
HUMAN RIGHTS NORMS FOR BUSINESS: THE MISSING PIECE OF THE RUGGIE JIGSAW

THE CASE OF INSTITUTIONAL INVESTORS(*)

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ABSTRACT
This paper intends to provide insights as to whether institutional investors, through the framework proposed by the UN Special Representative on Business and Human Rights, John Ruggie, can promote business respect for human rights worldwide. In this regard, the paper explains why investors are not currently paying attention to human rights and offers some practical proposals on how this situation can be addressed. The paper begins by describing the role institutional investors could play in helping ensure business respect for human rights. It identifies the central obstacle to them playing this role as the lack of consensus and clarity around the human rights expectations of companies and, specifically, the absence of an agreed normative framework against which corporate human rights performance can be assessed. It argues that the framework proposed by the Special Representative does not effectively address this shortcoming. The paper then sets out the authors' views on what an effective accountability framework for business and human rights would look like, most notably in relation to the potential role of institutional investors. Finally, it considers the implications of the authors' proposals in the context of the recommendations that have been made by the Special Representative.

KEY WORDS
Institutional investors, Business and Human Rights, Special Representative, John Ruggie, Accountability.

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1. INTRODUCTION
The UN Special Representative for Business and Human Rights, John Ruggie, has discussed at length the positive impact that companies over the world can have on human rights through foreign direct investment. He has, however, paid much less attention to the role that portfolio investment may play in respecting human rights. In this chapter, we not only argue that institutional investors (e.g. pension funds, investment managers, insurance companies) have a vitally important role to play but also explore the conditions under which they can most effectively play their part in this important agenda. We focus primarily on how institutional investors can – through their leverage and influence – contribute to the respect of human rights by other corporations.

Our starting point is that while issues such as climate change, health and safety, and bribery and corruption are progressively finding their way into investment decision-making and are increasingly being discussed in company-investor meetings, human rights have nothing like the same profile. It appears that investors are not systematically examining the human rights implications of their investment decisions, nor are they, with some exceptions, proactively encouraging companies to effectively manage their human rights impacts. In a world where the limitations of state-centric approaches to the realisation of human rights are ever more apparent, the lack of attention being paid by investors to human rights issues may well impact negatively on global efforts to protect and promote human rights.

The objectives of this chapter are to explain why investors are not currently paying attention to human rights and to offer some practical proposals on how this situation can be addressed. We begin by describing the role institutional investors could play in helping ensure business respect for human rights. We identify the central obstacle to them playing this role as the lack of consensus and clarity around the human rights expectations of companies and, specifically, the absence of an agreed normative framework against which corporate human rights performance can be assessed. We then set out our views on what an effective accountability framework for business and human rights would look like. Finally, we consider the implications of our proposals in the context of the recommendations that have been made by the Special Representative.
2. INSTITUTIONAL INVESTORS AND HUMAN RIGHTS

To start with, we would like to set out four limits to the scope of our chapter. First, we focus on a particular segment of the finance sector, namely ‘institutional investors’. These are entities that pool or manage financial resources with a view to investing them in equity, bonds or other investment products, and include pension funds, investment managers, insurance companies, investment banks, and sovereign wealth funds. We concentrate, in particular, on direct investors (i.e. those investors that make investment decisions rather than those that outsource investment decisions to others).¹ We recognise that institutional investors are just one type of investment decision-maker, and that investors are just one of many stakeholders in the business and human rights debate. However, the specific dilemmas and challenges faced by institutional investors in implementing human rights are indicative of the challenges faced by others seeking to deliver similar outcomes.

Second, we focus primarily on investments in equities (or shares), corporate debt and private equity, as these asset classes are those where there is the clearest link between investment and corporate activities. We acknowledge that these asset classes differ significantly in terms of the importance of human rights issues to the investor, the avenues (or mechanisms) of influence that are available and the actual influence that an individual investor can exert. Notwithstanding these differences, investors in these asset classes face broadly the same challenges when trying to assess corporate human rights performance, and the principles and issues we highlight in this chapter are broadly the same across these asset classes.²

Third, we pay limited attention to the so-called ‘ethical’ investors (i.e. investors that have explicitly ethical objective(s) that override financial objectives) as these represent a relatively small part of the overall investment market.³ Rather our focus

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¹ While not explicitly the subject of this article, any discussion around the role and responsibilities of institutional investors must be understood in the context of the demands and expectations placed on them by their clients, and the importance assigned by these clients to social, environmental and governance issues in their investment processes. See, generally, H. Viñes Fiestas, R. Sullivan & R. Crossley, Better Returns in a Better World – Responsible Investment: Overcoming the Barriers and Seeing the Returns (Oxfam, Oxford, 2010).

² The human rights implications of wider systemic issues in the financial services industry and of financial instruments such as derivatives are canvassed in M. Dowell-Jones & D. Kinley, ‘The Monster Beneath the Bed: Financial Services and the Ruggie Framework’ (chapter to be published in the same book as this paper, see note (¹)) and M. Dowell-Jones & D. Kinley, ‘Minding the Gap: Global Finance and Human Rights’, 25 Ethics and International Affairs, No. 2 (June 2011).

³ Eurosif, European SRI Study 2010 (Eurosif, Paris, 2010).
is on how mainstream investors can internalise human rights issues in their investment practices and processes.

Fourth, we are explicitly concerned about the role of investors in the absence of regulation that clearly defines the human rights obligations of companies or that explicitly requires investors to take account of human rights issues in their investment processes. Clearly, if such regulation was to emerge (an eventuality we consider most unlikely over the next five or ten years), the terms of this discussion around the responsibilities of investors would alter, at least for those human rights that were covered by the regulation.

2.1. Why Should Institutional Investors Be Concerned about Human Rights?

There are four broad arguments for investors to be concerned about human rights. The first derives from the call in the 1948 Universal Declaration of Human Rights (UDHR) for ‘every individual and every organ of society’ to respect and promote, to the extent of its capabilities, the rights set out in the UDHR. That is, all societal actors (a category that clearly includes investors) have an explicit obligation to respect and promote human rights. It is relevant to note here that despite the widely acknowledged status of – at least part of – the UDHR as customary international law, the UDHR does not impose binding human rights obligations directly on corporations or investors.

4 Expressed another way, we discuss the role and contribution of investors as a primarily voluntary activity, driven by societal (rather than regulatory) pressures and by the commercial and other interests of investors.

5 UN General Assembly, ‘Universal Declaration of Human Rights’, Resolution No. 217 A (III), 10 December 1948. We acknowledge that the UDHR, as a resolution of the UN General Assembly, is not per se legally binding.


7 For discussions of the potential to directly attribute human rights obligations to corporations under international law, see D. Kinley & J. Tadaki, ‘From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law’, 44 Virginia Journal of International Law 931 (2004); A. Clapham, Human Rights Obligations of Non-State Actors (Oxford University Press, Oxford, 2006); UN Human Rights Council, ‘Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts. Report of the Special Representative of the Secretary-General (SRSG) on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises’, 9 February 2007, UN Doc. No. A/HRC/4/035, paras. 35-41. While the UDHR does not impose binding human rights obligations on companies, specific obligations have been imposed on corporations in certain specific regimes (see, further, Clapham, op. cit., pp. 244 ff). It could be argued that sovereign wealth funds, as state actors, may be in a different position. For a cautious study of sovereign wealth fund accountability with regard to human rights under international law, see B. Demeyere, ‘Sovereign Wealth Funds and (Un)Ethical Investment: Using Due Diligence as a Yardstick to Avoid Contributing to Human Rights Violations
The second argument is that investors influence the actions of companies they choose to invest in and may, therefore, be considered to have a responsibility to take action to correct the negative consequences of these activities. It has been argued that the pressure from investors to put short-term profits ahead of corporate responsibility and the failure of many investors to play the part of active owners (i.e. by not holding company boards properly to account for their governance) are often contributory factors to unethical behaviour by companies. The manner in which institutional investors invest and discharge their responsibilities as the providers of capital and the owners of companies, therefore, has important consequences for society as a whole. As Mary Robinson, former UN High Commissioner for Human Rights and Chair of the Business Leaders Initiative for Human Rights (BLIHR), might argue: 'with this kind of power comes responsibility'.

The third argument relates to the fiduciary duties of institutional investors, in that investment returns may be affected by human rights, among a range of other factors. While it is difficult to put figures on the business costs and benefits of human rights, the broad connections are clear. Companies that are perceived as being implicated in human rights violations may face litigation from employees or other stakeholders,


8 See Human Rights Council, ‘Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, John Ruggie – Guiding Principles for the Implementation of the United Nations ‘Protect, Respect And Remedy’ Framework’, 21 March 2011, UN Doc. No. A/HRC/17/31, principle 19b, pp. 18-19, which states: ‘Where a business enterprise contributes or may contribute to an adverse human rights impact, it should take the necessary steps to cease or prevent its contribution and use its leverage to mitigate any remaining impact to the greatest extent possible. Leverage is considered to exist where the enterprise has the ability to effect change in the wrongful practices of an entity that causes a harm. Where a business enterprise has not contributed to an adverse human rights impact, but that impact is nevertheless directly linked to its operations, products or services by its business relationship with another entity, the situation is more complex. Among the factors that will enter into the determination of the appropriate action in such situations are the enterprise’s leverage over the entity concerned […] If the business enterprise has leverage to prevent or mitigate the adverse impact, it should exercise it.’ On these notions of influence and leverage, see also Human Rights Council, ‘Clarifying the Concepts of “Sphere of Influence” and “Complicity” – Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, John Ruggie’, 15 May 2008, UN Doc. No. A/HRC/8/16.


or may be targeted by NGOs or the press, with consequent impacts on their brand or reputation, their share prices, their ability to access markets, and their ability to recruit the best employees. Conversely, organisations with a good human rights record should be able to achieve a range of commercial benefits such as enhanced reputation and image, more secure ‘licence to operate’, improved employee recruitment and retention, reduced risk of litigation, new business opportunities and better stakeholder relationships. There may also be broader social benefits as a consequence of businesses operating in a responsible manner such as increased trust between business and the community or, depending on the country, a decline in social unrest. Expressed another way, it can be argued that companies striving to behave ethically are – all other things being equal – likely to represent better investments over the long term. As emphasized by Tessa Hebb, ‘[i]ncreasingly pension fund investors look to [environmental, social and governance] indicators as proxies for long-term performance.’ Clearly, human rights form an important aspect of the social performance of companies.

Finally, quite apart from the investment and moral arguments for taking account of human rights in investment decisions, investors are facing increased scrutiny and pressure from governments, media and civil society to be transparent and accountable for the social and environmental impact of their investments. Perhaps the most high profile example in recent years has been the campaign for the international prohibition of cluster munitions, which has seen investors being explicitly targeted. These campaigns have been particularly successful in the Netherlands and Scandinavia where an increasing number of investors now have explicit prohibitions on investing in companies involved in the production of cluster munitions.

2.2. WHAT CAN INVESTORS DO?

Among mainstream investors, the major strategies for addressing environmental, social and governance issues in investment practice are: (a) enhancing mainstream investment processes to explicitly incorporate consideration of company performance on these issues, (b) using the formal rights (e.g. shareholder rights

14 See, for example, the list presented in Viñes Fiestas et. al., op. cit., p. 11.
such as voting and calling emergency meetings) and informal influence available to investors to encourage companies to pay appropriate attention to the management of social, ethical and environmental issues, and (c) engagement with public policy makers and other stakeholders to encourage them to regulate or take other actions to address the underlying causes of social or environmental problems. Recent years have seen a dramatic increase in the number of investors using these strategies.¹⁵

In relation to investment analysis, there are good reasons for thinking that investment decision-making influences corporate behaviour, with the investment decisions made by stock-market participants setting the share price for companies which, in turn, affects company behaviour, both directly by affecting the cost of capital, and indirectly by motivating boards and executive behaviour. If insufficient weight is given to the value of good corporate social and environmental performance or to the costs of poor performance, the capital markets may create incentives for companies to cause (or fail to prevent) harmful corporate impacts on society and the environment.¹⁶

There are many examples of where these issues have impacted directly on company financial performance through litigation (e.g. tobacco, asbestosis, product liability), regulation, taxation and other market instruments, and company failure as a consequence of probity failings (e.g. Enron). Over the past five years, there has been a significant amount of research focused on the investment implications of social and environmental factors; investors have examined issues such as HIV/AIDS in the Southern African mining industry, the effects of the European Union’s Emission Trading Scheme on European electricity utility companies, the implications of obesity for food producers and retailers, and the effects of climate change on the insurance sector.¹⁷ Such analysis avoids the legal controversy traditionally associated with ethical screening because its aims are directed at maximising financial returns for investors.¹⁸ That is, there is no intention to place ethical considerations ahead of financial ones. Instead the intention is to improve on existing analysis and so deliver financial benefit to pension fund beneficiaries.

¹⁶ See Mackenzie, op. cit. for a more detailed treatment of this argument.
¹⁷ See, for example, the sell-side (investment bank) research posted at http://www.unpri.org/research/
Shareholder activism involves shareholders using their unique power as the owners of companies to facilitate change. As shareholders, large institutional investors have a range of formal and informal rights and powers relating to companies. Formally, shareholders may directly influence the way the company is managed, through voting on matters such as appointments to the board directors, the board’s remuneration policy, the appointment of auditors and the annual report and accounts. They may also file shareholder resolutions at general meetings and may, under certain conditions, have the ability to call emergency general meetings (EGMs). Informally, institutional investors can exert influence through their ability to buy and sell shares and bonds (hence influencing share price and/or the cost of capital), through their relationships and frequent contact with management, by encouraging other investors to use their formal powers and by creating peer pressure (e.g. through benchmarking performance on specific corporate governance or corporate responsibility issues). The views that investors express in meetings and other communications with company management about social and environmental issues can have an important influence on the weight assigned by company management to these issues and the actions they decide to take. Over the past ten years, shareholders in many countries have used their influence to create longer-term incentive structures for directors, increase board independence and executive accountability, create better risk management infrastructure (making it harder for incompetent or self-seeking managers to take unjustifiable risks with the business), and, more recently, to improve the quality of companies’ policies, management systems and disclosures on issues such as climate change, bribery and corruption, supply chain labour standards, human rights and access to medicines. In some cases this has contributed to important outcomes such as dramatically reduced prices of AIDS medicines, the withdrawal of companies from unhelpful industry lobby groups, and improvements in labour conditions in retail supply chains.

Public policy engagement involves investors working with policy makers and other actors to create the (regulatory) conditions whereby companies are encouraged to operate in a responsible manner. There are a number of examples where investors have sought to make this kind of contribution, most notably in relation to climate change (where investor groups have been to the forefront of calls for governments to


20 See, for example, the case studies in Sullivan and Mackenzie (eds.) op cit. and the views expressed in Viñes Fiestas et. al, op cit.
establish a robust international framework for greenhouse gas emissions\textsuperscript{21} and revenue transparency where investors have played a leading role in the Extractive Industries Transparency Initiative (EITI).\textsuperscript{22}

2.3 WILL INVESTORS TAKE ACTION?

The argument that investors have social and environmental responsibilities is increasingly accepted in the investment industry. Perhaps the most high-profile example is the UN-backed Principles for Responsible Investment (UNPRI)\textsuperscript{23}. As of early 2011, over 800 investment institutions (asset owners, investment managers and professional service providers) had become signatories to the UNPRI\textsuperscript{24}. The Principles, established in 2006, are intended to develop and promote best practice in the area of responsible investment through facilitating the integration of environmental, social and governance (ESG) issues into mainstream investment practice. Signatories commit to incorporating these issues into their investment analysis and decision-making and to engaging with the companies in which they are invested to encourage high standards of corporate responsibility and corporate governance.

The annual progress reports produced by UNPRI\textsuperscript{25} suggest that investors are increasing their capacity to address ESG issues in their investment processes, through adopting responsible investment policies, hiring dedicated staff, collaborating with other investors and building some consideration of ESG issues, including human rights, into their investment decisions. In addition, a number of the collaborative engagement programmes, facilitated by the UNPRI's Clearinghouse, have focused on social issues: 17% of engagements between April 2009 and March 2010 covered poverty and development issues such as indigenous peoples' rights,


\textsuperscript{22} Investors are identified, by the EITI, as one of its core supporters, there is an investor statement in support of the EITI, and investors are one of the stakeholder groups on the EITI's board. See, further, http://eiti.org/supporters/investors

\textsuperscript{23} http://www.unpri.org/

\textsuperscript{24} http://www.unpri.org/signatories/

\textsuperscript{25} The most recent report is Principles for Responsible Investment, \textit{Report on Progress 2010}, London: PRI (2010), Previous progress reports can be found at http://www.unpri.org/publications/
revenue transparency or human rights.  For example, in 2010, a group of UNPRI signatories engaged with 14 North American, European and Japanese consumer electronics companies to ensure that the tin, tantalum and other minerals sourced from the Democratic Republic of Congo was not linked to armed groups responsible for serious and persistent human rights’ abuses.

A number of other initiatives aiming to foster sustainable and responsible investment have emerged in recent years. The majority of these have focused on transparency and disclosure in relation to a defined sustainability theme, a defined region, or a defined economic sector. Examples include the European SRI Transparency Code, the Carbon Disclosure Project, the Forest Footprint Disclosure Project, the Investor Statement on Sustainability Reporting in Emerging Markets, and the Investors’ Statement on Transparency in the Extractives Sector. The rationale for focusing on disclosure is that if the functioning and performances of companies are thrown into bright light, investment markets, consumers, or possibly public authorities will presumably be able to sanction or reward them as appropriate. However, as we discuss further below, while transparency is an integral part of a global strategy for ensuring corporate accountability, disclosure processes relying mainly on reputational or market accountability are unlikely to achieve their purpose in the absence of clear substantive reference points.

2.4. WHAT MAKES INVESTOR ACTION EFFECTIVE? CLARITY AROUND EXPECTATIONS

The preceding discussion should provide some encouragement to those who wish to see investors playing a greater role in encouraging companies to adopt high standards of performance on human rights issues. There are financial, commercial, ethical and sometimes possibly legal reasons for investors to take action, there is evidence that such actions can be effective and, therefore, there is a growing

26 http://www.unpri.org/collaborations/
27 Principles for Responsible Investment (2010), op. cit.
29 http://www.cdpnews.org/
30 http://www.forestDisclosure.com/
consensus in the investment community that they should take these types of action. While there has been very significant progress on corporate governance and climate change (and, to an extent, environmental issues in general), investors face a series of practical challenges in integrating consideration of human rights issues into their investment processes. These include:\(^{34}\)

- The requirement for materiality (or financial significance) to be proven before an issue will be considered relevant. Therefore, for a particular human rights issue to be explicitly considered in an investment decision, it would be necessary to explain how the issue affected recognised drivers of investment value for the company in question and the financial significance of these impacts.\(^{35}\)
- A general lack of knowledge and understanding of human rights norms and issues in the financial sector;\(^ {36}\)
- The absence of a shared and uniform methodological framework for integrating social information into financial processes;
- The reality that social issues are generally presented in qualitative terms, making it difficult to integrate them into investment models.\(^ {37}\)

These are huge structural barriers and addressing them explicitly (e.g. through the development of human rights-related indicators, the wholesale education/re-education of the finance sector, the development of clear relationships between human rights performance and measures of financial impact) would take many years to achieve.

There is, however, another way of conceiving of this problem. Investors are more likely to take specific social issues into account in their investment decisions and their engagement where the expectations of companies are clearly defined (i.e., it is possible to assess compliance/non-compliance in objective terms) and where there is a consensus around the standards of behaviour or performance that are

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\(^{34}\) R. Roca & F. Manta, *Values Added: The Challenges of Integrating Human Rights into the Financial Sector* (The Danish Institute for Human Rights, Copenhagen, 2010).


\(^{36}\) It is important to emphasise that this does not mean that human rights issues are not taken into account at all. In practice, investors have rules of thumb that allow them to account for these issues. For example, they frequently will have some sort of measure of ‘country risk’ or ‘project risk’ that accounts for a whole series of issues including human rights-related aspects such as freedom of expression, rule of law, security and freedom of association. See, further, Sullivan (2011), *op. cit.*

expected. From an investment perspective, the argument is that the risks to companies (in terms of damage to their reputation and consequent impacts on cash flows and profits) are greatest where they violate or risk violating agreed societal norms, i.e. where their behaviour can be characterised as ‘unacceptable’ or ‘immoral’. In practice, this means that investors will look out for those areas where companies breach agreed norms of good practice and are more likely to avoid those companies whose behaviour is, or could be seen as, unacceptable and so at greatest risk.

This is not just a theoretical argument. When we look at specific human rights-related issues, the areas where there has been most progress – labour standards, bribery and corruption, cluster bombs and controversial weapons – are those where specific and widely supported international norms exist, and therefore where there is clarity around the specific expectations of companies. Clarity around expectations also provides a basis for engagement, through enabling company performance to be assessed in a structured and objective manner, thereby enabling investors to encourage laggards to improve while also rewarding leaders.

One question that the arguments above inevitably raise is whether a normative framework around the human rights expectations of companies would be helpful to companies. While we acknowledge that companies have generally lobbied against any efforts to define specific human rights obligations that they should meet (including the very strong lobbying against the proposals of the UN Sub-Commission on Business and Human Rights), we believe that the absence of an agreed normative framework makes it difficult for companies to clearly delineate the scope of their obligations. Moreover, this absence means that, even when companies have taken highly proactive approaches to managing human rights issues, it may be difficult for them to demonstrate that all human rights issues have been identified and properly managed. The establishment of an agreed normative framework could also help to address ‘free rider’ problems. It is predictable that not all states and not all firms will take the same care to observe fundamental human rights. In the absence of consensus around minimum standards or expectations, the more conscientious

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38 This was the central conclusion of Oxfam’s Better Returns in a Better World project (BRBW), a two year research project from 2008 to 2010 which sought to understand the barriers to greater investor engagement with poverty alleviation and development issues (Viñes Fiestas et al., op. cit.). The project was structured as a research partnership with the investment industry, involving seven workshops and a series of one-to-one interviews with investment sector representatives. In total, the project engaged with over 80 different investors across Europe and the United States.

corporations that invest time and money into observing human rights, and make themselves accountable for their record in this field, may find themselves at a competitive disadvantage in relation to more unscrupulous corporations that do not undertake such actions. They may also lose business opportunities in countries with poor human rights records, as these host governments may not wish to do business with ethically-driven corporations.

In the next section, we study how clarity around expectations could be achieved within the context of the work of the Special Representative.

3. NEEDED: A NORMATIVE FRAMEWORK FOR BUSINESS AND HUMAN RIGHTS

3.1. ACCOUNTABILITY HOW? PROCESS, SUBSTANCE AND THE SPECIAL REPRESENTATIVE’S FRAMEWORK

Despite our arguments above about the need for and value of a normative framework to investors and to companies, we recognise that the direction of travel in the business and human rights debate seems to be moving away from rather than towards developing such a body of human rights norms. Most of the discourse around the human rights responsibilities of companies has focused on the systems and processes that companies should have in place40 rather than the substantive performance outcomes they should be seeking to achieve from these processes. This focus on processes rather than performance is reflected in the investment world where the vast majority of the collaborative initiatives supported by investors have focused on improving the ‘transparency’ of corporate operations. Even though the increased transparency of corporate activities is, clearly, an important element of corporate accountability, shedding light on corporate practices is of limited value if there is no clear standard to assess performance against and for accountability ‘processes’ (such as investor-induced market rewards and sanctions) to play out. Accountability ‘processes’41 cannot work in a vacuum; they need to operate in

40 There is a general consensus around the management systems that companies should have in place to address their human rights issues. See, for example, Business Leaders Initiative for Human Rights, UN Global Compact & The Office of the High Commissioner for Human Rights, ‘A Guide for Integrating Human Rights into Business Management’, 2007, at: http://www.ohchr.org/Documents/Publications/GuideHRBusinessen.pdf
reference to a clear normative framework.\textsuperscript{42} These problems with process rather than performance-based approaches are being recognised by other actors, most notably, the European Parliament which has adopted a resolution\textsuperscript{43} criticizing the approach of the Commission to corporate social responsibility (CSR) as too process-oriented, and not enough focused on results.\textsuperscript{44}

Unfortunately, the work of the Special Representative epitomizes this shift from substance to process.\textsuperscript{45} As explained elsewhere in this volume, the Special Representative rightly states that corporations have a ‘responsibility to respect human rights’. However, when asked about the normative framework in reference to which this responsibility to respect should be discharged and assessed, the Special Representative argues that, based on his extensive empirical observations, corporations should be concerned with all human rights, as they can potentially breach all of them. His conclusion is, therefore, that looking for a ‘list of human rights obligations’ specially directed at corporations is a useless, redundant, and misguided exercise.\textsuperscript{46}

Admittedly, the Special Representative was appointed following the stalemate in the business and human rights debate which had been created by an attempt to identify a substantive body of corporate human rights obligations. Even though the ‘Norms on the Responsibilities of Transnational Corporations and Other Business

\textsuperscript{42} For a study of the ‘accountability processes’ applicable to an important financial institution, the European Investment Bank, and of the substantive standards in reference to which those processes work, see N. Hachez & J. Wouters, ‘The European Investment Bank’s Substantive and Procedural Accountability Principles with Regard to Human Rights, Social and Environmental Concerns’. Unpublished manuscript, on file with the authors.


\textsuperscript{45} See, for example, the argument made by C. Parker and J. Howe, ‘Ruggie’s Framework: Insights from Regulation and Compliance’ (chapter to be published in the same book as this paper, see note (*)) that the ‘second pillar [of the Special Representative’s framework] further distances the framework from the earlier Norms in the interest of diplomacy by defining corporations’ human rights “responsibilities” primarily in terms of “due diligence” rather than substantive values, rights or goals that business must meet.’

\textsuperscript{46} The Special Representative therefore concluded that there was no value in ‘defining a limited list of rights linked to imprecise and expansive responsibilities, rather than defining the specific responsibilities of companies with regard to all rights.’ Human Rights Council, ‘Protect, Respect and Remedy: a Framework for Business and Human Rights – Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie’, 7 April 2008, A/HRC/8/5, p. 15, para. 51.
Enterprises with Regard to Human Rights were adopted in 2003 by the United Nations Sub-Commission on the Promotion and Protection of Human Rights, they failed to be ratified by the then Commission on Human Rights. Despite enthusiasm from civil society, which saw in the Norms a pathway to direct legal human rights obligations for businesses, the corporate world lobbied intensively against the Norms, criticizing the vague – though law-like – language in which they were drafted. Business groups were particularly concerned about how the Norms might be implemented, and the potential consequences of diverting human rights responsibilities from state actors to private persons. With the business and human rights debate having stalled as a result of the demise of the Norms, the Special Representative was appointed in 2005 by Secretary-General Kofi Annan in order to get things moving again, which the Special Representative was able to achieve by advocating ‘principled pragmatism’. This entailed dismissing efforts to define a normative framework and focusing instead on the now well-known ‘protect, respect and remedy’ framework for corporate human rights accountability.

The protect-respect-remedy framework identifies three avenues for addressing the issue of corporate human rights violations: (i) the ‘duty’ of States to ‘protect’ their citizens against human rights violations (including those committed by corporations), (ii) the ‘responsibility’ of business to ‘respect’ human rights where they operate, and (iii) the necessity of ensuring that effective ‘remedies’ be available for victims of corporate human rights abuse. Looking more closely at prong (ii) of the framework

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(the corporate responsibility to respect human rights) while the Special Representative refers to 'all human rights', it appears that the practical intent is that corporations ought to comply with domestic laws on human rights where these are established, and where this is insufficient, refer to the international framework, which 'at a minimum' encompasses the International Bill of Rights, and the Core ILO Conventions. Based on those, companies must show 'due diligence', and establish 'policies and processes' to operationalize such due diligence and 'manage' their human rights impacts. Those policies and processes are, of course, to be differentiated according to sectors, regions, or types and sizes of corporations.

To paraphrase the Special Representative, while it is true that we need 'specific responsibilities', this does not detract from the fact that we also need clear norms relating to those responsibilities. The fact that all human rights may potentially be breached by corporations is something of a truism and should not be disputed. However, the reference by the Special Representative to 'all human rights' does not provide the required clarity around the normative framework for companies. We acknowledge the huge amount of work which the Special Representative and his team put into the protect-respect-remedy framework and the extensive consultation around this framework. Even though we agree with the broad 'protect, respect and remedy' framework, we find the absence of a normative description of corporate human rights obligations to be a major flaw in relation to the specific point of the corporate responsibility to respect human rights. Our concern is that by discussing the 'corporate responsibility to respect' mostly in terms of an elusive and relative obligation of 'due diligence' rather than in terms of substance and outcomes (i.e. that human rights be respected as the fundamental social and legal norms that they are), the effect is to suggest that the responsibility of corporations with regard to human rights is more one to 'manage' than one to 'respect'. This is not merely a matter of semantics and, in fact, has serious practical consequences in terms of corporate accountability. As we have explained above, accountability for performance requires that there be clarity around expectations and responsibilities, which can easily be

translated into a 'compliance/non-compliance' assessment framework. The self-standing 'due diligence' requirement in the Ruggie framework, coupled with a vague reference to the general body of international human rights law does not provide the level of specificity that we think is required.

This is true in respect of market-based accountability mechanisms (such as those induced by investors’ activities), but also in those cases in which the Special Representative's framework could be used to define a standard of conduct for corporations in legal accountability mechanisms such as civil liability suits. In broad terms, general civil liability regimes require the demonstration of a faulty behavior on the part of the defendant. A claimant alleging that a corporation has violated his/her human rights should therefore demonstrate (among other elements) to the court that the behavior of the corporation constitutes a 'fault' or a 'breach of its duty of care' in order for the corporation to be held legally liable.

Our intention here is not to promote a regime of strict liability in respect of human rights, or even an unattainable obligation of result in respect of human rights, even for those companies which can demonstrate responsible human rights conduct. However, the very loose 'obligation-of-means-type' managerial approach used by the Special Representative arguably leaves much to be desired if corporations effectively are to be held accountable. We identify two main grounds for concern.

56 While we use the term compliance here, we do not intend that this is confined to an assessment of compliance with the law, but rather a more general assessment of whether companies meet or do not meet defined standards of performance.

57 We note the analysis by R. Mares, 'Responsibility to respect: Why the core company should act when affiliates infringe rights' (chapter to be published in the same book as this paper, see note (5)) who makes a similar argument in his analysis of whether the Ruggie framework could be used to hold corporations legally to account. While not explicitly the subject of this chapter, we also note that these weaknesses in the manner in which corporations’ responsibility to respect human rights are defined also negatively impacts on the third strand of the Ruggie framework (i.e. the right for victims of human rights abuses to have access to 'remedies' in case a corporation fails to live by its responsibility to respect human rights).

58 In general regimes of civil liability, consequences will be attached to a human rights-related harm if it can be proven by the plaintiff that the defendant has committed a ‘fault’ or a breach of its ‘duty of care’ which caused the harm in question. Where harm has been suffered but no such fault or breach can be proven, no liability will be incurred. In contrast, in ‘strict’ liability regimes, liability will be incurred ‘automatically’ once harm has been suffered as a result of the occurrence of a certain type of event. Our view is that legislation on business and human rights (if adopted) is most likely to be based on civil rather than strict liability, with corporations being allowed to use the defence that they behaved 'as a reasonable person' or that they exercised 'reasonable care'. We also recognise that, given the very high legal and policy profile of human rights, corporations will have to demonstrate a high level of care in order to escape liability, especially when particularly grave violations are alleged. For a further discussion of this issue, see R. Mares, 'Defining the Limits of Corporate Responsibilities Against the Concept of Legal Positive Obligations', 40 George Washington International Law Review 1157 (2009), esp. pp. 1193 ff.)
The first is that it promotes the conception that human rights are just another business risk which corporations should manage as they would any other commercial risk. The problem with this conception is that it moves human rights from the realm of ethics to the realm of costs and benefits. That is, defining corporate human rights responsibilities only in process-oriented terms could be seen as a perversion of the business and human rights debate, as it contributes to reinforcing, in the corporate minds, the idea that respect for human rights is a risk management issue, and not a responsibility in its own right. The second is that the emphasis on due diligence without reference to substantively strong and outcomes-oriented obligations is bound to lower the effectiveness of the accountability framework (see infra). Emphasis on general due diligence processes opens the door to corporations engaging in 'creative' or 'symbolic' compliance, i.e. where they design 'human rights impact management processes' primarily aimed at avoiding liability while being aware that abuses might still occur. Indeed, the Special Representative’s framework suggests (although this is yet to be tested) that a corporation faced with a legal claim could escape liability for causing or contributing to human rights abuses if it was able to argue that it had a convincing enough 'due diligence' policy, rather than because it could show a concrete absence of fault on its part and a sincere commitment to respecting human rights.

59 In any case, the substantive obligations of corporations should be stronger than simply the obligation to ‘do no harm’ which was presented by the Special Representative (Human Rights Council, ‘Protect Respect and Remedy’, op. cit., para 24), and which he defines in the following terms: ‘[t]o respect rights essentially means not to infringe on the rights of others - put simply, to do no harm. Because companies can affect virtually all internationally recognized rights, they should consider the responsibility to respect in relation to all such rights, although some may require greater attention in particular contexts. There are situations in which companies may have additional responsibilities - for example, where they perform certain public functions, or because they have undertaken additional commitments voluntarily. But the responsibility to respect is the baseline expectation for all companies in all situations.’

60 For an interesting discussion on ‘creative compliance’, albeit from the field of tax rather than human rights law, see D. McBarnet. ‘When Compliance is not the Solution but the Problem: From Changes in Law to Changes in Attitude’, in V. Braithwaite (ed.) Taxing Democracy (Ashgate, Aldershot, 2002), who, at p. 229, notes: ‘creative compliance involves finding ways to accomplish compliance with the letter of the law while totally undermining the policy behind the words.’ We are not suggesting that corporations will focus primarily on designing the most credible-looking due diligence process rather than proactively engaging with the human rights issues faced by the corporation. However, we see it as a central limitation of the Special Representative’s framework that it allows this possibility, and may even to appear to encourage corporations to act in this manner. We note that the literature suggests that creative compliance has been identified as finding its source in a certain attitude towards law, which is notably encouraged by a certain way of drafting and designing norms (see McBarnet, op. cit., pp. 240-241).

61 The diversity in civil liability regimes is too great for a complete analysis to be conducted here, but it may be noted, on a general level, that the due diligence model could allow the alleged violator to argue that the required ‘policies and procedures’ were in place, rather than requiring a concrete, actual and proactive concern for human rights issues. That is,
In conclusion, we find the approach referring to 'all human rights' for the substance, and creating, for the rest, ‘due diligence’ processes, to be overly optimistic about the self-explanatory character of the international human rights regime and the way it is supposed to be interpreted and applied by business. Furthermore, it waters down the social and legal standard of conduct which business is expected to live by, and fails to clarify its concrete responsibilities. As a result, the 'due diligence' standard alone is unsuited for both market-based and investor-induced accountability, as well as for the application of civil liability mechanisms. We believe that an effective accountability framework should, before moving to compliance processes, first spell out the substance of the obligations of corporations in respect of human rights, for example in the form of a ‘Code’. In this respect, as we have noted above, simply cross-referencing general human rights instruments which were written with States in mind, is not enough. While the Special Representative undoubtedly makes very sensible proposals as to how to operationalize corporate due diligence (proposals that, in fact, fit comfortably within the enlightened and proactive approach to social issues management that investors expect of companies), the due diligence approach alone does not deal with the performance question. Specifically, in the absence of clearly spelled out substantive obligations, it is left to companies to define the outcomes that they wish to achieve.\(^{62}\) In this sense, it perhaps places corporations in too comfortable a position given the stakes involved. Self-regulation by reference to vague principles or agendas has clear limits and, with regard to human rights, such strategy seems a bit thin when considering the few incentives that businesses have to mend their ways, and the relative freedom they have not to.\(^{63}\)

In the next sections we further describe the kind of normative framework which we envision and offer some reflections and proposals as to how it may complement the Special Representative’s work.

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\(^{62}\) As the Special Representative himself rightly underlines: ‘the standards that business initiatives incorporate are typically self-defined rather than tracking internationally recognized human rights.’ (Draft Guiding Principles, para. 9, p. 3.)

\(^{63}\) We acknowledge that there are fundamental questions around the role and effectiveness of self-regulation in public policy, even in situations where there is a clear normative framework in place. For a critical analysis of self-regulation, see R. Sullivan, *Rethinking Voluntary Approaches in Environmental Policy* (Edward Elgar, Cheltenham, 2005).
3.2. **What Substance?**

Based on the above considerations, in broad terms, we think that a credible normative framework should - perhaps self-evidently - reflect the major sources of international human rights expectations, be sufficiently clear so that corporate performance can be assessed objectively and should focus on standards and performance (i.e. human rights outcomes) rather than just management systems and processes (such as due diligence).

Before moving on to the question of the substance of such a framework, we first wish to respond briefly to the commonly used business argument against such frameworks (and one that was heavily deployed against the Sub-Commission’s Draft Norms), namely that they are a precursor to binding regulation. We acknowledge this argument but do not think it has particular relevance for three reasons. The first is, as we note at the beginning of this chapter, that our chapter is explicitly concerned about the question of how we can make progress in the absence of regulation. Second, we do not believe that, even if there was some degree of consensus around human rights norms, regulation would automatically follow. In fact, we are sceptical that we will see anything that resembles a comprehensive human rights treaty being adopted within the next decade. Third, even if such a treaty or international agreement was adopted, ensuring the effective implementation of such a treaty presents a whole series of additional problems.  

Perhaps the closest to a suitable and robust framework for this purpose is that developed by the Business Leaders Initiative on Human Rights (BLIHR). The Initiative was established by a group of international businesses (including Barclays, Novartis and Novo Nordisk) with the aim of helping further integrate human rights into business policies and practices. The BLIHR member companies viewed international human rights standards as an important part of the global governance debate, as these would provide guidance in defining the respective human rights responsibilities of government, business, NGOs and other societal actors. A central element of the BLIHR programme was testing the value of the UN Sub-

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65 For further information on BLIHR, see http://www.blihr.org/
Commission’s Draft Norms and developing practical tools and guidance on their implementation.

While BLIHR acknowledged that the expectations on businesses are very sector-specific and reflect factors such as the size of the business, its markets, its activities, its geography and its history\(^66\), one of its central conclusions was that it is important to develop a bedrock of essential obligations that any company has, and of essential steps that any company should take regardless of its size, location or nature of its business\(^67\). It therefore proposed a framework – which was based on the UN Sub-Commission’s Draft Norms – that contained both minimum standards (what it referred to as ‘essential’ business behaviour in relation to specific human rights) as well as examples of performance that are expected by wider society that can be classed as ‘expected’ or ‘desirable’. BLIHR proposed that companies have responsibilities to respect the human rights listed in Annex 1. For each of these, BLIHR set out a series of ‘essential steps’ that virtually all companies should take if they were to meet their responsibilities in relation to that human right. To illustrate the BLIHR approach, Box 1 presents the example of the right to privacy.

**Box 1: Essential steps in relation to the right to privacy\(^68\)**

In respecting this right, the BLIHR companies see the following as essential steps:

- Ensuring that, upon request, individuals will be made aware of personal information that the business maintains on them, where it is held and how it can be corrected;
- Not asking workers about their health or pregnancy status except when the status is directly relevant to the performance of job duties, and seeking to keep such information confidential;
- Ensuring adequate protection of personal information held by the company;
- Only providing an individual’s personal or other information to government authorities to the extent required by law and upon request, or with the individual’s permission;
- Seeking to minimise the use of monitoring, surveillance and security

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\(^{67}\) BLIHR (2009), *op. cit.*, p. 11.

\(^{68}\) BLIHR (2009), *op. cit.*, p. 16.
measures that may invade the privacy of individuals to the extent practicable, and using such measures solely for the legitimate business purpose of protecting its assets and the safety of its workers or others.

In the context of our argument about the importance of norms, the BLIHR approach is attractive as an operationalization of the corporate responsibility to respect as it combines the substance, process and performance elements which we have identified as essential to an effective human rights framework for business. The list of rights and obligations provides a substantive reference on which corporations could base their objectives, and the essential steps delineate in a detailed and nuanced manner the various ways in which corporations are to reach those objectives. With the BLIHR approach as a framework, the objective of bringing clarity to the obligations of businesses and the expectations of stakeholders (and among them institutional investors) have of them can more easily be reached. On the legal accountability side, when a liability claim is made in practice by a harmed stakeholder, the framework allows both the standard of conduct for appreciating the existence of a fault or breach of duty of care and the limiting factors (e.g. foreseeability, proximity, causation\textsuperscript{69}) to be determined in a reasonably objective manner. At the same time, when a corporation makes a claim of compliance with its human rights responsibilities, it can do so by reference to a solid normative framework, and not only on the basis of self-defined risk-mitigating processes.

Finally, we wish to stress that our purpose is not to discard the framework put forward by the Special Representative altogether, and also that we do not view the BLIHR framework as an alternative to the Ruggie Framework. In fact, we see the two approaches as compatible, with the BLIHR addressing the major gaps in the Special Representative’s view of the corporate responsibility to respect. The BLIHR framework’s contribution is to explicitly enumerate the human rights applicable to corporate activities,\textsuperscript{70} thereby clarifying the scope and substance of corporate responsibilities in that respect, and to provide guidance on practicalities of discharging those responsibilities by exploring, right by right, what concrete actions are required of corporations. The BLHR approach connects to the Special Representative’s due diligence approach, but it improves it in two major ways: (i) it makes it relative to a clear, concrete and finite code of human rights obligations; and

\textsuperscript{69} Mares, \textit{op. cit.}, pp. 1188 ff.
\textsuperscript{70} Hereby putting substance (and nuance) on Ruggie’s claim that corporations are liable to breach all human rights.
(ii) it discusses due diligence processes not in an open-ended or self-reflective way, but in an applied and rights-specific way, delineating clear outcomes that need to be achieved by corporations.71 From the perspective of investors the BLIHR framework provides a clear and detailed benchmark which they can use to clearly and objectively assess corporate performance. Moreover, the fact that the BLIHR framework was developed and tested by companies gives it a degree of credibility and legitimacy, at least in the business community.

3.3. THE RECIPE FOR SUCCESS: LEGITIMACY AND EFFECTIVENESS

In order to be recognised as relevant, authoritative and valid, any normative framework would need to be effective and have legitimacy.72 By effectiveness, we mean the ability of the framework to actually reach its intended purpose. Expressed another way, the result should be increased respect for human rights by those businesses using the framework. By legitimacy, we mean that the framework should be recognized as 'appropriate' or 'the right thing to do', by a wide circle of stakeholders.73 These two characteristics are of course mutually reinforcing,74 and depend on a number of elements, ranging from their compatibility with agreed societal norms to the existence of practical mechanisms for accountability.

There are several reasons why we think the BLIHR framework could be both effective and legitimate. The first is it is clearly based on both core international human rights law principles and the work of the UN Sub-Commission. The second is that it has been applied in practice by companies. Based on this experience, BLIHR developed a series of guidance tools and materials to support their implementation.75

71 The intensity of the requirements delineated in the ‘steps’ varies from results-oriented steps (‘ensure that...’) to more means-oriented ones (‘seek to minimize...’). In this regard, the BLIHR framework reflects the complexity of human rights responsibilities of business, while, at the same time, not giving companies complete freedom to define for themselves the level of outcomes they will seek. Arguably, the extent of the defenses that a corporations could be able to present are more limited in this model than in the much vaguer ‘due diligence’ model presented by the Special Representative.
75 See further http://www.blihr.org/
That is, the principles are in a form that allow companies to use them as a basis for managing their human rights impacts. Third, the framework allows reasonably objective assessments of corporate performance to be made. This, in turn, would allow investors to make an assessment of whether the company is exposed to specific human rights risks (and to make an assessment of the significance of these risks), to assess how well the company is managing its human rights issues, and to engage with the company (and, in turn, objectively assess the quality of the company’s response to that engagement).

The BLIHR framework also has a number of limitations. In particular, we recognise that the sources and the testing of these, as with any other sets of principles, is not enough. If the framework is to be agreed as the definitive normative framework for business and human rights, it needs endorsement from across business and civil society. In relation to business, we would be surprised if there was particular opposition to this framework; in fact, if we look at the debates around the UN Sub-Commission Norms, the major objections from business seemed to relate to whether and how the Norms would be enforced rather than to the fact that business had specific responsibilities with regard to human rights.

In addition to the need for broad support and endorsement for the framework, we also believe that credible monitoring, assessment and redress mechanisms would be critical to the success of the framework.\(^{76}\) Such accountability is a crucial element of the effectiveness and of the legitimacy of any global governance instrument, all the more when designed and operated by private actors\(^ {77}\) and when domestic legal remedies are absent or ineffective.\(^{78}\) In its current state, the BLIHR framework is overly reliant on self-evaluation and reporting. As we have discussed above, while institutional investors would have a role to play in scrutinising corporate performance and perhaps holding companies to account for their performance, this falls short of structurally effective accountability in the business and human rights regulatory regime. The market is indeed powerless against the majority of corporate human rights violations: those committed by less visible corporations (e.g. those

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\(^{76}\) This speaks to the ‘due diligence’ policies and processes which the Special Representative advocates.


subcontractors buried deep down in the supply chain), those which are not disclosed voluntarily, etc.\textsuperscript{79} To address the shortcomings of market-based accountability, less diffuse accountability mechanisms would therefore be needed.

4. ASSESSMENT OF THE FRAMEWORK PROPOSED

We recognise that our argument in favour of a corporation-specific and substance-oriented normative framework may shake the consensus that has been reached around the protect-respect-remedy proposals that have been advanced by the Special Representative. We also recognise that there are a number of objections that could be raised about our proposals. We engage with what we see as the most substantive of these here as we believe that these challenges provide important insights to the design and effective implementation of a normative framework.

4.1. THE NORMS WERE REJECTED AND THERE IS A CONSENSUS AROUND THE PROTECT-RESPECT-REMEDY FRAMEWORK

Our analysis above suggests that, if we want investors to make a meaningful contribution to the protection and promotion of human rights, they need a clearly defined normative framework, supported by civil society and backed up by effective institutions. The question is not one of intellectual purity; it is one of how the capital markets can be harnessed to support the delivery of international human rights.

In this context, it is important not to overestimate the consensus formed around the Special Representative’s framework. While many stakeholders are happy that the Special Representative was able to jumpstart the debate after the stalemate caused by the Norms, many also regret the Special Representative’s lack of ambition, seeing the protect-respect-remedy framework primarily as a clarification effort (whereas the Norms were seen as an important conceptual breakthrough), and take issue with a number of important points, notably the total abandonment of a ‘list of human rights obligations’ approach.\textsuperscript{80}

\textsuperscript{79} Market accountability can be described as ‘diffuse’, i.e. characterized by a high degree of relativity and uncertainty.

4.2. Even if there was a Normative Framework Would Investors Use it and Would it be Effective?

We see this as a much more important question and one that we cannot provide a definitive answer to. We recognise that even if there was a clear human rights normative framework and even if investors did integrate human rights factors into their investment decisions, human rights issues would probably continue to be underplayed in investment analysis and decision-making. There are three broad reasons. First, investment models typically only look three years or, sometimes, five years forwards; impacts that occur outside these types of timeframes are generally ignored. Second, impacts that occur in the future are generally assigned a lower importance than similar impacts today. Third, as many significant social and environmental impacts are simply not financially material (i.e. they have a modest effect on companies’ earnings or profits), they tend to be excluded from investment analysis. The consequence is that, on its own, investment analysis is unlikely to be enough to incentivise companies to improve their human rights performance.

However, if this integration is supplemented by engagement, where investors explain to companies how human rights issues are factored into their investment decisions and clearly communicate their expectations of companies’ human rights performance, we can see a very different dynamic at play, where the incentives for companies to improve their performance would be significantly increased.

The creation of an agreed normative framework would also help bypass some of the problems presented by the general lack of knowledge about human rights issues in the investment world. It is likely that investors would articulate their expectations of companies by reference to ‘compliance with’ the framework and would look to companies to have the systems and processes in place to comply with (and demonstrate compliance with) the framework. That is, rather than requiring investors to become specialists in human rights issues, such a framework would allow investors to define their expectations by reference to compliance with a widely recognised standard.

We acknowledge that there are, at present, few incentives for investors to engage proactively with the companies in which they are invested. This is a well recognised

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While there may be arguments for investors to take a more proactive approach, the transaction costs of taking action and the reality that the benefits are difficult to measure and accrue to the investment industry as a whole (rather than to the individual investor) limit the level of willingness and interest of individual investors to commit significant resources to this area. There are other obstacles as well, including a general scepticism about the investment benefits of focusing on human rights, a general lack of understanding of how and why human rights issues could be relevant to investment, a reluctance to be seen as a 'social activist' or 'campaigning NGO', a lack of pressure from clients, stakeholders or industry peers to take action on these issues, an unwillingness to take a leadership position, and a perception that focusing on these issues would entail incurring additional costs or risk damaging investment performance.

Some of these obstacles may well be overcome if we see a greater focus on human rights in existing legal obligations or voluntary initiatives, in particular in the environmental space. Domestic legislation in some countries, for example, now seeks to induce, with more or less success, institutional investors to at least consider sustainable development issues in their operations, notably by requiring them to report on their social and environmental impacts. Certain states also explicitly require their national pension funds to take such factors into account. The most prominent example is that of Norway's Government Pension Fund, which is managed according to strict ethical guidelines adopted by the Norwegian Government, and under the oversight of a Council of Ethics. This is a good example of how national legislation and global private initiatives could interact: as domestic legislation requires investors to take human rights factors into account in their investment decisions, a framework such as that developed by BLIHR may be used as a reference instrument in discharging this legal obligation.

82 See, generally, Viñes Fiestas et. al., op. cit.
83 See E. de Cannart d'Hamale et al., La Responsabilité sociale des Entreprises (Corporate Social Responsibility) – Concept, Pratiques et Droit (Vanden Broele, Brugge, 2006), p. 151.
4.3. A NORMATIVE FRAMEWORK CANNOT COVER EVERY EVENTUALITY

We recognise that not all eventualities will be covered by a normative framework such as the one that we propose here. Yet, the Special Representative's approach relying on all-encompassing but overly general human rights instruments is no solution either. We believe that seeing the proposed normative framework as a set of adaptable (though not relative!) principles should overcome the difficulties resulting from the limited character of the framework. Not all aspects of behaviour can be prescribed for any actor in society and, therefore, a periodic review of the framework should allow to fill the gaps as they appear.

We also recognise that the development of any sort of normative framework such as that proposed here will inevitably mean that many of the important subtleties and nuances in the debate around the human rights responsibilities of business will be obscured. However, there are two responses. The first is that if investors' influence is to be harnessed, some compromises and simplifications will inevitably be needed. Second, any normative framework will develop and evolve over time, reflecting changing circumstances as well as experience in the application of the framework.

4.4. WOULD SUCH A FRAMEWORK BE LEGITIMATE?

There are a number of dimensions to the legitimacy of any framework – the sources of the framework, the expertise of its authors, its alignment with prevailing societal norms, the process with which it was adopted, whether it is perceived as effective, etc. The specific point we wish to address here is whether any such framework would succeed in gathering sufficiently widespread support to be seen as a credible and appropriate framework. We are actually quite optimistic on this point. We see the fact that many NGOs explicitly supported the UN Sub-Commission’s Norms as an indication that creating such wide-spread buy-in is feasible, although we fear that this may be more difficult than it was in 2003/2004 given that the Norms have effectively been sidelined and many NGOs have subsequently engaged with the Special Representative’s process.

There is a second reason why such legitimacy is important, and it relates to the role that investors can and could play in influencing corporate human rights practice. At present, the lack of a consistent view across the NGO community about the human rights expectations of companies and the relative lack of focus on the role that
institutional investors can play in protecting and promoting human rights, has meant that there has been limited pressure on investors to engage with companies on human rights issues. Moreover, the absence of consensus around a normative framework has meant that where such discussions have taken place, they have tended to focus on management processes rather than outcomes.

5. CONCLUDING COMMENTS

We acknowledge the challenge that our arguments present both to the UN Special Representative and to the international community. We recognise the consensus that has been painstakingly built up around the protect-respect-remedy formulation and the high level of global engagement with the Special Representative. That said, our central question is whether all of this work has moved us any closer to a coherent, practical framework that investors – and, indeed, other stakeholders – can use to assess the human rights performance of companies and to hold them to account for their performance against this framework. If this is the proper test of the work of the Special Representative, then our answer must be that the debate around business and human rights has, at best, stalled, and more likely regressed since the Special Representative was appointed.

In his protect, respect and remedy framework, the Special Representative emphasises the role of states in ensuring respect for human rights by corporations. However, in a world where the ability of the nation state to effectively control the activities of companies is severely constrained, we need to look beyond conventional regulatory approaches and to consider how the influence of other actors can be harnessed. In our view, this requires putting in place credible accountability mechanisms aimed at keeping corporate conduct in check, using the resources of all actors available, including corporations themselves, and their investors. Such accountability mechanisms should be based on clear normative references for judging behaviour, and on effective processes for operationalizing those norms and sanctioning misbehavers. In this light, our criticism of the Special Representative’s framework pertains mainly to the fact that, notably because of his rejection of the substance-oriented approach of the Norms and his exclusive focus on corporate due diligence, the conceptual effort toward corporate human rights accountability has been diverted into a search for management and disclosure processes which, though useful per se, are unlikely to function effectively in the absence of a
normative framework that clearly defines and delineates corporate human rights obligations. The fact that we do not have such a normative framework, in our view, weakens the pressures for companies to manage their human rights impacts effectively and makes it harder for the accountability mechanisms identified by the protect, respect and remedy framework to operate.

In relation to institutional investors and the ways in which they can contribute to increased accountability from business, we have, as a consequence, gone from a situation where a number of mainstream investors were proactively communicating the Norms to the companies in which they were invested and encouraging these companies to ensure that they met the letter and spirit of the Norms, to one where human rights are practically off the agenda. Our proposals are directed at changing this situation as quickly as possible. The priority is the development of a credible normative framework such as that provided by BLIHR. Given that this process would take some time, the immediate action should be for institutional investors (or at least a group – which could be relatively modest in terms of numbers - of large institutions) to endorse the BLIHR framework as the most credible human rights framework that is currently available. For their part, governments and civil society should lend their support to this agenda. This support has two dimensions. The first is to press the (next) Special Representative to develop such a framework and the second is to lend their support to the framework through pressing companies and investors to support and ensure the effective implementation of such a framework once it has been developed.

Finally, while the focus of this chapter is on the role that institutional investors can play in the protection and promotion of human rights in the business community, it is not our intention to argue that investors are the only or the most important actor. Companies face pressure from a range of stakeholders (governments, NGOs, the media, employees, etc), of whom investors are just one. We also recognise that investors may not be best placed to be the arbiters of company performance, either in terms of defining what is acceptable corporate behaviour or in holding companies to account for failings in their performance. Therefore, other types of accountability mechanisms will be needed as well. That said, we are also very aware of the realities of the limitations of international human rights law as it applies to business (in particular its limitations in holding companies to account for their human rights performance). Investors – at least in theory – offer the potential of stimulating moves towards the ‘regulation’ of companies, through encouraging the development of
effective corporate self-regulatory regimes as well as increasing the pressure on
governments to take action to complement or supplement these self-regulatory
initiatives. We therefore see this chapter as part of the wider discussion around the
potential for non-state actors to create the right incentives for companies to take
proper account of their human rights impacts.
Annex 1: Scope of Companies' Human Rights Responsibilities

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<td>Responsibilities in relation to the right to hold opinions and the right to freedom of expression and information</td>
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<td>10</td>
<td>Responsibilities in relation to the right to the prohibition against incitement of national, racial or religious hatred.</td>
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<td>Responsibilities in relation to the right to the right of peaceful assembly</td>
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<td>Responsibilities in relation to freedom of association, including the right to form and join trade unions and the right to strike</td>
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<td>Responsibilities in relation to the right to just and favourable conditions of work</td>
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<td>Responsibilities in relation to the right to social security, including social insurance</td>
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The Leuven Centre for Global Governance Studies is an interdisciplinary research centre of the Humanities and Social Sciences at the Katholieke Universiteit Leuven. It was set up in the Spring of 2007 to promote, support and carry out high-quality international, innovative and interdisciplinary research on global governance. In addition to its fundamental research activities the Centre carries out independent applied research and offers innovative policy advice and solutions to policy-makers on multilateral governance and global public policy issues. In 2010, the Centre has been recognized as a “K.U.Leuven Centre of Excellence”.

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For more information, please visit the website www.globalgovernancesstudies.eu

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