

Transnational governance in the field of CSR and the UN Special Representative on Business and Human Rights: Re-embedding or dis-embedding transnational markets?

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Is the rise of transnational governance activity in the field of corporate social responsibility, and its increasing reliance on the concept of corporate responsibilities for human rights, to be read as a countermovement tending to re-embed de-nationalised, liberal markets in transnational society? This paper approaches this question by scrutinising the conduct of the mandate of the United Nations Special Representative on Business and Human Rights (UNSR) as a candidate institutionalisation of forces of social reembedding at global level.

In **Part 1**, the office of the UNSR is briefly contextualised with respect to the UN's historical engagement with questions of social regulation of transnational economic activity, concentrating on the UN human rights system.¹ In **Part 2**, the process conducted by the UNSR and its outputs to date are surveyed. **Part 3** critically examines the notion of "embedded liberalism", coincidentally coined in the 1980s by the current holder of the UNSR mandate, Prof. John Ruggie, and indicated by him to be of Polanyian lineage, and its contemporary deployment in framing the UNSR mandate.

Lastly, in **Part 4**, it is suggested that though aspects of governance in the field of CSR, including the UNSR mandate, may on a Polanyian view be seen to result from the expression of a transnational "double movement", the process and substance of the latter are tending to promote, as much as to restrain, the social disembedding of transnational markets. In concluding, in **Part 5**, the relevance of this perhaps seemingly paradoxical finding for multi-level governance arrangements at the EU level and beyond, and aspirations for their constitutionalisation, in particular, via deliberative cosmopolitanism, are considered.

1. Contextualising the UNSR Mandate: the UN system's historical engagement with social regulation of transnational economic activities

The most salient contextual notes for the purposes of the analysis here relate to three issues: first, attempts within the UN to establish a New International Economic Order; second, the attempt, over the 1970s and 1980s, to enact a UN code of conduct for transnational corporations; and third, the production, in the 1990s, of a set of UN Draft Norms on Business and Human Rights.

1 (1) New International Economic Order

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¹ As indicated, the purpose of this part is to provide contextualisation. Accordingly, readers generally informed of this history should proceed directly to Part 2.

The achievement of independence by former colonies post-1945 rapidly changed the balance of power amongst industrialised and developing states within the UN system, which in turn led *inter alia* to the founding of the United Nations Conference on Trade and Development ('UNCTAD'), the formation of the Group of 77 developing countries² and the declaration by the United Nations General Assembly of a New International Economic Order. Instruments of the New International Economic Order generally addressed the terms on which economic relationships between governments of developed and developing countries should be conducted. However, they also integrated concern for the regulation of transnational corporations,³ in the wake of direct interventions by such corporations in the politics and governments of less industrialised nations.⁴ Against this backdrop, the UN Economic and Social Council ('ECOSOC') already in 1972 had requested a study of the impact of TNCs on developing countries, the character of the economic development process itself, and international relations.⁵

1(2) The UN Draft Code of Conduct for transnational corporations

² Joint Declaration of the Seventy-Seven Developing Countries, made at the conclusion of the United Nations Conference on Trade and Development, Geneva, 15 June 1964), (available at <http://www.g77.org/doc/Joint%20Declaration.html>)

³ UN GA Res. 3201 (S-VI), Declaration on the Establishment of a New International Economic Order, UN GAOR 6th Spec. Sess. Supp. No. 1 at 3, UN Doc. A/9959 (1974); Programme of Action on the Establishment of a New International Economic Order, UN GA Res. 3202 (S-VI), 1 May 1974. Section V of the Programme of Action, headed 'Regulation and control over the activities of transnational corporations', provides that: "All efforts should be made to formulate, adopt and implement an international code of conduct for transnational corporations:

- a. To prevent interference in the internal affairs of the countries where they operate and their collaboration with racist regimes and colonial administrations;
- b. To regulate their activities in host countries, to eliminate restrictive business practices and to conform to the national development plans and objectives of developing countries, and in this context facilitate, as necessary, the review and revision of previously concluded arrangements;
- c. To bring about assistance, transfer of technology and management skills to developing countries on equitable and favourable terms;
- d. To regulate the repatriation of the profits accruing from their operations, taking into account the legitimate interests of all parties concerned;
- e. To promote reinvestment of their profits in developing countries."

The UN Charter of Economic Rights and Duties of States, UN GA Res. 29/3281 (12 December 1974), enacted similar provisions including, under Art. 2(2), that every state has the right:

- b. To regulate and supervise the activities of transnational corporations within its national jurisdiction and take measures to ensure that such activities comply with its laws, rules and regulations and conform with its economic and social policies. Transnational corporations shall not intervene in the internal affairs of a host State. Every State should, with full regard for its sovereign rights, cooperate with other States in the exercise of the right set forth in this subparagraph...

See also, UN General Assembly Resolution 2542 (XXIV), 11 December 1969, Declaration on Social Progress and Development.

⁴ See, for example, Multinational Corporations and US Foreign Policy: Hearing on the International Telephone and Telegraph Company and Chile, 1970-1971, Before the SubCommission on Multinational Corporations of the Senate Committee on Foreign Relations, 93d Cong 1 (1973).

⁵ UN ESC Res. 1721 LIII UN ESCOR 53rd Sess. Supp. No. 1, (1972); UN Dept. of Econ. and Soc. Affairs, The Impact of Multinational Corporations on Development and on International Relations, UN Doc. E/5500/Rev.1, ST/ESA/6; and ESC Res. 1908 LVII UN ESCOR, 57th Sess. Supp. No.1 (1974); ESC Res. 1913 LVII, UN ESCOR 57th Sess. Supp. No. 1, UN Doc. E/5570 (1974). The first of these ECOSOC Resolutions 17621 LIII, requesting the Secretary General to appoint a Group of Eminent Persons to report on the impact of TNCs on developing countries, was proposed by the Chilean Government.

Subsequently, ECOSOC established a UN Commission on Transnational Corporations ('UNCTC') and a UN Centre on Transnational Corporations. UNCTAD was allocated parallel responsibilities relating to the monitoring of transnational corporations.⁶

Within a few years, from within this institutional framework emerged a Draft International Code of Conduct on Transnational Corporations. Like earlier initiatives, this focussed on the terms of relations between TNCs and developing country governments but also, specifically, on duties owed by TNCs to the governments of host states.⁷ Consequently, it divided UN members,⁸ and the Draft Code remained at *impasse* throughout the 1980s and up to the start of the 1990s, by which time developing states' leverage within the UN had substantially weakened. As one indicator of this change in the political climate, in 1994, the UN Centre on Transnational Corporations and UN Commission on Transnational Corporations were dismantled.⁹

1(3) The UN Draft Norms on Business and Human Rights and UNSR

Yet, simultaneously, similarly framed issues were being taken up within the UN human rights system, in particular, in the then UN SubCommission on Prevention of Discrimination and Protection of Minorities.¹⁰ Out of the SubCommission's engagement eventually would emerge the UN Draft Norms on the Responsibilities of

⁶ See further, P Muchlinski, "Attempts to Extend the Accountability of Transnational Corporations: The Role of UNCTAD," in M Kamminga and S Zia-Zarifi eds., *Liability of Multinational Corporations under International Law* 97 (2000, The Hague, Kluwer).

⁷ UN Draft International Code of Conduct on Transnational Corporations, May 1983, 23 ILM, 626 (1984); also reproduced in UN Doc. E/1988/39/Add.1; Development and International Economic Cooperation: Transnational Corporations, UN Doc. E/1990/94 of 12 June 1990.

⁸ UNCTC, Transnational Corporations, Services and the Uruguay Round, UN Doc. ST/CTC/103, 175, 177; 'Outstanding issues in the draft code of conduct on transnational enterprises', UN Doc. E/C.10/1984/S/5, 29 May 1984. Probably due to the perception, at the time, of their limited legal implications, a clause requiring corporations to respect human rights⁸ found acceptance on both sides.

⁹ (ESC Res. 1994/1 UN ESCOR, Substantive Sess. of 1994, Supp. No. 1 at 16, UN Doc. E/1994/32 (1994)).

¹⁰ In 1994 and 1995, the UN SubCommission requested reports on: i) the impact of transnational corporations' activities on human rights focussing on labour rights UN SubCommission, Res. 1994/37, UN Doc. E/CN.4/Sub.2/RES/1994/37, para.8 (g). The report, UN Doc. E/CN.4/Sub.2/1995/11, 24 July 1995, in fact undertook a survey of trends, dynamics and impacts on human rights of economic globalization, and concluded that responsibility for realizing the right to development must be extended to private sector actors, to which end there was a need for regulatory frameworks at national and international levels: para.142; ii) the right to development (UN SubCommission, Res. 1995/31, 24 August 1995, UN Doc. E/CN.4/SUB.2/RES/1995/31. This report emphasised states' right to regulate TNCs pursuant to national sovereignty and further stated, "A new comprehensive set of rules should represent standards of conduct for TNCs and set out economic and social duties for them with a view to maximising their contribution to economic and social development". It also indicated the UN Declaration on the Right to Development as the appropriate framework for negotiation of such rules: UN Doc. E/CN.4/Sub.2/1996/12. 2 July 1996, paras. 73-74. For the right to development, see UN Declaration on the Right to Development, 4 December 1986, A/41/53. Part I, para.10, Vienna Declaration and Programme of Action, 12 July 1993, A/CONF.157/23. See further, UN SubCommission Res. 1998/8, The Relationship Between the Enjoyment of Economic, Social and Cultural Rights and the Right to Development, and the Working Methods and Activities of Transnational Corporations, 20 August 1998, UN Doc. E/CN.4/Sub.2/RES/1998/8.

Transnational Corporations and Other Business Enterprises with Regard to Human Rights.¹¹ Though widely welcomed amongst human rights NGOs,¹² the Human Rights Commission however responded in lukewarm fashion to the Draft Norms¹³; they were unequivocally opposed by business groups,¹⁴ and their reception by trade unions was ambivalent.¹⁵ In 2005, while sustaining engagement with the question of transnational corporate actors' human rights responsibilities and impacts, the Human Rights Commission sought to establish it on a different track, seeking the appointment of an UN special representative on the issue of human rights and transnational corporations and other business enterprises.¹⁶ Prof. John Ruggie, UN Under Secretary General and Adviser to the UN Global Compact, was shortly afterwards appointed to

¹¹ UN SubCommission, Report of the Sessional Working Group on the Working Methods and Activities of Transnational Corporations, UN Doc. E/CN.4/Sub.2/2003/13; Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, UN SubCommission Res. 2003/16 of 13 August 2003, UN Doc. E/CN.4/Sub.2/2003/L.11; Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, UN Doc. E/CN.4/Sub.2/2003/12/Rev.2, 26 August 2003, ("the Draft Norms"); Commentary on the Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights, UN Doc. E/CN.4/Sub.2/2003/38/Rev.2 of 26 August 2003. In tandem, the UN SubCommission requested a focus on "possible negative impact[s] of the activities of transnational corporations and other business enterprises on human rights", including assessment of specific instances of corporate abuses: REFERENCE.

¹² E.g., Human Rights Council of Australia *et al*, Statement of Support for the UN Human Rights Norms for Business, delivered at the 60th Session of the Commission on Human Rights, 15 March – 23 April 2004, Geneva, previously available at <http://www.escr-net.org/EngGeneral/unnorms2.asp>.

¹³ The UN HRC stated that, as a draft text, the Draft Norms lacked legal standing, and directed the SubCommission's Sessional Working Group not to undertake any monitoring of individual corporations' conduct, contrary to the SubCommission's earlier instruction, UN Human Rights Commission, Decision 2004/116, UN Doc.E/CN.4/2004/L.11/Add.7, of 22 April 2004.

¹⁴ Joint Views of the IOE and ICC on the Draft Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights, March 2004, available at <http://www.reports-and-materials.org/IOE-ICC-views-UN-norms-March-2004.doc>. CBI stakeholder submission to the Report of the High Commissioner for Human Rights, available at <http://www.ohchr.org/english/issues/globalization/business/contributions.htm>

¹⁵ Friedrich-Ebert-Stiftung, IG Metall and Misereor, "ILO-UN Standards, Synergies or Competition? A Discussion Paper", (2006, Essen, FES), 5.

¹⁶ UNHRC Res.2005/69, available at http://ap.ohchr.org/documents/E/CHR/resolutions/E-CN_4-RES-2005-69.doc. UNHRC Res.2005/69 opens by recognising business' positive potential contribution to "...enjoyment of human rights, *inter alia* through investment, employment creation and the stimulation of economic growth", and that its "...responsible operation...and effective national legislation can contribute to the promotion of respect for human rights and assist in channelling the benefits of business towards this goal": para.1. The terms of the mandate set for the UNSR were as follows:

- (a) "To **identify and clarify standards of corporate responsibility and accountability** for transnational corporations and other business enterprises with regard to human rights;
- (b) To **elaborate on the role of States** in effectively **regulating and adjudicating** the role of transnational corporations and other business enterprises with regard to human rights, including through international cooperation;
- (c) To research and clarify the implications for transnational corporations and other business enterprises of concepts such as "**complicity**" and "**sphere of influence**";
- (d) To develop materials and methodologies for undertaking human rights **impact assessments** of the activities of transnational corporations and other business enterprises;
- (e) To compile a **compendium of best practices** of States and transnational corporations and other business enterprises..."

this post.¹⁷ The UNSR's initial two-year mandate¹⁸ was subsequently extended twice, the third and current mandate, granted by the UN HRC in June 2008, to run to 2011.¹⁹

2. The UNSR Mandate : Process and outputs

The main outputs of the UNSR mandate to date have been three reports submitted by the UNSR to the UNHRC. Their substance is considered in section 2 (2).²⁰ *En route*, the UNSR has generated a body of research and analysis, including discussion papers,²¹ surveys of corporate and state practice²² and analyses of international and national legal materials.²³ While some have been authored by the UNSR's small dedicated staff, the majority have been solicited from third parties outside the UN system, such as CSR consultancies, commercial law firms, think tanks and academics. Consultation meetings have been undertaken at global, regional, and sectoral levels, variously involving representatives of business, IGOs, national governments, NGOs and experts,²⁴ with much of the documentation emerging from these proceedings

¹⁷ As Under Secretary General, Ruggie had in fact been instrumental in the establishment of the UN Global Compact; Kuper indicates him as its "main intellectual progenitor": A Kuper, "Redistributing Responsibilities—The UN Global Compact with Companies", in A Follesdal and T Pogge eds, 365.

¹⁸ The UNHRC indicated that pursuit of the UNSR mandate should be undertaken in "liaison and consultation" with stakeholders, specifically, "...all stakeholders, including States, the Global Compact, international and regional organizations such as the [ILO], [UNCTAD], [UNEP] and the [OECD], transnational corporations and other business enterprises, and civil society, including employers' organizations, workers' organizations, indigenous and other affected communities and non-governmental organizations...": *id.*, para.3. The Resolution called on the UN High Commissioner for Human Rights to provide administrative support and resources (*id.*, para.4) and to convene annual industry sectoral dialogues, involving "...senior executives from companies and experts from a particular sector, such as the pharmaceutical, extractive or chemical industries, to consider, within the mandate of the [UNSR]... the specific human rights issues faced by those sectors, to raise awareness and share best practice..." : *id.*, para.5.

¹⁹ UN HRC Res. A/HRC/RES/8/7, 18 June 2008.

²⁰ Where not otherwise specified, materials referred to in the remainder of the paper, including the UNSR's three published reports cited here, are accessible via the UNSR's web portal, hosted by the Business and Human Rights Resource Centre ('BHRCC'), <http://www.business-humanrights.org/Gettingstarted/UNSpecialRepresentative>. (BHRCC is a non-profit entity funded by trusts, individuals and Amnesty International; it receives around 1.5 million site visits per month.)

²¹ E.g. Reporting on Non-Financial Performance Discussion Paper. For further examples, see A List of Documents prepared by and submitted to SRSG on Business and Human Rights As of July 2008, available at <http://www.reports-and-materials.org/Ruggie-docus-list-3-July-2008.pdf>.

²² For example, *Addendum 3: Human Rights Policies and Management Practices: Results from questionnaire surveys of Governments and Fortune Global 500 firms*, UN Doc.A/HRC/4/35/Add.3, 28 February 2007, and *Addendum 4: Business recognition of human rights: Global patterns, regional and sectoral variations*, UN Doc.A/HRC/4/35/Add.4, 8 February 2007.

²³ E.g. State responsibilities to regulate and adjudicate corporate activities under the United Nations core human rights treaties: an overview of treaty body commentaries, A/HRC/4/35/Add.1, 13 February 2007, <http://daccessdds.un.org/doc/UNDOC/GEN/G07/108/52/PDF/G0710852.pdf?OpenElement>.

²⁴ E.g. i) Sectoral consultations were held on Human Rights and the Extractive Industry (10.08.05) and Human Rights and the Financial Sector (16.02.07); ii) African, Asian, and Latin America Regional Consultations were held: <http://www.reports-and-materials.org/Ruggie-docus-list-3-July-2008.pdf>; iii) Expert Legal Workshops addressed topics including "Legislation and Government Regulation"; "Corporate Complicity in Human Rights Violations"; "Extraterritorial Legislation as a Tool for Improving the Human Rights Accountability of Transnational Corporations"; "Attributing Corporate Responsibility for Human Rights under International Law"; iv) "consultation meetings" were held on "Accountability Mechanisms for Resolving Complaints and Disputes", "Business and Human Rights in Conflict Zones: The Role of Home States", "Improving the Human Rights Performance of Business

made public via the UNSR's web portal. All manner of contributions and responses from interested parties (as well as official and personal, and rather *ad hominem*, responses by the UNSR to comments and materials submitted by stakeholders) have likewise been published electronically,²⁵ and relevant UN HRC meetings and presentations by the UNSR to them have been webcast.²⁶

No formal criteria were set for participation in the UNSR's consultation process. While this might be considered an improvement on arrangements elsewhere within the UN human rights system, which still severely curtail opportunities for NGO participation,²⁷ it nonetheless raises the question of whether adequate measures have been in place to ensure the UNSR's process has been inclusive and balanced as between the views and contributions of different interest groups and stakeholders.²⁸ Moreover, while UN resources to support the mandate were undoubtedly limited, the UNSR has relied substantially on funding and assistance in kind from transnational corporations and other business actors, with respect to the support of his core research staff²⁹ and specific projects,³⁰ alongside support received from state governments³¹

through Multi-stakeholder Initiatives"; "the Role of states in Effectively Regulating and Adjudicating the Activities of Corporations with Respect to Human Rights; and "Corporate Responsibility to Respect Human Rights"; v) meetings have also been held with the UN Special Procedures and OHCHR.

²⁵ E.g. Letter to UNSR from The Ethical Funds Company, Re: Revenue-Sharing and Fiscal Management, 10 October 2006.

²⁶ Available via UNSR web portal, *supra* note 20.

²⁷ REFERENCE from UNHR system article.

²⁸ It should be noted that the UNSR process *inter alia* has been publicly criticised for i) affording insufficient attention to reported instances of interference with human rights by corporations and for failing to engage with their victims. See e.g. the report published by the NGO Human Rights Watch, *On the Margins of Profit: Rights at Risk in the Global Economy* (available at <http://hrw.org/reports/2008/bhr0208/>) and the International Network for Economic, Social and Cultural Rights' (ESRC-Net) Collective Report on Business and Human Rights, Submission to the 8th Session of the UN Human Rights Council, June 2008 (available at http://www.esrc-net.org/actions_more/actions_more_show.htm?doc_id=693486), which also called for a "broader follow-on mandate...that includes an explicit capacity to examine real life instances of business abuse so that the views, experiences and expertise of those affected by business-related abuses fully inform the effort to identify appropriate solutions", Executive Summary; ii) contrary to the terms of the mandate (*supra* n. 16) failing to include as consultation participants indigenous peoples, e.g. Written Statement by the International Indian Treaty Council, UN Doc. A/HRC/8/NGO/1, 26 May 2008, though cf. *Indigenous People's Rights, Extractive Industries and Transnational and Other Business Enterprises*, Submission to the UNSR by Forest Peoples Programme and Tebtebba Foundation, 29 December 2006; and iii) has overwhelmingly relied on and attracted participation and submissions from parties based in or principally representing constituencies based within OECD states: see e.g. Report of the UNHCHR on the sectoral consultation entitled "Human Rights and the Financial Sector", 16 February 2007, UN Doc. A/HRC/4/99, 6 March 2007, Annex, List of Participants. Cf. the UN HRC's approval of "...the comprehensive, transparent and inclusive consultations conducted with relevant and interested actors in all regions", para.3, UNHRC Res.A/HRC/RES/8/7, 18 June 2008; and a report linked to the UNSR's final report, entitled "Alleged Corporate-Related Human Rights Abuse" *Addendum 2: Survey of Scope and Patterns of Alleged Corporate-Related Human Rights Abuse*, A/HRC/8/5/Add.2, 23 May 2008.

²⁹ Amongst UNSR staff are individuals on secondment from TNCs. Failure formally to draw attention to such relationships can be contrasted with the publicity eagerly given to secondment of NGO personnel (e.g. "UN/SRSG & Global Witness Team Up", Press Release. DATE It would also appear that the UNSR's own post, based at Harvard University's Kennedy School of Government Corporate Social Responsibility Initiative, is thereby financed by various US corporations (e.g. Coca-cola, Chevron, General Motors) that are donors to the CSRI: http://www.hks.harvard.edu/m-rcbg/CSRI/part_support.html.

and independent entities.³² Though the UNSR's online publication of materials produced and received through the mandate might, again, be regarded as providing some measure of transparency, whereas the UNSR has not formally disclosed accounts or other data concerning contributions received,³³ amongst civil society actors this has gradually come to impact on the credibility of the UNSR's office and process.³⁴ The issues of participation and transparency will be returned to below.

2 (1) Products of the UNSR mandate

As noted, the UNSR has published three main reports.³⁵ His concluding report, published in April 2008, on which I focus here, presents the UNSR's proposed "Framework for Business and Human Rights".³⁶

2 (2) Conclusions and recommendations

The centrepiece of the final report is a "strategic policy framework" based on three principles: i) states' duty to protect against human rights abuses by third parties, including corporate actors; ii) the "corporate responsibility to respect human rights"; and iii) more "effective access to remedies" for victims.

2 (2) (i) The state duty to protect

The first limb of the framework merely underscores a well established principle of international human rights law. As a consequence of their duty to ensure human rights' effectiveness, states are obliged not just to refrain from actively interfering with human rights, but also to intervene to prevent private actors within their jurisdiction from doing so.³⁷ Studies performed under the UNSR's mandate of commentaries on the various UN human rights treaties by their respective monitoring

³⁰ For example, Comparative report on corporate culture as a basis for the criminal liability of corporations, prepared by Allens Arthur Robinson, Aug 2006: List of Documents, *supra* note 21.

³¹ For example, Business Recognition of Human rights: Global Patterns, regional and sectoral variation, paper prepared with support from Governments of Canada and Sweden: *id.*

³² E.g. Meaningful Change: Raising the Bar in Supply Chain Workplace Standards, report of consultations undertaken with financial support of *Friedrich Ebert Stiftung*, *id.*

³³ E.g. UNSR refers to site visits undertaken at TNC operations in developing countries, without disclosing any details of these, BHR 5, and also to "pro bono" research by several law firms, who in practice are likely to be firms acting for corporate clients

³⁴ See e.g. Misereor and Global Policy Forum Europe, Problematic Pragmatism, The Ruggie Report 2008: Background, Analysis and Perspectives, June 2008, available at http://www.business-humanrights.org/Links/Repository/821796/link_page_view.

³⁵ The first two reports are UNHRC, Interim Report of the Secretary-General's Special Representative on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, UN Doc.E/CN.4/2006/97, 22 February 2006; and UNHRC, Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts, UN Doc.A/HRC/4/035, 9 February 2007.

³⁶ UNHRC, Protect, Respect and Remedy: a Framework for Business and Human Rights, Report of the UNSR on the issue of human rights and transnational corporations and other business enterprises, UN Doc.A/HRC/8/5, 7 April 2008.

³⁷ See e.g. UN Human Rights Committee, General Comment No.31 Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 26 May 2004, UN Doc. CCPR/C/21/Rev.1/Add.13, paras.6-8. For the now classic discussion in relation to effectiveness and positive obligations under the European Convention on Human Rights, see A Clapham, *Human Rights in the Private Sphere* (1993, Oxford, OUP).

bodies confirmed rising trends of: i) explicit recognition that such 'positive' obligations on states extend to actions by corporations potentially harming human rights (that is, supplementary to the actions of real persons); accordingly ii) the recommendation by UN treaty monitoring bodies of appropriate regulation and adjudication by states with respect to corporate conduct.³⁸

The UNSR's final report argues that national governments must now give a broader interpretation to this state 'duty to protect' against corporate human rights abuses and that they must integrate its consideration across all relevant public policy sectors.³⁹ Four issues in particular are identified in this context. First, governments should "support and strengthen market pressures..." (for instance, via statutory provisions requiring publication of sustainability reports,⁴⁰ the expansion of fiduciary duties, and by incentivising the institutionalisation within companies of respect for human rights standards via criminal and other forms of liability).⁴¹ A second issue is "policy alignment", referring to inconsistencies between states' duty to protect and, on one side, their other international legal obligations (for instance, arising through bilateral investment treaties via stabilization clauses) and on the other side, their domestic policies and practices.⁴² Third, at the international level, the UNSR calls on all the various elements of the UN human rights system to provide more guidance to states as regards the fulfilment of this aspect of their positive obligations. Fourth, as regards armed conflict zones, the suggestion is made that home state governments should take a more proactive role than they do at present to alert, inform and advise companies on human rights-related risks and appropriate conduct to mitigate them.⁴³

2(2) (ii) The corporate responsibility to protect human rights

³⁸ UN Doc. A/HRC/4/35/Add.1. The report highlights that the UN human rights treaty bodies generally concur in recommending states take all necessary steps to protect against abuses by non-state actors, including with reference to their duties of prevention, investigation, punishment and provision of access to redress, and that they view this as applicable equally with respect to all businesses, national or transnational, and all human rights (para.18). By contrast, no clear position emerges from treaty body commentaries to date on the issue of whether companies' home states are duty-bound under international human rights law to prevent extraterritorial abuses by them: para.19, cf. McCorquodale and Simons, *supra* n. X, who identify duty, albeit restricted, of extraterritorial corporate regulation.

³⁹ Protect, Respect and Remedy, *supra* n.36, paras.21-22.

⁴⁰ Cf. D Weil, A Fung, M Graham and E Fagotto, "The Effectiveness of Regulatory Policies", 25(1) *Journal of Policy Analysis and Management* 155, considering preconditions of effectiveness of transparency policies and concluding that effectiveness requires that the information generated is integrated into decision-making routines of both disclosers and information users.

⁴¹ *Id.*, paras.29-31.

⁴² E.g. where export credit agencies fail to apply human rights criteria in granting loans, insurance and export guarantees to domestic companies, *id.*, paras.33-42. See further, K Keenan, Export Credit Agencies and the International Law of Human Rights, Halifax Initiative Coalition, Halifax Initiative, January 2008, H Mann, ICIISD Paper and generally, F Francioni and E – U Petersmann (eds.), *Is There a Role for Human Rights in International Investment Law and Dispute Settlement?* REFERENCE

⁴³ *Id.*, paras.47-49. Here it is also observed that "States lag behind international institutions and responsible businesses in grappling with these difficult issues [i.e. dilemma facing companies operating in conflict zones]", para.49. Cf. e.g. OECD, OECD Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones, (2006, Paris, OECD); International Alert, Extractive Industries: Conflict-Sensitive Business Practice, available at www.international-alert.org/our_work/themes/extractive_industries.php; UN Global Compact Business Guide for Conflict Impact Assessment and Risk Management, available at www.unglobalcompact.org/docs/issues_doc/7.2.3/Business_Guide.pdf.

Turning to the second limb of the UNSR's "strategic policy framework", the "corporate responsibility to protect human rights", according to the UNSR's final report, this "...exists independently of State's duties".⁴⁴ Already expressed, the report asserts, in "soft law instruments"⁴⁵ and the UNGC, as well as in statements issued directly by companies,⁴⁶ its *scope* follows not the boundaries of legal compliance but public expectations - the "social licence to operate".⁴⁷ Accordingly, the approach of selecting a limited set of human rights as applicable to companies, out of the totality for which states are responsible is rejected: in the sense defined, virtually all human rights can be impacted by business activities.⁴⁸

As to the *content* of the corporate responsibility to protect, because companies are "specialized economic organs [of society], not democratic public interest institutions, their responsibilities for human rights, according to the UNSR, "...cannot and should not simply mirror the duties of states".⁴⁹ Whereas in general it can be said that this activates, "...not merely a passive responsibility for firms but may entail positive steps...",⁵⁰ assaying its content in any particular case rather requires that companies undertake exercises in "due diligence".⁵¹

2(2) (iii) Access to remedies

For the third and final limb of the Final Report's framework, the UNSR offers two rationales. First, "State regulation proscribing...corporate conduct will have little impact without accompanying mechanisms to investigate, punish and redress abuses...". A second assertion is that, "...the corporate responsibility to respect requires a means for those who believe they have been harmed to bring this to the attention of the company and seek remediation..."⁵²

Remedies for human rights abuses can be seen in the UNSR's final report as classed according to three categories: i) judicial remedies, or "adjudication"⁵³; ii) state-based, non-judicial remedies; and iii) non-state-based, non-judicial remedies. Judicial remedies are located by the UNSR as lying squarely within the domain of state responsibility and control. The UNSR calls on states to address obstacles to accessing judicial remedies, as well as to strengthen judicial capacity, "...to hear complaints and

⁴⁴ *Id.*, para.55.

⁴⁵ Such as the ILO Tripartite Declaration and OECD Guidelines for Multinational Enterprises, *id.*, para.23.

⁴⁶ Protect, Respect and Remedy, para.23, note 19, citing statement by the IOE, ICC and OECD BIAC, "Business and Human Rights: The Role of Government in Weak Governance Zones", Dec 2006, para.15, that companies "are expected...to respect the principles of relevant international instruments where national law is absent".

⁴⁷ *Id.*, para.54. See further, G Lynch-Wood and D Williamson, "The Social Licence as a Form of Regulation for Small and Medium Enterprises," 34(3) *Journal of Law and Society* 321 (2007), identifying various components of the social licence upon whose interplay its effects depend.

⁴⁸ Protect, Respect and Remedy, para.52.

⁴⁹ *Id.*, para.53.

⁵⁰ *Id.*, para.55.

⁵¹ *Id.*, paras.24-5, with due diligence described as, "...a process whereby companies not only ensure compliance with national laws but also manage the risk of human rights harm...".

⁵² *Id.*, para.82.

⁵³ A category that is also indicated to include "investigation" and "punishment", *id.*, para.83.

enforce remedies against all corporations operating or based in their territory...".⁵⁴ The second category includes public regulatory agencies, mediation services, interventions by national human rights institutions,⁵⁵ and the National Contact Points required to be established by OECD member states under the OECD Guidelines.⁵⁶

Internal to the UNSR's third class, that is, non-state, non-judicial mechanisms, two sub-categories are distinguished. Having grouped together, first, industry, multi-industry, multi-stakeholder and "financier" initiatives, the UNSR suggests that these need to provide grievance mechanisms, whether individually or "collaboratively", as "a check on performance, without which their "credibility...may be questioned."⁵⁷ Secondly, company level grievance mechanisms are asserted by the UNSR as integral to the corporate responsibility to protect.⁵⁸ For all types of non-judicial grievance mechanism, a set of six criteria of credibility and effectiveness are suggested: i) *legitimacy*⁵⁹; ii) *accessibility*; iii) *predictability*; iv) *equity*; v) *compatibility* of the mechanism's outcomes and remedies with international human rights standards; and vi) *transparency*, if not in full, at least concerning the receipt of complaints and outcomes of their determination.⁶⁰

Concluding, with respect to access to remedies, the UNSR suggests that the various mechanisms identified represent, "...a patchwork...at different levels of the international system, with different constituencies and processes,"⁶¹ which leaves gaps that "...[reflect] intended and unintended limitations in the competence and coverage of existing mechanisms".⁶² Noting the proposal for a global ombudsman whose functions would address such deficits, the UNSR however cautions the need for careful consideration of whether, in principle, such an entity could meet the expectations that would attach to it.⁶³

⁵⁴ *Id.*, para.91.

⁵⁵ REFERENCE TO UNSR SURVEY OF NHRIS.

⁵⁶ *Id.*, para.96-99. See Ch. 2 of my thesis for further discussion of the OECD Principles specific instances procedure.

⁵⁷ *Id.*, para.100-101. See further, Pins Brown, Principles that make for effective governance of multi-stakeholder initiatives: *updated, final version*, UN SRSG / Clean Clothes Campaign Expert workshop on improving human rights performance of business through multi-stakeholder initiatives, 6-7 Nov 2007, § 6.4.3 Grievance mechanisms: a litmus test..

⁵⁸ The report notes that, whether within an individual company, or provided in cooperation with others, a business-level grievance mechanism should encompass some role in its design and oversight for "...representatives of the groups who may need to access it...", as well as provision for equal information and expertise, as between the company and parties advancing a complaint: *id.*, para.93-95. See, now, further: KSG Report on grievance procedures.

⁵⁹ Specifically, the mechanism "...must have clear, transparent and sufficiently independent governance structures to ensure that no party...can interfere with the fair conduct of that process": para.92(b).

⁶⁰ *Id.* para.92.

⁶¹ *Id.*, para.102.

⁶² *Id.* para.103.

⁶³ *Id.*, para.103. Social actors have frequently called, in submissions to the UNSR, for a global-level mechanism to marshal human rights complaints against corporations, see e.g. Letter to John Ruggie from 239 organisations and individuals, calling *inter alia* for establishment of a UN special procedure on corporations and human rights with a mandate to include receipt of complaints, available at http://www.escr-net.org/usr_doc/OpenLetter_Ruggie_FinalEndorsements.pdf); at national level, they have started to pilot relevant structures, e.g. Oxfam Australia's Mining Ombudsman, which assists local and indigenous communities worldwide affected by the operations of extractive companies based

2(2)(iv) UNSR conclusions

In closing, the UNSR traces the origins of contemporary discussion of the business-human rights agenda – but only to the 1990s, when “...liberalisation, technology, and innovations in corporate structure combined to expand prior limits on where and how businesses could operate globally...”. That decade’s “rapid market expansion”, it is said, also created “governance gaps in numerous policy domains: gaps between the scope of economic activities and actors, and the capacity of political institutions to manage their adverse consequences”.⁶⁴

Labelled by the UNSR as significant developments in correcting this situation are the emergence of “...multi-stakeholder initiatives, public-private hybrids combining mandatory with voluntary measures, and industry and company self-regulation...”, operating in parallel with an “expanding web” of direct liabilities in criminal law for corporate abuses and some new national measures, albeit rare and modest in their ambitions, to promote greater corporate respect for human rights.⁶⁵ Yet, according to the UNSR, it remains “...our fundamental problem... that there are too few of them, none has reached a scale commensurate with the challenges at hand, there is little cross-learning, and they do not cohere as parts of a more systemic response with cumulative effects”.⁶⁶ Although the UN cannot itself effect a more coordinated development through “command and control”, nevertheless, the UNSR asserts, if it leads “...intellectually and by setting expectations and aspirations...”, which it can do by implementing the UNSR’s “respect, protect and remedy” framework, it will go a long way to closing the *lacunae* of liberalisation.

3. “Embedded liberalism” and the UNSR

Neither the terms of the UNSR mandate nor the UNSR’s conclusions and recommended framework make any explicit reference to the notion of “embedded liberalism” or the social dis- or re-embedding of markets. Nevertheless, scattered throughout the UNSR’s official *oeuvre* are implied suggestions that the mandate, and the broader contextual and normative settings from which it has emerged (namely, the increasingly widespread articulation in civil society of claims that corporate actors bear, and breach, human rights responsibilities and, in turn, responses in civil society to such claims, in the form of attempts to engender governance activity to reflect and support this new normative frontier) embody an historical re-balancing, at global level, of contrapuntal economic and social forces.

For example, the UNSR’s Final Report opens:

“Markets function efficiently and sustainably only when certain institutional parameters are in place. The preconditions for success generally are assumed to include the protection of property rights, the enforceability of contracts,

in Australia with information and advice on legal processes. See <http://www.oxfam.org.au/campaigns/mining/ombudsman/> .

⁶⁴ Respect, Protect and Remedy, *supra* note 36, para.104.

⁶⁵ *Id.*, para.105.

⁶⁶ *Id.*, para.106.

competition, and the smooth flow of information. But a key requisite is often overlooked: curtailing individual and social harms imposed by markets. History demonstrates that without adequate institutional underpinnings markets...may even become socially unsustainable.”⁶⁷

In similar vein, it closes: “There are lessons to be drawn from earlier periods. The Victorian era of globalisation collapsed because governments and business failed to manage its adverse impact on core values of social community”; the phenomena of fascism and communism in the 20th Century, it is added, that were “...championed in the name of social protection against economic forces controlled by ‘others’” resulted from a failed attempt, “...to restore a laissez-faire international economy after World War I.”⁶⁸

Moreover, as will be illustrated in section 3 (1), in this narrative can be heard clear echoes of arguments advanced in the UNSR’s *extra mural* writings, both prior and subsequent to appointment as UNSR, that link such ideas explicitly to Polanyi. But does Polanyi authorise the interpretation of global trajectories of economic liberalisation and social reaction as advanced by the UNSR (and, in addition, the positioning of the UNSR’s office at their contemporary acme)? It is this question the remainder of this section attempts to answer, as a preliminary to seeking, finally, broader lessons in transnational governance to be drawn from the UNSR experience.

3 (1) “Embedded liberalism” : The 1980s and international relations theory

Ruggie’s initial coining of the expression “embedded liberalism”, as noted at the outset, featured in a 1983 article in the journal *International Organisation* which, and by no means surprisingly, advanced its arguments in the terms of international relations theory.⁶⁹ Focussing on the historical international regimes for money and trade, its objective was a specific one: to contradict the theory of international economic regimes according to which a precondition of an “open” or “liberal” international economic order is the existence of an hegemonic power whose status as such derives from the concentration in it of economic capabilities; this was taken to be true of Britain in the late 19th century and the US post-World War II.⁷⁰ Conversely, under the theory, if a hegemon’s economic power weakens, liberal international

⁶⁷ Final Report, *supra* n X, para.1.

⁶⁸ Final Report, *supra* n.X, para.83.

⁶⁹ See R Manytz, *Embedded Theorising*...highlighting the significance of variation between the various interpretive frames applied by different academic disciplines, sub-disciplines and their European and North American variants.

⁷⁰ A liberal international economic order is further defined as one in which market rationality takes “pride of place” and where “authority relations...[are] constructed in such a way as to give maximum scope to market forces rather than to constrain them”. Of specific regimes serving a liberal international economic order, it is said they “...limit the discretion of states to intervene in the functioning of self-regulating currency and commodity markets”: J Ruggie, “International Regimes, Transactions and Change: Embedded Liberalism in the Postwar Economic Order”, 36(2) *International Organisation* 379, 381. For the criterion of capability, Ruggie cites K. Waltz, *Theory of International Politics* (1979, Reading, Mass., Addison-Wesely), 88. Ruggie elaborates that economic capability is necessary but insufficient to establish a liberal international economic order: in addition to raw power – “material supremacy” – it must be backed by political authority which requires a legitimate social purpose. Later Ruggie cites C Kindleberger, *The World in Depression, 1929-39* (1973, Berkeley, University of California Press. for hegemonic stability theory.

economic arrangements will unravel, to be replaced sooner or later by mercantilism, "...under which the constituent units reassert national political authority over transnational economic forces".⁷¹

Ruggie's contribution sought, as he saw it, to correct three defects in this account. First, was the omission from hegemonic stability theory of *social purpose* as a variable providing a discrete basis of differentiation between liberal economic regimes. Though both were supported by economic superpower, the liberal economic orders of the 19th and 20th century, Ruggie maintained, were distinguishable on this basis. Only the former, and not the latter, nor the post-World War II international economic order, was genuinely *laissez-faire*: though the last two sought to guarantee free and stable exchange, they were also concerned to protect domestic economies from the strictures of balance of payments and to cushion them from external shocks.⁷²

In addition, the Bretton Woods arrangements, according to Ruggie, embodied an "embedded liberalism compromise", the essence of which was that, "unlike the economic nationalism of the thirties, it would be multilateral in character; unlike the liberalism of the gold standard and free trade, its multilateralism would be predicated upon domestic *interventionism*".⁷³

Second, and contrasting his own to structuralist modes of explanation and conventional liberalism, Ruggie's article asserted that private transaction flows were not determinative of transnationalisation, regimes and hegemony.⁷⁴ Third, and flowing from the first two points, Ruggie claimed an economic regime could remain stable despite a hegemon's decline: if the regime's social purpose were shared amongst a number of actors for whom it remained constant, then only its rules and procedures need change in line with a shift in balance of power - yielding the notion of the "relative autonomy" of international regimes.⁷⁵

Describing his theoretical position as an "interpretation of the structure of international authority", Ruggie cited Polanyi's work as providing in its support "an historical illustration". Polanyi, Ruggie suggested, recognised the existence of both embedded and dis-embedded economic orders. For Polanyi, the 19th century provided the key example of the latter: across Europe, in that period, the state assumed the function of instituting the "self-regulating market".⁷⁶ By the late 1800s, however, social reaction to market rationality triggered "...the great transformation", a shift

⁷¹ Ruggie, *supra* n.X, 391.

⁷² *Id.*, 382. The argument is further backed by the examples of 17th Century Dutch hegemony that coexisted with mercantilism, and arrangements that would have been established by Hjalmar Schacht if Nazis had emerged victorious from World War II, 382, 394.

⁷³ *Id.*, 393.

⁷⁴ On international transaction flows, Ruggie claims that embedded liberalism would tend to see not a Ricardian "...international division of labour based on the functional differentiation of countries that reflects their comparative advantage", but a multi-lateral division of labour reflecting "...some notion of comparative advantage", yet also intended to "...minimise socially disruptive domestic adjustment costs as well as any national economic and political vulnerabilities that might accrue from international functional differentiation": *id.*, 399.

⁷⁵ *Id.*, 384.

⁷⁶ *Id.*, 385. Ruggie indicates that this also reflected a shift in authority relations between state and society, 386.

from “international automaticity” to the “...emergence of deliberate management of international economic transactions by means of collaboration amongst governments”.⁷⁷ In other words, the distinction between embedded and disembedded markets supplied Ruggie with the variation of social purpose he contended hegemonic stability theory was lacking.

Ruggie's embellishment of Polanyi's position was to claim that post-war economic liberal multilateralism owed its emergence and stability to the hegemonic power of the US, but also to the “...shared legitimacy of a set of social objectives to which the industrial world had moved, unevenly, but “...as a single entity”.⁷⁸ On the other hand, and now seeming to veer into structural explanation, Ruggie moved that, since social purposes “...reflect particular configurations of state-society relations...fundamental discontinuity in these regimes *would* be effected by an erosion in the prevailing balance of state-society relations among the major economic powers.” At the time, this led him to the further conclusion that, “Ironically, then, the foremost force for discontinuity... is not “the new protectionism” in money and trade, but the resurgent ethos of liberal capitalism”.⁷⁹

3 (2) Embedded liberalism II: The late 1990s, the UN and global governance

Ruggie returned to the notion of embedded liberalism from time to time during the following decade.⁸⁰ However, for present purposes, it is its canvassing by him beyond the perimeter of international relations, in discussions of CSR and business and human rights discourses, occurring after 2000, that is of interest.⁸¹ Though not yet appointed UNSR, as Under-Secretary General, as noted above, Ruggie was already at this time involved in establishing the UN Global Compact.

In 2002, in an article titled, “Taking Embedded Liberalism Global: The Corporate Connection”, Ruggie observes that, under contemporary conditions issuing from economic globalisation, industrialized states, individually and collectively, can no longer maintain the post-war “compromise”⁸² : “[E]mbedded liberalism presupposed

⁷⁷ *Id.*, 387.

⁷⁸ *Id.*, 398. It was thus not the case, Ruggie maintained, that the embedded liberalism compromise resulted from states' failed intention to establish a truly liberal international economic regime, compromised by a lot of “cheating taking place on the domestic side”, *id.*, 398. The phenomenon of social counter-movement, it should be noted, is thus periodised by Ruggie according to its function in explaining the emergence of a particular type of international economic regime. Similarly, regarding Bretton Woods, invoking in support the views of Polanyi, Keynes, and Harry Dexter White, Ruggie claims the post-1945 economic order reflected a global “change in state-society relations”: governments' assumption of “direct responsibility for domestic social security and economic stability” followed nearly universal “demands for social protection” in the wake of franchise extension, the rise of working class political parties, etc., *id.*, 388.

⁷⁹ *Id.*, 413.

⁸⁰ J Ruggie, “Embedded Liberalism Revisited”, in E Adler and B Crawford eds., *Progress in Postwar International Relations* (1991), 202; “Globalisation and the Embedded Liberalism Compromise: The End of an Era?”, in W Streeck ed., *Internationale Wirtschaft, Nationale Demokratie* (1998); “Trade, Protectionism and the Future of Welfare Capitalism”, 48 (1) *Journal of International Affairs* 1 (1994).

⁸¹ Ruggie was appointed to this post in 1999 by UN Secretary General Kofi Annan.

⁸² That is, the compromise between multi-laterally coordinated liberal trade and economic regimes, and protectionism, embodied by post-1945 welfare provision amongst advanced economies: J Ruggie, *Taking Embedded Liberalism Global: The Corporate Connection*, IILJ Working Paper 2003/2 and also

an *international* world...the existence of *national* economies, engaged in *external* transactions..."; globalisation, on the other hand, undermined these premises, and so "threatens to leave behind merely national social bargains".⁸³

However, he suggests, embedded liberalism might still survive in the 21st century – if it can be re-established on the *global* plane. But what could provide the vehicle for such a relocated dynamics of economic-social antagonism? Ruggie next presents what he suggests to be evidence of the emergence of a "...global public domain: an arena of discourse, contestation and action organized around global rule-making – a transnational space that is not exclusively inhabited by states, and which permits the direct expression and pursuit of human interests...".⁸⁴ Triggered by "certain social processes and movements" urging "more inclusive forms of global governance",⁸⁵ Ruggie identifies as an integral element in the creation of this new global public domain that the "transnational corporate sector" has started to play a "key bridging role" between national communities and global economy that, ultimately, could be capable of eliciting effective regulatory action by states.⁸⁶

Ranking prominently amongst examples of this mooted trend, according to Ruggie, is the UN Global Compact. In such governance activities should be recognized the scope, he further asserts, for "institutionalizing an emerging global public domain".⁸⁷ Even if, on the other hand, such non-bureaucratic, transnational governance activities represent a "...terrain...fraught with strategic manipulation and the potential for shirking", and do not constitute a stable end point,⁸⁸ it will be by this route, rather than via international or global corporatism, or cosmopolitan democracy, that the public sector can return to a meaningful role in global governance.⁸⁹

Subsequently, this basic thesis has been reiterated and elaborated in certain respects. A 2004 article again asserts that transnational CSR-type activities constitute a "...new global public domain".⁹⁰ Within this domain, expectations regarding "legitimate

in D Held and M Koenig-Archibugi, *Taming Globalisation: Frontiers of Governance* (2003, Cambridge, Polity), 3-4.

⁸³ Also noted is evidence of a shift from a "compensatory" approach to managing the impacts of trade liberalisation to a "competitiveness" model: *id.*, 8, citing G Garrett and D Mitchell, "Globalisation, government spending and taxation in the OECD", 39 *European Journal of Political Research* 147.

⁸⁴ Ruggie, *supra* n.82, 14.

⁸⁵ *Id.*, 3-4.

⁸⁶ "...[S]omething akin to an embedded liberalism compromise is being pulled and pushed into the global arena", with "...the corporate connection...a key element in that process", *id.*, 29.

⁸⁷ *Id.*, 26.

⁸⁸ He adds, "...the skewed distribution of agential capacity between North and South is too pronounced, accountability problems too pervasive and the distributional consequences of these kinds of global governance instruments too poorly understood for us to believe that they reflect some new stable equilibrium", *id.*, 28.

⁸⁹ On cosmopolitan interpretations, while Ruggie concedes there *might* be evidence in the governance activities he describes of "greater pluralism", nevertheless he maintains "...we are a long way from turning rich country consumers, the employees of transnational corporations or even dedicated activists into global citizens.": *id.*, 28.

⁹⁰ This global public domain being further defined as an "...increasingly institutionalised transnational arena of discourse, contestation and action concerning the production of global public goods, involving private as well as public actors"; the (circular) assertion that until the mid-20th century, the international public domain comprised exclusively of states is taken as a premise: J Ruggie,

social purposes” are articulated.⁹¹ Emerging “accountability systems”, such as voluntary corporate social reporting are positioning government in a new role as “downstream codifiers” of emerging social expectations, whose definition is undertaken “...entirely apart from the sphere of states.”⁹² Albeit states are still present via existing regulatory frameworks and rules, clearly “other social actors are drawn into playing public roles to compensate for governance gaps and governance failures at global and national levels...”⁹³ Overall, Ruggie’s claims is that this setup may, “...provide a historically progressive platform by creating a more inclusive institutional arena in which, and sites from which, other social actors, including CSO, international organisations and even states, can graft their pursuit of broader social agendas onto the global reach and capacity of TNCs”.⁹⁴

Ruggie recognises the transnational/global public domain he describes as “...thinner, more partial and more fragile than its domestic counterpart”⁹⁵. While it is allowed that some governance gaps may “...exist in the first place because the private sector has succeeded in curtailing the scope of the public sector”⁹⁶, at the same time any prospect of “legally binding regulations at the global level” is assessed as remote, given a lack of “political will or even capacity” on the part of states – and because “much of the corporate world would unite to fight it”.⁹⁷ Nevertheless, in the round it is fair to say that Ruggie’s narrative, though occasionally registering such conflicts of interest, rather conveys the idea of a spontaneous restoration of equilibria between countervailing economic and social forces at macro-level.⁹⁸ This surely exposes Ruggie’s thesis at the very least to criticism for idealism and functionalism.⁹⁹ On the other hand, perhaps worth noting is Ruggie’s continuing demurral from systemic or structural explanation with reference to power and exploitation.¹⁰⁰

Another dimension of what may be termed the *re-embedding global governance* thesis that Ruggie has elaborated concerns transnational governance via networks.¹⁰¹

“Reconstituting the Global Public Domain: Issues, Actors and Practices”, 10(4) *European Journal of International Relations* 499. PAGE REFERENCES OUT.

⁹¹ *Id.*, 9 (this feature, as will be recalled, conforms to Ruggie’s avowedly Weberian interpretation of political authority as fusion of power and social purpose.

⁹² *Id.*, 22.

⁹³ *Id.*, 24, 30.

⁹⁴ *Id.*, 8, where the phenomenon outlined are further claimed to represent part of a strengthening “sociality” at global level.

⁹⁵ *Id.*, 36.

⁹⁶ *Id.*, 30.

⁹⁷ *Id.*, 31.

⁹⁸ For example, he writes: “...the iconic case of civil society action to redress imbalances in global rulemaking remains its role in defeating of the Multilateral Agreement on Investment (MAI), strongly supported by TNCs and international business associations”, *id.*, 20.

⁹⁹ Although, on some views, at least in this respect Ruggie may be faithful to Polanyi: Ebner? Buraway? to be contrasted with Gramscian contingency.

¹⁰⁰ For example, he refers to “...asymmetries reflecting power differentials among different states, as well as between states and social actors, together with differences in their respective willingness and ability to resist or embrace these trends”, as if the association of these phenomena were a chance happening (*id.*, 36). Similarly, corporate human rights abuses by Shell in Nigeria, Nike in Indonesia, Exxon Valdez, and the use by companies of sweatshop labour are described as “doing bad things”, without any deeper reaching attempt being made to address potential underlying causes, *id.*, 20-21.

¹⁰¹ J Ruggie, “The UN and Globalisation: Patterns and Limits of Institutional Adaptation”, (2003). REFERENCE – See also, Ruggie & coauthor UNGC article on nested networks

With specific reference to the UNGC, and attempts by the UN to engage business in partnerships in activities contributing to achievement of the Millennium Development Goals (and also by contrast, Ruggie claims, with the “standard” bureaucratic arrangements of the 20th century’s intergovernmental order¹⁰²) network governance represents “a more inclusive and more fluid public domain”, that must necessarily promote goals shared by all participants, and “...do so in a reasonably equitable manner...”¹⁰³ This is so notwithstanding transnational governance networks “...raise serious accountability issues”: network governance is impossible, it is said, “...strictly through rules-based accountability systems”, which would kill their agility, so that they “...can only be managed for results”.¹⁰⁴ Though perhaps explicable by reference to the institutional focus of the argument, it is nonetheless noteworthy that, Ruggie is concerned only with intra-network accountability, and does not reflect on the question of accountability to external stakeholders: the issue of network governance’s *democratic* accountability is not raised.

Interestingly, Ruggie also asserts that institutional fragmentation in the UN system has been compensated for in the 1990s by conceptual convergence, indeed he asserts a conceptual consensus between the UN and the Bretton Woods system as having emerged during this period. According to his account,

“Historically, UN entities had expressed varying degrees of ambivalence about the market generally and globalisation in particular. The UN saw itself as the champion of social justice and distributive policies and viewed the economic system more of an impediment than a solution to these ends. On occasion – as in the New International Economic Order negotiations of the 1970s and early 1980s – the UN tilted heavily...to regulate global market forces and actors.”¹⁰⁵

For their part, Ruggie contends, the IMF and World Bank led an aggressive drive towards capital market liberalisation in the 1980s and continued to fixate on economic growth over the following decade. However, the 1990s’s new conceptual consensus, “...encompasses the centrality of governance, the rule of law, education, and health to economic success”,¹⁰⁶ it was also captured in Kofi Annan’s statement to the Millennium Summit, that “...a socially inclusive globalisation”, must be “...built on the great enabling force of the market, but market forces alone will not achieve it.”¹⁰⁷

Finally, Ruggie has deployed “embeddedness” in the context of an argument whose main purpose is to caution against the adoption of binding international legal

¹⁰² Arrangements that are described as, “constrained by...constitutional parameters”, and with respect to which “governments retain more absolute control”: Ruggie, “The UN and Globalisation: Patterns and Limits of Institutional Adaptation”, *supra* n.101, 317.

¹⁰³ That is, because networks operate on the basis of shared normative and conceptual frameworks within which, furthermore, participating entities create value, by establishing complementarities and synergies in the deployment of their respective capabilities: *id.*, 315.

¹⁰⁴ *Id.*, 316.

¹⁰⁵ “The United Nations and Globalisation: Patterns and Limits of Institutional Adaptation”, 9 *Global Governance* 301 (2003), 303-4, citing B Gosovic and J G Ruggie, “On the Creation of a New International Economic Order”, 30(2) *International Organisation* 309 (1976).

¹⁰⁶ Also mentioned in this context are foreign direct investment, debt relief and development assistance, barriers to trade, the need for agreements with private and civil society sectors, and the MDGs: *id.*, 304-5.

¹⁰⁷ *Id.*, 304 (footnote omitted).

standards directly addressing corporate actors' responsibilities to respect human rights, though this time, and surprisingly, given his alternative usage of it, with slightly different intent.¹⁰⁸ Asserting that global human rights compliance requires a grand consensus and social coalition, to include business in its embrace, it is claimed that *law's* effectiveness in this context hinges on whether "...it is embedded within, and deployed in support of, an overall strategy of increasing governance capacity in the face of enormously complex and ever-changing forces of globalisation."¹⁰⁹

3 (3) Critiquing "embedded liberalism"

The notion communicated by Ruggie of an emerging global-level "embedded liberalism" for which transnational CSR and related governance activity provided a vehicle has started to circulate in both academic and practitioner discussions and, in these fora, its claim to a Polanyian pedigree is not usually subjected to scrutiny.¹¹⁰ It is therefore appropriate to examine, with the assistance of more scrupulous contributions, whether the contemporary "embedded liberalism" construct is in fact faithful to Polanyian theory. This is the main task of the current section, and a preliminary to considering, in the next, whether the UNSR process can be said to promote or restrain the social reembedding of transnational markets, properly understood.¹¹¹

3 (3)(i) "Embedded liberalism" vs. Polanyian social embeddedness

A convincing argument that "embedded liberalism" in fact misinterprets Polanyi's idea of the social embeddedness of markets can be found in Ebner. It comprises two parts. The first addresses the distinction made by Polanyi between market *order* and market *embeddedness*. When markets are socially embedded, for Polanyi, rule-based market order is but one component of this. And because markets "...always require some type of institutional underpinning to sustain their operation", failing to appreciate this leads to the mistaken view that markets are, in a Polanyian sense, always socially embedded - whereas in fact they are only always institutionally

¹⁰⁸ J Ruggie, Business and Human Rights. The Evolving International Agenda, Harvard University JFK School for Government, Corporate Social Responsibility Initiative Working Paper No.38, June 2007, also 101 *American Journal of International Law* 819.

¹⁰⁹ *Id.*, 30. He proceeds that, "...many elements of an overall strategy lie beyond the legal sphere altogether", citing Sen for the proposition that fixating on legal compliance can "incarcerate" human rights, *id.*, 29, n.37 (A Sen, "Elements of a Theory of Human Rights", 32 *Philosophy and Public Affairs* 315 (2004)). Further, rather than "backward-looking judgments" about responsibility for past injustices, the focus of governance, it is indicated, should be "to expand the international regime horizontally, by seeking to further clarify and progressively codify the duties of states to protection human rights against corporate violations", *id.*, 28-9, this time citing IM Young, *Responsibility and Global Labor Justice*, 12 *Journal of Political Philosophy* 365.

¹¹⁰ E.g. A Lang, "Reconstructing embedded liberalism: John Gerard Ruggie and constructivist approaches to the study of the international trade regime", 9 (1) *Journal of International Economic Law* 8; J Caporaso and S Tarrow, Polanyi in Brussels. European Institutions and the Embedding of Markets in Society, RECON Online Working Paper 2008/1: "Without calling it 'welfare', the European Court of Justice's judgments regarding the free movement of labour have begun to embed social content within this marking-making precept", at 19; D Rodrik and Institute for International Economics, *Has Globalisation Gone Too Far?* 1997 R Keohane, "The World Political Economy and the Crisis of Embedded Liberalism," in J Goldthorpe ed., *Order and Conflict in Contemporary Capitalism*, 1984.

¹¹¹ A Ebner, *Governance Und Public Policy*, Kumulative Habilitationsschrift, Staatswissenschaftliche Fakultät, Universität Erfurt, Juli 2008 (*mimeo*).

embedded.¹¹² As Ebner points out, Polanyian embeddedness goes beyond institutional embeddedness, also denoting non-market modes of social integration, for example, via the redistributive role of the state.¹¹³

The second element of the argument relates to commodification.¹¹⁴ A truly Polanyian viewpoint "...implies an integrated perspective on embeddedness and commodification..." which addresses "the material substance of socio-economic reproduction". Ebner's criticism of Block, for "...completely neglecting markets as a terrain for the commodification of labour" and other fictitious commodities could equally well be raised against Ruggie,¹¹⁵ whose work has nowhere to date alluded to the multiple transformations of labour wrought by market transnationalisation.

Combining these two points, and with reference to Ruggie's interpretation of the Bretton Woods system,¹¹⁶ Ebner asserts that Ruggie's "embedded liberalism" identifies, "...embeddedness with the rules and regulations of market exchange", quite distinct from "...Polanyi's concern with commodification and de-commodification as key components of disembedding and re-embedding strategies and practices."¹¹⁷

¹¹² *Id.*, 16. This mistake is made, for example, by Caporaso and Tarrow, who state that "...the idea of a disembedded market is a myth, as Polanyi realized about nineteenth century England": J Caporaso and S Tarrow, Polanyi in Brussels. European Institutions and the Embedding of Markets in Society, RECON Online Working Paper 2008/1, 5, citing F Block, "Understanding the Diverging Trajectories of the United States and Western Europe: A Neo-Polanyian Analysis", 35 *Politics and Society* 3, 5. Ebner refers to 4-way typology of cognitive, cultural, structural and political embeddedness: S Zukin and P DiMaggio, Introduction in S Zukin and P DiMaggio (eds), *Structures of Capital: The Social Organization of the Economy* (1990, Cambridge, CUP), 1-36, 15-20. Beckert points to a similar error in the new economic sociology, inspired by M Granovetter, "Economic Action and Social Structure: The Problem of Embeddedness", 91 *American Journal of Sociology* 481, which took embeddedness as a "constitutive element of all economies": J Beckert, "The Great Transformation of Embeddedness. Karl Polanyi and the New Economic Sociology", MPIfG Discussion Paper 07/1, 17. Beckert also usefully highlights that institutional embeddedness is common to all three types of economic exchange Polanyi identifies: reciprocity, redistribution as well as market, *id.*, 8.

¹¹³ Ebner, *supra* n. X, 19.

¹¹⁴ In Polanyi's *The Great Transformation* (1957 [1944], Boston, Beacon Press) labour, land and money are identified as "fictitious commodities". Whereas economic liberalism requires that "...society pretend [they]... will behave like other commodities where the price mechanism produces a rapid balancing of supply and demand", not being produced for consumption via markets, this dynamic is subject, with respect to them, to limits, and disequilibrium: F Block, "Towards a New Understanding of Economic Modernity", Ch.1 in C Joerges, B Str  th and P Wagner eds., *The Economy as Polity: The Political Constitution of Contemporary Capitalism* (2005, London, UCL Press), 8.

¹¹⁵ Demonstrating how his first and second points tie together, Ebner states: "Rules that simply fulfil a market-enhancing function, for instance by reducing transaction costs and information asymmetries in the setting of wages, do not qualify as embedding rules. They still support the rationale of commodification that follows the allocative rationale of market supply and demand. However, a set of rules that delegates some component of wage setting and related features of industrial relations to an institutional domain beyond the commodity logic of supply and demand qualifies as a feature in the embedding – or re-embedding – of markets. These sets of rules, which may refer to the inclusion of welfare arrangements in wage setting or to the participation of the workforce in management decisions, just like in German co-determination law, actively promote a de-commodification of labour, as they shield its reproductive conditions from market fluctuations and employer's market power": Ebner, *supra* n. X, 15-16.

¹¹⁶ Which in Ebner's view, associates embeddedness "...with a kind of multilateralism in trade and investment regulations that allows for domestic interventions": *id.*, X.

¹¹⁷ Ebner, *id.*, 15. Ruggie generalises social embedding to all national economies participating in the post-war international economic institutions, bracketing together the US New Deal or Keynesian state,

In addition, Beckert observes a third aspect to Polanyian social embeddedness: the concept's "social-reformist connotations". Like commodification, Beckert suggests, these have lately been neglected. For Polanyi, however,

"The embeddedness of market exchange...is the unstable result of social and political struggles, an outcome that has to be shielded by means of deliberate political engagement from the danger of an "institutional separation of society into an economic and political sphere". The "double movement" is *not an automatic response* to the devastating effects of self-regulating markets but rather the result of political intervention in markets in the light of their social consequences. The "re-embedding" advocated by Polanyi implies a substantial political authority over the economy as a result of political and social engagement."¹¹⁸

As a result, moreover, as Beckert observes, in no way can *The Great Transformation* be seen to indicate or "...imply a linear concept of development of the sort found in Marx, Weber, Durkheim or Parsons. Embeddedness is not a characteristic that separates pre-modern economies from modern ones."¹¹⁹

Three distinct bases emerge, then, for rejecting "embedded liberalism" as a faithful application or even extrapolation of Polanyi: its failure to distinguish markets' institutional- from social-embeddedness; its silence on the point of commodification; and its misreading of the character of the double movement: while Ruggie's embedded liberalism suggests an historically inevitable unfolding of antithetical world-level forces, for Polanyi, the double movement is critically dependent on political agency, particularised and contingent.

3(3)(ii) Global governance and the welfare state

As noted earlier, broad allusions to the effects of economic transnationalisation and liberalisation in diminishing states' willingness and capacity to regulate markets, and corporate actors within them, are scattered through Ruggie's official and academic writings. This is indicated, furthermore, as providing a basis for reliance, going forward, on alternative modes of governance, including, for example, CSR and the UN Global Compact. Ruggie is again silent, however, regarding the transformation of the *welfare* state which coincides with those changes that he does draw attention to. To this, however, Ebner once again provides a useful counterpoint, in the form of a reconstruction of a Polanyian theory of public policy.

In Polanyian terms, Ebner claims, "...the welfare state stands for the social protectionist and redistributionist move... involving the social right of a minimum level of income and the corresponding allocation of benefits and payments according

and European "social democracy or the social market economy", this corroborates Ebner's analysis: absent any specific reference to (de)commodification of labour under these arrangements, embedding looks to be identical merely with market institutionalisation.

¹¹⁸ Beckert, 17, citing Polanyi, *supra* n.X, 71.

¹¹⁹ Beckert, *supra* n.X, 19. Though Beckert does not use the term, this suggests a place for Gramscian contingency within Polanyian interpretation: see further, M Burawoy, "For a Sociological Marxism: The Complementary Convergence of Antonio Gramsci and Karl Polanyi", 31 *Politics and Society* 193.

to non-market criteria".¹²⁰ Yet post-industrial globalisation, with nation state steering capacity and national regulatory frameworks for social protection weakened, has provoked a transformation of welfare regimes across many industrialised states, "...in the direction of an extension of market principles and related material incentives...", simultaneously recommodifying labour.¹²¹ So it can be observed that, in Polanyian terms, there has been,

"...a shift from embedding de-commodification to disembedding commodification. They [i.e. late 20th century welfare reform trends] approach the combination of disembeddedness and commodification typified by competitive markets and their integrative strength in market exchange."¹²²

The hegemonic ideal of 1990s welfare reform programmes and policies across a range of OECD countries, Ebner suggests, is well-captured by the "activation" paradigm. This encompasses a move from an approach to social welfare based on entitlement as a member of the national polity, to "...a work-based system that focuses on conditional assistance," and which emphasises "...flexibility, individualisation, individual employability and self-entrepreneurship and responsibility for material wellbeing", valorisation of these attributes standing instead of the ideal of social citizenship.¹²³

This retreat of collectivity, it is further suggested, has been "...paralleled by an extension of cooperative interaction between public and private sector in a new mode of political-economic governance," often resulting in "...a commercial reframing of non-commercial operations in terms of a provision of public goods."¹²⁴ In turn this leads to "...the disembedding commodification of an institutional setting [i.e. the welfare state] that had originally emerged from the counter-move against the market-system", and its institutional adaptation to the market process. Indeed, the welfare state is now allocated the role "...to safeguard the commodity character of labour on an individual level of competitive marketisation".¹²⁵

Also relevant, for reasons whose significance will become clearer below,¹²⁶ is Ebner's treatment of Esping-Andersen's account of the institutional varieties of welfare capitalism. This, Ebner shows, presumes Polanyian de-commodification. Further, for Esping-Andersen, de-commodification, "...rests upon the combination of social welfare assistance with an emancipation of individuals from market dependence". In addition, in this context "...decommodification resembles an institutional tendency

¹²⁰ Ebner, *supra* n.X, 37, citing G Dalton, "Introduction" in G Dalton ed., *Primitive, Archaic and Modern Economies: Essays of Karl Polanyi* (1968, New York, Anchor), iv-liv, xxvi.

¹²¹ *Id.*, 38.

¹²² *Id.*, 21. Block concurs with this contrast between the policy autonomy enjoyed by developed nations during the 1945-1973 period, and the post-1983 restrictive environment for developed and developing nations, ruling out the pursuit of full employment and budget deficits, and ushering in currency speculation, privatisation, deregulation and spending limits: Block, *supra* n.X, 7.

¹²³ Ebner, *supra* n.X, 41-42.

¹²⁴ *Id.*, 42, citing D Harvey, *A Brief History of Neoliberalism* (2005, Oxford & NY, OUP), 75-77.

¹²⁵ Ebner, 42-43, this time citing, at 42, B Jessop, "Regulation and Autopoietic Reflections on Polanyi's Account of Market Economies and Market Society", 6(2) *New Political Economy* 213, 219-220. providing "institutional means for providing commodified inputs to the labour market", and public policy overall "becomes an integral factor in the reproduction of the market system"

¹²⁶ See Section 5, and Ch.5 of doctoral thesis.

regarding the strength, scope and quality of social rights, which outlines the actual degrees to which various actors can uphold a socially acceptable living standard independently of their participation in the labour market.”¹²⁷

4. Embedding and disembedding markets: the paradoxes of transnational CSR and the UNSR mandate

The last section has demonstrated that the criteria for a transnational or global-level Polanyian social reembedding are rather different, and more demanding, than those indicated by Ruggie - and in this section it is against these criteria that the growth of transnational CSR activity, and the UNSR mandate, are briefly assessed.

As to the first, Ebner indeed suggests that the Polanyian double movement “...qualifies as a device for assessing the organised criticism of globalisation as a counter-move against the formation of a globalised commodity fiction”.¹²⁸ Recalling also that the double movement

“...is to be understood as a clash of social principles resulting from the contradiction between the market system and the persistence of modes of social integration beyond market exchange and commodification.”¹²⁹

the field of transnational CSR, if broadly defined, can certainly be said to include in its scope much activity that qualifies as organised criticism of commodification. This is true not just as regards labour, but also, too, for land, and knowledge (consider the growth of transnational debates, activism, and frequently violent protests concerning, for instance, forced evictions to make way for commercial development, indigenous people's rights to land and natural resources as against title and interests obtained by extractive companies, and intellectual property rights in the context of access to essential medicines¹³⁰). To the extent that the establishment of the UNSR mandate, along with the UN Global Compact before it, and the legion other transnational CSR initiatives that have emerged in civil society over the last decade and more, reflect and respond to such developments, it thus seems fair to say that they derive from the expression of a transnational double movement.

On the other hand, the analysis surely cannot stop there. To be classed in themselves as “socially reembedding” in Polanyian terms, individual CSR activities and initiatives must actively contest commodification; beyond attesting to the increasing mingling of economic and political systems, they must assert the authority of politics over the market; and they must also affirm non-market modes of social integration. In particular, in this 21st century context, they must, as a bare minimum, acknowledge

¹²⁷ And of course, only if work is a choice, and not a compulsion, can the consequence be de-proletarianisation: Ebner, *supra* n.X, 39, citing G Esping Andersen, *The Three Worlds of Welfare Capitalism* (1990, Cambridge, Polity), 21-22.

¹²⁸ Ebner, *supra* n.X, 46, citing V Birchfield, “José Bové and the Globalisation Countermovement in France and Beyond: A Polanyian interpretation”, 31(4) *Review of International Studies* 581.

¹²⁹ Ebner 43, citing K Polanyi Levitt, Keynes and Polanyi: The 1920s and the 1990s, 13(1) *Review of International Political Economy* 152.

¹³⁰ An extensive library of materials relating to recent activism and litigation concerning all of these issues is available at <http://www.business-humanrights.org>.

the transformation of advanced economies' welfare states and the erosion of social solidarity that has accompanied it.

As seen in Part 3, it was these welfare states that constituted the very foundation of Ruggie's original "embedded liberalism" concept. As demonstrated in Part 2, however, as UNSR, though alluding to political-economic transformation,¹³¹ and "collective action problems" faced by states in consequence of it,¹³² his findings and recommendations, and his contemporary deployment of "embedded liberalism", decline anywhere to mention the integral role of inclusive, non-conditional welfare arrangements to social reembedding, whether at national or transnational level – even though an abundance of standards and materials elaborating social and labour rights emanating from elsewhere within the UN system, and of course from the ILO would have licensed such a discussion.¹³³ Additionally, the keystone of the UNSR's recommended framework is the state responsibility to protect – states must step up to the plate to plug the "governance gaps" left by globalisation¹³⁴ – whereas this is plainly inconsistent with the earlier observed compromise of states' capacity and willingness to do just that.

Moreover, as regards the UNSR process, it was noted that the UNSR has sometimes recognised the accountability challenges attaching to new transnational governance modalities, alternative to inter-national bureaucracy, and the risk of participants engaging in strategic action.¹³⁵ However, to date, as illustrated in Part 2, there is scant evidence of any concerted effort being undertaken to insulate the conduct of his own mandate from such risks. If a Polanyian perspective counsels, "...a reflexive, dialogical mode of governance as the solution to a sustained co-existence between market economy and the wider social and ecological system",¹³⁶ substantial reliance on market actors' resources and contributions has not been compensated for in any way through, for example, steps to ensure transparency or equity in participation.

It has been observed that the "...impact of discourses on the social construction of market liberal moves and social protectionist counter-moves" makes a critical contribution to influencing the outcome of the "undetermined evolutionary processes"

¹³¹ E.g. Final Report, *supra* n.X, para.13-14.

¹³² "...in the international arena states may compete for access to markets and investments as a result of which collective action problems may restrict or impede their serving as the international community's public authority", Ruggie, Business and Human Rights, *supra* n.X, 27.

¹³³ Cf., e.g. Proposed ILO Declaration on Social Justice for a Fair Globalization International Labour Conference, 97th Session, Provisional Record 13A, Proposed ILO Declaration on Social Justice for a Fair Globalization, stating that, despite its benefits, "...global economic integration has caused many countries and sectors to face major challenges of income inequality, containing high levels of unemployment and poverty, vulnerability of economies to external shocks and the growth both of unprotected work and the informal economy, which impact on the employment relationship and the protections it can offer." It also "...affirms that labour is not a commodity and that poverty anywhere constitutes a danger to prosperity anywhere", and that it is the ILO's responsibility to "examine and consider all international economic and financial policies in the light of the fundamental objective of social justice", Preamble. It further declares as strategic objectives of the ILO, "...developing and enhancing measures of social protection – social security and labour protection..."

¹³⁴ "Imbalances" in global rule making, between those favouring market expansion and those promoting "equally valid social objectives, be they labour standards, human rights or environmental protection," 310. E.g. Final Report, *supra* note X, para.17.

¹³⁵ E.g. *Business and Human Rights*, *supra* n.X, 5.

¹³⁶ Ebner, *supra* n.X, 46, citing B Jessop 2001, 228-9.

that can lead, on one hand, to great transformation, or great involution, of society.¹³⁷ On the plane of discursive analysis, it is submitted, it can fairly be said of the UNSR's mandate that it:

- De-historicises, depoliticises and naturalises markets and their dysfunction (e.g. by omitting any mention of the New International Economic Order, and the right to development, as a predecessor attempt at social regulation of transnational corporate activity within the UN system, which focussed substantially on such activity as a threat to national sovereignty, self-determination and democratic control over natural resources amongst developing countries, and so implying consensual backing for the frameworks governing economic liberalisation in intervening years, rather than their origin in contestation and conflict¹³⁸; also in the claim of a "conceptual convergence" during the 1990s around ideas of social reembedding¹³⁹);
- De-couples transnational CSR from international human rights law, its foundational texts and sources (despite generating research addressing this legal framework, the UNSR's findings in fact attach novel, non-legal meanings to legal terms and concepts¹⁴⁰);
- Accordingly, also de-couples it from human rights' laws underpinning values (nowhere, for instance, does the mandate explicitly draw authority from the UDHR or the international Bill of Rights, or from the values or need to protect human dignity or equality);
- De-dramatises the impacts of transnational market integration and corporate actors on human beings (by declining to discuss any specific impacts on victims in any detail or including victim testimony¹⁴¹);

¹³⁷ Ebner, *supra* n.X, 44, citing R Munck, "Globalization, Labour and the 'Polanyi Problem', *Labor History* 45(3) 251, 253-254.

¹³⁸ Cf. i) Mouffe's observation of the importance to democratic politics of acknowledging power relations and antagonism: C Mouffe, "Democracy and Pluralism: A Critique of the Rationalist Approach", 16 *Cardozo Law Review* 1533, 1545; ii) the observation that policies which look "as if they were dictated by matters of fact (thematic patterns) deflect consideration of values of choices and the social, moral and political responsibility for such choices," J Lemke, *Textual Politics: Discourse and Social Dynamics* (London: Taylor & Francis, 1995), 60, cited in Pikalo, 9, and Pikalo's call to "...rescue independent thinking on political concepts from fixed relations among 'natural' entities" by "...dissolve[ing] political forms of the state, the individual, and the market back to historically specific relations between the people who constitute them", Pikalo, *id.*, 14; and Block's observation of the deployment of objectivism in earlier historical periods, by Townsend, Malthus and Ricardo: F Block and M Somers, "In the Shadow of Speenhamland: Social Policy and the Old Poor Law", 31(2) *Politics and Society* 283 (2003), 287-288, citing Townsend's *A Dissertation on the Poor Law* (1786; reprint, Berkeley: University of California Press, 1971), TR Malthus, *An Essay on the Principle of Population* (1798; reprint, London: Penguin, 1985)

¹³⁹ Cf. Ebner, "A frictionless harmonisation of market system and policy intervention thus remains out of sight" *supra* n.X, 43, citing K Polanyi Levitt, Keynes and Polanyi: The 1920s and the 1990s, 13(1) *Review of International Political Economy* 152.

¹⁴⁰ E.g. the UNSR Reports' definition's of "effective access to remedies" and "due diligence", defining corporate "responsibility" as tied to public expectations about company conduct, not to legal liability, *supra* n.X.

¹⁴¹ Cf. U Baxi, "The Politics of Reading Human Rights: Inclusion and exclusion within the production of human rights," Ch.10 in S Meckled-Garcia and B Cali eds, *The Legalization of Human Rights: Multidisciplinary Perspectives on human rights and human rights law* (2006, London, Routledge), 184; on Baxi's analysis, the exclusion of victims from the UNSR's process and narrative can be seen to represent a double denial, of authorship and the right to rights authorship. It is also particularly interesting that, even if the renunciation of an exclusively legal analysis opens up liberationist

- Assumes and reinforces a broadly liberal public-private divide (most obviously through the “respect, protect and remedy” framework, which presumes discrete and traditionally-defined roles and functions respectively for governments and non-state economic actors¹⁴² and implies, *contra* Polanyi, the notion of naturally free markets¹⁴³);
- Thus, and paradoxically, given that it is avowedly a governance narrative, re-centres a hierarchical regulation instead of promoting a de-centred, heterarchical one.¹⁴⁴

To draw from Ebner, once again, the double movement is consistent with “...a clash of specific cultural systems, involving ideological and motivational patterns that strive for institutional hegemony”; it also “...needs to address the aspects of power and politics in historically specific cultural settings”.¹⁴⁵ To date, the UNSR mandate, on this basis, can scarcely be seen as part of the forces of social re-embedding.

5. Conclusion

What are the implications for law and governance more broadly, including in the EU setting, of this paradoxical finding – emanating from a transnational double movement, the UNSR process, as a candidate institutionalisation of it, nevertheless contributes to continued disembedding of transnationalised markets?

This pattern would appear to have been prefigured by developments in the EU - in the form of the failure of the European Multistakeholder Forum on CSR (‘EMSF’) to reach consensus, due to the objections of non-business participants¹⁴⁶; and its

possibilities (“...human rights do not just constitute an affair of law; they also signify practices of resistance and struggle directed to *name* human rights and to put them to *work*...A violent epistemic exclusion arises when one focuses merely on the state/law production of human rights”, *id.*), the new “structure of interpretation of human rights” (encompassing the formation of authoritative interpretive communities, the hierarchical distribution of powers within these, and “degrees of openness and closure that constrain the narrative power of interpretive voices...”, *id.*, 184) introduced by the UNSR should effect inclusion/exclusion along such lines.

¹⁴² E.g. the Final Report states that its framework “...rests on differentiated but complementary responsibilities”, and that, “...as economic actors, companies have unique responsibilities. If those responsibilities are entangled with State obligations, it makes it difficult if not impossible to tell who is responsible for what in practice”, *supra*, n.X, para.9. Cf. C Chinkin, “A Critique of the Public/Private Dimension”, 10(2) *European Journal of International Law* 387, and G Anderson, *Social Democracy and the Limits of Rights Constitutionalism*, 17 *Canadian Journal of Law and Jurisprudence* 31, 33, 58, asserting that, within liberalism, the state-civil society divide, “...serves the crucial legitimating function of obscuring the broader constellation of law and political power – including corporate political power – operating in society”.

¹⁴³ “Polanyi...claims that it is in fact the market system, which is the product of an utopian rationalism that manifests itself in coordinated government interventions to disembed the market sphere from non-market modes of social integration..”, Ebner, *id.*, 28, citing J Holmwood, *Three Pillars of Welfare State Theory: T H Marshall, Karl Polanyi and Alva Myrdal in Defence of the National Welfare State*, 3(1) *European Journal of Social Theory* 23, 34-35.

¹⁴⁴ J Black, “Decentring Regulation: Understanding the Role of Regulation and Self Regulation in a “Post-regulatory” World,” 54 *Current Legal Problems* 103.

¹⁴⁵ Ebner, *supra* n.X, 38, citing J Harriss, *Institutions, Politics and Culture: A Polanyian Perspective on Economic Change*, 13(2) *International Review of Sociology* 343.

¹⁴⁶ NGO participants could not accept that ‘convergence of CSR practices and tools is occurring on a market-led basis through voluntary bottom-up and multi-stakeholder approaches, and other drivers, [which] can achieve quality and a good balance between comparability, consistency and flexibility’:

succession by **the European Alliance for Corporate Social Responsibility (EACSR) (launched by Implementing the Partnership for Growth and Jobs: Making Europe a Pole of Excellence on Corporate Social Responsibility)**, a “dialogue” on CSR this time comprising only businesses and their representative associations, and from which the social partners and NGOs were entirely excluded.¹⁴⁷

Of yet broader significance, however, high hopes have in the past been entertained for the democracy-enhancing potential of alternative modes of governance in the EU, including in the area of social protection. In the wake of recent developments, in the EU and globally, whether they constitute a countervailing force of sufficient strength against the corrosive effects on social solidarity of legally enforced market logic, whether such aspirations were well-founded is increasingly subject to question.¹⁴⁸

Elsewhere I have argued that any reconstitution of democracy in the EU, or other supranational governance arrangements, via deliberative cosmopolitan means demands full attention to the resource-distributive dimension of democratic self-governance, key to both social productivity and social reproduction, recognized by labour law, but neglected by liberal constitutional theory.¹⁴⁹ ¹⁵⁰Supranational social citizenship, re-defined as an expanded set of procedural rights alongside substantive social and welfare entitlements,¹⁵¹ is the critical complement to transnational governance, to counter the tendencies of its modalities such as subsidiarity and self-regulation in practice to autonomize market relations and market actors.¹⁵²

Final report, at 4, available at

http://ec.europa.eu/enterprise/csr/documents/29062004/EMSF_final_report.pdf

¹⁴⁷ Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee, Implementing the Partnership for growth and jobs: making Europe a pole of excellence on corporate social responsibility, Brussels 22.3.2006 COM (2006) 136 final.

¹⁴⁸ C Joerges, *The Renaissance of the European Economic Constitution?*, Paper for Research Conference, *The Lisbon Treaty – a Step Towards Integrating Welfare Functions into EU Law?* 29 August 2008, Copenhagen Business School: “...the concept of the economic constitution is not an adequate response to the new challenges”, that is, the EU’s drawing into social regulation post-Maastricht and under Lisbon, in combination with the shift to de-juridified governance marked by the Open Method of Coordination and the 2001 Commission White Paper on Governance. In this account, whereas social policy remained the domain of member states, and the economic constitution was enforced by EU’s non-majoritarian institutions, this distinction is now blurred, with social integrity neither protected adequately via Community institutions nor, following the ECJ’s arrogation of jurisdiction via the supremacy doctrine, is it adequately preserved as an area of national discretion. See also F Scharpf, “Economic integration, Democracy and the Welfare State”, 4 (1) *Journal of European Public Policy* 18 (1997) and *Governing in Europe: Effective and Democratic?* (1999, Oxford, OUP).

¹⁴⁹ C Methven O'Brien, “Reframing Deliberative Cosmopolitanism: Perspectives on Transnationalisation and Post-national Democracy from Labor Law”, *German Law Journal*.

¹⁵⁰ “...to conserve the great democratic achievements of the European nation-state, beyond its own limits”, and so including “...not only formal guarantees of civil rights, but levels of social welfare, education and leisure that are the precondition of both an effective private autonomy and of democratic citizenship”: J Habermas, *Why Europe Needs a Constitution*, 11 *New Left Review*, 5, 6 (2001) (emphasis added).

¹⁵¹ A Supiot, *The transformation of work and the future of labor law in Europe: A multidisciplinary perspective*, 138 *International Labor Review* 31 (1999) and A Supiot, *Au-delà de l’emploi: Transformations du travail et l’avenir du droit du travail en Europe. Rapport pour la Commission Européenne* (1999).

¹⁵² Or as Nancy Fraser puts it, in typically uncompromising terms, “At the international level...a motley and changing crew of unelected notables convenes...for loosely institutionalised discussions, while legal regulation of transnational business gives way to new forms of *ad hoc*, informal arbitration, whose private and discretionary character insulates them from public scrutiny”- a “ruling apparatus

Another angle on this is Iris Marion Young's idea of reframing justice: globalization is taken as requiring a three-fold definition of justice, including political/equal participation as well as distributive and recognition dimensions.¹⁵³ Two dimensions are identified to representation / the political level of justice: i) inclusion or exclusion from the decision-making community; ii) 'procedures that structure public processes of contestation' – which Young states as, "...the terms on which those included in the political community air their claims and adjudicate their disputes". In this respect, the question to ask, Young suggests, is "Do the community's decision rules accord equal voice in public deliberations and fair representation in public decision-making to all members?"¹⁵⁴

"Misframing", when this is not the case, is the most important type of misrepresentation, and "Akin to the loss of what Hannah Arendt called 'the right to have rights', a "political death". "...deprived of the possibility of authorising first order claims, they become nonpersons with respect to justice" even if they may become objects of charity or benevolence.¹⁵⁵ Adhering to the Keynesian-Westphalian frame, in a globalized context, blocks challenges to injustice, by channelling claims "...into the domestic political spaces of relatively powerless, if not wholly failed, states", thus insulating offshore powers from critique and control. Singled out by Young, in this respect, are "transnational private powers", including TNCs and, crucially, "the governance structures of the global economy, which set exploitative terms of interaction and then exempt them from democratic control".¹⁵⁶ "Meta-political misrepresentation", then, is "[e]xemplified by undemocratic processes of frame-setting"; here, "injustice consists in the failure to institutionalize parity of participation at the meta-political level, in deliberations and decisions concerning the 'who'." Meta-political representation occurs "...when states and transnational elites monopolize the activity of frame-setting, denying voice to those who may be harmed by the process, and blocking creation of democratic arenas where the latter's claims can be vetted and redressed". Whereas the role of activists can be viewed as "seeking to transfer elite frame-setting prerogatives to democratic publics", Young identifies as structural feature of her conjecture that "...struggles for justice in a globalizing world cannot succeed unless they go hand in hand with struggles for meta-political democracy".¹⁵⁷

The trajectory of the office of the UNSR, regrettably, would seem to be a signal lesson in the truth of this claim. Until alternative modes of governance at transnational level are supported, guided, and contained, by strong procedural protections, on one

whose composition is so complex and shifting" it has been called "la nebuleuse": N Fraser, "From Discipline to Flexibilisation? Rereading Foucault in the Shadow of Globalization", 10(2) *Constellations* 160, 168, citing R Cox, "Democracy in Hard Times: Economic Globalization and the Limits to Liberal Democracy", in A McGrew (ed.), *The Transformation of Democracy?* (1997, Cambridge, Polity).

¹⁵³ I M Young, "Reframing Justice in a Globalizing World", 36 *New Left Review* 69 (2005).

¹⁵⁴ Observed as obstacles to parity of participation, are "economic structures that deny... the resources they need in order to interact with others as peers" (distributive injustice – class structure) or status inequality, via institutionalised hierarchies of cultural value (status order), *id.*, 75.

¹⁵⁵ I Young, *id.*, 77, citing H Arendt, *The Origins of Totalitarianism* (1973, New York), 269.

¹⁵⁶ *Id.*, 78.

¹⁵⁷ 85-86.

hand, and solid and expansive commitment to social rights, on the other, the extent to which they will promote, rather than restrain, social embedding will be in doubt.