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A First Reading of Definitive Text: The UNHRC Endorsement Resolution and the Endorsed UNGP

The United Nations Guiding Principles for Business and Human Rights [UNGP] were unveiled in two stages, separated by about half a year, by John G. Ruggie in his role as Special Representative of the Secretary-General on Business & Human Rights (SRSG), together with a guidance intended summarizing of the SRSG's work from 2005 to 2011. First, a set of Draft Principles were circulated in November 2010.[1] After a period set aside for public comment and following revision of the text,[2] the SRSG circulated the final version of the UNGP (with an

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1. For the text of the 2010 Draft –Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John G. Ruggie, Draft Guiding Principles for the Implementation of United Nations "Protect, Respect, and Remedy" Framework, A/HRC/--- (N.D. circulated from November 2010) available [https://media.business-humanrights.org/media/documents/files/reports-and-materials/Ruggie-UN-draft-Guiding-Principles-22-Nov-2010.pdf; or https://menschenrechte-durchsetzen.dgvn.de/fileadmin/user_upload/menschenr_durchsetzen/bilder/Menschenrechtsdokumente/Ruggie-UN-draft-Guiding-Principles-22-Nov-2010.pdf], last accessed 25 February 2024 (the "2010 SSRSG Draft Report UNGP").

[2] Discussed infra Chapter 5.

included Official Commentary) in March 2011 annexed to his (final) 2011 SRSG Report,[3] the text of which was substantially revised from the circulated November 2010 Draft. In addition to the annex of the definitive text of the UNGP, the 2011 SRSG Report included a summing up—a summary overview of the process leading to the definitive draft and a concise explanation of context and objectives, as well as normative choices that give substance to the text.[4] A year later, the United Nations circulated a much more extensive "interpretive guide" to the "Second Pillar" of the UNGP, the corporate responsibility to respect human rights, overseen by the former SSRN, John Ruggie,[5] who expressed the "hope that this Guide will help ground those efforts soundly and squarely on the original meaning and intent of the Guiding Principles themselves."[6]

The UN Human Rights Council (UNHRC) endorsed the UNGP by resolution of 16 June 2011.[7] As John Ruggie later recalled, "Verbs in UN resolutions matter for legitimacy purposes. . . I proposed 'endorse' to my mandate's sponsors, even though it had never been used in relation to a text that governments did not negotiate themselves."[8] The UNHRC Resolution included several actions that may be useful in developing any commentary on the UNGP text. First the UNHRC endorsed the text of the UNGP as delivered in the 2011 SRSG Report.[9] Second, the UNHRC Resolution underscored both the anticipated role of the UNGP in "generating greater shared understanding of business and human rights challenges among all stakeholders"[10] and also its character as a stepping stone "on which further progress can be made."[11] Third, in the course of endorsing the UNGP, the UNHRC also took the opportunity of creating an institutional organ within the aegis of the UN Geneva operations—a special procedure,[12] the Working Group on the Issue of Human Rights and Transnational corporations and other business enterprises (the "UNGP Working Group"), as a coordinating body for further

3. Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John G. Ruggie, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect, and Remedy" Framework, A/HRC/17/31 (21 March 2011) (the "2011 SRSG Report"); available [https://documents.un.org/doc/undoc/gen/g11/121/90/pdf/g1112190.pdf?token=QH15WazfHNG8Jl3sao&fe=true] , last accessed 25 February 2024.

4. *Ibid.,* and discussion, infra ¶ 1.2.

5 United Nations Office of the High Commissioner for Human Rights, The Corporate Responsibility to Respect Human Rights: An Interpretive Guide (NY and Geneva: United Nations, 2012); available [https://www.ohchr.org/sites/default/files/Documents/publications/hr.puB.12.2_en.pdf], last accessed 25 February 2024.

6 Ibid.

7 Human Rights Council, Resolution Adopted by the Human Rights Council, Human Rights and Transnational Corporations and Other Business Enterprises (A/HRC/RES/17/4 (6 July 2011); available [https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/17/4] last accessed 12 February 2024 (hereafter the UNHRC 2011 UNGP Res) .

8 John G. Ruggie, *Just Business: Multinational Corporations and Human Rights* (WW Norton, 2013), p. 119.

9 UNHRC 2011 UNGP Res, §1.

10 Ibid., §3.

11 Ibid., §4.

12 The UN describes special procedures this way: "The special procedures of the Human Rights Council are independent human rights experts with mandates to report and advise on human rights from a thematic or country-specific perspective. They are non-paid and elected for 3-year mandates that can be reconducted for another three years." United Nations Office of the High Commissioner for Human Rights, Human Rights, Special Procedures website available [https://www.ohchr.org/en/special-procedures-human-rights-council], last accessed 16 February 2024. Within the scope of their mandates they are expected, generally, to contribute to the development of international human rights through a variety of activities, including advocacy, outreach, evidence gathering and consultations onsite, and by providing advice on technical issues within the purview of their mandate. Ibid.

progress.[13] And Lastly, the UNHRC Res established "a Forum on Business and Human Rights under the guidance of the [UNGP] Working Group."[14] The Forum has been from its initial meeting through the time of the writing of this Commentary an important event at which many individuals and organizations that seek to drive the application of the UNGP and collective understanding of its provisions, have met under the leadership of the UN BHR Working Group.[15]

Taken together, and at least for purposes of interpretation and commentary, the UNHRC endorsement gave *prominence* to the authoritative text of the UNGP, *significance* to the intention and objectives of its principal drafters, as memorialized in the SRSG's work between 2005 and 2011 and in the preambular materials to its endorsement, and *weight* to the UNGP Working Group as an advocacy and coordinating body for application of the UNGP and its "further progress" to be undertaken by other actors. Together, then, these strands of text, intent/objectives, and application, then must be built into commentary. Nonetheless, because the UNHRC did not appoint a supreme authoritative interpretive body to guide either the reading of the UNGP or the direction of its progress, creating merely another special procedure as a coordinating and advocacy space, the UNHRC left open a large doorway to a broad range of interpretive possibilities. The significance of these possibilities would be manifested both in theory, advocacy, and in the way in which the UNGP would be operationalized. Each of these—except the text itself—is important both as a (historical) marker, and as a record of the feasibility of implementing interpretive possibilities. Text, however, is what survives. And it is in text that the Commentary will use as its analytical core.

This chapter of the Commentary, then, has as its principal purpose the provision of a summary and commentary of the three principal critical originating texts around which the UNGP—as idea and action—are grounded. First, Section 2.1 considers more carefully the UNHRC Res itself; then Section 2.2 examines the construction of a framework around a hoped for overall interpretive intent of SRGG Ruggie which he sought to build into the 2011 SRSG Report in the shadow of the 2010 SRSG Draft Report UNGP; and lastly ¶ 2.3 will present a summary of the text of UNGP as an integrated whole. The intention is to provide an overview of the entirety of the textual project that is the UNGP before a deeper examination of its parts, the vectors through which intention has been inserted or projected, and the manifestation of interpretation and intent in the application of the UNGP by actors seeking to influence or solidify text as act, that is, of the conscious human experience of the UNGP.[16]

2.1 U.N. Human Rights Council Endorsement

As is customary in the resolutions and related products of public international organizations after 1945, the UNHRC Res begins with an untitled preamble of seven paragraphs. These are used to specify context and

[13] UNHRC UNGP Res, §6.
[14] Ibid., §§12-13.
[15] The organizers of the United Nations Forum on Business and Human Rights styles it "the world′s largest annual gathering on business and human rights with more than 2,000 participants from government, business, community groups and civil society, law firms, investor organisations, UN bodies, national human rights institutions, trade unions, academia and the media. United Nations, Office of the High Commissioner for Human Rights, United Nations Forum on Business and Human Rights website, available [https://www.ohchr.org/en/hrc-subsidiary-bodies/united-nations-forum-business-and-human-rights], last accessed 15 February 2024.
[16] Brian Kemple, *The Intersection of Semiotics and Phenomenology: Peirce and Heidegger in Dialogue* (De Gruyter, 2019).

intent/objectives of the textual materials that follow. It is a record of the frame of reference for reading the text as closely as possible to the way its creators wanted it read.[17] Under the rules of interpretation of the Vienna Convention on the Law of Treaties, a treaty's text includes its preambles and annexes.[18] The preambular text is followed by eighteen paragraphs that make up the substantive body of the resolution, including the act of endorsement itself, and a number of consequential directions and actions that are to be connected with that endorsement.

2.1.1 Endorsement Preambular Materials

Two of the Preambular paragraphs focused on context. The first[19] *recalled* the text of the UNHRC resolutions establishing[20] and the extending[21] the mandate of the SRSG. These are important to the extent that the substance and context of both carry over into the interpretive matrix of the UNGP. In particular, the authorizing UNHRC Resolution of 2005 was grounded in a recognition that "transnational corporations and related business enterprises can contribute to the enjoyment of human rights."[22] The UNHRC 2005 Resolution, in establishing the SRSG mandate, included a set of mandated objectives that were to be memorialized in whatever instrument was produced as a result of the SRSG's work.[23] Substantial text was also devoted to the mechanics and necessity of balanced consultations among a representative variety of stakeholders. The UNHRC 2008 Resolution extending the SRSG mandate included additional expectations touching on the substantive content and form of whatever text was to be produced. Underscored in this respect was the insistence that the primary responsibility to promote and protect human rights lies with states; embracing the principle that corporations have a responsibility to respect human rights; recognizing the role of both states and other public actors in enacting relevant regulation; and recognizing the role of markets and private law in the face of weak national legislation and implementation.[24] Indeed, it is worth noting that a substantial part of the preambular materials in the Endorsement resolution had already appeared in the UNHRC's 2008 Resolution extending the mandate of the SRSG.[25]

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[17] Max H. Hulme, "Preambles in Treaty Interpretation," University of Pennsylvania Law Review 164(5) (2016) 1281 - 1343 (noting possible tension between text-context and object-purpose).

[18] Vienna Convention on the Law of Treaties, United Nations Treaty Series, vol. 1155, p. 331 (23 May 1969, entry into force 27 January 1980); art. 31(2).

[19] UNHRC 2011 UNGP Res, supra., Preamble ¶ 1.

[20] United Nations Commission on Human Rights, Human Rights Resolution: 2005/69, E/CN.4/RES/2005/69 (20 April 2005); available [https://ap.ohchr.org/documents/E/CHR/resolutions/E-CN_4-RES-2005-69.doc], last accessed 1 March 2024 [hereafter the UNHRC Resolution 2005/69].

[21] Human Rights Council, "Mandate of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises" (A/HRC/Res/8/7 (18 June 2008)) [https://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_8_7.pdf] (hereafter the UNHRC Resolution) 8/7 2008.

[22] UNHRC Resolution 2005/69, supra, Preamble.

[23] These included the identification and clarification of standards of corporate responsibility, the role of international cooperation among states in establishing regulation, the foregrounding of complicity standards tied, initially at least, to concepts of 'spheres of influence'; to develop methods of assessing human rights impacts; and to develop business best practices. Resolution 2005/69, supra, ¶ 1.

[24] UNHRC Resolution 8/7 2008, supra.

[25] Compare UNHRC 2011 UNGP Res, Preamble ¶¶ 3-7 with UNHRC 2011 UNGP Res ¶¶ 2-7.

The second[26] *recalled* the text of the 2007 institution building reforms of the UNHRC in two resolutions adopted in 2007. One adopted the text of "United Nations Human Rights Council: Institution-Building."[27] The other adopted the "Code of Conduct for Special Procedures Mandate-Holders of the Human Rights Council,"[28] especially relevant to the work of the SRSG. Of particular value to a commentary of the UNGP was the emphasis on the nature and character of human rights within the scope of the work of the UNHRC.[29] This includes the basic (aspirational) principles of the then contemporary public global human rights system.[30] These, though stated in the well-known and often recited absolute terms of the fundamental framing of human rights as norm and for its impact on legitimate legality,[31] produce an effective system of balancing though its discursive tropes avoids the language of balance.[32] These principles will play an important role in mapping the scope of the UNGP's interpretive possibilities. For example, the UNGP adopts a principle of prioritization of rights remediation grounded in assessments of severity as a function of irremediability.[33]

The other five preambular paragraphs sketched out issues of intent and objectives.[34] One *stressed* the centrality of the state as the bearer of the primary responsibility to promote and protect human rights and fundamental freedoms[35]—a carryover from the 2008 Resolution extending the SRSG's mandate, now applied specifically as an intentional guidance to reading the endorsement of the text of the UNGP. This was reflected in

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[26] UNHRC 2011 UNGP Res, supra, Preamble ¶ 2.

[27] UN Human Rights Council, Institution Building of the United Nations Human Rights Council (A/HRC/Res/5/1 (18 June 2007).

[28] UN Human Rights Council, Code of Conduct for Special Procedures Mandate-Holders of the Human Rights Council (A/HRC/Res/5/2 (18 June 2007)).

[29] See generally Bertrand G. Ramcharon, *The Law, Policy, and Politics of the UN Human Rights Council* (Leiden: Brill Nijhoff, 2015).

[30] UN Human Rights Council, Code of Conduct for Special Procedures Mandate-Holders, supra. Among the most relevant:

> (a) Reaffirmed that all human rights are universal, indivisible, interrelated, interdependent and mutually reinforcing and that all human rights must be treated in a fair and equal manner on the same footing and with the same emphasis;
> (b) Acknowledged that peace and security, development and human rights are the pillars of the United Nations system and that they are interlinked and mutually reinforcing; . . .
> (d) Stressed the importance of "ensuring universality, objectivity and non-selectivity in the consideration of human rights issues, and the elimination of double standards and politicization";
> (e) Further recognized that the promotion and protection of human rights "should be based on the principles of cooperation and genuine dialogue and aimed at strengthening the capacity of Member States to comply with their human rights obligations for the benefit of all human beings";
> (f) Decided that "the work of the Council shall be guided by the principles of universality, impartiality, objectivity, and non-selectivity, constructive international dialogue and cooperation, with a view to enhancing the promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development"; Ibid., Preamble ¶ 3.

[31] Among the numerous invocations, see, e.g., UNHRC, Promoting human rights and fundamental freedoms through a better understanding of traditional values of humankind: best practices (A/HRC/21/L2 (21 September 2012).

[32] Peter Makossah and Gilbert Mittawa, 'Social Media, Peace and Security in Africa,' in In Dan Kuwali (ed) *The Palgrave Handbook of Sustainable Peace and Security in Africa* (Cham, Switzerland: Springer (Palgrave Macmillan), 2022), 241-252, 247-48; Theo Van Boven, 'Categories of Rights,' in Daniel Moeckli et al. (eds) *International Human Rights Law* (OUP, 2018), p. 140; Larry Catá Backer, China, in Jean d'Aspremont, and John Haskell (eds), *Tipping Points in International Law: Critique and Commitment* 52-73 (CUP, 2021)

[33] UNGP, Principle 24, discussed infra, Chapter 8.

[34] UNHRC 2011 UNGP Res., ¶¶ 2-7.

[35] UNHRC 2011 UNGP Res, Preamble ¶3.

the first Pillar of the UNGP text.[36] Another *emphasized* that enterprises have a responsibility to respect human rights.[37] This was reflected in the second Pillar of the UNGP text.[38] Combining the implications of these two, another *recognized* that proper legislation of enterprise-responsible operations fulfills two distinct functions—that of contributing to the promotion and protection of and respect for human rights, and that of channeling the benefits of business toward that contribution.[39] The thrust of these three preambular expressions is fairly clear—it is built around three core premises which are then reflected in the structure of the UNGP. The first is that states occupy the apex position of legality with a responsibility to "promote and protect." The second is that enterprises have a compliance *responsibility to "respect."* And the third is that both share in the furtherance of "proper regulation" that is aligned with those responsibilities.

Thus, it might follow that states and other public entities can share in the development of a regulatory matrix aligned to the fundamental principles of the character of human rights. By 2019 John Ruggie could refer to the term "smart mix of measures"[40] to mean "exactly what it says: a combination of voluntary and mandatory, as well as national and international measures."[41] These measures were to be assessed against the scope of the duty or responsibility assigned to states and business respectively,[42] but grounded in the core objectives of "contributing to" and "channeling the benefits of" economic activity toward the realization of human rights. What is left undefined are those key terms, around which context may produce differences in meaning and application: "benefits of business", "responsible operation," "assist in channeling," as well as the role of mass organizations in the process. That, in turn, keeps open, the space within which these terms may be applied as a function of sometimes quite distinct operational premises of important economic-political models, and within them. More succinctly, the framework does not impose a single optimal "answer" but merely a structure within which the multiple and variegated values systems of human social collectives may adjust their behaviors to incorporate those objectives, but always with contextual characteristics. The approach in the United States, the European Union, China, Cuba, and Indonesia may produce quite distinct regimes on the ground.

That basic framing intent then highlights the challenge, or contradiction, and the objective of the UNGP within the human rights system coordinated within the institutional structures of international organization around the United Nation system. The challenge is described as an expression of *concern* respecting state capacity to undertake their regulatory duty, as well as the regulatory gaps resulting from the misalignment of the structures of economic production and national sources of regulation.[43] The contradiction follows—the failure "fully realize the benefits of globalization or derive maximally the benefits of activities of transnational corporations and other business enterprise."[44] That produces the articulation of an objective: to "mitigate the negative impact of globalization on vulnerable economies, fully realize the benefits of globalization or derive maximally the benefits of activities of transnational corporations and other business enterprises."[45] That last foundational and perhaps

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[36] UNGP, supra, Principles 1-10.
[37] UNHRC 2011 UNGP Res, Preamble ¶4.
[38] Ibid., Principles 11-24.
[39] Ibid., Preamble ¶ 5 ("can contribute to the promotion, protection and fulfilment of and respect for human rights and assist in channeling the benefits of business towards contributing to the enjoyment of human rights and fundamental freedoms.").
[40] UNGP, Principle 3, Commentary.
[41] John Ruggie, Keynote Address by John Ruggie at the Conference 'Business & Human Rights: Towards a Common Agenda for Action' (2 December 2019); available [https://shiftproject.org/resource/john-ruggie-keynote-finland2019/], last accessed 1 February 2024.
[42] Ibid.
[43] UNHRC 2011 UNGP Res, Preamble ¶ 6.
[44] Ibid.
[45] Ibid.

transformational objective then provides a foundation for the last: an expression of the justification for endorsement around "the importance of building the capacity of all actors to better manage challenges in the area of business and human rights."[46]

2.1.2 Endorsement Operational Provisions

The Preamble is followed by the eighteen paragraphs of the body of the resolution. The first endorses the UNGP as annexed to the 2011 SRSG Report of the SRSG.[47] It is important to note the connection between the UNGP and the three pillar Protect, Respect, Remedy framework.[48] The UNHRC Res directly aligns the UNGP text (its thirty-one principles plus the General Principles) with the normative project of implementing the "protect, respect, remedy" framework first formally presented in the SRSG's 2008 Report. And this alignment affects both the way that the endorsement resolution is written, and the expectation about the meaning and objectives of the UNGP text.

The first three paragraphs also relate to the work of the SRSG, and, in that context, also suggest the template within which further work might be undertaken. Of particular significance was the SRSG's working style, which was *welcomed*, the character of which was described as "comprehensive, transparent and inclusive consultations conducted with relevant and interested actors in all regions" with the object of "generating greater shared understanding of business and human rights challenges among all stakeholders."[49] Tied to that objective is the importance given by the UNHRC to the task of developing and raising awareness, the SRSG's success with which was *commended*.[50] Consultation and awareness raising, then, appear to describe at least two notable characteristics of a legitimating working style that ought to permeate the interpretation and application of the UNGP. By implication, those principal characteristics become a point of mimesis[51]--repetition and simulation that then finds its way into the operating style of states and enterprises seeking to apply and comply with their respective duty to protect and responsibility to respect under the UNGPs. These notions of reproduction and simulation (for example of intention) will also mark the plausible interpretative range of the text of the UNGP itself.

Paragraphs four and five state key points about the context in which the UNGP will be placed. First, the UNHRC contextualizes the UNGP both within the constellation of human rights and as a vehicle for realizing the better regulation of human rights impacts in business. Paragraph four *recognizes* the role for the UNGP in the implementation of the protect, respect, remedy framework. Nonetheless, it embeds that recognition within two objectives. The first is the use of the idea of UNGP and its principles (the two are not the same)[52] as the basis for making further progress to enhancing standards and practices with regard to business and human rights. The

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[46] Ibid., Preamble ¶ 7.
[47] Ibid., ¶ 1.
[48] The Three Pillar Framework—the state duty to protect human rights, the corporate responsibility to respect human rights, and the remedial obligations of both was first presented in the 2008 Report of the SRSG. Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises. *Protect, Respect and Remedy: a Framework for Business and Human Rights*, U.N. Doc. A/HRC/8/5 (April 7, 2008). It is discussed with the other principal Travaux Préparatoires of SRSG John G Ruggie (2005-2011) in more detail infra Chapter 3.
[49] UNHRC 2011 UNGP Res, supra., ¶ 2.
[50] Ibid., ¶ 3.
[51] Arne Melberg, *Theories of Mimesis* (CUP, 1995) (imitation, repetition, reproduction, simulation as difference rather than as similarity; Ibid., p. 4). See also Paul Woodruff, 'Aristotle on Mimesis,' *Essays on Aristotle's poetics* 73-95 (Princeton University Press, 1992).
[52] To be discussed infra Chapter 12.

second is to use the UNGP and its principles as guidance for enhancing business and human rights standards and practices. Both objectives are to be bent to the greater objective of contributing to socially sustainable globalization, but with a caveat: "without foreclosing any other long term development, including further enhancement of standards."[53]

Paragraph five emphasizes multi-stakeholder dialogue and analysis—as the UNHRC had done since the start of the SRSG mandate. In this case the emphasis was aligned with the objectives to further two fundamental goals. *The first* was to "maintain and build on the results achieved to date."[54] Note here the two distinct sub-goals. One is to *maintain;* the other is *to build on.* The first suggests an objective of preserving the development and its forms of the UNGP, and the second suggests the need to further develop the forms and operation of the UNGP. One cautions against moving backwards; the other points to further development. The intent, then, is not to stay in place, and certainly not to move back to the time before the UNGP. The emphasis appears to be on moving forward—but from the foundation, forms, and principles of the UNGP. The UNGP, then, are meant to provide the cage in which development is to be fostered. The second was to ensure that the mechanics of development privilege substantial consultation among organized mass society, public and private—and especially with those mass organizations with a stake in the development from and out of the UNGP. mechanics of that fostering is to be achieved, as it had in the development of the UNGP after 2005, on the critical modalities of consultation of "multi-stakeholder dialogue."

Paragraph 6 then turns to the creation of an institutional framework within which the forward looking mandates and expectations might be coordinated, and perhaps realized. Central to that institutionalization was the creation of the Working Group on the issue of human rights and transnational corporations and other business enterprise (the UN Working Group) and specifying its mandate.[55] At the time of its creation, and the elaboration of its initial mandate, the UN Working Group served to underscore the core objectives tied to endorsement. These objectives—"further progress" and "enhancing standards,"[56] and the twin objectives embedded in the multi-stakeholder dialog principles[57]-- emphasized both the structural importance of the UNGP. When aligned with the expectations written into the endorsement resolution preambular materials—respecting "proper regulation" and the need to overcome the negative impact of globalization—it becomes clearer that endorsement was not just of the text of the UNGP, but also of an expectation that this text would serve as a springboard, the framework, and the baseline premises toward the full realization of the benefits of globalization.[58]

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[53] UNHRC 2011 UNGP Res, supra, ¶ 4.Socially sustainable globalization refers to the social dimensions of globalization., and more specifically the sense that the sort of globalization that might increase economic growth but that also increases social inequalities ought to be avoided in favor of a globalization that is sustainable. See, Marc Bacchetta and Marion Jansen, Making Globalization Socially Sustainable (World Trade Organization and International Labor Organization, 2011). The caveat to the goal of realizing socially sustainable globalization might reference might be meant to recall the 1986 General Assembly Resolution 41/128 (4 December 1986) Declaration on the Right to Development, which in its Article 1.1 declared that the right to development "is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized."

[54] UNHRC 2011 UNGP Res, supra., ¶ 5.

[55] UNHRC 2011 UNGP Res., ¶ 6. The Working Group, its mandate and its work after 2011 are discussed infra at Chapter 10.1.

[56] Ibid., ¶ 4.

[57] Ibid., ¶ 5.

[58] Ibid., preamble ¶¶ 5-6.

The coordinating responsibilities of the Working Group were the subject of elaboration in Paragraphs 7-9. To those ends, Paragraph 7 encouraged all institutional actors "to cooperate fully" with the Working Group,[59] especially respecting Working Group country visits. That has sometimes proven to be a sensitive not just for UN special procedures of the UNHRC, like the UN Working Group, but for the institutions of the High Commissioner for Human Rights as well.[60] Paragraph 8 invites public international organizations to consult with the Working Group "when formulating or developing relevant policies and instruments."[61] That suggests both the coordinating role of the UN Working Group, but also the expectation that further development in this field would occur beyond the UNGP. Lastly Paragraph 9 requests that the UN Secretary General and the UN Hugh Commissioner for Human Rights to find ways of providing "all the assistance necessary to the Working Group for the effective fulfillment of its mandate."[62]

Paragraphs 10 and 11 touch on issues of capacity building. The first targets national human rights institutions established in accordance with the Paris Principles.[63] The structuring of the UN Working Group and national human rights institutions reflect a certain amount of mimicry. The UNHRC welcomed the role of the national human rights institutions to develop the capacity "in relation to business and human rights" in order to "develop further capacity to fulfill that role."[64] That capacity building would be undertaken through the UN Working Group within its mandate under Paragraph 6. Paragraph 11 painted with a broader brush. It requests a report from the UN Secretary General on the manner in which the UN system "can contribute to the advancement of the business and human rights agenda and the dissemination and implementation of the Guiding Principles."[65] Several points might be extracted from that request. The first is that the UN system as a whole is to be committed to the principles in the UNGP, at least in spirit and as an aspirational set of principles. Their role, however, is to contribute—not to implement, operate, or advance on their own. The second is that there is now a "thing" to be known as a "business and human rights agenda" within the more general agenda of human rights.[66] Third, that agenda includes the UNGP. Fourth, the UNGP, within that agenda, is to be not merely disseminated but also implemented. Lastly, implementation and dissemination are understood as a function of capacity building. The

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[59] Ibid., ¶ 7.
[60] See, e.g., Zeid Ra'ad Al Hussein, Denial of access and lack of cooperation with UN bodies will not diminish scrutiny of a State's human rights record, Human Rights Council 35th session, Opening Statement by Zeid Ra'ad Al Hussein, United Nations High Commissioner for Human Rights (6 June 2017); available [https://www.ohchr.org/en/statements/2017/06/denial-access-and-lack-cooperation-un-bodies-will-not-diminish-scrutiny-states], last accessed 20 February 2024 ("As this Council is aware, where the human rights situation appears critical, and where access is repeatedly denied to my Office, the only option open to us may be to conduct various forms of remote monitoring. So long as refusals to enable access to persist, I will be compelled to consider reporting publicly and regularly on their findings," Ibid.); International Commission of Jurists, Venezuela: Visit by relevant UN human rights experts needed due to crisis (5 October 2017); available [https://www.icj.org/venezuela-visit-by-relevant-un-human-rights-experts-needed-due-to-crisis/], last accessed 20 February 2024 .
[61] UNHRC 2011 UNGP Res., ¶ 8.
[62] Ibid., ¶ 9
[63] UNGA, Resolution: Principles relating to the Status of National Institutions (The Paris Principles) (20 December 1993; UNGA Res 14/134).
[64] UNHRC 2011 UNGP Res., ¶ 10.
[65] Ibid., ¶ 11.
[66] Office of the High Commissioner for Human Rights, Website: Business and Human Rights; available [https://www.ohchr.org/en/topic/business-and-human-rights], las accessed 25 February 2024 ("UN Human Rights is mandated to lead the business and human rights agenda within the UN system, and to develop guidance and training relating to the UN Guiding Principles on Business and Human Rights in collaboration with the Working Group on Business and Human Rights." Ibid)

circle is complete if one can understand that capacity building may also be an important element of contributing to the advancement of the UNGP project.

The resulting Report of the UN Secretary General[67] suggested the way in which the forward facing role of the UNGP was to be realized almost from the moment of its endorsement. The Report contextualized the role of the UN Working Group after endorsement, and the place of the business and huma rights field within the broader agendas of human rights generally.

> While the Working Group established by the Human Rights Council has an important role to play in advancing the implementation of the Guiding Principles, the sheer scale and complexity of the business and human rights agenda requires larger concerted efforts that involve the United Nations system as a whole. This view is also reflected in calls by Governments, business and civil society for the United Nations to play an active role in advancing the dissemination and implementation of the Guiding Principles.[68]

The Report considered the effect of endorsement of the UNGP. The UNGP are to be treated as authoritative "both inside and outside the remit of the United Nations, for moving the business and human rights agenda to a new stage, focused on ensuring effective implementation."[69] It is to the forms in which the UNGP serve as a point of convergence for the further development of global standards and initiatives on business and human rights.[70] It is in this sense that the UNGP ought to be embedded in the larger human rights agendas of the UN system.[71] That, in turn, became a topic for interaction between the UNOHCHR and the UN Secretary General.[72]

Lastly, and in connection with the endorsement and the creation of the UN Working Group, the UNHRC established the Forum on Business and Human Rights[73] which, under the guidance of the UN Working Group was to be held annually "o discuss trends and challenges in the implementation of the Guiding Principles and promote dialogue and cooperation on issues linked to business and human rights, including challenges faced in particular sectors, operational environments or in relation to specific rights or

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[67] UN Secretary General, Contribution of the United Nations system as a whole to the advancement of the business and human rights agenda and the dissemination and implementation of the Guiding Principles on Business and Human Rights, UNHRC A/HRC/21/21 (2 July 2012); available [https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/21/21] (UNSG 2012 Report)); last accessed 21 February 2024. Corregium, A/HRC/21/21/Corr.1 (17 July 2012); available [https://documents.un.org/doc/undoc/gen/g12/152/93/pdf/g1215293.pdf?token=lJTzzPPUiwvGd7Rofo&fe=true], last accessed 21 February 2024.

[68] UNSG 2012 Report, supra, ¶ 7. The UN Working Group is to play a supporting role in the work of the UNHCHR in providing guidance and clarification on issues relating to the interpretation of the UNGP. Ibid., ¶ 96.

[69] Ibid., ¶ 12.

[70] Ibid., ¶ 13.

[71] Ibid., ¶¶29-30. e

[72] Considered infra at Chapter 12. See, e.g., UNOHCHR, Draft Concept Note: The role of the UN system in advancing the business and human rights agenda; Panel Discussion – Twenty-third session of the Human Rights Council (30 May 2013); available [https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/RegularSession/Session23/Concept_Note_HRAgenda.pdf], last accessed 22 February 2024 ("it is essential that the United Nations system as a whole—including agencies, funds, programmes and initiatives—address the issue of business and human rights not only in its formulation the Post-2015 Sustainable Development Goals, but also in strategies, policies, and practices aimed at their implementation." Ibid.).

[73] UNHRC 2011 UNGP Res., ¶¶ 12-17.

groups, as well as identifying good practices."[74] The Forum is open to a significant range of stakeholders and meet for two working days. The UN Working Group is to include in its annual report its reflections on the proceedings in the Forum and recommendations for thematic subjects.

Taken together, then, the UNHRC 2011 UNGP Res. Provides a substantial amount of signals about the UNGP, its role, function, and place within the constellation of human rights within the United Nations system, and from there, within the broader discussion about human rights globally. Those signals then serve two purposes, at least for purposes of commentary. First it suggests context for the interpretation of the UNGP's principles, and the aggregation of those principles into the structural system that the UNGP develops. Second, it also suggests the contours that will serve to define the spirit or idea of the UNGP—something that stands apart from the UNGP as an amalgam of principles that form a coherent whole. It is a means towards systems of proper regulation; it creates the structures that enhance the ability of economic enterprises to contribute to the promotion, protection, and fulfillment of and respect for human rights. It confirms the corporate obligation to promote, protect, and fulfill human rights; it establishes a principle that economic enterprises assist in channeling the benefits of business toward the enjoyment of human rights; it serves as a structure for elaborating the objective that proper regulation has as its object the effective mitigation of the negative impact of globalization on vulnerable economies (however that is conceived and measured); and that a normative regulatory structure is necessary to ensure that states "maximally" extract the benefits of the activities of economic enterprises.

The idea of the UNGPs speaks to a framework "on which further progress can be made;" its spirit contributes to socially sustainable globalization without foreclosing other long term development objectives; and it sets the tone and provides the structure for conversations about human rights and business. The spirit of the UNGP, its manifestation as an idea, establishes "a common global platform for action, on which cumulative progress can be built, step-by-step, without foreclosing any other promising longer-term developments;"[75] in the process "elaborating the implications of existing standards and practices for States and businesses; integrating them within a single, logically coherent and comprehensive template."[76] What it is not is a legal system or a toolkit—it suggests objectives, directions and framework—but not the answers. These last elaborations of the *spirit of the UNGP* , of the UNGP as an idea on or through which the public and private law of business and human rights could be elaborated, and through which a consensus could be built around the objectives of economic activity, and the relationship of this spirit to the detailed principles that serve as the operative heart of the UNGP were discussed by the SRSG in his 2011 SRSG Report presenting the final draft of the UNGP to the UNHRC.

2.2 The 2011 SRSG Report Presenting the UNGP Definitive Text and its 2010 Draft Text

In its publication of the UNGP, the United Nations noted the following:

> This publication contains the ″Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework″, which were developed by the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises. The Special Representative annexed the Guiding Principles to his final report to the Human Rights Council

[74] Ibid., ¶ 12.
[75] 2011 SRSG Report ¶ 13.
[76] Ibid., ¶ 14

> (A/HRC/17/31), which also includes an introduction to the Guiding Principles and an overview of the process that led to their development.[77]

It is possible to ignore this as purely descriptive. The SRSG did develop the UNGP which implemented the "protect, respect, remedy" framework which the SRSG also introduced. The SRSG did annex the final version of the UNGP to his final report, the 2011 SRSG Report,[78] and the 2011 SRSG Report also included an introduction to the UNGP. That would be a fair reading, though one perhaps closer to the edges of plausibility. Equally plausible is the possibility that the effort to remind readers of this also suggested the importance of the SRSG's views on the UNGP as an aid to plausible interpretation of its text, as well as the idea and function of the UNGP as a whole. In that sense, the SRSG's thoughts might not be determinative, but they ought to be persuasive. They represent the intent of one of the principal "developers" of the UNGP, operating under a mandate of the institution in whose behalf the UNGP were developed. It follows that this "introduction" constitutes not just one of the key travaux préparetoires of the UNGP, but also a text that acquired a measure of interpretive authority. To that extent it is worth considering here along with the instrument of endorsement and the text of the UNGP. The 2011 SRSG Report was actually four reports: the Report introducing the text of the UNGP along with three substantial addendums. The first spoke to "Piloting principles for effective company/stakeholder grievance mechanisms: A report of lessons learned."[79] The second reported on "Human rights and corporate law: trends and observations from a cross-national study" conducted by the SRSG.[80] The third elaborated "principles for responsible contracts."[81] These were immediately followed by the 2011 SRSG Report on Conflict Regions.[82] Each will be considered in subsequent chapters considering the text of the UNGP. For this chapter the focus is on the 2011 SRSG Report.

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[77] UNGP, p. 1 (front matter).
[78] 2011 SRSG Report, ¶¶ 1-16.
[79] Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John G. Ruggie, Addendum1: Piloting principles for effective company/stakeholder grievance mechanisms: A report of lessons learned A/HRC/17/31/Add.1 (24 May 2011); available [https://documents.un.org/doc/undoc/gen/g11/133/55/pdf/g1113355.pdf?token=VAGw7LPHqBebfT2dlQ&fe=true]; last accessed 25 February 2024 (the "2011 SRSG Report Addendum 1").
[80] Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John G. Ruggie, Addendum 2: Human rights and corporate law: trends and observations from a cross-national study conducted by the Special Representative A/HRC/17/31/add.2 (23 May 2011); available [https://documents.un.org/doc/undoc/gen/g11/133/25/pdf/g1113325.pdf?token=clQ4uyxuKetg7LSpws&fe=true]; last accessed 25 February 2024 (the "2022 SRSG Report Addendum 2").
[81] Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John G. Ruggie, Addendum 3: Principles for responsible contracts: integrating the management of human rights risks into State-investor contract negotiations: guidance for negotiators A/HRC/17/31/Add.3 (25 May 2011); available [https://documents.un.org/doc/undoc/gen/g11/134/20/pdf/g1113420.pdf?token=thaF2WZkS4FuLSqSFT&fe=true]; last accessed 25 February 2024 2011 (the "SSRG Report Addendum 3").
[82] Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John G. Ruggie, Business and human rights in conflict-affected regions: challenges and options towards State responses A/HRC/17/32 (27 May 2011); available [https://documents.un.org/doc/undoc/gen/g11/135/63/pdf/g1113563.pdf?token=Vl5XEMdPZslHQiME5s&fe=true]; last accessed 25 February 2025.

However, even so limited, there is a complication that might contribute towards interpretive dissonance. The final text of the 2011 SRSG Report,[83] was in some ways considerably different than the draft of what would become the 2011 SRSG Report introduction that was circulated in November 2010.[84] The differences may be useful in approaching the "definitive" introduction, both for what was included in the final version and for what served as the initial vision around which the draft NGP were to be presented, and perhaps also encased, at least from the perspective of interpretive guidance for reading and applying the text.

2.2.1 The 2011 SSRG Report

The focus of the 2011 SRSG Report is on historical development, and the data driven context that produced the UNGP—as a framework, and as the aggregation of the principles that give that structure its normative thrust and form. The introduction thus provides guidance toward both textual interpretation of the principles and the elaboration of the spirit of the UNGP as a whole. That spirit could be understood as the cluster of cire principles given expression by and through the UNGP, and that permeates each of its thirty-one principles and its general principles.[85] The result was the production of something that might be considered as close to an official history of the UNGP as one might obtain under the circumstances.[86] It may be important to note that every history generates its own counter-narratives.[87]

It stars with the core premise—that globalization made the process leading, eventually, to the UNGP inevitable. That inevitability was grounded in the success of the private sector as the ordering and driving force in the development of productive forces. The consequential liberation of productive forces from the normative oversight of territorially limited states required a corrective—perhaps to bring back a balance between public and private sectors. The driving force of that trajectory as a function of the consequences of the triumph of the private in the 1990s was the emergence of a "heightened social awareness of businesses' impact on human rights [which] also attracted the attention of the United Nations."[88] It is worth underscoring this principle and situating it in the text and spirit of the UNGP—what drives the project, and serves as its bedrock normative first principle,[89] is the goal-belief that the imbalance between public and private sectors has created an imbalance in the impacts of economic activity on human rights, imbalances that need correction by better aligning private sector economic activity with public sector human rights guardrails.

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[83] A full citation is here worth a repeat:
[84] 2010 SSRSG Draft Report UNGP
[85] 2011 SRSG Report, ¶¶ 1-16.
[86] On the importance of official history as a narrative tool of social cohesion and as a means of embedding core collective principles into its sense of itself, see, e.g., Larry Catá Backer, Reflections on Jiang Shigong on 'Philosophy and History: Interpreting the "Xi Jinping Era" through Xi's Report to the Nineteenth National Congress of the CCP' [哲学与历史 —从党的十九大报告解读"习近平时代" 强世功], Law at the End of the Day (3 Jun3 2018); available [https://lcbackerblog.blogspot.com/2018/06/reflections-on-jiang-shigong-on.html]; last accessed 26 February 2024.
[87] See, David Weissbrodt, 'Human Rights Standards Concerning Transnational Corporations and Other Business Entities,' (2014) 23 Minnesota Journal of International Law 135-171; David Weissbrodt and Muria Kruger, 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights,' (2003) 97 American Journal of International Law 901-922.
[88] Ibid., ¶ 1.
[89] On the nature and importance of first principles, see Chapter 1, supra.

But the path toward correction was to be littered with failure and failed approaches.[90] Principal among them were the Norms on Transnational Corporations and Other Business Enterprises "drafted by an expert subsidiary body of what was then the Commission on Human Rights."[91] Their fundamental error was to replicate the imbalance that was the object of reform. In place of a private sector (and the economic activity they drove) detached from the normative constraints of politics organized within the state system and its collective manifestations in UN institutions, the Norms offered to transform the private sector into a hybrid public administrative under the supervision of the state. "Essentially, this sought to impose on companies, directly under international law, the same range of human rights duties that States have accepted for themselves under treaties they have ratified."[92] Its principal failing was that the Norms were not voluntary and in the process overrode, without much democratic deliberation, substantial core normative consensus about the private sector and the role and purpose of economic activity in many states.[93]

The Norms produced "a deeply divisive debate" among key stakeholder with diverging interests,[94] resulting in the abandonment of the Norms and the substitution of a new effort. The mandate of the SRSG, then, was understood to have been born out of the ashes of the failed Norms—and that birth story significantly affected the approach to be undertaken thereafter. This "new process" under the mandate of the SRSG produced the UNGP and this last report.[95] For supporters this was a virtue; for others it posed a threat sufficiently large that the Norms project as a formal project was abandoned—until resurrected 2014 in the form of the effort to draft an international instrument for the regulation of the human rights effects of business.[96] That dialectical process—from the Norms, to the UNGP, and then back to the Norms in new forms, was initially criticized by Professor Ruggie early in its process of development.[97]

Paragraphs 4 -5 of the 2011 Report then describe the three phases through which the work of the SRSG evolved. The first phase was a cleaning phase, "[r]eflecting the mandate's origins in controversy"[98] and thus focused on data gathering—the identification and clarification of existing standards and practices. It set the tone of the mandate project as one that was meant to be data driven—one that would derive its principles from its aggregation, synthesis, and interpretation of data against aspirational ideals—*effectively an inductive process* against what was by implication the rejected deductive processes leading to the Norms. The former is data and context driven; the latter is driven by logical suppositions. The SRSG noted the production of a substantial amount

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[90] Among them the failed effort to draft an international code of conduct for economic collectives; Development and International Economic Cooperation: Transnational Corporations, UN Doc. E/1 990/94; see also Draft United Nations Code of Conduct on Transnational Corporations, May 1983, 23 ILM 626 (1984).
[91] 2011SRSG Report, ¶ 2.
[92] Ibid。
[93] Discussed in Larry Catá Backer,
[94] 2011 SRSG Report ¶ 3.
[95] Ibid.
[96] UNHRC, Resolution: Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights A/HRC/RES/26/9 (14 July 2014); available [https://documents.un.org/doc/undoc/gen/g14/082/52/pdf/g1408252.pdf?token=287rSGh5FqciKGmHmU&fe=true]; last accessed 26 February 20204. See, Larry Catá Backer, Principled Pragmatism in the Elaboration of a Comprehensive Treaty on Business and Human Rights, in Surya Deva & David Bilchitz (eds), Building a Treaty on Business and Human Rights: Context and Contours 105, 129.
[97] John G. Ruggie, The Past as Prologue? A Moment of Truth for UN Business and Human Rights Treaty; available [https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/programs/cri/files/Treaty_Final.pdf]; last accessed 12 February 2024.
[98] 2011 SRSG Report, ¶ 4.

of research that "provided a broader and more solid factual basis for the ongoing business and human rights discourse, and is reflected in the Guiding Principles annexed to this report."[99]

It is worth noting that neither the SRSG nor the critical text speak to inductive or deductive principles, nor to the critical role of dialectics in crafting a framework document.[100] Instead, much of this is subsumed within the once quite lively debate about the SRSG's "principled pragmatism"—a concept that the SRSG introduced in his 2006 SRSG Report.[101] His purpose was to provide greater conceptual clarity on the distinctive roles between public and private sector entities.[102] What he managed to describe was the data driven contextually based iterative process, guided by the overarching framework of an objective (aligning business activity with consequences for its impacts on human rights).[103] That overarching framework, in turn, was derived from the initial objective from which the SRSG's mandate was crafted: to identify and clarify standards of corporate responsibility and accountability with regard to human rights.[104]

Nonetheless, the principal point is clear enough: inductive reasoning provides a sounder basis for the development and implementation of human rights in economic activity than deductive approaches. It was on that basis that the SRS was able to undertake the second phase of his work in the wake of the renewal of his mandate by the UNHRC—that of producing and submitting recommendations.[105] To that end, again an inductive approach was undertaken. The SRSG considered the "many initiatives, public and private, which touched on business and human rights,[106] and determined that they pointed to a problem of anarchy—of order without a center. This gap the SRSG filled in 2008 with the introduction of the overarching framework (merging data and response from phase one) of "the "Protect, Respect and Remedy" Framework he had developed following three years of research and consultations."[107] The UNHRC welcomed the framework, "providing, thereby, the authoritative focal point that had been missing."[108]

Paragraphs 6-9, the SRSG developed a concise summary of the utility and value of the 'Protect, Respect, Remedy' three pillar Framework and its critical role in structuring the UNGP and providing its core normative foundations. Paragraph 6 described the essence of the three pillar framework. It did more, though: it also set out an interpretive principle: "Each pillar is an essential component in an inter-related and dynamic system of preventative and remedial measures."[109] Paragraph 7 then suggested the intrinsic utility of the Framework,[110] and Paragraph 8 touched on its quasi-democratic legitimacy, grounded in the extensive consultations that led to their

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[99] Ibid.
[100] See Jack Snyder and Leslie Vinjamuri, 'Principled pragmatism and the logic of consequences,' (2012) 4(3) International Theory 434-448.
[101] 2006 SRSG Report, ¶¶ 70-81. See also 2010 SRSG Report, ¶¶ 4-15 for a further elaboration.
[102] 2006 SRSG Report ¶ 70.
[103] 2010 SRSG Report, ¶ 4.
[104] United Nations Commission on Human Rights, Human Rights Resolution: 2005/69, E/CN.4/RES/2005/69 (20 April 2005); available [https://ap.ohchr.org/documents/E/CHR/resolutions/E-CN_4-RES-2005-69.doc], last accessed 1 March 2024 [hereafter HRC Resolution 2005/69].
[105] 2011 SRSG Report, ¶ 5.
[106] Ibid.
[107] Ibid.
[108] Ibid.
[109] Ibid., ¶ 6.
[110] Ibid., ¶ 7 ("has been endorsed or employed by individual Governments, business enterprises and associations, civil society and workers' organizations, national human rights institutions, and investors" Ibid.).

formation, which suggested positive reception.[111] Again, the issue might have touched on democratic legitimacy, but it also deepened the argument of inductive authority. Lastly, those data points then served as a basis for taking the "Protect, Respect, and Remedy" Framework on step further—toward its operationalization; "to provide concrete and practical recommendations for its implementation. This constitutes the mandate's third phase."[112]

Again, the inductive methodology served as the basis for the completion of the third phase of the project leading to the drafting of the UNGP: the "Council asked the Special Representative, in developing the Guiding Principles, to proceed in the same research-based and consultative manner that had characterized his mandate all along."[113] The 2011 Report notes that not only were the UNGP " informed by extensive discussions with all stakeholder groups,"[114] but they were "road-tested" as well.[115] That testing was essential, not merely for the success of inductive based drafting but also to underscore the point of workability even at the formative stage of the UNGP's development. The text of the draft UNGP were also "road-tested" by key stakeholders.[116]

The 2011 Report then shifts gears, from historical context, to the development and application of the driving ideology for developing the UNGP—data driven inductive processes organized around the c UNGP's core normative principle in the goal of bringing the public and private sectors into balance around the management of the human rights impacts of economic activity (organized around business). It bears emphasis that the 2011 Report does not embrace any set of normative principles over the value or preference for any specific manifestation of political-economic models. The inductive methodology of the SRSG effectively precluded pre-judging value, which would have been better aligned with a fundamentally deductive process. And, indeed, it is likely that one of the points of contention between the SRSG and critical stakeholder revolved around this issue—though the debate rarely spoke in those terms.[117]

First, the SRSG suggested that the UNGP might best be understood as the end of a phase in the development of a relationship between human rights and business activity—in the now famous expression that the UNGP "will mark the end of the beginning: by establishing a common global platform for action, on which cumulative progress can be built, step-by-step, without foreclosing any other promising longer-term developments."[118] That is meant to serve as an interpretive silver lining. Precisely because the UNGP operate as "soft law" it can be understood as a point in further development rather than a break on that development. Because the UNGP are grounded in the inductive principle of framing, the UNGP must be understood as a single point in a long iterative process of development. In effect the UNGP contribute to the dialective of human rights in the field of business. It is meant to produce further work from and through it. That is its value—that it serves as a platform rather than as a stopping point. Within the UNGP platform the consumers and producers of business and

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[111] Ibid., ¶ 8 ("the large number and inclusive character of stakeholder consultations convened by and for the mandate no doubt have contributed to its widespread positive reception." ibid).
[112] Ibid., ¶ 9.
[113] Ibid., ¶ 10.
[114] Ibid.,
[115] Ibid., ¶ 11("In short, the Guiding Principles aim not only to provide guidance that is practical, but also guidance informed by actual practice." Ibid.).
[116] Ibid., ¶ 12.
[117] See, e.g., John Sherman III, Beyond CSR: The Story of the UN Guiding Principles on Business and Human Rights, Harvard Kennedy School Corporate Responsibility Initiative Working Paper No. 71 (March 2020); available []https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/files/CRI_AWP_71.pdf, last accessed 20 February 2024, pp. 5-6.
[118] 2011 SRSG Report, ¶ 13.

human rights can engage in further dialective through which the field will continue to evolve and the forms of operationalization will develop. That is the object of Paragraph 14:

> The Guiding Principles' normative contribution lies not in the creation of new international law obligations but in elaborating the implications of existing standards and practices for States and businesses; integrating them within a single, logically coherent and comprehensive template; and identifying where the current regime falls short and how it should be improved.[119]

From this broad and dynamic reading a caution. The UNGP are not meant as a toolkit, though it can serve as a basis for their creation. Again the rejection of deductive principles produces a rejection by the SRSG of the idea that the principles can be "taken off the shelf and plugged in."[120] Indictive principles suggests the intersubjectivity of context and iterations –every contextually driven effort to implement and interpret will produce an effect that will also affect the way in which the UNGP principles are read going forward. The UNGP, then, are meant to embody generative principles. That will prove unsatisfactory to those who sought a deductive fixity in the UNGP– an anchor that could be projected through legal institutions. That, for example, was the essence of the fundamental critique of Amnesty International in 2010.[121] What is thus presented is something that, within these parameters is meant to be universally applicable, practical, and effective for the prevention, mitigation, and remediation of human rights harms in economic activity.[122]

2.2.2. The 2011 SRSG Report 17/31 Addenda.

The 2011 SRSG 2011 Report 17/31 was crafted both to present the definitive text of the UNGP, and to frame that presentation in ways that might help situate its interpretation and application within the large body of SRSG produced *travaux préparatoire*[123] as well as the text of the UNHRC endorsing resolution.[124] Beyond the overall guidance in approaching the meaning and application of the individual principles of the UNGP and its three pillar framework set out in the UNGP's General Principles,[125] the SRSG also sought to fill ought certain more specific conceptual points by way of addenda to the 2011 SRSG Report 17/31. Addendum 1 described what were described as key lessons learned from a study of the practical application of the non-state based grievance

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[119] 2011 SRSG Report, ¶ 14.
[120] Ibid., ¶ 15.
[121] Amnesty International, Comments on the United Nations Special Representative of the Secretary General on Transnational Corporations and other Business Enterprises' Draft Guiding Principles and on post-mandate arrangements December 2010; available [https://www.amnesty.org/en/documents/IOR50/002/2010/en/]; last accessed 24 February 2024. Amnesty highlighted four points: (1) failure to address the challenges of TNCs operations; (2) lack of clear guidance for regulatory measure to meet those challenges; (3) failures to make special provision for traditionally marginalized groups; and (4) failing to provide substantive provisions enhancing the effectiveness of remedy for human rights holders. These carry over into the efforts to draft an international business and human rights treaty after 2014. See also, Joint Civil Society Statement on the draft Guiding Principles on Business and Human Rights (January 2011); available [https://www.fidh.org/IMG/pdf/Joint_CSO_Statement_on_GPs.pdf], last accessed 25 February 2024. These, then, represent precisely wat the SRSG noted as the central character of the UNGP–its quality of encouraging dialectical exchanges and further evolution within the collective social structures around which human relations are organized, and subject to their heterogeneity.
[122] 2011 SRSG Report ¶ 16.
[123] Discussed infra Chapter 3.
[124] Discussed supra Chapter 2.1.
[125] Discussed infra Chapter 6.

mechanisms of the third pillar.[126] The second summarized what was seen as overarching trends in corporate law.[127] The third was used to present was used as a venue for the presentation of a set of Principles for Responsible Contracts.[128] Summary discussion of the Addenda follow below. Also produced was an additional report on conflict regions.[129] The 2011 SRSG Report 17/32 follows at Section 2.2.3

2.2.2.1. 2011 SRSG Report 17/31 Addendum 1 (Piloting Principles). A critical element of the remedial pillar of the UNGP are its forms of grievance mechanisms. Perhaps the least traditional, and the one most closely tied to the innovative principles of the 2d Pillar corporate responsibility to respect human rights, were the provisions providing for non-state based non-judicial grievance mechanisms, and aligned with that, the development of core principles of remedial procedures reflecting human rights values applied to remedy.[130] Applying principled pragmatism as methodology, the SRSG sought to "test drive" both in a pilot project conducted during the mandate extension period—2009-2010. Section I (¶¶ 1-11) provided project background information, identified the process principles tested, and defined "operational-level grievance mechanisms." Section II (¶¶ 12-20) focused on project methodology. Section III (¶¶ 21-75) set out the analysis and the modifications made in light of experience on the ground (again an example of principled pragmatism). Section IV (¶¶76-80) set out the revised process principles and offered some bigger picture insights.

The Introduction provided background on the need for the project. That need arose as a function of the lack of legitimacy, predictability, accessibility, and consensus around non state non judicial mechanisms, especially those operated within enterprises charged with the duty to respect. The solution was based on the legitimating power of mimesis—of mimicking, to the extent possible, the forms and principles attached to state

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[126] 2011 SRSG Report 17/31 Addendum 1-- Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John G. Ruggie, Addendum1: Piloting principles for effective company/stakeholder grievance mechanisms: A report of lessons learned A/HRC/17/31/Add.1 (24 May 2011); available [https://www.ohchr.org/en/special-procedures/wg-business/special-representative-secretary-general-human-rights-and-transnational-corporations-and-other]; last accessed 25 February 2024.

[127] 2011 SRSG Report 17/31 Addendum 2-- Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John G. Ruggie, Addendum 2: Human rights and corporate law: trends and observations from a cross-national study conducted by the Special Representative A/HRC/17/31/add.2 (23 May 2011); available [https://www.ohchr.org/en/special-procedures/wg-business/special-representative-secretary-general-human-rights-and-transnational-corporations-and-other]; last accessed 25 February 2024.

[128] 2011 SRSG Report 17/31 Addendum 3-- Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John G. Ruggie, Addendum 3: Principles for responsible contracts: integrating the management of human rights risks into State-investor contract negotiations: guidance for negotiators A/HRC/17/31/Add.3 (25 May 2011); available [https://www.ohchr.org/en/special-procedures/wg-business/special-representative-secretary-general-human-rights-and-transnational-corporations-and-other]; last accessed 25 February 2024.

[129] 2011 SRSG Report 17/32 Conflict Regions-- Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John G. Ruggie, Business and human rights in conflict-affected regions: challenges and options towards State responses A/HRC/17/32 (27 May 2011); available [https://www.ohchr.org/en/special-procedures/wg-business/special-representative-secretary-general-human-rights-and-transnational-corporations-and-other]; last accessed 25 February 2025.

[130] The principles were considered in both the 2008 SRSG Report 8/5 (Protect/Respect/Remedy); and the 2009 SRSG Report 11/13 (Operationalizing), discussed infra Chapter 3.2. More specifically, the 2011 SRSG Report 17/31 (Piloting Principles) notes: "The seven principles being piloted consist of the six principles for all non-judicial grievance mechanisms, first set out in the Special Representative's report to the Human Rights Council in 2008 (A/HRC/8/5, para. 92), plus the additional principle for operational-level grievance mechanisms specified in his 2009 report (A/HRC/11/13, para. 99)." (Ibid., Box A, p. 6).

based judicial remedies, without hobbling the system or making it impossible for non-state non judicial remedies to operate effectively as a front line impacts prevention-mitigation device.[131] The four participating enterprises were identified along with a participant in a so-called adjunct project.[132] Operational level mechanisms were then defined as mechanisms that "operate at the interface between a business enterprise and its affected stakeholders."[133] The term appears in the UNGP final version in UNGP Principle 29 as the means "for grievances to be addressed early and remediated directly"[134] and in UNGP Principle 31(h) (crafting of specific grievance mechanisms to be "based on engagement and dialogue").[135] The term also appears in the Commentary to UNGP Principle 22 (as one effective means of "enabling remediation"),[136] and the Commentary to Principle 25 (as a useful form of "early stage recourse and resolution" within the apex state duty to provide a system of remedy for adverse human rights impacts).[137]

The section on methodology described the structuring of the pilot project and the means used to extract data and assess operation. Of some interest is the use of the "Guidance Tool for Rights-Compatible Grievance Mechanisms developed by the Corporate Social Responsibility (CSR) Initiative at the Harvard Kennedy School.[138] Both were deemed to be broadly similar "as they resulted from the same research processes."[139] One of the difference between the Guidance Tool and the principles developed direct for the mandate was that the Guidance Tool included a "continuous learning" principle for and from grievance mechanisms;[140] that principle eventually found its way into the UNGP as Principle 31(g).

The heart of this Report was its Section III–"Lessons Learned." "The lessons are organized under the various principles. Each begins by restating the principle that was being tested. This is followed by an overview of some of the key learning points that emerged from across the various pilots with regard to that principle."[141] The end of each section summarizes the key lessons and sets out the revised principle. In the process one might acquire a sense of the way in which these principles—as they were memorialized in UNGP Principle 31—might be read in ways that aligned with the intent of the SRSG. The learning around the principle of legitimacy centered on the outward characteristics of trust.[142] Trust was translated into practical terms to suit the times: "formal and independent oversight structures, "effectiveness criteria" and context based dialogue all lay a role.[143] The language of the revised principle found its way into UNGP Principle 31(a). Accessibility focused on issues of transmission (publicity) and its mechanics.[144] Also explained was the decision to take language identifying barriers from the main text of the principle to what would become the UNGP Commentary to Principle 31 (b). Predictability focused on the core "challenges to achieving the right balance between formalization and

[131] 2011 SRSG Report 17/31 Addendum 1 (Piloting Principles), ¶¶ 1-3.
[132] Ibid., ¶¶ 4-7.
[133] Ibid., ¶ 8.
[134] UNGP Principle 29 (transposing the language of the 2011 SRSG Report 17/31 Addendum 1 ¶¶ 8-10).
[135] UNGP Principle 31(h). UNGP Principle 31 applies generally to non-state non-judicial grievance mechanisms.
[136] UNGP, Principle 22 Commentary (as an example of active engagement in remediation).
[137] Ibid., Principle 25 Commentary.
[138] 2011 SRSG Report 17/31 Addendum 1 (Piloting Principles), ¶ 14.
[139] Ibid., Box B, p. 8.
[140] Ibid.
[141] Ibid., ¶ 21.
[142] Ibid. Summary of Learning Box p. 11, (generally ¶¶ 22-29).
[143] Ibid.
[144] Ibid., Summary of Learning, p. 13, generally ¶¶ 30-37.

flexibility."[145] The focus was on time framing for building trust and managing that balance, which was retained in what became UNGP Principle 31(c).

Equitability centered on access to sources of information, advice, and expertise.[146] The revision recognized that enterprises could not guarantee but might facilitate that access; however the principle that the cost of access might have to be borne by the enterprise was retained in UNGP Principle 31(d), rationalized as a means of enhancing the systemic improvement in prevention and mitigation of adverse impact.—a sort of business case for subsidy. Rights compatibility retained its bifurcation between human rights based and other forms of complaint. While the text of the principle focused on alignment between outcome/remedies and internationally recognized human rights standards, the provision presupposes that the grievance mechanism would separate human rights issues complaints from others.[147] In its final form, UNGP Principle 31(f) retained the distinction but implied the need to treat all grievances initially as touching on human rights.[148] Left unresolved was the problem: where every action is human rights related or has human rights implications, then human rights moves from a position of distinct normative significance to fundamental premise and its legal effect becomes contextually bound up in context and action specific legalities. The principle of transparency was substantially reshaped to reflect a re-focus on the complainant, rather than on systemic administration with leveraging potential.[149] Mediating privacy became the fulcrum for the balancing, and a space for enterprise disclosure, without personally identifiable information was permitted. The former was preserved in what became UNCP Principle 31(e); the latter found its way into the Commentary to that principle.

Two systemic principles were also considered in the context of trust budling and continuous development of effective mechanisms. The former was bound up in the dialogue and engagement principle.[150] Dialogue and engagement was understood in two senses. The first was as a means of solving problems before they matured to grievance. But it also was tied to principles of communication, where, for example, the enterprise conducted its own investigation.[151] The second was related to the grievance process itself. This was tied into communication in the sense of ensuring alignment of understanding.[152] The key concern was stakeholder buy-in; with the issue of third party adjudication shifted down to commentary in the final version of the principle. These are tied into the added continuous learning principle,[153] which became UNGP Principle 31(g). n pat this was to serve as a sort of quality control and system function measure. In part it was supposed to assess the extent to which the grievance mechanism contributed to realization of approaching the idealized goal—the elimination of all adverse human rights impacts from the undertaking of economic activity.

The conclusion provided two useful insights for commentary. The first was the emphasis on the rejection of rigidity in interpretation of the UNGP Principles. That emphasis was articulated through the importance of context driven application and the principle of continuous learning. The second was the importance of the notion f balancing. That balancing requires a flexibility that, again, requires the avoidance of rigidity in textual meaning. Flexibility and contextual approaches, in turn, added to the evidence of an intention by the SRSG to avoid

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[145] Ibid., Summary of Learning, p. 15, generally ¶¶ 38-43.
[146] Ibid., Summary of Learning, p. 16-17, generally ¶¶ 44-48.
[147] Ibid., Summary of Learning, p.18, generally ¶¶ 49-52.
[148] UNGP Principle 31(f) Commentary.
[149] 2011 SRSG Report 17/31 Addendum 1 (Piloting Principles), ¶Summary of Learning, p. 19, generally ¶¶ 53-57.
[150] Ibid., Summary of Learning, pp. 21-22, generally ¶¶ 58-70.
[151] Ibid., ¶ 59.
[152] Ibid., ¶ 61.
[153] Ibid., Summary of Learning, p. 23, generally ¶¶71-75.

formalism in favor of an functionalist approach to the text, in which objectives rather than precise instruction was to be privileged.

2.2.2.1. 2011 SRSG Report 17/31 Addendum 2 (Human Rights and Corporate Law). Another critical trend, one that the SRSG took pains to attempt to show in his Reports after 2006, was that the business and human rights project as manifested in the three part framework, was not just compatible with traditional corporate law principles, but also aligned with the arc of its inevitable development. That premise was critical to acceptance of the UNGP by enterprises and states, especially those who might have been suspicious that the UNGP project was meant to be a flank attack on ancient and core principles of corporate law and the structures of corporate governance, corporate purpose, and the autonomy of the private (markets driven) sector. As one might surmise from a consideration of those SRSG Reports,[154] that assumption might not be entirely accurate. The inaccuracy, in turn, might be based on a quite specific and pointed reading of both the state of corporate law and corporate law principles, and of the interpretation of the direction that tis development was moving. Having raised the issue leave it to the reader to make their own judgment. Points of friction, however, were likely inevitable—especially in the context of the ancient argument of the extent to which private enterprises and individuals must first serve as instruments of public policy (beyond the basic obligation to legal compliance). Also unresolved are the sovereignty tinged issues of legal personality, asset partitioning, the "profit principle," and the principles of agency and veil piercing. The SRSG sought to leap over these by application of a principle of the supremacy of international law—especially in the spaces between sovereign authority –to states. The success of that endeavor remains very much a work in progress and one that is constrained in some respect by the UNGP themselves.[155]

It is in that broader context that one might situate the 2011 SRSG Report 17/31 Addendum 2 (Human Rights and Corporate Law) efforts reporting on the SRSG's Corporate Law Project. Its object was to deputize "20 leading corporate law firms from around the world" to examine the law of 39 jurisdictions to answer the question: whether and how corporate and securities laws encourages or impedes companies' respect for human rights. *To recast the question in UNGP terms, the SRSG sought to find empirical evidence for the existence of regulatory incoherence (corporate/securities law versus human rights law); and more generally the legal impediments in national law to the fulfillment by states of their duty to protect human rights in international law*. The SRSG was particularly interested in four trends with a likely intersection to human rights in economic activity. These included incorporation and listing,[156] director duties,[157] reporting,[158] and stakeholder engagement.[159] The Report sought to achieve two overall objectives: the first was to identify trends as these participants saw it. The second was to "stimulate discussion among key actors involved. . . . to lead to additional research"[160] and, implied, reform. That followed from the single pattern that catch the attention of the SRSG: "one pattern emerged, of a tendency for corporate and securities regulation to be separate from the enactment, implementation, and enforcement of other laws and policies encouraging business respect for human rights."[161]

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[154] The subject of Chapter 3, infra.
[155] Discussed infra Chapter 6.
[156] 2011 SRSG Report 17/31 Addendum 2 (Human Rights and Corporate Law), ¶¶ 29-50.
[157] Ibid., ¶¶ 51-125.
[158] Ibid., ¶¶ ¶¶ 126-163.
[159] Ibid., ¶¶164-183.
[160] 2011 SRSG Report 17/31 Addendum 2 (Human Rights and Corporate Law), Summary, p. 3. The list of participating law firms were posted to ibid. Appendix 1, p. 46. The list of jurisdictions examined were set out in Appendix II, p. 46. ,
[161] Ibid., ¶ 27.

The conclusions drawn from the survey questions and analysis suggest important points of framing for the interpretation of the UNGP. They provide substantial evidence of the baseline expectations and practices against which the principles of the UNGP would have to be interpreted, and thus applied. It also suggests the spaces within which both states and enterprises might seek to evolve their legal and private orders in the face of changing human rights (and now more generally sustainability) expectations.

With respect to incorporation, the study offered two conclusions.[162] The first was that there seemed to be a consensus among jurisdictions around the concepts of corporate legal personality, incorporation and listing. Likewise courts and regulation provide limited guidance on exceptions–veil piercing, agency. That suggest a set on consensus expectations around respect for autonomous legal personality and strong barriers to overcoming the presumptions of limited liability. The second, is a consensus around the absence of "any recognition of a duty to society or respect for human rights as a condition of incorporation or listing."[163] The best that can be offered–an important interpretive leap, is a compliance argument based on some alignment between corporate purpose limitation (to lawful purposes) with human rights objectives.

With respect to director duty, the study produced a number of conclusions.[164] The first referenced the well understood consensus view is that directors may consider non-shareholder impacts but only to the extent that consideration advances the company's best interest as a going concern.[165] Such impacts provisions tend to refer to environmental, social, and community impacts.[166]That consideration becomes mandatory when failure to consider triggers legal compliance liability.[167] From this the SRSG makes the leap that "Accordingly, many of the surveys argued that a prudent director would do well to consider and act on the company's human rights related impacts in accordance with their oversight role."[168] Alternatively, it is possible to conclude that a prudent director ought to consider human rights where it is required and otherwise balance it against other compliance related expectations in law. And so on. This becomes clearer when attached to the recognition of the substantial flexibility of corporate directors with respect to the determination of the importance of long term versus short term interest.[169] The SRSG also notes the interconnection between corporate law systems. They exist in constant states of intercommunication and inter penetration. That suggests the possibility of developing coherence and alignment .[170] The SRSG then posed a number of questions suggesting a desire to push corporate law toward alignment with and fulfillment of international human rights.[171]

With respect to obligations to report adverse human rights impact, the study suggested the continued authority of financial reporting and sought to find openings for broader disclosure and reporting mandates.[172] The principal insight, however, centered on the need for legislation is such requirements were to be transposed into

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[162] Ibid., ¶¶ 49-50.
[163] Ibid., ¶ 50.
[164] Ibid., ¶¶ 120-125.
[165] Ibid., ¶ 120.
[166] Ibid., ¶ 124.
[167] Ibid., ¶ 120. The argument was made that those could, in turn, be applied with a human rights lens. That has become more compelling with the adoption by the UNGA of a Resolution on the human right to a clean and healthy environment (A/RES/76/300) in 2022. A/76/PV.97 (28 July 2022) GA/12437.
161-0-8
[168] Ibid., ¶ 121.
[169] Ibid., ¶ 122.
[170] Ibid., ¶ 123.
[171] Ibid., ¶ 125.
[172] Ibid., ¶¶ 160-163.

corporate law.[173] In the meantime, reporting remains encouraged and permissive in most jurisdictions.[174] Even where reporting is encouraged or mandatory the geographical scope of reporting lack clarity and vary widely.[175] Lastly, requirements for verification, accountability and accessibility do not rise to the same level as those expected of financial reporting.[176]

Lastly, the conclusions around stakeholder engagement struck a hopeful tone.[177] "The surveys showed that while there is variation in the ways in which corporate governance codes and guidelines address CSR issues, there is also a commonality in that they are starting to deal with these issues; are rarely entirely "voluntary" in practice; and increasingly rely on international initiatives and standards to help frame any relevant guidance."[178] Most did not reference human rights directly but might draw on them indirectly.[179] That suggests the hoped for trajectory of corporate law/practice development, but also acknowledged the space between that goal and contemporary reality, a space mediated by the way the UNGP might be applied. That hopeful stance also was built into the issue of stakeholder representation on boards of directors—in 2011 not a legal and barely an aspirational expectation.[180] More promising were issues of gender representation on boards.[181] Though it must be admitted that in light of the rise of transgender rights, that focus may now require reframing.

The major insights that the SRSG though worth mentioning *will become important in defining the spirit of the UNGP*. The first is the notion that corporate governance requires state intervention and guidance. That is, that the corporate responsibility to respect human rights may be made harder or easier bas a function of state willingness to undertake its duty to protect human rights in a comprehensive manner—in this case by aligning corporate law principles to human rights expectations.[182] The second is that corporate response to adverse human rights impacts must be understood as a compliance issue—whether legal or markets driven; but that compliance will vary by context..[183] An aspirational goal looks to parity between financial and human rights reporting.[184] Yet that aspiration does not consider the quite substantial differences between the forms and premises of financial versus human rights reporting (e.g. qualitative versus quantitative; substantial guidance GAAP versus variegated guidance, and the like). The third is the use of soft law frameworks for nudging behaviors.[185]

2.2.2.3. 2011 SRSG Report 17/31 Addendum 3 (Principles for Responsible Contracts).This Addendum offers a toolkit for contracts that enhance the corporate responsibility, especially with respect to preventing and mitigating adverse human rights impacts, and to facilitate the efficiency of the human rights due diligence system

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[173] Ibid., ¶ 160. More than a decade after endorsement, this is precisely the invitation that states have taken up. Most relevant have been the French Loi de Viligence ("Duty of Vigilance of Parent and Instructing Companies" (Law No. 2017-399)), the German Supply Chain Due Diligence Law (Gesetz über die unternehmerischen Sorgfaltspflichten in Lieferketten Vom 16. Juli 2021, Bundesgesetzblatt Jahrgang 2021 Teil I Nr. 46, ausgegeben zu Bonn am 22. Juli 2021 p. 2959 et seq.), and the EU Corporate Sustainability Due Diligence Directive.
[174] 2011 SRSG Report 17/31 Addendum 2 (Human Rights and Corporate Law), ¶ 161.
[175] Ibid., ¶ 162.
[176] Ibid., ¶ 163.
[177] Ibid., ¶¶ 102-204.
[178] Ibid., ¶ 202.
[179] Ibid.
[180] Ibid., ¶ 203.
[181] Ibid., 204.
[182] Ibid., ¶¶ 206-207.
[183] Ibid., ¶ 205.
[184] Ibid., ¶¶ 208-210.
[185] Ibid., ¶ ¶212-214..

adopted by an enterprise. It offers ten principles: (1) project negotiations preparation and planning;[186] (2) management of potential adverse human rights impacts;[187] (3) project operating standards;[188] (4) stabilization clauses;[189] (5) "Additional goods or service provision;"[190] (6) physical security for the project;[191] (7) community engagement;[192] (8) project monitoring and compliance; [193](9) grievance mechanisms for non-contractual harms to third parties;[194] and (10) transparency/Disclosure of contract terms.[195]

The model contract provisions have two primary purposes. The first is to operationalize the positive elements of the business case for avoiding adverse human rights impacts through hardening private law. "States and business investors alike have learned from experience that unaddressed adverse human rights impacts present significant risks for commercial projects, and reduce the potential for such ventures to be a positive benefit to society."[196] The second is to guide the transposition from principle to policy and from policy to action by providing checklists that serve to comprehensively code action required to draft provisions might represent a form of the ideal alignment of principle to ensure proper operation of any UNGP HRDD system.[197] It is with respect to both that "ten principles for integrating the management of human rights risks into contract negotiations" were developed and offered simultaneously with the final text of the overarching principles of the UNGP.[198] Though directed to the production of private law, the "ten principles" also manifest the intertwining of first pillar state duty with second pillar corporate responsibility in construction and operation of systems for the appropriate production of micro-decision making that have the capacity to produce negative human rights impacts.

Each of the principles is divided into three parts. First the statement of the principle itself. That is followed by the "key implications" of the principle addressed to states and business—but not to stakeholders. That in itself appears to be a misalignment with the aspirational text of the companion Report of the SRSG on corporate governance.[199] The "key implications" are then followed by a "recommended checklist" of suggested actions to fulfill the intent and objectives of each principle. Lastly, a brief explanation is offered respecting the manner in which the principle can be built into management systems. These are again addressed to states and business enterprises, but not to stakeholders. The ultimate object is to build the ideal HRDD system. *And in the building of that ideal system the Report reveals the intention of the drafters around the meaning and application of the text of the UNGP.*

What sort of intent does the Report reveal respecting the ideal HRDD system, or at least that portion of the system that is bult on contract relationships? The SRSG might be said to have used this report to read the following overarching principles into HRDD—and state and enterprise duty/responsibility with respect to that system/process.

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[186] 2011 SRSG Report 17/31 Addendum 3 (Principles for Responsible Contracts), ¶¶ 17-20.
[187] Ibid., ¶¶ 21-24.
[188] Ibid., ¶¶ 25-30.
[189] Ibid., ¶¶ 31-39.
[190] Ibid., ¶¶ 40-42.
[191] Ibid., ¶¶ 43-46.
[192] Ibid., ¶¶ 47-51.
[193] Ibid., ¶¶ 52-53.
[194] Ibid., ¶¶ 54-59.
[195] Ibid., ¶¶ 60-64.
[196] Ibid., ¶ 10; generally ¶¶ 8-12.
[197] Ibid., ¶ 14; generally ¶¶ 13-16.
[198] Ibid., p. 7 et seq.
[199] 2011 SRSG Report 17/31 Addendum 2 (Human Rights and Corporate Law).

From principle 1 it is possible to extract an *expectation of knowledge and capacity*.[200] It also might imply a negligence-gross negligence-recklessness and a good faith expectation n the fulfillment of the UNGP especially in the construction and operationalization of HRDD systems.

From principle 2 it might be possible to extract an *expectation of an explicit allocation of risk of adverse human rights impacts*.[201] That allocation might be recognized by state organs through judicial remedial mechanisms enforcing contract and assigning liability.

From principle 3 one might read an *expectation of an explicit hierarchy of choice of law developed between operating partners and states*. Operating standards can be national but must, where possible, privilege international human rights referents.[202] Supplementary external standards require exercise of state duty by home and host states where possible, or mitigation efforts otherwise.

From Principle 4 one might extract an *expectation that contractual stabilization clauses ought to be unenforceable where they conflict with international human rights*. That expectation might be narrowed to those elements of international human rights domesticated within the home or home state legal order.[203]

From principle 5 one might extract an *expectation that all aspects of relations between enterprises respecting the provision of goods or services must be undertaken in a manner compatible with international human rights standards*. The expectation carries with it a sub-expectation that third party beneficiary rules ought to be read narrowly with adverse human rights impacts exceptions in the ideal case. The effect, of course, may be profound for national jurisprudence.[204]

From principle 6 one can extract a general *expectation that responsibility for the adverse human rights impacts of services by third party service providers is borne by the enterprise absent contractual provision that shifts liability (but not responsibility to oversee)*. The focus in the Report is on police and security services; it can apply as easily to the provision of services by any gatekeeper including lawyers and accountants.[205]

From principle 7, one can extract the *expectation that HRDD structures may not be valid in the absence of community engagement that is effective*. Invalid HRDD systems may result in a failure of the system itself with

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[200] 2011 SRSG Report 17/31 Addendum 3 (Principles for Responsible Contracts), ¶ 16, p. 7 ("Principle 1: The parties should be adequately prepared and have the capacity to properly address the human rights implications of projects during negotiations." Ibid., ¶ 16.)
[201] Ibid., ¶ 20, p. 9 ("Principle 2: Responsibilities for the prevention and mitigation of human rights risks associated with the project and its activities should be clarified and agreed before the contract is finalized." Ibid).
[202] Ibid., ¶¶25-30 ("Principle 3: The laws, regulations and standards governing the execution of the project should facilitate the prevention, mitigation and remediation of any negative human rights impacts throughout the life cycle of the project." Ibid., p. 10).
[203] Ibid., ¶¶ 31-39 ("Principle 4: Contractual stabilization clauses, if used, should be carefully drafted so that any protections for investors against future changes in law do not interfere with the State's bona fide efforts to implement laws, regulations or policies, in a non-discriminatory manner, in order to meet its human rights obligations." Ibid., p. 12).
[204] Ibid., ¶¶ 40-42 ("Principle 5: Where the contract envisages that investors will provide additional services beyond the scope of the project, this should be carried out in a manner compatible with the State's human rights obligations and the investor's human rights responsibilities." Ibid., p. 15).
[205] Ibid., ¶¶ 43-46 ("Principle 6: Physical security for the project's facilities, installations or personnel should be provided in a manner consistent with human rights principles and standards." Ibid., p. 15).

consequent effects on the allocation of liability. It might void contract provisions grounded on the presumption of HRDD validity.[206]

From principle 8 one might extract an *expectation that HRDD systems must be treated as part of a system of public compliance monitoring; but that compliance monitoring obligations may be a function of state guarantees against arbitrary interference*. Conflating the two principle—compliance and investment protection—appears to serve as the "deal" on which the relationship between state duty and corporate responsibility may be implemented. It also suggests that each may be dependent on the other; certainly as a matter of policy, perhaps as a matter of law where these are written into contract.[207]

Principle 9 suggests the *expectation that the principle of third party beneficiaries does not extend to impacted individuals and communities*. That principle is highly aspirational in many jurisdictions. Yet that aspirational objective suggests the intent of the SRSG to have the UNGP read in ways that facilitates change in law and practice—even fundamental change in both—that produces movement toward the desired ideal.[208]

Lastly, from principle 10 one might extract an *expectation of broad disclosure with narrow exceptions*. The ideal is for a convergence of private and public law transparency. Here the fundamental intention—which might leak into other UNGP text, is that private and public conduct must be adjudged by converging standards expectations. Both are, in effect, acts with public consequences (the very heart of the premise of corporate responsibility for adverse human rights impacts extending outward to communities through product life cycles).[209]

2.2.3. The 2011 SRSG Report 17/32 Conflict Regions.

The 2011 SGSG Report 17/32 Conflict Regions reported on the SRSG's mandate directed effort to "generate practical and innovative ideas and policy proposals to support business respect for human rights in conflict-affected areas and to help ensure that business enterprises operating in those contexts are not involved with abuses."[210] To those ends three workshops were organized, the results of which provided most of the content of this report. The workshops were described as brainstorming sessions built around scenarios.[211] The object was not to manage a consensus but to contribute to a "policy discussion that the Special Representative could draw upon in making his own recommendations contained in the present report."[212]

The premise for the report is that "Responsible businesses increasingly seek guidance from States on how to avoid contributing to human rights harm in these difficult contexts."[213] That premise, in turn, was directly related to guidance for the interpretation and application of UNGP Principle 7 (Supporting business respect for human rights in Conflict-affected areas). The idea appeared to be that, by offering the thoughts of a group of

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[206] Ibid., ¶¶ 47-51 ("Principle 7: The project should have an effective community engagement plan through its life-cycle, starting at the earliest stages of the project." Ibid., p. 18).
[207] Ibid., ¶¶ 52-53 ("Principle 8: The State should be able to monitor the project's compliance with relevant standards to protect human rights, while providing necessary assurances for business investors against arbitrary interference in the project." Ibid., p. 20).
[208] Ibid., ¶¶54-59 ("Principle 9: Individuals and communities that are impacted by project activities, but not party to the contract, should have access to an effective non-judicial grievance mechanism." Ibid., p. 21).
[209] Ibid., ¶¶ 60-64 ("Principle 10: The contract's terms should be disclosed, and the scope and duration of exceptions to such disclosure should be based on compelling justifications." Ibid., p. 23); see also ibid., note 21..
[210] 2011 SGSG Report 17/32 Conflict Regions, ¶ 2.
[211] Ibid., ¶ 3.
[212] Ibid., ¶ 4.
[213] Ibid. ¶ 11.

leading states ("a small but representative group of States"),[214] it would be possible to influence approaches to interpretation or practice by establishing the framework of the narratives within which both interpretation and application might be molded.[215] It followed the principled pragmatism pattern of consultation established early in the mandate of the SRSG around which the mechanics of consultation were shaped.[216]

The context was provided for discussion: conflict situations produce difficult human rights related situations;[217] it is necessary to intervene early to fulfill the prevent-mitigate-remedy principle;[218] it is assumed that in such situations the home State has effectively ceased to have effective capacity to fulfill its duty to protect; [219] in that context it is for host states (and their MNEs) to step in. [220] International organizations have developed initiatives to provide guidance; [221] these initiatives tend to focus on private actors. [222] The role of States in effectively projecting their political authority into a conflict zone within the sovereign space of another State, therefore, requires some attention. [223] The object of all of this is to deploy Pillar 1 State duty to enhance the ability of enterprises to meet their Pillar 2 responsibility to respect. [224] T is the corporate responsibility that is centered; State duty plays a complementary role, though one at the edges of State sovereign authority.

The Report distinguishes between so-called "cooperative enterprises," [225] and the so-called "uncooperative enterprises." [226] It ends with a series of conclusions that touch on the appropriate operationalization of the UNGP.[227] For cooperative enterprises the State may utilize UNGP 7 first to warn business of heightened risk,[228] and convey expectations of behavior, the latter an aspirational reading of UNGP 7.[229] To those ends, the standards of international law and norms ought to serve as a guide and foundation; an implication that might be read into that insight would be that international law and norms would constrain the development of State expectations, whether or not a State had acceded to a particular norm of treaty.[230] That is reinforced by discussion of the assessment and addressing harm obligation, with respect to which States would be

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[214] Ibid., ¶ 2.
[215] The structure and objective was not unique to the SRSG's work. As an example, the structure had served as a basis for important reforms established in the wake of the 2007 financial crisis around the Financial Stability Board and its functionally differentiated colleges. See, e.g., Larry Catá Backer , 'Private Actors and Public Governance Beyond the State: The Multinational Corporation, the Financial Stability Board, and the Global Governance Order,' (2011) 18(2) *Indiana Journal of Global Legal Studies* 751-802 ("Transnational soft law developed within the FSB framework becomes a gateway to hard law that is crammed down on nonparticipating jurisdictions through the application of pressure from the G-20 member states." Ibid., p. 788).
[216] Discussed infra, Chapter 3.
[217] 2011 SGSG Report 17/32 Conflict Regions, ¶ 5.
[218] Ibid., ¶¶ 6, 10.
[219] Ibid.
[220] Ibid.
[221] Ibid., ¶ 7.
[222] Ibid., ¶ 8.
[223] Ibid.
[224] Ibid., ¶ 9.
[225] Ibid., ¶¶ 12-16.
[226] Ibid., ¶¶ 17-18.
[227] Ibid., ¶¶ 19-21.
[228] Ibid., ¶ 12 (at least to the extent that it does not pose a risk to national security and perhaps national interests.
[229] Ibid.(noting that expectations are being developed in the fields of corruption.
[230] Ibid., ¶ 13.

expected to utilize international law and norms;[231] though it also gives rise to an expectation that State duty imposes an obligation to build capacity within their administrative apparatus.[232]

For the uncooperative enterprises, the Report offers what it calls "additional measures."[233] These include embassy investigations in host States; media statements; appointment of missions to investigate (one assumes where necessary with the consent of the host state); seeking aid from neighboring States whose interest align and that may be willing; ghosting the uncooperative enterprise by withdrawing consular or business development support; and some form of State shunning by excluding them from the universe of enterprises that might participate in procurement and aid programs.[234] When the uncooperative behaviors are deemed extreme enough, States are invited to develop legalities of civil fines and criminal penalties, sanctions programs, seizures, asset freezes, and the commencement of investigation by international bodies.[235] Here the parallel between action against private firms and the emerging systems of sanctions against rogue state behaviors—for example against the Russian Federation in the wake of the 2022 invasion of Ukraine,--appears to be quite strong.[236] And, indeed, it is that *mimicry of expectation between private enterprise and State organs that suggests the impulse, embedded in the UNGP to align behavior expectations between the two*. Among the conclusion was the suggestion that multilateral agreement would enhance fulfillment of State expectations with respect to conflict affected regions;[237] effectively, and without direct reference to the UNGP, the Report suggested that what became endorsed as UNGP Principle 7 would be enhanced by complementary invocation of UNGP Principle 10.

2.2.4. The 2010 SRSG Draft Report UNGP

Where the 2011 SRSG Report focused on historical context, process, and the critical application of an inductive process to develop a structural platform within which it is possible to develop practices for the management of the adverse impacts of economic activity on human rights, the focus of the 2010 SRSG Draft Report UNGP was substance—and more particularly on the substantive principles within which private sector activities, driven by individuals and economic collectives can operate in the shadow of a responsibility to respect human rights. For purposes of interpretation, one must be able to read the UNGP text (and extract the principles around which the spirit of the UNGP are manifested) against its history and principled methodology, and also against the normative substance around which the principles are drafted.

Paragraph 1 of the 2010 SRSG Draft Report UNGP starts by guiding textual reading of the UNGP around and through the prism of its critical element-- economic activity; not a particular form that business can take, such as a corporation, partnership, conglomerate, joint venture, value or supply chain, or the like—but business

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[231] Ibid., ¶ 14.
[232] Ibid., ¶ ¶ 15-16.
[233] Ibid., ¶ 17.
[234] Ibid.
[235] Ibid., 18.
[236] Considered within the context of the UNGP in Larry Catá Backer, The Russian Invasion of Ukraine and Business: Responsibility, Complicity and the Responsibility to Respect Human Rights Under the UN Guiding Principles for Business and Human Rights, Law at the End of the Day (26 February 2022); available [https://lcbackerblog.blogspot.com/2022/02/the-russian-invasioon-of-ukraine-and.html], last accessed March 30, 2024.
[237] 2011 SGSG Report 17/32 Conflict Regions, ¶ 21.

understood as a complex nexus of economics, law and politics.[238] Both the state and civil society are decentered—the state is centered upward as the framing element of spaces within which private economic activity occurs; civil society is re-centered as outside mediating agents within and between public and private spaces. That nexus is posited as having been at some sort of reasonable equilibrium in which the roles of the state and of non-state actors were aligned. But the last several decades have "witnessed growing institutional misalignments, from local levels to the global, between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences."[239] At the heart of this misalignment is the corporation, which has evolved to embody "complex forms that challenge conventional understanding and policy designs."[240] These changes have affected all regions and states; they have effectively shattered the old status quo.[241] Change is not merely expedient; change is necessary to restore the alignment between the economic, policy, political, and social forces represented by business and those represented by the state.

This opening paragraph nicely sets the stage for the elaboration of both the theory and praxis that is to follow. Its purpose is specific—to focus on the problem of the governance of private aggregations of economic power. The logic of this construct is straightforward. Economic, political, and communal spheres operate best when they exist in a stable system in which each contributes to the social fabric and each is bound by a set of obligations that ensure the stability of the system and the likelihood that it will work towards maximizing the ability of this construct to contribute to the welfare of people and the stability of the state. But the logic of globalization[242] has changed the traditional alignment of these three communities. Though the SRSG focuses on the misalignment caused by the evolution of corporate power,[243] misalignment also has roots in the evolution of state and communal power. For example, regimes of free movements of capital, goods, and services has substantially altered the relationship between states and corporations, but has also changed the relationship of states with their populations and with other states as well. The burgeoning network of agreements among states has substantially altered the relationship between states and greatly augmented the institutional character and regulatory power of the community of states through increasingly effective international organizations, both public and private in character. The decentralization of power has substantially increased the number and character of stakeholders in global society.[244]

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[238] "Business is the major source of investment and job creation, and markets can be highly efficient means for allocating scarce resources, capable of generating economic growth, reducing poverty, and increasing demand for the rule of law, thereby contributing to the realization of a broad spectrum of human rights. "2010 SRSSG Draft Report UNGP, ¶1.

[239] Ibid.

[240] Ibid. The state, of course, also had evolved in an extraordinary way, becoming less stridently autonomous and more enmeshed in a growing web of supra national relationships and international consensus norms (both embodied in international hard and soft law) that have challenged the conventional notion of the state, sovereignty, democratic accountability, and law. *See, e.g.*, R.J. Barry Jones, *Globalisation and Interdependence in the International Political Economy: Rhetoric and Reality*, 47-54 (1995); Oscar Schachter, *The Decline of the Nation-State and Its Implications for International Law*, (1997) 36 *Colum. J. Transnat'l L.* 7; José E. Alvarez, *Why Nations Behave*, (1998) 19 Mich. J. Int'l L. 303; Anne-Marie Slaughter, 'Governing the Global Economy Through Government Networks,' in David Held & Anthony McGrew (eds *The Global Transformations Reader: An Introduction to the Globalization Debate* 189 (2nd ed., 2000).

[241] 2011 SRSG Report, ¶ 1.

[242] On globalization, *see generally, e.g.*, Manfred B. Steger, Globalism: The New Market Ideology (2002); the classic rendering is Thomas L. Friedman, *The Lexus and the Olive Tree (2000); and the classic critique is Joseph E. Stiglitz, Globalization and Its Discontents* (Anchor Books, 2002); the classic counter is Joseph Stiglitz, *Globalization and its Discontents* (Penguin, 2002).

[243] 2010 SRSG Draft Report UNGP, ¶ 1.

[244] "We are beginning to abandon the hierarchies that worked well in the centralized, industrial era. In their place, we are substituting the network model of organization and communication, which has its roots in the natural, egalitarian, and

But the SRSG does not mean to set the world right. His object is more modest in scope, though not in aim. The sort of "epochal changes"[245] produced by the misalignments within the state and private sectors, and between the local, national and global have destabilized traditional "expectations about the respect roles of government and business."[246] That has to be set right to mend the now less predictable broader social fabric before it comes "unraveled altogether."[247] This unraveling has significant impacts on the human rights effects of economic activity.[248] It is to help correct the imbalance that the SRSG undertook his mandate. And the response appeared straightforward as a function of the nature of the misalignments—to put human rights back into the equation of economic activity. That required initially an undertaking "to map the challenges and recommend effective means to address them."[249] But it also required a straightforward conceptual fundamental operational premise: "idea of human rights is as simple as it is powerful: treating people with dignity."[250] And operationalizing that basic concept required a strategy. And it is here that the door opens to transformation from within the current system:

> A successful strategy must identify the ways whereby all relevant actors can and must learn to do many things differently. This requires operational and cultural changes in and among governments as well as business enterprises—to create more effective combinations of existing competencies as well as devising new ones. The aim must be to shift from institutional misalignments onto a socially sustainable path.[251]

The SRSG thus moves from the description of the problem—misalignment—to the consequences of its resolution. And that resolution is bound up in pathways that take critical actors (States, and enterprises), from the current framework of legal obligations and market gaps to something transformational. This is a journey that has just started.[252]

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spontaneous formation of groups among like-minded people." John Naisbitt, *Megatrends: Ten New Directions Transforming Our Lives* 281 (Warner Books, 1982). "Naisbitt liked to say: "Trends, like horses, are easier to ride in the direction they are going." Robert B. Tucker, 'What John Naisbitt Taught Me about the Future,' Forbes (20 September 2021); available [https://www.forbes.com/sites/robertbtucker/2021/09/20/what-john-naisbitt-taught-me-about-the-future/?sh=382aa0d115fb], las accessed 20 February 2024.

[245] 2010 SRSG Draft Report UNGP ¶1.

[246] Ibid.

[247] Ibid.

[248] Ibid., ¶ 2. The SRSG explains:

> Institutional misalignments create the permissive environment within which blameworthy acts by business enterprises may occur, inadvertently or intentionally, without adequate sanctioning or reparation. The worst corporate-related human rights abuses, including acts that amount to international crimes, take place in areas affected by conflict, or where governments otherwise lack the capacity or will to govern in the public interest. But companies can impact adversely just about all internationally recognized human rights, and in virtually all types of operational contexts. (Ibid.).

[249] Ibid.

[250] Ibid., ¶ 3.

[251] Ibid., ¶ 3.

[252] Ibid., ¶ 6.

That transformation has a topography—the embedding of human rights in economic activity must follow a "socially sustainable path."[253] And it has a new name: "socially sustainable globalization."[254] And socially sustainable globalization—the transformative path—must have both a pathway, and a starting place. It points to a new policy domain which "differs significantly from the traditional human rights agenda,"[255] for States or for business."[256] The starting place is built into the web of current legal obligations of States, and the political and economic climate in which business operates. "States are under competing pressures when it comes to business, not only because of corporate influence but also because so many other legitimate policy demands come into play. . . absent any internationally-recognized hierarchy of treaty obligations, States are unlikely to place every single human right they have recognized above their legal obligations in those other area."[257] Business is bound up in an incentive driven system grounded in compliance on one side and the effects and objectives of non-human rights driven law.[258] The result is that the issue of business and human rights is bound up with the issue of states and human rights—companies may be complicit in the legal system based human rights violations of states, and states may be involved in the human rights violations of companies.[259] The two distinct governance areas are thus intimately connected, yet each is also subject to governance regimes that, though overlapping, are not the same. In addition, both law-state and corporate social-norm systems are intertwined with networks of regulation at the international level. Finally, the human rights obligations of states, corporations and international organizations are bound up in larger webs of legal and social norm constraints.[260]

For the SRSG, then, the problem of misalignment is the expression of a macro issue that is supported in some measure by the underling structural incapacities of states: "State practices exhibit substantial legal and policy incoherence and gaps."[261] Policy incoherence is the outward expression of institutional incapacity in the face of changing circumstances.[262] At the international level, incoherence is evidenced by the disordered state of territorial limits of state action.[263] Extraterritoriality is at once valued both for its ordering effect on behavior

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[253] Ibid. The idea is that the "Protect, Respect, and Remedy" Framework itself provided the path the forward projection of which would be manifested in the smart mix of regulation.
[254] UNGP, General Principles.
[255] 2010 SRSG Draft Report UNGP, ¶ 4.
[256] Ibid..
[257] Ibid., ¶ 5.
[258] Ibid.
[259] The interrelationship has been made explicit in the ethics based determinations of the Ethics Council of the Norwegian Sovereign Wealth Fund. *See, e.g.*, Larry Catá Backer, Part I: Developing a Coherent Transnational Jurisprudence of Ethical Investing: The Norwegian Sovereign Wealth Fund Ethics Council Model, Law at the End of the Day (1 February 2011), available [http://lcbackerblog.blogspot.com/2011/02/this-blog-essay-site-devotes-every.html], last accessed 24 February 2024.
[260] 2010 SRSG Draft Report UNGP, ¶ 5.
[261] Ibid.., ¶ 6.
[262] The 2010 SRSG Draft Report UNGP cautioned against the failures of regulatory coherence between legal fields, and especially between those that shape business practices, "in such areas as corporate law and securities regulation, investment promotion and protection, and commercial policy" which tend to be isolated from and are "uninformed by, and at times undermine the effectiveness of their Government's own human rights obligations and agencies." Ibid.
[263] Ibid., ¶ 7 ("States have chosen to act only in exceptional cases, and unevenly. This is in contrast to the approaches adopted in other areas related to business, such as anti-corruption, money-laundering, some environmental regimes, and child sex tourism, many of which are today the subject of multilateral agreements." Ibid.).

across borders, and encouraged as a means of controlling the activity of business.[264] But it is also reviled as a means of projecting power from dominating to subordinated states.[265] The SRSG suggests a very narrow form of extraterritoriality—the power of the home state to assert regulatory authority over its citizens or the entities it has chartered.[266] The SRSG avoids the more aggressive versions of extraterritoriality and suggests, a superior alternative model: the substitution of inter-state consensus standards for projections of state power abroad.[267] And indeed, one can understand both the need for extraterritoriality as a tool and its solution, as there exists powerful evidence of the consequences of misalignment and the way it produces incentives to extend the subordination of smaller states by larger ones in the form of extraterritoriality. Misalignment is also the expression of a macro issue that is supported, in some measure, by the underlying structural incapacities of companies.[268] Thus, misalignment and incoherence involve not merely adjustments between public and private governance, but also among states and within the legal ordering of the community of states.

Having identified the scope and character of the problem, the SRSG theorizes a solution and posits a suggested approach to implementation. The Report asserted the proposition that one major reason that past public and private approaches have fallen short of the mark has been the lack of an authoritative focal point around which the expectations and actions of relevant stakeholders could converge. Therefore, when the SRSG was asked to submit recommendations to the Human Rights Council in 2008 he made only one: that the Council endorse the 'Protect, Respect and Remedy' Framework he had proposed, following three years of extensive research and inclusive consultations on every continent,[269] which is then described.[270] The value of the "Protect, Respect and Remedy" Framework as a remedy for the regulatory misalignments that served as a part of the genesis of the project leading to the UGP is then examined. That examination suggests the interweaving of the three pillars as the essential element in creating alignments and bridging regulatory gaps—both as to form and function, with each pillar serving as "an essential component in supporting what is intended to be a dynamic system of preventative

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264 "This enables a 'home' State to avoid being associated with possible overseas corporate abuse. It can also provide much-needed support to 'host' States that may lack the capacity to implement fully effective regulatory regimes on their own." *Ibid.* at para. 8." Ibid。， ¶8.

265 For a discussion on extraterritoriality and neo-colonialism, *see, e.g.*, Kal Raustiala, *Does the Constitution Follow the Flag?: The Evolution of Territoriality in American Law* 6-7 (OUP, 2009); Richard Falk, *Predatory Globalization: A Critique* 35-47 (Polity Press, 1999).

266 Special Representative of the United Nations Secretary-General for Business & Human Rights, *Online Forum*, cmt. John H. Knox 9 (Jan. 17, 2011), http://www.business-humanrights.org/media/documents/ruggie/online-forum-re-guiding-principles-nov-2010-to-jan-2011.pdf (Draft Guiding Principles (GPs) for Implementation of the U.N. "Protect, Respect and Remedy" Framework Online Consultation.).

267 2010 SRSG Draft Report UNGP ¶¶ 10-11.

268 Ibid., ¶ 9 (Business consultancies and corporate law firms are establishing practices to advise clients on the requirements not only of their legal, but also their social, license to operate. . . However, these developments have not acquired sufficient scale to reach a tipping point of truly shifting markets.").

269 Ibid., ¶ 10.

270 Ibid., ¶ 11.

and remedial measures.[271] The breadth of its influence also suggests its utility,[272] even before it has been operationalized.[273]

If the "Protect, Respect and Remedy" Framework provides the theoretical "authoritative focal point around which the expectations and actions of relevant stakeholders could converge"[274] then the Guiding Principles provide the operational focal point for the project. "The Guiding Principles that follow constitute the next step, providing the 'concrete and practical recommendations' for the Framework's implementation requested by the Council."[275] The nature of the Guiding Principles' contribution to the resolution of the problem that gave rise to the SRSG's project is complex and subtle. The Guiding Principles contribute to the "operational and cultural changes in and among governments as well as business enterprises—to create more effective combinations of existing competencies as well as devising new ones"[276] not by changing contemporary legal and social norm structures, but by providing a new organization for them. That organization is grounded in elaboration of existing practices and standards, their integration within a single framework, and the identification of areas that require further development[277]—marking the UNGP's normative contribution as "the end of the beginning."[278] But at the same time, the operationalization proposed (in the form of the Guiding Principles) is not meant to be what the SRSG described as a mere "tool kit, simply to be taken off the shelf and plugged in."[279]

And so the 2010 SRSG Draft Report UNGP ends where it started—mindful of the difficulties of theorizing and implementing a single coherent and comprehensive framework that "will reflect the fact that we live in a world of 192 United Nations Member States, 80,000 transnational enterprises, ten times as many subsidiaries and countless millions of national firms, most of which are small and medium-sized enterprises."[280] The Draft Principles reflect these points of convergence, autonomy, polycentricity, and flexibility both within the governance frameworks of each of the components of the system articulated, and within the proposed framework itself.

The space between the 2010 SRSG Draft Report UNGP and its revised version submitted as the 2011 SRSG Report, which served as the basis on which UNHRC endorsement was secured, is now clearly visible. Clear as well is the value of reading the 2011 SRSG Report in the shadow of the 2010 SRSG Draft Report UNGP. The former focused almost entirely on framing issues—historical justification, the embrace and practice of generative inductive analytics as the basis both for the development of the UNGP and the adoption of a principle of constant

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[271] Ibid. ("the State duty to protect because it lies at the very core of the international human rights regime; an independent corporate responsibility to respect because it is the basic expectation society has of business in relation to human rights; and access to remedy because even the most concerted efforts cannot prevent all abuse").
[272] The Framework has "become a common foundation on which thinking and action by stakeholders can build over time. Thus, the Framework has already influenced policy development by Governments and international institutions, business policies and practices, as well as the analytical and advocacy work of trade unions and civil society organizations." Ibid., ¶ 12.
[273] In the context of which the SRSG's work carries forward the essential elements of its mandate extended in 2008. "In resolution 8/7 (June 2008), the Council was unanimous in welcoming this policy Framework, and in extending the Special Representative's mandate to 2011 in order for him to 'operationalize' and 'promote' it." Ibid.
[274] Ibid., ¶ 10.
[275] Ibid., ¶ 12.
[276] Ibid., ¶ 3.
[277] Ibid., ¶ 13 ("elaborating the implications of existing standards and practices for States and businesses; integrating them within a single, coherent and comprehensive template; and identifying where the current regime falls short and how it should be improved.")
[278] Ibid., ¶ 13, a turn of phrase that survived virtually intact as ¶ 13 of the 2011 SRSG Report.
[279] Ibid., ¶ 14, the textual language of which also survived to find its way into the 2011 SRSG Report at ¶ 14.
[280] Ibid.

evolution. almost purely framing objective. The 2010 SRSG Draft Report UNGP gave a fuller description of the normative framing within which it was possible to discuss the historical context and the methodologies constructed around these normative foundations—the socially sustainable path. With that in mind it might eb possible to extract a little different set of meanings from the sixteen paragraphs of the 2011 SRSG Report.

The 2011 SRSG Report provides the most well developed synthesis and exposition of the business and human rights project begun by the Special Representative in 2005.[281] The first three paragraphs of the Introduction set the stage by suggesting the historical inevitability of the Guiding Principles. Paragraph 1 suggests the inevitability of the project, arising from a fundamental evolution of global society within which the "issue of business and human rights became permanently implanted on the global policy agenda in the 1990s, reflecting the dramatic worldwide expansion of the private sector at the time, coupled with a corresponding rise in transnational economic activity."[282]

Paragraphs 2-3 are particularly important for distinguishing the Guiding Principles project from more aggressive earlier efforts,[283] and to confine them to a governance space that would not threaten any of the principal stakeholders, particularly states with respect to which the earlier efforts "evoked a deeply divisive debate."[284] This is important for setting the political context in which the Guiding Principles are framed—that they do not extend law or impose additional obligations on states or recognize a new status for non-state actors. The Special Representative stresses this point.[285] The Introduction itself is then presented as the final product of the alternative process *successfully initiated* built on and avoiding the failure of the Norms process.[286]

The next set of paragraphs then recount the process from concept to principle. Paragraphs 4 and 5 provide a distilled summary of the first two phases of the process that produced,[287] and by the method of its production, legitimated, the "Protect, Respect and Remedy" Framework on which the Guiding Principles are based.[288] Paragraph 4 is also important for its suggestion of the necessity of institutionalization of the Guiding Principles project—the informational (and legitimating) basis of the project is founded on knowledge of existing standards and practices "that has continued to the present"—the essence of the inductive process that make the UNGP more authoritative.[289] The fruits of the second phase of the Project—"that the Council support the 'Protect,

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[281] 2011 SRSG Report ¶ 3.
[282] Ibid.
[283] Ibid., ¶ 2.
[284] Ibid., ¶ 3.
[285] Ibid., ¶ 14; compare with the statement in the 2010 SRSG Draft Report UNGP ¶ 13.
[286] Ibid., ¶ 3.
[287] The SRSG explained that Phase one identified and clarified the mission. Ibid., ¶ 4. Phase two produced the recommendations of the structures on which the text of the UNGP were developed. Ibid., ¶ 5. Phase three then operationalized the framework through the text of the UNGP presented to the UNHRC. Ibid., ¶ 9.
[288] The dialectics of historical data driven process is offered as a substitute for" the more deductive normative justifications on which the first paragraphs of the 2010 SRS Draft Report UNGP were built. "It has provided a broader and more solid factual basis for the ongoing business and human rights discourse, and is reflected in the Guiding Principles annexed to this report." 2011 SRSG Report ¶ 4.
[289] Ibid. The 2011 SRSG Report identifies the modalities of that data driven inductive Project—"mapping patterns of alleged human rights abuses by business enterprises; evolving standards of international human rights law and international criminal law; emerging practices by States and companies; commentaries of United Nations treaty bodies on State obligations concerning business-related human rights abuses; the impact of investment agreements and corporate law and securities regulation on both States' and enterprises' human rights policies; and related subject." Ibid. These were elaborated in the supporting annexes to the Report and identified first in the SRSG travaux préparetoires discussed in Chapter 3, infra.

Respect and Remedy' Framework [the Special Representative] had developed following three years of research and consultations"[290]—was described in Paragraph 6.[291] Paragraph 6 sketches the three pillar framework in broad strokes. It provides a very generalized sense of the fundamental characteristics of the three pillar framework—grounded in two distinct but interlinked sources of obligation that are tied by the joint obligation to remedy breaches of obligation.

Paragraph 7 returns to the issue of legitimization. It describes the breadth of formal acceptance of the framework by critical stakeholders in the public, non-governmental, and business sectors.[292] It suggests functional acceptance by international organizations that have drawn on the "Protect, Respect and Remedy" Framework "in developing their own initiatives in the business and human rights domain."[293] Paragraph 8 expands on the legitimization theme by cataloguing "the large number and inclusive character of stakeholder consultations convened by and for the mandate [that] no doubt have contributed to its widespread positive reception."[294] The object, of course, is to emphasize both substantive legitimacy—grounded in facts—and process legitimacy, derived from the adherence to generally accepted methods of stakeholder consultation as a substitute for the conventional processes of democratic governance in states.[295] Stake holding legitimates action the way mass popular movements legitimate changes in government sometimes, in their active and representative capacities, who come "to constitute a global movement of sorts in support of a successful mandate."[296]

This legitimating acceptance led to phase three of the project—operationalizing the three pillar framework, "to provide concrete and practical recommendations for its implementation."[297] Those concrete and practical recommendations were to take the form of guiding principles.[298] These Guiding Principles were reinforced by (and reinforced) the approach taken to produce the "Protect, Respect and Remedy" Framework upon which the Guiding Principles are based.[299] As such, the Guiding Principles are grounded in the same sort of principled pragmatism that marked the development of the three-pillar framework, including the "road testing" of particular guidelines[300] and extensive consultations on the wording of the text. [301] "In short, the Guiding Principles aim not only to provide guidance that is practical, but also guidance informed by actual practice."[302]

And what result? The Special Representative suggested the principal objective of these efforts: to establish "a common global platform for action, on which cumulative progress can be built, step-by-step, without

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[290] Ibid., ¶ 5 noting the UNHRC unanimous "welcoming" of the three pillar framework in 2008.
[291] Ibid., ¶ 6.
[292] Ibid., ¶ 7.
[293] Ibid.
[294] Ibid., ¶ 8.
[295] *See, e.g.*, Caroline Bradley, 'Consultation and Legitimacy in Transnational Standard-Setting,' (2011) 20 *Minnesota Journal of International Law* 480 (2011).
[296] 2011 SRSG Report ¶ 16.
[297] Ibid., ¶ 9.
[298] Ibid. ("During the interactive dialogue at the Council's June 2010 session, delegations agreed that the recommendations should take the form of 'Guiding Principles' ; these are annexed to this report.").
[299] Ibid., ¶ 10 (the UNGP "are informed by extensive discussions with all stakeholder groups, including Governments, business enterprises and associations, individuals and communities directly affected by the activities of enterprises in various parts of the world, civil society, and experts in the many areas of law and policy").
[300] Ibid., ¶ 11.
[301] Ibid., ¶ 12.
[302] Ibid., ¶ 11.

foreclosing any other promising longer-term developments."[303] The Introduction ends with a description of the Guiding Principles defining its scope and purpose by what the Guiding Principles are not, focusing on two characteristics in particular. The first has already been mentioned—the Guiding Principles are not a normatively positive project; their object is merely to integrate or to repackage the cluster of legal and social norms that already binds states and corporations (at least as these touch on issues of human rights), "within a single, logically coherent and comprehensive template; and identifying where the current regime falls short and how it should be improved."[304] Second, the fact that the Guiding Principles do not mean to create new legal obligations does not mean that it is no more than a more efficient codex; "the Guiding Principles are not intended as a tool kit, simply to be taken off the shelf and plugged in."[305] There is a certain amount of art involved in the application of the Guiding Principles, precisely because it involves the interactions of legal and social norms, of states and corporations, of national and international norms, and of rights and remedies within and beyond the law of states.[306] Neither normative system nor mere toolbox, then, the Guiding Principles are offered as "universally applicable and yet practical. . . [doctrines] on the effective prevention of, and remedy for, business-related human rights harm."[307] Nonetheless, in the process, the UNGP were understood, from the beginning to be (1) porous—inviting collateral efforts; (2) polycentric—insisting that the three pillar framework was more than cosmetic and reflected distinctive regulatory and operational forces that required coordination; and (3) inductively iterative—positing a data driven collaboration toward the realization of the singular core objective of the UNGP project: to correct the misalignments "between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequence"[308] the normative basis of which is defined by and as human rights.[309] To that end the UNGP were developed to "to achieve tangible results for affected individuals and communities, and thereby also contributing to a socially sustainable globalization."[310]

2.3 The UNGP Definitive Text: A Wholistic Summary

The object of this section is to provide a brief narrative summary description of the text of the UNGP. While there will be considerable attention paid to the text of each of its principles, it is important to consider the whole of the principles together in one place. That exercise aligns with the UNGP's instruction that it be "understood as a coherent whole and should be read, individually and collectively, in terms of their objective of enhancing standards and practices."[311]

The UNGP text is divided into three sections or "Pillars" preceded by an unnumbered section entitled "General Principles." The three sections parallel the three Pillar structure of the UNGPs framework announced in 2008 plus its overarching Chapeau (general principles; state duty to protect; corporate responsibility to respect;

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[303] Ibid., ¶ 13.
[304] Ibid., ¶ 14.
[305] Ibid., ¶ 15.
[306] Ibid., ¶ 14 "While the Principles themselves are universally applicable, the means by which they are realized will reflect the fact that we live in a world of 192 United Nations Member States, 80,000 transnational enterprises, 10 times as many subsidiaries and countless millions of national firms, most of which are small and medium-sized enterprises." Ibid.).
[307] Ibid., ¶ 16. This is a phrase that carried over from the 2010 SRSG Draft Report UNGP ¶ 15.
[308] 2010 SRSG Draft Report UNGP, ¶ 1.
[309] United Nations Commission on Human Rights, Human Rights Resolution: 2005/69, E/CN.4/RES/2005/69 (20 April 2005); available [https://ap.ohchr.org/documents/E/CHR/resolutions/E-CN_4-RES-2005-69.doc], last accessed 1 March 2024 [HRC Resolution 2005/69].
[310] UNGP, General Principles.
[311] UNGP, General Principles.

and access to remedy). Each of the substantive sections of the UNGP (state duty, corporate responsibility, and remedial rights) are divided into two broad sections: foundational principles and operational principles. These may then be further sub-divided. The broad division—foundations and operations, reflects both the working style of the SRSG's work leading to the development of the UNGP and also the core inductive iterative premise on which they were conceived. Each section, then, is meant to operationalize an internal dialectic in which foundation principles affect the operational principles, and that effect on operational principles then affects foundational principles—and so on

The General Principles of the UNGP are meant to provide the framework within which the substantive provisions of the UNGP ought to be read.[312] The first section, the state duty to protect human rights, is set out in ten principles (UNGP Principles 1-10).[313] Those ten principles, in turn is sub-divided among the state duty foundational principles (UNGP Principles 1-2), and the state duty's operational principles (UNGP Principles 3-10). These operational principles are then divided among general state regulatory and policy functions (UNGP Principle 3); the state-business nexus (UNGP Principles 4-6); conflict affected area rules (UNGP Principle 7); and the provisions on policy coherence (UNGP Principles 8-10).

The second section, the corporate responsibility to respect human rights consists of fourteen principles (UNGP Principles 1-24).[314] Again, following the structure of the state duty, the corporate respect for human rights is divided among foundational principles (UNGP Principles 11-15); and operational principles (UNGP Principles 16-24). The operational principles are themselves are further divided among principles on policy commitments (UNGP Principle 16); Human right due diligence (UNGP principles 17-21); remediation (UNGP Principle 22); and issues of context in responding to human rights risks (UNGP Principles 23-24).

The third section, access to remedy consists of seven principles (UNGP Principles 25-31).[315] Again, the remedies principles are divided among foundational principles (UNGP Principle 25); and operational principles (UNGP Principles 26-31). The operational principles are subdivided into state based judicial remedies (UNGP Principle 26); state based non-judicia remedies (UNGP Principle 27); non-state based grievance mechanisms (UNGP Principles 28-30); and effectiveness criteria principles (UNGP Principle 31).

2.3.1 General Principles

The UNGP General Principles are meant to guide the interpretation and application of the principles that follow. To that end, several key interpretive guardrails were specified. It also serves to situate those principles within the "protect, respect, and remedy" Framework which was the basis on which the UNGP were to be structured. To that end, the General Principles sought to crystalize the essence of the Three Pillar framework. Unlike the other UNGP Principles, the General Principles do not include an official Commentary.

The General Principles first recognizes that the UNGP are "grounded in recognition of" the states' existing obligations to respect, protect and fulfill human rights. It then recognizes the role of business as specialized organs of society performing specialized functions with respect to which a broad scope of compliance is expected. Lastly it recognizes the fundamental principle of aligning rights and obligations with remedies.

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[312] For the commentary on the UNGP General Principles, see Chapter 6, infra.
[313] For the commentary on the UNGP ¶¶ 1-10, see Chapter 7, infra.
[314] For the commentary on the UNGP ¶¶ 11-24, se Chapter 8, infra.
[315] For the commentary on the UNGP ¶¶ 25-31, see Chapter 9, infra.

The General Principles then set out four key interpretive premises. *The first* touches on applicability of the UNGP. The principles apply to all States and all business enterprises. They do not directly apply to anyone or anything else—including religious institutions and civil society. *The second* touches on a set of first principles for interpretation of the principles that follow. The UNP are to be treated as a coherent whole; they are to read in terms of their objective, which is also specified. Interpretation, then, is to be an objectives based project. The singular objective, one worth repeating: "enhancing standards and practices with regard to business and human rights, drawn from paragraph 4 of the UNHRC endorsement resolution (and discussed above) in a way that seeks to achieve tangible results for affected individuals and communities, and thereby also contributing to a socially sustainable globalization." *The third* is set out in the form of a caution—that the UNGP neither create new international law nor undermine existing or future State obligations under international law. *The fourth* creates an interpretive privileging of sorts and with it an interpretive tension. One the one hand the UNGP are to be implemented (and interpreted) in a non-discriminatory manner. On the other particular attention must be paid, with respect to both, to the rights and needs of identified traditionally vulnerable or at risk groups.

2.3.2 The State Duty to Protect Human Rights.

The first Pillar State duty to protect human rights is divided between foundational and operational principles. Operational principles are then further subdivided among (1) General State Regulatory and Policy Functions; (2) The State-Business Nexus; (3) Supporting Business Respect for Human Rights in Conflict-Affected Areas; and (4) Ensuring Policy Coherence.

2.3.2.1 Foundational Principles. UNGP Principles 1 and 2 set out the foundational principles around the concept of the state duty to protect human rights. These are to be understood and applied in a way that aligns with the UNGP's general principles, and especially consonant with the UNGP's core objective: enhancing standards and practices with regard to business and human rights in ways that contribute to socially sustainable globalization.

Principle 1 sets the general operative principle—States must protect against human rights abuse. That duty extends to the limits of their territory and/or jurisdiction. It applies to human rights abuses by third parties including business enterprises. The Commentary notes that this duty derives from the international human rights law obligations imposed on States to respect, protect and fulfill the human rights of individuals. This duty is implemented through the use of those actions expected of states in fulfilling their political and public functions: polities, legislation, regulation, and adjudication. The fulfillment however is judged against a standard of effectiveness. And effectiveness is judged, in turn, by reference to the taking of appropriate steps to prevent, investigate, punish and refers human rights abuse. The commentary describes the duty to protect as a standard of conduct. And the standard against which such conduct is assessed is international human rights law, with the caveat drawn from the General Principles, that international human rights law applies to any state only to the extent that the State has obligated itself under principles of international law (jus cogens providing the exception, and international customary law the dialectical framework).

Principle 2 speaks to clarity and transparency in regulatory and policy manifestations of compliance with the state duty. First, States should clearly set out expectations with respect to which business is expected to comply. Those expectations are targeted to business domiciled in their territories and/or jurisdiction. But it is made to extend to the entirety of the business' operations where ever that may be. The Commentary speaks to the extra-territorial regulation of business domiciled in a State. The Principle does not take a position on the issue of the outward projection of state regulatory power through domestically chartered enterprises' operations abroad. The Commentary, however, does provide some examples of ways in which such extraterritorial projection might be accomplished.

2.3.2.2 Operational Principles. UNGP Principles 3-10 set out the principles through which the state duty is operationalized. These are organized into four sets of principles: (1) General State Regulatory and Policy Functions; (2) The State-Business Nexus; (3) Supporting Business Respect for Human Rights in Conflict-Affected Areas; and (4) Ensuring Policy Coherence.

The "General State Regulatory and Policy Functions" sub-part of the State duty are set out in Principle 3. Principle 3 lists four means by which States meet their duty to protect human rights. The first touches on enforcing laws touching on business and human rights, and periodically assessing their adequacy. The second focuses on legal coherence. That is, that other laws do not constrain the proper application and enforcement of laws touching on business and human rights. Particularly targeted is corporate law, which, the Commentary suggests directly shape business behavior—and thus the core ideology of markets and private behavior. The third suggests approaches to policy and guidance for business relating to their activities that may impact human rights. The fourth stresses the development of modalities for business communication about the way in which they address human rights impacts.

The Commentary starts with a reminder that business might under some circumstances prefer state regulatory action over inaction, especially when state action is deeply embedded in the "smart mix of measures developed in the SRSG pre endorsement reports. The key, of course, is the emphasis on embedding traditional regulation within polycentric governance structures. The Commentary also reminds states about the dangers of "law washing"—the practice of enacting laws which are thereafter not enforced. Avoidance of law washing requires both enforcement and assessment of the state of law making. The Commentary includes a reminder that incoherence between human rights law and the workhorse regulatory structures for economic activity—corporate, securities, and contract (private) law matters. The Commentary does not suggest a preference for an underlying ideology of the relationship of economic and politics. It does suggest a preference for the development of more robust guidance mechanisms—the private sphere, in this case, can work better under the guidance and leadership of the state where the state seeks to operationalize a smart mix of regulation. The Commentary then elaborates on corporate communication. It is understood as a function of the capacity building, but also as an instrument of nudging state approved behaviors. The Commentary notes the .

The "State-Business Nexus" sub-part of the State duty to protect human rights is elaborated in UNGP Principles 4-6. Principal 4 is short; its Commentary is considerably longer. The focus of Principle are a specific category of economic enterprises—those owned or controlled by the State—either directly or effectively through State support from export credit agencies, and investment insurance or guarantee mechanisms. In those cases Principle 4 demands "additional steps," including considering but not requiring human rights due diligence required of economic actors in markets under the second Pillar responsibility to respect human rights. The Commentary notes the conceptual and practical difficulties for a State that acts as regulator, as "trustee" of the international human rights regime, and as the principal or driving force in the economic activity regulated by and through the State. There are no easy answers offered, only this: the connection between the State (effectively as an economic actor gives rise to both a heightened and a more targeted duty to protect. That duty falls on the State and its agencies through which economic activity is owned or controlled, or nudged, etc. In those circumstances it might be appropriate to treat the agencies as economic actors (akin to private shareholders) and hold them to account under the principles and mechanisms of the UNGP 2nd Pillar.

Principle 5 touches on State oversight of their human rights obligations in the context of its own procurement contracting. The "adequate oversight" obligations extend to relationships with business enterprises with which the State contracts with or legislates for. The Commentary speaks to the core objective of the Principle

is to target business enterprises through which the State may privatize the delivery of services. The Commentary urges clarification of the obligation of the enterprise to respect human rights, and oversight strategies, including independent monitoring ad accountability.

Principle 6 then broadens the focus of Principle 5 to include all enterprises with which the State does business—for example, purchasing paper clips or leasing property, etc. With respect to these relationships, the State "should promote respect for human rights." The Commentary suggests that these commercial engagements provide a great opportunity to "promote awareness of and respect for human rights." To those ends, the Commentary suggests the value of embedding this awareness in contracts—subject to (in the language of the Commentary, "with due regard") to the State's relevant obligations under national and international law.

The "Supporting Business Respect for Human Rights in Conflict-Affected Areas" sub-part of the State Duty to protect human rights is elaborated in UNGP Principle 7. The core premise of Principle 7 is that the risk of gross human rights abuses are heightened in conflict-affected areas. These areas, for purposes of Principle 7 may not be in the territories or subject to control by the State to which Principle 7 is directed, though it applies with equal force to the State within the territories of which the conflict occurs. In these context the State has an additional duty—"to help ensure" that enterprises operating in conflict-affects areas "are not involved" with such abuses. Principle 7 offers four suggestions (the "including by" language suggesting that States are free to develop other means of meeting the standard of the Principle. The first two offer positive aid. One is to "engage" with such enterprises "at the earliest stage possible" to prevent or mitigate risk of harm. The second is to provide "adequate assistance" for businesses to assess and address the heightened risk. The third suggest punitive measures—denying access to public support or services to and refusing to cooperate with to enterprises in volved in gross human rights abuses. The last suggests a review and development of current policies, legislation, regulations, and enforcement measure. The Commentary suggests the consultation is a two way street; it is in the best interests of business to consult with their home states to reduce risk (not necessarily of human rights abuses, but of compliance grounded in the consequences of such human rights abuses). The Commentary also gently suggests the context in which home states ought to project power out into host states through their consultation and guidance relationships with business. The Commentary reminds States of the importance of cultivating policy coherence among its ministries, of developing early warning systems, and of developing useful systems of rewards and punishments that have effect. These are all meant to be measure sin addition to those otherwise demanded of States under international humanitarian law.

The "Ensuring Policy Coherence" sub-part of the State duty to protect human rights is elaborated in Principles 8-10. Principle 8 provides guidance on State policy coherence within its administrative apparatus and its political branches. The Principle targets "governmental departments, agencies, and other State-based institutions" but only those that shape business practices. These entities should be made "aware of and observe" national human rights obligations. Recall the General Principles limiting principle that State acquire no additional legal obligations under international law by operation of the UNGPs. The highlighted means of meeting this obligation are the provision of relevant information, training, and support. The Commentary speaks to the obligation as a useful mechanism for balancing between incompatible core premises of a State's political economic system. The Commentary does not offer suggestions except implicitly through the premise of the superiority of human rights as a function of the State's legal obligations in international law. The Commentary distinguished between vertical and horizontal coherence.

Principle 9 extends the insights of Principle 8 to the international field. It adopts a "maintain adequate domestic policy space" standard to be applied when States pursue business-related policy objectives with other States or businesses. The principal targets are investment treaties or contracts. The Commentary make that clear.

But also high on the priority list are the internal human rights related consequences of investment, free trade and similar agreements—where the terms of such agreements "may constrain States from fully implementing new human rights legislation, or put them at risk of binding international arbitration if they do so."

Principle 10 then ramps the insights of Principles 8 and 9 to the area of multilateral institutions that deal with business-related issues. In that context Principle 10 offers three pathways to policy coherence. The first is to ensure that multilateral institutions neither restrain nor hinder their member states from meeting their duty to protec. The second is to encourage multilateral institutions to promote respect for human rights and help States to meet their duty—with a focus on technical assistance, capacity-building and awareness raining. The last is to draw on the UNGP themselves to promote shared understanding and advance international cooperation in the management of business and human rights challenges. The Commentary provides justifications for the thrust of multilateral institutional capacity building. In the process they suggest important framework objectives for the UNGP: to share information about challenges and best practices that help evolve smart mixes (and aligns with the fact based iterative approach of the UNGP), to nudge compliance by "laggards" states; and to reinforce the UNGP as a common reference point—and thus to solidify its role as a platform.

2.3.3 The Corporate Responsibility to Respect Human Rights.

The second Pillar corporate responsibility to respect human rights is divided between foundational and operational principles. Operational principles are further divided among principles on policy commitments (UNGP Principle 16); Human right due diligence (UNGP principles 17-21); remediation (UNGP Principle 22); and issues of context in responding to human rights risks (UNGP Principles 23-24).

The foundational principles for the corporate responsibility to respect human rights is substantially more elaborate than those for the state duty to protect human rights. The reason is straightforward—State duty under international law is relatively well understood; the need in the UNGP was to align what exists with the objectives of the UNGP relating to business and human rights. Corporate responsibility—at least its textual expression and rationalization, is far less developed, and its alignment must be made not just to international public law, but to private law and the quite well developed principles on the basis of which markets driven non-state sector economic activity has been developed for the last several hundred years. That construction and challenge drove much of the work of the SRSG, and its result, the second pillar corporate responsibility to respect human rights proved to be the most contentious part of the UNGP. The sub-textual issues touched on the relationship between private markets and public policy; and between models of corporate purpose—at one extreme the ideology of purely private welfare enhancement through markets protected by the state; at the other an ideology of public policy and public objectives driving economic activity and the focus of economic purpose. The extreme private approach tended toward approaching human rights in economic activity as a purely public issue with respect to which compliance with law was the extent of responsibility; the extreme public approach tended toward approaching human rights as the core purpose of economic activity, the expression of which was to be guided and directed by state based objectives, though responsibility for its effectuation remained the duty of economic actors. One was premised on the separation of public and private functions; the other posited that economic activity merely expressed delegated public authority which though privatized remained subject to the authority and guidance of the state.

The UNGP sought to take a position somewhere in the middle—effectively positing what might develop into system of administrative supervision as a function of preventing, mitigating, and remedying human rights harms but in which the driving force of economic activity continued to express private rather than State preferences. That middle is expressed practically, through the system of human rights due diligence, and by

embedding the prevent, mitigate and remedy model as a part of the operational costs of doing business but subject to the policy caveat that business value prevention above mitigation, and mitigation above remedy.

2.3.2.1 Foundational Principles. The Foundational principles seek to describe the corporate responsibility to respect human rights and to situate it within the smart mix of regulatory measures posited in the first pillar State duty. *Principle 11 expresses the core premise*: that business enterprises should respect human rights. It is worth noting that other human collectives, including corporate stakeholders may not share this same level of respecting human rights—primary among them are civil society elements that may operate as a social collective. Having expressed the core premise, Principle 11 then attempts to explain it: resecting human rights has two elements; first to avoid infringing on the human rights of others and second to address adverse human rights impacts with which they are involved. Both derive from the core objective of the UNGP as set out in the 2011 SRSG 2011 Report: "establishing universally applicable and yet practical Guiding Principles on the effective prevention of, and remedy for, business-related human rights harm,"[316] the purpose of which, underscored by the UNHRC in its endorsement resolution, was to "mitigate the negative impact of globalization on vulnerable economies, fully realize the benefits of globalization or derive maximally the benefits of activities of transnational corporations and other business enterprises."[317] The Commentary describes the responsibility to respect as a "global standard of expected conduct," one that is autonomous of the state and its regulatory duties. The Commentary also articulates the operative premise of the standard—that irrespective of legal or compliance obligation, in the face of adverse human rights impacts the enterprise must first seek to prevent, then mitigate and if neither is possible, then remedy those adverse impacts. The term "impacts" is defined as a measurable object in Principle 12. Lastly the Commentary cautions enterprises, in the pursuit of their own human rights responsibilities, against undermining the ability of the State to meet their own duty, especially the integrity of the judicial process. That caution ties the 2nd Pillar corporate responsibility to the third pillar remedial obligation, shared between States and enterprises.

Principle 12 provides a catalogue of rights to which the responsibility refers. Enterprises should respect "internationally recognized human rights ." Because the responsibility to respect exists autonomously of the State duty, international recognition are not limited to those recognized either by home or host states. At the same time, Principle 12 also identifies the International Bill of Human Rights (IBHR) and the principles concerning fundamental rights set out in the ILO's Declaration on Fundamental Principles and Rights to Work. The Commentary reminds one that though all human rights apply, in practice different clusters of rights will be impacted depending on context. The Commentary also suggested that the IBHR and the ILO core conventions are benchmarks against which assessments of impacts ought to be made. The Commentary also serves to remind that, consonant with the expectations of the General Principles, the UNGP be applied in this context with particular attention to adverse impacts on individuals or groups at heightened risk of adverse impact, which may be addressed not by recognized international huma rights law but norms and declarations and the like.

Principle 13 then fleshes out the nature of the respect "standard of conduct" in two ways. The first requires enterprises seeking to comply with the responsibility to respect to "avoid causing or contributing to adverse human rights impacts" and to address them when they occur. The second requires enterprises to "seek to prevent or mitigate" adverse impacts that are "directly linked" to their "operations, products or services by their business relationships.". These requirements reinforce the action hierarchy built into the prevent, mitigate, and remedy principle by eliminating choice between these alternatives. Instead it posits that the enterprise must first seek to prevent, then to mitigate, and only then to remedy. The requirements also expand the decoupling of the

[316] 2011 SRSG Report, ¶ 16.
[317] UNHRC 2011 UNGP Res, Preamble ¶ 6.

enterprise from both its home and host states. The operative territory of the autonomous enterprise is defined by its supply chain and supply chain relationships, which the Commentary specifically cross-references with Principle 19.

Principle 14 then suggests the breadth of the responsibility to respect across different sorts of economic actors. It first broadly defines applicability to all business enterprises regardless of size, sector, operational context, ownership and structure. Nonetheless, it then provides that the means by which the responsibility is met will vary, perhaps considerably depending on two factors. The first is the "scale and complexity" of their operations. The second is the "severity" of adverse human rights impacts. Both factors are weighed to produce a contextual optimum approach. The balancing of capacity as a function of size and operations against severity of impacts is discussed in the Commentary.

Principle 15 then sets out the way in which the corporate responsibility ought to be textualized. The contextual application of the foundational principles should be set out in policies and processes with three critical elements. The first is a textual policy commitment to meet their responsibility to respect. The second is to develop and have in place a human rights due diligence process, which is the subject of a significant part of the second pillar's operational principles. The third is to develop processes to enable remediation (though curiously not prevention or mitigation measures). The Commentary references Principles 16-24 as the means by which an enterprise "knows and shows" respect for human rights.

2.3.2.2 Operational Principles. UNGP Principles 16-24 set out the principles through which the corporate responsibility is operationalized. These are further divided among principles on Policy Commitment (UNGP Principle 16); Human right due diligence (UNGP principles 17-21); remediation (UNGP Principle 22); and issues of context in responding to human rights risks (UNGP Principles 23-24).

The "Policy Commitment" sub-part of the corporate responsibility to respect human rights is elaborated in Principle 16. Policy commitment is understood as a critical performative act—the basis for embedding the responsibility to respect within their operations. It is thus both object and signification. It signifies the transposition of standards into commitments that produce the ideal of respect against which process, conduct and operations may be assessed and measured. The heart of Principle 16 consists of a description of the five key elements of a policy commitment. The first is that the policy commitment is to be approved at the most senior level of the business enterprise—presumably the entity that controls production in an integrated or organized production chain. Second, the policy commitment must be informed by relevant internal and external expertise. Presumably that protects against the transformation of a policy commitment into a propaganda effort without substance. Third, includes a description of the enterprise's human rights expectations of personnel, business partners and other parties (but only those "directly linked" to its operations, products and services. Fourth, the text (or other representation) of the policy commitment must be communicated (internally and externally) to relevant parties beyond personnel and business partners. Fifth, the policy commitment must be reflected in operational policies and procedures; it must in effect be transposed from policy to operations. One imagines that would be undertaken through the structures of a contextually relevant human rights due diligence system. The Commentary makes clear that the policy commitment may be crafted in whatever form accords with the usual forms and practices of an enterprise. The Commentary cautions that relevant expertise is both contextually determined and a function of complexity. The Commentary emphasizes that the "directly linked" standard can include a wide array of actors—including state functionaries and institutions—aligning this with State duty Principles 4-6. Lastly the Commentary sought to bring in concepts of policy coherence into the development of a policy commitment. Again there is an effort to align this with State duty Principles 8-10.

The "Human Rights Due Diligence " sub-part of the corporate responsibility to respect human rights is elaborated in Principles 17-21. It represents the heart of the operational provisions of the corporate responsibility to respect human rights. Principle 17 provides the framework around which a human rights due diligence system is created, and the factors identified against which the effectiveness and value of the system is to be measured. *First the purpose of human rights due diligence is articulated*—to "identify, prevent, mitigate, and account for" the way in which an enterprise addresses adverse human rights impacts. *Second, the scope of human rights due diligence is identified*—assessing actual and potential adverse human rights impacts. *Third, the components of a human rights due diligence system are identifies*—each further elaborated in succeeding UNGP Principles—(1) assessing impacts; (2) integrating and acting on findings; (3) tracking responses; and (4) communicating how impacts are addressed.

Principle 17 then provides the meta-structures and premises under which systems of HRDD are to operate. They are organized in three points. *The first* carries over and seeks to operationalize a core premise drawn from the responsibility to respect foundational principles (and especially UNGP Principle 13): HRDD systems ought to cover adverse human rights impacts that may be caused by or contributed to through the enterprise's own activities or which may be "directly linked" to its operations, products, services or business relationships. *The second* carries over and seeks to operationalize the contextualizing core premise of the corporate responsibility drawn from the second Pillar foundational principles (and especially UNGP Principle 14): HRDD systems will vary as a function of the size of the enterprise, the nature and context of operations, and the severity of impacts. *The third* adds a temporal element: HRDD systems are not snapshots but rather signal—or in the language of the UNGP they are meant to be ongoing with a sensitivity to the premise that human rights risks change over time.

The Commentary underlines the role of Principle 17 as an organizational chapeau, defining parameters that are ten elaborated in Principles 18-21. The Commentary proffers a definition of "human rights risks" as an enterprise's actual or potential human rights impacts. Potential impacts, in turn, are to be addressed through prevention or mitigation; actual impacts are addressed through remediation under Principle 22. The Commentary suggests that HRDD may be embedded within an enterprise's risk management systems. However, the Commentary warns against adopting the sensibilities of risk management as incompatible with the "prevent, mitigate, remedy" operational premises of HRDD. The Commentary addressed the practical aspects of complexity in very large enterprises suggesting an approach that generalizes or targets compliance. Most importantly, the Commentary raises the *issue of complicity* within HRDD systems. The Commentary proffers a triggering standard: "contributes to, or is seen as contributing to" adverse human rights impacts. It notes that complicity has public and private law aspects, with the public aspect narrower and defined strictly by law. Private l (or non-legal as the Commentary has it) complicity is ordered by private law and by the expectations of the market. The Commentary then offers a "business case" for HRDD.

Principle 18 focuses on the "identify and assess" standards for a HRDD system. The "identify and assess" standard applies to actual or potential adverse human rights impacts. Impacts are attributable to an enterprise where the impact is directly attributed to it or where it results from their business relationships. Principle 18 then specifies the process elements of the "identify and assess" standard. First, the process should draw on internal and external expertise. Second, the process should involve "meaningful consultation". Meaningful consultation includes with potentially affected groups and other relevant stakeholders. The meaning of "relevant" and "potentially affected" is a function of the size of the enterprise and the nature and context of the operation.

The Commentary to Principle 18 adds context. At the same time it aligns the process of HRDD systemicity with the principled pragmatist (inductive and iterative) process that marked the work of the SRSG in

developing the UNGP. "Identify and assess" is characterized as the initial step in the operation of a HRDD system. Its purpose is to develop a factual basis for assessment, and then for action. In the process of using "identification and assessment" to understand specific impacts, the Commentary specifies that it ought to occur before a business activity is undertaken, it ought to identify those who might be affected, it ought to catalogue relevant human rights standards and issues, and project the nature of the (adverse) impact. While the focus is on adverse impact the Principle and its commentary is silent respect any assessment of specifically positive impact, though that may be implied as part of the "business case." Special care ought to be taken respecting vulnerable and marginalized groups. Assessments ought to occur periodically rather than being triggered by a decision to engage in a specific activity. Consultation is undertaken to more accurately assess the human rights impacts of proposed or undertaken activity subject to HRDD.

Principle 19 then focuses on the consequences of the impacts analysis of Principle 18—the prevention and mitigation of human rights impacts. Where prevention and mitigation is possible (recall that under Principle 17, impacts for which neither prevention nor mitigation are possible are considered under the remediation provisions of Principle 22), enterprises are expected to take *appropriate action*. That starts with an obligation to *integrate* findings developed under Principle 18's "identify and assess" exercise, across relevant internal functions and processes. "Effective integration", in turn, requires the assignment of responsibility for addressing the impact to an appropriate level and function within the enterprise. It also requires an alignment of this assignment with internal-decision-making, budget, and oversight processes that avoid impeding such response. The Principle is silent with respect to outsourcing such responsibility. In addition "appropriate action" is defined as contextually determined. "Appropriate action" will turn on the relation of the enterprise to the impact. Effectiveness is measured as a function of (1) whether the enterprise "causes or contributes" to the impacts or (2) whether the enterprise is involved solely because the impact is "directly linked" to its "operations, products or services by a business relationship." Appropriate action" is also made dependent on the concept of "leverage," a concept developed in the Commentary and found nowhere else in the UNGP.

The Commentary amplifies the standards and approaches of Principle 19. First it underscores the critical importance of horizontal integration of specific findings concerning human rights impacts an enterprise policy commitment (UNGP Principle 16) embedded in all relevant business functions . This reflects the emphasis of policy coherence in both the State duty and the corporate responsibility pillars. It also underscores the division between actual and potential human rights impacts analysis—the former to be subject to remediation, the latter to prevention and mitigation measures. The Commentary explains to under the "contributes or may contribute" standard, the enterprise ought to take "necessary steps" (1) to cease or prevent its contribution, and (2) to use "leverage" to mitigate any remaining impact. This approach, of course, is subject to the balancing and timing rules of Principle 24. The Commentary defines "leverage" as a situation in which the "enterprise has the ability to effect change in the wrongful practices of an entity that causes a harm." It should be noted that the obligation to use leverage does not also require that leverage be successfully used. The Commentary also speaks to the cultivation of leverage in the business relationships of the enterprise. Leverage, for example, ought to be exercised if it exists and might prevent or mitigate impact. Leverage may be increased by "offering capacity building, or other incentives." Here the UNGP seek to align the working patterns of Principles 3, 8, and 10 of the State Duty, with the deployment of leverage in the operation of HRDD.

On the other hand, the Commentary explains that where an enterprise is only "directly linked" to the adverse impact complexity standards apply. In this case that produces a factor balancing approach in which the quantum of leverage, the importance of the relationship with the offending entity is balanced against the severity of the impact, which is itself mitigated by the extent to which terminating a relationship will itself produce adverse human rights impacts. Again, the Commentary requires reading against or aligned with Principe 24. Complexity

also augurs the use of independent experts. The Commentary also speaks to the analytics of crucial relationships in the factor balancing framework of Principle 19. It offers a definition grounded in an assessment of the "essential to the enterprise's business" standard coupled with a showing of no reasonable alternative source. Severity is understood both as an intensifier of impact but also of the speed with which a response is required. The more severe the impact, then, the quicker the expected response and the more significant a showing must be made of countervailing factors (quantum of leverage and importance of product or relationship, and human rights impact of terminations). Where the abuse continues under these standards the obligation to prevent, mitigate or remedy remains.

Principle 20 speaks to verification. The focus is on the extent to which adverse human rights impacts identified and assessed (Principle 18) have produced "appropriate action" (Principle 19) that are effective. To that end, tracking is required. The development of a HRDD tracking system requires attention to two key elements. The first is the ensuring that tracking effectiveness be based on appropriate (contextually) "qualitative and quantitative indicators." The second is that effective tracking ought to draw on internally and externally sources feedback. That feedback must include affected stakeholders (identified via the systems specified in Principle 18). The Commentary emphasizes that effectiveness tracking serves two different purposes. The first is connected to the adverse impact that produced the need for response. The second is institutional: "to drive continuous improvement." Special attention ought to be devoted to effectiveness analytics touching on vulnerable and marginalized groups at heightened risk of adverse impact. The Commentary suggests that effectiveness tracking be integrated into "relevant internal reporting processes" and that in that context the enterprise might achieve efficiencies through "tool sharing"—including data and analytics. Data and qualitative measures may also be extracted from an analysis of activity touching on the enterprise's operational level grievance mechanisms (Principle 29).

Principle 21 then shift the focus from internal effectiveness tracking (Principle 20) and assessment to external communication and accountability. The object is accountability communication beyond that which may be required under the law of the home or host state and directed principally to stakeholders and their defenders. Special attention is mandated for business activity posing risks of severe impact. Principle 21 then describes the form and context of such accountability communication. First, it must be accessible and of a form and frequency that reflects the enterprise's impacts. Second, it must provide information sufficient for recipients to evaluate the adequacy of response. Third, it must not provide so much information that the disclosure creates a risk to (1) affected stakeholders, (2) personnel, or (3) "legitimate requirements of commercial confidentiality." The Commentary describes the essence of Principle 21 as the operationalization of a "know and show" principle. It also suggests that communication is not limited to text. It may also include in-person meetings, online dialogues, consultation and formal reports. Of course memorializing any such efforts are likely prudent in the event recollections differ. The Commentary does suggest that formal reporting "is expected" in the face of situations of severe risk . The Commentary also suggests the benefits of independent verification—akin, perhaps, to an auditing function.

The "Remediation" sub-part of the corporate responsibility to respect human rights is elaborated in Principle 22. Principle 22 applies where an enterprise identifies (Principles17 and 18) that they meet the "cause or contribute" standard related to adverse impacts. Under those circumstances an enterprise should "provide for or cooperate in" their remediation. Either may be undertaken through "legitimate processes." The Commentary makes clear that remediation is the fallback position under a HRDD system with emphasis on prevention and mitigation. Remediation is required where an enterprise "has not foreseen or been able to prevent" adverse impacts. The "been able to prevent" standard must be aligned with the balancing of factor analysis of Principles 19, 23 and 24. The Commentary describes the remediation obligation as requiring "active engagement."

Operational level grievance mechanisms are offered as a useful mechanism for active engagement in remediation of adverse impact—but those must meet the requirements of Principle 31 to be deemed legitimate. Where remediation is required arising in "directly linked" situations, the enterprise is not required to directly provide remediation "though it may take a role in doing so." Remediation in criminal matters requires cooperation with judicial mechanisms and the Commentary cross references the guidance in the third Pillar remediation principles.

The "Issues of Context" sub-part of the corporate responsibility to respect human rights is elaborated in Principles 23-24. These provisions refine both the analytics of HRDD and the assessment of responsive action under specific circumstances. They create principles through which enterprises may balance factors and weigh alternatives.

Principle 23 provides a hierarchy of compliance against which adverse impacts analysis must be undertaken. First, Principle 23 specifies that, without contextual exception, enterprises must first *comply* with all applicable law, and *respect* internationally recognized human rights, everywhere they operate. Legal compliance is mandatory; normative conformity is expected around that core of legal compliance. Left unspecified are what constitutes "applicable" law or "internationally recognized" human rights which appear to include norms beyond law at the international level. Second, it provides that where legal compliance and respect for internationally recognized human rights produce "conflicting requirements," then the enterprise must seek ways to honor the principles of internationally recognized human rights. Third, the enterprise must treat the risk of "causing or contributing" to gross human rights abuses as a matter of legal compliance everywhere they operate. The last appears to elevate internationally recognized human rights in the face of gross abuses even where neither the home nor host state has recognized those rights with respect to which it may have no obligation under the UNGP General Principles.

The Commentary provides a little clarification. It reminds that the responsibility to respect is distinct from the duty to protect and that law and norms are to be treated in the first instance, as distinct realms of compliance. Where legal compliance makes respect impossible then enterprises are expected to respect international human rights to the extent possible. Left unstated is whether, irrespective of legal capacity, such failure to comply still produce a remediation obligation where as a result of the impossibility adverse impacts occur under international rights even if they are not recognized in a home or host state. Here Principle 23 and 24 read together suggest that remediation in such circumstances is plausible, though not a necessary reading. The Commentary suggests extensive consultations, with governments, experts and international institutions in the case of conflict. The Commentary also suggests that issues of complicity in conflict affected areas may transform such conflicts between national law and international rights into one affecting the liability of an enterprise under systems of international criminal law (for example under the Rome Statute of the International Criminal Court). In all such cases enterprises ought to adjust their conduct to avoid exacerbating the impact.

Principle 24 speaks to prioritization of action in the face of adverse impacts. The rule of prioritization is straightforward. Prioritization applies to both actual and potential adverse human rights impacts. The enterprise must prioritize responses as a function of severity—responding first to the most severe impacts "or where delayed response would make them irremediable." The Commentary adds specifics. First prioritization does not excuse the obligation to, in the last instance. Provide remedies under Principle 22. Second, prioritization may also be affected by national legislation or public management. Third, the standard of severity in prioritization is not to be understood as an absolute concept. Instead it is relative to other identified impacts. Implied is the idea that all impact must be resolved—the most severe first through application of principles of prevention and mitigation. The others, to the extent that there are no alternatives, through (eventual) remediation. In this respect Principle 24 must be read to align with Principles 17, 19, and 22.

2.3.4 Access to Remedy.

The third Pillar on access to remedy is, like the state duty to protect and the corporate responsibility to respect human rights, divided between foundational and operational principles. The operational principles are further subdivided into state based judicial remedies (UNGP Principle 26); state based non-judicia remedies (UNGP Principle 27); non-state based grievance mechanisms (UNGP Principles 28-30); and effectiveness criteria principles (UNGP Principle 31).

2.3.4.1 Foundational Principle. The foundational principle on access to remedy of Principle 25 is directed to States. It is understood as an essential element of a State 's duty to protect human rights. States are required to "take appropriate steps to ensure. . . that when such abuses occur . . those affected have access to effective remedy. " The means by which such access to effective remedy is realized is "through judicial, administrative, or other appropriate means." Note the interplay of expectations: (1) the obligation applies to "business-related human rights abuse" (2) the objective is *effective* remedy; (3) the obligation requires taking appropriate steps with the goal of "ensuring"; (4) the duty extends to the full extent of their territory and jurisdiction (which could be worldwide in some instances); and (5) the means by which goal and objective may be realized is quite broad. "Effectiveness," the term used throughout the access to remedy pillar are defined by reference to the criteria set out in Principle 31 but only for non-judicial grievance mechanisms, both State-based and non-State-based. With respect to State-based judicial mechanisms it is presumed that effectiveness is measured by the application of the general and specific principles of the constituted legal order in which they are embedded. It follows that while the effectiveness criteria of non-judicial grievance mechanisms may be coordinated around a single set of principles, one might expect more variation in the effectiveness criteria of State-based Judicial mechanisms except to the extent of conformity to the expectations set out n Principle 26. Despite this, it ought to be noted that the criteria in Principle 31 mirror the fundamental criteria for the operation of rule of law based judicial systems.

The Commentary to Principle 25 amplifies the foundational principle of remedial access. It reiterates the core rationale for remedial access—rights without remedy may render meaningless the State duty to protect and impossible effective operation of HRDD. This applies even in the face of the privileging of prevention and mitigation strategies under HRDD. The Commentary identifies two aspects of access of remedy—one is procedural and the other is substantive. Grievance mechanisms are procedural; the remedies provided through such grievance mechanisms are substantive. Both remedy and mechanism can take a variety of forms. Remedies have as their aim to "counteract or make good and human rights harms." Grievance mechanisms "should be impartial, protected from corruption and free from political or other attempts to influence the outcome."

The Commentary defines a grievance as "a perceived injustice evoking a sense of entitlement by the remedy seeker." That entitlement is detached form law and, in addition to law may be based on contract (private law), promises, custom, or a generalized notion of fairness. Grievance mechanisms are understood to include any routinized process through which grievances may be raised and remedies provided. State based grievance mechanisms are broadly defined to include judicial and non-judicial bodies—"courts, labor tribunals, national human rights institutions, National Contact Points under the OECD Guidelines for Multinational Enterprises, ombuds institutions, and government run complaints offices." The Commentary also aligns effectiveness of access to remedy with public with public awareness of their existence and operation. Lastly the Commentary explains that these systems should form a "foundation of a wider system of remedy. These wider systems can incorporate mechanisms for effective prevention and mitigation.

2.3.4.2 Operational Principles. UNGP Principles 26-31 set out the principles through which the access to remedy pillar is operationalized. These are further divided among principles on state based judicial remedies (UNGP Principle 26); state based non-judicia remedies (UNGP Principle 27); non-state based grievance mechanisms (UNGP Principles 28-30); and effectiveness criteria principles (UNGP Principle 31).

The "State-Based Judicial Mechanisms" sub-part of the access to remedy pillar is elaborated in Principle 26. The text of the principle is short; its explanation in the Commentary is considerably longer. The Principle provides that States should take "appropriate steps to ensure" the effectiveness of its domestic judicial mechanisms when addressing business related human rights abuses. Effectiveness is tied to efforts to reduce legal, practical and other barriers that "could lead" to denial of access to the courts, and thus to remedy.

The Commentary underscore the premise that *effective* judicial mechanisms are at the core of access to remedy. The issue, then, revolves around effectiveness. It is to an elaboration of the principles around which the concept of effectiveness is understood that the Commentary devotes substantial space. *The first principle of effect*iveness is to avoid the erection of barriers to "legitimate cases." This avoidance of barriers applies, in the first instance only where judicial recourse is "an essential part" of accessing remedy. *The second principle of effectiveness* is to avoid corruption of the judicial process. That notion, in turn, centers on structural corruption—and the embrace of the ideal of judicial independence. Independence is understood, in turn, as liberation from economic or political pressures from State agents, business actors, and the avoidance of the obstruction of "legitimate and peaceful activities" of human rights defenders.

The Commentary then provides examples of legal and procedural barriers. Three examples of legal barriers are set out. One is the continued adherence to ancient and strict principles of asset partitioning as a fundamental legal characteristics of legal persons. Another touches on the use of legal doctrine to foreclose the interposition of judicial proceedings that effectively "deny justice" without regard to the merits of the claim. A third involves legal or social disabilities imposed on vulnerable or traditionally marginalized groups that affects their ability to access judicial mechanisms. Four examples of "practical or procedural" barriers are given. The first concerns costs of bringing claims. The second involves the difficulties (including financial resource difficulties) of securing legal representation. The third are centered on procedural rules making claim aggregation difficult. The last turn on State failure to provide sufficient resources to its prosecutors. Lamented, as well, are the power imbalances at the heart of many of the barriers described. Particular attention is suggested in that respect in each of the three stages of remedy: identified as access, procedures, and outcome.

The "State-Based Non-Judicial Grievance Mechanisms" sub-part of the access to remedy pillar is elaborated in Principle 27. Principle 27 mirrors Principle 26. It provides that States should provide "effective and appropriate "non-judicial grievance mechanisms, to operate alongside judicial mechanisms. Recall the definition of "grievance mechanism" from the Commentary to Access to Remedy Foundational Principle 25: any routinized process through which grievances may be raised and remedies provided. These non-judicial state-based mechanisms are envisioned as part of a "comprehensive State-based system for the remedy" of business-related human rights abuse.

The Commentary provides more detail. State-based non judicial remedies are understood to "play an essential role" but only as a complement and supplement to judicial mechanisms. They are effectively assigned a role as second order grievance mechanisms. They serve primarily to relieve the burdens on the judiciary and to play a primary role when a judicial remedy is not required. They also serve a gap filling role. To those ends, the mandates of existing non-judicial State-based grievance mechanisms could be broadened or new mechanisms added. The forms suggested including "mediation-based, adjudicative, or culturally appropriate and rights-

compatible processes." The Commentary single out national human rights institutions for the potential role they might play in the construction and operation of systems of State-based non-judicial grievance mechanisms. Effectiveness, again, is measured against the criteria of Principle 31. The Commentary carries over the sensitivity to power imbalances described in Principle 26 Commentary to the operation of the mechanisms constituted via Principle 27.

The "Non-State-Based Grievance Mechanisms" sub-part of the access to remedy pillar is elaborated in Principles 28-30. While Principles 27-28 direct that States "should take appropriate steps" (Principle 26) and "should provide effective and appropriate" mechanisms (Principle 27), Principle 28 provides only that States "should consider ways to facilitate" access to effective non-Stat-based grievance mechanisms. That consideration is focused on those grievance mechanisms "dealing with" business-related human rights harms. Of course, non-State-based grievance mechanism in many systems are not dependent on action by the State but may arise through private law. Facilitation, and the management of effectiveness, however, are two of the critical roles that the State may play in the development of these mechanism, and as part of the "comprehensive State-based system for the remedy of business-related human rights abuse" envisioned in Principle 27.

The Commentary first identifies the location of such non-State-based mechanism. *One category of these mechanisms* includes private actors. Among them are mechanisms are administered by the business enterprise alone. Another may be administered by an industry association or a multi-stakeholder group. Either of these forms of non-State grievance mechanisms may include stakeholders. With respect to these, the structural sensibilities influencing the construction of State-based non-judicial mechanisms (Principle 27) are applied—though, "non-judicial, but may use adjudicative, dialogue-based or other culturally appropriate and rights-compatible processes." The Commentary suggests the factors that make these grievance mechanisms useful—they serve to reduce barriers to access to remedy that sometimes may prove difficult for State-based mechanisms. *Another category of such mechanisms* are distinguished from private mechanisms—these are non-State-based mechanisms operated by regional and international human rights bodies. Though the Commentary reminds that these bodies traditionally dealt with State adverse human rights impacts, they have dealt with the failure by States to meet their duty to protect human rights (and thus provide a potential resource against States for violation of their State Duty obligations under the first pillar of the UNGP). Lastly, the Commentary identifies awareness raising as a means of facilitation—but with an emphasis that such awareness include the notion that these exist "alongside the mechanisms provided by States."

Principles 29 and 30 then provide specific mandates for enterprise administered grievance mechanisms (Principle 29), and industry, multi-stakeholder and other collaborative initiatives (Principle 30).

Principle 29 then provides the rationale and basis for non-State-based grievance mechanisms operated by enterprises (with or without stakeholder participation) and sets put the mandate for their creation (fulfilling in this way the remediation obligation of the 2d Pillar Principle 22). Principle 29 starts with the rationale for non-Sate-based grievance mechanisms—to "make it possible for grievances to be addressed early and remediated directly." It then sets out the mandate for business enterprises: to "establish or participate [recall the 2 Principal forms of non-State-based mechanisms described in the Commentary to Principe 28] for individuals and communities" adversely impacted. It ought to be noted that the term "communities appears only three time in the UNGP—in the General Principles (goal of the UNGP to achieve tangible results for individuals and communities), and in the Commentary to Principle 25 (where the reference is to "aggrieved communities"), and in the body of the text of Principle 29.

The Commentary reemphasizes the categorization of non-State based mechanisms introduced in the Commentary to Principle 28. The Commentary emphasizes the informality of the process ads compared, for

example to State-based judicial mechanisms. The bulk of the Commentary focuses on the two key functions of operational level grievance mechanisms with respect to the fulfilment of the corporate responsibility to respect human rights. *The first* is to support the identification of adverse impacts (and thus is intimately connected with the HRDD identification and assessment mechanisms elaborated in Principle 18. Effectively the grievance mechanism serves as a data source critical for the operation of HRDD. The second is to provide a structure through which the enterprise may meet the remediation obligations of Principe 22. The object here is not merely remedial, but also, because intervention occurs early in the process and is resolved quickly, of mitigating harm. The Commentary notes that because enterprise based grievance mechanisms serve both remedial purposes and HRDD input and analysis purposes, it need not be confined to actual complaints of harms (actual impacts) but may be invoked by those raising concerns (potential impacts)—with the "aim to identify any legitimate concerns of those who may be adversely impacted." The effectiveness criteria of Principle 31 apply to these mechanisms. They are understood, within the constellation of access to remedy as "important *complements* to wider stakeholder engagement and collective bargaining processes." At the same time the Commentary cautions against the use of these grievance mechanisms to undermine collective action or to preclude access to State-based mechanisms.

Principle 30 then touches on the role and constitution of "industry, multi-stakeholder and other collaborative initiatives." These must be "based on respect for human rights-related standards" and should "ensure that effective grievance mechanisms are available." The Commentary adds that these mechanism are becoming more available . These bodies are organized around codes of conduct, performance standards, global framework agreements, and "similar undertakings." The Commentary cautions that these initiatives "should ensure" the availability of effective mechanisms for the raising of concerns (recall the understanding and purpose of concern raising in the Commentary to Principle 29) by affected parties or their legitimate representatives. The trigger is subsumed within a "belief" standard. Accountability measures ought to be developed and applied. And the mechanisms ought to "help enable the remediation" of adverse impacts.

The "Effectiveness Criteria for Non-Judicial Grievance Mechanisms" sub-part of the access to remedy pillar is elaborated in Principle 31. State-based judicial mechanisms are not covered within Principle 31, though Principle 26 provides very general criteria or aspirational goals for State-based judicial mechanisms otherwise subject to the effectiveness expectations of their respective constitutional and political orders. Principle 31 identifies seven general effectiveness criteria and an additional criteria applicable to operational level non-State-based mechanisms. The seven criteria specify that to be effective, these mechanisms should be: (1) legitimate; (2) accessible; (3) predictable; (4) equitable; (5)transparent; (6) rights compatible; and (7) a source of continuous learning. Operational level mechanisms must also be (1) based on engagement and dialogue.

Each of these criteria are further elaborated in the body of Principle 31. *Legitimacy* enables trust and is attached to accountability for fair conduct of process. *Accessibility* is grounded in being known to stakeholders to whom adequate assistance is provided to surmount particular barriers to access. *Predictability* is a function of clear and known procedures and clarity respecting types of available processes and outcomes. *Equity* touches on reasonable access to information and information sources, advice and expertise necessary to engage in the grievance process. *Transparency* is based on keeping parties informed about the progress of the grievance process and the public informed sufficiently to build confidence in its effectiveness. Rights-compatibility is a function of outcomes and remedies aligning with internationally recognized human rights. And *continuous learning sourcing* serves to project the identification of lessons for improving the mechanism and preventing future grievance and harm. For operational level mechanisms, engagement and dialogue requires consulting with stakeholder groups on issues of design and focusing on dialogue as a means of addressing and resolving grievance.

The Commentary builds on the central premises of Principle 31—that a grievance mechanism can serve its purpose only "if the people it is intended to serve [1] know about it, [2] trust it and [3] are able to use it." The criteria identified are understood as providing a benchmark for grievance mechanism design and operation. The Commentary notes that the term "grievance mechanism" is a "term of art." However, it is a term of art that may be inapposite when applied to a specific mechanism—nonetheless the criteria for effectiveness "remain the same." The Commentary ends with additional guidance respecting the eight criteria. It notes that a policy of party non-interference is critical for building system trust. It identifies among barriers to access "lack of awareness of the mechanism, language, literacy, costs, physical location and fears of reprisal." It urges as a trust building mechanisms the provision of public information about the procedures offered., along with flexibly applied time frames for resolution. It emphasizes the importance of informational parity to ensure trust. It notes that communication throughout the process is essential to retaining confidence in the grievance mechanisms. It notes that grievances may not be appropriately framed in human rights terms and that a fair process of translation ought to be applied to such grievances. It also notes that applying data driven analytics to the rates and forms of grievance would be useful in making more efficient and effective the enterprises HRDD systems. Lastly, for operational level grievance mechanisms, the Commentary notes the importance of stakeholder engagement in mechanism design and in constructing the range and forms of remedy. The closer the system gets to adjudication the greater the incentive to ensure that its process is provided by "a legitimate, independent third party mechanism" to avoid conflict of interest or its appearance and enhance trust.

2.3.5 A Note on Defined Terms in the UNGP

The UNGP does not include a separate provision defining terms of art or specific terms used in the Principles, even as it sometimes uses them in quite specific ways, that is as terms of art. The lack of definition does not invariably mean that definitions of terms must always be inferred for text or derived from "plain meaning" or outside sources—customs and traditions, usual expectations, and the like. In several instances the UNGP includes definitions—not in the black letter text of a UNGP Principle, but rather in the Commentary embedded in them. This section provides a first look at those definitions by drawing them out of the text of the UNGP.

"Activities", as in Principle 13's use of the term business enterprise's "activities" is defined as including both actions and omissions.

"Appropriate Action," is defined in Principle 19's Commentary as the product of a multi-factor balancing standard that include "the enterprise's leverage over the entity concerned, how crucial the relationship is to the enterprise, the severity of the abuse, and whether terminating the relationship with the entity itself would have adverse human rights consequences."

"Business relationships", as in its use in Principle 13 "are understood to include relationships with business partners, entities in its value chain, and other non-State and State entity directly linked to its business operations, products or services.

"Effectiveness" or "Effective", as used in the Access to Remedy Pillar (Principles 25-31)are defined by reference to the criteria set out in Principle 31, except respecting the effectiveness of State-based judicial mechanisms.

"Grievance," especially as the term is used in the Access to Remedy Pillar, is defined in the Commentary to Principle 25 as a perceived injustice evoking a sense of entitlement by the remedy seeker."

"Horizontal policy coherence" in Principle 8's Commentary is defined as "supporting and equipping department and agencies" described in Principle 8's Commentary, "to be informed of and ac in a manner compatible with the Government's [note, not the State's] human rights obligations."

"Legal liability and enforcement," is found in in Principle 12, and in its Commentary is "defined largely by national law provisions in relevant jurisdictions but may also be defined by the Rome Statute system in the context at least of Principle 23.

"Leverage," which is used in several Principles is defined in the Commentary to Principle 19 as centered on situations in which the "enterprise has the ability to effect change in the wrongful practices of an entity that causes harm."

"Parameters for human rights due diligence are defined by the text of Principle 17.

"Respect human rights" is defined in the black letter of Principle 11 as the obligation that business enterprises "should avoid "infringing on the human rights of others and should address adverse human rights impacts with which they are involved."

"Socially sustainable globalization" is found in the UNGP General Principles but is not defined. It recalls, however, discussion by the SRSG in his 2010 Draft Principles (discussed this Chapter) as well as in the SRSG's Travaux Préparatoire (discussed Chapters 3 and 6).

State-based grievance mechanisms," are defined in Principle 25's Commentary as including "judicial and non-judicial bodies—courts, labor tribunals, national human rights institutions, National Contact Points under the OECD Guidelines for Multinational Enterprises, ombuds institutions, and government run complaints offices."

"Statement", as in a statement of policy described in Principle 16, is defined in the Commentary to that Principle as a term that "is used generically, to describe whatever means an enterprise employs to set out publicly its responsibilities, commitments, and Expectations."