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The Monster under the Bed: Financial Services and the Ruggie Framework

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The work to develop the 'protect, respect and remedy' framework governing the human rights impacts of business has coincided with one of the worst financial crises to hit the global economy and financial system in many decades. The social and individual welfare impacts have been wide-ranging and devastating. Estimates suggest that over 27 million workers have lost their jobs[1]; the number of people in 'vulnerable employment' has risen to 1.5 billion[2]; 64 million more people are living in extreme poverty[3]; and over 1 billion people, or one sixth of humanity, are now undernourished.[4] And flowing from these circumstances a raft of human rights are threatened or diminished, including rights to food, water and an adequate standard of living, to health, education and adequate housing, to non-discrimination, to privacy, to bodily integrity, and to a fair trial (the poor are often on the margins or effectively excluded from rule of law processes), as well as health and safety in the workplace and the right to work itself.

In the advanced economies, the 'socialisation' of financial sector losses through State bailouts has in some cases tripled the debt burden on States, leading to sovereign debt problems and savage budget cuts which could undermine human rights enjoyment. The

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[1] International Labour Organisation: *Global Employment Trends 2011: The challenge of a jobs recovery* (ILO, Geneva, 2011) p. ix.

[2] Ibid., p.22. Vulnerable employment is defined as 'own-account and unpaid family workers', and is characterised by 'informal work arrangements including a lack of social protection, low pay and difficult working conditions in which fundamental rights may be undermined.' Ibid., p.21-22.

[3] World Bank, *Global Monitoring Report 2010: The MDGs after the crisis* (World Bank, Washington, 2010) p.6.

[4] Food & Agriculture Organisation, *1.02 billion people hungry: One sixth of humanity undernourished – more than ever before'*, 19th June 2009, available at: www.fao.org/news/story/en/item/20568/icode/. The FAO commented that: "The most recent increase in hunger is not the consequence of poor global harvests but is caused by the world economic crisis that has resulted in lower incomes and increased unemployment."

USA has announced over $1trillion of budget cuts over the next decade[5]; while European governments are projected to make hundreds of billions of dollars worth of spending cuts over the next four years.[6] The crisis has clearly demonstrated that in today's deeply integrated financial markets, accumulated failings in regulation, monetary policy, corporate governance and corporate behaviour can be catastrophic and far-reaching for human rights enjoyment. Human rights standards are inevitably drawn along in the slipstream of financial market malfunction. Lying between financial sector failings and the adverse human rights impacts they generate there are layers of financial complexity in products, processes and corporate form, as well as the long extra-territorial reach of financial activity, that even regulators have struggled to monitor. This is the nature of the monster beneath the bed of the Ruggie framework, and none of it is easily interpolated into the 'protect, respect and remedy' framework. As it stands the framework provides, at best, a benchmark for arguing that the management of international financial markets should take into account their human rights impacts. Yet, given the dimensions of the problem, it is not easy to see what else it could do at this stage.

During his tenure as a Special Representative of the Secretary-General (SRSG), Professor Ruggie acknowledged the importance of the crisis as a context for his work and as a challenge for the operationalisation of the 'protect, respect and remedy' framework, calling for States to recalibrate "the balance between market and state", and for corporations to "better integrate societal concerns into their long-term strategic goals."[7] In the realm of financial services, the real question is: how?

There are various dimensions to this question. In this chapter we will seek explore some of the unchartered dimensions by examining the Ruggie framework in light of the types of complex financial issues, products and processes that underlay the devastating human rights impacts of the most recent financial crisis. Our focus is on the broad systemic, macro level harms that the finance sector can cause in aggregate to human rights worldwide, which is a largely unrecognised threat in much human rights literature, which has tended instead to focus on areas of direct, immediate impact of corporate acts on the rights of individuals or groups. The financial crisis highlights the distinctness of the financial sector in terms of causality and methods of interacting with human rights standards, and the difficulty of using the Ruggie framework as an operational benchmark for addressing this. Although the subprime securitization process at the heart of the financial meltdown did contain examples of the type of immediate corporate human rights harms that the

[5] Congressional Budget Office, *Monthly Budget Review Fiscal Year 2009*, 7th October 2009, available at: www.cbo.gov/ftpdocs/106xx/doc10640/10-2009-MBR.pdf; White House Office of Management and Budget, *The Federal Budget Fiscal Year 2012: Budget Overview*, available at: www.whitehouse.gov/omb/overview.
[6] BBC, *EU austerity drive country by country*, 31st March 2011, available at: www.bbc.co.uk/news/10162176.
[7] *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises: Towards operationalising the "protect, respect and remedy" framework*, 22 April 2009, A/HRC/11/13, para.10. On the crisis see paras.7-11.

business/human rights community is more familiar with – such as mis-selling, fraud and abuse on the part of mortgage brokers for subprime credit - a large part of the process of generating such a staggering economic, financial and human rights crisis lay well beyond the ambit of this causal model. Thus at the outset it is important to stress that even had the Ruggie framework been available and able to address some of the more flagrant human rights abuses and fraudulent behaviour among mortgage lenders, it could not in and of itself have stemmed the tide of system-wide harm that engulfed the global economy.

The chapter is organised as follows: in section A we highlight how the integration of social and human rights criteria into financial sector practice has so far been shallow, despite the appearance of comprehensive coverage one might infer from the proliferation of codes of standards and initiatives over the last decade or so. As such, there is little of substance to be drawn on in applying the 'protect, respect and remedy' framework to the financial sector as a whole. In section B, we provide a brief overview of some key features of the subprime meltdown, including the way the subprime mortgage-backed securities at the heart of the crisis were created and sold. This is intended to give the reader an insight into the distinct way that human rights harms can be created and magnified in the financial sector. In section C, we examine the three pillars of the Ruggie framework in light of the subprime process and highlight some of the challenges that it raises for operationalisation of the framework. This is intended to give a flavour of some of the largely unmapped problems that finance poses for the 'protect, respect and remedy' framework, and for human rights standards more broadly. In section D, we provide some thoughts on the way ahead, while section E concludes.

A. Financial Services & Human Rights: The State of Play

Are the human rights impacts from financial instability 'externalities' of market dysfunction that are beyond the scope of human rights due diligence in the financial sector? Or are they captured by the broad strokes of the SRSG's principles which challenge those tasked with operationalisation to think more extensively and more technically about the relationship between human rights and financial services?

The Guiding Principles would appear to sanction, indeed endorse, a comprehensive approach to preventing and mitigating human rights harm in the financial sector. In meeting their duty to protect against human rights abuse by business enterprises domiciled in their jurisdiction, States must enforce laws that require business enterprises to respect human rights, ensure that other laws and policies governing business enable them to respect human rights, and must ensure policy coherence across governmental

departments and multilateral institutions which ensures respect for human rights.[8] This would prima facie appear to capture the legislative and regulatory architecture of the financial system within the ambit of the Guiding Principles as it played a key causal role in the crisis. In principle at least States need to ensure that this architecture provides "an environment conducive to business respect for human rights."[9] However, Ruggie concedes that the human rights implications of many business-related laws and policies "remain poorly understood"[10], and nowhere is this more so than in the governing architecture of international finance which, as we shall explore below, is immensely technical and not easily harmonised with international human rights norms.[11]

Businesses' responsibility requires that they avoid causing or contributing to adverse human rights impacts through their own activities, or any that are linked to their operations through business relationships 'even if they have not contributed to those impacts'.[12] Insofar as the crisis emerged from toxic risk taking by financial corporations around the world, magnified by corporate governance failings and the highly interconnected nature of financial services firms, there is a strong case to argue that a comprehensive approach needs to be taken to examining the responsibility to respect human rights in financial activity, even if achieving this is a long-term objective.

However as we move beyond the broad scope of the Guiding Principles, there is little to draw on in applying the 'protect, respect and remedy' framework to financial services at an operational level because so far few technical areas of finance have been mapped to human rights standards.[13] Although there has been a proliferation of codes of principle, standards and initiatives in the finance and human rights cum environment space over the last decade:- the Equator Principles[14], the Global Compact[15], the Principles on Responsible Investment[16], the United Nations Environment Programme Finance Initiative[17], and the

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[8] *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie: Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, UN Doc. A/HRC/17/31, 21st March 2011, principles 1, 3, 8 & 10.

[9] Ibid., p. 8, commentary to principle 3.

[10] *Guiding Principles on Business and Human Rights*, *supra* note 8, p. 8, commentary to principle 3.

[11] Studies into the crisis paint a picture of the extraordinary complexity involved. See for example: Financial Crisis Inquiry Commission, *The Financial Crisis Inquiry Report: Final Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States* (Public Affairs, New York, 2011); UK Financial Services Authority, *The Turner Review: A Regulatory Response to the Global Banking Crisis*, (FSA, London, 2009).

[12] *Guiding Principles on Business and Human Rights*, *supra* note 8, principles 11 & 13.

[13] M. Dowell-Jones & D. Kinley, 'Minding the Gap: Global Finance and Human Rights', 25 *Ethics & International Affairs*, no.2 (June 2011), pp.183-210.

[14] www.equator-principles.com

[15] www.unglobalcompact.org

[16] www.unpri.org

[17] www.unepfi.org

Wolfsberg Principles[18], to name but a few, efforts have largely related to a few key areas where environmental and some human rights impacts are most visible and directly attributable to corporate activity. Project finance, prudential and ethical investing (though not always together), environmental, social and governance (ESG) issues, and corruption and transparency matters have been the main focus, though globally they cover only a fraction of financial activity and do not touch upon the structural dynamics and characteristics of the financial system that generate financial crises and wide-ranging adverse human rights impacts.

There can be a tendency to equate gross assets under management (AUM) of signatory institutions with the depth of coverage across financial activity of social criteria. For example, the 800+ signatory institutions of the Principles on Responsible Investment have combined AUM of US$22 trillion.[19] This gross figure is somewhat misleading as an indicator of depth of penetration of social criteria into financial activity and the structure of financial markets for the following reasons: investment processes are still governed by modern financial theory which has been heavily criticised for lacing instability through financial markets which has far-reaching and often adverse social impacts – both when markets are reaching euphoric highs (as we have seen with booming commodity and property markets) and when they are spiralling downwards[20]; these assets are themselves drawn along in the flow of financial fashion thanks to benchmarking[21] which in practice compounds market instability, causing negative social impacts; and the apparent size of this pool of assets is still a very small fraction of financial markets, which are worth in excess of US$1,000 trillion and are made up of complex, interlocking layers of financial activity which, as we have seen with the current crisis, serves to compound and magnify risk, not diversify it. This $22 trillion of assets sit within this context and are conditioned by it, no matter how high-sounding their social principles.

The unfolding of the subprime crisis provides a timely illustration of how the layers of complexity involved in modern finance and the linguistic incongruity between it and human rights concepts provide a substantial barrier to the comprehensive application of the 'protect, respect and remedy' framework to global financial activity. What appeared to

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[18] www.wolfsberg-principles.com

[19] Principles for Responsible Investment, *Annual Report of the PRI Initiative 2010*, p.1, available at: www.unpri.org/files/annual_report2010.pdf.

[20] On the failings of modern financial theory see: K. Dowd & M. Hutchinson, *Alchemists of Loss: How Modern Finance and Government Intervention Crashed the Financial System* (John Wiley, London, 2010).

[21] Benchmarking refers to the practice of measuring a fund's performance against a target index, say for example the FTSE 100, on a quarterly or annual basis. This is then also used to weigh the fund's performance against its peer group. What this produces in practice is 'closet indexing', or a tendency to standardisation whereby funds will mimic the composition of the benchmark as closely as possible in order not to deviate too far from its performance. This exacerbates herding behaviour in financial markets, and partly accounts for the reality that actively managed funds rarely outperform index-tracking funds over anything but a very short-term time horizon, despite much higher fees being charged to investors.

be a straightforward and laudable policy goal that would further human rights realisation (by expanding home loans to low income borrowers) became a vehicle for broad-based, global human rights harm thanks to deficiencies in financial engineering and layers of interconnected structural failings in the architecture of the financial system itself. Most of the critical failings were located in areas of the financial system that are currently off the human rights radar and that require substantial industry experience to decode[22], and so the question can legitimately be posed: how far can we or should we go in including those failings within the 'protect, respect and remedy' framework? Is trying to deepen the application of human rights principles to finance through focusing on more systemic issues stretching the Ruggie framework too far?

It is worth stressing at this point that the subprime meltdown was not an isolated case of financial malfunction, but a manifestation of some of the ongoing problems that the financial system poses for global human rights enjoyment. It demonstrates how financial alchemy and complexity can transform a commendable goal of social justice and equity into a vehicle for adverse human rights impacts far beyond the epicentre of financial activity. As we will see below, the idiosyncratic and convoluted nature of the way 'human rights harms' are generated by financial activity suggests that important policy and operational choices will have to be made in determining the boundaries of the Ruggie framework in relation to financial activity. The 'protect, respect and remedy' framework may require creative and sometimes counter-intuitive interpretation when applied to financial services. If a comprehensive and inclusive approach to 'human rights harm' is taken which includes the very extensive social welfare degradation that systemic financial instability causes, then a substantial body of work and financial expertise is going to be needed to translate the Ruggie framework into a meaningful operational benchmark for the financial sector as a whole. The alternative approach of limiting it to those areas of finance that are currently well understood from a human rights point of view risks inadvertently giving the financial sector a veneer of social responsibility while the more nefarious and socially-detrimental practices are continued beneath the radar.[23]

B. Understanding the Sub-Prime Process: Identifying Human Rights Harm

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[22] Indeed, it is interesting to hear regulators talk openly about the "social costs of systemic risk" and that banking "risks endangering innocent bystanders within the wider economy", but you are unlikely to hear many human rights advocates talking directly about the human rights costs of systemic risk. *The $100 billion question*, Comments by Andrew Haldene, Executive Director, Financial Stability, Bank of England, at the Institute of Regulation & Risk, Hong Kong, 30th March 2010, available at: www.bis.org/review/r100406d.pdf?frames=0.

[23] As former Federal Reserve Chairman Alan Greenspan told the Financial Crisis Inquiry Commission: 'partial supervision is dangerous because it creates a Good Housekeeping stamp.' *The Financial Crisis Inquiry Report*, *supra* note 11, p.95.

The trigger for the global financial meltdown of 2007-9 was savage losses being incurred across the world's financial system on reasonably new, untested products called residential-mortgage-backed securities (RMBS) and collateralised debt obligations (CDOs) linked to subprime US mortgages.[24] The losses set in train compounding falls in other similar products and in financial markets around the world, and a sharp contraction in economic and trade activity which had widespread adverse consequences for human rights. Although the losses on subprime products were not enough on their own to account for the enormous scale of the crisis, the failure of these products that had been at the vanguard of widely trumpeted 'financial innovation', combined with other structural interconnections and vulnerabilities "that bankers, government officials and others had missed or dismissed"[25], severely destabilised financial markets and brought the system as a whole to the point of collapse. The sharp contraction in global economic and financial activity, and enormous losses on financial assets, were devastating for the global poor whose incomes and livelihoods are precarious at best, and highly exposed to any adverse change in economic conditions.

This analysis is not intended to be a systematic review of the epidemiology of the crisis. Rather, we will focus on sketching out a few of the features of subprime RMBSs and CDOs which we will then use to draw out some of the challenges that the 'protect, respect and remedy' framework will face in financial services. Chief among these is the difficulty of pre-emptively identifying and remediating human rights harm among the complexity of financial products, processes and jargon.

A subprime RMBS is a collection of mortgages that were bundled together into a 'pool' and then the streams of repayments divided up and sold as separate financial assets. They were derivatives of the underlying mortgages that effectively sold on to investors the likelihood of being repaid. They were invented in the late 1990s as a way of transforming the credit process to respond to different pressures coming from the legal and commercial operating environment.[26]

Prior to securitization, customers who wanted a mortgage had to build up a long-term relationship with their bank and diligently save up a sizeable deposit even to be considered. Once the bank manager deemed them a worthy credit and granted a mortgage,

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[24] The process of securitization is discussed below. CDOs were a sub-set of RMBSs that effectively 're-securitized' the lower-rated tranches of several RMBSs. For an example of how the processes worked see Goldman Sachs: *Effective Regulation: Part 1 Avoiding Another Meltdown*, March 2009, pp.19-26, available at: www2.goldmansachs.com/ideas/global-markets-institute/featured-research/effective-re-part-1.pdf.

[25] *The Financial Crisis Inquiry Report*, *supra*. note 11, p. 27.

[26] For an analysis of the history and process of securitization see: *Financial Crisis Inquiry Report*, *supra* note 11; G. Tett, *Fool's Gold: How Unrestrained Greed Corrupted a Dream, Shattered Global Markets, and Unleashed a Catastrophe* (Little Brown, London, 2009); M. Lewis, *The Big Short – Inside the Doomsday Machine* (Allen Lane, London, 2010); J. Kregel, *Changes in the U.S. Financial System and the Subprime Crisis*, The Levy Economics Institute of Bard College, Working Paper no.530, April 2008.

the bank would 'own' the loan for its duration, and monitor the repayments. Thus the 'credit risk', i.e. whether it would be repaid or not, was dealt with on a relational basis, largely by the bank getting to know the customer very well, and it was held by the bank for the 20-25 years of the loan. This gave the bank a huge incentive to manage its lending responsibly and carefully. The downside of this model was that there was a lot less credit available, there was a lower rate of home ownership, and it could be very difficult to obtain a mortgage for those on lower incomes or with a poor credit history because the risk was considered too great.

In the US context this tended to result in discriminatory lending practices towards poorer, often black and Hispanic neighbourhoods which were largely excluded from access to home loans and other credit because they were deemed too high risk.[27] The US Community Reinvestment Act of 1977 (CRA) was enacted to address this discrimination and widen access to financial services for low income groups. This mandated that banks had to demonstrate that they were actively lending in such neighbourhoods if they wanted to benefit from federal deposit insurance.[28] The Financial Services Modernization Act of 1999 – which repealed parts of the Glass-Steagall Act of 1933[29] by allowing banks to become 'universal banks' offering all types of financial services under one roof - reinforced the CRA by specifying that a condition of being granted a license to become a 'universal bank' was that they had to demonstrate compliance with the CRA. In order to comply with the terms of the Act, and to curry public and regulatory support for the 'mega mergers' that dominated the US banking landscape in the late '90s and 2000s, banks made hundreds of billions of dollars worth of 'community lending pledges' to support low- and moderate-income communities, including mortgages lending.[30] In signing the 1999 Act into law, then President Bill Clinton declared:

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[27] So-called 'redlining'. See Illinois Legislative Investigating Commission, *Redlining: Discrimination in Residential Mortgage Loans: a report to the Illinois General Assembly*, (Illinois General Assembly, Chicago, 1975); A.-M. Regan: 'The Community Reinvestment Act Regulations: Another Attempt to Control Redlining', 28 *Catholic University Law Review* (1979) pp.635-656. Housing discrimination was a key issue in the civil rights movement because it reinforced the economic segregation of racial groups in deprived, inner city ghettos. United States Commission on Civil Rights Report 4: Housing, 1961, available at: www.law.maryland.edu/marshall/usccr/documents/cr11961bk4.pdf.

[28] For an analysis of the CRA's role in expanding access to financial services for low income groups see: M. Barr, 'Credit Where it Counts: The Community Reinvestment Act and its Critics', 75 *New York University Law Review* (May 2005) pp. 101-233.

[29] Which had been enacted in the aftermath of the Wall Street collapse of 1929, and which separated out bank functions into different financial entities.

[30] For example, Bank of America committed to $750 billion in community lending over 10 years during its merger with FleetBoston Financial Corp in 2004, Citigroup committed to $120 billion in community lending in 2002 when it merged with California Federal Bank. See *The Financial Crisis Inquiry Report*, *supra*, note 11, p.97. For an example of the way the Federal Reserve considered the issue of CRA compliance in granting mergers see: Federal Reserve Board press release: *Order Approving the Merger of Bank Holding Companies*, 15th December 2005, approving the merger of Bank of America with MBNA Corp, available at:www.federalreserve.gov/boarddocs/press/orders/2005/20051215/attachment.pdf.

> "The Act establishes an important prospective principle: banking organizations seeking to conduct new ... activities must first demonstrate a satisfactory record of meeting the credit needs of all the communities they serve, including low- and moderate-income communities."[31]

This legal and policy framework would seem to be highly consistent with the SRSG's Guiding Principles, which requires States to "enforce laws that are aimed at, or have the effect of, requiring business enterprises to respect human rights".[32] Financial inclusion and the growth in lending to the poor (e.g. microcredit) have been lauded in human rights and development literature over the last decade as key tools in poverty reduction and human rights realisation. Indeed, much of a guide produced by the Federal Reserve Bank of Boston to aid mortgage originators in complying with the CRA could have been written with the Ruggie framework in mind, such is its language of addressing discrimination by not rigidly sticking to old credit assessment practices which largely exclude lower-income borrowers.[33]

However, in a system as complex as finance the law of unintended consequences generally applies, and this legislation interacted with other aspects of the legislative and policy architecture of international finance to usher in significant changes to the American mortgage industry and financial sector which ultimately cost many individuals dearly in terms of their social, personal and economic well being.[34] At the front end of mortgage origination, lending standards had to be relaxed because it was difficult to comply with the

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[31] President William J. Clinton: 'Statement on Signing the Gramm-Leach-Bliley Act', 12th November 1999, available at: www.presidency.ucsb.edu/ws/index.php?pid=56922.

[32] *Guiding Principles on Business and Human Rights*, *supra* note 8, principle 3 (a). Even the merging of financial services companies into 'universal banks' was supported at the time as a goal which would further efficiency and help enhance economic welfare.

[33] Federal Reserve Bank of Boston, *{Closing The Gap:} A Guide to Equal Opportunity Lending*, (no date), available at: www.bos.frb.org/commdev/closing-the-gap/index.htm.

[34] The precise role that the CRA played in the subprime crisis is a matter of ongoing controversy. While not taking a clear view on the share of the blame to be accorded to the CRA, the Act did, at the very least, serve as a catalyst in opening up the subprime mortgage market by forcing banks to find ways to manage profitably the credit risk of subprime lending. This paved the way for securitization and the growth in other types of lenders moving into the subprime market. Testimony given to the Financial Crisis Inquiry Commission by a former Federal Reserve Governor noted, for example, that enforcing the CRA "had given the banks an incentive to invest in technology that would make lending to lower-income borrowers profitable by such means as creating credit scoring models customized to the market. Shadow banks not covered by the CRA would use these same credit scoring models, which could draw on now more substantial historical lending data for their estimates, to underwrite loans." *Financial Crisis Inquiry Report*, *supra* note 11, p.74. For the purposes of analysing the Ruggie framework, it provides a good example of how social goals can interact with other parts of the financial sector in unanticipated ways. See: B. Bernanke: 'The Community Reinvestment Act: Its Evolution and New Challenges', Speech at the Community Affairs Research Conference, Washington D.C., 30th March 2007, available at: www.federalreserve.gov/newsevents/speech/bernanke20070330a.htm.

CRA using old credit risk tools that systematically excluded poorer borrowers.[35] The result was a proliferation of forms of mortgages and a slackening of standards of oversight which, when combined with the growing demand from investment banks for mortgages to package into RMBSs and CDOs, substantially increased mortgage lending and led to many of the abuses and frauds which are now synonymous with subprime.[36] This was one of the most direct and visible of the adverse human rights impacts that stemmed from the crisis. The tricking and cajoling of many subprime borrowers into mortgages they did not understand nor could afford violated their rights to speech (which includes the receipt of full and frank information where appropriate), to non-discrimination (across a range of gender, race and age categories united by being relatively poor), and fair trial and right to a remedy (the lack of adequate recourse to the courts for many mortgagees on the basis of questionable cause of action or most frequently lack of resources to fund the litigation). Many have subsequently lost their homes or are unable to meet the repayments.[37] Such direct infringements would appear to be a relatively straightforward type of human rights harm to pre-emptively identify and address through standard techniques as envisaged in the Ruggie framework. Indeed, if mortgage brokers had in place robust human rights policies and due diligence procedures, could at least some of these abuses have been prevented?

In considering this question, it is worth bearing in mind the commercial environment which nurtured this exploitative behaviour. The credit process effectively fractured across different corporate entities as it was transformed by securitization, meaning that it was no longer a binary relationship between borrower and lender but was rather a complex process involving many different corporate actors and activities. Credit production, repackaging and reselling became a highly-leveraged and highly lucrative production line involving different corporate entities all engaged in a particular part of the process (the 'originate to distribute' model). This seriously diluted responsibility for credit and ethical standards as products were passed on so quickly from one corporate entity or legal vehicle

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[35] For a criticism of the role of Government policy in producing lax underwriting standards see Stan Liebowitz, 'Anatomy of a Train Wreck: Causes of the Mortgage Meltdown', in B. Powell & R. Halcomb: *Housing America: Building Out of A Crisis* (Transaction Publishers, New Jersey, 2009).

[36] One of these was the 'option-ARMs' mortgages, or option-Adjustable Rate Mortgages, whereby borrowers would be sold a mortgage with very low 'teaser' rates of interest payments for the first few months or years, which made the mortgage appear affordable, but which would shift sharply upwards (or 'reset') to a much higher interest rate at the end of this period. Sometimes the monthly repayments under the reset rate were more than the income of the borrower. This type of mortgage was at the centre of investigations by, for example, the California Attorney General into fraudulent practices at Countrywide Financial which had been one of the biggest mortgage brokers in the US. See 'Atty. Gen. Brown Discloses New Evidence of Countrywide's Deceptive Practices', State of California Department of Justice, Office of the Attorney General Press Release, 17th July 2008, available at: www.oag.ca.gov/news/press_release?id=1588&y=2008.

[37] The Financial Crisis Inquiry Commission found that four million families had lost their homes, and another four and a half million were either in the foreclosure process or were behind on their mortgage payments. *Financial Crisis Inquiry Report*, *supra* note 11, chapter 22, pp.402-410.

to another, and the various stages of the process became highly specialised. Using due diligence to spot potential human rights harm in this environment is challenging to say the least, as the creation of the 'harm' is spread across different actors and different, highly technical stages of the product creation process. Having said this, the clear cases of fraud, mis-selling and abuse by mortgage brokers could most readily be subjected to human rights due diligence as these instances fall more obviously within the existing notion of human rights causality. Though even here, it must be said, the complexity of financial fraud makes it difficult to determine exactly when fraudulent behaviour by mortgage brokers becomes a human rights issue. Given the scale of the financial crisis, however, using the Ruggie framework to weed out cases of the most egregious abuse in the mortgage market could not have stopped the housing and securitization bubble in its tracks, and so it is important not to assume that the existing notion of corporate human rights causality provides a strong enough intellectual model from which to develop the practical means to pre-empt the depth and range of harms that can result from financial activity.

The subprime RMBS and CDO was created by investment banks in part in response to the increased credit risk that they now had to hold on their books thanks to CRA loans. This was problematic because of risk-based capital adequacy regulations that had been enacted after the Savings & Loans crisis of the 1980s which required banks to put aside more capital against these low quality credit risks compared to safer, higher-rated assets like treasury bonds.[38] The process of securitization offered a way of transferring these assets onto other investors, earning a profit for doing so, and lowering the amount of capital that they had to hold against these assets.[39] It is this process of 'risk transfer' and regulatory capital arbitrage that was a prime cause of the adverse global human rights impacts of the crisis, but in a much less obvious or transparent way than human rights lawyers are used to dealing with, and one which would be very difficult to deal with from a human rights due diligence point of view.

Securitization relied on newly available developments in quantitative finance that provided a mathematical technique for pooling home loans together and calculating the overall credit risk – i.e. risk of loss on the pool of mortgages as a whole – and then dividing up that risk into separate parts (or 'tranches') for sale to investors.[40] Although this may not seem like a relevant issue for oversight of human rights effects, this is a good example of how the genesis of adverse human rights impacts in the financial sector may be remote from any existing notion of what is legitimately an issue of human rights concern. The method used

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[38] These were introduced in the first Basel Accord on international capital adequacy standards of 1988, and introduced in the USA in the Federal Deposit Insurance Corporation Improvement Act of 1991.

[39] See *Effective Regulation: Part 1 Avoiding Another Meltdown*, *supra* note 24, which explains the way the regulatory capital framework applied to securitized mortgage assets.

[40] The groundbreaking paper was David Li, 'On Default Correlation: A Copula Function Approach', 9 *Journal of Fixed Income*, no. 4 (Spring 2000) pp.43-54.

to calculate the credit risk across a disparate pool of mortgages was central to the subprime edifice and its eventual collapse, with its wide-ranging human rights ramifications. The way the 'probability of default' (i.e. likelihood of loss on the mortgages) and the 'correlation' (i.e. the likelihood of the pooled assets defaulting in similar ways – if one borrower defaults, does it increase the chances of other borrowers doing the same?) were calculated was fundamental to the ability of banks to pool these assets together for sale to investors. This is a legitimate human rights concern because beyond the broad financial hardships felt by many as a consequence of this deep systemic failure, some individuals endured such severe financial stress that they lost many of the financial and social assets that provided them with a minimum tolerable level of social inclusion and individual respect and dignity, namely, jobs, savings, housing, voice, privacy, educational choices and access to adequate health care.

It also allowed rating agencies to award these products the now-infamous AAA-ratings, creating the illusion that such products carried only very low levels of risk but paid above-market rates of return. This rating was crucial to the subprime machine because many institutional investors were prevented by regulation from investing in assets with credit ratings below AAA.[41] It also enabled banks to hold RMBSs and CDOs themselves for treasury and investment purposes while requiring minimal capital under risk-based capital regulations. When the mortgages started defaulting, banks found themselves severely undercapitalised and could not absorb the savage losses on these products, intensifying the collapse of global markets in the face of extreme uncertainty as to the solvency of the world's financial system. Thus the mathematics at the heart of securitization enabled both the creation of the product and - when combined with the mathematics of risk and of capital adequacy - the creation of a global market for that product.

This combination proved toxic because it quadrupled the size of the subprime loan market in just 4 years: subprime mortgage origination rose from $130 billion in 2001 to $625 billion in 2005.[42] By 2007 there were 7.5 million subprime mortgages outstanding, with a combined value of $1.3 trillion.[43] This fuelled – and was fed by - an enormous and unsustainable housing boom which was not factored into the calculations on which RMBSs and CDOs were based, making the whole edifice severely vulnerable to a change in market

[41] The Financial Crisis Inquiry Commission described the credit rating agencies as "essential cogs in the wheel of financial destruction. ... The mortgage-related securities at the heart of the crisis could not have been marketed and sold without their seal of approval. Investors relied on them, often blindly. In some cases, they were obligated to use them, or regulatory capital standards were hinged on them. The crisis could not have happened without the rating agencies." The report also notes that between 2000 and 2007, Moody's rated nearly 45,000 mortgage-backed securities as AAA. In contrast, only six US companies carried this credit rating in 2010. *The Financial Crisis Inquiry Report*, supra. note 11, p.xxv.

[42] D. Greenlaw, J. Hatzius, A. Kashyap & H. S. Shin, *Leveraged Losses: Lessons from the Mortgage Market Meltdown*, US Monetary Policy Forum Conference Draft, 2008, p.16, available at: http://research.Chicagobooth.edu/igm/events/docs/USMPF-final.pdf.

[43] K. Dowd & M. Hutchinson, *Alchemists of Loss*, *supra* note 20, p.301.

conditions. By creating a global investment market for subprime RMBS and CDOs, it transmitted the eventual damage right around the world, helping to spread the fallout from the crisis onto some of the world's poorest and most vulnerable people. It also undermined the ability of subprime borrowers to protect their own rights to information, procedural fairness and a remedy, because buyers of RMBS and CDOs were now so remote from these original borrowers that there was no chance of them being able to approach their lenders to renegotiate terms if they found themselves in difficulty repaying their mortgages.

By replacing steady verification of the quality of the mortgages going into a RMBS or CDO (which could number in the thousands) the mathematical techniques effectively enabled the 'automation' of the securitization process which allowed trillions of dollars worth of mortgages to be repackaged and resold in a short space of time, without proper checks. By using very sophisticated quantitative analytics, which were largely indecipherable to those without advanced quantitative skills, it created the illusion of safety in products that had not been tested in any period of market stress. Ordinarily, normal investor prudence should have reined in demand for these products, limiting their damage to the financial system and eventually human rights, but the combined forces of financial fashion, high rates of return being offered in a 'low yield' global environment, and a supporting backdrop of risk-based capital regulations, quantitative risk management techniques that were benchmarked to asset prices, the use of derivatives like credit default swaps to 'insure' any residual risk on the products, and 'mark-to-market' accounting standards set in train a global credit bubble of unprecedented proportions which was socially ruinous for many living on the margins and ultimately devastating for their human rights enjoyment. The mathematics of credit risk, securitization, and risk-based capital regulations allowed an illusion of certainty and sophistication to obfuscate the true level of risk across trillions of dollars worth of subprime mortgage-backed RMBSs and CDOs that were sold around the world to investors who did not fully understand or verify the risks they were exposing themselves to. The intellectually persuasive theoretical explanation for what was happening was even being widely trumpeted by regulators who were supposed to monitor and control financial exuberance.[44] But ultimately the edifice proved to be fundamentally unstable, and the human rights impacts of its collapse were, for many, catastrophic.

It is difficult to shoehorn much of this into a traditional analysis of human rights causality, which depends on a reasonably direct, linear relationship between corporate actor/act and human rights harm on defined individuals. From a human rights perspective, it may indeed

[44] *Risk Transfer and Financial Stability*, Remarks by Alan Greenspan to the Federal Reserve Bank of Chicago's Forty-First Annual Conference on Bank Structure, 5th May 2005, available at: www.federalreserve.gov/boarddocs/speeches/2005/20050505/default.htm; *Regulation and Financial Innovation*, Remarks by Ben Bernanke to the Federal Reserve Bank of Atlanta's 2007 Financial Markets Conference, 15th May 2007, available at: www.federalreserve.gov/newsevents/speech/bernanke20070515a.htm.

be countered that this description of the subprime process and its social, economic and human rights impacts, is remote from and incidental to the Ruggie framework, that it is more the preserve of financiers than human rights lawyers. The complex, multi-layered nature of the causality involved across the world's financial sector and the difficulty of attributing causation to any individual corporate actor is very different to what is generally considered to fall within normal the boundaries of attribution of responsibility for human rights abuse. But in seeking to understand the wide-ranging human rights harm that was generated by the crisis and how this can be addressed from the standpoint of the 'protect, respect and remedy' framework, it is important to venture off the beaten track and look at these structural factors. The way RMBSs and CDOs were structured, the assumptions embedded in the quantitative models on which they were built, and the way they generated and spread complicated and largely un-measurable risk through the global financial system under the watchful eyes of regulators and senior management provides an excellent example of the complex causality of human rights harm in today's colossal financial markets, and how closely it is bound up with systemic risk. It shows how in just a few years the financial supply chain turned one of the oldest and safest financial products (the home mortgage) into a crisis severe enough to imperil its own solvency and to leave lasting impacts on the socio-economic, and in some cases civil and political rights of the poor.

C. Applying the Ruggie Framework to the Subprime Process

Although this is a rather slimmed down version of a very complex series of events, it has sought to highlight how convoluted the process of generating human rights harm can be in the financial sector once you move beyond more straightforward transactions where it is already reasonably well understood. Here we will attempt to apply some of the Guiding Principles to the subprime process, to illustrate in more detail some of the challenges that will be encountered in applying the 'protect, respect and remedy' framework to financial services and in particular to the types of financial activity that collectively generate such broad-based human rights harms.

I. The State Duty to Protect Human Rights

The first of the frameworks' three pillars requires States to protect human rights from abuse by third parties, including business enterprises. This requires that they take 'appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication' and that they should 'set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations.'[45] As straightforward as this may sound, it is anything but when applied to financial regulation.

[45] *Guiding Principles on Business and Human Rights*, *supra* note 8, Principles 1 & 2.

At the very least, it would seem to require that policymakers and regulators can demonstrate that they have actively taken possible human rights impacts into account in regulating the financial system, and that overall the regulatory architecture of international financial markets should be designed so as to minimise their potential adverse human rights impacts. This is extremely difficult at this present juncture because it assumes: a) that regulators can foresee and predict how complex financial activity and systemic dynamics may generate adverse human rights impacts both in their own country and, through market contagion, in countries around the world; and b) that they can frame regulation of the entities over which they have jurisdiction so as to pre-empt these impacts. This is far easier said than done: regulators and policymakers have widely claimed after the event that they simply did not see or understand the extent of the risks building in financial markets during the subprime bubble.[46]

The financial system has grown in complexity to such a degree over recent years that there is no accepted understanding of how to measure and control either the financial or human rights risks it generates. Moreover, the 'model' on which financial regulation is built is based on theories which may be remote from human rights values because they assume that liberalised finance is socially optimal in aggregate, without looking at impacts on vulnerable individuals. The globalisation of financial services has not been accompanied by sustained attention to their impact on the global poor and marginalised through for example financial crises. Regulators and policymakers are also susceptible to the influence of industry narratives, and the same "cognitive errors" as those they are meant to regulate.[47] In the case of subprime, regulators and policymakers simply failed to look beyond enormous profits and the sophisticated quantitative analytics that were embedded in RMBSs and CDOs and the regulatory architecture itself to conjecture what risks were piling up and what their impact would be beyond the financial markets.[48] Instead, they bought into the dominant intellectual paradigm, the belief that financial markets benefitted everyone by acting as the "risk managers for the economy"[49] and that the new model of

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[46] As the FCIC commented: "policy makers and regulators were caught off guard as the contagion spread, responding on an ad hoc basis ... to put fingers in the dike. There was no comprehensive and strategic plan for containment, because they lacked a full understanding of the risks and interconnections in the financial markets. ... We had allowed the system to race ahead of our ability to protect it." *Financial Crisis Inquiry Report*, *supra* note 11, p. Xxi.

[47] A. Pollock, 'Lots of Regulatory Expansion but Little Reform', 4 *Regulation Outlook* (June 2010) pp. 1-6, at p.2, American Enterprise Institute for Public Policy Research.

[48] Under this risk-based approach, regulatory authorities acted more like 'consultants', who did not 'attempt to restrict risk-taking but rather [to] determine whether banks identify, understand, and control the risks they assume.' *Financial Crisis Inquiry Report*, *supra* note 11, p. 307, quoting the *OCC Large Bank Supervision Handbook*.

[49] *Financial markets as risk managers for the economy: Main effects and side-effects*, Remarks by Thomas Mayer, Chief European Economist at Deutsche Bank, at the ECB-Bundesbank-Cfs conference on financial system modernisation and economic growth in Europe, 28th September 2006, available at: www.eu-financial-system.org/fileadmin/content/Dokumente-Events/seventh-conference/Mayer.pdf. This is an excellent example of the dominant industry logic prior to the collapse.

'risk transfer' strengthened the resilience of the financial sector and enhanced economic growth. Where regulators did raise concerns, they encountered industry "pushback" because "it was difficult to express their concerns forcefully when financial institutions were generating record-level profits."[50] It is also worth stressing that in general securitization occurred in compliance with various laws aimed at the financial sector;[51] and that the regulatory architecture – which had been developed around theories of finance for which Nobel prizes had been won[52] - proved to enhance financial fragility, not prevent it.

Against this backdrop, a comprehensive perspective on the State duty to protect human rights from abuse by financial services companies requires more than just an overlay of human rights-focused legislation or principle on the pre-existing regulatory framework to address issues such as financial inclusion. As we have seen with the Community Reinvestment Act, the law of unintended consequences applies, and mandating human rights goals can interact with other parts of the regulatory framework in unanticipated ways which can result in human rights harm down the line. In the long-term, the State duty to protect will require a recognition that adverse human rights impacts can be generated by failings in technical areas of financial regulation (like capital adequacy) which may initially seem remote from human rights concerns. Scrutiny of the regulatory architecture of finance as a whole which takes into account the potential adverse impacts on the rights of the world's poorest and most vulnerable people from financial market activity and malfunction will be necessary. This may require a more prudent and possibly conservative attitude to financial markets than we have at present. The complicating difficulty for the operationalisation of the State duty to protect, however, is elaborating how human rights values can be fitted into the technical detail of the regulatory framework. And further still, how to overcome the financial sector resistance to reregulation even after the (apparent) chastening it experienced in 2007/8. The political muscle of the sector as a whole, and in particular of large, complex financial institutions (LCFIs) that are now designated as 'too big to fail', cannot be underestimated. Considering that in Washington DC there are reportedly more than three financial sector lobbyists for every member of the US Congress,[53] it is clear that the pockets of financiers are very deep whenever it comes to

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[50] *Financial Crisis Inquiry Report*, *supra* note 11, p. 307.

[51] Except in a few rare cases such as Lehmans' 'Repo 105' transactions. It is noteworthy how few criminal prosecutions have been launched against bankers in the aftermath of the credit crisis, in comparison to previous crises like the Savings & Loan crisis of the 1980s, and the dotcom collapse of 2001.

[52] Modern Financial Theory, which "can be summarized as the application of the theories of mathematical statistics to finance." It includes the efficient markets hypothesis, modern portfolio theory, the Black-Scholes-Merton options pricing formula, and statistical/probability-based risk management. K. Dowd & M. Hutchinson, *Alchemists of Loss*, supra. note 20, p.65. For an overview and critique of Modern Financial Theory see pp. 65-135.

[53] Based on 2010 figures from the Centre for Responsive Politics: www.opensecret.org > Lobbying > Industries. The Centre reports that a total of 1629 lobbyists were reported as working for the following industries: securities and investment; commercial banks; finance/credit companies; insurance; credit unions; savings and loans; and miscellaneous finance.

lobbying in key policy and legislative hubs, and that their voice can be very loud or soft, but is invariably and very carefully listened to.

II. The Corporate Responsibility to Respect Human Rights

The second of the framework's three pillars is simply this: business enterprises should respect human rights. This is an "expected standard of conduct for all business enterprises wherever they operate."[54] Applying this to corporate activity beyond the areas that are currently the focus of finance-human rights related initiatives will require a substantial expansion of the understanding of the relationship between international financial markets and human rights, as well as how this understanding can be used to foster changes in industry-wide corporate practices.

Firstly, implementation of this principle will require the development of analysis which provides a template with which financial companies can assess the potential adverse impacts of their commercial activities across the board. So far, as we have noted, few areas of financial activity have been mapped against human rights principles and the areas that have been mapped have tended to be those where the relationship is most transparent. The subprime crisis has amply demonstrated that adverse human rights impacts can lurk in far less accessible corners of financial activity, like derivatives, structured finance, liquidity management and risk management where causation is far more difficult to pinpoint among the complexity of financial jargon and process. There is currently no template or benchmark that companies can use to evaluate potential human rights harm flowing from these more technical areas of their business – in fact they are likely to be very unwilling to concede that there is any connection between these parts of their operations and human rights principles.

Secondly, developing such a template will require a foray into systemic dynamics and the issue of collective action/collective responsibility. There are many cases in finance where what would be harmless activity when conducted by a few market participants in small numbers turns into a powderkeg of risk for everyone, including the global poor, when it attracts large numbers of players. Securitization and RMBSs/CDOs are a clear example. Practiced in small numbers, they may well have done what they were advertised to do: improving access to credit for poorer borrowers, transferring risk to financial entities most able to bare it, and easing the international flow of capital. But herding in financial markets is endemic – and partly driven by the homogenisation of processes like risk management, industry benchmarking, and regulatory standards themselves - and is hugely destabilising. It is capable of turning time-honoured products (home mortgages) into a global financial catastrophe that reverberates through many communities, impacting especially detrimentally on the poorest and most vulnerable within them.

[54] *Guiding Principles on Business and Human Rights*, *supra* note 8, principle 11 & commentary.

The Guiding Principles clearly state that the responsibility to respect human rights requires that corporate entities "seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts."[55] This very expansive principle potentially does away with the collective action problem by imputing collective responsibility for systemic dynamics, and the role that their activities may play in systemic dynamics, to every corporate participant in financial markets. It would appear to suggest that companies cannot use the excuse that it was not their subprime deals that caused the collapse of world economic activity and its attendant human rights ills to deflect responsibility. It potentially imposes a very high standard of conduct on financial entities when reviewing their corporate strategies for potential human rights harm. However in doing so it opens up a can of worms because the relationship between systemic risk, financial markets and human rights is not well documented nor understood, and so the attribution of responsibility will remain an incredibly difficult task to perform. The practicality of the guiding principle is, therefore, fundamentally challenged.

In the absence of any existing model or understanding of systemic risk which permits markets to be analysed and outcomes to be predicted with anything like reasonable certainty, the operationalisation of this principle is a steep uphill climb. In capturing all types of financial activity within its ambit, the principle is a weak base upon which to try to build a case for corporate responsibility in the financial sector. The complexity of financial markets not only provides lots of smoke and mirrors behind which they can hide, it also presents a formidable obstacle to understanding what this principle requires in practice even for those financial companies with high principles. For example, does it require that financial entities disinvest from certain markets that may be overheating because the attendant systemic risks may well prove extremely detrimental to human rights should they materialise, even in the face of huge uncertainty as to the likelihood of this? How does this interact with a bank's responsibilities to its shareholders? Would doing so only have destabilised the markets sooner rather than later?

The breadth of the Guiding Principles would also appear to capture within their ambit the shadow banking system and its highly specialised financial activities that generally do not feature on the human rights agenda. The shadow banking system is effectively a "parallel financial system[s] of enormous scale"[56] that engages in very specialised financial activities alongside the traditional banking system. In 2008, this system was valued at roughly $20 trillion, compared to about $13 trillion for the traditional banking system with which human rights advocates are generally familiar.[57] The shadow banking system provided key

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[55] *Guiding Principles on Business and Human Rights*, *supra* note 8, principle 13(b).
[56] *Financial Crisis Inquiry Report, supra* note 11, p.28; on shadow banking see pp.27-37.
[57] Z. Pozsar, T. Adrian, A. Ashcroft & H. Boesky, *Shadow Banking*, Federal Reserve Bank of New York Staff Reports no.458 (July 2010).

aspects of the securitization process and played a key role in transforming subprime mortgages into a global financial meltdown and human rights harm. Monoline bond insurers, for example, provided the credit default swaps that were used to 'insure' subprime CDOs to give the impression that any risk was virtually minimal. It was all part of the game of very sophisticated obfuscation that allowed the markets to overheat to such an extraordinary degree with the active support of industry leaders and regulators. Tying the shadow banking system to potential human rights harm is however, another very substantial challenge for the operationalisation of the 'protect, respect and remedy' framework in financial services.

- *The particular question of due diligence*

The practical implementation of the notion of the corporate responsibility to respect hinges upon an ongoing process of human rights due diligence which requires businesses to 'comprehensively and proactively attempt to uncover human rights risks, actual and potential, over the entire life cycle of a project or business activity'.[58] If a comprehensive and systemic perspective on potential human rights harm in the financial sector is taken which captures in the corporate responsibility to respect the adverse outcomes that flow from specialised areas of financial market activity, then there is no immediate way in which human rights due diligence could be used to pre-empt such harms. Even where human rights due diligence is "included within broader enterprise risk-management systems"[59] within the financial sector this is likely to be highly misleading and to fail to capture many human rights risks precisely because those risks may flow from failures in risk management systems themselves.

As we have highlighted above, it is very difficult to see how human rights due diligence could have been used in any pre-emptive way in the securitization process, except where the process interacted most directly with the rights of subprime borrowers themselves. It is particularly difficult to see how human rights due diligence could have been applied to the process in any of its more technical stages. To use human rights due diligence in this context would require an understanding of deficiencies in quantitative finance and how this fed into broader market dynamics, as well as how all of this would impact upon the rights of the global poor through systemic interdependencies. Not only would this require substantial industry expertise, it would also require high-level influence within an organisation in order for any problems identified to be acted upon in the face of lucrative profit streams.

Although Principle 19 (ii) of the Guiding Principles states that the effective integration of human rights impact assessments requires that "[i]nternal decision-making, budget

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[58] *Towards operationalising the "protect, respect and remedy" framework*, *supra* note 7, para.71.
[59] *Guiding Principles on Business and Human Rights*, *supra* note 8, Commentary to Principle 17, p.16.

allocations and oversight processes [should] enable effective responses to" those impacts, in reality it is likely that responsibility for human rights due diligence will fall to CSR teams who are quite far removed from decisions on risk taking or the allocation of capital across business lines. Arguably, many CSR teams lack the product and process experience to apply due diligence to specialised areas of bank activities, particularly in large, complex financial institutions (LCFIs) and the more specialised financial vehicles in the shadow banking system. Even where such expertise is available within an institution and processes in place, it is difficult to see how human rights due diligence could have been applied to securitization arms in a preventive way because it is often a matter of extreme controversy and expert judgement as to what the systemic implications are likely to be. There is often a huge degree of uncertainty involved, which will water down the force of human rights due diligence. Where a particular product or process is generating huge returns and appears justified by prevailing financial logic, as was the case with subprime RMBSs and CDOs, it is very doubtful whether a due diligence process could pre-empt or reign in excessive risk taking and speculative activity that appear likely to generate substantial human rights harms down the line. The success of this may also strongly depend on the organisation in question: human rights due diligence may perhaps have had more success at J.P. Morgan which began scaling back its involvement in subprime in 2006, than at Citigroup where its then Chief Executive, Chuck Prince declared in July 2007, just a month before major problems started in the subprime market: "as long as the music is playing, you've got to get up and dance. We're still dancing."[60] There is an awful lot of conceptual groundwork to lay before human rights due diligence could be used as a methodology at financial institutions to identify and mitigate human rights risks right across their businesses.

III. Access to Remedy

The third pillar of the Ruggie framework requires that those affected by corporate human rights abuses should have access to an effective remedy. The aim of a grievance procedure is "to counteract or make good any human rights harms that have occurred" and it can include "apologies, restitution, rehabilitation, financial or non-financial compensation and punitive sanctions ... as well as the prevention of harm through, for example, injunctions or guarantees of non-repetition."[61] The provision of an effective remedy at the corporate level requires an ability to trace, with reasonable certainty, the identified human rights harm from victim to causal corporate act. Where the causal nexus was diffused across millions of corporate actors and millions of individuals who suffered human rights harm around the world, it is difficult to see how this methodology could apply. It would be difficult, to say the least, to try to isolate causality and responsibility for providing a remedy at the level of any individual corporate actor in the case of the subprime meltdown. For example, as we

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[60] G. Tett, *Fool's Gold*, *supra* note 2626, pp. 168-9 & p. 174.
[61] *Guiding Principles on Business and Human Rights*, *supra* note 8, commentary to Principle 25, p.22.

noted at the opening of this chapter, the numbers of the poor and vulnerable who have been negatively impacted by the crisis have been staggering – 27.6 million alone who have lost their jobs, and 64 million more living in extreme poverty.[62] But it would be extremely difficult to impute any of these impacts directly to any of the banks at the centre of the crisis in order to claim some form of restitution for victims, at least at this current juncture. Even though their actions were major catalysts for the crisis, the generation of these human rights harms also required contributing failings by many other actors which compounded those of the major banks, for example, other financial entities, retail investors, regulators, policymakers, and economic actors across a complex chain which reached from Wall Street and the City of London into the lives of factory workers in South East Asia, for example. Many of the failings that led to the subprime crisis were overseen by and endorsed by regulators and policymakers using orthodox financial theories who were widely trumpeting the apparent success of their policies. This failure of oversight complicates the task of apportioning blame and attributing a responsibility to provide a remedy to victims because corporate human rights abuse in this case has a profound systemic dimension.

It is also worth bearing in mind that the financial condition of many banks after the crisis may have limited their capacity to provide an effective remedy. In the case of Ireland, for example, the cost of rescuing the banking sector has amounted to roughly two thirds of Irish GDP[63] as the banks have been crippled by losses on property loans. Basic economic and social rights of many people in Ireland are being negatively impacted by the substantial public sector budget cuts that are in progress in order to meet the State costs of the financial sector rescue. In such circumstances, it is doubtful whether Irish banks are in a position to provide any sort of remedy to those people who are now being affected by the public sector cuts.

The access to remedy is unlikely to work in finance in the way it can work in other sectors where causal relationships are easier to identify. At least where causal dynamics are diffused across market participants, it can be extremely difficult to identify which corporate entities are responsible for what direct harm, something which may make it extremely difficult to claim any form of remedy from them. It may in fact be the case that providing a remedy for financial crises may take on a different form – perhaps some form of collective 'insurance fund' that all market participants contribute to and which can be held on standby to mitigate the impacts of market dislocation on the world's marginalised people.

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[62] See above, p.1.

[63] 'Irish Bow to Trichet on Bondholders as Rescue Hits $142 Billion', *Bloomberg Business Week*, 1st April 2011, available at: www.businessweek.com/news/2011-04-01/Irish-bow-to-trichet-on-bondholders-as-rescue-hits-142-billion.html.

D. *The Way Ahead*

While it is easy on first reading to feel pessimistic given how long and hard fought has been the battle to achieve even the current level of human rights awareness in financial services, there are two factors that should be borne in mind. Firstly, the true scale of the problem should spur human rights advocates into further action. Financial crises are an increasingly important menace to economic stability and global human rights enjoyment, particularly for those on the margins of society. Over the last 20 years as global markets have integrated and grown exponentially in both size and complexity, financial crises have occurred on a regular 5-7 year cycle, accompanied, each time, by seriously detrimental human rights impacts. The growing scale of financial crises also means that States' ability to take measures to protect the human rights of their citizens can be severely compromised by financial meltdown. Often, States are themselves overwhelmed by the scale of the meltdown and their ability to comply with their international human rights obligations, including the obligation of non-retrogression, severely constrained. Thus there is little room for complacency or scope for pessimism among human rights advocates as this is an issue that at some point, sooner rather than later, has to be addressed on the human rights agenda. The Ruggie framework at least offers a solid starting point for this debate by establishing the principle that businesses as well as Governments have responsibilities towards human rights that span all aspects of their operations, not just those areas where human rights impacts are most immediately visible. Thus, the Ruggie framework provides a glimmer of hope in challenging the notion that international financial markets are too powerful or difficult to restrain, on the basis that it has established a putative principle that financial markets that are inherently unstable and that produce regular crises which decimate the basic rights of the most vulnerable members of humanity, directly undermine the economic and social conditions assumed in international law as perquisites for the adequate protection of human rights.

Secondly, the problem of financial system stability is one that is well-worn in the financial, economic and policy making literature. Admittedly, it is a complex topic, but there are many sources of information available and it is subject to an ongoing process of negotiation and research in various international fora. The challenge for human rights advocates is to join this debate by raising the issue of the human rights aspects of systemic risk and asking, if not demanding, policymakers to consider their responsibilities to the global poor in managing the global financial system. Encouraging consideration of whether the human rights dimensions of crises changes the way the issue of financial stability is dealt with, or

at least modifies the attitude to key issues in banking and market regulation, is itself a good starting point.[64]

E. Conclusion

In his 2009 report, the SRSG declared that: "Human rights concerns remain poorly integrated into other policy domains that directly shape business practices. Therefore, a major objective of the Special Representative ... is to assist Governments in recognizing those connections and advancing the business and human rights agenda beyond its currently narrow confines."[65] As we have highlighted above, only a narrow range of issues in the financial sector have so far been addressed from a human rights perspective, and many of the most far reaching issues have barely been touched at all. There are many outstanding issues which will need to be addressed in fitting the Ruggie framework to the realities of today's financial system. Here we have sought to tackle some of the less accessible, to give readers an insight into some of the problems and challenges which are likely to be encountered. What is certain, however, is that as financial markets continue to grow in both size and complexity, their ability to negatively impact the human rights of the world's poor and marginalised through periodic disruptions in the functioning of the world's economy and financial system will only grow in scale. That fact alone should give us cause to redouble our efforts to try to understand what are the human rights implications of global finance, how they are caused and what might feasibly be done to correct the situation, no matter how demanding the task. Within global finance lies both the power and wherewithal to improve the lot of the world's poor and marginalised, so there is much to hope for. The Ruggie Framework still leaves us some way from converting that hope into expectation, but at the very least it serves the invaluable purpose of illustrating how difficult such alchemy is.

[64] And yet going beyond pontification to making practicable proposals as to how one might do this, proves to be extremely difficult. A recent *Report of the Independent Expert on the question of human rights and extreme poverty, Magdalena Sepúlveda Carmona* (A/HRC/17/34; 17 March 2011) exemplifies the problem, for while the Report repeatedly urges that human rights be taken into consideration in any restructuring of global finance, it provides only two or three brief pointers as to *how* that might be concretely achieved - namely, improved data collection; better and broader training of financial policy makers in governments; and greater participation of community and civil society organisations in processes of financial policy formulation: see paras 86, 88 and 90.

[65] *Towards operationalising the "protect, respect and remedy" framework*, *supra* note 7, para.44.