BUSINESS AND HUMAN RIGHTS: WHAT'S THE BOARD GOT TO DO WITH IT?

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Corporate scandals related to human rights issues have illustrated the hefty cost associated with ignoring humanitarian issues while conducting business. For example, the Royal Dutch Petroleum Company (Shell) has spent tens of millions of dollars related to the Nigerian government's execution of the "Ogoni 9," which was preceded by a tense relationship between the corporation and Ogoni people of Nigeria. In addition, in India, the Vedanta corporation lost substantial market capitalization following a trial related to its mountain mining activities for its effects on the people of the region. Despite the moral duty that may have compelled action in these examples, it is also clear that a corporation's (particularly a transnational corporation's) decision to develop a framework for proactive corporate responsibility is also good business. Assuming the accuracy of this conclusion, this Article questions what role the board of directors should have in formulating this framework in light of the Alien Tort Claims Act and the United Nations' Guiding Principles on corporate responsibility and human rights. This Article admits that the board of directors will face great challenges when incorporating human rights issues into a company's corporate governance. However, given the central role courts are placing on the board of directors, it would be wise to rise to the challenge and make sure that human rights are a key part of their function.

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INTRODUCTION

The boards of directors of publicly traded corporations have a multitude of responsibilities to manage, including representing the interests of shareholders, reviewing financial statements, and positioning the corporation publicly to maximize its revenue stream. However, there is one set of emerging issues that may implicate a board's role—the increased potential for human rights issues to lead to corporate accountability. The scenarios that can impact business and human rights are numerous—labor and employment, mineral extraction and indigenous communities, and corporate operations in weak governance zones. Despite the varied nature of the liability and responsibilities involved, there are many common elements that can have profound implications for a corporation's framework in developing its human rights agenda.

The conversation regarding corporations and their involvement in human rights issues tends to fall within two camps. On the one hand, it is handled directly—as a way of assessing (or, more often, disputing) corporate liability for human rights issues.[1] The business lobby's consistent attack on the Alien Tort Claims Act's (ATCA) use in litigation against

1. *See* Cynthia A. Williams & John M. Conley, *Is There an Emerging Fiduciary Duty to Consider Human Rights?*, 74 U. CIN. L. REV. 75, 76–78 (2005).

corporations is a prime example of this.[2] The ATCA became a part of human rights advocates' arsenal after one ingenious litigator used it in the legal equivalent of a Hail Mary Pass by bringing a lawsuit against a Paraguayan official for his alleged involvement in the kidnapping and torture of Joelito Filártiga.[3] Since that time, businesses have fought back. From the Supreme Court's first modern review of ATCA in *Sosa v. Alvarez-Machain*,[4] the business lobby has filed amicus briefs propounding that ATCA should not be used to hold nonstate actors (namely corporations) liable for human rights violations overseas.[5]

On the other hand, the concept of business and human rights has been discussed quietly, whispered in the corners of discussions of corporate social responsibility (CSR).[6] In small but significant ways, the business lobby has begun to acknowledge that there are corporate accountability issues arising from the work they do in developing countries that encompass far more than simply building a school in an area surrounding its base of operations.[7] Unfortunately, much of the work regarding a corporation's need to respect human rights is still couched in the language of CSR, leading many to believe that corporate respect of human rights is the same as CSR.[8]

Yet, the differences between CSR work and business and human rights are foundational. As the director for Business and Human Rights explains:

> A CSR approach tends to be top-down: a company decides what issues it wishes to address. Perhaps contributing to community education, healthcare or the arts. . . . Or taking steps to encourage staff diversity or reduce pollution. These voluntary approaches should be welcomed. But a human rights approach is different. It is not top-down, but bottom-up—with individual at the centre, not the corporation. . . . When it comes to human rights, companies do not

2. *Id*. at 88–89.
3. Filártiga v. Peña-Irala, 630 F.2d 876, 887 (2d Cir. 1980).
4. 542 U.S. 692, 712–24 (2004).
5. Williams & Conley, *supra* note 1, at 88.
6. Oftentimes, particularly in its nascent stages, business and human rights issues were discussed within the broader framework of corporate social responsibility. *See, e.g.*, Lisa J. Laplante & Suzanne A. Spears, *Out of the Conflict Zone: The Case for Community Consent Processes in the Extractive Sector*, 11 YALE HUM. RTS. & DEV. L.J. 69, 71 (2008) (discussing conflicts between industry and indigenous communities and using citing solutions as an example of "second-generation CSR initiatives"); John M. Conley & Cynthia A. Williams, *Engage, Embed, and Embellish: Theory Versus Practice in the Corporate Social Responsibility Movement*, 31 J. CORP. L. 1, 2 (2005) (providing a broad definition of corporate social responsibility that includes issues that would now be labeled business and human rights issues). But, as a growing number of commentators acknowledge, they are in fact very different things. *See, e.g.*, Chris Avery, *The Difference Between CSR and Human Rights*, CORP. CITIZENSHIP BRIEFING, Aug./Sept. 2006, at 4, *available at* http://www.sg.unimaas.nl/_old/oudelezingen/Avery-difference-between-CSR-and-human-rights-Aug-Sep-2006.pdf. As Avery notes, "sometimes the relationship between [CSR] and human rights is not properly understood. They have very different meanings. Companies, unaware of the difference, or thinking that a traditional CSR approach is enough, are exposing themselves to risk." *Id.*
7. *See* Avery, *supra* note 6, at 4.
8. *See id.*

get to pick and choose from a smorgasbord those issues with which they feel comfortable.[9]

As a result, there is a growing consensus that a new approach needs to be used for assessing business and human rights in the corporate literature—namely, a framework that includes proactive corporate responsibility for preventing human rights abuses.[10]

When directors and managers fail to assess human rights issues as part of their risk-management functions, there can be very real, long-lasting legal consequences for a corporation. Witness, for example the plight of the Royal Dutch Petroleum Company (Shell). In 1995, Shell's Niger subsidiary became enmeshed in a human rights controversy when the then heads of the Nigerian government executed the "Ogoni 9," a group of activists who were protesting Shell's work in the Niger Delta.[11] Even though the incident happened over seventeen years ago, Shell is still unraveling the legal consequences of its relationship with those involved—most recently by providing oral arguments before the U.S. Supreme Court on whether the ATCA can be used to hold corporations (as nonstate actors) liable.[12] Regardless of the Supreme Court's decision, Shell has spent tens of millions of dollars dealing with the fallout from this scandal.[13] Therefore, whether the issue of business and human rights is examined as a humanitarian issue or an issue of good business practice,[14] it is becoming increasingly clear that corporations need to include preventing human rights violations in their risk assessments.

9. *Id*.

10. *See generally* U.N. Global Compact Office & U.N. High Comm'r for Human Rights, *A Guide for Business: How to Develop a Human Rights Policy*, at 4 (2011) (by Lucy Amis) [hereinafter U.N. Global Compact Office], *available at* http://www.ohchr.org/Documents/Publications/DevelopHumanRightsPolicy_en.pdf ("*A Guide for Business: How to Develop a Human Rights Policy* seeks to outline why companies should respect human rights, the principal reasons for adopting a human rights policy, its key ingredients and the best-practice process to develop one.").

11. A similar case was brought by the family of Ken Saro Wiwa, considered the head of the Ogoni 9. That case was settled in 2009. For a fuller examination of Shell's relationship with Wiwa and potential shift in paradigms issues that could arise from it, see Jena Martin Amerson, *What's in a Name? Transnational Corporations as Bystanders Under International Law*, 85 ST. JOHN'S L. REV. 1, 3–7 (2011).

12. On February 28, 2012, the Supreme Court heard arguments in the matter. *See* Transcript of Oral Argument, Kiobel v. Royal Dutch Petroleum Co., No. 10-1491 (U.S. Feb. 28, 2012), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/10-1491.pdf. Subsequently, the Court declined to make a decision and instead placed the case on its calendar for its 2012–2013 term. Additional arguments were given on October 1, 2012. The Court issued its decision on April 17, 2013. In its ruling, the Court held that while "ATS covers actions by aliens for violations of the law of nations," it does not have an extraterritorial reach. Kiobel v. Royal Dutch Petroleum Co., No. 10-1491 (U.S. Apr. 17, 2013) (slip op., at 7); *see also* discussion *infra* note 163.

13. Isabel Ordonez & Russell Gold, *Corporate News: Shell Settles Nigeria Case: Oil Giant to Pay $15.5 Million Over Deaths of Activists*, WALL ST. J., June 9, 2009, at B.2.

14. This might be a prime moment for advancing the business and human rights agenda, simply because it seems that we are witnessing (as Derrick Bell has referred to it) interest convergences between business and human rights advocates. *See* Derrick A. Bell, Jr., Comment, Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523–25 (1980). For a discussion on why adopting a stakeholder model for corporate governance makes long-term business sense,

A more recent example comes from India, where the Vedanta corporation, "a globally diversified natural resources group committed to sustainable development, supporting local communities and contributing to the economies of the areas where [it] operate[s]"[15] was accused of violating international human rights norms by mining a mountain that the local indigenous tribe considered central to their religion.[16] Vedanta maintained that it had gone through all of the necessary approval approaches with the Indian government.[17] The company also had the support of the local Orissa community.[18] However, human rights advocates claim that the consultation did not include Orissa's indigenous population who view the mountain as sacred and receive cover from the elements in its shadow.[19] The India Supreme Court sided with Vedanta, holding that the company had complied with all laws, both national and international.[20] Nonetheless, the spotlight on the project and its potential human rights implications put pressure on India and, in 2010, the Indian government ordered Vedanta to stop work on the mine.[21] The resulting losses to Vedanta contributed to its shares' devaluation on the Bombay Stock Exchange.[22] This example shows the growing interdependence between business, human rights, and a corporation's profits.[23] As Faith Stevelman, a scholar in the emerging field of business and human rights, states:

> Where there are persistent claims of serious human rights abuses, social opprobrium may trigger costly consumer, investor and even employee backlash. Such backlash is not constrained by the structures of civil procedure and law. In a world where there is growing popular concern about human rights compliance, as well as growing

see David Millon, *Two Models of Corporate Social Responsibility*, 46 WAKE FOREST L. REV. 523, 530–40 (2011).

15. *About Us*, VEDANTA, http://www.vedantaresources.com/about-us.aspx (last visited Mar. 28, 2013).

16. Bianca Jagger, *Undermining Human Rights in the Name of Development*, READER SUPPORTED NEWS, Apr. 9, 2012, http://readersupportednews.org/opinion2/277-75/10874-undermining-human-rights-in-the-name-of-development.

17. *Lanjigarh Project*, VEDANTA, http://lanjigarhproject.vedantaaluminium.com/lanjigarh-project.htm (last visited Mar. 28, 2013).

18. Jagger, *supra* note 16.

19. *Id.*

20. *Lanjigarh Project*, *supra* note 17.

21. Maseeh Rahman, *India Blocks Vedanta Mine on Dongria-Kondh Tribe's Sacred Hill*, THE GUARDIAN, Aug. 24, 2010, http://www.guardian.co.uk/business/2010/aug/24/vedanta-mining-industry-india.

22. Prince Thomas, *Orissa Test for Anil Agarwal*, FORBES INDIA, Feb. 27, 2012, http://forbesindia.com/blog/business-strategy/orissa-test-for-anil-agarwal.

23. This also shows the rapidly changing framework of business and human rights and how a company's operations can quickly affect its human rights responsibilities. As John Ruggie discusses, the dynamic situation of businesses can lead to rapid situational changes. For instance, a company that discovers will impact human rights and the ability of people in that community to find work. *See* Interview by John Sherman, International Bar Association (Apr. 19, 2010) [hereinafter Ruggie Interview], *available at* http://www.ibanet.org/Article/Detail.aspx?ArticleUid=4B5233CB-F4B9-4FCD-9779-77E7E85E4D83.

> technological capacity to post any form of "smoking gun" evidence to the web, the prospect of more aggressive human rights due diligence will be a two-edged sword for companies and executives. Consumers, employees, investors and governments will each expect if not demand it. Corporations will become more accustomed to these expectations, and to their commitments, if not their duties, to live up to them.[24]

The problem for business and human rights is particularly acute for Transnational Corporations (TNCs).[25] There are many specific traits of TNCs that are applicable here. First, TNCs are almost invariably publicly traded corporations with varied shareholder interests in addition to a large stakeholder population.[26] Second, TNCs' overseas operations are often run through subsidiaries that help to shield them from liability.[27] Finally, because of their varied geographical locations, information gathering can be a particular challenge for TNCs and a TNC's board of directors.[28] Given that these boards can influence and affect not only specific communities but also implicate larger issues of globalization that provide the context for business and human rights,[29] examining the role of boards at TNCs seems appropriate.

Assuming that corporations agree to take on the responsibility for human rights, this Article examines the following question: what role should the board play? In the United States, a board of directors has specific duties related to assisting the corporation it serves in fulfilling the corporation's legal obligations. Some scholars have questioned whether these duties are implicated if a board fails to consider human rights issues. Cynthia Williams and John Conley discussed this issue over seven years ago when they examined how ATCA may give rise to director duties that include considering human rights issues.[30] Indeed, Williams and Conley's article went further and specifically highlighted the potential issues that business and human rights may have on boards of directors, stating that "[g]iven the view of business amici [in *Sosa*] that ATCA litigation presents a 'unique but significant risk,' it would be imprudent for directors to ignore the possibility of this risk as too remote to

24. Faith Stevelman, *Global Finance, Multinationals and Human Rights: With Commentary on Backer's Critique of the 2008 Report by John Ruggie*, 9 SANTA CLARA J. INT'L L. 101, 121 (2011).

25. *See* Jena Martin Amerson, *"The End of the Beginning?": A Comprehensive Look at the U.N.'s Business and Human Rights Agenda from a Bystander Perspective*, 17 FORDHAM J. CORP. & FIN. L. 871, 873 (2012).

26. For instance, of the top fifty companies on CNN's 2012 Global 500 list, forty-five of them are publicly traded. *Global 500*, CNN MONEY, http://money.cnn.com/magazines/fortune/global500/2012/full_list/index.html (last visited Mar. 28, 2013).

27. Martin Amerson, *supra* note 25, at 879, 888; *see also* Stefan J. Padfield, *In Search of a Higher Standard: Rethinking Fiduciary Duties of Directors of Wholly-Owned Subsidiaries*, 10 FORDHAM J. CORP. & FIN. L. 79, 111–17 (2004).

28. Martin Amerson, *supra* note 25, at 879.

29. *See* Millon, *supra* note 14, at 531–33.

30. Williams & Conley, *supra* note 1, at 87–94.

consider in the board's approach to risk management as part of their duty of oversight."[31]

In addition, the United Nations has added new prominence to business and human rights issues on the international stage. On June 16, 2011, the U.N. unanimously endorsed a set of Guiding Principles to help corporations maintain responsibilities for human rights issues.[32]

In previous work, I have argued that the Guiding Principles elevated the U.N.'s role in business and human rights issues in a way that may lead to a future duty for TNCs under international law.[33] The Guiding Principles also marked the end of a dramatic shift in the dialogue regarding legal responsibility for corporations and human rights issues.[34] Given the widespread attention the issue of business and human rights has received lately, now seems like a ripe moment to reassess the work of Williams and others within the context of the Guiding Principles and to examine how these principles might implicate board behavior. In this Article, then, I explore what the current sources are (in both the literature and the law) for corporate duties and responsibilities in the business and human rights arena. I argue that these sources may give rise in the future to the level of a legally cognizable duty, and that, even if it falls short of that standard, it is something that, at a minimum, an effective board should incorporate into its risk assessment function. This Article offers some suggestions regarding the means and methodology for making that happen.

This Article proceeds in three parts. Part I and Part II explore in more detail the various sources for corporate duties and responsibilities of the board with regard to business and human rights. In Part I, I examine the current corporate governance discourse in the United States to see if our corporate duties and responsibilities of the firm can be applied to a business and human rights perspective. I conclude that the way that the law is trending now may give rise to a legally cognizable duty for board members specifically with respect to assessing business and human rights risks.

Part II of this Article uses the Guiding Principles to examine the key guidance that may especially be used within the context of board function. In this Part, I highlight the point that, even if the national law does not yet rise to the level of legally required compliance, the Guiding Principles herald a trend in international law that may lead to eventual corporate accountability if the firm fails to take business and human rights issues into account. Examining how the Guiding Principles speak to the board's duties and responsibilities will help an effective board es-

31. *Id*. at 89.
32. Martin Amerson, *supra* note 25, at 873.
33. *Id.* at 932–36.
34. *Id.* at 873.

tablish mechanisms to examine business and human rights issues now, to prevent legal accountability later.

Finally, in Part III, I argue that the best method for ensuring that businesses proactively avoid human rights violations is one where a corporation's board is actively engaged in gathering information and monitoring the corporation's role in human rights issues. Drawing on the work of scholars engaged in analyzing organizational behavior theory, I posit that having a corporation's board use a more process-oriented approach in business and human rights issues will not only ensure greater compliance in this area but will also translate to greater board efficiencies in other areas of corporate interest. Like it or not, as the corporate landscape changes significantly, it would seem that the board[35] has quite a lot to do with business and human rights after all.

I. BOARD FUNCTION IN VARIOUS CORPORATE PARADIGMS

One of the great ongoing debates in corporate governance literature concerns what the exact role is for the board of directors in U.S. corporations.[36] The continued confusion regarding what role the board should have has very real world consequences.[37] As Tamar Frankel states, until a board understands and agrees upon "the group's objectives and its roles," it will continue to function at a sub-optimal level.[38] So, while boards in different corporations vary in efficiency depending on the extent to which the board members understand and agree on the dual roles they play as advisors and supervisors, if there is disagreement at all, boards are likely to be dysfunctional or fail.[39]

A public corporation's board of directors has varying degrees of autonomy and control in relation to the corporation's CEOs.[40] Many of the

35. The idea of taking mainstream notions of corporate jurisprudence and applying it to larger stakeholders' issues affecting the corporation is finally beginning to gain traction. For instance, David Millon, has written on the issues of corporate social responsibility. Millon, *supra* note 14 at 523. According to Millon, it is often assumed (incorrectly) that there is a zero-sum trade-off between the interests of shareholders and nonshareholders. *Id.* at 525–26.

36. *See* Padfield, *supra* note 27, at 94–97; Lynn A. Stout, *Bad and Not-So-Bad Arguments for Shareholder Primacy*, 75 S. CAL. L. REV. 1189, 1189–90 (2002).

37. *See* Tamar Frankel, *Corporate Boards of Directors: Advisors or Supervisors?*, 77 U. CIN. L. REV. 501, 501 (2008).

38. *Id.* I should note that, while I agree with Prof. Frankel's point regarding the need for the board to understand its role, her claim may seem more as a normative one than a legal one: under the current legal scheme, the board's role is really deciding what obligations it will undertake in fulfilling its statutorily defined role.

39. *Id*.

40. Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. U. L. REV. 547, 559–60 (2003). From a *legal* perspective, any control a CEO has is delegated to the CEO by the board—the board ultimately retains control (unless otherwise provided in the certificate of incorporation). *See* DEL. CODE ANN. tit. 8 § 141(a) (2013) ("The business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors, except as may be otherwise provided in this chapter or in its certificate of incorporation. If any such provision is made in the certificate of incorporation, the powers and duties conferred or imposed upon the board of directors by this chapter shall be exercised or performed to such extent and

current debates in corporate governance literature (and, in particular, in the articles from this Symposium) focus on the degree to which each board of directors should be autonomous from management and the attendant duties that the board should possess for that autonomy and oversight.[41] In addition to these Symposium scholars, Stephen Bainbridge has been guiding much of the debate regarding corporate governance and the board of directors.[42] In his work, Bainbridge set forth a framing analysis that has been almost uniformly adopted as the methodology for charting the different corporate theories and how they apply.[43] Bainbridge did so by putting forth a graph on which he plots the means of corporate governance—to wit, who should control the corporation and the ends of corporate governance—whom the corporation should benefit. For Bainbridge, this means/ends axis is the primary paradigm for analyzing future corporate governance theory by examining how the theory plots on the graph.[44]

This Article takes no direct position on either side of the means/ends axis debate in corporate governance. For instance, while there might be certain frameworks that better assess business and human rights impacts, I believe that, regardless of who is in control of the corporation, these impacts can be assessed and resolved. More specifically, regardless of whether the corporation is run through the CEO, the board

by such person or persons as shall be provided in the certificate of incorporation."); *cf.* Smith v. Van Gorkom, 488 A.2d 858, 872 (Del. 1985) ("The business judgment rule [as provided in section 141(a)] exists to protect and promote the full and free exercise of the managerial power granted to Delaware directors."); McQuade v. Stoneham, 189 N.E. 234, 236 (N.Y. 1934) ("Directors are the exclusive executive representatives of the corporation, charged with administration of its internal affairs and the management and use of its assets. They manage the business of the corporation."). Thus, under our current legal regime, it would seem that it is the board that chooses to retain or delegate varying degrees of control. Notwithstanding our current legal structure, however, there are many public corporations that are, in practice, dominated by strong CEOs and, as such, if a corporation's board ever chose to reclaim the power it had delegated, there may be some strong resistance on the part of the CEO and the shareholders. While, as the widely publicized Disney "shareholder revolt" demonstrated, the CEO's power can sometimes be minimized or even lead to his eventual resignation, the means often employed fall outside the legal structure. *See, e.g.*, Bruce Orwall & Joann S. Lublin, *Disney Shareholders' Revolt Widens*, WALL ST. J., Feb. 27, 2004, at B.1 (discussing the campaign, run by former Disney board member Roy Disney, for shareholders to withhold their support for Disney's then CEO Michael Eisner); s*ee also* Bruce Orwall, *End of the Ride: Disney's Eisner Will Quit in 2006 after Surviving Bruising Battles*, WALL ST. J., Sep. 10, 2004, at A.1 (explaining how the Disney shareholder revolt eventually led Eisner to resign).

41. Bainbridge, *supra* note 40, at 561.

42. *See generally id.* (exploring director primacy across a range of corporate law doctrines).

43. *Id.* at 548.

44. *Id.* at 548–50. I should note, however, that I generally reject Bainbridge's premise that "the ultimate decisionmaker is presented with a zero-sum game" regarding corporate interests. *Id.* at 550. Rather, I think that far more frequently, many of the various conceptual frameworks can, in fact, be reconciled. For instance, a hotel that implores consumers to refrain from using many different towels during their hotel stay to aid the environment is also, coincidentally, helping its bottom line with reduced labor and laundry costs. The *agendas* of the individual actors who are advocating on behalf of another, however, make it seem that the differences are irreconcilable far more frequently than they actually are. Nonetheless, I recognize that there are others who believe that the conceptual agenda itself is, in fact, irreconcilable. Also, while Bainbridge's methodology is not the only way to frame the issues in corporate governance, it is still, ten years later, the predominant framing theory.

of directors, or the shareholders, there can be a large and influential role for the board of directors. Likewise, while I certainly have a preference for an ends analysis that considers a broader stakeholder community,[45] I believe that business and human rights can (and should) still be considered, even under a shareholder primacy model.[46]

While these frameworks and paradigms are important in informing our analysis of the roles that members of the corporate organ can play in the entity itself, these constructs (like all artificially created constructs) are in danger of falling under their own theoretical weight. While they may help us by providing a uniform set of understandings and common vocabulary, the purity of their models rarely stand up against the reality of modern corporations.[47] That is not to say that these constructs are bad, irrelevant, or even flawed, because most of them are none of these things. It is to say, rather, that we need to keep the role of the various corporate governance theories (like any theory) within the larger context. Here, that context is twofold: (1) how businesses use boards of directors in advancing their agenda and (2) how the law, ex post, assesses whether the board of directors fulfilled its role correctly in the eyes of the law.

This next Section provides a brief overview of the varying theories that currently dominate corporate governance literature. The overview is discussed specifically from the analytical perspective regarding what role the board can (and should) have under these varying theories and, specifically, how a particular framework may implicate a corporation's human rights agenda.

45. In that instance, I believe that the best model for corporate governance is the one that recognizes a larger stakeholder community. I am not alone in this view of the corporation. Many other scholars have argued that the most efficient use of the corporation is one where the exclusive interests of the shareholders should not be the only consideration. Millon, *supra* note 14, at 530–31, 538–40; Padfield, *supra* note 27, at 128; Stout, *supra* note 36, at 1208–09. Indeed, many state codes have recognized this in their enactment of constituency statutes that expressly allow for corporate boards to consider other interests than those of shareholders. *See, e.g.*, 15 PA. CONS. STAT. § 515(a)–(b) (West 2013) (permitting, but not requiring, boards of directors to consider other interests besides shareholders). For a comprehensive discussion of constituency statutes, see Lawrence E. Mitchell, *A Theoretical and Practical Framework for Enforcing Corporate Constituency Statutes*, 70 TEX. L. REV. 579 (1992). Delaware has no constituency statute. Case law in Delaware, however, has made clear that in all instances, except when the life of the corporation is ending, directors have the rights (but not the duty) to consider other interests besides the shareholders. Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946 (Del. 1985); *see also* Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 182 (Del. 1986) (stating that, in an auction environment "the duty of the board has thus changed from the preservation of . . . [the] corporate entity to the maximization of the company's value *at a sale for the stockholder's benefit*" (emphasis added)).

46. This will become even more apparent when we discuss risk assessment. *See* discussion *infra* Part III.C.

47. *See* discussion *infra* Part III.C.1.

A. Dueling Theories of Corporate Governance

The function and role of the board are dependent on one's larger theory of corporate governance. The difference in the theories often comes down to agendas and priorities. At their heart, each theory picks an actor and a priority tension and pushes it to the front, claiming *those* are the ends a corporation serves. While many of these theories can be (and have been) described in numerous ways, examining these models from either a contractarian or communitarian perspective can offer specific insight for TNCs and their human rights agenda. The unique structure of TNCs also raises additional issues regarding the board. Specifically, the board should address what roles board members of wholly owned subsidiaries should play in examining these issues. For instance, Stefan Padfield has discussed the issue of fiduciary duties of the board members of wholly owned subsidiaries.[48] Padfield's article brings to the forefront the debate between communitarians (who believe the state should have corporations take into account more stakeholders than just the shareholders by imposing additional fiduciary duties) and contractarians (who find that shareholder profit is of primary importance).[49]

Contractarians envision the corporation under a "nexus of contracts" model.[50] This theory sees the corporation as the nexus of private contracts between corporate constituents. Nonshareholder constituents, such as employees or creditors, enter into explicit contracts. Shareholders, however, have implicit contracts entitling them to residual claims. As residual risk-bearers, shareholders warrant primacy in corporate decision making.[51] The board of directors, however, rather than simply acting as a check against management entrenchment, takes the predominant position of controlling the corporation.

The contractarian model is useful for plotting the source of directoral authority. As Butler and McChesney note:

> The contractual theory of the corporation explains why boards of directors have the legal authority to define the perimeters of managerial decision making. In this view, the board of directors is a market induced mechanism for monitoring management on behalf of shareholders. The relevant question then becomes whether directors—either individually or collectively—have the incentive to do *their* job.[52]

48. Padfield, *supra* note 27.

49. *Id.* at 94–97.

50. *See, e.g.*, FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 36–39 (1991).

51. Bernali Choudhury, *Serving Two Masters: Incorporating Social Responsibility into the Corporate Paradigm*, 11 U. PA. J. BUS. L. 631, 636–37 (2009).

52. Henry N. Butler & Fred S. McChesney, *Why They Give at the Office: Shareholder Welfare and Corporate Philanthropy in the Contractual Theory of the Corporation*, 84 CORNELL L. REV. 1195, 1201 (1999). In commenting on Butler and McChesney's theory, noted scholar Thomas Joo has stated "although it is often argued that directors *should* owe duties only to shareholders . . . in practice direc-

This statement succinctly encapsulates the issue of entrenchment—the problem that occurs when shareholder representatives (such as management) have interests that are at odds with the shareholders themselves. The concern is that, faced with this tension, a manager will almost always pick her self-interest over the interest of the shareholder. In one sense, the board of directors was seen as a solution to the problem—a way of monitoring those who would prioritize their own interest. The problem with this solution is that it does not account for the fact that boards themselves may have conflicting priorities from those of shareholders. The entrenchment problem then is particularly important to a business and human rights agenda, because if directors have difficulty putting the corporation's *financial* incentives (which can often be directly correlated back to director incentives) ahead of their own, it seems even more likely that they will be unable to prioritize putting a decision that advances human rights (and may not be seen as a direct financial benefit to the corporation) ahead of decisions that benefit the corporation.[53]

Bainbridge has embraced this contractarian model of corporate governance.[54] He argues that "the board of directors is not a mere agent of the shareholders, but rather is a *sui generis* body—a sort of Platonic guardian—serving as the nexus for the various contracts comprising the corporation."[55] Bainbridge argues that it is the directors who, rather than serving the will of the shareholders, should be insulated from their reach.[56] This theory shifts the focus from the shareholders to the board, which requires independence to perform its role of wealth maximization.[57] Further, Bainbridge argues that it is important to insulate the board from shareholders to maintain a longer perspective.[58] As some other scholars suggest, reducing power from the shareholders is not a problem because shareholder power *is* the problem.[59]

tors consider the interests of multiple constituencies." CORPORATE GOVERNANCE: LAW, THEORY AND POLICY 41 (Thomas W. Joo ed., 2004).

53. Enunciated so explicitly, this stakeholder theory would probably be difficult to maintain in Delaware. *See, e.g.*, eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 35 (Del. Ch. 2010) ("Directors of a for-profit Delaware corporation cannot deploy a rights plan to defend a business strategy that openly eschews stockholder wealth maximization—at least not consistently with the directors' fiduciary duties under Delaware law."). This statement is not entirely inconsistent with a stakeholder theory—rather it only counsels elevating other constituencies over the goal of shareholder maximization. Nonetheless, a determined corporation could still maintain a strategy that values stakeholders (perhaps even above shareholders) in Delaware, so long as the corporation were to frame it within a shareholder-benefit framework. For a scathing criticism of shareholder theory's manifestation within corporations (that includes an analysis of the eBay case), see Leo E. Strine, Jr., *Our Continuing Struggle with the Idea that For-Profit Corporations Seek Profit*, 47 WAKE FOREST L. REV. 135 (2012).

54. Bainbridge, *supra* note 40, at 561.

55. *Id*. at 550–51 (internal citation omitted).

56. *Id.* at 600.

57. Grant Hayden & Matthew T. Bodie, *Shareholder Democracy and the Curious Turn Toward Board Primacy*, 51 WM. & MARY L. REV. 2071, 2090 (2010).

58. *Id*. at 2076.

59. *Id*. at 2094 (referring to other "long term theorists," Lawrence Mitchell, Martin Lipton, and Steven A. Rosenblum who, in their articles, support board insulation from shareholders).

In contrast to contractarians, communitarians argue that in addition to internal organizational beneficiaries (such as shareholders and the corporate entity itself), other stakeholders (such as employees, the locus of operation for the corporation, and the community at large) should be a factor in corporate decision making.[60] More specifically, these groups should be factored in, not just within the view of how these relationships will contribute to shareholder wealth maximization or the continuance of the corporate entity, but should be considered as separate constituencies who are impacted by the corporation's actions, operations, and relationships.[61] This theory has often been articulated under a stakeholder theory.

At its core, the stakeholder theory posits that since shareholders undoubtedly have a wide variety of interests, the diversity among stakeholders would not cause any additional consideration for the board.[62] The diverging interests among shareholders became clear during the "hostile takeover wave" in the 1980s[63] where shareholders were often divided regarding to whom to sell the shares of a company. Some shareholders considered the profit only while other shareholders considered the merger's effect on the larger community.[64] As a result of all the corporate action, thirty states enacted "constituency statutes."[65] Constituency statutes allow a corporation's officers and directors "to give weight to the interests of enumerated groups other than shareholders in the performance of their fiduciary duties."[66] The level to which various stakeholders are included, and the weight which their interest should be given, varies from state to state.[67]

While Delaware has no constituency statute, the decisions of its supreme court explicitly allow a corporation to consider constituent interests other than shareholders. In *Unocal Corp. v. Mesa Petroleum Co.*, the court stated that among the concerns directors may consider in managing the firm is "the impact on 'constituencies' other than shareholders (i.e., creditors, customers, employees, and perhaps even the community generally)."[68] In *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*,

60. Williams & Conley, *supra* note 1, at 77.

61. The idea that a corporation's relationships (in addition to its operations) can have a significant impact on the larger community is a central tenet to the business and human rights narrative. Ruggie discusses the importance for a TNC to monitor its relationships for potentially negative human rights impacts. In addition, in a separate series of articles, I am wrestling with the notion of corporate relationships as a basis for crafting an accountability framework. *See* Martin Amerson, *supra* note 25; Martin Amerson, *supra* note 11.

62. *See* Brett H. McDonnell, *Corporate Constituency Statutes and Employee Governance*, 30 WM. MITCHELL L. REV. 1227, 1235 (2004).

63. *Id.*

64. This is particularly true for shareholders who were also employees or members of the corporation's community.

65. McDonnell, *supra* note 62, at 1231.

66. *Id*.

67. *Id*.

68. 493 A.2d 946, 955 (Del. 1985).

the court reiterated, "[a] board may have regard for various constituencies in discharging its responsibilities, provided there are rationally related benefits accruing to the stockholders."[69] Finally, in *Paramount Communications, Inc. v. Time Inc.*, the court said, "a board of directors, while always required to act in an informed manner, is not under any *per se* duty to maximize shareholder value in the short term."[70] Thus, the court has recognized interests other than shareholders should also be at the forefront of a company's decision-making process.

This still leaves a significant issue that is often overlooked: many of the theoretical discussions posited by scholars fall apart when adopted by the judiciary.[71] For instance, Lynn Stout points out that there seems to be a judicial "elision" in which there is a tendency for courts to blur distinctions between contradictory ideas to decide cases while avoiding broad issues of public policy.[72] Stout claims that the Delaware courts use rhetoric shrouded in shareholder primacy but, in reality, are allowing directors to redirect wealth from shareholders to other stakeholders.[73]

Communitarians push forth the idea that there must be increased transparency and coordination. This idea resonates particularly well within the context of business and human rights. First, the nature of the human rights abuses that can lead to substantial exposure are usually in a part of the firm's operations that are in weak governance zones.[74] Second, a firm's operating subsidiaries are usually in very different and distant locations from its headquarters.[75] Finally, given the fact that, more often than not, the board of directors sits at the seat of headquarters (in the more developed areas of the world) rather than in the developing areas (prone to weak governance issues), it seems even more important to allow for a coordinated operation that allows the board to have broad discretion across corporate lines to proactively address these issues.[76]

69. 506 A.2d 173, 182 (Del. 1986).

70. 571 A.2d 1140, 1150 (Del. 1990).

71. Given the translation of theory to practice, this would almost seem inevitable. *See* discussion *infra* Part I.B.

72. Stout, *supra* note 36, at 1203.

73. *Id*.

74. Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Act*, ¶ 48 n.45, U.N. Doc. A/HRC/4/35 (Feb. 9, 2007) ("[M]any of the most serious corporate-related human rights violations take place in what the OECD describes as weak governance zones . . . .").

75. *See* Martin Amerson, *supra* note 25, at 880.

76. Obviously, this is not an issue that is unique in the developing world. Nor is it unique to human rights issues. Witness, for instance, the disappearance of billions of dollars in funds at a trading operator's desk at UBS in September 2011. Ben Protess & Julia Werdigier, *Arrest of UBS Trader Rattles Banks in Europe*, N.Y. TIMES, Sept. 15, 2011, at A1(L). As the article noted "the rogue trading case is a troubling reminder that the controls and warning systems that banks like UBS have put into place in the three years since the financial system nearly collapsed may not be enough to protect the system . . . ." *Id.* The revelation of a rogue trading scandal even after the company implemented increased Enterprise Risk Management shows how far firms still have to go to achieve acceptable risk-management practices. *Id.*

B. Board Function in the Corporation

The various ideas contained in each corporate theory have a direct impact on board function. Many scholars have posited their view regarding what role the board should have within the corporate entity. Some argue that the board should have an advising function,[77] while others argue that the board needs an information-gathering function.[78] Still others have stated that the board's role is to be the primary decision maker for the company, while some have maintained that the board's role is that of a monitor.[79]

The two most dominant narratives are those that emanate from the board's role as advisor and monitor. Under the first narrative, the board is a consensus building team, working with management by giving constructive advice and providing knowledgeable guidance.[80] Under the second narrative, the board monitors management's actions—acting as a check against management's power and potential conflicts of interest.[81] The second narrative also either explicitly (or implicitly) acts as a counter-narrative to the first—where, rather than being seen as minions of management embroiled in "management capture," the board is an independent body, capable of checking management when it has gone too far.[82]

The reality, though, is that a board at a TNC will often have both of these roles (and indeed many others) at once, such as advising management and monitoring it, making sure that it can present its wisdom and expertise for the corporation's benefit, and building consensus for the actions it contemplates, while at the same time standing up to or even terminating executives when it feels that management has gone too far.[83] Indeed, one transaction often involves these multiple roles. For instance, in a proposed merger and acquisition, the board must exercise a com-

77. *See generally* Frankel, *supra* note 37 (examining the board's advisory and supervisory function in relation to CEOs); Renée B. Adams & Daniel Ferreira, *A Theory of Friendly Boards* 1–2 (European Corp. Governance Inst., Fin. Working Paper No. 100/2005, Oct. 2005) (analyzing the board's decision-making and advisory authority).

78. *See* Adams & Ferreira, *supra* note 77, at 24 ("[M]anagers are less inclined to share information with a sole board as its monitoring intensity increases.").

79. *See infra* Part II.B.1.

80. Nicola Faith Sharpe, *Questioning Authority: The Critical Link Between Board Power and Process*, 38 J. CORP. L. 1, 28–31 (2012).

81. *Id.*

82. Even within this symposium, many different theories about the role of the board were postulated. *See, e.g.*, Lisa M. Fairfax, *Mandating Board-Shareholder Engagement?*, 2013 U. ILL. L. REV. 821, 829–40; Nicola F. Sharpe, *Informational Autonomy in the Boardroom*, 2013 U. ILL. L. REV. 1087, 1093–1109; *see also* Donald C. Langevoort, *The Human Nature of Corporate Boards: Laws, Norms, and the Unintended Consequences of Independence and Accountability*, 89 GEO. L.J. 797, 797–98 (2001). As Langevoort notes, however, regardless of the legal perspective regarding corporate boards, the reality is that boards work together toward a common goal and not necessarily as a monitoring function. *Id.* at 797. Given this reality, perhaps it makes the most sense to envision board theory through this reality instead of crafting a theory that has no bearing on what is actually happening.

83. *See generally* Frankel, *supra* note 37 (exploring the dual role of the board).

plete view of the transaction—examining all the documents to monitor whether management has engaged in the correct process to secure the deal, while at the same time discussing whether the deal is the best for the constituencies at issue (and potentially advising management of alternatives or the best way to secure the deal).[84]

The dialogue between scholars about the proper roles of the board of directors is replete with ideas on how to properly balance these two interests. Renée Adams and Daniel Ferreira state, "at first glance, the advisory and monitoring roles of a sole board complement each other, because the board [can use the] information the manager provides . . . both to make better recommendations and to implement better decisions,"[85] but, in practice and reality, the flow of information requires the board to give up a certain level of effectiveness in one role in order to be more effective in another.[86]

The matter becomes further complicated by the interrelated legal duties for boards as they take on these dual roles. What process then should a board have when trying to fulfill this role? What issues should and should it not be examining in order to do so?

An analysis of board function should include a view of three very important business principles: corporate due diligence, risk assessment, and enterprise risk management. It is these principles that form the nexus between the theoretical tools of scholars and how these tools might be translated into the reality of business dealings and board function.[87]

1. Board Function and Due Diligence; Risk Assessment and Enterprise Risk Management

Traditionally in corporate practice, the board's due diligence role was associated with one-time transactions such as mergers and acquisitions.[88] In those instances, the board's function was to monitor management as it performed its due diligence for the transaction and then to make sure that all of the correct protocols had been followed.[89] Recently, the board's due diligence role has become a more continuous one, often conflated within the legal issue of oversight.[90] In short, courts nowadays seem to treat the board's oversight role as having been satisfied if it has

84. *See, e.g.*, Langevoort, *supra* note 82, at 803.

85. Adams & Ferreira, *supra* note 77, at 2.

86. *See, e.g.*, *id.* (analyzing various board models and scenarios based on board structure and access to information).

87. In addition, examining these different theoretical constructs will become increasingly useful when we discuss the board's role within the context of business and human rights, because scholars will often use their theoretical paradigm as arguments against many of the tenets of business and human rights (if not by that name), and we, therefore, need to understand the background in order to analyze why many of these arguments do not, in fact, apply.

88. *See, e.g.*, Escott v. BarChris Constr. Corp., 283 F. Supp. 643 (S.D.N.Y. 1968).

89. *See, e.g.*, *id.*

90. *See infra* Part III.D.

put into place procedures for making sure specific protocols are being followed as management is going about its day-to-day business.[91] In such instances, the role of the board is more akin to that of oversight rather than advising. The board's role cannot be limited to just oversight, however; its role must also include an advisory component, which takes into account risk assessment and Enterprise Risk Management (ERM).

ERM has been defined as a collective process, one that involves an expansive examination of a company's processes to identify the potential risks and include them in an assessment of the organization's objectives.[92] A key component of this type of risk management is that it purports to include both risk assessments that have a behavioral component along with purely financial assessments of risk.[93]

As one author has noted, many of the mechanisms for a successful ERM naturally fall within the role and duties of the board.[94] For instance, "these elements [of successful enterprise risk management] include objective setting, risk assessment, risk response, and communicating and monitoring the firm's overall risk position."[95]

Some scholars now point to the failure of risk management and, particularly, the board's failed role in risk management, and they indicate that to be successful, firms must employ a more coordinated approach to risk management. The paradox for ERM and board function is noted by Harner who states that while "communication and coordination among the board, senior management, and others in the firm are essential to effective ERM,"[96] they are also "among the most challenging for large business entities to implement."[97] In that regard, one role of the board within this context could be to act as a director of traffic—coordinating the flow of information specifically within the field of risk management

91. *See id.*

92. Michelle M. Harner, *Ignoring the Writing on the Wall: The Role of Enterprise Risk Management in the Economic Crisis*, 5 J. BUS. & TECH. L. 45, 46 (2010).

93. *Id*.

94. *Id.* at 48.

95. *Id*.

96. *Id.* at 52.

97. *Id.* at 51–52; *see also* ROGER BARKER, RESPONDING TO THE CRISIS: THE CORPORATE GOVERNANCE PERSPECTIVE 2 (Feb. 20, 2009); CRMPG III, CONTAINING SYSTEMATIC RISK: THE ROAD TO REFORM 11–12 (Aug. 6, 2008), *available at* http://www.crmpolicygroup.org/docs/CRMPG-III.pdf ("[A]ll large integrated financial intermediaries must periodically conduct comprehensive exercises aimed at exercising risk appetite. The results of such exercises should be shared with the highest level of management, the board of directors and the institution's primary supervisor." (emphasis omitted)); Peter Green & Jeremy Jennings-Mares, *IIF's Final Report on Market Best Practices for Financial Institutions and Financial Products*, BANKING & FIN. SERVICES POL'Y REP., Sept. 2008, at 1, *available at* http://www.mofo.com/files/Publication/608f0727-33a1-4660-87a5-812ee62d9bef/Presentation/PublicationAttachment/d21cf403-14a7-45df-8b26-83aa4e56c079/0809IIF.pdf; Grant Kirkpatrick, *The Corporate Governance Lessons from the Financial Crisis*, FIN. MARKET TRENDS, vol. 2009/1 at 19, *available at* http://www.oecd.org/finance/financialmarkets/42229620.pdf; MARTIN LIPTON ET AL., RISK MANAGEMENT AND THE BOARD OF DIRECTORS 15–17 (2008), *available at* http://blogs.law.harvard.edu/corpgov/files/2008/11/risk-management-and-the-board-of-directors.pdf.

(and within the various subject-matter specific areas that the particular TNC would need).

In addition to the financial benefits of ERM, Harner notes that there are now, in theory, significant legal liabilities that are attached to boards who fail to meaningfully engage in ERM.[98]

> A board's failure to implement an effective ERM program would appear to breach the board's duty of care. Indeed, without effective ERM, a board arguably is approving overall firm strategy or making other critical decisions without necessary and adequate information. Nevertheless, litigants and courts generally cast ERM claims as failure-to-monitor claims, perhaps because of the barriers to imposing duty of care liability on boards. A failure-to-monitor claim is governed largely by the standards articulated in three Delaware state court decisions, i.e., *Caremark*, *Guttman*, and *Stone*. Under this case trilogy, a failure-to-monitor claim is reviewed in terms of bad faith and duty of loyalty; to succeed, plaintiffs must show "a sustained or systematic failure of the board to exercise oversight—such as an utter failure to attempt to assure a reasonable information and reporting system exists." This standard is difficult to prove, as reiterated by Chancellor Chandler in the *Citigroup* litigation.[99]

Although, as stated earlier, board functions differ depending on what theory of the firm you employ, it seems that many of them share one common characteristic—information.[100] Whether through monitoring, advising, or managing risk, the role of information to a board's performance is key. This is even more apparent when the information that needs to be gathered deals with situations across continents and within different cultures and different workforces. In that sense, not just information, but good information—information viewed within the particular cultural paradigm—would seem to be the most effective way to prevent human rights injustices from happening.

In addition, given the importance that Harner noted of ERM to prevent a finding of legal liability, it would seem equally important that an assessment of business and human rights be included as part of any information gathering strategy. Failure to do so may provoke a duty of care analysis. This would seem particularly true in light of the increased importance that business and human rights has gained on both the national and international state. The next Part will discuss this in detail.

98. Harner, *supra* note 92, at 53–54.

99. *Id*. (quoting *In re* Caremark Int'l Inc. Derivative Litig., 698 A.2d 959, 971, (Del. Ch. Ct. 1996)).

100. *See supra* Part I.A.

II. BUSINESS AND HUMAN RIGHTS

The previous discussion highlights how corporate due diligence, risk assessment, and ERM have evolved as the firm itself has evolved. One major evolutionary step that these principles must now address is the growing legal framework of business and human rights.

It is fair to say that the legal discipline of "business and human rights" has grown exponentially in the last ten years.[101] Since international law was typically focused on state behavior,[102] corporate accountability for human rights abuses were relegated to advocacy campaigns by human rights activists who would use public campaigns in an attempt to shame corporations into better behavior.[103] In addition, (as mentioned previously) the issue of business and human rights was largely subsumed under the general rubric of corporate social responsibility.[104] As scholars have grown more aware of the nuances involved with corporations and human rights issues, however, business and human rights has evolved into its own distinct field of study.[105] The legal issues for scholars to explore include: the level of responsibility that corporations should assume with regards to human rights issues;[106] the impact of corporate relationships on human rights;[107] and the ramifications of working in weak governance zones.[108] All of these issues are ripe for review.

Part of the issue regarding business and human rights that implicates the board is how a business and human rights framework relates to corporate governance. Particularly, how does corporate governance (internal governance) relate to accountability mechanisms (external governance) in a way that adheres to the current structure of international law? Indeed, in the conversations U.N. Representative John Ruggie had with businesses, he noted this as a particular challenge: that states were concerned by the previous attempt at creating a workable structure for corporations under international law because they felt to a certain extent

101. Martin Amerson, *supra* note 25, at 936.
102. *Id.* at 879.
103. *Id.* at 940.
104. Avery, *supra* note 6, at 4.
105. As an example of the growing of business and human rights into its own distinct field, I point to two recent events. The first was Columbia University's inaugural conference on Teaching Business and Human Rights in May 2010. *See* Anthony Ewing, *Teaching Business and Human Rights: Challenges and Opportunities*, INST. FOR HUMANS RIGHTS AND BUS. (Oct. 19, 2011), http://www.ihrb.org/commentary/guest/teaching_business_and_human_rights-challenges_and_opportunities.html. The second was the United Nations first annual business and human rights conference that occurred December 3–5, 2012. *First Annual United Nations Forum on Business and Human Rights, 3–5 December 2012*, UNITED NATIONS HUMAN RIGHTS: OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, http://www.ohchr.org/EN/Issues/Business/Pages/ForumonBusinessandHR2012.aspx (last visited Mar. 28, 2013). Each was the first of its kind.
106. Martin Amerson, *supra* note 11, at 7–10.
107. *See id.*
108. Martin Amerson, *supra* note 25, at 926.

that it was "privatising governmental functions to regulate human rights."[109]

A. United Nations

The impetus behind much of the recent work comes from the United Nations. In 2011, the U.N. Human Rights Council, for the first time, unanimously endorsed a set of Guiding Principles to help states and corporations navigate their respective duties and responsibilities within the area of human rights.[110] These Guiding Principles, in turn, build on the Special Representative's Protect, Respect and Remedy Framework (Respect Framework), adopted by the Council three years before.[111]

The Respect Framework rests on three pillars: (1) the state's duty to protect, (2) the corporation's duty to respect, and (3) the various stakeholders' role in remedying violations.[112] Moreover, while the state's duty to protect against human rights abuses is embodied in both the Respect Framework and the Guiding Principles, both documents emphasize that no *legal* responsibility would attach to corporations under international law other than that which was already in place.[113]

The Guiding Principles provide recommendations for a corporation to follow. It is divided between foundational and operational princi-

109. Ruggie Interview, *supra* note 23.

110. Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, U.N. Doc. (Mar. 21, 2011) (by John Ruggie) [hereinafter Guiding Principles], *available at* http://www.ohchr.org/EN/Issues/TransnationalCorporations/Pages/Reports.aspx. The report was submitted to the Human Rights Council in March 2011. Larry Catá Backer, *From Institutional Misalignments to Socially Sustainable Governance: The Guiding Principles for the Implementation of the United Nations' "Protect, Respect and Remedy" and the Construction of Inter-Systemic Global Governance*, 25 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 69, 77 (2012). The U.N. Human Rights Council approved the Report three months later. *Id.* Even before the Respect Framework, there was work being done at the U.N. level to bring business and human rights under an international framework. In 2003, the Sub-Commission of what was then the U.N. Commission on Human Rights, adopted a set of Norms that attempted to adopt some accountability mechanisms for TNCs who were found in violation of certain human rights treaties. Joanne Bauer, *Business and Human Rights: A New Approach to Advancing Environmental Justice in the United States*, *in* HUMAN RIGHTS IN THE UNITED STATES: BEYOND EXCEPTIONALISM 175, 181 (Shareen Hertel & Kathryn Libal eds., 2011). The Norms were met with vigorous opposition and in the end never adopted by the full Commission. *Id.* Instead, the U.N. Secretary General (at the recommendation of the Commission) appointed Professor John Ruggie as Special Representative for business and human rights issues. Backer, *supra*, at 76. It is the work of Ruggie's team that led to the Respect Framework and the Guiding Principles. *See generally* Martin Amerson, *supra* note 25 (providing a comprehensive discussion of the history of business and human rights at the international level).

111. Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Protect, Respect and Remedy: A Framework for Business and Human Rights*, U.N. Doc. A/HRC/8/5 (Apr. 7, 2008) (by John Ruggie) [hereinafter *Respect Framework*], *available at* http://www.ohchr.org/EN/Issues/TransnationalCorporations/Pages/Reports.aspx.

112. *Id.* at 9, 14, 22.

113. *Guiding Principles*, *supra* note 110, at 6, 13–14; *Respect Framework*, *supra* note 111, at 28.

ples.[114] The foundational principles amplify the ideas laid out in the Respect Framework regarding corporations' responsibility to anticipate human rights issues.[115] The operational principles, in turn, set out specific guidance regarding how to assess and anticipate relevant human rights issues that may affect corporate process.[116] Several of these operational principles have implicit connections to the role and duty of the board. The Guiding Principles make it clear that effective corporate responsibility for human rights issues must be integrated into the highest levels of corporate governance. For instance, Guiding Principle 16 states that businesses "should express their commitment to meet [their responsibility for respecting human rights] through a statement of policy that . . . [i]s approved at the most senior level of the business enterprise."[117] While the most obvious source of these policy initiatives is senior management, there are opportunities for the board's involvement in crafting and approving the policy statement. If the board is involved, it would widen the typical risk assessment landscape that boards examine. This involvement can mitigate or even prevent future harm from corporate involvement in human rights violations through corporate due diligence.[118]

Specifically, after establishing the importance of a policy statement to secure corporate buy-in, the Guiding Principles next assert that corporate due diligence—specifically with regard to human rights impacts—is needed when crafting a human rights policy.[119]

Analyzing these principles, specifically due diligence and risk assessment, can show how the board's current function can be redefined within the context of business and human rights.

B. The Guiding Principles and "Human Rights Due Diligence"

As mentioned earlier, the concept of due diligence is one that has evolved in the corporate literature and in corporate practice. The expanded concept encompasses an internal and ongoing policy, mainly engaged by the board of directors to monitor corporate practices and ensure that there have been adequate internal controls in place.[120] This idea of consistent self-reflection is one that also has deep roots in internation-

114. *Guiding Principles*, *supra* note 110, at 6, 8, 13, 15, 22, 23.
115. *Id.* at 13.
116. *Id*. at 15–22.
117. *Id.* at 15.
118. Of course, should the corporation nonetheless become enmeshed in human rights controversy, the policy statement may well lead to charges of hypocrisy by advocates. Lisa M. Fairfax offers an alternative view, however. Lisa M. Fairfax, *Easier Said than Done? A Corporate Law Theory for Actualizing Social Responsibility Rhetoric*, 59 FLA. L. REV. 771 (2007). Examining issues of corporate responsibility, Fairfax argues that corporate rhetoric is actually a valuable tool for changing corporate behavior. *Id.* at 817–18. Drawing on the consistency principle from social psychology literature, Fairfax makes the point that having these statements of corporate responsibility can, in turn, increase corporate responsible behaviors. *Id.*
119. *Guiding Principles*, *supra* note 110, at 16.
120. Stevelman, *supra* note 24, at 119.

al law literature. As Stevelman states, "within the scholarly discourse of international law, transparency and the accountability it makes possible have always been a 'first principle' of good governance."[121]

The Guiding Principles, then, serve as a logical next step for business and human rights by imbuing traditional due diligence with a flavor more commonly known in international law, but one that is starting to gain traction in traditional corporate practice.[122] The ways in which the Guiding Principles envision this new form of corporate due diligence—what it calls human rights due diligence—is specific to the challenges of this field. For instance, Guiding Principles 18–21 set out how human rights due diligence differs from traditional notions of corporate due diligence, laying out the essential components of what an expanded due diligence strategy would be.[123]

> In order to identify, prevent, mitigate and account for how they address their adverse human rights impacts, business enterprises should carry out human rights due diligence. The process should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed.[124]

Larry Catá Backer, one of the leading scholars in this area, expands upon the distinct character and strand of human rights due diligence. To Backer, the four principle functions mirror governance functions found in political society.[125] First, there is a legislative function, where due diligence serves as a way to centralize corporate policy on human rights issues.[126] Second, the due diligence under the Guiding Principles would serve an executive function "providing the information necessary for determining corporate action."[127] Third, human rights due diligence, as conceived by the Guiding Principles, would serve as a "monitoring device" that can be used by all stakeholders, internal and external, to ensure compliance with identified norms.[128] Fourth, human rights due diligence would serve as a fact finding and, if necessary, a remediation function, giving corporate actors the means to resolve "human rights affecting actions" as they arise.[129]

121. *Id.*

122. *Id.* at 119–21 (discussing the expanded notions of corporate due diligence and risk assessment).

123. *Guiding Principles*, *supra* note 110, at 17–21.

124. *Id*. at 16.

125. Backer, *supra* note 110, at 158–59.

126. *Id.* at 158.

127. *Id.* at 159.

128. *Id.*

129. *Id.* According to Backer, these functions raise a framework of polycentricity, one where governance occurs by multiple actors on multiple levels. *Id.* at 163. If Backer is right and that is where the Guiding Principles are leading us, then the results are ironic. The original framework for business and human rights, the Norms, was rejected by corporations specifically because it implied a polycentric framework. One "which essentially would have imposed on businesses the same human rights duties that states have accepted for themselves over time, separated only by the slippery distinction between

These four functions, viewed within the context of human rights due diligence, would encompass the full assortment of internal corporate activities, ideally providing a top-down, 360º view of all the potential human rights impacts that a TNC's activities could have on a community.[130] Of course, such an expansive approach could be seen as unworkable—too many potential disasters that (if catastrophic) could affect too much of the corporation, leading detractors to declare that it is too much to manage. Such a criticism, however, is common to any negative modality.[131] Two ways to counteract that criticism in this context are (1) to make sure that human rights discussions are part of every corporate conversation, that the culture is truly infused to a sensitivity to avoiding negative human rights impacts[132] and (2) to develop effective tools to guide due diligence efforts in an efficient yet systemic way. As discussed in the next Section, an expanded risk assessment platform is one such tool.

primary and secondary responsibility or duties, and corporate spheres of influence." Ruggie Interview, *supra* note 23. It may be that by buying into this framework with complementary notions of governance, the Guiding Principles are laying the foundation for precisely the polycentric notion of governance that they were trying to avoid. *Cf.* Martin Amerson, *supra* note 25 at 933–35 (discussing the possible consequences of corporate buy-in for future notions of corporate accountability).

130. Of course, community could include many different interpretations including local neighborhoods, regions or even nations and the world.

131. For instance, this comment occurs frequently when discussing why it was difficult, if not impossible, to avert the financial crisis of 2008. Some also use it to argue that it would be impossible for companies to avert any future financial crisis. For example, in psychology, doctors discuss the concept of information overload—a phenomenon that occurs when an individual is overwhelmed with so much information that he or she physically shuts down. UT Counseling & Mental Health Ctr., *Managing Stress*, CMHC, http://www.cmhc.utexas.edu/stress.html (last visited Mar. 28, 2013). This concept can also be seen in the advancement of technology, when one type of software is no longer efficient to process all of the data, and thus additional software must be brought in to help manage. However, adding additional software makes the process of analyzing data no longer efficient. *See, e.g.*, Kevin Fogarty, *Systems Management Dilemma: How Much Is Too Much?*, NETWORK COMPUTING (Sept. 6, 2012), http://www.networkcomputing.com/data-networking-management/systems-management-dilemma-how-much-is-t/240006898. In addition, this comment has occurred when discussing why regulators failed to detect the financial crisis. For instance, Andrew Odlyzko states that while the "finance bubble that burst in 2008 was detectable," it was not a simple matter of having "an intelligent observer spending a few hours Web surfing." Andrew Odlyzko, *Bubbles, Gullibility and Other Challenges for Economics, Psychology, Sociology, and Information Sciences*, FIRST MONDAY, Sept. 6, 2010, http://www.firstmonday.org/htbin/cgiwrap/bin/ojs/index.php/fm/article/view/3142/2603. Interestingly enough, Odlyzko hypothesizes that this burst might actually have been due to "information viscosity," namely "the tendency of important data items to stay confined in narrow circles, and not reach (or at least not be accepted) by the appropriate decision-makers." *Id*. I would argue that this is two sides of the same coin—namely that given the amount of information that is present and received by the markets, one option is to shut down. Another is to confine the information to narrow circles. Finally the third, which could apply here with such a specific structural catalyst, is to have the information funneled directly to directors.

132. Google's motto "Don't be evil" seems to be a great example of how, if successful, a company's corporate policy regarding human rights issues can inform every part of its business. In fact, many have credited this simple model with one of the driving forces behind Google's key decisions in China. *See* Bruce Einhorn, *Google and China: A Win for Liberty and Strategy*, BLOOMBERG BUSINESSWEEK MAG., Jan. 14, 2010, http://www.businessweek.com/magazine/content/10_04/b4164035494362.htm.

C. The Guiding Principles and Expanded Risk Assessment

Under the Guiding Principles, due diligence strategies perform risk assessment functions.[133] Therefore, as part of the corporation's broader due diligence role within business and human rights, the risk assessment function is also broadened under the Guiding Principles. Rather than a traditional risk assessment paradigm, the Guiding Principles seek to broaden the framework in two ways.

First, they seek to expand the relevant risk data points by examining human rights impacts to the larger community, not simply direct human rights risks to the corporation.[134] As the Guiding Principles note, "[h]uman rights due diligence can be included within broader enterprise risk-management systems, provided that it goes beyond simply identifying and managing material risks to the company itself, to include risks to rights-holders."[135] Second, the Guiding Principles seek to expand traditional assessment by broadening the substantive data that is used for evaluating risks to human rights.[136] As the commentary to the Guiding Principles states,

> While processes for assessing human rights impacts can be incorporated within other processes such as risk assessments or environmental and social impact assessments, they should include all internationally recognized human rights as a reference point, since enterprises may potentially impact virtually any of these rights.[137]

In that sense then, risk assessment under the Guiding Principles goes beyond conventional business strategy which assesses "what's going on inside the corporation; what is happening in terms of competition in the firm's markets; and, by deduction, what both inquiries hold for the firm's future."[138] Instead, it acknowledges that risk can come in many forms, including in the guise of social unrest.[139]

Thus, an expanded risk assessment model should encompass more than financial measurements for how a risk affects a company. Rather, an expanded risk assessment model should take into account as much risk as possible, even when it's difficult to quantify. As one commentator points out, a company's effective risk assessment system should include addressing "the adverse impacts of their activities on all stakeholders, in-

133. *Guiding Principles*, *supra* note 110, at 16–20. For instance, Guiding Principle 17 states that part of the corporate process for human rights due diligence includes "assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed." *Id.* at 16.

134. *Id.* at 16–17.

135. *Id.* at 16. In short, under a human rights due diligence framework, a corporation would not be able to justify an action solely on the basis of corporate self-interest.

136. *Id.* at 16–18.

137. *Id.* at 17.

138. Witold J. Henisz & Jonathan Story, *Corporate Risk Assessment and Business Strategy: A Prime Task for Senior Management*, *in* CORPORATE GOVERNANCE AND CAPITAL FLOWS IN A GLOBAL ECONOMY 217, 217 (Peter K. Cornelius & Bruce Kogut eds., 2003).

139. *Guiding Principles*, *supra* note 110, at 17–18.

ternal and external to the company."[140] A risk assessment analysis from that perspective could highlight how, even for different external stakeholders, the risk perspectives, while potentially overlapping, are often in fact different.[141] Doing so would show that there is both a convergence and a divergence between a company's risk assessment perspective and the risk assessment of the broader stakeholder community. John Sherman, another leading scholar in business and human rights, uses the famous Ford Pinto case as an illustration of the detrimental effect of what happens when a company does not include others' vision.[142] Furthermore, the expanded risk assessment allows a TNC to consider these types of issues before it becomes problematic. If the TNC functions under a shareholder primacy theory rather than a stakeholder primacy theory, however, the board's function may be limited in terms of addressing expanded risk assessment.

Indeed, this issue is at the heart of the Guiding Principles due diligence principle. Guiding Principle 17 discusses how human rights due diligence diverges from traditional due diligence.[143] Using the model outlined by Ruggie would encompass a broader perspective that would not only benefit the corporation's reputational value but it would also potentially stave off devastating litigation costs when the company's callous cost-benefit analysis is undertaken.

So, for instance, within the context of business and human rights, expanded risk assessment should include investigation of the company's operation in both its host state and its home state.[144] This issue can arise in a number of different ways. For example, the risk assessment in a corporation's home state should take into account that the corporation's labor, employment, and environmental operations within its home state impact the larger human rights narrative (even if the home state is more developed). In that regard, the typical U.S. narrative suffers from a twofold problem. First, it tends not to be included as a specific human rights risk assessment here, but is instead viewed solely from a legal and regula-

140. John Sherman, *Whose Risk is it? Viewing Corporate Catastrophe Through a Human Rights Lens*, INT'L BAR ASS'N, http://www.ibanet.org/Article/Detail.aspx?ArticleUid=7a9003a3-93bf-41dd-a531-f397e889eb84 (last visited Mar. 28, 2013). Why it is so important to include these other issues? Because to do otherwise would be courting disaster. The financial crisis has shown us that systemic and catastrophic risk can have fundamental financial and legal consequences, not simply to the corporation but to the society as a whole. One justification of failing to plan for these disasters is the low probability of such a devastating issue arising. It is precisely because it is so remote that planning is necessary. Taking into account what Sherman calls "low-probability, high risk impacts" can help prevent significant damage to the company. *Id.*

141. *Id.*

142. *Id.* The Ford Pinto case relates to a badly managed situation by Ford's executives. In the 1970s, numerous people were killed after Ford's Pinto model began exploding during car accidents. It was later discovered that the cause of the explosions was a faulty design in the Pinto model. It was also discovered that Ford knew of the dangers and had the means to fix the problem but decided instead to settle or litigate the cases as they arose because the cost of settling was cheaper than the cost of recalling all the outstanding models and changing the defective part.

143. *Guiding Principles*, *supra* note 110, at 16–17.

144. *See id.*

tory framework derived from its sub-components (labor issues, employment issues, sexual harassment); rarely is it viewed as part of a cohesive whole.[145] The reason for this is enshrined in the second problem with the U.S. narrative. Namely, that issues that implicate international human rights treaties are not viewed through the lens of a human rights discourse in the United States.[146] Instead, they are diminished to a "civil rights" paradigm that unfairly shrinks their impact to a statutory remedy rather than examining it as part of the fundamental human rights that each citizen, including each American, is embodied with (and which, in theory, the United States enshrines as a signatory to many of these treaties).[147]

Another way that this risk assessment can arise within a TNC's home state operations is when the legal frameworks within the home state and the host state differ dramatically. The differences can occur on both ends in terms of operations. A well-worn example occurs when a TNC's host state law allows payments to governmental officials to help facilitate new work in that area, this practice would inevitably run afoul of the Foreign Corrupt Practices Act in the United States.[148] Similar disparities occur within the context of legal frameworks that more directly impact business and human rights issues.[149]

Despite the step forward that the U.N.'s work has taken for developing comprehensive corporate governance, there is still a gap in the Respect Framework and its implementing document—the Guiding Principles—due to its failure to address the lack of legal responsibility for corporations. In addition, while the Respect Framework discusses the need for corporations to respect human rights, it does not offer a specific place in the organizational structure for this to be housed.[150] Therefore, while the Guiding Principles are a step forward in that they note that

145. Lisa Crooms, Opening Statement, *Seeing Through a Glass Darkly No More: Making the Case for a U.S. Commission on Human Rights*, 159 U. PA. L. REV. PENNUMBRA 128, 129–33 (2010).

146. Dawinder S. Sidhu, Rebuttal, *On Reframing, Not Expanding the Commission's Mandate*, 159 U. PA. L. REV. PENNUMBRA 134, 138–39.

147. *Id.* at 139.

148. At its most basic level the FCPA prohibits companies from providing any monetary incentive (what we in the United States tend to think of as bribes) to governmental officials. 15 U.S.C. § 78dd-1 (2006).

149. Take, for instance, the case of Yahoo!'s operations in China. A reporter and editor of a newspaper was arrested after he disseminated confidential information from his private Yahoo! email account. The government obtained his name after Yahoo! provided evidence of his identity to Chinese officials. *See "Race to the Bottom": Corporate Complicity in Chinese Internet Censorship—Appendix III: Details of Shi Tao's Case*, HUMAN RIGHTS WATCH (Aug. 2006), http://www.hrw.org/reports/2006/china0806/11.htm. A key part of the due diligence is identified by Backer as moving from "outputs to action"—that is, Guiding Principles 19–21 identify the steps that a company should undertake if they have evaluated a negative human rights impact. Backer, *supra* note 110, at 133. This includes integrating the findings of negative human rights impacts into all relevant internal functions and processes, tracking the effectiveness of its response using qualitative and quantitative measures and communicating its findings to external stakeholders. Moreover, corporations that fail to undertake these assessments may face consequences not merely under the transnational framework but also in domestic legal regimes. *See* discussion *infra* Part III.D.

150. *Respect Framework*, *supra* note 111.

such implementation needs to come from the highest levels of the organization,[151] it is not specific enough. As such, "for corporate governance scholars, the Report's most notable omission is its failure to discuss *where* the 'respecting human rights function' should reside within the corporation. The question is crucial to the efficacy of the result."[152] While this Article does not seek to answer that question directly, it does posit that under any framework, the board of directors should have a significant role in the crafting and monitoring of a corporation's human rights policy.[153]

As stated previously, the Guiding Principles' enunciation of corporate responsibilities is aspirational. Under our current international framework, there are no legal consequences under international law if the corporation fails to attend to these duties. In that regard, the legally cognizable duties of boards for monitoring human rights is even more attenuated. Nonetheless, given the current climate, a savvy board of directors will include human rights assessments in their organizational strategy. At every stage the board of directors could play a role in due diligence (with assessing and fact-finding) and expanded risk management (by acting upon the findings, tracking, and communicating).

III. CORPORATE MONITORING OF HUMAN RIGHTS: THE ROLE OF THE BOARD

The new landscape for business and human rights provides an important first step in marrying corporate behavior with international human rights norms. Although the current international instruments make clear that corporations, as nonstate actors, have no legal responsibility under international law,[154] corporations do have a huge role to play in assessing and preventing human rights abuses.

Given that boards are prime players in all TNCs (either nominally or actually), an important next step is examining how a board—one of a TNC's key players—can influence the development of these issues. The next Section will analyze earlier discussed board functions with this key addition in mind.

151. *Guiding Principles*, *supra* note 110, at 15–16.

152. Stevelman, *supra* note 24, at 127–28.

153. For instance, under Delaware Code section 141(a) "the business and affairs of [a] corporation" should be managed by a board of directors. DEL. CODE. ANN. tit. 8, § 141(a) (2013). Reconceptualizing human rights impacts as a "business and affairs" issue, places the role of the board squarely within the center of oversight.

154. *Respect Framework*, *supra* note 111, at 5–6.

A. Corporate Due Diligence and Human Rights

Enshrined in the basic tenets of corporate law is that the board has primary monitoring responsibility. Therefore, the board would seem a natural fit for the additional function of monitoring business and human rights issues. As Stevelman notes, however, "when this touchstone concept of board oversight and authority is applied to the business and human rights context, difficult issues surface immediately."[155]

To that end, it is critical that any construction of due diligence within the business and human rights construct be done well and comprehensively. As Stevelman states, "paltry due diligence efforts or poorly run compliance programs may be worse than none if trouble ensues. This is because they may suggest knowledge of wrongdoing and indifference."[156]

The extent to which a *Caremark* duty can be applied to the issue of business and human rights is part of a larger conversation within the legal academy regarding the extent the board has a fiduciary duty of oversight. This discussion can be applied to a human rights agenda given the emerging consensus among many scholars that there should be such a duty: to monitor risk.[157] It seems a critical part of the risk they should be analyzing is the risk to monitor for human rights impacts.[158] Therefore, examining *Caremark* (and its progeny) demonstrates that, as Hill and McDonnell have noted, it's not just legal compliance risk that is at issue in a board's monitoring function, but a more general duty to monitor business risk.[159] Therefore, the next step in the analysis would be to understand what can be and what should not be categorized as business risk. Doing so would allow us to move forward and bring human rights into the narrative of business risk.[160]

155. Stevelman, *supra* note 24, at 128.

156. *Id.* at 120.

157. *See* Claire A. Hill & Brett H. McDonnell, *Reconsidering Board Oversight Duties After the Financial Crisis*, 2013 U. ILL. L. REV. 859, 861–66.

158. Williams & Conley, *supra* note 1, at 87–88. To that extent, some synergy may be found through the work of scholars that note that there is a false dichotomy between our national narrative of human rights issues abroad and "civil rights" issues here. For instance, Lisa Crooms has succinctly stated in her work that many of the causes that have been adjudicated abroad as human rights violations are in fact identical in nature to conduct that occurs on the ground. Lisa Crooms, Closing Statement, *The Possibilities of More to Overcome the Limitations of Less*, 159 U. PA. L. REV. PENNUMBRA. 141, 142–43 (2010). Forcing boards of directors to make that first step by understanding that certain corporate behavior in the United States can have very real litigation consequences here can lead to an extension of that understanding when the same conduct is found in corporate activity (or inactivity) abroad. Williams & Conley, *supra* note 1, at 88.

159. Hill & McDonnell, *supra* note 157, at 866–69.

160. Hill and McDonnell's suggestion for proposed *Goldman* duties would be to extend traditional monitoring analysis in such a way that they ask the following questions: "Do we [the board] adequately understand the risks we are exposing ourselves to? Is there something that the corporation is doing that might expose the corporation, its shareholders, its other stakeholders, and/or the greater society to risks we have not considered?" *Id.* at 873. Stating the questions this broadly allows the corporation to make sure that it is monitoring all sorts of risks that have business implications even when those risks do not, at first blush, look like they are in fact business risks. *Id.* It seems, therefore, that Hill and McDonnell are on the right track when they posit "[a]s a matter of aspirational best practices,

Of course, one main reason why businesses were initially hesitant to embrace the Guiding Principles and the Respect Framework is that they were concerned that (1) it would create an accountability mechanism based on their due diligence, and (2) it would not prevent plaintiffs from seeking redress for corporate human rights abuses even when the corporation has undertaken due diligence.[161] On the first point, some practitioners who have worked with both companies and the U.N. in developing the Guiding Principles have rejected the notion that a human rights due diligence framework would create an accountability framework. Instead, they offer human rights due diligence as a counter-narrative—one that involves corporate protection. For instance, as Sherman and Lehr note, "conducting due diligence provides corporate boards with strong protection against mismanagement claims by shareholders, usually in the form of derivative lawsuits, as the Chancery Court of Delaware (home to most major U.S. companies) determined in its 1996 *Caremark* decision."[162] As to the second point, this risk may now be significantly less given the court's decision in the *Kiobel* case. However, the court's opinion still left open the possibility that corporations may be sued for human rights abuses if the plaintiffs can prove that some of the conduct occurred, or the defendant resided, within the United States. Therefore, there may still be a legitimate concern of litigation risk through ATCA claims.[163]

Sherman and Lehr note, however, that given the predominance of knowledge that courts seem to ascribe to the corporations "whether an ATS claim is filed against a company on an agency or an aiding and abetting basis, knowledge of human rights risks is a company's friend, not its enemy."[164]

But first, it is also important to recognize the two mechanisms at play in the structure of the firm. First, there are internal mechanisms.

the directors might even be encouraged to ask about the corporation's behavior that might have the potential to harm the society whether or not it was to have a bad effect on shareholders." *Id.* Given this, one could firmly plot Hill and McDonnell into the stakeholder theory, whereby their duties are extended to the larger community rather than to simply what is in the best interest of shareholder wealth maximization. If that is true, then this could theoretically change how we analyze firm duties and the duties of boards of directors in a way that is now emerging in the dialogue of social corporations and the use of constituency statutes.

161. John Sherman, III & Amy Lehr, *Human Rights Due Diligence: Is It Too Risky?* 5, 12 (John F. Kennedy Sch. of Gov't., Corp. Soc. Responsibility Initiative Working Paper No. 55, 2010), *available at* http://www.hks.harvard.edu/m-rcbg/CSRI/publications/workingpaper_55_shermanlehr.pdf.

162. *Id.* at 5.

163. Although the Supreme Court's decision in *Kiobel* will certainly affect the number of lawsuits being filed, it does not necessarily completely foreclose the use of ATCA as a tool for human rights advocates. For instance, "among the kinds of cases that still might be considered under the Alien Tort Statute are those that include U.S. contractors who are accused of taking part in atrocities abroad." Mark Sherman, *Foreign Victims of Human Rights Abuses Who Sue in US Suffer Supreme Court Setback*, WASH. POST (Apr. 17, 2013), http://www.washingtonpost.com/politics/courts_law/supreme-court-limits-lawsuits-over-foreign-human-rights-abuses/2013/04/17/a0845838-a769-11e2-9e1c-bb0fb0c2edd9_story_1.html.

164. Sherman & Lehr, *supra* note 161, at 100.

This is where risk management and information gathering come into play. Then there are the external legal mechanisms that influence most firms' behavior. Here that is the Business Judgment Rule and compliance. As has been pointed out by Professor Nicola Sharpe, information gathering is a part of both.[165]

B. Business and Human Rights Through Information Management

A key step in determining board function in a business and human rights narrative is by examining how the board's role will work in practice as opposed to how traditional legal theory would place them. To that end, while the various structural roles attributed to the board are instructive, and the Guiding Principles' application of traditional corporate concepts to business and human rights moves the concepts closer to the pragmatics, there is still a need to develop a specific understanding of how the board's practice in reality can be adopted to address this emerging issue.

In that regard, Professor Sharpe's work on board process helps to bridge that gap.[166] In her article, *Questioning Authority*, Sharpe uses reforms after the recent financial crisis to highlight the gap between legal theory and the practical realities of running the board.[167] Sharpe proposes an analysis that focuses on process rather than structure for guidance on how boards should function.[168] Specifically, Sharpe draws on organizational behavior literature from other disciplines to arrive at a framework where boards focus on information gathering as a way of contributing to the overall corporate governance structure.[169]

According to Sharpe, boards need to work in both a proactive and reactive manner if they are to be at their most efficient.[170] It seems, however, that the often overlooked part of that equation is the proactive stance needed for boards to accurately assess information. This becomes even clearer when examining this within the context of a human rights framework. Because of its seemingly amorphous nature, it seems even more important that business and human rights efforts by the board be undertaken ex ante. Indeed, given the lack of a clear external governance structure on the international level for the corporate role in human

165. Sharpe, *supra* note 80, at 36.

166. *See id.* at 28.

167. *Id.*

168. *Id.* at 41.

169. As a foundation to her analysis, Sharpe makes the point that the gap in legal reforms centers on the distinction between structural authority (which she claims boards can rightly assert) and processual authority (which she argues boards do not have). *Id.* at 11. To Sharpe, given the lack of authority in the process, boards have no actual authority vis-à-vis management. *Id.* at 44. As Sharpe writes, "when a legally subordinate group [here, management] dominates the decision-making process and the legally superior group [the board of directors] lacks an independent means of verification and control over the subordinates' steps, the superior group's authority only exists in theory and law." *Id.* at 11.

170. *Id.* at 36–38.

rights evaluation, ex ante evaluation seems like the only probable tool left to satisfy a *Caremark* analysis.[171]

The problem comes when the law treats a board's decision-making process for human rights evaluation in the same way that it would treat the evaluative process for a merger or some other structural change. To that extent, it is key to remember that human rights issues are, by their very nature, dynamic.[172] They require continuous access to information. While there may be certain events that would give rise to a value judgment at a particular time,[173] it seems more likely that the due diligence required for human rights issues needs to be done in a fluid and organic environment—one that recognizes the changing nature of societal impacts.

Therefore, Sharpe's suggestion regarding how to use board process has key applications within the context of business and human rights. Sharpe identifies various ways that boards can improve their process in ways that will help the overall performance of the board.[174] These include (1) forward-looking information, (2) multiple information gathering channels, (3) proactive goal setting, and (4) conflict management.[175] All of these have implications in the role of business and human rights. In fact, many of them are explicitly used in the Guiding Principles as the cornerstone of a good due diligence framework for human rights evaluation.[176]

While all of these mechanisms are important, information gathering needs to be at the heart of any corporate strategy that incorporates human rights. For instance, corporations should take steps to thoroughly research the community where they would like to operate—not simply from a financial perspective, but also with regard to its political, social, and religious climate. In particular, given that many of the human rights conflicts that occur between corporations deal with indigenous communities, corporations should pay particular attention to whether there are special challenges that their operations would have for indigenous communities. To that extent, it's not enough for corporations to work with

171. The term, "*Caremark* analysis" comes from a Delaware Chancery opinion. *See* In re Caremark Int'l Inc. Derivative Litig., 698 A.2d 959 (Del. Ch. 1996). For an extended discussion of the Caremark case and how it applies to a business and human rights context, see discussion *infra* Part III.D.

172. *Cf.* Alison Peck, Essay, *Sustainable Development and the Reconciliation of Opposites*, 57 ST. LOUIS U. L.J. 151 (2012) (analyzing theory of sustainable development using concepts of opposition and change in Jungian analytical psychology, Taoism, and quantum mechanics). Peck argues that the tensions implied by the concept of sustainable development (among what is often referred to as "the three E's"—economics, environment, and equity)—may not need to be resolvable for the concept to have transformative potential. Peck's essay suggests that the admission into the law of a more dynamic flow of understanding can yield results that may seem unachievable if conflicts between interest groups are isolated in any given moment.

173. *See* Jagger, *supra* note 16.

174. Sharpe, *supra* note 80, at 43.

175. *Id.*

176. *See supra* Part II.B.

established networks that the state or the communities provide; in addition, it may be helpful for corporations to actively seek out those populations that have not before been heard. As for the board, companies can institute direct channels whereby the people on the ground have direct access to the board, and board members may also have free and unfettered access to those people who are in charge of discerning a corporation's human rights impact.[177]

There are limitations, however. For instance, Professor Backer notes that the extent of human rights due diligence goes hand in hand with corporate responsibility and strategy as a whole. To that extent, limitations that affect a corporation's operations also implicate its human rights due diligence. Specifically, Backer identifies three: (1) issues of coverage, (2) issues regarding the complexity of a corporation's operations, and (3) the "time horizons" of a corporation's due diligence strategy.[178] Backer elaborates:

> It is in the context of coverage that the issue of supply and value chain liability resurfaces, mitigating liability where the connection between the corporation and the entity directly responsible are either too remote or where a control or influence relationship is unreasonable. It also serves to develop a principle of corporate complicity for the adverse human rights impacts of others—including states. The Commentary emphasizes the effects of polycentricity in the context of corporate liability. With respect to complicity, corporations must be aware of the distinct bases for complicity liability under legal regimes and under social norm regimes.[179]

Many corporations may have difficulty incorporating a strategy that includes human rights. This struggle is not unique to this area, rath-er it is more emblematic of the difficulty corporations have in shifting from a tangible asset perspective to a perspective that includes, within its viewpoint, intangible assets such as skills, talents, and societal reputation.[180]

177. Many companies are already gathering this information. There is a danger, however, that even though the corporation is gathering the information, it is analyzing the information still from a primary financial lens. While the shareholder primacy model (mentioned earlier) would seem to encourage this form of analysis, there is still a potential danger—particularly if corporations are equating shareholder maximization with *short-term* maximization. If a corporation's next quarter is the primary goal, then there is a risk that the focus will be too narrow. If the idea of shareholder profit maximization is truly meant to incorporate the long-term financial health of the company, then the idea of examining human rights should go hand in hand with this idea. Otherwise, a company could risk exposure to reputational damage and litigation risks.

178. Backer, *supra* note 110, at 131.

179. *Id.*

180. ROBERT S. KAPLAN & DAVID P. NORTON, THE STRATEGY-FOCUSED ORGANIZATION: HOW BALANCED SCORECARD COMPANIES THRIVE IN THE NEW BUSINESS ENVIRONMENT 2 (2001).

C. *Enterprise Risk Management and Human Rights*

Much of the guidance that has been offered by the business academy on how to incorporate intangibles into a corporation's strategy can be applied here. For example, Professor Kaplan correctly points out that the challenges to a shift in focus (or strategy) include adjusting a system that has traditionally been one dominated by central control and failing to take into account the tremendous impact that intangible assets can have on the overall value and growth of the firm.[181] Kaplan further observes, that for a change in organizational strategy to be effective, firms must "adopt a new set of cultural values and priorities."[182] In that sense, Ruggie's later work on the Guiding Principles echoes this philosophy—when the Guiding Principles discuss the need for a human rights focused approach to begin at the highest levels of management, it is a reflection of the need for any shift, particularly one that is dealing with intangibles (such as human rights), to begin at the top to be truly effective. In addition, Kaplan's work, applied here, emphasizes that a broad system of measurement is needed—one that goes beyond financial measures of success and also takes into account nonfinancial indicators.[183] Finally, according to Kaplan, for a firm to be successful, not only must the strategy start at the highest level of management, but it must then be suffused at every level of the firm.[184] Likewise, the Guiding Principles note that, an effective human rights due diligence strategy must not be relegated to a firm's CSR or human resources department but must be acknowledged by every employee.

Factoring human rights assessment into ERM can be a challenging task. For instance, it might be tempting for corporations, particularly in an economic downturn, to focus on the "fundamentals" of the company rather than on a more holistic approach to governance. In addition, a predominance of weak governance zones abroad, where there is not only little regulation but almost no supervision, makes it challenging to get needed information that would be key to a proper ERM analysis. This could encourage managers who act in bad faith to eschew notions of human rights impacts. That would be unwise, however. As Sherman notes "inadequate or absent government regulation doesn't justify a company's failure to respect human rights. . . . [T]he responsibility 'exists independently of States' human rights duties. It applies to all companies in all situations.'"[185] Moreover, as Stevelman points out, in this era of increased global technology, the impacts of one badly timed corporate action leading to negative human rights impacts can be devastating for the

181. *Id.* at 2–3.
182. *Id.* at 4.
183. *Id*. at 104.
184. *Id*.
185. Sherman, *supra* note 140.

company.[186] That is why it is crucial for the board to have a role in directing company policy in this area. Presumably, boards can take a role in monitoring corporate behavior from a broader perspective than a manager on the ground in Indonesia who is feeling the pressure of regional quotas. The board should (in theory) even be able to transcend beyond the short-term earning assessment of the senior executives, whose compensation is either directly or indirectly tied to quarterly performance.

In examining Sherman's analysis of risk assessment, it is clear that there is a role then for the board and an information gathering process for the board. Specifically, board members can be tasked with certain "regions of focus" that they can look at holistically and without the immediate operational pressures that managers feel. This would allow board members to gain expertise in a certain area and then use that expertise to better advise the board and the corporation as a whole as to the human rights impacts of firm actions in various regions. As an alternative (and as a way to avoid overburdening directors) the firm could employ human rights experts to assess and report on a region in general and, more specifically, on the impact a firm's operations will have on international human rights. Key to this solution would be the chain of command. This human rights expert must be hired, be managed, and report directly to the board of directors, and, although he will need to interact with management to obtain information that will impact his analysis, for reporting purposes, he would bypass management entirely. Presumably, management will have hired someone with a similar function, so doing this would allow the board to have access to key information.

Another challenge in business and human rights and board function is translating the information into an appropriate level of risk. As Sherman notes, "integrating human rights impact assessments into existing risk-management processes requires an understanding of the limitations of traditional risk-management tools when applied to human rights impacts."[187]

Specifically, a major concern in looking at business and human rights risk is determining what the appropriate unit of risk is. There are many different units of risk that one can draw upon, including systemic risk, business risk, and nonbusiness risk. Regardless of the unit of risk that you use, it seems clear that human rights and the risk involved in human rights (specifically ignoring human rights issues) can have a spillover effect on every other kind of risk, including business risks and even systemic risks. Maybe the net result is that if we present human rights risk as a business risk, then that will be placed into language that businesses can understand.

186. Stevelman, *supra* note 24, at 107–08, 121, 145.
187. Sherman, *supra* note 140.

It seems that the board can (and indeed should) have a risk assessment role within the corporation that includes nonfinancial risks that are still business risks. The challenge, however, is recognizing how that assessment of risk would translate in the context of a business and human rights agenda.

Although tied to a State function, the consequences for failure to properly undertake risk assessment were anticipated through the Guiding Principles. For instance, Guiding Principle 20 states

> In order to verify whether adverse human rights impacts are being addressed, business enterprises should track the effectiveness of their response. Tracking should:
>
> (a) Be based on appropriate qualitative and quantitative indicators;
>
> (b) Draw on feedback from both internal and external sources, including affected stakeholders.[188]

Thus, for example, the French Human Rights Commission has faulted this definition for failure "to specify that the concept of 'enterprise' covers all social and economic activities, including services; that it relates to both public and private sector enterprises and that it expressly refers not only to parent companies but also to their subsidiaries, subcontractors and contracting parties."[189]

How the risk is viewed must be examined hand in hand with what the enterprise's objectives are.[190] This raises an interesting issue for business and human rights, because a frequent criticism of stakeholder-centered objectives is that they conflict (either directly or indirectly) with the shareholder's objectives and thus, the enterprise's objectives.[191] The significant objectives for ERM under industry standards centers on four different categories: (1) strategies, (2) operations, (3) reporting, and (4) compliance.[192] It is at this point in the process for an ERM program that the board can and should have a role in embedding the principles of the firm in such a way that it does not, in fact, conflict with later assessments regarding business and human rights.

188. *Guiding Principles*, *supra* note 110, at 19.

189. Larry Catá Backer, *An Analysis of the U.N. Protect, Respect and Remedy Framework Guiding Principles, Part IV—Section By Section Analysis, From Draft to Final Principles: Overall Structure and Capstone Principles*, LAW END DAY (Sept. 2, 2011), http://lcbackerblog.blogspot.com/2011/09/analysis-of-un-protect-respect-and.html (quoting another source).

190. Much of the work on Enterprise Risk Management and its real-world applications has been attributed to the Committee of Sponsoring Organizations of the Treadway Commission (COSO). *See* Richard Ziegler, *Enterprise Risk Management: What, Why and How*, *in* CORPORATE COUNSEL INSTITUTE 2009, at 127, 130-132 (2009). COSO was established in response to a number of financial frauds that occurred and has become known as one of the leading authorities. For a discussion of COSO and its history, see COSO, http://www.COSO.org (last visited Mar. 28, 2013).

191. Margaret M. Blair, *Corporate Personhood and the Corporate Persona*, 2013 U. ILL. L. REV. 785, 807–808.

192. Ziegler, *supra* note 190, at 130.

In addition, most people recognize that a key component of ERM is to determine who is in charge for managing what. And to that extent, at least one commentator acknowledges how important the board's role should be:

> An essential component of ERM is the involvement of high level leadership within the organization for its implementation. Some corporations state that experience in ERM is a desirable quality for a candidate for the board of directors.
>
> Other corporations have incorporated the oversight of the company's ERM into the structure of the board of directors itself. This takes a variety of forms. Several boards assign ERM responsibilities to the Audit Committee. Other approaches include delegating ERM oversight to the Finance Committee, Risk Committee, or to the Directors and Corporate Governance Committee.[193]

To that end, one of Harner's chief contributions to the literature is her push to have scholars and businesses consider the *informative value* of ERM. She writes:

> Thinking about ERM solely as a monitoring process undercuts its potential value. An essential component of ERM is a firm-wide monitoring and reporting system. But equally important is the information targeted by the system and transmitted to the board. As discussed above, the board should review, understand, and approve a firm's risk appetite and ongoing risk strategy. A board, in turn, must receive the necessary information and reports to make these decisions. A board's failure to be reasonably informed about risk-related decisions potentially impairs firm performance and ultimate profitability.[194]

Having the board engaged in this way in the information gathering process with respect to business and human rights, by using some sort of channel that is independent of the CEO, can help to counteract some of the issues presented by certain corporate paradigms that were discussed earlier.[195] Giving the role for business and human rights to the corporate board is not without risks, however.

Stevelman notes a number of challenges for warehousing human rights compliance within the corporate board. First, Stevelman points out that boards are already stretched thin these days by increased compliance and demand for knowledgeable and thoughtful analysis in corporate monitoring. Indeed, in these days of increased compliance, this task of corporate monitoring has become even more daunting than before. As a result, Stevelman discusses the stop-gap remedies that have been proposed—namely the formation of committees. Specifically a committee that would be charged with handling these issues. As Stevelman

193. *Id.* at 132–33.
194. Harner, *supra* note 92, at 55 (internal citations omitted).
195. *See supra* Part II.A–B.

notes, however, "the solution is more problematic than it first appears because a human rights risk-management committee—presumably a committee at the parent company level—is likely to be isolated both geographically and informationally from the immediate area where rights conflicts will present themselves."[196] Finally, Stevelman notes that "the fiduciary duty of good faith—which would encompass a boards' oversight duties vis-á-vis human rights—is profoundly indeterminate."[197]

Despite these challenges, it seems that the directors are a natural repository for the challenge. Given that the *Caremark* duty of care may already place responsibility for this framework squarely at the feet of directors, a smart board would do well to be proactive in anticipating some of the challenges (even with the caveats that Stevelman presents) rather than not doing anything at all and facing almost certain liability—if not now, then in the future. In addition, giving boards the leeway to examine business and human rights issues may go a long way towards mitigating issues of "short-termism." Allowing boards to focus on these longer term goals not just for the company but also for the community can only benefit the corporation.

D. Outlining a Caremark *Duty for Business and Human Rights*

> [L]aws offer only a general definition of the director's role. The law, after all, must be sufficiently flexible to cope with ever-changing business developments that are forever challenging directors with new issues and questions to resolve.[198]

Monks and Minnow expressed this view in 2008, right as the financial crisis was beginning to unfold. These words apply well to the issues that directors face regarding human rights. This sentiment is particularly true when applying a *Caremark* analysis to director's business and human rights duties. The *Caremark* decision was issued in 1996 when the Delaware Chancery court was much more concerned with a director's ability to manage executive performance in the face of corporate criminal behavior than with the idea of managing executive performance in the face of business and human rights issues.[199] Nonetheless, the law's flexibility allows for an analysis regarding how a director's duty of oversight would apply within this context.

The *In re Caremark International Derivative Litigation* decision discussed the proper role for members of the board in upholding their duty of care.[200] In particular, the court examined the amount of oversight necessary to pass the standard for due care test.[201] In this case, the court was

196. Stevelman, *supra* note 24, at 129.
197. *Id.*
198. ROBERT A.G. MONKS & NELL MINOW, CORPORATE GOVERNANCE 232 (4th ed. 2008).
199. *See id.* at 234.
200. 698 A.2d 959, 971 (Del. Ch. 1996).
201. *Id.*

examining a settlement approval to determine whether the facts gleaned during discovery were sufficient to support the parties' proposed settlement.[202] While the court concluded that it was, the court expressed sufficient concern with the underlying action to send a clear warning that those same facts, in the future, could expose directors to liability.[203] In assessing whether oversight was needed to pass the requisite duty of care the court stated

> [I]t would . . . be a mistake to conclude that . . . corporate boards may satisfy their obligation to be reasonably informed concerning the corporation, *without assuring themselves that information and reporting systems exist* in the organization that are reasonably designed to provide to senior management and to the board itself timely, accurate information sufficient to allow management and the board, each within its scope, to reach informed judgments concerning both the corporation's compliance with the law and its business performance.[204]

This one statement illuminated the court's belief that an oversight system would be necessary to satisfy a director's duty of care. Moreover, the court's statement setting forth this analysis is broad enough to encompass not merely the strict financial analysis that is typical of claims in business but also the types of claims that would be the subject of a business and human rights issue presented to the board from both a legal and performance perspective. In addition, some of the facts the court highlighted in its decision also seem to foreshadow how a business and human rights issue can be brought before a Delaware court under a *Caremark* analysis.

Examining the facts that the court highlights in its decision also supports this position. For instance, among the facts that the court discusses in the *Caremark* decision was the public announcement that the corporation made regarding corporate actions that many alleged were illegal.[205] In response, *Caremark* said (although it stated that it did not believe its actions were illegal) that it would stop the controversial activity and institute measures to make sure that the actions would cease.[206] The court then stated that "Caremark's Board took several additional steps consistent with an effort to assure compliance."[207] Later on in its analysis the court then alluded to these facts, stating that "the record supplies essentially no evidence that the director defendants were guilty of a sustained failure to exercise their oversight function," presumably finding support for this in, among other things, the board's steps to en-

202. *Id*. at 960–62.
203. *Id.* at 970.
204. *Id*. (emphasis added).
205. *Id.* at 962.
206. *Id*.
207. *Id*. at 963.

sure compliance.[208] What is interesting is how the court ties the corporation's public statements regarding its next steps with its internal next steps. Obviously, in this instance, the charges were critical to corporate operations (since the alleged conduct was being brought criminally); yet one wonders if the analysis would still apply to a statement that was seemingly more attenuated (because, for instance, it relates to business and human rights) that was then followed with no internal action whatsoever. Given that many human rights advocates view corporate policy in this area as doing exactly that (to wit, acting as nothing more than a massive PR campaign with no underlying substance)[209] the idea that a contradiction of this nature could lead to liability under *Caremark* should cause many corporations to reassess their compliance programs with an eye to this issue.

In addition to its specific factual analysis, the court's statement (quoted above) provides (1) that the information system is reasonably related to the information a corporate board would need, and (2) that information should include a corporate legal compliance and business performance. This is the essence of the oversight necessary to satisfy a duty of care, the court placed no limitation on what type of business performance was necessary or the particular type of legal compliance. As such, there is a fair argument that could be made that a large corporation, particularly a TNC that operates in weak governance zones (governance zones that have a significant past with poor human rights records) needs to include, as part of its oversight system, a reporting system that discusses the human rights impact on the corporation.

This seems even clearer now, particularly in light of recent legal effects that are beginning to explicitly tie corporate requirements under the law with certain human rights issues. To wit, the SEC recently promulgated a final rule that requires corporations to make disclosures regarding its mining operations in those zones that may have dealings with "conflict" minerals, minerals that originate in the Congo.[210] What is particularly interesting about this rule is that it specifically links its policy to a U.N. *human rights* initiative, not a business performance policy, leading to a clear path for those plaintiffs who would like to bring a claim regarding a corporation's operations in this area and its impact on human rights.

In addition, more and more corporations are touting their corporate personality by subscribing to various human rights initiatives (e.g., the Global Compact and the OECD guidelines) and incorporating human rights issues into their mission statements and corporate codes of con-

208. *Id*. at 971.
209. Bauer, *supra* note 110, at 184.
210. Conflict Minerals, Exchange Act Release No. 34-67716 (final rule Aug. 22, 2012) (to be codified at 17 C.F.R. §§ 240, 249b).

duct.[211] Therefore, an argument can be made that this type of promotion and publicity, if contradicted by a company's lack of oversight in this area, could directly impact its business performance. In short, now that companies are committing to human rights publicly as an essential part of their corporate mission, it will become increasingly difficult for them to justify a total lack of monitoring or oversight on those same issues.

CONCLUSION

Eight years ago, Williams and Conley discussed the need for boards to consider human rights as a part of their function within the corporation. They argued that boards were required to consider human rights issues to fulfill their fiduciary duties to their shareholders.[212] One particular insight that they had was to note that

> [although] we have stated that boards are currently "required" to consider the rights and interests of other constituents . . . in only one instance is this a requirement of law, and that is when examining the interaction of Alien Torts Claims Act litigation and corporate fiduciary duty law. The "requirements" to consider institutional investor activism on stakeholder issues are market requirements, and the "requirements" to meet the standards of developing public-private governance regimes are norms-based requirements. . . . The more interesting question is how far apart there "requirements" are. "Legal" requirements presume potential enforcement in court, while market- and norms-based requirements presume enforcement by other means (such as shareholder disinvestment, bad publicity, consumer boycotts, and the risk of regulatory interventions to create new legal requirements).[213]

In the intervening eight years, the business and human rights regime has exploded dramatically. More and more, institutions at a national and international level are placing corporations under increasing scrutiny for their business and human rights practices, as well as the relationships that they have that may also affect an individual's human rights. For instance, the SEC's rulemaking requiring firms to disclose the source of certain minerals mined overseas is a good example of the trend that we are seeing more and more—namely the increased intertwining between a corporation (and by extension a board's duty) and the business and human rights agenda. Indeed, while it may not currently be the case, it may very well be that, sooner rather than later, business and human rights assessments should be a part of a corporation's risk assessment function, or risk liability. In this new environment, the varying 'requirements' outlined by Williams and Conley are becoming increasingly intertwined. As a result, directors would be wise to rise to the challenge and make sure

211. *Guiding Principles*, *supra* note 110, at 26.
212. Williams & Conley, *supra* note 1, at 75.
213. *Id.* at 77.

that the interaction between business and human rights is a key part of their board function.

The challenges for a board in encompassing business and human rights into their functions as directors are daunting. The amorphous nature of the risk associated with human rights, combined with the translation problems involved in taking traditional board tools and applying them to a human rights context can lead many practitioners to conclude that the business and human rights agenda should be outside a board's function. That would be a mistake. Although a court might find it difficult to apply traditional precedents to these types of situations, courts and legislatures have signaled that they are willing to take up the task. Directors who ignore this cue do so at their peril.