

# 12 **Protect, Respect, Remedy and Participate: 'New Governance' Lessons for the Ruggie Framework**

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## 1. **Introduction**

John Gerard Ruggie has contributed enormously to the field of international law and public policy throughout his eminent career, both as public law scholar and international public servant. Nowhere is this more evident than in his recent work as Special Representative of the Secretary-General (SRSG) on the issue of human rights and transnational corporations, a United Nations mandate he held from 2005 to 2011.<sup>1</sup> Under that mandate Professor Ruggie and his accomplished team have succeeded in crafting a principles-based conceptual and policy framework for addressing business-related human rights harm that has not only raised the international prominence of human rights responsibilities for business entities, but has done so in terms that have been widely endorsed by a broad range of key stakeholders – especially states and business associations,<sup>2</sup> but also many civil society organisations.<sup>3</sup> Following on the heels of the

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1 UN Doc. E/CN.4/2005/L.87, para. 1 (15 April 2005) (establishing mandate).

2 In June 2008, the UN Human Rights Council unanimously endorsed the PRR policy framework. See UN Doc. A/HRC/8/5. As Ruggie has underscored, that endorsement marked the first time the Council or its predecessor had taken an express policy position on business and human rights. The framework has likewise been endorsed by the world's largest business associations, the International Council on Mining and Metals, the Business Leaders Initiative on Human Rights, and scores of socially responsible investment funds. See J. G. Ruggie, 'Protect, Respect and Remedy: A United Nations Policy Framework for Business and Human Rights', 103 *American Society of International Law Proceedings* (2009) pp. 282, 287.

3 The value of the framework has been recognised by Amnesty International and large numbers of other civil society organisations (CSOs) in individual and joint submissions to the Human Rights Council. See UN Doc. A/HRC/8/NGO/5; Ruggie, *supra* note 2, p. 287.

more coolly-received Draft Norms,<sup>4</sup> such broad endorsement constitutes a significant political and diplomatic achievement for the Special Representative, essential for moving forward the international agenda on business and human rights.

Despite this important achievement, we nonetheless believe that there are serious shortcomings in the SRSG's 'Protect, Respect, Remedy' (PRR) framework. In this chapter, we interrogate the theoretical underpinnings of the PRR framework and query whether a conceptually and operationally more effective framework might have been produced had Ruggie and his team approached the task from a new governance or new accountability perspective.<sup>5</sup> While it is unclear whether Professor Ruggie would consider himself a new governance scholar, it is clear that much of his work closely parallels the emergence of the new governance perspective. Thus, over the same period that he was developing the precepts of social constructivism, embedded liberalism, and the global public domain, 'new governance' was taking form as a framework for understanding modern policy making. As described below, it likewise seeks to articulate a new nonreductionist understanding of institutional change and to document a richer set of actors and processes in global governance.

We recognise that attention to these actors and processes has been an important part of the SRSG's work during the second phase of his mandate.<sup>6</sup> Drawing on

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Nevertheless, a large number of other CSOs, especially from the global south, have been more critical, urging the Human Rights Council to reject the Draft Guiding Principles. See e.g. Statement to the Delegations on the Human Rights Council 2011, 17th Session, Agenda Item 3 (30 May 2011), <[www.fian.org/news/press-releases/CSOs-respond-to-ruggies-guiding-principles-regarding-human-rights-and-transnational-corporations/pdf](http://www.fian.org/news/press-releases/CSOs-respond-to-ruggies-guiding-principles-regarding-human-rights-and-transnational-corporations/pdf)>.

- 4 Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, UN Doc. E/CN.4/Sub.2/2003/12/Rev.2 (26 August 2003). While the UN Human Rights Commission's decision to table the Draft Norms can be understood from a variety of perspectives, much of the criticism focused on claims that the Norms inappropriately sought to extend to corporations many of the same human rights responsibilities that applied to states did so without adequately attending to the differences between the two types of actors or between 'voluntary' and 'non-voluntary' duties, and engaged in conceptual ambiguities and certain doctrinal excesses that extended international law beyond its present scope. See e.g. UN Doc. E/CN.4/2006/97 ("[I]n the SRSG's view the divisive debate over the norms obscures rather than illuminates promising areas of consensus and cooperation among business, civil society, governments, and international institutions with respect to human rights"); J. G. Ruggie, 'Business and Human Rights: The Evolving International Agenda', 101 *American Journal of International Law* (2007) pp. 819–840.
- 5 The term 'new accountability' has been used to describe the parallel trend in the human rights context to the uptake of 'new governance' in the regulatory field. See T. Melish, 'Maximum Feasible Participation of the Poor: New Governance, New Accountability and a 21st Century War on the Sources of Poverty', 13 *Yale Human Rights & Development Law Journal* (2010) pp. 1–133. It is best understood as a type of new governance, and hence is not differentiated from new governance here.
- 6 See UN Doc. A/HRC/RES/8/7 (extending Ruggie's mandate by three years and tasking him with 'operationalising' the framework by providing 'practical recommendations' and 'concrete guidance' to states, businesses, and other social actors on its implementation).

new governance scholarship and Ruggie’s own theoretical work in the area of social constructivism and the global public domain, we nonetheless suggest that the SRSR’s decision to include reference to the duties and responsibilities of only states and businesses in the PRR framework was ultimately a mistake. Explicit inclusion of the participatory roles and responsibilities of civil society organisations and multistakeholder initiatives – recognised as tantamount in importance and complementary to those of states and businesses at all levels of global governance – would have made a stronger conceptual policy framework and, critically, one with more and better opportunities for operationalisation on the ground. Recognition of this important participatory role is particularly critical, we contend, given the nature of the governance gaps, and the misaligned incentive structures that underlie them, that Ruggie himself identifies as the ‘root cause’ of the business and human rights predicament we face today.<sup>7</sup>

New governance scholarship provides important insights into this problem, from both normative and instrumental perspectives. In the following four sections we thus offer a constructive critique of the Ruggie proposal from a new governance perspective. After situating Ruggie’s PRR policy framework within the sociological institutionalist tradition of understanding systemic transformation, we describe the insights that a new governance approach adds to the picture, particularly for filling the governance gaps created by globalisation in the business and human rights context. We then suggest the utility of updating the schema by adding a fourth ‘participation’ pillar as the basis for moving forward and offer elements to support this shift from a dyadic-unidirectional to triadic-multidirectional structure of shared responsibility in the global public domain.

## 2. The Ruggie PRR Policy Framework: A Sociological Institutional Approach to System Transformation

In his work as SRSR, Professor Ruggie has identified his mandate’s primary objective as “reduc[ing] or compensat[ing] for the governance gaps created by globalization” in the area of business and human rights.<sup>8</sup> Such gaps have grown particularly wide over the last several decades as business entities have amassed increasingly expansive rights within the global economic structure. Such rights, together with new technologies and the increasing ease of transborder migration, have allowed business interests to circumvent, override, capture or dis-incentivise state regulatory authority with increasing facility. Correspondingly, Ruggie defines ‘governance gaps’ in terms of the growing gulf “between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences”.<sup>9</sup> Recalling his earlier work on embedded liberalism,<sup>10</sup> he underscores that “markets work optimally only if they are embedded within rules, customs and institutions”, and that, as history teaches us,

7 UN Doc. A/HRC/8/5, p. 3; Ruggie, *supra* note 2, p. 287.

8 UN Doc. A/HRC/8/5, p. 3.

9 *Ibid.*

10 See e.g. J. G. Ruggie, ‘International regimes, transactions, and change: Embedded liberalism in the postwar economic order’, 26 *International Organization* (1982) pp. 379–415.

“markets pose the greatest risks – to society and business itself – when their scope and power far exceed the reach of the institutional underpinnings that allow them to function smoothly and ensure their political sustainability”.<sup>11</sup> “How to narrow and ultimately bridge the[se governance] gaps in relation to human rights”, he concludes, “is our fundamental challenge”.<sup>12</sup>

The PRR framework is the policy prescription Ruggie sets forth for meeting this challenge. It seeks to establish a new common conceptual and policy framework for understanding the human rights duties and responsibilities of state and business actors. By embedding these shared understandings within corporate culture and state practice, he hopes to establish a solid foundation (congruent with the ‘embedded liberalism’ he understands to have characterised state-market relationships in the post-war economic order) for solving the collective action problems that have allowed abusive corporate activities to proliferate. Ruggie ascribes these problems in large part to the deontic ‘confusion’ he believes currently dominates the field, one in which states and businesses remain uncertain about the precise nature and scope of the duties they hold. Such confusion, Ruggie suggests, has led to endless strategic gaming. It has, correspondingly, hindered development of the underlying rules, customs and institutions within business culture and practice necessary to constrain corporate excesses. Such embedded normative and prescriptive institutional understandings are, in Ruggie’s view, essential for achieving each of the dual challenges presented by the business and human rights conundrum: one, ensuring the smooth functioning of competitive markets and business operations and, two, protecting society from their negative externalities.<sup>13</sup> Achieving the appropriate accommodation between these two important policy goals defines Ruggie’s business-friendly normative project.

Significantly, in its construction, the PRR framework closely tracks Ruggie’s intellectual commitments in the field of international relations (IR), a point we believe is important to highlight for understanding both its strengths and weaknesses as a global project. As a scholar, Professor Ruggie has long been a prominent critic of neo-utilitarian or rational choice models of IR, charging that, in their individualistic methodologies and focus on narrow material or economic interests, they fail to take account of the broader cultural, institutional and ideational forms and processes that shape social actors’ outlooks and behaviour.<sup>14</sup> Being an intellectual progenitor of social constructivism, he has thus endorsed a theoretically-informed approach to the study of international relations that focuses on how the identities and interests of individual actors, such as corporate entities or state representatives, are in fact socially constructed in international life.<sup>15</sup> Such construction, he theorises, occurs through

11 UN Doc. A/HRC/8/5, p. 3.

12 *Ibid.* Such gaps “provide the permissive environment for wrongful acts by companies of all kinds without adequate sanctioning or reparation” (*ibid.*).

13 *Cf.* Ruggie, *supra* note 10.

14 J. G. Ruggie, ‘What Makes the World Hang Together? Neo-utilitarianism and the Social Constructivist Challenge’, 52:4 *International Organization* (1998) pp. 855–885.

15 *Ibid.*, p. 856 (“Constructivism is about human consciousness and its role in international life”).

the proliferation of global norms or shared cultural understandings. These shared or ‘intersubjective’ beliefs ultimately become embedded in human consciousness where they construct the interests and identities of purposive actors. Once embedded, such normative understandings become ‘constitutive rules’ or new ‘social facts’ that constitute and prestructure the domains of action within which individuals operate and understand their world. Within these domains, ‘socially knowledgeable and discursively competent actors’ strategically create and recreate international structure, engaging in an active process of interpretation and construction of reality.<sup>16</sup> It is toward the creation of such new constitutive rules in state and business culture that Ruggie’s project is authoritatively directed.

According to Ruggie, such constitutive rules serve two distinct functions at the level of the international polity. At an interpretive level, they may take the form of “international regimes that limit strictly interest-based self-interpretation of appropriate behavior by their members”.<sup>17</sup> At a deontic level, they “may create rights and responsibilities in a manner that is not simply determined by the material interests of the dominant power(s)”.<sup>18</sup> Through the global construction and embedding of constitutive rules in corporate culture, a rule-based ‘logic of appropriateness’ may thus come to supplant a rational interest-based ‘logic of consequences’ as the direct driver of policy action, a development Ruggie views as key to normative success.

Importantly, following from this theoretical understanding of how social change is effectuated in the world, Ruggie’s intellectual attention is focused less on the concrete mechanisms through which the material interests of powerful actors can be leveraged by less powerful actors to promote socially accountable behaviour, than on the more nebulous international socialisation processes through which powerful actors, such as states and businesses, are acculturated into new understandings of socially appropriate behaviour. His focus is “the general process by which actors adopt the beliefs and behavioral patterns of the surrounding culture”.<sup>19</sup> This distinction between ‘social accountability’ dynamics and ‘social acculturation’ processes is critical, we believe, for understanding the nature of the Ruggie project. In particular, it explains why that project is focused so narrowly on the normative clarification of the duties and responsibilities of states and businesses in terms they will find acceptable and consistent with their interests, rather than on the critical role of other non-state actors in holding states and businesses concretely to account for their conduct.

Consistent with the PRR framework, corporate actors should thus have human rights compliance systems in place with five standard components: a formally articulated human rights policy; a commitment to undertaking ‘impact assessments’ as a risk management tool; the integration of the company’s human rights policy into operational practice guides; a way to track performance; and internal redress mechanisms

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16 *Ibid.*, p. 879.

17 *Ibid.*

18 *Ibid.*

19 R. Goodman and D. Jinks, ‘How to Influence States: Socialization and International Human Rights Law’, 54 *Duke Law Journal* (2004) pp. 621-703, 626 (defining ‘sociological acculturation’).

to ensure appropriate remedies where unjustified harm occurs.<sup>20</sup> Likewise, states must have systems in place to address three component areas: more effective policy alignment, both vertically and horizontally; market incentives aimed at promoting a corporate human rights culture; and available systems of human rights redress.<sup>21</sup>

Such compliance systems track closely what states and corporations already do or understand their obligations to be. Provided such compliance systems are in place, the PRR framework suggests that states and corporate entities satisfy their international duties and responsibilities in the business and human rights context. The challenge from the framework's perspective is to ensure that such systems are in fact replicated, standardised and, ultimately, internalised in business and government policies around the globe, a process in which states and businesses appear to be the primary actors. Indeed, although the system script does integrate certain incentive-based elements, the driving impulse behind the framework is one in which states and corporate actors voluntarily conform to the behavioural expectations of the wider culture as a result of the varying degrees of cognitive and social pressures that accompany identification with their global reference group.<sup>22</sup>

To facilitate this process of voluntary uptake and group social conformity, Ruggie engages in several important framing tactics. Perhaps most importantly, he avoids identifying corporate duties as 'legally' mandated or compulsory, preferring to identify them simply as 'responsibilities' or 'social duties' emanating from the 'social license' businesses need to operate.<sup>23</sup> The primary frame of compliance for business, then, is not legal regulation or judicial oversight, but rather shareholder, consumer and societal preferences. Distinguishing corporate 'social responsibilities' from both 'moral' and 'legal' duties, Ruggie reserves the latter exclusively for states, albeit under a reduced set of prescriptions that emphasise market-based promotional measures and the provision of post-hoc, individual-oriented grievance procedures. At the same time, Ruggie organises the framework principally around highly definitionally-malleable policy concepts such as 'due diligence' and 'risk management systems' that are already widely used and accepted in corporate culture and/or state-oriented human rights practice. Both framing tactics are designed to facilitate a familiarity and comfort with the framework that will promote voluntary buy-in and elite engagement with the new international regime, while allowing a large degree of creative ambiguity about what such engagement must in fact entail. The Guiding Principles, though providing some degree of policy direction, allow a similar measure of flexibility and business-determined discretion.<sup>24</sup>

20 UN Doc. A/HRC/8/5 (2008).

21 *Ibid.*

22 Cf. R. Goodman and D. Jinks, 'Incomplete Internalization and Compliance with Human Rights Law', 19 *European Journal of International Law* (2008) pp. 725–748, 726 (describing driving forces behind acculturative mechanisms of international law).

23 UN Doc. A/HRC/8/5; UN Doc. E/CN.4/2006/97.

24 UN Doc. A/HRC/17/31.

While Ruggie and other constructivists affirm that social constructivism is not itself a theory of international relations,<sup>25</sup> Ruggie’s approach nests comfortably within institutional theory. Specifically, it represents an expression of ‘sociological institutionalism’<sup>26</sup> or ‘idealist institutionalism’.<sup>27</sup> These approaches share the central contention of institutional theory that “[w]orldwide models define and legitimate agendas for local action, shaping the structures and policies of nation-states and other national and local actors in virtually all of the domains of rationalized social life”.<sup>28</sup> Unlike other ‘new institutionalisms’ associated with political science and economics, which Ruggie criticises as ‘neo-utilitarian’, they nonetheless do not draw expressly on rational choice theory and material interest as the driver of policy action. Rather, emphasising norms and the political process dynamics that lead to norm emergence, sociological institutionalists attribute the causal behaviour of social actors to their context or to higher-order factors, such as scripts or schemas drawn from shared cultural systems. Standard research designs in the field thus seek to document the effect of the world polity and global norms on national policy and structure, showing how ‘world culture’ reconfigures state and other policies in a range of policy arenas.<sup>29</sup>

Viewed within this broader theoretical frame Ruggie’s PRR project makes particular sense. It is designed to create, in Ruggie’s words, “an authoritative focal point” – a common global script for worldwide diffusion and adoption – on what human rights compliance systems look like within both corporate and state entities. Once approved, that global script would henceforth be made available for global diffusion and, through internationally organised processes of persuasion and socialisation, individual actor mimicry, uptake and internalisation. Thus, Ruggie aims to stimulate an international socialisation process through which the individual components of his global script are embedded as a new set of constitutive rules that define and prestructure the scope

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- 25 Ruggie, *supra* note 14; M. Finnemore and K. Sikkink, ‘Taking Stock: The Constructivist Research Program in International Relations and Comparative Politics’, 4 *Annual Review of Political Science* (2001) pp. 391–416.
- 26 See M. Schneiberg and E. Clemens, ‘The Typical Tools for the Job: Research Strategies in Institutional Analysis’, 24:3 *Sociological Theory* (2006) pp. 195–227 (defining ‘sociological institutionalism’).
- 27 L. Fransen, ‘Competition and Convergence in Private Governance: A Political-Institutional Analysis of Transnational Labour Standards Regulation’, in *Governance: An International Journal of Policy, Administration and Institutions* (forthcoming 2011) pp. 1–40 (defining idealist institutionalism).
- 28 J. W. Meyer *et al.*, ‘World Society and the Nation-State’, 103 *American Journal of Sociology* (1997) p. 145.
- 29 Schneiberg and Clemens, *supra* note 26; M. Finnemore, ‘Norms, Culture and World Politics: Insights from Sociology’s Institutionalism’, 50 *International Organization* (1996) pp. 325–347; Meyer *et al.*, *ibid.*, pp. 144–181; J. W. Meyer and M. T. Hannan (eds.), *National Development and the World-System: Educational, Economic and Political Change, 1950–1970* (Univ. of Chicago Press, Chicago, 1979). Countertrends nonetheless appear within ‘critical constructivism’. See M. Barnett and K. Sikkink, ‘From International Relations to Global Society’, *The Oxford Handbook of International Relations* (2008) pp. 62–83 (citing examples).

of socially-acceptable corporate conduct. When this occurs, the 'life-cycle' of the underlying norms will have been completed, having passed through the iterative stages of persuasion, socialisation and ultimately internalisation.<sup>30</sup> The resulting taken-for-granted quality of the underlying norms would henceforth address the misaligned incentive structure and collective action problems that Ruggie currently attributes to the absence of consensus regarding appropriate policy forms and outcomes. Like the social consensus around business conduct that Ruggie has identified in his work on 'embedded liberalism' in the post-war economic era, such a consensus would resolve the modern governance gaps that define today's business and human rights context.

In this regard, consistent with social constructivist approaches more generally, the PRR framework does not attempt to make claims about the content of the relevant social structures or the nature of the agents at work in these processes.<sup>31</sup> It merely assumes or understands that these complex processes of persuasion and socialisation take place somewhere and somehow. The framework can thus best be seen as a policy expression, not of any particular set of mechanisms for causing social change, but rather of a particular social theory about the nature and causal direction of social change: that it is shaped primarily by ideational factors rather than material ones, and that the most important of these are 'intersubjective' beliefs widely shared across world culture.<sup>32</sup>

This theoretical approach is undoubtedly a necessary complement to neorealist and neoliberal approaches to international relations that have traditionally focused too heavily on materialist perspectives and individualist methodologies. Social constructivism has correspondingly played an important role in explaining worldwide institutional change that cannot be accounted for exclusively or even primarily by reference to rational material self-interest of distinct social actors or to the effects of coercion or persuasion-based models alone.<sup>33</sup> This is particularly true with respect to human rights norms.<sup>34</sup> Nevertheless, constructivist or sociological institutionalist approaches suffer from serious shortcomings when ideational factors become the exclusive or near exclusive focus of policy analysis or regime design, letting the important insights of economic institutionalism and the 'logic of consequences' recede to the margins. By failing to take more explicit account of the actual mechanics of and actors involved in

30 M. Finnemore and K. Sikkink, 'International Norm Dynamics and Political Change', 52 *International Organization* (1998).

31 *Ibid.* (discussing social constructivist approaches).

32 Ruggie, *supra* note 14; Finnemore and Sikkink, *supra* note 30.

33 Goodman and Jinks, *supra* note 22, pp. 725–727 (defending acculturation-based models, both descriptively and empirically, on the ground that neither coercion- nor persuasion-based accounts of social influence explain the twin observed patterns of structural isomorphism and decoupling that exist in the world with respect to states' embrace of international law norms).

34 T. Risse *et al.* (eds.), *The Power of Human Rights: International Norms and Domestic Change* (Cambridge University Press, Cambridge, 1999); O. Hathaway, 'Do Human Rights Treaties Make a Difference?', 111 *Yale Law Journal* (2002) pp. 1935–2042.

effectuating social change, we believe the PRR project has drifted dangerously in this direction.

In this regard, there are several discomfiting aspects of the Ruggie PRR framework and approach, two of which we highlight. Both spring from the framework’s basis in acculturation-based models of social change and corresponding overemphasis on promoting a ‘logic of appropriateness’ from above, while paying insufficient attention to the operational structures and mechanics necessary to create a corresponding ‘logic of consequences’ from below. While certain scholars defend this focus on the ground that acculturative processes may indirectly promote opportunities for the emergence of domestic-level social movements,<sup>35</sup> we believe that any regime design that fails to take such essential social actors into specific operational account is a deficient and incomplete one.

The first concerning aspect of the Ruggie PRR framework lies in its central focus on the diffusion of a singular global human rights script as the solution to the lack of consensus around appropriate policy forms in the corporate accountability context. There are two principle risks associated with this search for a definitive authoritative centre, especially with its accompanying trend toward orthodoxy and institutional isomorphism. Most directly, an overemphasis on institutional isomorphism as the basis of human rights compliance tends inevitably to lead to strategically calculated and formalistic uptake practices, extensively described in the literature on ‘decoupling’<sup>36</sup> and ‘creative compliance’.<sup>37</sup> This phenomenon, popularly known as ‘paper compliance’ or ‘greenwashing’, has been widely observed in the corporate accountability context and is the principle criticism lodged against acculturation-based models of social influence. In his recent study of private governance arrangements in the garment industry, for example, Luc Fransen has documented how companies have used formal policy uptake to avoid exposure by activists, while failing to engage in the more difficult and expensive process of actual implementation.<sup>38</sup> He has also demonstrated that while corporate-led private governance initiatives have achieved a high level of policy convergence, they have generally done so by defining requirements in ways that require very little actual change in corporate operations. These decoupling processes are also common in other fields,<sup>39</sup> although they can be countered by effective competitor programmes and social monitoring.<sup>40</sup>

35 Goodman and Jinks, *supra* note 22, pp. 733–743.

36 J. W. Meyer *et al.*, ‘World Society and the Nation-State’, 103 *American Journal of Sociology* (1997) p. 144; Goodman and Jinks, *supra* note 19, pp. 651–655.

37 C. Whelan and D. McBarnet, *Creative Accounting and the Cross-Eyed Javelin Thrower* (John Wiley and Sons, New York, 1999).

38 Fransen, *supra* note 27.

39 See sources in *supra* note 36 (citing examples).

40 See e.g. W. Laufer, ‘Social Accountability and Corporate Greenwashing’, 43:3 *Journal of Business Ethics* (2003) pp. 253–261; A. Lubitow and M. Davis, ‘Pastel Injustice: The Corporate Use of Pinkwashing for Profit’, 4:2 *Environmental Justice* (2011) pp. 139–144; C. Marquis and M. Toffel, ‘The Globalization of Corporate Environmental Disclosure: Ac-

At a different level, an overemphasis on an authoritative centre allows for certain ‘strategies of resistance’ from businesses wishing to avoid real change. An example of this phenomenon is documented in the important fieldwork-based contribution in this volume by Haines, MacDonald and Balaton-Chrimes, who detail the justificatory strategies of businesses in the Indian tea sector for failing to comply in practice with human rights safeguards that they nonetheless steadfastly affirm their adherence to and compliance with as universal norms.<sup>41</sup> In the absence of institutionally-recognised mechanisms for affected communities and other civil society monitors to contest the empirical basis of such justificatory narratives and to assert their own understandings of how community rights are affected, it is difficult to expect the PRR framework, as a universalising global script, to lead to anything but suboptimal localised implementation. It is for this reason that we disagree with Sullivan and Hachez’s contribution in this volume, in which they reproach the Ruggie project not for its inattention to civil society participation processes, but rather because it does not create a more detailed standardised check-list for corporations to voluntarily adhere to.<sup>42</sup> Again, in the absence of a role for participatory verification, monitoring, assessment and reconstruction by affected stakeholders themselves, reliance on such standardised checklists for uniform compliance is unlikely to facilitate much more than paper compliance and other shallow or superficial institutional reform efforts.

In this latter respect, an overemphasis on individual mimicry of standardised global forms tends likewise to lead to decontextualised systems that are unresponsive to localised problems or particular community needs. This is particularly problematic in the human rights context, where human rights requirements must be defined not by standardised texts, but according to the varied conditions and evolving perspectives of affected communities.<sup>43</sup> Although Ruggie cautions that the framework is not intended to serve as a “tool kit, simply to be taken off the shelf and plugged in”,<sup>44</sup> there is no serious attempt to specify how due diligence and other requirements should be structured to be able to flexibly and responsively take account of varying contexts and the multiple voices that may be affected by corporate conduct in discrete circumstances.<sup>45</sup> The remedy pillar, though nominally established to achieve this end, is inadequate for ad-

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countability or Greenwashing?’, *Harvard Business School Working Paper* No. 11-115 (2011), <[papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1836472](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1836472)>.

41 See the chapter by Haines, MacDonald and Balaton-Chrimes in this volume.

42 See the chapter by Sullivan and Hachez in this volume.

43 See generally B. Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance* (Cambridge University Press, Cambridge, 2003); M. Mutua, ‘Standard Setting in Human Rights: Critique and Prognosis’, 29 *Human Rights Quarterly* (2007) pp. 547–630 (critiquing lack of third world perspectives in mainstream human rights standard-setting processes).

44 UN Doc. A/HRC/17/31 (2011), para. 15.

45 Although Ruggie’s 2011 Guiding Principles do recognise the importance of transparency and participation in due diligence reporting, these aspects remain largely undeveloped and are not structured in a way so that they can be invoked as rights. *Ibid.*

addressing the varied and multiple means through which civil society actors participate in the construction, contestation and reconstruction of both local and global norms.

A second troubling aspect of the PRR framework, closely related to the first, is its embrace of an understanding of systemic transformation that is predominantly unidirectional in causation. That is, individual actors in the world polity adopt new rules, customs and institutions *in response to* a global framework. While political process dynamics are key to sociological institutional theory,<sup>46</sup> the causal imagery tends to move in one primary direction: from ‘higher’ international frameworks to ‘lower’ individual actors. This is true even as the precise mechanisms through which that unidirectional causality occurs are rarely described in the theory-based literature.<sup>47</sup> This leads to several important blind-spots, each apparent in the PRR framework. First, it overlooks the ways that global norms are constituted and reconstituted from below – a process particularly characteristic of human rights claims, which inevitably arise as historically- and contextually contingent challenges to power.<sup>48</sup> Similarly, it fails to identify feedback effects from local agents onto global structures. In these ways, sociological institutional approaches can, in Finnemore and Sikkink’s evocative words, “begin to treat international norms as a global ‘oobleck’ that covers the planet and homogenizes us all”.<sup>49</sup> Such approaches tend, correspondingly, to undervalue the critical role of local actors in both creating relevant human rights meaning in accordance with local values, mores and conditions and, equally important, in holding actors accountable to such meanings in locally effective and meaningful ways. They tend likewise to be insufficiently attentive to the importance of dynamic learning processes, competitive experimentalism, and how ‘best’ and ‘worst’ practices at the individual actor level must be tracked, systematised and disseminated for global learning and responsive adaptation in distinct local contexts. All of these processes are necessarily multidirectional, involving multiple stakeholders in constantly evolving communication, contestation and informational exchange.

This is not to say that sociological institutional or acculturation-based approaches to social influence are irrelevant to the design of effective international human rights regimes. To the contrary, we believe that they are critical, especially in understanding

46 Ruggie, *supra* note 14.

47 Exceptions appear in the works of Keck, Sikkink, Finnemore, Roppe and Risse, who have analysed the techniques used by activist groups, including strategic use of information, symbolic politics, leverage and accountability politics, issue framing and shaming. See e.g. M.E. Keck and K. Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics* (Cornell University Press, Ithaca, 1998); T. Risse *et al.* (eds.), *The Power of Human Rights: International Norms and Domestic Change* (Cambridge University Press, Cambridge, 1999). Such scholars nevertheless tend to recognise the limitations of social constructivist theories, especially in their more recent work, and the strengths of alternative theories in explaining evolving institutional behavior. See e.g. Barnett and Sikkink, *supra* note 29, p. 63.

48 See e.g. E. Kamenka, ‘Human Rights, Peoples’ Rights’, in James Crawford (ed.), *The Rights of Peoples* (Clarendon, Oxford, 1988); Rajagopal, *supra* note 43.

49 Finnemore and Sikkink, *supra* note 25, p. 397 (citing Dr. Seuss’s 1970 *Bartholomew and the Oobleck*).

the multiple causal pathways by which diverse actors come to respect international human rights norms. However, as even sociological institutionalism's most ardent defenders acknowledge, acculturative forces do not inevitably increase respect for human rights norms; indeed, they may produce highly negative results.<sup>50</sup> Designing a human rights regime exclusively or even primarily around such forces can thus be short-sighted and counterproductive. Rather, optimal human rights regime design requires that express attention be given to the multiple and evolving sets of actors and institutions that can take up global human rights scripts to press for compliance within domestic political and legal systems, using a variety of persuasion- and coercion-based incentive systems. It requires attention not only to interest discovery among elite players, but also to interest conflict and how less powerful actors seek to narrow power asymmetries through organised mechanisms of social leverage.

Clearly missing from the PRR framework, then, is concerted attention to *how* processes of socialisation and institutional change in fact occur. Through what mechanisms or channels? Which actors are most important in such processes and why? While other social constructivist theorists, such as Sikkink, Finnemore, Risse and Keck, have spent significantly more time unpacking these processes of social change, especially with regard to the critical role played by civil society in global governance,<sup>51</sup> attention to ensuring the on-the-ground operation of such processes is notably absent from Ruggie's PRR framework. This is true even as Ruggie in his scholarly work has himself broadly observed the rising role of new actors in reconstituting the 'global public domain'.<sup>52</sup>

In this respect, we remain unconvinced by framework supporters who argue that this participatory governance concern is effectively addressed by the 'remedy' pillar. Not only was that pillar hard-fought by the human rights community, which lobbied throughout the SRSG's mandate for more attention to mechanisms of civil society-directed accountability processes,<sup>53</sup> the remedy pillar is one that focuses on post-hoc, individual-oriented grievance procedures within state and corporate institutions. It is also one directed primarily at breaches of 'legal' rules, substantially limiting its direct application to the 'social duties' of businesses. Although critically important, such judicial and non-judicial 'remedial' mechanisms are only one set of tools in a much

50 R. Goodman and D. Jinks, 'Incomplete Internalization and Compliance with Human Rights Law: A Rejoinder to Roda Muchkat', 20 *European Journal of International Law* (2009) pp. 443–44 ("Acculturation often produces negative results such as dangerous national security practices, dysfunctional environmental laws, exorbitant administrative bureaucracies, and rights-based policies that are poorly suited to local needs"). As such, Goodman and Jinks disavow that "acculturation is the ideal or preferable social mechanism around which to design international human rights regimes", even as it should be "part of the larger conversation". Goodman and Jinks, *supra* note 22, note 10.

51 See *supra* note 47.

52 J. G. Ruggie, 'Reconstituting the Global Public Domain: Issues, Actors and Practices', 10 *European Journal of International Relations* (December 2004) pp. 499–531.

53 Interview with Irene Khan, Secretary-General of Amnesty International from 2001–2009 (May 2011).

broader toolbox of strategies and tactics increasingly used by non-governmental organisations (NGOs) and other civil society groups for holding state and corporate actors to account for human rights harm.<sup>54</sup> Such strategies are widely recognised as key to promoting actual on-the-ground change in corporate conduct, especially in line with new governance approaches. The failure to recognise these additional strategies and actors directly within the PRR framework, we contend, is a serious shortcoming in its construction.

The foregoing operational limitations are, we suggest, not merely a ‘pragmatic’ or ‘diplomatic’ concession to promote state and business compliance (as many commentators suggest), but also a direct reflection of the framework’s theoretical underpinnings. As discussed, those underpinnings are grounded in the understanding that, through complex processes of elite socialisation around group norms, rational interest-based calculations of individual actors may come to take a backseat to embedded understandings of appropriate social conduct. This assumption is nonetheless made without addressing precisely *how* that process is to be effectuated, especially given the SRSO’s explicit recognition of the governance gaps that have heretofore made state regulation and voluntary corporate social responsibility initiatives by themselves ineffective at promoting change. As a result, the Ruggie PRR framework pays insufficient attention to the need for new kinds of actors and accountability systems capable of leveraging the material interests of corporate actors and aligning their material and extra-material interests. This may be its greatest weakness. While we agree with Ruggie that norms and reputation matter for interests, and often matter greatly, there is a need in the PRR framework for greater attention to creating mechanisms that can ensure that a ‘logic of consequences’ (economic institutionalism) accompanies the ‘logic of appropriateness’ (sociological institutionalism) approach of Ruggie.<sup>55</sup>

New governance scholarship, which relies on both sociological and economic models of institutionalism, provides important insights into each of these key limitations in the Ruggie PRR framework.

### **3. A New Governance Perspective on Institutional Transformation: Recognising and Legitimising the Roles and Responsibilities of New Actors and Processes**

‘New governance’ scholarship reflects a growing recognition that the assumptions of an authoritative centre and unidirectional causation do not reflect some of the most important lessons of regulatory governance gleaned in the past several decades. New governance approaches have, in this sense, emerged as a corrective to prior models of regulatory governance that assumed that legalised compliance with uniform rules generated and enforced from the centre was the most effective way of regulating public

54 Melish, *supra* note 5, pp. 55–59, 68–110.

55 Accord Goodman and Jinks, *supra* note 19, p. 444 (citing ambition of scholarly project as contributing to the development of an integrated theory of human rights regime design – one that, by definition, accounts for all mechanisms of social influence, including acculturation, persuasion, coercion and managerialism).

and private conduct. Emanating from the conviction that centralised regulatory control too often stifles innovation, competition, creativity, economic efficiency and local responsiveness, new governance approaches reject that view. They draw on a more varied set of actors and more varied set of techniques that emphasise regulatory fit, adaptability, efficiency, competition, stakeholder negotiation and continuously revised performance measures. They correspondingly tend to deemphasise reliance on formal rules, investing a more decentralised, often increasingly non-governmental set of agents with substantial discretion in determining the means through which goal-specific performance indicators will be met.

At the same time, new governance models seek to incorporate new mechanisms of stakeholder participation and public accountability as a way to retain democratic legitimacy and ensure community responsiveness. A principal way of doing so is through incentive and result-based performance evaluation systems that impose information-generation and disclosure requirements and reward entities for meeting performance benchmarks. It is expected that material incentives, together with stakeholder-accessible performance evaluation, will lead to greater local competition, the scaling up of best practices, and the potential for constant renewal and responsiveness to changing circumstances and the diversity of local needs. New governance regimes thus seek to redefine state-society interactions, with multiple stakeholders assuming traditional roles of governance.

Variouly described in the literature as ‘reflexive law’, ‘collaborative governance’, ‘decentred regulation’ and ‘democratic experimentalism’, among other descriptors,<sup>56</sup> new governance approaches are highly influential in almost all fields of governance, at both national and global levels. International financial institutions and national civil service sectors, for their part, embrace the model under a ‘new public management’ rubric, while the European Union (EU) applies it as a supranational governance tool through the Open Method of Coordination.<sup>57</sup>

Indeed, in almost every field of governance, many types of actors play increasingly important authoritative roles, as is described in more detail below. It is now likewise understood that effective governance institutions must be responsive and dynamic: they must be committed to the transparent production and disclosure of information, learn from experience, listen to stakeholders, and adapt to particular circumstances. To accommodate these basic insights, new governance scholarship often lists a broad set of institutional changes that are reframing how governance structures are, can be, and should be exercised in the 21st century. These include: increasing decentralisation and subsidiarity; growing roles for non-state actors; widespread stakeholder participation; growing use of flexible and adaptable mechanisms such as information production and sharing duties; soft law, framework agreements, voluntary standards and open coordination; and stress on dynamic governance mechanisms such as compe-

56 Others include ‘soft law’, ‘outsourcing regulation’, ‘reconstitutive law’, ‘revitalizing regulation’, ‘regulatory pluralism’, ‘meta-regulation’, ‘negotiated governance’, ‘responsive regulation’ and ‘post-regulatory law’.

57 For citations, see Melish, *supra* note 5, pp. 32–33, notes 131–133.

tion, organisational management systems, performance monitoring, experimental implementation mechanisms, and the like.<sup>58</sup>

Discussion of these new governance approaches is useful for understanding the limitations of the Ruggie PRR framework and how it might conceptually and operationally be enhanced. This is particularly true with respect to three core components of new governance regimes: (1) the critical role played by civil society actors in systems of global governance; (2) new and innovative processes for holding a broader set of social actors to account for achieving or failing to achieve distinct sets of social goals, targets or benchmarks; (3) and the necessity of institutionalising systems and processes of orchestration for the facilitation of cross-sector social learning and information exchange. We address each in turn.

### 3.1. ***New Actors, Decentred Processes and Widespread Stakeholder Participation***

While it was once assumed that states played the exclusive, or at least controlling, role in governance systems, it is increasingly recognised that global governance is today conducted through the operation of ever more dense and interconnected networks of actors. These actors include not only states and businesses, but also all levels of civil society and civil society organisations (CSOs) – from individual norm entrepreneurs, to grassroots community-based organisations, to issue- or identity-motivated NGOs, to religious groups, labour organisations, and consumer or credit associations, on to a wide range of transnational advocacy networks and multistakeholder initiatives. Often working closely with intergovernmental organisations and industry networks, such actors have become increasingly active in every facet of regulatory policy, from standard setting and lawmaking through adjudication, monitoring and enforcement, at local and global levels alike. As their respective interests, networks and capabilities continuously evolve, the roles they play can vary significantly over both time and space. Their involvement has in fact become so important to the production and revision of multilayered governance structures that international law and governance institutions are recognised to “increasingly become part of the problem if they cannot somehow adapt to this current reality”.<sup>59</sup>

58 See e.g. O. Lobel, ‘The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought’, 89 *Minnesota Law Review* (2004) pp. 342–470. For applications in the transnational sphere, see e.g. K. W. Abbott and D. Snidal, ‘Strengthening International Regulation Through Transnational New Governance: Overcoming the Orchestration Deficit’, 42 *Vanderbilt Journal of Transnational Law* (2009) pp. 501–578; E. Meidinger, ‘Private Import Safety Regulation and Transnational New Governance’, in C. Coglianese, A. Finkel and D. Zaring, *Import Safety: Regulatory Governance in the Global Economy* (University of Pennsylvania, Philadelphia, 2009) pp. 233–256; Melish, *supra* note 5; J. Scott and D. Trubek, ‘Mind the Gap: Law and New Approaches to Governance in the European Union’, 1 *European Law Journal* (2002) pp. 1–18.

59 M. L. Schweitz, ‘NGO Participation in International Governance: The Question of Legitimacy’, 89 *Proceedings of the Annual Meeting (American Society of International Law), Structures of World Order (April 5–8, 1995)*, pp. 415–420.

New governance regimes rely heavily on such actors for the legitimacy, efficiency and accountability of their operations. Indeed, traditional state-centred regulatory systems have already manifested a decades-long movement toward expanded public participation, deliberation, consultation and transparency; so it is not surprising that increasingly pluralistic regulatory systems would adopt similar practices. The primary traditional justifications have been efficacy and legitimacy: (1) the more information and feedback a regulatory programme garners, the more likely its activities are to be fitting and effective;<sup>60</sup> (2) the more regulated parties and beneficiaries participate in and understand a regulatory programme, the more likely they are to view it as appropriate and legitimate.<sup>61</sup> CSOs bring essential knowledge and expertise to global problem-solving and, by relying on their global networks and communication strategies, they are able to amplify local voices, spotlight problems and spread awareness in ways scarcely imaginable a generation ago.

In this way, CSOs likewise play essential accountability roles, holding other social actors, both public and private, to their social, policy and legal commitments and to other community standards of socially acceptable conduct. Accountability implies, in this regard, “that some actors have the right to hold other actors to a set of standards, to judge whether they have fulfilled their responsibilities in light of these standards, and to impose sanctions if they determine that these responsibilities have not been met”.<sup>62</sup> Drawing on these core elements – especially those of information transparency, social actor responsibility, performance measures and social sanction – civil society groups have increasingly insisted on the right of communities most affected by human rights misconduct to hold other community members and social actors to a set of rights-based performance standards related to those rights, to independently monitor and assess compliance with those standards, and to impose some form of penalty or sanction where performance is objectively inadequate or where justificatory or process requirements are not met.<sup>63</sup> To establish the normative and institutional framework within which to do this, such movements draw directly on the substantive and procedural standards of international human rights law, particularly the legal process and accountability relationships it creates between distinct social actors, both public and private.<sup>64</sup>

They do this through a variety of strategies. They collect and channel information, lobby and advocate, educate and set agendas, participate in dispute resolution, implement policies and programmes, collaborate in policy and lawmaking, monitor and assess conduct through impact assessments, fact-finding and reporting, and impose positive and negative incentives on behaviour through certification, grading and

60 E. J. Freeman, ‘Collaborative Governance in the Administrative State’, 45:1 *UCLA Law Review* (1987).

61 T. Tyler, *Why People Obey the Law* (Yale University Press, New Haven, 1990).

62 R. W. Grant and R. O. Keohane, ‘Accountability and Abuses of Power in World Politics’, 99 *American Political Science Review* (2005) p. 29.

63 Melish, *supra* note 5, pp. 57–58.

64 *Ibid.*

auditing strategies – strategies that rely increasingly on social and consumer power in the marketplace.

Perhaps the most striking expansion in non-state activity has been in performance monitoring and enforcement. Thus, civil society actors play a critical role in developing indicators and benchmarks capable of measuring priority concerns, assessing social actor conduct against those measures, and widely publicising successes and failures in meeting appropriate benchmarks. Such strategies have been particularly important in the human rights context, where civil society actors engage in ‘shadow reporting’ under human rights treaties to independently assess government conduct in accordance with local experience and otherwise seek to hold a wide range of actors to account for conduct that fails to accord with minimum standards of socially-appropriate conduct.

At the same time, provisions for ‘citizen suit’ enforcement have proliferated in many fields of law, from environment to competition, in both common and civil law systems.<sup>65</sup> The rise of non-governmental enforcement mechanisms has been driven in many ways by resource concerns, but also by a desire to provide a check on state discretion. Governments simply cannot deploy sufficient enforcement resources across the broad sweep of activities that must be regulated by modern governance systems. They have learned to partly ameliorate this problem by authorising enforcement suits by non-governmental actors and offering incentives (either reimbursement of litigation costs or portions of penalties) for successful suits. This has the twin benefits of forcing violators to internalise a larger proportion of total enforcement costs and removing those costs from state budgets. Many private enforcement provisions are also driven by an implicit or explicit desire to limit the absolute discretion of government officials over regulatory enforcement. By creating an alternative enforcement mechanism, they create an additional accountability mechanism that can lead to increased predictability and legitimacy of the system.<sup>66</sup> In different situations, non-governmental enforcers can be civil society groups, business associations or even competitors.<sup>67</sup>

Non-state actors have also become very active in the development, promulgation and adjudication of standards. The modern version of this practice is often traced back to the founding of the International Organization for Standardization (ISO) after World War II to define transnational product standards to facilitate trade, although there are earlier examples.<sup>68</sup> The ISO system provides not only for the development of standards outside governmental processes, but also for their adjudication. That is, in-

65 E.g. B. Boyer and E. Meidinger, ‘Privatizing Regulatory Enforcement: A Preliminary Assessment of Citizen Suits Under Federal Environmental Laws,’ 35 *Buffalo Law Review* (1985) pp. 834–965; S. Casey-Lefkowitz *et al.*, ‘The Evolving Role of Citizens in Environmental Enforcement’, Fourth International Conference on Environment and Enforcement (Chiang Mai, Thailand, 1996), <[www.inece.org/4thvol1/futrell.pdf](http://www.inece.org/4thvol1/futrell.pdf)>.

66 I. Ayres and J. Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford, New York, 1992).

67 *Ibid.*, p. 158.

68 E.g. standards for organic food developed in Germany in the 1920s and standards for electrical products before then. See e.g. Meidinger, *supra* note 58, pp. 233–256.

dependent non-governmental actors, often contracted by either a producer or a buyer, determine that products and manufacturing processes conform to the standards. They thus provide the same kind of ‘trust’ in the producer that a government regulatory approval might provide.

Examples of regulation by non-state actors abound across industries and issue areas.<sup>69</sup> A prominent example is the Forest Stewardship Council, which certifies sustainable forestry around the world. It is a multi-stakeholder initiative comprised of social, economic and environmental chambers that provides its own mechanisms for setting global, national and subnational forest management standards, as well as for certifying compliance and sanctioning non-compliance.<sup>70</sup> The standards incorporate global, national and local expectations for proper forest management, including human rights and environmental ones. The sanctioning process is largely driven by independent CSOs that monitor producer behaviour and seek to leverage transnational product chains and consumer expectations to promote adoption and compliance by firms.<sup>71</sup>

While non-governmental standards typically begin as ‘voluntary’, they often become effectively compulsory through incorporation in powerful market chains. Moreover, it is not uncommon for state legislatures and agencies to adopt and make them legally compulsory.<sup>72</sup> Thus, many modern governance standards are produced, promulgated and implemented by varying combinations of private and governmental actors. This expanded panoply of actors, however, is only part of the story. Equally important is the growing reliance on new governance processes.

### 3.2. **New Governance Accountability Processes**

The incorporation of multiple kinds of actors into legislative, adjudicatory, monitoring and enforcement roles has been accompanied by a growing focus on participatory and process-oriented dimensions of governance. This development corresponds to an understanding that compliance with fixed rules applied uniformly across contexts can lead to suboptimal outcomes. Not only does it frequently fail to take localised circumstances into account, but it may fail to draw on community resources and expertise in ways that promote democratic control and legitimacy. This is particularly true given the contextual and evolving nature of problems faced by distinct communities, requiring often unique and targeted solutions that one-size-fits-all solutions determined from above generally cannot fully accommodate. Such participatory and process-oriented approaches likewise prioritise mechanisms for policy learning, adaptation and constant improvement in result-oriented goals.

69 Abbott and Snidal, *supra* note 58 (governance triangle).

70 E. Meidinger, ‘Multi-Interest Self-Governance through Global Product Certification Programs’, in O. Dilling, M. Herberg and G. Winter (eds.), *Responsible Business? Self-Governance in Transnational Economic Transactions* (Hart, Oxford, 2008) pp. 259–291.

71 M. Conroy, *Branded: How the Certification Revolution is Transforming Global Corporations* (New Society, New York, 2007).

72 H. Schepel, *The Constitution of Private Governance: Product Standards in the Regulation of Integrating Markets* (Hart Publishing, Oxford, 2005).

One of the most important of these participatory processes is performance monitoring.<sup>73</sup> Following the maxim that it is not possible to manage what is not measured, the monitoring of practices and impacts has become a near universal criterion for new governance. Performance monitoring in this regard entails several steps. First, it requires that an entity or community determine the goals of positive performance. It then requires the establishment of a set of indicators to measure whether progress is or is not being made toward those performance goals. By determining a baseline and establishing a set of benchmarks or targets to indicate the level of performance expected by a given time, performance monitoring provides a mechanism by which distinct social actors can assess other social actors' relative success in making improvements in performance measures, such as the enjoyment of human rights for particularly affected communities.<sup>74</sup>

In this regard, information transparency and disclosure is essential. It provides the basis for a wide range of interested actors to call attention to unjustified backtracking with respect to priority goals or policies, arbitrary or discriminatory impacts, or insufficient progress in achieving locally agreed benchmarks or other performance goals. It likewise encourages the timely identification and assessment of such problems as they arise, facilitating social input as to their causes and the generation of community-based ideas for how distinct policies may be reconstructed or redirected to better serve human rights ends. Under this approach, less priority may be given to standardised policy uptake or to the precise means chosen to achieve any particular socially-sanctioned end, than to the progress (or lack thereof) that is in fact being made on core human rights indicators, particularly for the most vulnerable.

Under new governance arrangements, performance monitoring should accordingly be undertaken both by the organisation carrying out a given policy and external organisations of affected stakeholders or other interested monitors. Internal monitoring is central to the family of 'management systems' techniques that have been widely adopted by both governmental and non-governmental organisations over the past two decades. Exemplified and propagated by the ISO 9000 series of management standards, the management systems approach requires an organisation to define the impacts in which it is interested, develop mechanisms for consistently monitoring them – including making specific officers responsible for doing so – and look regularly for shortcomings and ways of making improvements.<sup>75</sup> The rapid uptake of management systems techniques worldwide appears to be driven both by the belief that organisations using them are more profitable and successful than their competitors and by tendencies toward organisational isomorphism, in which organisations are drawn to

73 The following description draws from Melish, *supra* note 5.

74 An exemplary organisation committed to such community-based performance monitoring is the Participation and Practice of Rights (PPR) Project, a new accountability initiative operating in Northern Belfast and North Inner City Dublin. See <[www.pprproject.org](http://www.pprproject.org)>.

75 E.g. M. Potoski and A. Prakash, 'Information Asymmetries as Trade Barriers: ISO 9000 Increases International Commerce', 28:2 *Journal of Policy Analysis and Management* (2009) pp. 221–238.

imitate the practices of their most prominent or successful peers. It also seems to be generally assumed that when an organisation adopts a new routine based on incentives, that routine is likely to eventually become a taken-for-granted part of its operations, thus moving from a logic of consequences to a logic of appropriateness.

The management systems approach fits well with the PRR stress on corporate due diligence as a way of institutionalising human rights protection. It essentially provides a systematic approach to routinising that process. As we have suggested, however, by itself this will often be inadequate to achieve satisfactory human rights protection, for several reasons. First, internal management systems work best when organisations have material incentives to make them successful,<sup>76</sup> which will often not be the case for human rights if there are not sustained external pressures to perform well. Second, in other arenas even where appropriate internal incentives are present, organisational management systems are often complemented by external monitoring or certification systems. The external systems serve several important functions. The most obvious being to verify for interested constituencies that the organisation being reviewed is actually performing as it claims.

At the same time, it is important that an external check be available to verify that the measures being used to evaluate performance in fact correspond to community or social priorities or goals.<sup>77</sup> Where they do not, external monitoring processes are essential for bringing attention to the inappropriateness of the indicators chosen and for publicising the results of independent monitoring under the more appropriate performance measures. Through shaming, negative publicity or other ways of incentivising material interests, they may correspondingly bring pressure on an entity to change its measures and hence to improve its own internal process. Indeed, experience has shown that when governments and corporate actors are left to select and define their own indicators, those measurements often do not coincide with the real concerns and priorities of the local populations. The process thus runs the risk of measuring the wrong things – *i.e.*, raw service delivery targets or narrow outcome indicators that tell a partial, even skewed story of what is in fact happening on the ground.<sup>78</sup> For this reason, it is critical that local communities and other stakeholders have a role in defining the broader goals of performance systems, as well as the particular indicators or measures used to evaluate performance toward those goals.

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76 C. Coglianese and J. Nash, *Regulating from the Inside: Can Environmental Management Systems Achieve Policy Goals?* (Resources For the Future, Washington, D.C., 2001); N. Gunningham and P. Grabosky, *Smart Regulation: Designing Environmental Policy* (Clarendon, Oxford, 1998) p. 247.

77 D. O'Rourke, 'Multi-stakeholder Regulation: Privatizing or Socializing Global Labor Standards?', 34:5 *World Development* (2006) pp. 800–918; C. Rodriguez-Garavito, 'Global Governance and Labor Rights: Codes of Conduct and Anti-Sweatshop Struggles in Global Apparel Factories in Mexico and Guatemala', 33:2 *Politics & Society* (2005) pp. 203–333.

78 A. Rosga and M. Satterthwaite, 'The Trust in Indicators: Measuring Human Rights', 27:2 *Berkeley Journal of International Law* (2009) pp. 253–315; Melish, *supra* note 5, pp. 43–46, 94–99.

Less obvious, but extremely important, is that external monitoring and certification organisations can serve as essential communication and learning mechanisms. They are able to transfer information about best practices and emergent problems among business enterprises, and also to hold public discussions and deliberations about the best ways to achieve governance goals. Most importantly, they can serve as fora for deliberating what practices are appropriate for a given locale and type of industry. Although government agencies could in principle perform these deliberative functions, in practice they rarely do. Instead, these functions have become highly dispersed among transnational, national and local actors. The PRR framework does not propose a method for linking such discussions in a way that will help business enterprises know or achieve appropriate levels of protection in variable and changing circumstances.

Other participation-enhancing, process-oriented tactics used by large numbers of CSOs in new governance regimes include the organised use of civil society 'report cards', 'testing' processes, shadow reports, social auditing and certification schemes and the development of alternative budgets.<sup>79</sup> While many of these auditing and certification processes have initially been developed in the environmental arena, they are increasingly being used in the labour, education, health and other fields of new governance. This is done in a concerted effort to engage ordinary people in directly monitoring the quality and impacts of a range of public services by both public and private actors. By explicitly identifying areas of satisfactory and unsatisfactory service delivery, competitively rating providers, and then assessing 'grades', rankings or minimum standards for social certification, CSOs create new and socially-driven accountability frameworks that can impel direct rights-based improvements in public service delivery and access.<sup>80</sup>

In so doing, they aim to ensure that best and worst performers are publicly and transparently named, that processes exist through which consumers are provided valuable information about which businesses comply or fail to comply with minimum standards of human rights protection, and – most importantly – that all such information is widely and transparently accessible to the broad range of citizens and consumers that are in a position to act on it in making choices about how to spend their money, support political candidates, pursue their interests and otherwise organise their day-to-day lives.<sup>81</sup>

Two other kinds of new governance procedures are particularly relevant to human rights protection. Both often involve competition. The first is exemplified in the European Union's 'Open Method of Coordination' (OMC). In this method of govern-

79 Melish, *supra* note 5, p. 89.

80 See e.g. R. Jenkins and A. M. Goetz, 'Accounts and Accountability: Theoretical Implications of the Right-to-Information Movement in India', 20 *Third World Quarterly* (1999) pp. 603, 608 (discussing use of the 'report card' method in which public opinion surveys are conducted in low income neighbourhoods to report on the perceived quality and appropriateness of a range of public services, using the results as social leverage for improving service delivery performance).

81 Melish, *supra* note 5, pp. 105–106.

ance the EU establishes short, medium and long-term policy goals together with a broad set of quantitative and qualitative indicators for them. Individual countries translate the goals into context-appropriate national and regional policies, which are subject to regular monitoring, evaluation and peer review. National experiences are compared, peer reviewed and debated, and, over time, national policies are adjusted to reflect those discussions and the experiences of other countries.<sup>82</sup> The OMC thus eschews strict regulatory requirements in favour of broad goals and seeks to establish an iterative process of mutual learning based on monitoring and comparison of national reform experiments adapted to local circumstances.<sup>83</sup>

The OMC, however, requires a relatively powerful central authority to set goals and assess monitoring and reporting, conditions generally not met in global human rights governance. Although the international human rights field has moderately authoritative international actors that have articulated many broad principles of human rights over time, they lack the regulatory authority of the EU. The human rights field thus resembles many other areas of global governance, although it may be blessed with an unusually rich set of governing principles and rules. Like many other fields, human rights have multiple, sometimes competing authorities engaged in converting those principles and standards into binding localised rules and enforcement mechanisms. The most obvious ones are nation states, but they are continually assisted, supplemented and challenged by non-governmental organisations that are also engaged in the articulation and enforcement of rules. Like similar bodies in many other fields (e.g., forestry, fisheries and mining) these non-governmental organisations typically have relatively elaborate procedures for defining standards, adjudicating ('certifying') compliance, and taking action against noncompliance – the latter often through public campaigns.<sup>84</sup> Many of these processes parallel those developed by the ISO and used by other organisations, particularly those in the ISEAL Alliance.<sup>85</sup> Multi-stakeholder standard setting, publication of standards, rules and procedures, public comment on policy determinations, third party certification proceedings, peer review and so on are the guiding norms, although some organisations adhere to them more closely than others.

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82 D. Trubek and L. Trubek, 'Hard and Soft Law in the Construction of Social Europe: the Role of the Open Method of Coordination,' 11 *European Law Journal* (2005) pp. 343–364.

83 B. Eberlein and D. Kerwer, 'New Governance in the European Union: A Theoretical Perspective', 42 *J. Com. Mkt. Stud.* (2004) pp. 121–142, at p. 123; C. Sabel and J. Zeitlin, 'Learning from Difference: The New Architecture of Experimentalist Governance in the European Union', 14:3 *European Law Journal* (2008) pp. 271–327.

84 E.g. E. Meidinger, 'The Administrative Law of Global Private-Public Regulation: the Case of Forestry', 17 *European Journal of International Law* (2006) pp. 47–87.

85 The ISEAL Alliance is a global association of non-governmental standard setting and certification organisations that seeks to provide and promote guidance for best practices in standard setting. Originally founded by eight organisations, including the FSC, FLO and IFOAM, its membership is slowly growing and currently includes 11 full members and 8 associate members. See <[www.isealalliance.org/](http://www.isealalliance.org/)>.

A critical additional point is that these organisations compete with each other and even with states for adherents, policy influence and public legitimacy. They desire that their systems of standards and enforcement will be more widely respected and adopted than others and thus have decisive influence in the field. This process is particularly evident in the field of international labour standards, where a number of significant transnational non-governmental organisations, including the Fair Labor Association (FLA), Social Accountability International (SAI), Ethical Trading Initiative (ETI), Workers Rights Consortium (WRC), Worldwide Responsible Apparel Production Program (WRAP), and Business Social Compliance Initiative (BSCI), currently compete to define and certify proper labour practices.<sup>86</sup> While they share many attributes and all rely heavily on the body of labour standards associated with the UN-based International Labour Organization (ILO), these organisations differ considerably in their requirements and methods of enforcement. At present, however, there appear to be few institutionalised mechanisms for judging or reconciling their competition.

### 3.3. **Human Rights Governance Ensembles and the Need for Orchestration**

A third basic tenet of new governance is legal orchestration. Legal orchestration, it is said, is what separates the new governance model from flat processes of devolution and deregulation.<sup>87</sup> That is, following the subsidiarity principle, it functions to prevent the isolation or abandonment of decentralised initiatives, ensuring that they are linked together within a supportive 'higher' framework. Through that framework, the plurality of proliferating norm-generating practices that emerge in the market and civil society can be gathered, coordinated, sorted and made available for observation, allowing different actors to learn from other experiences, replicate success stories, scale-up where appropriate, and hence to engage in constant innovation and improvement.

Orchestration is particularly important in the human rights field. Indeed, human rights governance is carried out by many types of organisations and networks engaged in complex relationships and processes that the PRR framework neither directly accounts for nor utilises. At the bottom, organisations such as FLA, SAI, WRC and others exist because the system of states and corporations on which the PRR framework relies has not translated the body of international human rights laws into effective protections for workers in developing countries. Consequently, these non-governmental organisations have sought to impose their own standard setting and enforcement processes to persuade international customers to buy only products produced under acceptable conditions. Moreover, many other types of organisations are engaged in monitoring of human rights practices and advocacy of human rights regulations.<sup>88</sup>

86 Fransen, *supra* note 27. (The ETI does not certify firms, but instead focuses on setting standards that firms can use in self-certification.) For a general discussion of legitimacy competition, see J. Black, 'Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes', 2 *Regulation and Governance* (2008) pp. 137–164.

87 Lobel, *supra* note 58, p. 400.

88 P. Nelson and E. Dorsey, 'New Rights Advocacy in a Global Public Domain', 13 *European Journal of International Relations* (2007) pp. 187–216.

Overall, then, the system of human rights governance involves several types of actors whose activities are more interdependent than the PRR framework would suggest. Human rights rulemaking, adjudication and enforcement are carried out in many processes beyond state law making and corporate due diligence analyses. If one were to visualise the human rights governance system in any given locale one would see a complex mix of local, national, regional and international state and non-state agencies engaged in overlapping and intertwined rule making, adjudication, monitoring and enforcement activities. Similar configurations in other fields have been termed regimes,<sup>89</sup> regime complexes,<sup>90</sup> ecosystems,<sup>91</sup> and ensembles.<sup>92</sup> Each term is helpful, but ‘ensembles’ may be the most instructive for this analysis. It conveys the presence of multiple performers whose roles are interrelated and should be coordinated and harmonised, but who also have an inherent degree of autonomy. These players currently lack both a detailed score and an effective conductor. Because of the variable and changing conditions of their performance, a detailed score is not plausible. Nor, given the current state of the PRR framework, has a conductor been created. At present we have many necessary players groping toward an effective governance system, but limited understanding of how to orchestrate them. The implicit constructivist hope that orchestration might emerge from continuing efforts to give content to human rights norms by states and corporations has not adequately contended with the need to incorporate CSOs in the many facets of human rights governance, nor with how to adequately orchestrate that process.

There can be little doubt under present circumstances that the involvement of actors beyond states and corporations is desirable, and even necessary, given the limited resources and complex motivations of states and corporations. However, this is not to say that the system is functioning optimally. At present there is considerable fragmentation and conflict regarding what the human rights duties of corporations are. FLA and WRAP, for example, promote significantly different standards for corporate behaviour and implement them in different ways. Efforts to harmonise the standards and practices of these CSOs have often been difficult and contentious, leading commentators sometimes to declare failure.<sup>93</sup> Progress seems to be continuing, however, with all of the labour standards organisations recently having agreed to minimum and

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89 Abbott and Snidal, *supra* note 58.

90 K. Raustiala and D. G. Victor ‘The Regime Complex for Plant Genetic Resources’, 58:2 *International Organization* (2004) pp. 277–309.

91 Meidinger, *supra* note 58. This term reflects the tendency for programmes to find niches in which they seem to have comparative advantages and to cooperate and compete with each other depending on their relative advantages. It was developed to characterise food governance in particular.

92 Perez uses this term to describe environmental governance structures around sustainability indexes. O. Perez, ‘Private Environmental Governance as Ensemble Regulation: A Critical Exploration of Sustainability Indexes and the New Ensemble Politics’, *Theoretical Inquiries in Law* (forthcoming 2011).

93 Fransen, *supra* note 27.

living wage requirements, and generally tending to ‘harmonise up’.<sup>94</sup> While this process appears similar to the better documented ‘ratcheting up’ in forestry standards,<sup>95</sup> it is not clear that this is happening in the broader field of human rights standards, where efforts often remain localised and isolated. Accordingly, both the contributions of individual programs and the functioning of the larger system seem likely to remain suboptimal and to require greater attention than they have thus far received.

In sum, although CSOs make valuable and necessary contributions to an otherwise incomplete system for human rights protection, there is a pressing need for mechanisms to orchestrate and harmonise their activities, and to integrate the lessons they have learned into the larger process of human rights governance. A critical complement to the PRR framework, therefore, will be to produce studies and recommendations regarding how to learn from and flexibly orchestrate the activities of the full set of actors in the system, ensuring that their insights can be used to promote responsive adaptation, fit and scale in all localised human rights implementation efforts.

#### 4. Operationalising the Business and Human Rights Framework: The Utility of Updating the Schema

We recognise that Ruggie does not entirely ignore the critical role of civil society actors or broader learning and sharing processes. His attention to these actors and processes has, however, largely been limited to the second phase of his mandate, under which he was tasked by the Human Rights Council specifically with offering concrete guidance to states, businesses and other social actors on how to ‘operationalise’ the PRR framework.<sup>96</sup> His 2007 Mapping report to the Human Rights Council on the PRR framework described selected multi-stakeholder initiatives, public-private hybrids that combine mandatory with voluntary measures, and examples of industry and company self-regulation.<sup>97</sup> Likewise, his 2008 report concluded that the intent behind the PRR framework is to help expand the number and scale of initiatives, promote cross-learning, and help cohere individual measures/initiatives into a more systemic response with cumulative effects.<sup>98</sup> Nonetheless, his PRR framework fails to create a conceptual or policy basis for *how* these initiatives may either be *promoted* by appropriate actors or *orchestrated* to in fact promote cross-learning, scaling up and competitive races to the top.

94 D. Doorey, ‘Contestation, Authorizations, Collaboration in Labour Code Initiatives: The Case of the Living Wage’, Draft Paper for the Workshop on Transnational Business Governance Interactions, Florence, Italy, May 2011. It should be noted that while the living wage has been accepted in principle by the certifying organisations, it still seems quite far from being achieved in practice.

95 C. Overdeest, ‘Comparing Forest Certification Schemes: the Case of Ratcheting Standards in the Forest Sector’, 8:1 *Socio-Econ. Rev.* (2010) pp. 47–76.

96 UN Doc. A/HRC/RES/8/7.

97 UN Doc. A/HRC/4/035.

98 UN Doc. A/HRC/8/5, paras. 105–106

We believe this failure is a significant design flaw, one carrying major conceptual and operational costs for the effectiveness of the project. An operationally more effective framework, we believe, would have incorporated a fourth pillar, one designed to recognise and affirm the central role played by civil society actors and affected stakeholders in human rights governance and accountability processes. Under the heading '*Participate*', that pillar – or final 'P' – would have complemented the 'Protect, Respect, Remedy' framework by legitimating and spotlighting one of the key mechanisms through which human rights harms in the business context are contextually identified and defined and, critically, by which states and businesses are held to their international duties and responsibilities in practice. A 'PRRP' framework would correspondingly have recognised the equal instrumental importance of civil society actors to states and businesses in protecting against human rights harms in the business sector. Such recognition is critical, we believe, for ensuring that such actors have the social leveraging tools and international legitimation necessary for effective independent monitoring and accountability processes.

In proposing this fourth pillar, we recognise that a global framework of the PRR sort requires a certain presentational simplicity. Such presentational simplicity will, in turn, necessarily veil many important details the framework intends to encompass, both conceptually and operationally. In this regard, it is important to underscore that we do not take issue here with Ruggie's choice to focus his framework on the state duty to 'protect', the corporate duty to 'respect' and the overlapping duty to 'remedy' claimed breaches of said duties. We understand and appreciate the utility of this conceptual framework from both a legal and operational perspective, including for the important acculturation-based processes it promotes. In particular, unlike some other critics, we are convinced that the framework neither limits the legal duties held by states outside the 'business and human rights' context nor restrains the corporate duty to 'respect' to its 'negative' orientation. Accordingly, we believe the formal articulation of the PRR duties in an international framework that has received broad stakeholder endorsement is a useful and important contribution to advocacy and progress in the business and human rights field.

Where we do take issue, and where we believe a new governance approach provides key insight, is with respect to Ruggie's choice to focus his framework on the duties and responsibilities of *only* states and corporate entities and, specifically, to do so in a way that suggests that states and businesses are the central actors in human rights compliance regimes. Missing is the critical role and key responsibilities of civil society actors in global governance, particularly in defining, monitoring, evaluating, participating in, assessing and (re)constructing the operational elements of state and business duties in the business and human rights context. Without the incorporation of these critical actors – and a corresponding emphasis on independent civil society accountability processes as a complement to state-based remediation and voluntary enforcement efforts – we do not believe it is possible to close the 'governance gaps' that Ruggie identifies as the root cause of the business and human rights conundrum.

Indeed, Ruggie specifically acknowledges the basis of these governance gaps in the lack of sufficient accountability incentives faced by states and businesses today. He thus recognises that state authorities are not able to effectively regulate corporate

conduct in light of the political and economic incentives they currently face in the globalised economy. At the same time, businesses are not able to effectively regulate themselves. As the SRSR affirms, ‘[t]he Achilles heel of self-regulatory arrangements to date is their undeveloped accountability mechanisms’.<sup>99</sup> It remains unclear, then, how simply better articulating the normative duties or responsibilities of these actors in pillars 1, 2 and 3 – duties the respective actors already understood themselves to hold under international human rights law – will change the incentive structures they face or improve their internal accountability systems. Some type of independent and external monitoring and accountability is essential, it would seem, to disrupt and reshape the material incentives facing states and businesses in their day-to-day conduct as it affects human rights. That is, additional actors, with distinct ways of leveraging power over corporate and state conduct, must be explicitly brought into the framework for it to be effective in closing the current governance gaps. The ‘participate’ pillar would have addressed this critical concern by supplementing Ruggie’s current emphasis on promoting a ‘logic of appropriateness’ from above with a corresponding ‘logic of consequences’ from below.

The inclusion of a fourth pillar would likewise have served to respond to the central critique lodged by scholarly commentators against acculturation-based models of regime design: that acculturative models promote only shallow and superficial reforms by targeted actors and hence should never form the basis for regime design.<sup>100</sup> Indeed, the problem of institutional isomorphism (manifested in high numbers of treaty ratifications and other formal human rights commitments) accompanied by deep and widespread patterns of ‘decoupling’ between those commitments and actual undertakings has long been a major problem in the human rights field. It has led commentators to insist that the problem with human rights law is not that it is insufficiently acculturative, but rather that it is under-enforced.<sup>101</sup> On this view, greater emphasis needs to be placed on new and innovative mechanisms of enforcement for human rights law and on how to hold state and business actors to account, socially, legally and politically (through a variety of incentive-based mechanisms), for policies and practices that threaten human rights harm.

Authoritative recognition of a fourth ‘participation’ pillar would have helped to address this central human rights concern by more accurately representing the complex social dynamic of interaction between interested actors that is necessary for institutional transformation to in fact take place within corporate culture and state practice. Specifically, it would have served to provide civil society actors with a critical set of leverage tools for asserting their voice and socially amplifying their power through a broad combination of persuasion, coercion and acculturation-based strategies to help close gaps between formal commitments and actual undertakings. As previously underscored, this range of strategies far exceeds those covered under a narrow ‘remedy’

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99 J. G. Ruggie, ‘Business and Human Rights: The Evolving International Agenda’, 101 *American Journal of International Law* (2007) p. 836.

100 Goodman and Jinks, *supra* note 22, p. 725 (noting critique).

101 *Ibid.*

prong.<sup>102</sup> A ‘PRRP’ framework would correspondingly reflect the growing understanding that while acculturation-based models must be a “part of the larger conversation”, by themselves they are “not the ideal or preferable social mechanism around which to design international human rights regimes”, a fact acknowledged even by sociological institutionalism’s most dedicated defenders.<sup>103</sup>

The insights of both new governance and economic institutionalism are thus as critical to institutional transformation in the business and human rights context as is Ruggie’s more idealist emphasis on the social embedding of norms. These approaches emphasise the necessity of ensuring social accountability systems that can effectively and sustainably leverage interests by embedding a logic of consequences within institutional structures. Hence, even if one would expect a rule-based logic of appropriateness to at some point become so embedded in corporate conduct as to supplant a logic of consequences as the effective driver of policy action, it is difficult to expect such embedding to occur in the absence of active processes of leverage and interest-based organising on the part of distinct social actors, especially those in civil society most directly impacted by state and corporate conduct. Express attention to these actors, processes and mechanics is thus essential to any effective accountability or governance regime.

In proposing a fourth ‘participate’ pillar we do anticipate counterarguments. This is especially so given the amount of time and resources already invested in the PRR framework and hence the resistance that will likely follow the prospect of updating it so soon. Specifically, we foresee four principle counterarguments: two question its necessity, two its advisability.

#### **4.1. The Necessity of a Fourth ‘Participate’ Pillar**

First, we anticipate that many framework supporters will defend the current structure by arguing that a ‘participate’ pillar is simply not necessary. Two arguments can be expected in this regard. First, civil society participation is already suggested in the Guiding Principles and hence need not be incorporated in the framework itself. Second, civil society will organise and participate regardless of what the framework looks like. We believe that neither argument is persuasive. Indeed, both take insufficient account of the very real power asymmetries that characterise human rights struggles, asymmetries that function in practice to substantially inhibit, limit or even preclude community-based civil society engagement in monitoring and accountability processes. By contrast, formal recognition in an authoritative international policy design of the right of stakeholders to participate in human rights governance and ac-

102 They likewise include active engagement in the conduct of human rights impact assessments, independent performance monitoring of businesses and states under locally-defined human rights indicators, the assessment of corporate and state policies, the publicising of setbacks, lack of progress, or abusive policies, and the active gathering and sharing of information related to all aspects of corporate-related human rights abuse, among many others.

103 Goodman and Jinks, *supra* note 22, note 10.

countability processes would provide a critical set of legal resources and leveraging tools to affected communities – both for mobilising less powerful actors to engage systems of abuse and for legitimating their participation *vis-à-vis* more powerful actors.

The instrumental importance of such recognition cannot be underestimated. Although the Guiding Principles do call for transparency and participation in the conduct of corporate due diligence responsibilities, such participation is not neither required under the framework, nor can it be asserted by civil society groups as a ‘right’ conferred under the framework. Under the current conceptual framework, a business can legitimately claim that it need not allow for civil society participation in external monitoring of any of the aforementioned due diligence activities. This apparent corporate right of control over who has access to relevant information for human rights monitoring and impact assessment and who can speak on behalf of communities in voluntary consultation processes is a major operational gap in the Ruggie framework. Indeed, corporate actors are unlikely, at least in the short-term, to see external monitoring of their operations on the human rights of affected communities as consistent with their economic interest. As has been noted with respect to private governance organisations in the garment industries, the degree of control over implementation and compliance procedures is a major source of division. Those initiatives, such as WRAP and BSCI, that are predominantly business-controlled, favour compliance systems in which the division of tasks between social and business actors is heavily weighted toward business actors. They thus select auditors themselves, preferring professional auditing firms; do not allow audited information to be released to the public; and insist that complaints and grievances be dealt with internally by firm representatives.<sup>104</sup>

Businesses that adopt policies such as these may be in formal compliance with the PRR framework, while in fact impeding real change in their corporate approach to respecting human rights. In this sense, by not incorporating a ‘participate’ pillar, the PRR framework may unwittingly contribute to a system in which corporate human rights policies are allowed to be used strategically by businesses to signal compliance to the market (thereby enhancing reputational interests), while simultaneously impeding production of and access to the information necessary for ensuring that the corresponding social reputation markets are functioning properly. If this were the case, the PRR framework could in practice serve to weaken, rather than enhance, corporate social accountability processes. The kind of mutual competition and monitoring by external actors that we have argued for would of course help to resolve these problems.

A fourth ‘participate’ pillar would play a critical legitimisation role in this regard by validating civil society requests to access information from business entities about their policies, guidelines, impact assessments and performance tracking systems, while promoting greater business reliance on external, independent and community-based monitoring and assessment systems. It would correspondingly allow civil society actors to use the framework proactively, as an operational sword, to demand active spaces for their participation where it is otherwise denied.

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104 Fransen, *supra* note 27. It should be noted that we are not arguing that it is never appropriate for firms to choose their own auditors in social accountability systems, only that the practice has serious risks unless counterbalanced by other accountability mechanisms.

In addition to its legitimating role, the inclusion of a ‘participate’ prong would also serve an essential mobilising function. It is important to recall in this regard that human rights law is designed specifically to protect and enhance the participatory agency of individuals to stand up and defend their own rights when threatened by external actors, whether public or private.<sup>105</sup> The international human rights architecture has correspondingly made protecting and promoting the right to participatory inclusion by individuals and groups in decision-making processes that affect their lives an increasing priority in its work.<sup>106</sup> A ‘participate’ pillar would assist civil society actors in organising themselves and mobilising internal resources to demand active engagement in increasingly creative and novel ways. By focusing on corporate and state actors only, the current PRR framework does not provide this critical resource to other community actors, as a human rights-based approach would require.

It has been suggested that Ruggie intended for the ‘remedy’ prong of the PRR framework to serve this role. Yet, the SRSG’s discussion of state and corporate duties to remedy is focused almost exclusively on the provision of grievance procedures for ‘victims’ of human rights abuse. Although he refers to the importance of both judicial and non-judicial mechanisms, both types of mechanisms are directed toward ex-post redress for harms that have occurred in the corporate context. Community members are conceived principally as ‘objects’ of potential abuse, not as ‘subjects’ of decision-making processes and impact assessments concerning activities that may affect their lives. The ‘remedy’ prong is thus insufficient for addressing the distinct issues that arise from the right and responsibility of citizens to ‘participate’ in system accountability processes.

An effective regime for compliance with human rights norms must correspondingly focus much more explicitly on mechanisms of community participation and assessment that take effect before significant harm occurs. Such mobilisation of participation, as an internationally-recognised right of civil society actors, would likewise serve to counteract what has come to be known as the ‘participation industry,’ often called the fastest growing sector of the governance business. It would thus provide a framework of mobilisation to communities in ensuring, against token company exercises of ‘stakeholder participation’ that rely exclusively on limited ‘consultations’ or ‘focus groups’ with affected communities, the inclusion of a ‘representative’ of marginalised affected groups on advisory boards, or the creation of self-help groups or users’ associations under program guidelines.<sup>107</sup> Rather, it would provide the tools for in-

105 See e.g. M. Ignatieff, ‘Human Rights as Politics’, in A. Gutman (ed.), *Human Rights as Politics and Idolatry* (Princeton University Press, Princeton, 2001) p. 4; P. Alston, ‘International Law and the Human Right to Food’ in P. Alston and K. Tomasevski (eds.), *The Right to Food* (Martinus Nijhoff, Leiden, 1984) p. 62.

106 See e.g. UN ECOSOC, Comm. On Econ., Soc. & Cultural Rights, General Comment No. 14, *The Right to the Highest Attainable Standard of Health*, para. 54, 22nd Sess., UN Doc. E/C.12/2000.4 (2000).

107 See e.g. *The World Bank Group, The World Bank Participation Sourcebook* (1996) pp. 145–146. While these kinds of participatory mechanisms can sometimes also spur increased community participation (M. Tysiachniouk and E. Meidinger, ‘Importing Democracy:

sisting on the creation of new mechanisms through which affected communities may *independently* monitor the performance of decision-makers, not by invitation, but by their own power to identify minimum standards of appropriate community conduct (consistent with human rights values) and to exert social sanction where performance does not meet those standards.<sup>108</sup>

A second major counter-argument to the addition of a 'participate' pillar is that civil society will organise and participate regardless of the framework's precise elements. Defenders of acculturation-based international law regimes often highlight this argument, stressing that, by creating a global script that can be called upon in mobilisation campaigns, acculturative processes may indirectly promote opportunities for the emergence of domestic-level social movements.<sup>109</sup> While we do not disagree, we believe the argument only reinforces the importance of civil society mobilisation and participatory engagement for ensuring systemic transformation. It underscores – not diminishes – the utility of a fourth pillar to strengthen and promote this essential social dynamic in the business and human rights context.

In addressing this concern, we emphasise that we do not presume that Ruggie fails to appreciate the importance of civil society actors and processes. We believe that he assumes and expects them to operate. Nonetheless, consistent with his broader theoretical commitments, he understands them as ancillary to, or definitionally subsumed within, the larger process of norm acculturation or socialisation that he seeks to promote within the operations of states and global business entities. Our concern is that, by failing to recognise such actors and processes expressly, Ruggie undermines their very ability to mobilise and operate as legitimate actors within his framework. Accordingly, we believe that any regime design that fails to take such essential social actors into specific operational account is incomplete and deficient.

#### **4.2. The Advisability of a Fourth 'Participate' Pillar**

A second set of likely counterarguments to a fourth pillar arises from a desire to avoid the political divisiveness caused by business opposition to the Draft Norms. These arguments focus not on the utility of a 'participate' pillar, but rather on its advisability. On this view, any added instrumental utility to a PRRP framework should be sacrificed in favour of strong business sector buy-in and engagement with a more limited PRR framework.

Whether the business community would in fact oppose framework recognition of the role of civil society in human rights governance is nonetheless an empirical question. Interestingly, it is one that has not appeared to bear itself out in practice. According to inner members of the Ruggie team, a repeated question posed to the

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Promoting Participatory Decision Making in Russian Forest Communities,' in C. Claeys and M. Jacqu , *Environmental Democracy: Facing Uncertainty* (Peter Lang Publishers, London and Brussels, 2011), they are often used to dampen and control community participatory processes.

<sup>108</sup> Melish, *supra* note 5, p. 92.

<sup>109</sup> Goodman and Jinks, *supra* note 22, pp. 733–743.

SMSG by business sector representatives in the SMSG's extensive global stakeholder consultations was why states and businesses were the only social actors addressed under the PRR framework.<sup>110</sup> They wondered why the roles and responsibilities of civil society were not likewise addressed. It does not appear, then, that the business community was broadly, or even marginally, opposed to explicit references in the framework to civil society rights and responsibilities. They may in fact have highly welcomed them.<sup>111</sup> We do not, then, believe that 'anticipated business opposition' is a persuasive argument for avoiding a fourth pillar.

A second potential, but equally unpersuasive, argument is that the addition of a 'participate' pillar would exceed the SMSG's mandate by recognising a right or duty that extends beyond current international law principles. Claims of such doctrinal excess were indeed a major motivation for broad business opposition to the Draft Norms. Whether or not such excess in fact characterised the Norms, it does not characterise our proposed fourth pillar. The right of civil society to participate in decision-making processes that impact their lives has consistently been recognised by international treaty bodies and tribunals. UN human rights treaty bodies, for example, expressly recognise the right to participatory inclusion by affected individuals and groups as "an integral component of any policy, programme or strategy development to discharge governmental [human rights] obligations ...".<sup>112</sup> The effective enjoyment of human rights, such expert bodies insist, can only be secured if the "right to participate in public decision-making" is ensured to all groups in society.<sup>113</sup>

This important principle has likewise been recognised by the regional human rights tribunals. In the specific context of business and indigenous rights, regional tribunals have, for example, repeatedly recognised that states may not move forward with plans or concessions to private business regarding development, investment, exploration or resource extraction on indigenous lands without first ensuring the right to 'effective participation' of affected communities in the decision-making process. At the same time, required human rights safeguards include the obligation to ensure the performance of a prior social and environmental impact assessment *by an independent*

110 R. Davis, 'Ethical and Practical Challenges for Corporate Lawyers Advising Clients on Human Rights', 105 *Proceedings of the Annual Meeting (American Society of International Law), Harmony & Dissonance in International Law* (23–26 March 2011) (audio transcript).

111 Perhaps ironically, it was the civil society sector participating in the consultations that was most opposed to taking the emphasis of the framework off of states and businesses. *Ibid.*

112 UN ECOSOC, Comm. On Econ., Soc. & Cultural Rights, General Comment No. 14, *The Right to the Highest Attainable Standard of Health*, para. 54, 22nd Sess., UN Doc. E/C.12/2000.4 (2000).

113 See e.g. *ibid.* ("Effective provision of health services can only be assured if people's participation is secured by States"); UN ECOSOC, Comm. On Econ., Soc. & Cultural Rights, General Comment No. 4, *The Right to Adequate Housing*, para. 9, 6th Sess., UN Doc. E/1992/23 (1991) ("[T]he right to participate in public decision-making—is indispensable if the right to adequate housing is to be realized and maintained by all groups in society").

entity.<sup>114</sup> That is, international human rights tribunals have recognised that impact assessments conducted by economically interested parties often are not trustworthy indicators of likely human rights impacts. Attention to who is to conduct human rights impact assessments, under what conditions, and on the basis of what standards is an area of critical concern in the human rights context. It remains markedly under-specified in the Ruggie PRR framework.<sup>115</sup>

## 5. Conclusion: Moving Forward

In providing the foregoing critique and proposal, new governance lessons have been particularly influential to our analysis. As discussed, new governance approaches seek to maximise policy responsiveness and adaptability to agreed public goals by incorporating new channels for stakeholder participation and new processes of transparency, accountability and orchestration. These channels and processes are seen as necessary for both ensuring the legitimacy and operational effectiveness of public and private programs and for ensuring that ‘compliance’ or ‘implementation gaps’ are identified and closed as needed. At the same time, they do not seek mimicry or orthodoxy in forms, but rather encourage experimentation and competition for results in line with local diversity, priorities and experience.

Correspondingly, new governance approaches provide important insight into how an international human rights regime might be designed to both respect contextual diversity in the global community and to close the ‘governance gaps’ that the SRSG himself has identified as the root cause of the global business and human rights conundrum. Such approaches are in this regard consistent with Ruggie’s social constructivist perspective, even while extending beyond it to expressly incorporate more instrumentalist elements. Indeed, by focusing not only on norms, but also on the political process dynamics that create and recreate them, Ruggie’s theoretical approach has always emphasised the importance of actors engaging in that “active process of interpretation and construction of reality”.<sup>116</sup> That process is not one that involves the deployment of norms alone, however. It necessarily relies on the strategic leverage of economic and other material interests by norm entrepreneurs as a means of instantiating new normative understandings or priorities in social actor conduct. As we have

114 See e.g. *Saramaka People v. Suriname*, Judgment of 28 November 2007, Inter-Am. Ct. (Ser. C), para. 129; *Center for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of the Endorois Welfare Council v. Kenya*, Communication 276/2003, Afr. Comm’n on Hum. & Peoples’ Rts (2010).

115 In recognising the foundational basis of our proposal in mainstream international law principles and jurisprudence, we underscore that we do not and would not characterise our proposal as ‘radical’, as do Parker and Howe with respect to their similar participatory proposal in this volume. While our proposal does necessarily address issues of power and interest conflict, such questions are fundamentally what human rights are about and hence should not, in our view, be understood as representing anything outside of mainstream acceptance.

116 Ruggie, *supra* note 14.

suggested, the construction of relevant human rights norms in any particular context cannot legitimately or effectively occur without the direct and active participation of those whose human rights are at stake. Hence, the need to both ensure and promote the direct participation of those and other supporting actors in corporate social accountability processes.

To help fill this critical gap in the PRR framework, this chapter has proposed an important fourth pillar – civil society participation – upon which processes of this sort could have been advanced through the SRSG’s mandate. Developing and institutionalising these ideas, including those related to effective orchestration of the lessons and informational outputs produced by the proliferation of such participatory processes, will be a necessary next step in creating an effective human rights governance system. We urge the new Working Group on business and human rights, established by the Human Rights Council to succeed the SRSG,<sup>117</sup> to take up expressly in this regard what Ruggie left insufficiently acknowledged and conceptually underdeveloped.

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<sup>117</sup> UN Doc. A/HRC/RES/17/4 (2011) (establishing a ‘Working Group on the issue of human rights and transnational corporations and other business enterprises, consisting of five independent experts’, to continue the SRSG’s work by promoting the dissemination and implementation of the Guiding Principles and assessing them on the basis of information received from all relevant sources).