of exception and will not be able to assist in efforts of legalization for the rest of BHR field (less direct involvement of parent companies and less severe infringements of human rights).

The "two track" perspective advanced herein suggests that one should not move liberally between the two regimes of BHR—direct and indirect involvement—by using the banner of "just

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91. See, e.g., 19 U.S.C. § 1907 (2012) (prohibiting the import and sale of goods manufactured by forced labor).

legalize the HRDD” contained in the UNGPs and thus selling the illusion that this legalization can be done as coercively as one wishes for. Indeed, regulating MNEs could be imagined as being merely a battle with the legal separation of entities principle alone; the temptation would be to overrun this principle under the normative power of human rights and “just hold MNEs accountable.” However, as argued herein, in the transnational human rights context, the battle is with three first order principles that also interact if the value chains would redirect in response to hard, coercive legalization of HRDD. Undertones of a unified, coercive strategy of holding MNEs accountable<sup>92</sup> would merely sell an illusion that by advocacy a stringent approach can be expanded further and further to cover indirect involvement situations. Instead, such undertones will backfire by giving ammunition to opponents of corporate responsibilities and legalization to box-in the human rights perspective as fringe, ideological, and not mindful enough of first principles of corporate and state organization. The first legalization baseline was well underway in merging direct and indirect involvement situations and subjecting them to coercive regulations. Overall, the aforementioned undertones generated a unidimensional narrative of the global economy that played its part in sinking the Norms and that has now been overtaken by the multi-dimensional narrative created by the Ruggie mandate.

Broad calls on dealing decisively with MNEs run the risk of obscuring the diversity of involvement (direct or indirect), the diversity of legal sanctioning regimes (ranging from more to less coercive), and the multitude of parallel channels that should be accounted for in treating root causes of tainted value chains. In other words, the sanctioning legal regime should be far from an afterthought raising mere *legal technicalities* (DD defense, reversal of burden of proof, level of sanctions) but should be a

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92. That the gravitational pull is towards the harder end of the continuum (strict liability) results from the natural plaintiff-friendly character of human rights proposals with recent writings advocating an insurance approach. See generally Skinner, McCorquodale, & De Schutter, *supra* note 11, at 96 (recommending that “advocates encourage policy makers to investigate the enactment of such legislation (at the federal or state level) that requires or encourages businesses to obtain insurance that clearly cover claims against the business brought by citizens abroad who have been damaged by corporate actions”).

*foundational aspect* at the very core of how legalization works in transnational BHR. Saying that HRDD should be legalized to escape voluntarism says absolutely nothing about the dangers of redirection of value chains, about what “first order principles” are at play in the transnational BHR context, and about the genuine need for a carefully balanced policy mix needed to prevent redirection and find creative ways to summon maximum leverage for human rights protection. Far from a legal technicality to be sorted out later and subjected to political negotiations, these are aspects at the very heart of the role of legalization in global value chains. Indeed, too heavy a responsibility to act and/or sanction (liable for reparation of harm, for example) risks extinguishing the leverage. The company can redirect its value chain, as the risks are not worth taking. The legalization agenda then has to navigate a course around first order principles of international law, business law, and human rights law that interact in the transnational value chain context.

Moving towards a comprehensive legalization baseline requires us to get clear about the limits of hard legalization when applied to MNEs (get rid of an illusion) and then to get down to a very laborious task of creating a less centralized regulatory regime with multiple moving parts (rope weaker threads into a strong rope). Once the multiple reductionisms performed by the first legalization baseline are put to rest—a narrowing down of BHR to the MNE (intra-firm channel) and to the coercive—a multitude of policy channels developing soft legalization and non-legal strategies of change become visible. As the project is not merely about moving liability upwards to “hold MNEs accountable,” the task becomes one of mobilizing leverage from multiple sources and devising a “roping” strategy to further compound the leverage.

Many corporate accountability proponents are inclined to see soft legalization as inherently inadequate or mere stepping stones towards the coercive law ideal. The result is thus not only a devaluation of such non-coercive drivers, but also a disincentive to account for recent developments in less obvious places such as trade and CSR; they deliver only more soft legalization and voluntarism. For example, labor provisions in FTAs are seen as much weaker than investor protections backed by international arbitration. Indeed, investment and trade regimes continue to be



seen as pro-business and even inherently unfriendly to human rights, and recent developments therein might well be summarily dismissed. The multichannel perspective on BHR impresses the need for an updated and broader field of vision to grasp new openings in the global economy and not dismiss them prematurely. Only then can a roping strategy become visible and viable to deliver systemic change in the transnational BHR setting.

The correction to BHR that Ruggie applied in his work—his trademark of polycentrism promoting a narrower corporate responsibility wrapped in a more compelling narrative of human rights in the global economy—was a salutary development. The third legalization baseline should resist reverting uncritically to the first baseline of legalization drawn in the mid-2000s that has been overtaken both conceptually and by the realities of the global economy. Instead, the challenge is to build on the strengths of the second baseline and complement it with a carefully applied legalization layer. However, the complementarity between the UNGPs and further legalization between the second and third baselines in BHR has been genuine; this article sought to dispel the superficial complementarity inherent in broad calls to “just legalize HRDD,” for a treaty to just turn the UNGPs into law. Proponents of legalization have a choice: seek hard, coercive legalization in limited contexts where it is appropriate and creates minimum frictions with first order principles, or—if one is inclined to leave the comfort of coercive legal solutions and hierarchical ordering—seek a more complex legalization perspective of maximizing leverage for human rights in a way that builds on Ruggie’s polycentrism. It is necessary and possible that the early 2000s are not the last say in what a human rights law perspective has to offer as a comprehensive frame of thinking about corporate responsibilities in times of accelerating economic exchanges.

### *V. Conclusion*

This rejoinder to Professor Skinner’s significant contribution to the BHR field explained its merits in two ways: on the one hand, by noting the careful delimitations of her argument that is

grounded in extensive research and sensible analysis, and on the other hand, by placing her proposal in the broader BHR context, where a debate on how to legalize MNE responsibilities has been on-going for decades.

The bulk of the reflections in this rejoinder relate to this broader context of BHR. I accounted for three baselines that marked the thinking in this field: the first legalization baseline drawn by international human rights lawyers engaged in the UN Draft Norms effort of early 2000s, the second baseline exposing the polycentrism and principled pragmatism of the Ruggie mandate that delivered the 2011 UN Guiding Principles, and the third legalization baseline that is currently being drawn in the post-UNGPs period by those engaged in the 2014 UN process to craft a BHR treaty.

Seeking to absorb the lessons from the two previous baselines, the argument herein was in favor of a legalization perspective on BHR that is both comprehensive and nuanced. I put forward a “two track, multichannel legalization perspective” as an effort to clarify a few aspects: (a) when coercive, harder legalization or softer forms of legalization are appropriate by analytically separating two regimes of BHR in line with the UNGPs Principle 13; (b) why there is a necessity to valorize better softer legalization and non-legal strategies by highlighting three “first order principles” that exist and interact in the transnational value chain context; and (c) how to valorize such softer legalization strategies by employing a “roping” strategy of gaining strength from weak threads and by accounting for recent developments in several channels that potentially or even actually are aligning and interacting to promote human rights.

The third legalization baseline would benefit from reflecting deeply about the reductionisms displayed in the first legalization baseline as well as the current and specific context of transnational BHR. The article highlighted reductionism in several guises that came to define the first BHR baseline and proposed that the third baseline finds ways to expand beyond the MNE (abandon the project of moving liability upwards to the parent company), beyond the coercive (not diminish softer legalization and non-legal strategies of change), and beyond a unidimensional view of the global economy (avoid a narrative that uniformly pitches MNEs, markets, trade, and investment

policies, against human rights). Instead, the third baseline should fundamentally manage to valorize softer legalization and other strategies, encompass multiple transnational channels to maximizing leverage for human rights, and offer a multi-dimensional narrative capable of taking advantage of openings in the global economy.

The third legalization baseline should seek to be attuned to the context of BHR in 2016. Here, the article highlighted four dimensions redefining the context of BHR: structural changes in the global economy, openings in several policy channels with a bearing on BHR, the specificity of the transnational BHR setting characterized by three first order principles, and the Ruggie mandate that reset the BHR field crippled by the reductionisms of the first baseline.

The third legalization baseline should reflect a more complex regulatory understanding of legalization that is better attuned to the transnational BHR context. It should resist tendencies to conflate the two BHR regimes of direct and indirect involvement in abuse, refrain from putting forward coercive, hard legalization solutions as uniformly appropriate and feasible for the entire BHR field, and steer clear from old reductionist tendencies in order to identify new sources of leverage and find new ways to compound leverage. In essence, this rejoinder encourages reflection on the legalization of BHR in tune with mid-2010s realities by resisting an uncritical reversion to the thinking exposed in the first baseline and by seeking to add a legalization layer on the second baseline in a way that ensures genuine complementarity between the UNGPs and the further legalization project.